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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

JOHN BRIDGE ASPINALL,

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named provision is contained in sect. 21 of the Merchant Shipping Act 1906 (6 Edw. 7, c. 48). The respondent R. used two petrol-driven motor-boats for carrying passengers, exceeding twelve in number, on two specified days on the river Exe, and into and along the Exeter Canal, without having obtained a certificate of survey from the Board of Trade under sect. 271 of the Merchant Shipping Act 1894. The canal is connected with the sea by means of locks, and is used by seagoing ships for the purpose of getting to and from Exeter, but the motor-boats did not proceed to sea, nor did they go beyond non-tidal waters. Held, reversing the decision of the justices, that the motor-boats were passenger steamers within the meaning of the Act, that they were used for carrying passengers on an excursion, and that they were used "in navigation," and that, although they did not proceed to sea, a certificate of the Board of Trade was required to be held by the owner or master. *Mayor, &c., of Southport* v. *Morriss* (68 L. T. Rep. 221); (1893) 1 Q. B. 359) distinguished. (K. B. Div. Ct.) *Weeks* (app.) v. *Ross* (resp.). 307

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CARRIAGE OF GOODS.

1. *Bill of lading—Lien for unpaid freight due from limited company—Shipment by receiver.*—A limited company had for many years shipped goods by the appellants' line of steamers to their agents abroad under a bill of lading which contained a clause giving the shipowners a lien on the goods, not only for freight due thereunder, but also for any previously unsatisfied freight due from the shippers or the consignees. The company got into difficulties, and the respondent was appointed receiver, and he shipped goods by a ship of the appellants to the agents abroad, with instructions to "deliver as below, charging to yours respectfully 'the Company' by A. F. W., Receiver and Manager." The address given for delivery was to the company, care of the agents. The appellants informed the respondent of the amount of freight, and inclosed a bill of lading in the same form as that used on previous shipments by the company. On the arrival of the goods, the shipowners claimed a lien in respect of unsatisfied freight due from the company on shipments before the appointment of the receiver. Held, that they were not entitled to do so. Judgment of the Court of Appeal affirmed, Lords Shaw and Mersey dissenting. (*H. of L.*) *Moss Steamship Company* v. *Whinney* 25

2. *Charter-party—Arbitration clause—Bill of lading—Incorporation.*—Goods were shipped under a charter-party which contained an arbitration clause by which "any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at the port where it occurs, and the same shall be settled by arbitration." A bill of lading was given to the shipper which provided that freight should be paid "for the said goods, with other conditions as per charter," and in the margin was written in ink, "Deck load 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 sued the bill of lading holders for demurrage at the port of discharge: Held, that the arbitration clause in the charter-party was not incorporated in the bill of lading so as to make it applicable to this dispute, it being only intended to apply to the method of settling disputes between the parties to the charter-party arising out of its conditions, and not to disputes arising out of the bill of lading. Judgment of the court below affirmed. *Hamilton* v. *Mackie* (5 Times L. Rep. 677) approved and followed. (H. of L.) *Thomas and Co.* v. *Portsea Steamship Company* 23

3. *Construction—"For six or seven (in charterers' option) consecutive voyages during* 1910."—A charter-party contained the following clause: "This charter to remain in force for six or seven (in charterers' option) consecutive voyages during 1910." On the 3rd Jan. 1910 the ship was ready to receive cargo at Newcastle, but the charterers were unable to load her in consequence of a strike which lasted till the 11th Jan. The ship consequently went on a voyage to Italy for other charterers with a cargo of coal from South Wales, the learned judge finding that this was reasonable. She did not arrive home from her sixth voyage till the 6th Jan. 1911, when the charterers purported to exercise their option to load her for a seventh voyage. Held, on the true construction of the charter-party, that the words "during 1910" were words of description and protection for both parties, the one being only bound to receive cargo, and the other only bound to supply the ship during 1910, and that therefore the charterers were not entitled to exercise the option claimed. *Pope* v. *Bavidge* (1854) 10 Ex. 73) not followed. (Scrutton, J.) *Dunford and Co. Limited* v. *Cia Anonima Maritima Union* ... 32

4. *Demurrage—Delivery according to custom of port—Discharge by port authority—Delay beyond control of charterer.*—The plaintiffs entered into a charter-party with the defendants by which they undertook to send their steamship to a port in Finland to be loaded with pit props and to deliver them at Swansea. It was a term of the charter-party that the cargo should be discharged as fast as the steamship could deliver during the ordinary working hours of the port, but according to the custom thereof, and, should the steamship be detained beyond the time stipulated as above, demurrage should be paid at 4d. per net registered ton per day, and *pro rata* for any part thereof. The charter-party further provided that the discharge was to be effected by the receivers' stevedore, the steamship paying so much per fathom. In a County Court action brought by the shipowners against the charterers for demurrage there was evidence and it was found that there was a custom in Swansea that discharge of pit props was to be done by the harbour authority and not by any stevedore to be named by the receivers of the cargo. Some delay occurred in the discharge. The judge gave judgment for the defendants, the charterers, on the ground

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that as no time was fixed for the discharge, and as the discharge was, according to the practice of the port, in the hands of the harbour authority, the charterers were not liable for the delay, though there was in fact a delay of three days, which would have entitled the plaintiffs to 90*l*., caused by the negligence of the harbour authority. The shipowners appealed. Held (affirming the decision of the County Court judge), that the charterers were not liable for the delay, for the port authority, who discharged the vessel, were not their servants or agents to effect the discharge, and the delay was due to circumstances beyond their control. *Weir* v. *Richardson* (3 Com. Cas. 20) approved. (Adm. Div. Ct.) *The Kingsland* 38

5. *Time charter — Exceptions — Strikes.*—A ship was chartered under a time charter which contained the following clause: "Mutual exceptions: The owners and charterers shall be mutually absolved from liability in carrying out this contract in so far as they may be hindered or prevented by" (*inter alia*) "strikes." The charterers in good faith, in the ordinary course of trade, sent the ship to load a cargo of coal at a port where to their knowledge there was a strike at the collieries. The ship could have been employed in other ways, but was retained by the charterers within the area of the strike. In consequence of the strike she was delayed for some time in obtaining a cargo. Held, that the charterers were liable to pay the agreed hire for the period of such delay. Judgment of the Court of Appeal affirmed. (H. of L.) *Brown and Another* v. *Turner Brightman and Co.* 79

6. *Loss by fire—Unseaworthiness—Actual fault or privity—M.S.A.* 1894, *S.* 502.—The owner of a British sea-going ship is exempted by sect. 502 of the Merchant Shipping Act 1894 from liability for loss or damage by reason of fire on board the ship where the loss or damage happens without his actual fault or privity. A bill of lading contained a clause providing that the shipowner was not responsible for any loss of or damage to the goods received for carriage occasioned by . . . fire or unseaworthiness, provided all reasonable means had been taken to provide against such unseaworthiness. Held, by the Court of Appeal, that a shipowner is not deprived of the protection of sect. 502 merely because the fire is caused by unseaworthiness, but that the operation of the section may be ousted by special contract and the owners be liable where a breach of the warranty of seaworthiness is proved. Decision of Bray, J. affirmed. (Ct. of App.) *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company Limited* ... 82

7. *Bill of lading—Railway Acts.*—The provisions of the Railway and Canal Traffic Act 1854 are extended by section 31 of the Railways Clauses Act 1863 to the steam vessels of a railway company and to the traffic carried on thereby. Therefore a railway company, whose private Act incorporates the Railways Clauses Act 1863, is not protected by a condition in a bill of lading in respect of goods carried by them by sea only that they shall not be liable for the negligence of the master or mariners navigating their steam vessels, as such a condition is not reasonable. (Coleridge, J.) *Jenkins* v. *Great Central Railway Company* 154

8. *Bill of lading—Through carriage—Liability of shipowner for damage—Onus of proof.*—Goods were dispatched from Minneapolis to Glasgow, *viâ* New York, under a through bill of lading which covered the whole transit both by land and water carriers. The bill of lading was signed by an agent representing both the inland carriers and the shipowners "on behalf of carriers severally, but not jointly," and contained clauses that the goods were "received in apparent good order except as noted," and that "no carrier shall be liable for loss or damage not occurring on his own road or his own portion of the straight route, nor after the property is ready for delivery to the next carrier or consignee." The receipt given at New York by the respondents—the shipowners—to the inland carrier stated that a small quantity of the total shipment was damaged. On discharge from the respondents' vessel at Glasgow a much larger quantity was found to have similar damage. There was evidence to show that at New York the goods were hurriedly shipped without adequate examination as to the condition of delivery from the inland carrier, and there was also some evidence that during the shipment at New York rain had fallen which might have caused the damage. Held, that the shipowners were liable for the whole loss except that notified to the inland carriers at New York. By Lord Shaw: The principal of *The Peter der Grosse* (3 Asp. Mar. Law Cas. 195 (1876); 1 P. Div. 414; 34 L. T. Rep. 749) as to onus of proof approved. Judgment of the Court of Session reversed and decision of the Lord Ordinary restored. (H. of L.) *Crawford and Another* v. *Allan Line Steamship Company* 100

9. *Charter-party — Delay—Inaccessibility—Strikes—*Ejusdem generis.—A steamer was chartered to proceed to named ports ordered on signing bills of lading and there deliver her cargo alongside any wharf and (or) vessel and (or) craft as ordered. The cargo was to be taken from alongside by the consignees at the port of discharge at a specified rate, "provided steamer can deliver it at this rate." If longer detained the consignees were to pay steamer demurrage at specified rate. "Time to commence when steamer is ready to unload and written notice given, whether in berth or not. . . . 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." On the arrival of the steamer at one of the named ports on the 20th Sept. it was found that all the berths alongside the wharf were occupied by other vessels and the steamer could not get to a berth alongside the wharf until the 25th Sept. By a regulation the shore labourers would not discharge vessels until they were in a berth alongside a wharf; and cargo was brought to the rail by them, the ship's crew not being employed. Held, first, that the parties must be assumed to know the regulations at the port, and time commenced not when unloading in fact began, but when the steamer was ready to unload, "whether in berth or not." Held, secondly, that the words "provided the steamer can deliver" had no bearing on the case, as they were only concerned with the mechanical facilities of the steamer for delivery. Held, thirdly, that delay occasioned not by a strike or by anything analogous thereto, but by a regulation of the shore labourers of the port, did not fall within the exception in respect of strikes, &c. Decision of Hamilton, J. affirmed. (Hamilton, J.) *Northfield Steamship Company Limited* v. *Compagnie l'Union des Gaz* 87

10. *Bills of lading—Assignment—Cessor of liability—Arbitration Act* 1889 (52 & 53 *Vict. c.* 49), *s.* 6.—The plaintiffs, owners of the steamship *Den of Mains*, chartered her by charter-party dated the 26th April 1911 to the defendants M. and Co., to load a cargo of beans at Vladivostock, and to proceed to a port in the United Kingdom and there deliver the cargo "agreeably to bills of lading." On the 10th June a cargo of about 6000 tons was loaded, and bills of lading made out to the order of the defendants or their assigns were signed by the master and handed to the defendants' representative. They

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had, by a contract dated the 27th April 1911, sold the cargo to the other defendants the B. Company on the terms of a "basis delivered" contract, by clause 10 of which the contract was to be void as regarded any portion shipped which might not arrive. On the 12th June the defendants M. and Co., under the contract of the 27th April, declared to the B. Company that the beans had been shipped by steamship *Den of Mains*. On arrival of the vessel at Liverpool, the port of discharge, M. and Co. handed to the B. Company the bills of lading indorsed against a payment. When the discharge had been completed it was alleged that there was a shortage of 171 bags, and, the B. Company having paid only in respect of the quantity actually delivered, M. and Co. instructed them to make a corresponding deduction from the freight, but the plaintiffs refused to acknowledge the claim for short delivery. A dispute having thus arisen, M. and Co. gave notice that they demanded an arbitration under a clause in the charter-party which provided for arbitration "by arbitrators, one to be appointed by each of the parties to this agreement, if necessary the arbitrators to appoint a third," and formally required the plaintiffs within seven clear days to appoint their arbitrator. The plaintiffs did not appoint an arbitrator, and the defendants after the expiry of the seven days gave notice of the appointment of a gentleman to act as sole arbitrator. On a summons for direction taken out by the plaintiffs: Held, (1) that there was nothing in the contract or the circumstances of the case to satisfy the court that it was the intention of the shipowners and charterers that the responsibility of the former under the charter-party had ceased; and (2) that the submission to arbitration came within sect. 6 of the Arbitration Act 1889. (K. B. Div. Bray, J. *Steamship Den of Airlie Company Limited* v. *Mitsui and Co. Limited and British Oil and Cake Mills Limited.*) 97

11. *Charter-party — Strike clause — "Loading" and "discharge" — Demurrage.*—A charter-party contained a "strike" clause: "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 of discharging shall not count during the continuance of such strike or lock-out." On the arrival of the ship at the port of discharge, a strike of carters was in existence, in consequence of which the docks had become congested: this condition of affairs rendered it impossible for the defendant, who was consignee, to accept delivery of the cargo, there being neither space for the cargo in the docks nor means of taking it away when tendered over the ship's rail. Held, in the circumstances, that the carters were not a "class of workmen essential to the discharge" within the meaning of the clause, and that the defendant was not protected by the clause as discharge was not made impossible by the strike. Held, also, that "discharge" is a joint act, necessitating co-operation on the part of the ship and the receiver of the cargo, and that the obligation of the ship under this term is fulfilled when its crew or its stevedore's men are in a position to offer, and do offer, delivery to the consignee over the ship's side. (Ir. K. B. Div. Ct.) *Langham Steamship Company Limited* v. *James Gallagher* 109

12. *At ship's risk.*—A charter-party contained the following clause: "The cargo to be ordered by the captain as required, and when signed for to be at ship's risk until shipped on board . . . but in all other respects the act of God, perils of the sea . . . are always mutually excepted." The cargo, consisting of sleepers, was brought alongside the vessel in rafts, and a number of sleepers were lost after being signed for on behalf of the shipowner through certain excepted perils before they were shipped on board. Held, that "at ship's risk" meant that the sleepers were at the absolute risk of the shipowner during the period between their being signed for and being shipped on board as the excepted perils did not apply to that period. (Bray, J.) *Dampskebsselskabet Skjoldborg and C. K. Hansen* v. *Charles Calder and Co.* 156

13. *Charter-party—Charterer to pay all "dues"—Ship to pay all "port charges"—Custom of port of Santos.*—A charter-party contained the following clause: "The charterer paying all dues and duties on the cargo, and the steamer all port charges, pilotages, &c., as customary," and also provided that on arrival at Santos the steamer should discharge on the quay. At Santos a dock company has authority to enforce a tariff, being entitled (*inter alia*) to make a charge "for the use of the quay for loading and discharging goods and any merchandise. . . . " The plaintiffs' vessel having been discharged on to the quay, the charterers' agents at the port of Santos charged against the ship in accounts rendered the particular charge for cargo so delivered. In an action by the shipowners to recover the amount deducted: Held, following the decision of Walton, J. in *Field Line (Cardiff)* v. *San Paulo Gas Company* (unreported, but delivered on the 14th April 1908), that the charge was not a "due" on the cargo, but a port charge falling on the steamer. (Hamilton, J.) *Societa Anonima Ungherese di Armamenti Marittimo* v. *Hamburg South American Steamship Company* 228

14. *Charter-party—"Consignees to effect discharge of cargo steamer paying 1s. per ton"—Sale of cargo by consignee—"Cost of stevedoring to be paid by" purchaser—Right to sum payable by steamer.*—The appellant had chartered a steamer to load a cargo of coal for Sydney. The charter-party contained the following clause: "Consignees to effect the discharge of the cargo, strike or no strike, steamer paying 1s. per ton of 20cwt." Before the ship arrived the appellant sold the cargo to the Government of New South Wales on the terms (*inter alia*) "The Government to guarantee to discharge the vessel at not less than 500 tons per day, strike or no strike. The cost of stevedoring to be paid by the Government." Held, that the Government were entitled to retain the 1s. per ton payable as against the appellant. Judgment of the court below affirmed. (P. C.) *White* v. *Williams* 208

15. *Charter-party—Bills of lading—Submission—Injunction to restrain arbitration—Arbitration Act 1889 (52 & 53 Vict. c. 49), s. 6.*—The plaintiffs, owners of the steamship *Den of Mains*, chartered her by charter-party dated the 26th April 1911 to the defendants M. and Co., to load a cargo of beans at Vladivostock, and to proceed to a port in the United Kingdom and there deliver the cargo "agreeably to bills of lading." On the 10th June a cargo of about 6000 tons was loaded, and bills of lading made out to the order of M. and Co. or their assigns were signed by the master and handed to M. and Co.'s representative. M. and Co. had, by a contract dated the 27th April 1911, sold the cargo to the defendants the B. Company on the terms of a "basis delivered" contract, by clause 10 of which the contract was to be void as regarded any portion shipped which might not arrive. On the 12th June the defendants M. and Co., under the contract of the 27th April, declared to the B. Company that the beans had been shipped by steamship *Den of Mains*. On arrival of the vessel at Liverpool, the port of discharge, M. and Co. handed to the B. Company the bills of lading indorsed against a payment. When the discharge had been completed it was alleged that there was a shortage of 171 bags, and, the

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B. Company having paid only in respect of the quantity actually delivered, M. and Co. instructed them to make a corresponding deduction from the freight, but the plaintiffs refused to acknowledge the claim for short delivery. A dispute having thus arisen, M. and Co. gave notice that they demanded an arbitration under a clause in the charter-party which provided for arbitration "by arbitrators, one to be appointed by each of the parties to this agreement, if necessary the arbitrators to appoint a third," and formally required the plaintiffs within seven clear days to appoint their arbitrator. The plaintiffs did not appoint an arbitrator, and the defendants after the expiry of the seven days gave notice of the appointment of a gentleman to act as sole arbitrator. The plaintiffs thereupon took out a summons for further directions, asking (*inter alia*) for an injunction to restrain the first defendants from proceeding with the arbitration, alternatively that leave be given to the plaintiffs to revoke the submission to arbitration. Held, without deciding the point of law decided by Bray, J. (1) that there was no jurisdiction in the court to grant the injunction asked for; and (2) that in the exercise of its discretion the court ought not to give leave to revoke the submission to arbitration. Decision of Bray, J., reported 12 Asp. Mar. Law Cas. 97 (1912); 105 L. T. Rep. 823, affirmed on other grounds. *Steamship Den of Airlie Company Limited* v. *Mitsui and Co. Limited and British Oil and Cake Mills Limited.* (Ct. of App. Vaughan Williams, Farwell, and Kennedy, L.JJ.) 169

16. *Charter-party—Bill of lading—Failure to load complete cargo—Unseaworthiness—Deviation to port of refuge—Dead freight—Lien—Unliquidated damages.*—By the terms of a charter-party the shipowners had a lien on the cargo for dead freight, and by the bills of lading the cargo was to be delivered to the shippers' order, or to their assigns, "all other conditions as per charter-party." The charterers failed to load a complete cargo, and the owners loaded other cargo, at a lower rate than the chartered freight, in order to minimise the loss. An excessive quantity of deck cargo was loaded so as to make the ship in fact unseaworthy at the time of sailing, and she was in consequence compelled to put into a port of refuge for repairs, after which she completed her voyage. In a claim by the owners 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: Held, that the right to compensation having accrued before the ship sailed, and the deviation to a port of refuge for repairs being justifiable under the circumstances, the contract of affreightment was not put an end to by the unseaworthiness or the deviation, and the owners retained their rights under it, and that a claim for dead freight included a claim for unliquidated damages. Judgment of the Court of Appeal reversed. (H. of L.) *Kish and another* v. *Taylor Sons and Co.* 217

17. *Bill of lading—"Shipped in apparent good order and condition"—Incorrect statement—Liability of shipowner—Estoppel.*—The master of a ship signed bills of lading by which he acknowledged to have received a cargo of sugar in "apparent good order and condition." In an action by the indorsees of the bills of lading against the shipowners in respect of damage to the sugar: Held, that, as the bill of lading contained a statement that the goods when shipped were in "apparent good order and condition," they were estopped from saying that the goods when shipped were not in apparent good order and condition. *Compania Naviera Vasconzada* v. *Churchill and Sim* (10 Asp. Mar. Law Cas. 177; 94 L. T. Rep. 59; (1906) 1 K. B. 237) followed.

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(Scrutton, J.) *Martineaus Limited* v. *Royal Mail Steam Packet Company Limited.* 190

18. *Bill of lading—Loading charges—London clauses—Discharge of ship at riverside wharf.*—By the "London clause" shipowners are entitled to exact certain charges from consignees of cargo in respect of discharge of vessels. On the construction of a bill of lading: Held, that these charges could only be exacted by the ship when she discharged her cargo in a dock, and not when she discharged at a riverside wharf. (Scrutton, J.) *Produce Brokers' Company Limited* v. *Fromess, Withy, and Co. Limited* ... 188

19. *Bill of lading—Defect in tap—Loss by fire—Unseaworthiness.*—A bill of lading provided that the owners of the vessel were not to be liable "for fire on board" or owing to "unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." The ship took fire in consequence of some oil from a leaky tap coming into contact with a light, the tap being in that condition at the commencement of the voyage. Held, that as there was no defect existing in the tap which could not be ordinarily remedied in the course of the voyage, the condition of the tap did not in any way constitute initial unseaworthiness. (Hamilton, J.) *Virginia Carolina Chemical Company* v. *Norfolk and North American Shipping Company* 233

20. *Loss by fire—Unseaworthiness—Fault or privity of owners—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 502.—A cargo of oil carried on board a ship was destroyed by fire, the cause of the loss being the stranding of the ship occasioned by the unseaworthiness of her boilers. Held, that as the owners had not fulfilled their duty in seeing that the ship was seaworthy, they were not entitled to the protection of sect. 502 of the Merchant Shipping Act 1894, as the loss had not happened without their actual fault or privity. (Bray, J.) *Asiatic Petroleum Company Limited* v. *Lennard's Carrying Company Limited* 269

21. *Bill of lading—Strikes—Clause exempting shipowners from liability.*—A bill of lading contained a clause to the following effect: "If the master reasonably anticipates that delivery will be impeded at the port of delivery by strikes, the master may at any point of the transit, at the risk and expense of the owner of the goods, tranship or land or otherwise dispose of the cargo, or any part thereof, and the same may be reshipped or forwarded, or he may proceed on the voyage with the whole or part of the goods, and discharge the same on the return voyage, or forward them to their destination from another port always subject to the conditions of the forwarding conveyance. . . . If the discharge of the cargo be or threatens to be impeded by absence from whatever cause of facilities of discharge, the master to have liberty at ship's expense, but shipper's risk, to put the whole of the cargo into hulk, lighter. . . . Transhipment of cargo for ports where the ship does not call or for shipowner's purposes to be at shipowner's expense." A ship left Adelaide on the 10th April 1912, bound to London and Liverpool with a general cargo including 2794 sacks of flour belonging to plaintiffs for delivery in London. She arrived at Gravesend when there was a strike throughout the Port of London which would or might have prevented the discharge in London of her cargo. The strike also would or might have prevented her loading coal necessary for her refrigerating machinery. She had only 100 tons of coal on board, equal to one day's consumption for refrigerator and steaming purposes, and required an immediate further supply of coal. There was no way of ascertaining how long the strike

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would last, and in fact the strike continued till the month of August. Under these circumstances she proceeded at once to the Hook of Holland, arriving there on the 25th May, where she took a sufficient quantity of coal on board. Learning that the strike still continued, she proceeded on the 26th May towards Liverpool, where she arrived on the 28th May and discharged her cargo, including plaintiffs' cargo and other London cargo. As a result of the discharging of the plaintiffs' cargo at Liverpool instead of London, transhipment expenses and dock dues at Liverpool amounting to 30*l.* 15s. 7d. were paid by the defendants to the Mersey Docks and Harbour Board, and were charged to the plaintiffs by the defendants. Of this the plaintiffs had paid 30*l.* under protest, and now sought to recover the said sum. Held, that the plaintiffs were entitled to succeed as in the events which happened the expenses were not thrown upon the owners of the goods. (Bray, J.) *Wiles and Co. Limited* v. *Ocean Steamship Company Limited* 277

22. *Bill of lading—Unseaworthiness—Fire—Exception—Merchant Shipping Act* 1894 (57 & 58 *Vict.* c. 60), *s.* 502.—The parties to a bill of lading excluded the operation of sect. 502 of the Merchant Shipping Act 1894, which exempts the shipowner from liability for loss or damage to goods by fire. It was found as a fact that the vessel was unseaworthy, and that the unseaworthiness caused the loss either by perils of the seas or fire. Held, that the shipowner was liable, as the bill of lading was ambiguous and consequently did not exempt the shipowner from the obligation to provide a seaworthy ship. (Scrutton, J.) *Ingram and Royle Limited* v. *Services Maritimes Du Tréport Limited* 295

23. *Lump freight—Perils of the seas.*—By the terms of a charter-party it was provided that the steamship *Ethelwalda* should load a full and complete cargo of pit props at a port in Finland and proceed to Port Talbot, a dock as ordered, and there deliver the cargo on being paid a lump sum of 1600*l.* The charter-party contained an exception clause including (*inter alia*) perils of the seas. The *Ethelwalda* loaded her cargo and proceeded to Port Talbot, but before she could get into a dock she went ashore and ultimately became a total wreck. Part of the cargo was washed ashore, and a substantial part was collected on behalf of the shipowners and delivered to the consignees. Held, that the shipowners were entitled to payment of the lump freight as they had substantially performed their contract save in so far as they had been prevented by an excepted peril, namely, perils of the seas. (Pickford, J.) *Harrowing Steamship Company Limited* v. *William Thomas and Sons* 261

24. *Liability for damage caused by open valves.*—A charter-party provided that "nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage, or absence of customary ventilation, or by improper opening of valves, sluices, and ports." Held, that the shipowners were liable for damage caused by a valve being improperly left open although it had originally been properly opened. (Bray, J.) *Meral and Co.* v. *Ropner and Co.* 268

25. *Demurrage—Exceptions—" Strikes . . . or any other cause beyond the control of the charterer."*—The following printed clause appeared in a charter-party: "The steamer to be loaded in usual turn, with customary dispatch at Goole, and discharged in thirty-six running hours, commencing first high water on or after arrival at or off the berth, unless berthed before, but time, unless used, not to commence between six p.m. and six a.m." The following written clause appeared in the margin: "When steamer loads at Hull seventy-two running hours will be allowed for loading and discharging, which time is to commence when steamer is at or off loading berth, but should steamer be prevented from entering the loading dock owing to congestion, time to commence from first high water after arrival off the dock." Held, that when the steamer loaded at Hull the time commenced to run from the time the steamer got to the loading berth. The charter-party also contained the following clause: "Strikes of workmen, lock-outs, pay days, idle days or cavilling days, or riots, or frost, rain, or floods, or any accident or any cause whatsoever beyond the control of the charterer, which may prevent or delay her loading or unloading excepted." There was a delay of seventeen hours at the port of discharge in consequence of a deficiency of railway waggons due to an abnormal demand upon the railway company. The plaintiffs claimed demurrage in respect of the seventeen hours. Held, that the words "or any cause whatsoever" were wide enough to exclude the *ejusdem generis* rule of construction, and that the charterers were therefore not liable for demurrage. (Bailhache, J.) *France, Fenwick, and Co. Limited* v. *Philip Spackman and Sons* 289

26. *Custom of port of Novorossisk—Evidence—Distinction between law and custom.*—A custom is a reasonable and universal rule of action in a locality, followed, not because it is believed to be the general law of the land or because the parties following it have made particular agreements to observe it, but because "it is in effect the common law within that place to which it extends, although contrary to the general law of the realm." Alleged custom of the port of Novorossisk considered. *Lockwood* v. *Wood* (6 Q. B. 50) considered. (Scrutton, J.) *Anglo-Hellenic Steamship Company Limited* v. *Louis Dreyfus and Co.* 291

27. *Strike — Demurrage — Construction of discharging clause.*—A charter-party contained the following clause: "Time to commence when steamer is ready to unload and written notice given, whether in berth or not. In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count unless the steamer is already on demurrage." Held, that the clause did not mean that time was not to count at all if a strike delayed the discharging, but that time should not count to the extent of any delay caused by a strike. (Scrutton, J.) *London and Northern Steamship Company Limited* v. *Central Argentine Railway Limited* 303

28. *Charter-party—Safe port.*—A charter-party provided that a ship should "trade between any safe ports between Hamburg and Brest and the United Kingdom." The ship was ordered by the charterers to go to Craster, a port in the United Kingdom which was perfectly safe to make provided the sea were smooth, but which might become dangerous if a change of wind altered the conditions. At the time the vessel was ordered to Craster the sea was smooth. Held, that the port was not a safe port within the meaning of the charter-party. (Rowlatt, J.) *Johnston Brothers* v. *Saxon Queen Steamship Company* 305

29. *Bill of lading — Freight — Warehouseman — Delivery—Liability of consignee for freight—Merchant Shipping Act* 1894 (57 & 58 *Vict.* c. 60), *ss.* 493-496.—Certain goods were shipped at Antwerp in a steamship owned by the defendants and consigned to the plaintiffs at Southampton under a bill of lading which provided (*inter alia*) as follows: "The goods to be taken from alongside by the consignees as soon as the vessel is ready to discharge . . . or other-

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wise they may be landed, put into lighters, or stored . . . at the expense of the consignee of the goods. . . . Freight to be paid at destination before delivery. . . . The company shall have a lien upon the goods for the payment thereof, as well as a general lien, not only for the freight of the same, but for all other freights, storages, or other charges owing to the company by the shipper, consignee, or owners." The vessel arrived at Southampton, and was ready to discharge, but the plaintiffs did not take delivery. The goods were landed by the master and stored with a warehouseman, with instructions that the goods were to be held for the shipowners, and not to be delivered to any person without their instructions, which were to be accompanied by their release for the freight. The bill of lading was sent by the plaintiffs to the warehouseman with the sum due for freight as under sects. 493-496 of the Merchant Shipping Act 1894. The warehouseman, acting upon the instructions of the shipowners that the goods were not to be delivered to the plaintiffs until payment of freight to the shipowners had been made, refused to deliver the goods. In an action by the plaintiffs for the delivery of the goods on payment of freight to the warehouseman: Held, that as the shipowners had not landed the goods and stored them in the warehouse under the provisions of the Merchant Shipping Act 1894, the consignees had no right to delivery of the goods by the warehouseman on depositing the amount due for freight. (Scrutton, J.) *Dennis and Sons Limited* v. *Cork Steamship Company Limited* 337

30. *Bill of lading—Exemptions from liability—Fire—" Actual fault or privity "—Perils of the sea—Unseaworthiness—Maintenance of vessel's class—Merchant Shipping Act* 1894 (57 & 58 *Vict.* c. 60), s 502.—By sect. 502 of the Merchant Shipping Act 1894, the owner of a British seagoing ship is not liable to make good any loss or damage happening without his actual default or privity where any goods, merchandise, or other things taken in or put on board his ship are lost or damaged by reason of fire on board the ship. A bill of lading, on the terms of which the plaintiffs shipped certain goods on the defendants' ship, contained the following exemptions from liability: (1) " Fire on board. . . . and all accidents, loss, and damage whatsoever from . . . perils of the seas . . . or from any act, neglect, or default whatsoever of the master, officers, crew . . . or agents of the owners . . . in the management, loading, stowing, discharging, or navigation of the ship or otherwise. . . ." (11) " It is agreed that the maintenance by the shipowners of the vessel's class . . . shall be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage." A fire broke out on the ship, which went down, and the plaintiff's goods were lost. Scrutton, J. found as facts that the ship was unseaworthy; that the unseaworthiness caused the loss of goods either by perils of the sea or by fire, and that the fire occurred without the actual fault or privity of the shipowner, and he held that the parties to the bill of lading had excluded the operation of the above sect. 502; and that the shipowners were liable as the bill of lading did not in unambiguous terms exempt them from the obligation to provide a seaworthy ship. Held, that there was no contract between the parties excluding the protection afforded to the shipowners by sect. 502, and substituting in its place a contractual liability of the shipowners, and, therefore, the shipowners were not liable. *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (12 Asp. Mar. Law Cas. 82, 233; 107 L. T. Rep. 320; (1912) 1 K. B. 229) distinguished. Decision of Scrutton, J. reversed. (Ct. of App.) *Ingram and Royle Limited* v. *Services Maritimes Du Treport Limited* 381

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31. *Charter-party — Lay days — Strike — Avoidance of charter.*—By the terms of a charter-party it was agreed that a vessel should proceed to a dock, there to load from the charterers a cargo of coal. The coal was to be loaded in 140 running hours, and it was provided that " any time lost through riots, strikes, lock-outs, or any disputes between masters and men occasioning a stoppage of pitmen, trimmers, or other hands connected with the working or the delivery of the coal for which the steamer is stemmed; or by reason of accidents to mines or machinery, obstructions on the railway or in the docks; or by reason of floods, frosts, fogs, storms, or any cause beyond the control of the charterers, not to be computed as part of the loading time (unless any cargo be actually loaded during such time). In the event of any stoppage or stoppages arising from any of these causes continuing for the period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages." The vessel was ready to load in the dock on the 4th April 1912 at 1 p.m. At that time a national coal strike was in progress, which terminated on the 9th April 1912. No coal had been received at the dock during the continuance of the strike, and after its termination none was ready for shipment until the 11th April, a period of more than six days after the vessel was ready to load. On the 10th April the charterers gave notice to the shipowners that, a stoppage having continued for six running days within the meaning of the charter-party, such charter-party was null and void. In an arbitration between the shipowners and the charterers an umpire held that the charter-party was void by reason of a stoppage arising from the specified causes or some of them—viz., a colliers' strike and causes beyond the control of the charterers within the meaning of clause 3 of the charter. Held, that although the actual strike was over, it had directly caused a state of affairs in the collieries which physically prevented the output of coal, and that in these circumstances there was a stoppage due to strike within the meaning of the charter-party, and the decision of the umpire was right. Observation: In order that there may be a " stoppage due to strike," the stoppage and the strike must be absolutely intimately connected one with the other. (Bailhache, J.) *Gordon Steamship Company Limited* v. *Moxey Savon and Co. Limited* 339

32. *Charter-party—Lump freight—Non-arrival of chartered ship—Delivery of part of cargo—Freight.*—By the terms of a charter-party it was provided that a steamship should load a full and complete cargo of pit props at a port in Finland and proceed to Port Talbot, a dock as ordered, and there deliver the cargo on being paid a lump sum of 1600*l*. The charter-party contained an exception clause including (*inter alia*) perils of the seas. The steamship loaded her cargo and proceeded to Port Talbot, but before she could get into a dock she went ashore and ultimately became a total wreck. Part of the cargo was washed ashore, and a substantial part was collected on behalf of the shipowners and delivered to the consignees. Held, that the shipowners were entitled to payment of the lump freight as they had performed their contract save in so far as they had been prevented by an excepted peril. Judgment of Pickford, J. (12 Asp. Mar. Law Cas. 261; 107 L. T. Rep. 459) affirmed. (Ct. of App.) *Harrowing Steamship Company Limited* v. *William Thomas and Sons* 344

33. *Charter-party — Construction — Date specified for termination of hire—Retention of vessel beyond date specified—Time essence of contract.*—By the terms of a charter-party a vessel was chartered from 15/31 May 1912 until

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15/31 Oct. 1912 at the rate of 615*l*. per current month "hire to continue from the time specified for terminating the charter until her redelivery to owners (unless lost) at a port on east coast of United Kingdom between the 15th and 31st Oct. 1912." On the 18th Oct. 1912 the vessel was at West Hartlepool, and upon that day she was despatched by the charterers on a voyage from which, to the knowledge of the charterers, it was impossible that she could return in time to be redelivered to the owners by the 31st Oct. She was in fact redelivered on the 20th Nov. The current rate obtainable for the vessel on the 31st Oct. was 900*l*. per month, and the owner sought to recover from the charterers damages for twenty days' detention of the ship calculated at the difference between the current rate and the chartered rate for the period in question. Held, that the clause in the charter-party set out above indicated an intention on the part of the parties to make the time specified in the charter for the redelivery of the vessel of the essence of the contract, and that as she was not redelivered by the 31st Oct. the charterers had committed a breach of contract for which they were liable in damages at the rate claimed. (Atkin, J.) *Watson Steamship Company Limited* v. *Merryweather and Co.* 353

34. *Charter-party — Demurrage — Agreed rate— Damages for detention.*—A charter-party provided that cargo was to be taken from alongside the ship at the port of discharge at the average rate of 500 tons per day, and "if longer detained consignees to pay steamer demurrage at the rate of 4d. per net register ton per running day." Held, that no provision, either express or implied, was contained in the charter-party that the agreed rate of demurrage should only apply to a reasonable number of days over and above the lay days. (Bray, J.) *Western Steamship Company Limited* v. *Amaral, Sutherland, and Co. Limited* 358

35. *Cargo—Loss by fire—Unseaworthiness of ship —Fault or privity of owners—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 502.—A cargo of oil carried on board a ship was destroyed by fire, the cause of the loss being the stranding of the ship occasioned by the unseaworthiness of her boilers. Held (Vaughan Williams, L.J. dissenting), that the owners were not entitled to the protection of sect. 502 of the Merchant Shipping Act 1894, as the loss had not happened without their actual fault or privity. Per Buckley, L.J., the words "actual fault or privity" infer something personal to the owner, something blameworthy in him as distinguished from the fault or privity of his servants or agents. Per Hamilton, L.J., that if the sources of information had been used and not neglected, the condition of the boilers would have been learnt in time. In the present case the managers had from time to time such knowledge of the matter as made them blameworthy for the ship's unseaworthiness. Decision of Bray, J. (reported 12 Asp. Mar. Law Cas. 269; 107 L. T. Rep. 651) affirmed. (Ct. of App.) *Asiatic Petroleum Company Limited* v. *Lennard's Carrying Company Limited* 381

36. *Bill of lading—Exceptions—Liability for unmarked goods—Missing goods—Several consignees—Apportionment of unmarked goods—Condition exempting ship from liability for obliteration or absence of marks*—Commixtio.—A vessel loaded with a cargo of jute in bales. The bills of lading, which included bales with many different marks, were indorsed to thirty-seven different consignees. All the cargo was discharged at one port, and it was then discovered that thirty-three of the consignees had received their full consignments, but that the consignments to the four others were incomplete. There were eleven bales which could not be identified as belonging to any consignee by reason of defective or obliterated marking. In addition, there was a deficiency of fourteen bales. The bills of lading stated that the bales were received "marked and numbered as per margin"; that the number of packages signed for was to be binding on the shipowners unless errors or fraud were proved; but the ship was not to be liable for "inaccuracies, obliteration, or absence of marks." In an action for freight brought by the shipowners against one of the four consignees, an indorsee of one of the bills of lading, he counter-claimed for the value of six bales not delivered to him. The shipowners admitted their liability to make good the shortage of the fourteen bales, but contended that they were not liable at all for the eleven bales which could not be identified, and that the above exception protected them. Held, that the burden of proving that the exception protected them lay upon the shipowners, and that on the facts found no such protection was available to them; that they had failed to deliver the six bales and had failed to prove that the failure to deliver was due to any obliteration or absence of marks, and were liable for their full value. *Spence* v. *Union Marine Insurance Company* (18 L. T. Rep. 632; L. Rep. 3 C. P. 427) distinguished. Dictum of Lord Russell of Killowen in *Smurthwaite* v. *Hannay* (7 Asp. Mar. Law Cas. 380, 485; 71 L. T. Rep. 157, 160; (1894) A. C. 494, 505) considered. Decision of the Second Division of the Court of Session (1913, S. C. 19) reversed. (H. of L.) *Sandeman and Sons* v. *Tyzack and Branfoot Steamship Company Limited* 437

37. *Charter-party—Cessation of hire—Damage to ship during voyage owing to shifting of cargo.*—A charter-party provided that "in the event of loss of time from deficiency of men or stores, breakdown of machinery, collision, docking, stranding, or other accident or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost shall be allowed to the charterers, including first twenty-four hours, and if such detention shall exceed thirty days charterers to have the option of cancelling this charter; but should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense." The chartered vessel, which carried, amongst other things, a deck cargo, encountered heavy weather in the course of the voyage, and the deck cargo shifted. It was found necessary for safety to put into port, and upon arrival it was necessary to discharge the deck cargo and to examine the ship, which was injured by reason of the combined effect of the stress of weather and the shifting of the cargo, and to execute the necessary repairs to the ship. The vessel was detained in all for thirty-three days and seventeen hours, of which period nine days and twelve hours were occupied by repairs to the ship itself. It was contended by the charterers that, under the terms of the charter-party, the vessel was off hire for a period of nine days and twelve hours upon the ground that it was time lost from an accident or damage preventing the working of the vessel. For the shipowners it was contended that the ship was on hire during the period when she was being repaired on the ground that the delay was due to an accident to the cargo. Held, that the words "such detention" in the clause "should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense" referred only to time actually lost by stress of weather, or by accident to cargo and repairing the results of such accident, but did not include time lost owing to damage to the ship which was caused by the accident to the cargo, such damage coming

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within the words "or other accident or damage" in the earlier part of the clause, and that consequently, as the delay caused by the repairing of the vessel exceeded twenty-four hours, she was off hire during the nine days and twelve hours occupied in repairing her. (Bailhache, J.) *Burrell and Sons* v. *F. Green and Co.* 411

38. *Carrier — Lighterman — Contract to lighter goods—Exemption from liability—Negligence.*—In a contract made between the plaintiffs and the defendant, it was agreed that the defendant should lighter goods from an import ship to a wharf on the Thames. The goods were lightered by the defendant on the terms (*inter alia*) of the following notice: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman." The plaintiffs suffered a loss which they alleged arose from the negligence by defendant's servants. On the facts: Held, that the damage was not caused by the negligence alleged, but *Semble*, the notice given by the defendant did not exempt him from liability for loss by negligence. (Pickford, J.) *Joseph Travers and Sons Limited* v. *Cooper* 444

NOTE.—Since affirmed by C. A.—ED.

39. *Contract of carriage—Through bill of lading—Transhipment into lighter—Unseaworthiness of lighter—Liability of shipowner on the through bill of lading—Shipper's risk.*—Cargo owners shipped machinery on the defendants' steamship at New York for carriage to Hull to be thence transhipped to Norrköping in Sweden on terms contained in a through bill of lading. The goods arrived safely at Hull, and were placed in a lighter hired by the defendants in order that they might be transhipped into a vessel bound for Norrköping. Owing to the unseaworthiness of the lighter the machinery was damaged. The cargo owners sued the shipowners who had carried the goods to Hull for the damage they had sustained, alleging that the shipowners were the carriers of the machinery from New York to Norrköping, and were liable for the damage sustained by the unseaworthiness of the lighter. The shipowners contended that they were only carriers to Hull, and that from thence their only duty was to make contracts to forward the goods to Norrköping, and that if they were carriers the terms of the bill of lading exempted them from liability. Held, that the obligations of the shipowners as carriers subsisted when the goods were shipped into lighter, and that the shipowners were therefore liable for the damage caused by the unseaworthiness of the barge. Held, further, that the words "shipper's risk" only applied to the carriage after the goods had been placed on the transhipment vessel, and that whatever the words meant they referred to something other than a breach of the fundamental obligation of the shipowner to supply a seaworthy vessel. (C. A.) *The Galileo* 461

NOTE.—Since affirmed by H. of L.—ED.

40. *Charter-party—Dispatch money—Time saved in loading.*—*Primâ facie* the presumption is that the object and intention of dispatch clauses is that the shipowner shall pay to the charterer for all time saved to the ship, calculated in the way in which, in the converse case, demurrage would be calculated—that is, taking no account of the lay day exceptions: (*Laing* v. *Holloway*, 1878, 3 Q. B. Div. 437, and *Re Royal Mail Steam Packet Company* v. *River Plate Steamship Company*, 102 L. T. Rep. 333; 11 Asp. Mar. Law Cas. 372; 1910 1 K. B. 601). This *primâ facie* presumption may be displaced where either (i.) lay days and time saved by dispatch are dealt with in one clause and demurrage in another clause (*The Glendevon*, 70 L. T. Rep. 416; 7 Asp. Mar. Law Cas. 439; 1893 P., 269); (ii.) lay days, time saved by dispatch, and demurrage are dealt with in the same clause, but upon the construction of that clause the court is of opinion, from the collocation of the words, or other reason, that the days saved are referable to and used in the same sense as the lay days as described in the clause, and are not referable to or used in the same sense as days lost by demurrage: (*Nelson* v. *Nelson Line*, 96 L. T. Rep 887; 10 Asp. Mar. Law Cas., 544, 581; 1907 2 K. B. 705). By the terms of a charter-party it was provided that "the entire cargo shall be loaded at the average rate of 500 units per running day of twenty-four consecutive hours (Sundays and non-working holidays excepted)," and the owners agreed to pay the charterers 10*l.* per day for all time saved in loading. The cargo loaded consisted of 5132 units, and it was agreed that the charterer was entitled to ten and a half days for loading the cargo, and that the lay days began to count at 8 a.m. on Thursday, the 20th March. The 23rd March was a Sunday, and the loading was finished at 8 a.m. on Wednesday, the 26th March, so that, excluding the Sunday, five days had been occupied in loading. The charterer claimed that, as the remaining five and a half lay days (excluding Sundays), if used, would have expired only at 8 p.m. on Tuesday the 1st of April, he was entitled to be paid six and a half days' dispatch money at the rate of 10*l.* a day. The owners admitted their liability for five and a half days, but disputed their liability for the remaining day on the ground that it was a Sunday and was excluded from the lay days, and was therefore equally excluded from the dispatch days. It was contended on behalf of the charterer that the object of the clause was to give dispatch money in respect of time saved to the ship, and that, as owing to the exertions of the charterer the ship was using the Sunday for the purpose of the voyage, he was entitled to be paid dispatch money in respect of that day. Held, that the Sunday must be taken into account in assessing the dispatch money to which the charterer was entitled. (Bailhache, J.) *Mawson Shipping Company Limited* v. *Beyer* 423

41. *Charter-party — Master co-owner — Loss of cargo through unseaworthiness—Liability of co-owner other than master.*—A ketch was owned by two co-owners, and worked on the basis that the master took two-thirds of the gross freights, out of which he paid the mate and the crew, the provisions, and expenses of the voyage. The owners took one-third of the gross freight, subject to deductions for port dues. The owners provided for the upkeep and insurance of the vessel. The ketch loaded a cargo of cement under a charter-party made by the master, which was lost through the unseaworthiness of the vessel. In an action by the owners of the cargo against one of the co-owners of the ketch: Held, that the contract of charter-party was made by the master personally, and that the defendant was therefore not liable. *Steel* v. *Lester* (37 L. T. Rep. 642; 3 Asp. Mar. Law Cas. 537; 3 C. P. Div. 131) and *Bernard* v. *Aaron* (9 Jur. N. S. 470) followed. *Associated Portland Cement Manufacturers* (1900) *Limited* v. *Ashton* 501

42. *Charter-party — Exceptions — Restraint of princes—Right to cancel.*—The defendants chartered a Greek steamer from the plaintiff to sail from Leghorn and load a cargo at a port in the Sea of Azof under a charter-party which contained an exception of restraints of princes. The steamer passed through the Dardanelles on

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the 28th Sept., and on the 30th, in view of the imminent probability of war, the Turkish Government arrested and detained all Greek vessels arriving in the Dardanelles. The steamer arrived at her loading port on the 1st Oct., and received delivery of part of her cargo, after which the charterers stopped the loading. On the 18th Oct. war was declared between Greece and Turkey. From the 16th to the 20th Oct. the Turkish Government unexpectedly allowed Greek vessels to pass through the Dardanelles for certain short periods. The steamer's lay days did not expire until the 22nd Oct., and on the 21st Oct. the defendants cancelled the charter. In an action by the plaintiff for damages for alleged breach of charter: Held, that at the time of the breach alleged an excepted peril, namely, restraint of princes, prevented the charter from being carried out by the vessel proceeding on her voyage, and that the restraint was likely to continue so long as to defeat the object of the adventure, and that therefore the defendants were not liable. *Embiricos* v. *Reid and Co.* 513

43. *Charter-party—Loss of time—Prevention of efficient working—Cesser of hire.*—A charter-party contained the following clause, "In the event of loss of time through deficiency of men or stores, repairs, breakdown of machinery, pumps, pipes, or boilers (whether partial or otherwise), collision or stranding, or damage preventing the efficient working of the vessel for more than forty-eight running hours, the payment of hire shall cease until she be again in an efficient state to resume her service." On the construction of the clause: Held, that for losses of time of less than forty-eight hours no claim for cesser of hire could be made, but where from any of the causes named in the charter-party there were losses of time exceeding forty-eight hours the charterer was entitled to cesser of hire for the whole of the time so lost. *Meade King, Robinson, and Co.* v. *Jacobs and Co. and others* 515

44. *Charter-party — Demurrage — Agreed rate— Damages for detention.—Western Steamship Company Limited* v. *Amaral, Sutherland, and Co. Limited* 493

45. *Charter-party—Loss by excepted peril—Delivery of part of cargo—Lump sum freight— Right of shipowner to recover.*—By a charter-party, which contained an exception of "perils of the seas," a ship was to proceed to a named port and there load a full and complete cargo of pit props, and then proceed to a port in the United Kingdom and there deliver the same on payment of a lump sum for freight, to be paid in cash on the unloading and right delivery of the cargo. The ship loaded the cargo and proceeded to the port of discharge, but was wrecked outside that port by perils of the seas, and became a total loss. About three-quarters of the cargo was saved and was delivered to the charterers. Held, that the shipowners were entitled to the full freight. Judgment of the Court of Appeal (12 Asp. Mar. Law Cas. 344; 108 L. T. Rep. 622) affirmed. *Thomas and Sons* v. *Harrowing Steamship Company* ... 532

46. *Bill of lading—Transhipment of goods at ship's expense and shipper's risk—Damage during transhipment — Negligence — Liability of shipowner.*—Goods were shipped under a through bill of lading at New York for conveyance to a port in Sweden *viâ* Hull. By the terms of the bill of lading the goods were to be delivered at Hull "to be thence transhipped at ship's expense and shipper's risk to the port of N.," the carrier to "have liberty to convey goods in craft and (or) lighters to and from the steamer, at the risk of the owner of the goods. The goods arrived at Hull in good order and condition, and were there transhipped into a lighter, to be conveyed to a vessel bound for N. in Sweden. The lighter was not seaworthy, and was left unattended in the dock, and sank, and the goods were damaged. Held, that there was negligence on the part of the shipowners, and that they were not protected by the clause in the bill of lading. Judgment of the Court of Appeal (12 Asp. Mar. Law Cas. 461; 110 L. T. Rep. 614; (1914) P. 9) affirmed. *Wilson and Sons* v. *Owners of Cargo ex Galileo; The Galileo* 534

47. *Charter-party—Timber — Freight — Measurement of cargo — Alternative methods — Remeasurement—Liability for cost of.*—By the terms of a charter-party it was provided (*inter alia*) that a steamship should load from the agents of the charterers a cargo of pit props, freight to be payable at a specified rate "per intaken piled fathom of 216 cubic feet." Pit props are measured by alternative methods: either by lengths and tops, or lengths alone, the former method giving more timber per fathom than the latter. The terms of the charter-party served to indicate that the measurement of the cargo was to be by lengths alone, but in fact, at the port of loading, the shippers measured by lengths and tops, giving 683 cubic fathoms, a bill of lading being tendered accordingly to the owners and signed by them under protest. The bill of lading contained the words "measure unknown," in accordance with the terms of the charter-party. When the ship arrived at the port of discharge the shipowners alleged that the bill of lading was inaccurate, and had the cargo remeasured by length only, on which basis the cargo was found to consist of 784 cubic fathoms. In an action by the shipowners to recover the expense of remeasuring the cargo: Held, that the charterers were liable to pay to the shipowners the expenses incurred by having the cargo measured at the port of discharge, as the charter-party created a contractual obligation on the part of the charterers to procure the measurement of the cargo at the port of loading in accordance with the method indicated by the charter-party. *Joseph Merryweather and Co. Limited* v. *William Pearson and Co.* ... 540

48. *Charter-party—Port — King's Lynn — "Safe port"—Meaning of.*—The term "port" in a charter-party is to be taken in its commercial sense, and is not to be defined by the meaning given to it by the Legislature in Acts passed for such entirely different objects such as pilotage or revenue. Where by a charter-party a vessel was to call for orders "to discharge at a safe port in the United Kingdom . . . or so near thereto as she can safely get always afloat and deliver such cargo in accordance with the custom of the port for steamers," and the vessel was ordered to King's Lynn, but could not enter the dock there without being lightened, and therefore lightened at another place and completed her discharge in King's Lynn Dock, and the owners of the ship brought an action to recover the extra expense incurred by them in lightening the ship: Held, the owners were entitled to the extra expense of lightening, as King's Lynn was a safe port within the meaning of the charter-party. A "safe port" means a port to which a vessel can get laden as she is, and at which she can lay and discharge, always afloat. *The Alhambra* (4 Asp. Mar. Law Cas. 410; 44 L. T. Rep. 637; 6 P. Div. 68) followed. *Hall Brothers Steamship Company Limited* v. *R. and W. Paul Limited* 543

49. *Port of London—Port rates—Transhipment— "Coastwise"—Exemptions.*—By sect. 13, sub-sect. 1, of the Port of London Act 1908, "all goods imported from ports beyond the sea or coastwise into the port of London or exported to parts beyond the seas or

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coastwise from that port" shall be liable to port rates. By sect. 13, sub-sect. 5: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point." By sect. 9 of the Provisional Order confirmed by the Port of London (Port Rates on Goods) Provisional Order Act 1910, "No port rates shall be charged by the authority on transhipment goods, which expression wherever used in this order means and includes goods imported for transhipment only," and "for the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise." Goods were imported from beyond the seas into the port of London for transhipment only, and were duly certified by the owners as being for transhipment. They were conveyed by a sailing barge down the Thames to Rochester on the Medway. Held (Buckley, L.J. dissenting), that the word "coastwise" in the expression "beyond the seas or coastwise" in sect. 9 of the above Provisional Order has its ordinary meaning, having reference to a voyage between places on the coast of the United Kingdom, when used, as in the context, in contrast to "beyond the seas," and that its ordinary meaning was not displaced by the definition of the words "goods imported or exported coastwise" in sect. 13, sub-sect. 5, of the Act of 1908; that the conveyance from London to Rochester by the Thames and Medway was a conveyance "by sea only" to another port "coastwise" within the meaning of sect. 9; and that therefore the goods, having been imported for the purpose of being conveyed, were exempt from port rates. *British Oil and Cake Mills Limited* v. *Port of London Authority* 548

50. *Carrier — Lighterman — Contract to lighter goods—Exemption from liability—Negligence.*—When a bailee of goods has to admit that goods have been damaged while in his custody, and in the absence of his custodian, and it is found that the absence was improper and negligent, and that the absence makes it difficult to determine what was the cause of the damage, and the owner of the goods can suggest a probable cause which the presence of the custodian might have prevented, the burden of proof is imposed on the bailee to show that it was not the negligent absence of his custodian which was the cause of the damage. Where goods were laden on a barge under a contract by which the barge owner sought to relieve himself from liability for negligence by the insertion of the following clause, "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any loss of or damage to goods, however caused, which can be covered by insurance . . . ." and the barge owner's servant was in fact negligent in that he left the barge unattended, in consequence of which during his absence the barge began to fill and later sank, the Court of Appeal held that the onus lay upon the barge owner to show that he had taken proper and reasonable care of the goods, and that the negligence of his servant was not the cause of the loss. Decision of the House of Lords in *Morison, Pollexfen, and Blair* v. *Walton* (unreported), decided on the 10th May 1909, followed. Held, further (Buckley, L.J. dissenting), that the terms of the notice given by the defendant were wide enough to exempt him from liability for loss by negligence. (Ct. of App.) *Joseph Travers and Sons Limited* v. *Cooper* 561

NOTE.—The material words of the decision in *Morison, Pollexfen, and Blair* v. *Walton* (unreported), decided on the 10th May 1909, were, per Lord Loreburn, L.C., "Here is a bailee, who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision and difficult to discover at all what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his own wrongdoing, he must make that loss good"; and, per Lord Halsbury, "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him." If the shorthand notes of this case can be obtained it will be reported in these Reports at a later date.—ED.

51. *Loss of time—Cesser of hire—"Damage preventing working of vessel"—"Accident to cargo"—Ship driven into port of refuge—Delay by charterers in giving instructions to master—Appeal against finding of umpire.*—A ship under charter was driven into a port of refuge. An umpire found that there was in fact an unrestowage of the deck cargo, and that the charterers on the ship's arrival at the port to give instructions to the master with regard to the restowage of the deck cargo, and that the charterers ought in the ordinary course of business to have given the master instructions. It was contended for the charterers that this was a finding in law, and that the finding was wrong in law, as it was the duty of the master to act without waiting for the charterers' instructions. Held, that there might have been before the umpire facts to justify his finding, and, that being so, there was no rule of law which compelled the court to say that the umpire was wrong in his finding. Decision of Bailhache, J. (12 Asp. Mar. Law Cas. 411; 109 L. T. Rep. 970; (1914) 1 K. B. 293) affirmed. (Ct. of App.) *Burrell and Sons* v. *F. Green and Co.* Appeal from the King's Bench Division 589

52 *War risk—C.i.f. contract—Goods lost owing to capture of vessel by enemy cruiser—Whether war risk on buyer or seller.*—The appellants bought 100 bales of cloth from the respondent, which were to be shipped from Calcutta to London. The contract of sale provided that should the goods not arrive from loss of vessel or other unavoidable cause, the tender to the buyer of the insurance policy with the bill of lading should be deemed a good tender of the goods not arriving. It also contained a clause, "War risk for buyer's account." On the 15th July 1914 twenty-five bales goods were shipped per steamship *City of W.*, and on the following day the shippers took out an insurance policy which did not cover war risk—that is to say, an f.c.s. policy. On the 20th Aug. the respondent tendered the documents, including the above policy, but on the following day the steamer was posted as lost, having been sunk by a German cruiser. In arbitration proceedings claiming payment of 441*l.* 2s. on the shipper's draft, the arbitrator found the appellants (the buyers) responsible for the war risk. On a case stated: Held, following *Biddell Brothers* v. *E. Clemens Horst Company* (12 Asp. Mar. Law Cas. 1, 80; 105 L. T. Rep. 563; (1911) 1 K. B. 220), (1) that, apart from the special terms of the contract, the tender of a policy containing the f.c. and s. clause was a sufficient tender within the meaning of the contract, it being proved that there was no custom in the trade for the seller to take the war risk; (2) that this being a c.i.f. contract, it was duly performed by the tender of the proper documents within a reasonable time after shipment, and that it was immaterial to consider whether before the date of the tender

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of the document the property in the goods was the seller's or the buyer's or some other person's; and, further, that the seller's obligation could not depend on whether the goods are lost or not. (Atkin, J.) *Groom Limited* v. *Barber* 594

CARRIER.

See *Carriage of Goods*, Nos. 38, 50.

CESSER OF HIRE.

See *Carriage of Goods*, Nos. 43, 51.

CESSER OF LIABILITY.

See *Carriage of Goods*, No. 10.

CHARTER-PARTY.

See *Carriage of Goods*, Nos. 9, 10, 11, 12, 13, 14, 15, 16, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 37, 40, 41, 42, 43, 44, 45, 47, 48, 51, 52.

"CHARTERED OR AS IF CHARTERED."

See *Marine Insurance*, No. 11.

C.I.F. CONTRACT.

See *Carriage of Goods*, No. 52—*Enemy—Marine Insurance*, No. 2—*Sale of Goods*, Nos. 1, 3, 4.

CLOSING OF REGISTER.

See *Specific Performance*.

COAST FISHERY.

See *Prize*, No. 4.

"COASTWISE."

See *Carriage of Goods*, No. 49.

COLLISION.

1. *Whistle—Warship—Squadrons.*—In a case of collision between a merchant ship and a warship which was one of a flotilla, the Court of Appeal, having found that the merchant ship negligently ported when close to the warship and that she failed to sound her whistle when she ported: Held, differing from the President, that she was in fault for a breach of art. 28 or the regulations, which provides for appropriate signals when a vessel takes "any course authorised or required by these rules." (Ct. of App.) *The Hero.* (See *Collision*, No. 6, below.) 10

NOTE.—The H. of L. has since (see *Shipping Gazette*, Jan. 30, 1912) dismissed an appeal from the above judgment. Their Lordships agreed with the Court of Appeal in finding both vessels to blame. They arrived at this conclusion, however, on a different ground to that upon which the Court of Appeal decided the case. Their Lordships found the merchant ship to blame for negligently porting across the vessels of the flotilla, and for so mainly contributing to the accident. They found the warship to blame because she also contributed to the accident.—ED.

2. *Duty to take compass bearing of approaching vessels—Collision Regulations* 1910 *—Preliminary to steering and sailing rules— Arts.* 2, 21, 28, 29.—It is the duty of those navigating a ship who see a light on a ship approaching them to see whether it appreciably alters its bearing with reference to their ship, and to test this by compass according to the direction contained in the preliminary paragraph to art. 17 of the Sea Rules. (Adm. Div.) *The President Lincoln* 41

3. *Trawler engaged in trawling—Duty of trawler to keep her course and speed—Collision Regulations* 1910, *arts.* 9 (*d*) 1 (1906), 19, 21, 23.—When a steam trawler is exhibiting a triplex light in accordance with art. 9 (*d*) 1 (1906) of the Sea Rules, she is to be regarded as incapable of manœuvring. It is the duty of approaching vessels to keep out of her way. Her duty is to do nothing but keep her course and speed. There is no duty upon her to stop her engines, except, perhaps, in obedience to the note to art. 21 of the Sea Rules. (Adm. Div.) *The Ragnhild* 44

4. *Launch—Conflict of duties.*—Shipbuilders, who were about to launch a vessel, gave notice to the harbour authority, to the pilots of the port, and to persons using the port of their intention to launch a vessel at a particular time on a certain day. On the morning of the launch the vessel to be launched was dressed with flags; and tugs and boats were in attendance to warn passing vessels. The launch being timed to take place at 12.30 p.m., preparations for releasing the vessel were begun at 6 a.m. About 10.30 a.m. a ketch drifting up the river with her anchor down fouled some moorings in the river and brought up a little below the slipway from which the launch was to take place. Messages were sent to her at 10.30 a.m. and 11.30 a.m. from the shipbuilding yard that she had better move, and about noon a tug was sent to advise her to buoy her anchor and let the tug tow her away to a place of safety. Those on the ketch refused this offer, as they did not think the ketch was in the line of the launch, though they offered to move if the shipbuilders would give them a new anchor. The shipbuilders delayed the launch fifteen minutes to enable the tug to move the ketch. The tidal conditions were favourable at the time fixed for the launch. Had it been further delayed they would have been unfavourable. The shipbuilders, being apprehensive of danger to their vessel and the lives of their men and the public using the river, if the launch was delayed, and, not thinking that there was any substantial risk to the ketch, launched the vessel, which collided with the ketch, the collision being due to the vessel not going across the river, but being swept a little down river by the tide, which, owing to the delay, had begun to set down river along the river bank. In an action for damage by the ketch owners it was held in the Admiralty Court that, though the ketch had no right to be where she was, the shipbuilders could have prevented any damage to her by postponing the launch, and judgment was given for the amount of the damage claimed by the ketch owners. The shipbuilders appealed to the Court of Appeal. Held, by the Court of Appeal, reversing the decision of the Admiralty Court, that the claim of the ketch owners should be dismissed, and that judgment should be entered for the shipbuilders, who had been placed in a position of difficulty and had adopted a reasonable course of action, and had without negligence chosen the lesser of two evils. (Ct. of App.) *The Highland Loch.* (See No. 5 below.) 68

5. *Launch—Right of shipbuilders to launch—Duty of ship at anchor to get out of the way.*—Where a person, through no fault of his own, is placed in a position in which he is obliged to take one of two risks, he is justified in taking what appears to be the lesser risk, and will not be held liable for damage so caused to the party whose act occasioned the risk. Shipbuilders were preparing to launch a ship, and had given all the necessary notices that they intended to launch at a certain hour on a certain day. About two hours before the time fixed for the launch a vessel anchored in a position in which it was possible, though not probable, that she might be injured by the launch. Her master was warned that the launch was about to take place, and was requested to move, but refused to do so. There was evidence that if the launch had not taken place at the time fixed it must have been delayed for twenty-four hours, and

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that, after all preparations had been made, such delay would have caused considerable risk to life and property. The launch took place, and the vessel launched, collided with the vessel at anchor and injured her. Held, that the vessel at anchor was solely to blame for the collision. Judgment of the court below affirmed. (H. of L.) *Owners of the Frances* v. *Owners of the Highland Loch; The Highland Loch* 106

6. *Warship—Merchant ship—Both to blame.*—A merchant steamship met a flotilla of warships proceeding upon an opposite and parallel course. The warships were proceeding in two columns each divided into three subdivisions. The merchant ship passed inside the first subdivision of the starboard column, which was a little out of its station to starboard, and outside the second subdivision, passing it green to green. On approaching the third subdivision she ported her helm, and ran across the bows of the leading vessel of that subdivision, causing risk of collision. The helm of the warship was first ported, and then starboarded, and a collision took place by which the warship was sunk. Held, that both vessels were to blame as both had contributed to the accident. Judgment of the court below affirmed. (H. of L.) *Owners of the Hero* v. *Lord Commissioners of the Admiralty, and Cross-appeal; The Hero* ... 108

7. *Navigation round bend of river.*—Where vessels are approaching each other at Baldwin Point in Bow Creek, which is a blind corner and a difficult bend to navigate, good seamanship requires that a vessel going up with the tide shall give such warning as will enable vessels which may be coming down against the tide to approach the bend in such a way as to prevent any collision. It is the duty of vessels coming down against the tide to proceed cautiously, and if necessary stop above the bend altogether. In the City of London Court the learned deputy judge held that a vessel going up with the tide approaching this bend was alone to blame for a collision with a down-comer for failing to warn her. The Divisional Court varied this order on appeal, holding that both vessels were to blame, the one going up for not giving sufficient warning, and the one coming down for proceeding carelessly at such a speed that she could not have avoided a collision with an innocent vessel if she met one at the bend. (Adm. Div. Ct.) *The Kennet* 120

8. *Compulsory pilotage — Exemption — Ballast—Bunkers—Merchant Shipping Act* 1894—*Order in Council the* 25*th July* 1861.—A steamship left Newcastle-on-Tyne for London, on a voyage to Port Chalmers, New Zealand, *viâ* London, with no cargo, but having on board 3040 tons of coal, of which 1095 tons were carried in her bunkers and the rest in No. 3 hold and No. 3 between deck; she also had on board 710 tons of water ballast. The steamship had a water ballast capacity of 1538 tons and the water ballast and coal on board was more than was necessary to make the vessel seaworthy. When coming up the Thames in charge of a pilot she ran into and damaged a pier. In an action brought by the pier owners against the shipowners to recover damages for the injury done to the pier, the shipowners pleaded that the steamship was in charge of a compulsory pilot, and that the damage was caused by his negligence. An order was made that the point whether the steamship was under compulsory pilotage should be tried first. On the hearing: Held, that the steamship was navigating in ballast from a port or place in the United Kingdom to another port or place in the United Kingdom within the meaning of the Trinity House by-law authorised by the Order in Council of the 25th July 1861, and was therefore exempt from compulsory pilotage. (Adm. Div.) *The Tongariro* 235

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9. *Fog—Tug attached but not towing—Sound signals—Maritime Conventions Act* 1911.—Where a tug was during fog accompanying a vessel in from sea to the Tyne, and was made fast alongside her but was not towing her, it was held in the circumstances: (1) That the tug was not bound to comply with sub-sect. (e) of art. 15 of the Sea Rules as she was not towing. (2) That she was not bound to comply with sub-sect. (a) of the same article as safe navigation demanded that she should not sound any signals as if she were a separate vessel having way upon her. In this case both the plaintiffs' and defendants' vessels were found to blame for excessive speed. The defendants' vessel was found to blame in addition for bad look-out and for not stopping. The court, in applying sect. 1 of the Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57), apportioned two-thirds of the blame to the defendants' vessel and one-third to the plaintiffs', and gave no costs on either side. (Adm. Div.) *The Sargasso* 202

10. *Fog—Both to blame—Initial wrong—Degree of fault—Maritime Conventions Act* 1911—*Costs.*—In an action for damage by collision, in which both vessels were found to blame for negligent navigation in fog, the vessel which was found guilty of the initial fault was ordered to pay 60 per cent. of the damage, the other vessel 40 per cent., under the provisions of sect. 1, sub-sect. 1, of the Maritime Conventions Act 1911. No order was made as to costs. (Adm. Div.) *The Rosalia* 166

NOTE.—This was the first case to be tried under the Maritime Conventions Act 1911.—ED.

11. *Lights—Tug lying by a ship and in attendance on her—Sound signals—Compulsory pilot.*—A tug in attendance on, but not fast to, a vessel at anchor with anchor lights, in the Mersey was stemming the tide, and carrying the usual under-way lights. Her green light was open to an upcoming steamship in charge of a compulsory pilot in such a position that the pilot navigated the upcoming ship towards the vessel at anchor and her tug under the impression that he was approaching one vessel under way showing her green light. A collision and damage resulted. In a damage action brought by the owners of the ship at anchor, the defendants pleaded compulsory pilotage: Held, that the tug was properly exhibiting her green light as she was under way, and that the defendants could not properly complain of having been misled by the green light; that the collision was brought about by the negligence of the pilot, but that the plea of compulsory pilotage failed upon the grounds: (1) That the master of the defendants' ship in fact appreciated the true position of things in time to warn the pilot that he was under a misapprehension and failed to do so as was his duty in accordance with the decision in *The Tactician* (10 Asp. Mar. Law Cas. 534; 97 L. T. Rep. 621; (1907) P. 244). (2) That the master of the defendants' ship knew what the pilot was doing and failed to call his attention to the fact that no sound signals had been given as was his duty. (Adm. Div.) *The Elysia*...... 198

NOTE.—This case seems to decide the point left open by Lord Alverstone, L.C.J., in *The St. Paul* (11 Asp. Mar. Law Cas. 169; 100 L. T. Rep. 184; (1909) P. 43) as to whether it is the duty of a master to call the attention of a compulsory pilot to the fact that sound signals ought to be given. It does not, however, decide the other point left open in that case as to whether the responsibility for giving sound signals rests with a master or a pilot.—ED.

12. *Application of Maritime Conventions Act* 1911 (1 & 2 *Geo.* 5 *c.* 57), *ss.* 4 (1), 9 (2).—A steamship dredging up the river Ouse was run into by two lighters proceeding up the river in tow of a tug. The collision happened before the passing of the Maritime Conventions Act

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1911, but proceedings were instituted after, by the owners of the steamship against the owners of the tug to recover the damage. The defendants contended that, even if they were to blame, as the steamship had broken art. 28 of the collision regulations by failing to sound whistle signals when she ported and went astern she was also to be deemed to be in fault. Held, that as sect. 419 (4) of the Merchant Shipping Act 1894 was repealed by sect. 4 (1) of the Maritime Conventions Act 1911 and as no proceedings had been taken in respect of the collision before the passing of the Maritime Conventions Act 1911, sect. 9 (2) and (3) of that Act applied, and as the breach of the collision regulations did not in fact contribute to the collision, the steamship was not to blame. (Adm. Div.) *The Enterprise* 240

13. *Vessel aground in Thames at night—Lights —Validity of rule* 30 *of the Thames Rules— Collision Regulations, art.* 11.—A vessel upwards of 150ft. in length aground in the Thames was exhibiting two white lights, one forward and one aft, in order to comply with rule 30 of the Thames By-laws for vessels "of 150ft. or upwards aground in or near a fairway." It was contended in a damage action that she should have exhibited the two white lights and the two red lights prescribed by art. 11 of the Sea Rules for vessels "aground in or near a fairway," as rule 30 of the Thames Rules was ambiguous, and that therefore art. 11 of the Sea Rules was the article to be obeyed. Held, that there is no ambiguity in rule 30 of the Thames By-laws so far as concerns "vessels of 150ft. or upwards"; that it was a rule duly made by a local authority as contemplated by art. 30 of the Sea Rules, and as such was the rule which applied to vessels "150ft. in length or upwards aground in or near a fairway" in the Thames. *The Carlotta* (8 Asp. Mar. Law Cas. 544; (1899) P. 223; 80 L. T. Rep. 664) referred to. (Adm. Div.) *The Bitinia* 237

NOTE.—This decision does not seem to cover the case of a vessel which may be less than 150ft. in length aground in the Thames. Query as to the lights such a vessel ought to carry.—ED.

14. *Steamship aground in the Thames—Signals— Thames Rules* 30, 40, *and* 52.—A vessel proceeding up the Thames grounded. She sounded four short blasts on her whistle to signify that she was not under command, but, before she could put up the lights required by art. 30 of the Thames Rules, she was run into by a steamship which had been coming up the river about a quarter of a mile astern of her. In a damage action: Held, that the steamship which got aground was not to blame for not putting up the lights required by art. 30, as that rule was not applicable, and, even assuming that she was, there was not sufficient time in which to put them up before the collision, and she had sounded a four-blast signal signifying that she was not under command. Held, further, that the overtaking ship was alone to blame for not keeping out of the way and for bad look-out. Observations on the want of a signal to be made by vessels temporarily aground in the Thames. (Adm. Div.) *The Bromsgrove* 196

15. *Collision — Thames — Compulsory pilotage — General Pilotage Act* 1825 (6 *Geo.* 4 *c.* 125), *s.* 59 *—Duties of Masters and Pilots.*—(1) A steamship belonging to the port of London while going down the Thames in charge of a duly licensed Trinity House pilot on a voyage from London to East Africa with a cargo and passengers collided with some barges and tugs. The master had been absent from the bridge for some time before the collision, and only returned shortly before the collision. In a damage action brought by the owners of the injured craft it was held that the master was not negligent in not being on the bridge in accordance with art. 14 of the Thames Rules, that the pilot was solely in fault, and that, following the case of *The Hankow* (40 L. T. Rep. 335; 4 Asp. Mar. Law Cas. 97 (1879); 4 P. Div. 179), the owners of the steamship were not liable for the damage as the pilot was compulsorily in charge, as the steamship was navigating in the port of London, a place in relation to which particular provision as to the appointment of pilots had been made by charter and by Act of Parliament within the meaning of the statute (6 Geo. 4, c. 125, s. 59). On appeal to the Court of Appeal: Held, affirming the decision of Sir S. Evans, P. (reported below and in (1911 P. 234) that the owners of the steamship were not liable as the pilot was compulsorily in charge, for the steamship was navigating within a port in relation to which particular provision as to the appointment of pilots had been made. *The Hankow* (ubi sup.) approved (*a*). (2) Observations by the President (Sir Samuel Evans) in the Admiralty Court as to the effect of rule 14 of the Thames Rules and as to the duties of masters of ships in charge of pilots (*b*). Ct. of App.) *The Umsinga* 174

NOTE.—(*a*) A note as to the charters of the Trinity House will be found in the report of *The Hankow*, at p. 97 of 4 Asp. Mar. Law Cas. The charters have been printed and published (1730), and there is a copy of the publication in Lincoln's-inn Library. The case of *The Cayo Bonito*, reported in 9 Asp. Mar. Law Cas. 445 and in (1903) P. 203, contains much valuable information. (*b*) In the course of the case in the Admiralty Court *The St. Paul* (1908) P. 320; (1909) P. 43; 11 Asp. Mar. Law Cas. 152) was referred to as to the duties of masters and pilots with regard to whistling. The point was left open by the learned President. *The Shakkeborg* (1911) P. 245, and in *Shipping Gazette*, 11th April 1911) was also cited, in which case Bargrave Deane, J., decided, upon the advice of the Elder Brethren, that the duty of a look out in the River Thames is to report every material light as soon as it becomes material.—ED.

16. *Workmen's Compensation Act* 1906—*Action in* rem—*Damage done by any ship—Admiralty Court Act* 1861 (24 *Vict.* c. 10) *s.* 7—*Remoteness of damage.*—A lightship owned by the Commissioners of Irish Lights was run into and damaged by a German sailing ship which was in tow of a tug. The sailing ship was arrested in England in an action *in rem* instituted by the owners of the lightship to recover the damage they had sustained, and an undertaking was given in the action to appear and put in bail to answer the claim. After the writ was issued and the undertaking was given, one of the crew of the lightship made a claim under the Workmen's Compensation Act 1906 against her owners for compensation for injury caused by shock by fright before the collision actually took place, and an award was made in his favour in proceedings before an Irish County Court judge. The owners of the German ship were not represented at the County Court and were not parties. The owners of the lightship claimed an indemnity for any sum paid or payable to the workman in respect of his injury, and sought to recover the sum so paid from the owners of the German sailing ship. On the claim coming before the registrar he dismissed it. The owners of the lightship appealed from his decision. On appeal: Held, affirming the decision of the registrar, that even assuming that the seaman had in fact sustained the shock alleged and was entitled to recover compensation under the Act from the commissioners, and though the ship was for the purposes of the Act to be considered a British ship, the owners of the German sailing ship were not bound by the

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decision in the arbitration. Held, further, that the damage was not "done by any ship" within the meaning of sect. 7 of the Admiralty Court Act 1861, and that the claim was too remote. (Adm. Div.) *The Rigel* 192

17. *Compulsory pilotage—Humber—Bunker coal—Pilotage—Stores*—2 & 3 *Will.* 4, *c. cv.*, *s.* 24.—The defendant steamship on a voyage from Yarmouth to a Russian port was coming up the Humber to Grimsby for bunker coal in charge of a duly licensed Humber pilot, when she collided with and damaged a steam trawler. In a damage action brought by the owners of the steam trawler, the defendants alleged that if there was any negligence on board their steamship which caused or contributed to the collision it was the negligence of the compulsory pilot who was in charge, and that they were not liable. Held, that the defendants were liable, for though the negligence on their vessel which caused the collision was that of the pilot, the vessel was exempt from compulsory pilotage as bunker coals were "stores," and so their vessel was putting into the Humber for the purpose of obtaining stores only within the meaning of sect. 24 of 2 & 3 Will. 4, c. cv. (Adm. Div.) *The Nicolay Belozwetow* 279

18. *Damage to buoy — County Courts Admiralty Jurisdiction Act* 1868 (31 & 32 *Vict. c.* 71), *s.* 3 (3) — *County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 & 33 *Vict. c.* 51), *s.* 4.—A steamship ran into a gas buoy and injured it. The owners of the gas buoy sued the owners of the steamship, bringing their action in a County Court in Admiralty. The County Court judge dismissed the action, holding that he had no jurisdiction to try the case. On appeal to the Admiralty Divisional Court: Held (affirming the decision of the County Court judge) that the County Court had no jurisdiction to try the case, as the word "collision" in the County Courts Admiralty Jurisdiction Act 1868, s. 3, sub-s. 3, only referred to collisions between ships. *The Normandy* (26 C. C. C. Rep. 314; 90 L. T. Rep. 351; 9 Asp. Mar. Law Cas. 568; (1904) P. 187) followed. (Adm. Div. Ct.) *The Upcerne* 281

19. *Both to blame—Different degrees of fault—Costs—Maritime Conventions Act* 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1.—When in a collision action both ships are held to be in fault, but in different degrees, the practice in force before the passing of the Maritime Conventions Act, that each party to the action should bear their own costs, is to be followed unless there are special circumstances in existence to induce the court to depart from it. (Adm. Div.) *The Bravo* 311

20. *Crossing vessels—Duty to give way—Duty to keep course—Look-out.*—Where in an action for damage by collision the facts showed that two vessels were approaching each other so as to involve risk of collision, the duty upon one being to keep out of the way and upon the other to keep course and speed, the President (Sir Samuel Evans) found as a fact that the officer in charge of the keep course and speed vessel was closely watching the other vessel, up to the last expecting her to carry out her obligation to keep out of the way, and said that in such circumstances the court should not be too ready to cast blame upon a vessel placed in a difficulty by, and left in doubt as to the intentions of, another vessel whose duty it is to keep out of the way. (Adm. Div.) *The Tempus* 396

21. "*Excessive bail*"—*Cost of bail fees.*—A steamship ran into another moored alongside a wharf in the river Thames, doing damage to the moored vessel and breaking her adrift. The vessel which had been moored did damage to others after she was broken adrift. In an action for damage brought by the owners of the vessel broken adrift they demanded bail in 10,000*l.* but ultimately reduced their demand to 9000*l.* The question of liability having been fought and determined in favour of the plaintiffs, they filed a claim in the registry amounting to 3451*l.* 13s. 5d. The defendants tendered 3100*l.*, which was accepted by the plaintiffs. On a motion by the defendants that the plaintiffs should bear the cost of the excessive bail fees: Held, that the bail demanded was excessive, and that the plaintiffs were to bear the cost of the fees for the bail demanded above 6000*l.* (Adm. Div.) *The Princess Marie José* ... 360

22. *River Thames—Vessel turning in river—Sound signals—Thames By-laws* 1898, *by-law* 40.—When a steamship is turning round in the Thames and has in accordance with by-law 40 of the Thames By-laws 1898 given four blasts to signify her manœuvre, that signal for the time being supersedes signals as to engine movements, and good navigation does not require that three short blasts should be blown every time engines are put full speed astern in such circumstances. (Adm. Div.) *The Harberton* ... 342

23. *Single ships approaching squadrons—Duty to give way—Duty to keep course and speed—Notice to Mariners, April* 1907—*Collision Regulations* 1897, 19, 21, 22, 27, 29.—Where in a collision action a foreign steamship was approaching a squadron of British warships and it was her duty under art. 21 of the Regulations for Preventing Collisions at Sea (1897) to keep her course and speed, it was held by the President (Sir Samuel Evans) that it was not bad seamanship or negligence for her to do so in the circumstances, and that she was not to blame for failing to comply with the Board of Trade notice to mariners, dated April 1897, with reference to single ships approaching squadrons, about the existence of which notice her officers had no knowledge. (Adm. Div. *The King Alfred* 401

24. *Joint negligence of two ships—Innocent third ship—Recovery of damage by owners of innocent ship against the owners of one of the wrong-doing ships—Right of the owners of the wrong-doing ship who had paid to recover a contribution from the owners of the other wrong-doing ship—Division of loss—Maritime Conventions Act* (1 & 2 *Geo.* 5, *c.* 57) 1911, *s.* 1—*Construction of statute—Preamble of Act.*—Sect. 1 of the Maritime Conventions Act 1911 must be construed not as apportioning any existing liability, but as providing that the whole of the damage or loss referred to is to be borne in proportion to the degree in which each vessel is in fault; and, if it be impossible to establish different degrees of fault, then equally. A tug towing two hoppers brought one of them into collision with a steamship. Both the hopper and steamship were damaged. In a collision action brought by the owners of the hopper against the owners of the steamship and the owners of the tug to recover the damage they had sustained, the steamship and tug were both held to be equally in fault for the collision, and the hopper was held free from blame. The owners of the hopper recovered the whole of their damage against the owners of the steamship. The owners of the steamships then sought to recover half the sum paid by them to the owners of the hopper from the owners of the tug. The President (Sir S. Evans) held that they were entitled to recover that sum. The owners of the tug appealed to the Court of Appeal. Held, affirming the decision of the President (Sir S. Evans), that the sum recovered by way of damage against the owners of one of the wrong-doing ships by the owners of the innocent ship was loss caused to that wrong-doing ship within the meaning of sect. 1 of the

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Maritime Conventions Act 1911, and that the owners of the wrong-doing ship who had paid it were entitled to recover half the sum so paid from the owners of the other wrong-doing ship. Held, further, that where the words of an Act are clear it is not permissible to look at the preamble of the Act as an aid to construe the meaning to be given to the provisions of the Act. (Ct. of App.) *The Cairnbahn* 455

25. *Collision—Steamship entering the river Mersey from dock—Duty to steamships in the river — Crossing vessels — Good seamanship — Mersey Rules, art.* 1—*Collision Regulations* 1897, *arts.* 19, 27, 29.—Art. 19 of the Collision Regulations applies in the Mersey in all fit and proper cases, but there may be circumstances in which the rules of good seamanship may displace its application. A steamship leaving dock and entering the Mersey sighted another on the port bow coming up the river. The steamship coming up the river had her starboard side open to the steamship entering the river. The steamship coming up the river sounded two short blasts and starboarded until shortly before the collision, when she reversed. The vessel entering the river kept her course and speed and then ported. In an action for damage brought in the County Court, it was held that the steamship entering the river from dock was alone to blame, as art. 19 of the collision regulations did not apply, and that instead of keeping her course and speed she should have waited in the dock entrance until the upcoming steamship had passed. On appeal to the Divisional Court: Held, that art. 19 did not apply in the circumstances and that both vessels were to blame, the steamship coming up the river for continuing to starboard when she knew the vessel entering the river was porting, and for not reversing sooner; and the vessel entering the river for not waiting in the dock mouth till the steamship coming up had passed. *The Sunlight* (90 L. T. Rep. 32; 9 Asp. Mar. Law Cas. 509; (1904) P. 100) considered. *The Llanelly* 485

26. *Compulsory pilot—Duty of crew to assist pilot —Liability of owners for damage.*—The plea of compulsory pilotage will not be upheld if the pilot does not receive proper support and assistance from the crew. In a collision action where both vessels were to blame for speed in fog, it was held by Bargrave Deane, J. that where reports in a foreign tongue were made from forward to the bridge to which a pilot paid no attention, it was the duty of the crew to see that the pilot understood the reports, and to point out to him that by continuing at speed he was committing a breach of the collision regulations. *The Ape* 487

27. *Collision between a steamship and a barge in tow of a tug—Steamship and tug to blame—Damage to cargo on barge—Claim by owners of Cargo—Right to recover total damage against either steamship or tug—Division of loss—Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1; *s.* 9, *sub-s.* 4.—A dumb barge in tow of a tug came into collision with a steamship. The cargo on the barge was damaged. The servants of the tug owners controlled the navigation of the barge, and the barge was under hire to the tug owners, who were in the position of owners of the barge. The tug owners and the cargo owners brought an action against the owners of the steamship to recover the amount of the damage done to the barge and to the cargo on the barge. The owners of the steamship counter-claimed against the tug owners for the damage done to the steamship. The court held that the collision was due to the fault of the steamship and the tug, and that the steamship was to blame to the extent of three-fourths and the tug was to blame to the extent of one-fourth. The owners of the cargo on the barge claimed as innocent parties to recover the whole of their damage against the owners of the steamship. Held, that as the tug and barge were controlled by the servants of the tug, by whose fault the collision was partly caused, the principle laid down in *The Milan* (5 L. T. Rep. 590; Lush. 388) was applicable, and that the cargo owners could only recover three-fourths of their damage from the owners of the steamship. *The Drumlanrig* 103 L. T. Rep. 773; 11 Asp. Mar. Law Cas. 520; (1911) A. C. 16) followed. *The Devonshire* (107 L. T. Rep. 179; 12 Asp. Mar. Law Cas. 210; (1912) A. C. 634) distinguished. *The Umona* ... 527

28. *Collision—Warship—Value of vessel—Depreciation—Allowance for degradation of type—Circumstances justifying an alteration of the amount assessed by the registrar—Cause of action for loss of life of seamen apart from statute—Right to recover pensions and gratuities paid by the Admiralty as an act of grace—Remoteness of damage.*—A submarine having been sunk through the negligent navigation of a steamship and all but one of her crew drowned, the Commissioners of the Admiralty brought an action against the steamship owners to recover the damage they had sustained. They included in their claim the following among other items: 35,000*l.*, the value of the submarine; 5140*l.* 18*s.* 6*d.*, the capitalised amount of the pensions and gratuities paid or payable by the plaintiffs to the relatives of the crew who were drowned. At the reference the assistant registrar allowed the value of the submarine at 26,500*l.*, and he disallowed the sum claimed for pensions, but stated that, if he was wrong in disallowing it, the sum recoverable was 4100*l.* The Admiralty Commissioners appealed, seeking to recover the capitalised value of the pensions, which they agreed to accept at 4100*l.*; the shipowners appealed, seeking to get the amounts allowed for the value of the vessel reduced. On the hearing of the appeal, the President (Sir S. T. Evans) Held that on the evidence a sufficient deduction had not been made for depreciation and degradation of type, and that the sum of 26,500*l.* should be reduced to 23,850*l.* Held, further, that, as apart from statute, the negligent killing of a person gave rise to no cause of action, the Admiralty Commissioners could not recover damages for the loss of the crew, and that, as the pensions and gratuities were given as an act of grace and were not recoverable from the Admiralty as of right, the Admiralty Commissioners could not recover them as damages; and that the sums paid were too speculative and remote to be recovered as damages. The Admiralty Commissioners appealed to the Court of Appeal, seeking to get the above decision reversed. Held, by the Court of Appeal, that, as the appeal with regard to the value of the submarine was a question of *quantum* only, and as the assistant registrar and merchants had made no error in principle or calculation and had not misunderstood the evidence given when they assessed the value of the sunken submarine at 26,500*l.*, that figure would be restored, and the decision of the learned President would be reversed and the appeal on that point would be allowed. Held, further, by the Court of Appeal, that the Admiralty Commissioners had sustained no injury by the deaths of the seamen; that the amounts paid to their dependants by the Admiralty Commissioners were not recoverable as damage resulting from the collision; and that the decision of the learned President would be affirmed on this point. Held, further, by Kennedy, L.J., that the amounts paid by the Admiralty Commissioners were not recoverable as they were paid gratuitously and were not paid because the

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wrongful act of the defendants had imposed a duty on the Admiralty Commissioners to make the payments. *The Amerika* 536

NOTE.—Apparently the ground upon which the Court of Appeal reversed the President was that a figure arrived at by the registrar should only be reviewed if the registrar has erred in principle or the sum allowed is either grossly too large or grossly too small. It may be doubted whether the Court of Appeal has sufficiently considered what hitherto has been the practice of the Admiralty Court, namely, that the report of the registrar is not a final judgment, but it must be confirmed by the Court to give it validity (see Roscoe's Admiralty Practice, 3rd edit., p. 385, note to Order LVI., r. 10; see also the judgment of Bargrave Deane, J., in *The Wallsend*, 10 Asp. Mar. Law Cas. 476; 96 L. T. Rep. 851; (1907) P. 302).—ED.

29. *Overtaking and overtaken vessels—Negligence—Steamers crossing—Regulations for Preventing Collisions at Sea, arts.* 19, 21, 24*—Suction or interaction — " Swerve " — Admission of further evidence.*—A warship, the *Hawke*, and a large Atlantic liner, the *Olympic*, approaching each other on crossing and converging courses in the Solent, off the Isle of Wight, came into collision. The House of Lords held that the real cause of the collision was that the *Olympic*, having the *Hawke* on her starboard hand and the consequent duty to keep clear, took too wide a sweep round the West Brambles Buoy, and, having plenty of sea room, failed to avail herself of it and keep clear of the *Hawke* as she could and ought to have done. Held, also, that, in the case of a vessel so large as the *Olympic*, forces of interaction, the true nature of which may not be clearly known, might have been operative at a distance of 100 yards or even more, and that the two vessels, moving through the shallow waters in that locality at high speeds, were in sufficiently close proximity for an interaction resembling suction in its effects to take place between them. Held, also, that the contention on behalf of the owners of the *Olympic*, founded upon the case of *The Pekin* (8 Asp. Mar. Law Cas. 367; 77 L. T. Rep. 443; (1897) A. C. 532)—namely, that, having regard to the locality, the Crossing Rules (arts. 19 and 21) were not applicable—was not well founded. Decision of the Court of Appeal affirming Evans, P., affirmed. H. of L.) *The Owners of the Steamship Olympic* v. *Commander William F. Blunt; Owners of the Steamship Olympic* v. *Commissioners for Executing the Office of Lord High Admiral of the United Kingdom* 580

COLLISION CLAUSE.
See *Marine Insurance*, Nos. 15, 24.

COMMERCIAL LIST.
See *Practice*, No. 11.

COMMIXTIO.
See *Carriage of Goods*, No. 36.

COMPASS BEARING.
See *Collision*, No. 2.

COMPROMISE.
See *Marine Insurance*, No. 29.

COMPULSORY PILOTAGE.
See *Collision*, Nos. 1, 8, 11, 15, 17, 26—*Pilotage—Practice*, No. 8—*Salvage*, No. 3.

CONCEALMENT
See *Marine Insurance*, Nos. 7, 10, 11, 12, 27.

CONDEMNATION.
See *Prize*, No. 2.

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CONFLICT OF DUTIES.
See *Collision*, No. 4.

CONSIGNEE.
See *Carriage of Goods*, No. 36.

CONSTRUCTION.
See *Carriage of Goods*, Nos. 3, 33—*Collision*, No. 24—*Marine Insurance*, No. 9—*Sale of Goods*, No. 2.

CONSTRUCTIVE TOTAL LOSS.
See *Marine Insurance*, Nos. 5, 9, 21, 29—*Specific Performance.*

CONTRACT.
See *Damage—Restraint of Trade.*

CONTRACT OF CARRIAGE.
See *Carriage of Goods*, No. 39.

CONTRACT TO LIGHTER GOODS.
See *Carriage of Goods*, No. 50.

CONTRACT OF SALE.
See *Specific Performance.*

CONTRIBUTION.
See *Collision*, No. 24.

CONTRIBUTORY NEGLIGENCE.
See *Collision*, No. 6.

CONVENTION VI., ARTS. 1, 2.
See *Prize*, No. 1.

COSTS.
See *Collision*, No. 19—*Marine Insurance*, No. 29—*Practice*, Nos. 8, 9.

COUNTY COURTS ADMIRALTY JURISDICTION ACT 1868.
See *Collision*, No. 18.

COUNTY COURTS ADMIRALTY JURISDICTION AMENDMENT ACT 1869.
See *Collision*, No. 18.

CRASTER (PORT OF).
See *Carriage of Goods*, No. 28.

CROSSING VESSELS.
See *Collision*, Nos. 20, 25.

CURRENCY OF POLICY.
See *Marine Insurance*, No. 1.

CUSTOM.
See *Carriage of Goods*, No. 26.

CUSTOM OF PORT.
See *Carriage of Goods*, Nos. 4, 13.

DAMAGE.

Contract—Graving dock—Railway company—Regulations—Negligence—Liability for damages.—The plaintiffs, owners of the steamship *Marmion*, claimed against the defendants, owners of a graving dock at Hull, damages for the defendants' alleged breach of contract in and about the dry-docking of the steamship. She suffered damage by reason of the unevenness of the block caps on which she rested, which were provided by the defendants for reward, and the unevenness was alleged to be due to the defendants' want of care. There were no statutory provisions relating to the defendants' rights and liabilities as dry-dock owners. The *Marmion* required painting, and the defendants let the dock for that purpose

SUBJECTS OF CASES.

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and did not do the painting themselves. The ship entered the dock under a contract with the defendants, by virtue of which dock dues were charged, and there were also charges for pumping, and the use of blocks, shores, &c., which the defendants contracted to supply, the blocks being of the usual kind. Clause 9 of the defendants' regulations was as follows: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into, or out of, or whilst in the graving dock, whatever may be the nature of such accident or damage, or howsoever arising." Held, that clause 9 applied; that it covered negligence, and rendered the defendants immune from liability for the condition of the blocks. *Pyman Steamship Company Limited* v. *Hull and Barnsley Railway Company Limited; The Marmion* 511

DAMAGE.
See *Collision*, No. 18.

"DAMAGE DONE BY ANY SHIP."
See *Collision*, No. 16.

DAMAGE DURING TRANSHIPMENT.
See *Carriage of Goods*, No. 46.

DAMAGE PREVENTING WORKING OF VESSEL
See *Carriage of Goods*, No. 51.

DAMAGE TO CARGO.
See *Carriage of Goods*, No. 24.

DAMAGE TO GOODS.
See *Practice*, No. 7.

DAMAGES.
See *Carriage of Goods*, No. 34—*Damage—Docks*, No. 1—*Marine Insurance*, No. 21.

DAMAGES FOR DETENTION.
See *Carriage of Goods*, No. 34, 44.

DEAD FREIGHT.
See *Carriage of Goods*, No. 16.

DECREE.
See *Practice*, No. 3.

DEGRADATION OF TYPE.
See *Collision*, No. 28—*Registrar and Merchants*, No. 3.

DEGREE OF FAULT.
See *Collision*, No. 19.

DELAY.
See *Carriage of Goods*, Nos. 4, 9.

DELAY BY CHARTERERS IN GIVING INSTRUCTIONS TO MASTER.
See *Carriage of Goods*, No. 51.

DELIVERY AT HAMBURG.
See *Enemy*.

DEMURRAGE.
See *Carriage of Goods*, Nos. 4, 11, 25, 26, 27, 34, 44.

DEPENDENCY.
See *Seaman*, No. 2.

DEPRECIATION.
See *Collision*, No. 28—*Registrar and Merchants*, No. 3.

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DESERTION.
See *Seaman*, No. 3.

DETENTION.
See *Carriage of Goods*, No. 34—*Prize*, No. 1.

DEVIATION.
See *Carriage of Goods*, No. 16.

DISCHARGE.
See *Carriage of Goods*, Nos. 4, 11, 14, 18.

DISCOVERY.
See *Practice*, Nos. 4, 11.

DISPATCH CLAUSES.
See *Carriage of Goods*, No. 40.

DISPATCH MONEY.
See *Carriage of Goods*, No. 40.

DIVISIONAL COURT CASES.
See *Carriage of Goods*, No. 4—*Statute of Limitations—Seaman*, Nos. 7, 8, 9.

DIVISION OF LOSS.
See *Collision*, Nos. 24, 27—*Tug and Tow*, Nos. 2, 3, 4, 5.

DOCK.
See *Damage*.

DOCKS.

1. *Docks—Berth—Preferential right to occupy berth—Damages.*—A shipping company had a preferential right to occupy a certain berth in a dock on Wednesday and Saturday in each week and were not entitled to use any other berth in the same port. The berth was situated at a wharf in a channel which was partly natural and partly artificial. The agreement between the two companies provided (*inter alia*) that in the event of any accident beyond the control of the dock company which caused loss or delay to the shipping company, the latter should be entitled to use some other berth, the dock company being under no liability to make good or pay compensation for such loss or delay. On the 28th Oct. 1911 the shipping company's steamer *P.* arrived in the port, and found that the particular berth to which she should have gone was occupied by the steamship *B.*, belonging to a Dutch company, which had gone to the berth and remained there contrary to the orders of the dock company. Owing to shortness of water in the dock the *B.* could not be moved to admit of the *P.* occupying the berth, and the *P.* accordingly went into an inner dock by the direction of the dock company, and by reason of shortness of water was detained there for a week, and consequently lost a complete round voyage. A portion of her cargo was shut out, and taken on by the next steamer of the line. The shipping company claimed from the dock company damages for the delay suffered by the *P.*, and the dock company in turn sued the owners of the *B.* to recover any damages they might be called upon to pay to the shipping company. Held, that the dock company were liable to the shipping company, as they had not in fact used their best endeavours to ensure that the shipping company should have the use of the berth, and that the wrongful action of the owners of the *B.* was not an accident beyond the "control of the dock company" within the meaning of the agreement; (2) that the owners of the *B.*, being guilty of a trespass, were liable to pay damages to the dock company, but not in respect of the whole of the detention of the *P.*, as she did not go into the inner dock

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owing to the order of the master of the *B.*; and (3) that the owners of the *B.* were not liable to pay the dock company's costs in defending the action brought by the shipping company, because it was unreasonable for the dock company to defend the action. (Scrutton, J.) *South Wales and Liverpool Steamship Company Limited* v. *Nevill's Dock and Railway Company Limited; Nevill's Dock and Railway Company Limited* v. *Maatschappij Steamship Bestevaer, Rotterdam* 328

2. *Rates—Exemption—Goods imported for transhipment only—Goods imported for conveyance by sea to any other port coastwise—Transhipment of goods in port of London for Rochester—Port of London Act* 1908 (8 *Edw.* 7, *c.* 68), *s.* 13 *—Port of London (Port Rate on Goods) Provisional Order Act* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c. c.*), *sched.*, *s.* 9.—Goods were imported from beyond the seas into the port of London for transhipment only, and were duly certified by the owners as being for transhipment. They were conveyed down the Thames to Rochester on the Medway. Held, under sect. 13 of the Port of London Act 1908 and sect. 9 of the Port of London (Port Rates on Goods) Order 1910 that the goods were exempt from payment of port rates as they were goods imported from beyond the seas for the purpose of being conveyed by sea only to another port "coastwise," as the definition of "coastwise" in sub-sect. 3 of sect. 13 of the Port of London Act 1908 is not imported into sect. 9 of the Provisional Order 1910, and the term "conveyed by sea only" is used to make a distinction between conveyance by land and not by river. (Pickford, J.) *British Oil and Cake Mills Limited* v. *Port of London Authority* 417

NOTE.—Since upheld by C. A.—ED.

3. *Port of London—Port Rates—Exemptions "Goods imported for transhipment only"—Oil in bulk—Mixture with other oil—Identification—Goods "shipped again as soon as practicable"—Port of London Act* 1908 (8 *Edw.* 7, *c.* 68), *s.* 13—*Port of London (Port Rates on Goods) Provisional Order Act* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c. c.*), *sched.*, *s.* 9.—By sect. 13 of the Port of London Act 1908 and sect. 9 of the Port of London (Port Rates on Goods) Order Act 1910, it is provided that goods imported for transhipment only into the port of London are exempt from port rates. By sect. 9 of the Provisional Order 1910, the expression "goods imported for transhipment only" is defined as meaning goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port, which are certified and proved within a certain period of the report of the ship at the Custom House to have been intended for transhipment, and which shall have been shipped again as soon as practicable for conveyance by sea to some other port. The certificate stating that the goods are intended for transhipment must contain particulars of the description, quantity, destination, route, and mode of conveyance of such goods, and the certificate stating that the goods have been shipped again as soon as practicable must contain such particulars as the Port of London Authority may require. The plaintiffs were importers of oil in ocean tank steamers. Such oil as was intended for transhipment was discharged into tanks in London, some of the tanks being empty, some containing oil brought by other steamers, and some containing oil intended for distribution in the London district. The plaintiffs delivered to the defendants inwards port rates exemption certificates which stated that the oil was intended for transhipment, and gave the statutory particulars as to the amount of oil intended to be transhipped with its destination. On one of the certificates was given the name of three steamers bracketed together, it not being then known which of the steamers would be available. The plaintiffs also delivered outwards port rates exemption certificates with respect to oil for transhipment for which they claimed exemption. The defendants denied the plaintiff's right to exemption with respect to the oil intended for transhipment upon four points—viz.: (1) that the oil lost its identity on being discharged into tanks; (2) that it was impossible to identify the oil transhipped with the oil set out in the inwards certificate; (3) that the name of the export steamer was not sufficiently stated; and (4) that the oil had not been transhipped as soon as practicable. Held, that if the plaintiffs could prove that the oil intended for transhipment had in fact been transhipped the oil was exempt from the port rates even though it was discharged into tanks containing other oil or mixed with oil not intended for transhipment, and that it was not necessary to set out the specific name of the export vessel in the exemption certificate. Held, also, that the words "as soon as practicable" mean that the transhipment must be carried out as soon as practicable having regard to the ordinary course of navigation and the facilities of the port, and not as soon as practicable having regard to the convenience of the merchant's business. (Pickford, J.) *Anglo-American Oil Company* v. *Port of London Authority* 419

NOTE.—Since upheld by C. A.—ED.

EJUSDEM GENERIS.

See *Carriage of Goods*, Nos. 9, 25.

ENEMY.

Trading with the enemy—C.i.f. contract—Tender of documents after outbreak of war—Goods to deliver at Hamburg—Seller not entitled to force acceptance of documents involving delivery of goods to alien enemy.—The claimants, who were produce merchants of Liverpool, in May 1914 sold certain Chilean honey to the respondents to be shipped on a certain German-owned steamer and delivered at Hamburg, terms c.i.f. cash in Liverpool against documents. The honey was shipped on the 28th June and the shipment was declared on the 28th July, but the ship was interned at a neutral port. On the 4th Aug. war was declared with Germany, and on the 5th Aug. a proclamation was issued prohibiting trading with the enemy, and on the same day the shipping documents were tendered. The respondents having refused payment; Held, that the respondents (the buyers) were justified in refusing the tender of the documents on the ground that if they accepted them they would be offending against the provisions of the proclamation of the 5th Aug., inasmuch as it would involve trading with the enemy. (Atkin, J.) *Duncan Fox and Co.* v. *Schrempft and Bonke* 591

ENEMY FISHING VESSEL.

See *Prize* No. 4.

ENEMY SHIP.

See *Prize*, Nos. 1, 2, 3.

ESTOPPEL.

See *Carriage of goods*, No. 17.

EVIDENCE.

See *Carriage of Goods*, No. 26.

EVIDENCE ADMISSIBLE IN PRIZE CASES

See *Prize*, No. 4.

SUBJECTS OF CASES.

EXCEPTIONS.
See *Carriage of Goods*, Nos. 5, 22, 25, 36, 42, 45, 49 —*Negligence*.

EXEMPTION FROM CAPTURE.
See *Prize*, No. 4.

EXEMPTION FROM LIABILITY.
See *Carriage of Goods*, No. 50.

FIDUCIARY RELATIONSHIP.
See *Statute of Limitations*.

FIRE.
See *Carriage of Goods*, Nos, 6, 19, 20, 22, 30, 35.

FISHING VESSEL.
See *Prize*, No. 4.

FLOATING DOCK.
See *Marine Insurance*, Nos. 7, 10.

"F.O.B."
See *Sale of Goods*, No. 5.

FOG.
See *Collision*, Nos. 9, 10.

"FOR ORDERS."
See *Pilotage*.

FOREIGN CORPORATION.
See *Practice*, No. 10.

FREIGHT.
See *Carriage of Goods*, Nos. 29, 32, 47.

FREIGHT POLICY.
See *Marine Insurance*, Nos. 9, 11.

GAS BUOY.
See *Collision*, No. 18.

GENERAL PILOTAGE ACT 1825.
See *Collision*, No. 15.

GRAVING DOCK.
See *Damage*.

HAGUE CONFERENCE 1907.
See *Prize*, Nos. 1, 2, 3, 4.

HARBOURS, DOCKS AND PIERS CLAUSES ACT 1847.
See *Port of London*, No. 2.

HIRE.
See *Carriage of Goods*, No. 37.

HONOUR POLICIES.
See *Marine Insurance* No. 3.

HOSTILITIES.
See *Prize*, No. 1.

HULK.
See *Marine Insurance*, No. 8.

HULL.
See *Carriage of Goods*, No. 25.

HUMBER.
See *Collision*, No. 17.

IDENTIFICATION.
See *Tug and Tow*, No. 5—*Prize*, No. 3.

IGNORANCE.
See *Prize*, Nos. 2, 3.

INACCESSIBILITY.
See *Carriage of Goods*, No. 9.

INCHMAREE CLAUSE.
See *Marine Insurance*, Nos. 1, 28.

INDEMNITY.
See *Tug and Tow*, No. 6.

INEVITABLE ACCIDENT.
See *Practice*, No. 8.

INITIAL WRONG.
See *Collision*, No. 10.

INSPECTION.
See *Practice*, No. 4.

INSTITUTE TIME CLAUSES.
See *Marine Insurance*, Nos. 9, 19, 28.

INTENTION.
See *Marine Insurance*, Nos. 4, 6.

INTERACTION.
See *Collision*, No. 29.

ISSUES IN FACT AND LAW.
See *Practice*, No. 9.

JUDICATURE ACT 1873.
See *Tug and Tow*, Nos 2, 3, 4

JURISDICTION.
See *Practice*, No. 10—*Prize* No. 1—*Seaman*, No. 11.

KING'S LYNN.
See *Carriage of Goods*, No. 48.

LATENT DEFECT.
See *Marine Insurance*, No. 1.

LAUNCH.
See *Collision*, Nos. 4, 5, 6.

LAW MERCHANT.
See *Sale of Goods*, No. 2.

LAY DAYS.
See *Carriage of Goods* No. 31.

LEAKAGE.
See *Marine Insurance*, No. 8.

LIEN.
See *Carriage of Goods*, Nos. 1, 16.

LIGHTER.
See *Carriage of Goods*, No. 39.

LIGHTERMAN.
See *Carriage of Goods*, Nos. 38, 50.

LIGHTS.
See *Collision*, Nos. 2, 11, 13, 14.

LIGHTSHIP.
See *Collision*, No. 16.

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LIMITATION OF LIABILITY.

Pilot — Several claimants — Apportionment — Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 620.—Where a Trinity House pilot has executed a bond under sect. 619 (ii.) of the Merchant Shipping Act 1894 by reason of which his liability for negligence is limited under the provisions of sect. 620 of the Act to 100*l.* and the pilotage for the voyage during which such negligence has occurred, the court, in the event of several parties suffering damage by the pilot's negligence, has no power to divide the amount of the pilot's statutory liability rateably amongst the various claimants, and if none of the claimants have been paid by the pilot the first person suing is entitled to be paid in full and not the rateable amount of his loss up to the limit of the pilot's liability. (K.B. Div. Ct.) *Deering and Sons* v. *Targett* 273

LIMITATION OF LIABILITY.
See *Practice* No. 3.

LLOYD'S POLICY.
See *Marine Insurance*, No. 25.

"LOADING."
See *Carriage of Goods*, No. 11.

LOADING TIME.
See *Carriage of Goods*, No. 40.

LONDON.
See *Carriage of Goods*, No. 49—*Port of London*, Nos. 1, 2, 3.

"LONDON CLAUSE."
See *Carriage of Goods* No. 18.

LOOKOUT.
See *Collision*, No. 20.

LORD CAMPBELL'S ACT.
See *Maritime Conventions Act* 1911.

LOSS BY FIRE.
See *Carriage of Goods*, No. 19.

LOSS OF CARGO.
See *Sale of Goods*, No. 7.

LOSS OF FISHING.
See *Salvage*, No. 1.

LOSS OF TIME.
See *Carriage of Goods*, Nos. 43, 51.

LOSS OF USE.
See *Registrar and Merchants*, No. 1.

LUMP FREIGHT.
See *Carriage of Goods*, Nos. 23, 32.

LUMP SUM FREIGHT.
See *Carriage of Goods*, No. 45.

MAGISTRATE.
See *Seaman*, No. 8.

MAINTENANCE OF CLASS.
See *Carriage of Goods*, No. 30.

MARINE INSURANCE.

1. *Inchmaree clause—Latent defect—Damage to hull prior to policy.*—A policy of marine insurance insuring a ship for twelve months from the 8th Dec. 1908 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 sternpost 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 sternpost: 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. Decision of Scrutton, J. (reported 104 L. T. Rep. 208 (1911), 11 Asp. Mar. Law Cas 580), affirmed. (Ct. of App.) *Hutchins Brothers* v. *Royal Exchange Assurance* 21

2. *Sale of goods — C.i.f. contract — Insurance against "all risks."*—By a contract in writing the defendants sold a quantity of citrons to the plaintiffs, and as the plaintiffs stipulated for "complete insurance against all risks," the defendants inserted in the margin of the contract the following words: "Insurance to be effected by us all risks." The defendants took out a policy covering the goods from Piræus to Antwerp for "850*l.* on 102 casks citrons (in brine). So valued. To pay average as customary." The policy contained an f.p.a. clause and the usual memorandum. There were clauses attached to the policy including one which covered "all risks by land or water (if by sea, at current additional premium)" and a "held covered clause," which provided (*inter alia*) that in the case of circumstances which might cause a variation and (or) entire alteration in the risk as contemplated in the policy, a payment in respect thereof should be made by the assured. The citrons, on their arrival at Antwerp, were found to be considerably damaged owing to their having been stowed on deck instead of under deck. In an action by the plaintiffs against the defendants for failing to insure the goods against all risks: Held, on the true construction of the contract, that the defendants were only bound to cover all risks in the sense of the entire quantum of damage, and not to procure a policy covering the plaintiffs against all causes of accident. (Hamilton, J.) *Vincentelli and Co.* v. *John Rowlett and Co.* ... 34

3. *Non-disclosure of material facts—Over-insurance—Marine Insurance Act* 1906.—Two policies of insurance were taken out by the owners of a ship upon her hull without disclosing to the insurers the fact that the master appointed for the voyage had not been to sea for twenty-two years, that he had lost his last ship, and had had his certificate suspended. The hull was in fact over-insured. There were other insurances on gross freight and disbursements. There was no insurable interest in part of the disbursements. The insurance upon them was by an "honour policy," otherwise a "p.p.i. policy." The managing owner (to whom money was due from the ship) had effected "honour policies" to a large amount on disbursements to protect his own interests. The ship was lost on the voyage by the default of the master. In an action brought by the shipowners against the insurers on the policies: Held, affirming the decision of the Court of Session, that the ship was not unseaworthy by reason of the incompetence of the captain, and that there was no breach of warranty of seaworthiness; that there was no duty on the owners to disclose the master's record to the insurers, and that such non-disclosure was not non-disclosure of a material circumstance within the meaning of the Marine Insurance Act 1906. Held, also,

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reversing the decision of the Court of Session, that the omission to disclose the over-insurance of the hull and the existence and amount of the "honour policies" did amount to the non-disclosure of material circumstances, and that the two policies were void owing to the concealment of material facts. (H. of L.) *Thames and Mersey Marine Insurance Company* v. *Gunford Ship Company—Southern Marine Mutual Insurance Association* v. *Same* 49

4. *Reinsurance—Risk—Intention of assured.*—A ship was insured by three policies issued by the plaintiffs. The first two were for 500*l.* each for a voyage from "Newcastle, N.S.W., to port or ports, place or places in any order or rotation on the West Coast of South America." The vessel was valued at 12,000*l.* in them, and the risk was to continue until thirty days after arrival at final port of discharge or until sailing on next voyage, whichever might first happen. The third was for 1000*l.* for a voyage "at and from Valparaiso and (or) port or ports, place or places in any order or rotation on the West Coast of South America" to the United Kingdom, or Continent, or the United States. The vessel was valued in this policy at 10,000*l.*, and the risk was to commence from the expiration of the previous policy. The plaintiffs reinsured the vessel with the defendant for a voyage "at and from Valparaiso and (or) any port or ports, place or places on the West Coast of South America" to the United Kingdom, Continent of Europe, or the United States. The valuation of the vessel was the same as in the original policy. The plaintiffs gave instructions to their brokers to effect this reinsurance for a voyage "at and from Valparaiso and (or) W.C.S.A. or h/c to U.K. and (or) Cont., or to U.S.A. or h/c . . . warranted nitrate or h/c. Valuation clause. Hull, &c., vd. 10,000*l.* or v.o.p." The vessel was chartered to load a cargo of coal at Newcastle, N.S.W., and under the charter-party the charterers directed her to discharge the cargo at Valparaiso, and bills of lading were accordingly issued making it deliverable at that port. The vessel was then under a second charter-party to proceed to Tocopilla to load a nitrate cargo for a European port, and when she reached Valparaiso it was agreed between the owners and charterers under the first charter-party that, instead of delivering the whole of the cargo of coal at Valparaiso, she should proceed with 800 or 900 tons of coal still on board and deliver same to charterers at Tocopilla. By this arrangement it was unnecessary for the captain to take ballast on board for the voyage from Valparaiso to Tocopilla, and on this voyage the vessel stranded and became a total loss. The plaintiffs paid the owners of the ship for a loss under the first two policies, and now brought an action on the policy of reinsurance. Held, that the defendant was liable as there was no evidence of an intention on the part of the plaintiffs to cover only their liability under the third policy. (Bray, J.) *Reliance Insurance Company* v. *Duder* 95

5. *Constructive total loss—Marine Insurance Act 1906.* — For the purpose of determining whether a ship can be treated as a constructive total loss within the meaning of the Marine Insurance Act, the value of the wreck cannot be taken into consideration, and the assured is not entitled to add the value of the wreck to the cost of repairs. By reason of the provision contained in sub-sect. 2 (ii.) of sect. 60 of the Marine Insurance Act 1906, there is a constructive total loss of a ship where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. The effect of the section is to alter the law as laid down by the House of Lords in *Macbeth* v. *Maritime Insurance Company Limited* (11 Asp. Mar. Law Cas. 52; 98 L. T. Rep. 594; (1908) A. C. 144.) (Bray, J.) *Hall* v. *Hayman* 158

6. *Reinsurance—Risk—Intention — Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 26, *sub-s.* 3.—The plaintiffs issued two policies for the insurance of a vessel for a voyage from "Newcastle, N.S.W., to port or ports, place or places, in any order or rotation, on the West Coast of South America." The vessel was valued in these policies at 12,000*l.*, and the risk was to continue until thirty days after arrival at final port of discharge or until sailing on next voyage, whichever might first happen. The vessel was also insured by a policy issued by the plaintiffs 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 the United Kingdom, or Continent, or the United States. The vessel was valued in this policy at 10,000*l.*, and the risk was to commence from the expiration of the previous policy. The plaintiffs reinsured the vessel with the defendant for a voyage "at and from Valparaiso and (or) port or ports, and (or) place or places, on the West Coast of South America" to the United Kingdom, Continent of Europe, or the United States. The valuation of the vessel was the same as in the two original policies. The plaintiffs gave instructions to their brokers to effect this reinsurance for a voyage "At and from Valparaiso and (or) W. C. S. A. or h/c to U. K. and (or) Cont., or to U.S.A. or h/c . . (wd. nitrate or h/c). Valuation clause. Hull, &c., vd. 10,000*l.* or v.o.p." The vessel was chartered to load a cargo of coal at Newcastle, N.S.W., and under the charter-party the charterers directed her to discharge the cargo at Valparaiso, and bills of lading were accordingly issued making it deliverable at that port. The vessel was then under a second charter-party to proceed to Tocopilla to load a nitrate cargo for a European port, and when she reached Valparaiso it was agreed between the owners and charterers under the first charter-party that, instead of delivering the whole of the cargo of coal at Valparaiso, she should proceed with 800 or 900 tons of coal still on board and deliver the same to charterers at Tocopilla. By this arrangemeent it was unnecessary for the captain to take ballast on board for the voyage from Valparaiso to Tocopilla, and on this voyage the vessel stranded and became a total loss. The plaintiffs paid the owners of the ship for a loss under the first two policies, and then brought an action against the defendant on the policy of reinsurance. The defendant contended that the plaintiffs did not intend to cover by the reinsurance any risk except the risk under the third policy, and intended to exclude their liability under the two earlier policies. Held, that this contention failed both upon the facts and the law; that the terms of the written contract being what they were, the evidence as to intention adduced by the defendant was not legally admissible; and held also, Buckley, L.J. (*dubitante*), that the defendant was liable as there was no evidence to show that the plaintiffs intended to cover only their risk under the third policy. Decision of Bray, J. (12 Asp. Mar. Law Cas. 95; 105 L. T. Rep. 820) affirmed, and sect. 26, sub-sect. 3, of the Marine Insurance Act 1906 considered. (Ct. of App.) *Reliance Insurance Company* v. *Duder* 223

7. *Policy on floating dock — "Seaworthiness admitted" — Concealment.* — The plaintiffs effected an insurance on a floating dock, which was to be towed from Avonmouth to Brindisi, against all the usual risks, and the policy contained a clause "seaworthiness admitted." Although the plaintiffs believed that the dock

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was fit for the voyage, it was not in fact seaworthy, as it required special strengthening in order to fit it for the voyage. During the voyage the dock sank and was totally lost. In an action on the policies: Held, that the underwriters were by reason of the admission of seaworthiness put on inquiry as to its construction, and the plaintiffs were not bound to disclose the want of special strengthening. (Scrutton, J.) *Cantiere Meccanico Brindisino* v. *Janson and Others; Cantiere Meccanico Brindisino* v. *Constant* 186

8. *Perils of seas—Hulk—Damage by leakage.*—Goods belonging to the appellants were stored in a hulk moored in a tidal river, in smooth water, and were insured (*inter alia*) against perils of the seas. In consequence of natural decay, which could not be detected by ordinary examination, the hulk became leaky, and the goods were injured by water which found its way through the decayed woodwork of the bottom of the hulk. Held, that though the damage was due to sea water it was not due to sea perils, which were the perils insured against. Judgment of the court below affirmed. (P. C.) *Sassoon and Co.* v. *Western Assurance Co.* 206

9. *Constructive total loss — Freight policy — Institute time clauses — Construction.*— The plaintiffs, the assured, were insured with the defendants under a time policy on freight per the steamship *Ivy*, valued at 950*l.*, "chartered on unchartered, on board or not on board, and (or) bunker out and freight only home." There were three separate printed sets of clauses attached, the principal one being the "Institute Time Clauses—Freight 1910," of which No. 5 was as follows: "In the event of total loss, whether absolute or constructive, of the steamer, the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded, or in ballast, chartered or unchartered." During the course of the voyage the vessel became a constructive total loss, but was subsequently towed to a port where she discharged her cargo, and the plaintiff received payment of freight. In an action to recover the full amount of the policy: Held, that the underwriters were entitled to credit for the amount of the freight received by the assured. (Hamilton, J.) *Coker* v. *Bolton* 231

10. *Policy on floating dock — "Seaworthiness admitted" — Concealment — Marine Insurance Act* 1906.—The plaintiffs effected an insurance on a floating dock, which was to be towed from Avonmouth to Brindisi, against all the usual risks, and the policy contained a clause "seaworthiness admitted." Although the plaintiffs believed that the dock was fit for the voyage, it was not in fact seaworthy, as it required special strengthening in order to fit it for the voyage. During the voyage the dock sank and was totally lost. In an action on the policies: Held, that the underwriters, who were aware that the subject-matter of the insurance was a dock and not an ordinary sea-going vessel, were by reason of the admission of seaworthiness put upon inquiry as to the dock's construction, and the plaintiffs were not bound to disclose the want of special strengthening. Decision of Scrutton, J. (12 Asp. Mar. Law Cas. 186; 106 L. T. Rep. 678; (1912) 2 K. B. 112) affirmed. (Ct. of App.) Appeal from the King's Bench Division. *Cantiere Meccanico Brindisino* v. *Janson and others; Cantiere Meccanico Brindisino* v. *Constant* 246

11. *Policy on freight—Chartered or as if chartered—Concealment—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 18.—A policy of insurance taken out by the plaintiffs in respect of the steamship *Ayrshire* was expressed to be upon "Freight of frozen meat and (or) apples and (or) other refrigerated produce, and valued at 15,000*l.* chartered or as if chartered. On board or not on board . . . lost or not lost at and from any ports or places in any order or rotation in the United Kingdom to any ports or places in any order or rotation in Australia and (or) Tasmania *viâ* Durban and (or) any route and wheresoever." Attached to the policy was a clause which contained (*inter alia*) the following stipulations: "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date." On the construction of the policy: Held, that the expression "as if chartered" did not extend the freight covered to the anticipation of freight under contracts which at the material time did not exist. Held, also, that as the plaintiffs concealed from the defendants the fact that by the terms of a certain contract freight was liable to be lost if the steamer did not arrive in Tasmania to load on a certain date, this was a concealment of a material fact, and entitled the defendants to avoid the policy. (Hamilton, J.) *Scottish Shire Line Limited and others* v. *London and Provincial Marine and General Insurance Company Limited* 253

12. *Concealment—Innocent assignee—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 50 (2).—An underwriter must have the opportunity of deciding for himself whether the knowledge of a material fact will affect him or not. A defence of concealment of a material fact in connection with a policy of marine insurance is a good defence even against an innocent assignee of the policy. Such a defence arises "out of the contract" within the meaning of sect. 50 (2) of the Marine Insurance Act 1906. (Hamilton, J.) *William Pickersgill and Sons Limited* v. *London and Provincial Insurance Company Limited and Ocean Marine Insurance Company Limited* 263

13. *Reinsurance—Slips.*—In Jan. 1911 D. and W. (a firm of underwriters) initialled a slip insuring the steamshps *Olympic* and *Titanic* for twelve months from delivery, and afterwards reinsured part of this risk with the plaintiffs. In Dec. 1911 the defendant initialled a slip reinsuring a portion of the plaintiff's risk for "twelve months from expiration or delivery, clauses and conditions as original." In Jan. 1912, whilst the steamship *Titanic* remained undelivered, D. and W. initialled another slip, as follows: "*Olympic*, *Titanic*, twelve months from expiry." No intimation was given to D. and W. or the plaintiff's agent that this was intended to be anything else than a renewal for a further twelve months after the expiry of the first twelve months, but before the policy was issued an intimation was given to the leading underwriter to explain that the insurance, so far as the *Titanic* was concerned, would commence from the delivery of the same. On the 3rd April 1912 a policy was issued by D. and W. insuring the *Titanic* for 2500*l.* from the 2nd April 1912. On the 10th April 1912 the plaintiffs, by a policy of that date, reinsured D. and W.'s risk to the extent of 400*l.*, and on the 11th April 1912 the defendant underwrote a policy reinsuring the plaintiff's risk to the amount of 80*l.*, the policy having the following clause: "Being a reinsurance for account, the Scottish National Insurance Company Limited, subject to the same clauses and conditions as original policy or policies, and to pay as may be paid thereon." The *Titanic* was lost on the 15th April 1912, and the plaintiffs paid D. and W. under the policy of the 10th April. They now sued the defendant under the policy of the 11th April. Held, that the defendant was liable on the grounds that the policy of the 10th April 1912 was the original policy referred to in the

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policy of the 11th April 1912; that D. and W. were always under a contract of insurance of the *Titanic* for the first twelve months by virtue of the slip they initialled in Jan. 1911; that the plaintiffs agreed to reinsure them up to 400*l.* in Jan. 1911, and remained under this liability; that the defendant agreed to reinsure the plaintiffs against their liability to the amount of 80*l.* by initialling the slip of Dec. 1911; that he signed the policy of the 11th April in pursuance of that contract of reinsurance. (Bray, J.) *Scottish National Insurance Company Limited* v. *Poole* 266

14. *Non-disclosure of material fact—Policy "subject without notice to the same clauses and conditions as the original policy"—Liability of reinsurer.*—The plaintiffs insured the hull of a steamship on a time policy for 500*l.* at a premium of 6 per cent. The policy contained a clause that the ship had the option to navigate the Canadian lakes, and an additional premium of 3 per cent. was paid in respect thereof. The defendants reinsured 250*l.* on the risk at the same premium of 6 per cent., but no mention was made at the time the reinsurance was effected of the option to navigate the lakes or the additional premium. The defendants' policy was stated to be "subject without notice to the same clauses and conditions as the original policy." While in the lakes the ship sustained damage in respect of which the plaintiffs paid 117*l.* 13*s.* on their original policy. The plaintiffs claimed 58*l.* 16*s.* 6*d.*, the proportion due from the defendants, but the defendants repudiated liability on the ground that a material fact had been concealed from them, and their policy of reinsurance was thereby rendered invalid. Held, that although the option to navigate the lakes was a material fact that ordinarily should have been disclosed when the reinsurance was effected, the defendants had agreed to be bound by the terms of the original policy without notice, and were therefore liable. (Scrutton, J.) *Property Insurance Company Limited* v. *National Protector Insurance Company Limited* 287

15. *Lloyd's policy—Collision clause—Construction—Collision with nets of fishing vessel.*—A collision with nets attached to a fishing vessel is not a "collision with any other ship or vessel" so as to bring it within the terms of the usual collision clause of a Lloyd's policy. (Pickford, J.) *Bennett Steamship Company Limited* v. *Hull Mutual Steamship Protecting Society Limited* 355

16. *Reinsurance against total or constructive total loss only—Provision "to follow hull underwriters in event of a compromised or arranged loss being settled."*—The plaintiff took out a policy of reinsurance with the defendants which contained the following clause: "Being a reinsurance and to pay as per original policy or policies, but the insurance is against the risk of the total or constructive total loss of the steamer only, but to follow hull underwriters in the event of a compromised or arranged loss being settled." The owner of the insured ship brought an action against the hull underwriters claiming for a constructive total loss and alternatively for a partial loss. This action was compromised without anything being said as to whether the settlement was as for a constructive total loss or as for a partial loss. In an action on the reinsurance policy: Held, that the plaintiff was entitled to recover as, there having been a claim for a constructive total loss and that claim having been compromised, there was, within the meaning of the clause in question, "a compromised or arranged loss," notwithstanding that there was at the same time a claim for a partial loss. (Bray, J.) *Street* v. *Royal Exchange Assurance* 356

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17. *Marine Insurance—Total loss—War risk—Cargo not sent forward for fear of capture—Whether constructive total loss.*—In Dec. 1903 the plaintiffs took out a marine policy with the defendants to insure a cargo against war risk only at and from San Francisco to Vladisvostok *viâ* Nagasaki. In Feb. 1904, when some of the cargo had been loaded, war had broken out between Russia and Japan, and the Japanese fleet was blockading Vladivostok, and stopping and capturing vessels. Under these circumstances the underwriters telegraphed to the plaintiffs that if the cargo was sent to Vladivostok *viâ* Nagasaki they would take up the position that the plaintiffs had deliberately caused the loss. The plaintiffs then gave notice of abandonment to the underwriters, which the latter refused to accept, and the plaintiffs discharged the cargo and sold it in order to minimise the loss to the underwriters. In an action by the plaintiffs to recover on the policy: Held, that in the circumstances anticipation of loss by capture did not constitute a constructive total loss; that at the time of the abandonment there was no constructive total loss; that partial loss was insufficient, and the plaintiffs were not entitled to recover. See *The Knight of St. Michael* (infra) and *Butler* v. *Wildman* (infra). (Pickford, J.) *Kacianoff and Co.*, v. *China Traders' Insurance Company Limited* .. 395

18. *Captain's effects—Total loss—Captain's clothes and watch not lost—Liability of underwriters.*—A policy of marine insurance for the sum of 100*l.* was issued by underwriters upon captain's effects, sextant, and chronometer, against risk of total loss of vessel only. During the currency of the policy the vessel was lost while in port through one of the perils insured against, and such of the captain's effects as were on board were destroyed. At the time of the loss the captain was on shore, and the clothes and watch he was wearing were not lost. In an action claiming the full amount of the policy: Held, that the policy covered the whole of the captain's effects, including those temporarily removed from the ship, and the value of the goods not lost must be taken into account in estimating the amount for which the underwriters were liable. (Pickford, J.) *Anstey* v. *Ocean Marine Insurance Company Limited* ... 409

19. *Policy—Perils of the seas—Institute time clauses.*—The plaintiffs took out a policy of marine insurance with the defendants on their ship which covered (*inter alia*) perils of the seas. The policy included the conditions of the Institute time clauses as attached, clause 3 of which provided as follows: "In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, for all occasions." Clause 7 provided: "This insurance also specially to cover . . . loss of or damage to hull or machinery through the negligence of the master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull. . ." While the ship was lying in a dock, a boiler which was being lifted by a floating crane in order that it might be loaded into the hold fell and damaged the ship owing to the pin of a shackle breaking. In an action under the policy: Held, that the loss was not covered (i.) by the words in the body of the policy, as it was not caused by a peril of the sea; (ii.) by clause 3 of the attached clauses, as that clause did not enlarge the risks covered by the policy; (iii.) by clause 7 of the attached clauses, which ought not to be read into the ordinary Lloyd's perils clause in the policy so as to apply the general words of Lloyd's perils clause to clause 7; (iv.) that the Marine Insurance Act 1906 had not altered the law in this

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respect. *Jackson* v. *Mumford* (1902, 8 Com. Cas. 61) followed. (Pickford, J.) *Stott (Baltic) Steamers Limited* v. *Marten and others* ... 414

NOTE.—This case has since been affirmed by the C. A. Phillimore, L.J. *dubitante*.—ED.

20. *Policy—Transit—Duration of risk—Conclusion of transit.*—The plaintiffs effected a policy of marine insurance with the defendant and other underwriters, at Lloyd's, in respect of a new cast-steel frame for a steamer. The policy was expressed to be "against all risks, especially including breakage and damage done and received through loading and discharging, irrespective of percentage." By clauses attached to the policy it was also provided that the insurance should include "all risks of craft and (or) raft and (or) of any special lighterage without recourse against lighterman . . . of fire, transhipment, landing, warehousing, and reshipment if incurred, and whilst waiting shipment and (or) reshipment, and all other risks and losses by land and water from the time of leaving the warehouse at point of departure until safely delivered into warehouse or other place for which the goods have been entered, or in which it is intended they shall be lodged, whether previously discharged or landed elsewhere within the port or place of destination or not." The casting was shipped to Hamburg and discharged on the quay on the 14th June, at which time the steamer into which the steel frame was to be fitted had not arrived. On the 27th June the frame was transported in a lighter to the quay of the V. Company's shipbuilding yard at Hamburg, and while being lifted from the lighter to the quay it struck the quay wall and was thereby rendered useless. In an action by the plaintiffs to recover under the policy: Held, that the loss was not covered by the policy, as the transit was at an end when the loss occurred. (Pickford, J.) *Deutsch-Australische Dampschiffsgesellschaft* v. *Sturge* 453

21. *Policy—Insurance against risk of seizure and detention—Actual total loss—Constructive total loss—Particular average loss—Captain's letters—Privilege—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *ss.* 57 (1), 60.—The plaintiffs' steamship *P.* was chartered to carry a cargo of coal from Newport to Constantinople. She was insured with the defendant at Lloyd's against capture, seizure, and detention. While on the voyage war broke out between Greece and Turkey, and the *P.* was stopped by the Greeks off Tenedos who took her to Lemnos and removed the cargo. The plaintiffs gave the defendant notice of abandonment, and six weeks after the Greeks released the ship. In an action by the plaintiffs on the policy for an actual or a contructive total loss, or alternatively, damages for a particular average loss. Held, that there was not an actual total loss at the time of notice of abandonment as the plaintiffs were not then "irretrievably deprived" of the ship within the meaning of sect 57 (1) of the Marine Insurance Act 1906, nor a constructive total loss within the meaning of sect. 60 (2) as the words of the sub-section, "unlikely that he can recover the ship," mean within a reasonable time. Held, also, that the plaintiffs were entitled to the extraordinary expenses paid to procure the release of the ship, and to damages by reason of her detention, as a particular average loss, but not to damages for depreciation in the earning capacity of the ship by reason of her detention. *Quære*, whether privilege attaches to the letters of a master where he is instructed by her owners to state that they are written for the benefit of the solicitors. (Pickford, J.) *Polurrian Steamship Company Limited* v. *Young* ... 449

22. *Policy—Reinsurance—Constructive total loss—Partial loss—"Compromised or arranged loss."*—The plaintiff took out a policy of reinsurance with the defendants which contained the following clause: "Being a reinsurance and to pay as per original policy or policies, but the insurance is against the risk of the total or constructive total loss of the steamer only, but to follow hull underwriters in the event of a compromised or arranged loss being settled." The owner of the insured ship brought an action against the hull underwriters claiming for a constructive total loss and alternatively for a partial loss. This action was compromised without anything being said as to whether the settlement was as for a constructive total loss or as for a partial loss. In an action on the reinsurance policy: Held, that as a claim had been made by the shipowner in respect of a constructive total loss and had been persisted in down to the settlement of the action which had been compromised, there was within the meaning of the clause in question "a compromised or arranged loss" notwithstanding that there was at the same time a claim for a partial loss. Decision of Bray, J. (12 Asp. Mar. Law Cas. 356; 109 L. T. Rep. 215) affirmed. *Street* v. *Royal Exchange Assurance* ... 496

23. *Policy—Pool—Passage money.*—The plaintiffs took out a policy of marine insurance with the defendant on the steamship *W.* for a voyage from the United Kingdom to Australia and New Zealand. The policy covered the risk of loss of passage money, and was also expressed to cover any reasonable disbursements arising from accident or loss on account of passengers, whether for maintenance or conveyance to destination in accordance with the requirements of the Merchant Shipping Act 1894. The plaintiffs had a "pooling" agreement with two other shipping companies for sharing profits. The *W.*, having a number of emigrant passengers on board, dragged her anchors at the outset of the voyage, returned to port, and was detained for repairs. The passengers in question were sent on in another ship belonging to the "pool," and the *W.* eventually proceeded on her voyage carrying other passengers who had paid their passage money, the number exceeding that which had originally started in her. The plaintiffs made disbursements in respect of the maintenance of the original passengers, and also in respect of carriage to their destination. In an action on the policy: Held, that the plaintiffs were entitled to recover, as the insurance was made by the plaintiffs for their own benefit, and not for that of the pool, and that the passage money paid by the other passengers was not in the nature of a salvage. *New Zealand Shipping Company Limited* v. *Duke* ... 507

24. *Policy — Collision clause — Lloyd's policy — Nets.*—A collision with nets attached to a fishing vessel is not a "collision with any other ship or vessel" so as to bring it within the terms of the usual collision clause of a Lloyd's policy. Decision of Pickford, J. (12 Asp. Mar. Law Cas. 355; 109 L. T. Rep. 213; (1913) 3 K. B. 371) affirmed. *Bennett Steamship Company Limited* v. *Hull Mutual Steamship Protecting Society Limited* ... 522

25. *Total loss—War risk—Cargo not sent forward for fear of capture—Whether constructive total loss.*— In Dec. 1903 the plaintiffs took out a marine policy with the defendants to insure a cargo against war risk only, at and from San Francisco to Vladivostok *viâ* Nagasaki. In Feb. 1904, when some of the cargo had been loaded, war having broken out between Russia and Japan, the Japanese fleet was blockading Vladivostok, and stopping and capturing vessels. Under these circumstances the underwriters telegraphed to the plaintiffs that, if the cargo was sent to Vladivostok *viâ* Nagasaki, they would take up the position that the

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plaintiffs had deliberately caused the loss. The plaintiffs then gave notice of abandonment to the underwriters, which the underwriters refused to accept, and the plaintiffs discharged the cargo and sold it. In an action by the plaintiffs to recover on the policy: Held, that the loss was not caused by the peril insured against, namely, capture, for the discharge of the cargo had prevented the peril from operating; the vessel was never in risk of capture, for the plaintiffs determined not to undergo the risk. Decision of Pickford, J. (12 Asp. Mar. Law Cas. 395; 109 L. T. Rep. 365; (1913) 3 K. B. 407) affirmed. *Kacianoff and Co.* v. *China Traders' Insurance Company Limited* ... 526

26. *Policy—Collision—Damage—Collision caused to their ship by back-wash—Liability.*—By a policy of marine insurance underwritten by the defendants on the plaintiff's steamer *C.*, it was provided that "if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured," the defendants would pay a certain proportion of such sum or sums. A collision occurring between the steamship *C.* and the steamship *R.*, the impetus thus given to the *R.* plus the back-wash from the *C.*'s propeller drove the *R.* into the steamship *G.*, causing damage which the owners of the *C.* were held liable to pay to the owners of the *R.* In an action on the policy: Held, that as the forces set in operation by the C. caused the collision, the defendants were liable. *William France, Fenwick, and Co. Limited* v. *Merchants' Marine Insurance Company Limited* 544

27. *Material fact — Innocent mistake as to materiality — Secondhand machinery—Concealment.*—Where a policy of marine insurance contained the following clause: "In the event of any incorrect definition of the interest insured, it is agreed to held the assured covered at a premium (if any) to be arranged," and the subject-matter of the insurance was new and second-hand machinery, but the assured honestly thought that to define it as "machinery" simply was a sufficient and correct definition of the interest insured: Held, that in the circumstances the failure to disclose to the underwriters that some of the machinery was second-hand, though a concealment of a material fact, was an innocent non-disclosure, and that the assured were entitled to rely on the "held covered" clause. *Hewitt Brothers* v. *Wilson* ... 546

28. *Time policy—"Perils of the sea"—Institute time clauses — "Inchmaree" clause — Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 30; *sched.* 1. *r.* 12.—The expression "a peril of the sea" means a peril to which the assured is exposed by reason of the fact that his adventure is a marine adventure, or, expressed in the negative, a peril to which the assured would not be exposed if his adventure were not a marine adventure—that is to say, the peril must be in some sense attributable to the fact that an adventure is marine. The plaintiffs took out a policy of marine insurance with the defendants on their ship, which covered (*inter alia*) perils of the seas. The policy included the conditions of the Institute time clauses as attached, clause 3 of which provided as follows: "In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, and on all occasions." Clause 7 provided: "This insurance also specially to cover . . . loss of or damage to hull or machinery through the negligence of the master, mariners, engineers, or pilots, or through explosions, burstings of boilers, breakage of shafts, or through any latent defect in the machinery or hull. . ." While the ship was lying in the dock a boiler, which was being lifted by a floating crane in order that it might be loaded into a hold, fell, owing to the pin of a shackle breaking, and damaged the ship. In an action under the policy: Held, (1) that the loss was not caused by a peril of the sea; (2) that clause 3 of the Institute time clauses did not enlarge the risks insured by the policy; and (3) that the risks specifically mentioned in clause 7 were not extended to matters *ejusdem generis* by the general words in the body of the policy. *Stott (Baltic) Steamers Limited* v. *Marten and others* 555

29. *Plaintiffs British subjects—Defendants alien enemies—Action on policy—Right of plaintiffs to proceed with action—Right of defendants to appear—Costs.*—An action was brought upon a policy of marine insurance effected on behalf of the plaintiffs, who were British subjects, with the defendant company. The policy was effected before the war between Great Britain and Germany. The loss was before the war, and the pleadings were closed before the war. The war had the effect of making the defendant company an alien enemy. On an application on behalf of the defendants for a stay of proceedings during the war: Held, that there was no rule of the common law which suspended an action in which an alien enemy was defendant, or prevented his appearing and conducting his defence. *Quære*, whether in the event of the alien enemy defendant succeeding in the action, he would be entitled to an order for payment of costs until after the war. (Bailache, J.) *Robinson and Co.* v. *Continental Insurance Company of Mannheim* 574

30. *Reinsurance — Constructive total loss — Compromise between assured and insurers of original policy—Benefit of compromise to reinsurers.*—Where a loss occurs under a policy of insurance and the underwriter is covered by reinsurance to the full extent, the contract of the reinsurer is to pay the original insurer forthwith the full amount for which the original insurer is liable to the assured, the indemnity afforded by reinsurance being against liability, and not against the discharge of liability. In such a case the reinsurer is entitled to have all the rights of the original insurer, whether of abandonment or subrogation, exercised for his benefit. The plaintiffs insured a ship against total and (or) constructive total loss only and reinsured the risk with the defendants, the policy of reinsurance not containing the usual clause "to pay as may be paid thereon." The ship stranded, and notice of abandonment was given by her owner, who alleged that she was a constructive total loss. The plaintiffs refused to accept the notice of abandonment, and the owner brought an action against them which was compromised by the plaintiffs paying the owner less than the loss. The defendants were invited to agree to the compromise, but declined on the ground that there had been no constructive total loss in fact. In an action by the plaintiffs against the defendants on the policy of reinsurance: Held, that there was a constructive total loss in fact; that the defendants were disentitled to the benefit of the compromise, and were liable to the plaintiffs for the full amount of the reinsurance, subject to the benefit of any rights they might have had in respect of the abandonment of the ship if no compromise had been effected. (Bailhache, J.) *British Dominions General Insurance Company Limited* v. *Duder and others* 575

MARINE INSURANCE ACT 1906.

See *Marine Insurance*, Nos. 3, 5, 6, 21, 28—*Specific Performance.*

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MARITIME CONVENTIONS ACT 1911.

Maritime Conventions Act 1911 (1 & 2 *Geo.* 5, *c.* 57), *ss.* 5, 8—*Lord Campbell's Act.*—A steam trawler collided with a ketch. The ketch was lost, and in consequence of the collision her crew, one of whom was her owner, were drowned. After the passing of the Maritime Conventions Act 1911, and more than a year after the collision, the widow of the owner instituted proceedings *in rem* to recover damages for the loss of the ketch, and damages on behalf of herself and her four children under the Fatal Accidents Act for the loss of life of her husband. The defendants admitted liability for the loss of the ketch, but alleged that the action to enforce the right given by the Fatal Accidents Act should have been brought within twelve months after the death of the deceased, and that, as that had not been done, the plaintiff had lost her right to recover anything in respect of the loss of her husband. Held, that a claim against a vessel or her owners for damages for loss of life may under sect. 8 of the Maritime Conventions Act 1911 be brought within two years from the date when the loss was caused in spite of the provisions of Lord Campbell's Act by which an action for damages for loss of life must be begun within twelve calendar months after the death of the deceased person. (Adm. Div.) *The Caliph* 244

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See *Collision*, Nos. 10. 12, 19, 24, 27.

MATERIAL FACT.

See *Marine Insurance*, No. 27.

MEASURE OF DAMAGE.

See *Registrar and Merchants*, No. 1.

MEASUREMENT OF CARGO.

See *Carriage of Goods*, No. 47.

MERCHANT SHIPPING ACT 1854.

See *Board of Trade Certificate*.

MERCHANT SHIPPING ACT 1894.

See *Carriage of Goods* Nos. 6, 20, 22—*Marine Insurance*, No. 23—*Negligence*—*Seaman*, Nos. 3, 6, 10, 11.

MERCHANT SHIPPING ACT 1894.

Sects. 113-114—See *Seaman* No. 7; Sects. 113, 236—See *Seaman*, No. 9; Sect. 164—See *Seaman*, No. 8; Sects. 493-496—See *Carriage of Goods*, No. 29; Sect. 502—See *Carriage of Goods*, Nos. 30, 35; Sect. 742—See *Seaman*, No. 7.

MERCHANT SHIPPING ACT 1906.

See *Board of Trade Certificate*—*Specific Performance*—*Seaman*, No. 3.

MERSEY.

See *Collision*, No. 25.

MERSEY DOCK ACTS.

Sunken vessel—Obstruction to navigation—Right to destroy vessel—Mersey Docks Act 1874 (37 & 38 *Vict. c. xxx.*), *s.* 11—*Mersey Docks and Harbour Board Act* 1889 (52 & 53 *Vict. c. cxi.*), *s.* 29.—A schooner sank in Crosby Channel, within the defendants' jurisdiction. The defendants destroyed the schooner by blowing her up. Sect. 11 of the Mersey Docks Act 1874, as amended by sect 29 of the Mersey Docks and Harbour Board Act 1889, empowers the Mersey Docks and Harbour Board to raise, destroy, or remove any wrecks of vessels or any vessels sunk or stranded in any dock or elsewhere within the port of Liverpool which are an obstruction to safe and convenient navigation "in the judgment of the marine surveyor . . . of the board . . . such judgment being recorded in writing and deposited with the secretary of the board." In an action by the owners of the schooner: Held, that it was not a condition precedent to the exercise by the board of their statutory powers that the judgment of the marine surveyor that the vessel was an obstruction to safe and convenient navigation should first have been recorded in writing and deposited with the secretary of the board. In order that the board might exercise their powers it was sufficient that the marine surveyor had honestly arrived at the conclusion that the vessel should be raised, destroyed, or removed, and that his judgment to that effect should be put in writing and deposited with the secretary of the board within a reasonable time thereafter. (Scrutton, J.) *Jones* v. *Mersey Docks and Harbour Board* 335

MISDIRECTION.

See *Negligence*.

MORTGAGEES.

See *Prize* No. 3.

MOTOR BOAT.

See *Board of Trade Certificate*.

NECESSARIES.

See *Prize*, No. 3.

NEGLIGENCE.

Contract ticket—"Form approved by the Board of Trade"—Exception of negligence on back of ticket—Exception not approved by Board of Trade—Validity—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 320—*Misdirection.*—The several plaintiffs sued the defendants under the Fatal Accidents Act 1846 to recover damages for negligence in respect of the deaths of the members of their respective families who were drowned while emigrant passengers on the *Titanic.* The defendants denied negligence, and alternatively claimed exemption from liability by reason of clause 3 of the "Notice to Passengers" printed upon the back of the contract ticket, which by sect. 320 (1) of the Merchant Shipping Act 1894 the shipowner is bound to give to the person who pays for the steerage passage, which notice included a condition that the shipowner should not be liable to any passenger carried under the contract, even though the loss or damage was caused or contributed to by the neglect or default of the shipowner's servants. This condition was referred to on the face of the ticket by the words 'See Back." The plaintiffs contended that (1) the words constituting the exemption clause were not part of the contract set forth on the contract ticket; (2) If they were the operation of the exemption was excluded by sect. 320 (2) of the Merchant Shipping Act 1894 which provides that the contract ticket shall be in a form approved by the Board of Trade. Held, that there was evidence upon which the jury were entitled to find that the defendants were negligent. Held, further (Buckley, L.J., dissenting), that clause 3 not being in the form approved by the Board of Trade under sect. 320 of the Merchant Shipping Act 1894, was invalid. Held, also, by Vaughan Williams, L.J., that clause 3 was not part of the contract between the passenger and the defendants. Decision of Bailhache, J., affirmed. (Ct. of App.) *The Titanic* 466

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PILOT.
See *Collision*, No. 26—*Limitation of Liability*—*Pilotage.*

PILOTAGE.

Compulsory pilotage—Ship navigating in compulsory pilotage district—Stopping outside port for orders—Orders from port taken to ship by boat—No pilot employed—Pilotage Act 1913 (2 & 3 *Geo.* 5, *c.* 31), *s.* 11.—Sect. 11, sub-sect. 1, of the Pilotage Act 1913 provides as follows: "Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of . . . making use of any port in the district . . . shall be either (*a*) under the pilotage of a licensed pilot of the district; or (*b*) under the pilotage of a master or mate possessing a pilotage certificate for the district who is *bonâ fide* acting as master or mate of the ship." The London pilotage district extends from Dungeness to Gravesend, and embraces Dover. A ship, not an excepted ship, was directed to proceed to Dover for orders. She came up the Channel, passed Dungeness, and proceeded to Dover, where she stopped about a quarter of a mile from the Admiralty Pier, and while lying there a motor-boat came from the port with orders for her to proceed to Hamburg. Neither her master nor her mate possessed a pilotage certificate for the district. Held, that the words "making use of any port in the district" included the use which the ship made of the port of Dover, and that she was in the circumstances bound to employ a licensed pilot of the district. (Bailhache, J.) *Connell and the Corporation of Trinity House, London* v. *Lawther, Latta, and Co. and another* 578

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PORT OF LONDON.

1. *Port of London—"Barge"—Sailing barge—By-laws—Registration—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60)—*Port of London Act* 1908 (8 *Edw.* 7, *c.* 68), *s.* 11 (2) (*f*).—A sailing barge is a "barge" within the meaning of the Port of London Act 1908, *s.* 11 (2) (*f*), and therefore liable to registration under by-law No. 4 of the Port of London (Registration of River Craft) By-laws 1910. (Hamilton, J.) *Smeed, Dean and Co. Limited* v. *Port of London Authority* 213

2. *Right to weigh and measure goods shipped or unshipped—Harbours, Docks and Piers Clauses Act* 1847 (10 & 11 *Vict. c.* 27), *s.* 82—*Port of London Act* 1908 (8 *Edw.* 7, *c.* 68).—The powers vested in the Port of London Authority include, on due publication of rates for weighing, the sole right of weighing and measuring any goods shipped or unshipped in the Surrey Commercial Docks, but not the sole right of providing machines for such weighing. (Scrutton, J.) *Port of London Authority* v. *Cairn Line of Steamships Limited* 293

3. *By-laws—Registration of craft—Sailing barge—"All lighters, barges and other like craft"—Port of London Act* 1908.—A sailing barge is a "barge" within the words "all lighters, barges, and other like craft" in the Port of London Act 1908, s. 11 (2) (*f*) (*i.*), and therefore liable to registration under by-law No. 4 of the Port of London (Registration of River Craft) By-laws 1910. Decision of Hamilton, J. (12 Asp. Mar. Law Cas. 213; 106 L. T. Rep. 960; (1912) 2 K. B. 585) affirmed. (Ct. of App.) *Smeed, Dean, and Co. Limited* v. *Port of London Authority* 297

PORT OF LONDON ACT 1908.
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PORT OF LONDON PROVISIONAL ORDER ACT 1910.
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PORT OF REFUGE.
See *Carriage of Goods*, No. 16.

PORT RATES.
See *Carriage of Goods*, No. 9—*Docks*, No. 3.

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PRACTICE.

1. *Workmen's Compensation Act* 1906 (6 *Edw.* 7, *c.* 58)—*Appeals thereunder.*—In any proceeding under sect. 11 of the Workmen's Compensation Act 1906, an appeal from an order therein made by the judge of a County Court does not lie direct to the Court of Appeal, but to the Divisional Court. Such an order is made by the judge of a County Court in exercise of his general jurisdiction and not as arbitrator, and an apeal therefrom is by the ordinary procedure as to appeals from County Courts. So held by the Court of Appeal, Farwell, L.J. dissenting. (Ct. of App.) *Paganotis* v. *Owners of Ship Pontiac* 92

2. *Preliminary Acts.*—Observations by Fletcher Moulton, L.J., as to the binding character of statements made by parties in the Preliminary Acts filed by them. (Ct. of App.) *The Seacombe* 142

3. *Action* in rem—*Appearance by foreign defendants—Bail—Statutory limit of liability.*—The owners of a British ship instituted an action *in rem* to recover the damage they had sustained by reason of a collision between her and a French barque. The French barque was arrested, and her owners, foreigners, entered an appearance in the action and gave bail to obtain the release of the vessel, the amount of the bail being equal to the appraised value of the barque and the agreed amount of the freight. The foreign owners defended the action and counter-claimed for the damage they had sustained. On the hearing of the action the French barque was held alone to blame, and a decree was drawn up condemning the defendants and their bail in the amount of the damage sustained by the plaintiffs with the costs of the claim and counter-claim. On motion by the defendants to vary the decree by limiting its terms so that the plaintiffs should not be entitled to recover more under it than the appraised value of the vessel, the freight, and costs: Held, on the authority of the principles laid down in *The Dictator* (67 L. T. Rep. 563; 7 Asp. Mar. Law Cas. 251; (1892) P. 304), approved by the Court of Appeal in *The Gemma* (81 L. T. Rep. 379; 8 Asp. Mar. Law Cas. 585; (1899) P. 285), that, as the appearance of the defendants was voluntary and they had submitted to the jurisdiction of the court, the decree had been rightly drawn up and judgment should be given against them personally for the whole of the damage sustained by the plaintiffs, subject to the right of the defendants to limit their liability under the provisions of the Merchant Shipping Act 1894. (Adm. Ct.) *The Dupleix* 122

4. *Discovery—Admission of liability subject to a reference—Inspection—Order XXXI., r.* 18.—A collision occurred between a steamship and a lightship in Liverpool Bay. The owner, master, and crew of the lightship started an action *in rem* to recover the damage they had sustained. The owners of the steamship admitted liability subject to a reference. The plaintiffs then delivered particulars of their claim and *inter alia* claimed a sum of 7047*l.* as the value of the lightship. The defendants made an application to the registrar for an order that they were entitled to inspect the plaintiffs' books in order to see upon what basis the plaintiffs arrived at the value set upon their lightship at the time of the collision. The registrar refused to make the order, and on appeal to the judge he confirmed the order of the registrar. The defendants appealed to the Court of Appeal. It was admitted that the books would have to be produced at the reference. Held, reversing the decision of the judge and the registrar, that the defendants were entitled to an order for the inspection of the books before the reference. (Ct. of App.) *The Pacuare* 222

5. *Lights—Preliminary act.*—Order XIX., r. 28, of the Rules of the Supreme Court 1883 directs that in actions for damage by collision between vessels, the plaintiff and the defendant are to file with the registrar a document to be called a preliminary act, which, among other information is to contain the following statements concerning the lights seen on the vessel collided with: "(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." The defendants' preliminary act contained the following statements in answer to (k): "The masthead, towing, and both side lights of the *Tavistock*"; and in answer to (l), "None." In fact the master of the defendants' vessel, after seeing all the lights on the plaintiffs' vessel, saw the green light shut in, leaving the red open alone, and then the red was shut in and the green light alone left open. Observation by the President: It is desirable that practitioners should state, in answer to par. (l) in the Preliminary Act Forms in Collision Actions, the lights in the sense of the combination of lights seen on the other vessel and the alterations therein. (Adm. Div.) *The Monica* 164

6. *Pleadings—Particulars.*—A vessel at anchor was run into and damaged by a vessel in motion. In an action for damage, the owners of the vessel at anchor delivered a statement of claim in which they alleged that those on the vessel colliding with them did not take proper and seamanlike measures to keep clear. A summons for particulars of the measures which should have been taken was dismissed by the registrar. The defendants appealed to the judge in chambers. On appeal: Held, that as the plaintiffs could give no particulars the allegation should be struck out, the judge at the trial having power to deal with any negligence proved but not pleaded. (Adm. Div.) *The Kanawha* 317

7. *Practice Jurisdiction—Short delivery—Damage to goods—"Goods carried to any port in England"—Power to arrest—Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 6—*Arbitration Act* 1889 (52 & 53 *Vict. c.* 49), *s.* 4.—Ten cases of gold coin were shipped at Hamburg by the plaintiffs on a German steamship to be carried to Montevideo or Buenos Ayres. The bill of lading on the terms of which the cases were carried gave the shipowner liberty to call at intermediate ports, and provided that any disputes as to its interpretation were "to be decided in Hamburg according to German law." The steamship called at Southampton and then went on to Montevideo, where only nine cases of gold coin were delivered. The steamship put into Southampton on her voyage back from Montevideo to Hamburg. The owners of the case arrested the steamship at Southampton, alleging that damage had been done to goods carried into a port in England by breach of duty or contract on the part of the owner, master, or crew of the steamship. There was no evidence as to where the case was lost. The owner of the ship, having entered an appearance under protest, took out a summons asking that the writ, the warrant of arrest, and the undertaking to put in bail should be set aside on the ground that the court had no jurisdiction to arrest the vessel or try the case, or that the action should be stayed under sect. 4 of the Arbitration Act 1889. Held, by the President (Sir S. T. Evans), that the court had jurisdiction to try the case as the goods were goods carried into a port in England, but that the proceedings in the action should be stayed in order that the parties

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might litigate in Germany as they had agreed to do under the terms of the bill of lading, the clause therein relating to disputes amounting to a submission to arbitration within the meaning of sect. 4 of the Arbitration Act 1889. (Adm. Div.) *The Cap Blanco* 399

See *Collision*, No. 2.

8. *Alternative Defences—Compulsory pilotage—Inevitable accident—Costs.*—A steamship at anchor in the Thames was run into and damaged by another steamship which was proceeding down the Thames in charge of a compulsory pilot. In a damage action brought by the owners of the vessel at anchor the defendants alleged that the collision could not have been avoided by the exercise of ordinary and reasonable maritime care and skill; and, further, that if there was any negligence on their steamship, which they denied, it was the negligence of the compulsory pilot. The action was dismissed on the ground that the sole negligence on the defendants' ship was that of the compulsory pilot, but no order was made as to costs. The defendants obtained leave from the judge to appeal as to costs. Held, that no general rule as to whether in such circumstances the action should be dismissed with or without costs could be laid down. That if the defendants had relied solely on the plea of compulsory pilotage and had succeeded on that plea, *primâ facie* they would have been entitled to their costs, but that when alternative defences are raised and the defendants lose on one and succeed on the other, the judge is entitled in the exercise of his discretion to make no order as to costs. (Ct. of App.) *The Ophelia* 434

9. *Practice—Costs—Non-jury action—Issues in fact and law—Judgment for plaintiff on both with costs at trial—Appeal by defendant on issue of law only—Judgment wholly set aside on appeal, and judgment entered for defendant with costs —Taxation—Costs of issue of fact on which plaintiff succeeded at trial—Order LXV., rr.* 1, 2. —An issue in fact and an issue in law were raised upon a claim. The plaintiffs succeeded on both issues before a judge sitting without a jury, and he ordered judgment to be entered for the plaintiffs with costs. The defendants appealed on the issue in law only. The Court of Appeal ordered that the appeal be allowed, and that the judgment in favour of the plaintiffs be wholly set aside, and that judgment be entered for the defendants with costs, including the costs of the appeal. No special application was made by either side as to the costs of the issue of fact. On a summons to review taxation, Bailhache, J. held that the taxing master was not debarred by the order of the Court of Appeal from taxing the plaintiffs' costs of the issue of fact. Held, by the Court of Appeal, that the taxing master was bound by the order of the Court of Appeal, and the plaintiffs were therefore not entitled to the costs of the issue of fact. *Slatford* v. *Erlebach* (106 L. T. Rep. 61; (1912) 3 K. B. 155) distinguished. *Ingram and Royle Limited* v. *Services Maritimes du Tréport* 493

10. *Writ—Service—Foreign corporation—Residence within jurisdiction—Carrying on business —Firm of agents in England—Service on one member of firm—Authority of agents to contract—Order IX., r.* 8.—A foreign corporation may be served within the jurisdiction if it is carrying on business in this country. And it does so if contracts have been habitually made for a reasonably substantial period of time at a fixed place of business within the jurisdiction by a firm or a person there, without referring each time to the foreign corporation for instructions, and with the result that the foreign corporation has become bound to another party. The test in each case is to ascertain whether the agent, in carrying on the foreign corporation's business, makes a contract for the foreign corporation, or, in carrying on the agent's own business, sells a contract with the foreign corporation. In the former case the foreign corporation is, and in the latter it is not, carrying on business at the agent's place. If a firm are carrying on the foreign corporation's business in this country they are the proper persons to be served, and service upon one member of the firm is service upon the firm, for each member is agent for every other. In such a case there is no question of "head officer," as referred to in rule 8 of Order IX., as distinguished from subordinate officer. The foreign corporation is served by service on the firm or some member of the firm. Decision of Coleridge, J. affirmed. *Thames and Mersey Marine Insurance Company* v. *Societa di Navigazione a Vapore del Lloyd Austriaco* 491

11. *Practice — Discovery — Privilege—Marine insurance — Commercial list — Inspection of documents—Communications from agent after commencement of litigation for the purpose of conducting defence.* — The plaintiffs sued the defendants upon a policy of marine insurance upon the plaintiffs' ship. On the 28th Oct. 1913 the ship went ashore, and on the 30th Oct. the plaintiffs gave the defendants notice of abandonment, which was refused. In Jan. 1914 the writ was issued, and the defendants agreed to treat the writ as issued on the 30th Oct. 1913. The plaintiffs applied for discovery of part 2 of the defendants' list of documents, which was as follows: "Cables and correspondence which passed between the Salvage Association and their agent . . . and other persons and came into existence on and after the 30th Oct. 1913 . . . such cables and correspondence being with regard to the subject-matter of this litigation and expressing or for the purpose of obtaining advice or evidence to be used in it or for the purpose of leading to the obtaining of evidence to enable the defendants' solicitors properly to conduct the action on their behalf." The defendants having claimed privilege: Held, that the claim of privilege came within the decision in *Birmingham and Midland Motor Omnibus Company Limited* v. *London and North-Western Railway Company* (109 L. T. Rep. 64; (1913) 3 K. B. 850), and was good, the correspondence having taken place after the parties became at arm's length, and having been obtained for use by the defendants' solicitors in the prospective litigation between the parties. Decision of Bailhache, J. reversed. *Adam Steamship Company Limited* v. *London Assurance Corporation* 559

PRELIMINARY ACT.

See *Practice*, Nos. 2, 5—*Tug and Tow*, No. 4.

PRESUMPTION.

See *Prize*, No. 4.

PRIVILEGE.

See *Marine Insurance*, No. 21—*Practice*, No. 11.

PRIZE.

1. *Enemy ship—Outbreak of hostilities—Ship in British port—Right to capture or detain—Jurisdiction of Prize Court—Hague Conference* 1907 *— Convention VI., arts.* 1, 2 *— Reciprocal arrangements—Right of alien enemy to appear in Prize Court—Sufficiency of affidavit.*—By the Hague Convention 1907, No. VI., it is stated (*inter alia*), in art. 1, that it is desirable that any merchant ship belonging to one of the belligerent Powers which is in an enemy

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port at the commencement of hostilities should be allowed a certain number of days, if necessary, to depart freely to its port of destination, or to any other port indicated to it; and, in art. 2, that if the ship cannot, owing to circumstances beyond its control, depart within the specified period, it sould be detained, but not condemned. A German vessel arrived in an English port before the outbreak of hostilities between Great Britain and Germany, and was seized after the commencement of the war by the Collector of Customs of the port. Held, that the seizure of the ship was lawful; and upon the application of counsel for the Crown, the ship was ordered to be detained by the marshal until further order of the court, with liberty to apply and all questions of costs reserved. The agents of the owners of an enemy ship have no *locus standi* in an English Prize Court, where the affidavit filed by them shows no grounds entitling them to appear in the proceedings. (Prize Court. Evans, P.) *The Chile* 598

2. *Enemy ship—Capture on high seas—Ignorance of declaration of war—Right of capture—Hague Conference* 1907—*Convention VI., art.* 3—*Germany not a party to the article—Article not applicable—Condemnation.*—By international law enemy ships, and the cargoes of enemy subjects therein, are liable to capture and condemnation as lawful prize if they are taken on the high seas at any time after the outbreak of hostilities. It is immaterial that the ships set sail before the declaration of war or that the masters of the same were still ignorant of a state of war being in existence at the time of capture. The only exception to this rule is provided by art. 3 of the Hague Convention 1907, No. VI., which substitutes detention and restoration at the conclusion of the war for condemnation, and the exception only applies to those Powers which have assented to the article. As the German Empire had refused to give its assent, the exception has no application in the case of ships and cargoes belonging to the subjects of that country. (Prize Court. Evans, P.) *The Perkeo* 600

3. *Enemy ship—Capture on high seas—Ignorance of declaration of war—Hague Conference* 1907—*Convention VI., art.* 3—*Right of alien enemy to appear in Prize Court—Nature of affidavit required as condition precedent—Shareholders—Neutrals and British subjects—Neutral mortgagees—Claims—Identification of mortgagees with ship—Rejection of claims—Claimants for price of necessaries—Bounty of Crown.*—A ship flying the German flag, which left her last port of departure before the declaration of war between Great Britain and Germany, was captured on the high seas whilst still ignorant that a state of war existed. Held that by international law there was an undoubted right to capture and to condemn her, since Germany had refused to accede to art. 3 of the Hague Conference 1907, Convention VI. She was therefore condemned, and not ordered simply to be detained. At the time of capture the ship was subject to a *bonâ fide* mortgage to a Dutch company, but remained in the possession of the German owners. The Dutch company claimed that their rights, as mortgagees, should be met out of the proceeds of the sale of the ship. Held, that the mortgagees were identified with the nationality of the ship, and that "upon the authorities, upon principle, and upon grounds of convenience and practice" the claims of the neutral mortgagees must be rejected in the Prize Court. In this respect there was no difference between neutral mortgagees and British mortgagees. As the affidavit filed by the agents of the German owners of the ship showed no special right in them to be heard in an English Prize Court, their claim was struck out. Shareholders in an enemy ship, even though they be British or allied subjects, and necessaries men have no rights in the Prize Court. (Prize Court. Evans, P.) *The Marie Glaeser* 601

4. *Enemy fishing vessel—Vessel employed exclusively in coast fishery—Exemption from capture—Position of vessel when captured—Presumption that vessel is deep-sea fishing vessel—Right of capture—Hague Conference* 1907, *Convention XI., art.* 3 — *Evidence admissible in prize cases—Prize Court Rules* 1914, *Order XV.*—By art. 3. of the Hague Conference 1907, Convention XI., it is provided that: "Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, and cargo. This exemption ceases as soon as they take any part whatever in hostilities." This immunity from capture does not extend to deep-sea fishing vessels which are engaged in a commercial enterprise which forms a part of the trade of the enemy country. *Quære*, whether Germany can, during the present war, claim any of the benefits of the Hague Conventions. The Prize Court is not bound by the ordinary rules of evidence of the municipal courts, but may in its discretion draw inferences from trustworthy information in its possession. (Prize Court. Evans, P.) *The Berlin* 607

PRIZE COURT RULES 1914, ORDER XV.
See *Prize*, No. 4.

PROVISIONAL ORDER ACT.
See *Docks*, Nos. 2, 3.

RAILWAY.
See *Carriage of Goods*, No. 7.

RAILWAY CLAUSES ACT 1863.
See *Carriage of Goods*, No. 7.

RAILWAY AND CANAL TRAFFIC ACTS 1854.
See *Carriage of Goods*, No. 7.

RAILWAY COMPANY.
See *Damage*.

RATES.
See *Docks*, No. 2.

RECEIVER.
See *Carriage of Goods*, No. 1.

RECIPROCAL ARRANGEMENTS.
See *Prize*, No. 1.

REGISTER.
See *Specific Performance*.

REGISTRAR AND MERCHANTS.

1. *Measure of damage—Remoteness—Loss of use of vessel—Strike delaying progress of repairs.*—Where a vessel is injured in a collision at sea by the negligence of another vessel and it is reasonable to take the damaged vessel to a dock for repair, and where the owner of the innocent vessel acts in a reasonable and businesslike way in all matters connected with the docking and repairing of the vessel up to the time of the vessel being delivered to him in a state of repair, the wrongdoer is liable to make good any loss which the owner of the injured ship can show he suffered by being deprived of the use of his ship during the whole period when she was unavailable for use through being under repair. A collision occurred between two vessels, and the plaintiffs' vessel was so damaged that she had to be dry docked for

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repairs. Plaintiffs and defendants agreed that a reasonable time for the repairs to take was eighteen days. The contract made between the plaintiffs and the repairers provided that, owing to circumstances that might arise in regard to weather and labour troubles, the repairers should not guarantee a time in which to complete the work, but the repairers undertook to do their very utmost to complete the work in eighteen weather working days. The repairs were begun on the 18th May. On the 31st May a strike began which continued until the 20th July. The repairs were finished on the 10th Aug. But for the strike the repairs would have been finished in eighteen days. At the reference, when the damages were being assessed, the plaintiffs claimed for the loss of the use of the vessel from the date of the collision up to the end of the time taken to repair it. The defendants denied that they were liable for the loss of the use of the vessel when the actual work of repair was suspended by the strike. The registrar held that the defendants were liable for the whole of the time. The defendants appealed to the judge. Held, confirming the report of the registrar, that the loss of the use of the vessel for the whole period while she was in dry dock, including the period of the strike which occurred while she was in dry dock, flowed directly or immediately and naturally and in the usual or ordinary course of things from the wrongful act of the plaintiffs, and such damage was not too remote and was recoverable. (Adm. Div.) *The London* 405

2. *Ship sunk—Time charter—Ship sub-chartered on time—Sub-charterers' right to recover bill of lading freight—Right of bailee to recover damage.*—An Italian steamship was let on time charter to a firm who sub-chartered the steamship under a time charter, the terms of which, with the exception of the rate of freight, were similar to that of the time charter between the Italian owners and the original charterers. During the currency of the sub-time charter the steamship was sunk, and the Italian owners and the owners of the cargo brought an action against the owners of the wrongdoing vessel and recovered damages. The sub-charterers then started proceedings as time charterers of the Italian steamship against the owners of the wrongdoing steamship to recover damages—namely, the bill of lading freight which they would have earned if the voyage the Italian steamship was performing when she was sunk had been completed and the value of certain bunker coal owned by them and which would have been on board at the end of the voyage. The action was settled on terms, and, on the reference to the registrar to assess the damage, the registrar allowed the claim for bunker coal, but disallowed the claim for freight on the ground that injury to the property of another which rendered a contract made between the owner of the property and a third party less beneficial to the third party gave no right of action to the third party against the wrongdoer. On appeal the judge of the Admiralty Court affirmed the decision of the registrar. The sub-charterers appealed to the Court of Appeal. The Court of Appeal having ordered further evidence to be taken before the registrar as to who were the parties to the contract of carriage, and on its being reported by the registrar that the contract of carriage was made between the sub-charterers as carriers and the shippers, the owners of the cargo: Held, that the plaintiffs, the sub-charterers, had a sufficient possessory interest in ship and cargo as bailees to entitle them to maintain an action for the bill of lading freight lost through the collision. (Ct. of App.) *The Okehampton* 428

3. *Warship—Value of vessel—Depreciation—Degradation of type—Searching for wreck—Cause of action for loss of life of seamen apart from statute—Right to recover pensions and gratuities paid by the Admiralty as an act of grace—Remoteness of damage.*—A submarine having been sunk through the negligent navigation of a steamship and all but one of her crew drowned, the Commissioners of the Admiralty brought an action against the steamship owners to recover the damage they had sustained. They included in their claim the following among other items: 35,000*l*., the value of the submarine; 1286*l*. 3s. 8d., the expenses for searching for her; 5140*l*. 18s. 6d., the capitalised amount of the pensions and gratuities paid or payable by the plaintiffs to the relatives of the crew who were drowned. At the reference the assistant registrar allowed the value of the submarine at 26,500*l*.; the expenses for searching for the wreck, 1286*l*. 3s. 8d.; and he disallowed the sum claimed for pensions, but stated that if he was wrong in disallowing it the sum recoverable was 4100*l*. The Admiralty Commissioners appealed seeking to recover the capitalised value of the pensions, which they agreed to accept at 4100*l*.; the shipowners appealed seeking to get the amounts allowed for the value of the vessel and the expenses of searching for her reduced. On the hearing of the appeal by Sir S. T. Evans, President: Held, that on the evidence a sufficient deduction had not been made for depreciation and degradation of type, and that the sum of 26,500*l*. should be reduced to 23,850*l*. Held, further, that on the evidence 1286*l*. 3s. 8d. was a proper sum to allow for searching for the vessel. Held, further, that as apart from statute the negligent killing of a person gave rise to no cause of action, the Admiralty Commissioners could not recover damages for the loss of the crew; that as the pensions and gratuities were given as an act of grace and were not recoverable from the Admiralty as of right, the Admiralty Commissioners could not recover the sums paid as they were too speculative and remote to be recovered as damages. (Adm. Div.) *The Amerika* 478

NOTE.—The Court of Appeal (Buckley and Kennedy, LL.J. and Scrutton, J.) have since varied the above decision and restored the finding of the Assistant Registrar as to the item of £26,500, the amount which he had allowed at the reference for the value of the submarine, thus reversing the decision of the President, who had reduced that item to £23,850. Apparently the ground upon which the Court of Appeal reversed the President was that such a figure should only be reviewed if the Registrar has erred in principle or the sum allowed is either grossly too large or grossly too small. It may be doubted whether the Court of Appeal sufficiently considered what hitherto has been the practice of the Admiralty Court—namely, that the report of the Registrar is not a final judgment, but it must be confirmed by the court to give it validity: (see Roscoe's Admiralty Practice, 3rd edit., p. 385, note to Order LVI., r. 10; see also the judgment of Deane, J. in *The Wallsend*, 10 Asp. Mar. Law Cas. 476; 96 L. T. Rep. 851; (1907) P. 302).—ED.

REGULATIONS.
See *Damage*.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.
See *Collision*, Nos. 1, 2, 3, 9, 10, 11, 12, 14, 20, 23.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA, ARTS. 19, 21, 24.
See *Collision*, No. 29.

REIMBURSEMENT ACCOUNT.
See *Seaman*, No. 3.

REINSURANCE.
See *Marine Insurance*, Nos. 4, 13, 16, 22, 29.

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REJECTION OF CLAIMS.
See *Prize*, No. 3.

REMEASUREMENT.
See *Carriage of Goods*, No. 47.

REMOTENESS.
See *Registrar and Merchants*, Nos. 1 and 3.

REMOTENESS OF DAMAGE.
See *Collision*, No. 28.

RESALE.
See *Sale of Goods*.

RESTRAINT OF PRINCES.
See *Carriage of Goods*, No. 42.

RESTRAINT OF TRADE.

Contract—"Intent to restrain trade to the detriment of the public"—Construction—Proof of intent—Evidence—Contracts in restraint of trade unenforceable at common law—Australian Industries Preservation Act 1906, *ss.* 4, 7, 9, 15A.—It is an essential element of offence under sect. 4 (1) (a) and sect. 7 (1) of the Australian Industries Preservation Act 1906, that there should be an actual intent to restrain trade or commerce to the detriment of the public, and the mere intent to restrain trade or commerce without the further intent to cause detriment to the public, is not sufficient. All contracts in restraint of trade or commerce which are unenforceable at common law, and all combinations in restraint of trade or commerce which, if embodied in a contract, would be unenforceable at common law, are not necessarily detrimental to the public within the meaning of the Act, nor are those who enter into such contracts or combinations necessarily to be taken to have intended to act to the detriment of the public merely from being so concerned. In establishing the contract, or combination, or the monopoly, or attempt to monopolise, the prosecutor may, in default of evidence to the contrary, rely on averments in the information, declaration, or claim, but the wrongful intention must always be proved by proper evidence. The prosecutor cannot plead the evidence whereby he hopes to establish wrongful intention and rely on the provisions of sect. 15A (inserted in the Act of 1906 by sect. 4 of the amending Act of 1908) as rendering the proof of what he pleads unnecessary. The principles of law relating to monopolies and contracts in restraint of trade considered. Decision of the High Court of Australia affirmed. (P. C.) *Attorney-General of the Comonwealth of Australia* v. *Adelaide Steamship Company Limited and others* 361

RIGHT TO PROCEED.
See *Marine Insurance*, No. 29.

RISK.
See *Marine Insurance*, Nos. 4, 6—*Salvage*, No. 3.

SAFE PORT.
See *Carriage of Goods*, Nos. 28, 48.

SAILING BARGE.
See *Port of London*, No. 3.

SALE OF GOODS.

1. *C.i.f. contract—Payment—Tender of shipping documents—Sale of Goods Act* 1893.—Where goods are sold under the terms of a c.i.f. contract for net cash the buyer is bound to pay for the goods on tender of the usual shipping documents, even though the goods have not arrived at their destination. Judgment of the Court of Appeal reversed. (H. of L.) *E. Clemens Horst Company* v. *Biddell Brothers* ... 80

2. *Law merchant—Documents—Construction.*—Observations on the effect of the law merchant upon the construction of commercial documents. (Ct. of App.) *Biddell Brothers* v. *E. Clemens Horst and Co.* 1

3. *C.i.f. contract—Transhipment—Tender of one bill of lading—Right to reject goods.*—Where there is a contract on sale on c.i.f. terms, it is, by mercantile usage, unless otherwise agreed, the duty of the seller to provide by a contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, and by an indorsed bill of lading or otherwise to transfer to the buyer the benefit of those rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from port of shipment to port of destination. In the case of a shipment of goods under a c.i.f. contract from Manila to London *viâ* Hong-Kong under the bills of lading, one from Manila to Hong-Kong and the other from Hong-Kong to London respectively, where the seller tendered to the buyer the Hong-Kong to London bill of lading: Held, that this was not a good tender, and the buyer was entitled to reject the goods. (Scrutton, J.) *Landauer and Co.* v. *Craven and Speeding Brothers* 182

4. *F.O.B.—Shipment by seller—Notice—Sale of Goods Act* 1893 (56 & 57 *Vict. c.* 71), *s.* 32, *sub. s.* 3.—By a contract dated the 27th June 1912 the plaintiffs sold to the defendants 200 bags of rice f.o.b. Antwerp, cash against bills of lading. On the 9th Aug. the defendants sent instructions to the plaintiffs to ship the rice to Odessa and pay the freight on their account. The plaintiffs instructed certain merchants in Hamburg, from whom they had bought the rice, to ship it by first steamer to Odessa on account of the defendants. On the 24th Aug. the rice was shipped per steamship *Egyptian* which sailed on the 25th Aug., and was lost at sea on the following day. The first intimation of the shipment that the defendants received from the plaintiffs was on the 29th Aug., when the plaintiffs presented the bills of lading for payment. The defendants had not insured the rice, evidence being given to the effect that it was not their practice to insure until after they had received notice as to which ship the goods had been dispatched by. The plaintiffs claimed the price of the rice and the amount of freight paid by them on defendants' account. The Sale of Goods Act 1893, s. 32 (3), provides that: "Unless otherwise agreed, where goods are sent by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit." Held, that the sub-section did not apply to a contract for the sale of goods on f.o.b. terms, and the defendants were therefore liable. (Bailhache, J.) *Wimble* v. *Rosenberg* 275

5. *Sale of goods—Shipment by seller—No statutory notice of shipment given by seller to buyer—Sale of Goods Act* 1893 (56 & 57 *Vict. c.* 71), *s.* 32, *sub-s.* 3.—By a contract dated the 27th June 1912 the plaintiffs sold to the defendants 200 bags of rice f.o.b. Antwerp, cash against bills of lading. On the 9th Aug. the defendants sent instructions to the plaintiffs to ship the rice to Odessa, and pay the freight on their account, leaving it to the plaintiffs to select the ship. The plaintiffs instructed certain merchants in Hamburg, from

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7. *Performance of contract—Resale—Appropriation—Loss of cargo on voyage—Sellers aware of loss at time of tender of appropriation—Validity of tender.*—In May 1912 the P. Company sold to the O. Company a certain quantity of goods to be shipped from an Oriental port to an English port in the month of Dec. 1912 or Jan. 1913. By two of the clauses of the contract it was provided that: (3) " Particulars of shipment . . . to be declared by original sellers not later than forty days from the date of the last bill of lading. . . . In case of resales, copy of original appropriation shall be accepted by buyers and passed on without delay. . . ."; and (10) " This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract." In Sept. 1912 the P. Company purchased the same amount of the same kind of goods for shipment from V. to England under a similar contract from a third company, the date of the shipment to be Dec. 1912 or Jan. 1913. The goods were duly shipped, and the vessel in which they were carried sailed from V. towards the end of Jan. 1913. A few days later the vessel was wrecked and the cargo was totally lost. On the date of the loss the P. Company received a declaration and appropriation of the cargo carried in the vessel, but, at the time of such declaration and appropriation, neither the P. Company nor the third company had any knowledge of the vessel except that she had sailed from the port of V. Later on the same day the P. Company, having in the meantime become aware of the loss of the vessel and its cargo, declared and appropriated the shipment to their contract with the O. Company. The O. Company refused to accept the tender. Held, that as the P. Company knew of the loss of the vessel and its cargo at the time of the declaration and appropriation to the O. Company, there was no obligation on the latter to accept the tender, and that clause (10) in the contract did not operate, as there had been no valid declaration and appropriation between the parties to it. (K.B. Div. Ct.) *Olympia Oil and Cake Company Limited (apps.)* v. *Produce Brokers Company Limited (resps.)* 570

SALE OF GOODS ACT 1893.

See *Sale of Goods*, Nos. 1, 2, 3, 5, 6.

SALVAGE.

1. *Loss of fishing—Loss of profit.*—Three steam trawlers while engaged in fishing in the North Sea fell in with a vessel in distress and towed her to a place of safety. In salvage suits brought by the steam trawlers they each made a claim of varying amounts for loss of profit on the fishing voyages which were ended or interrupted by rendering the services. Held, that they were not entitled to recover a sum representing loss of the prospective profit on the fishing voyage interrupted to render the salvage services. (Adm. Div.) *The Fairport* ... 165

2. *Practice—Salvage—Actions by co-salvors—Tender of lump sum by owners of salved property—Duty to apportion among the different salvors.*—A steamship broke down and had to take the assistance of a tug. The tug ran short of coal and had to leave her. A steam trawler and a lifeboat then came up and rendered assistance, and she was brought into safety. Actions for salvage were instituted by the trawler and the lifeboat, and the actions were consolidated. The owners of the salved steamship then tendered a lump sum of 350*l*. to the salvors. The salvors took out a summons asking for an order that the defendants should apportion the sum tendered between them. The assistant registrar made an order directing the apportionment. The defendants appealed to the judge. Held, that it was impossible to lay down any hard-and-fast rule as to when or by whom a salvage tender ought to be apportioned, but that it was desirable, where the owners of the salved ship had full information as to the merits of the services of the various salvors, that they should save the expense of further litigation by themselves apportioning the amount which they tendered, and that in the circumstances of this case the defendants should apportion. *The Burnock* 490

3. *Compulsory pilot—Risk necessary to entitle a pilot to salvage.*—A steamship on a voyage from the Tyne to Marseilles when off the Royal Sovereign Lightship lost her propeller and drifted up Channel. She anchored off Rye and then touched the ground several times. Those on the steamship burnt flares for assistance and a lifeboat and tugs came out to the vessel and she was taken in tow for London. When the steamship entered the compulsory pilotage district she was boarded by a pilot off Dungeness, who took charge of her to Gravesend. Salvage suits were instituted by the tugs, the pilot, and the lifeboat crew. Held, that the tugs and the lifeboat crew were entitled to salvage, and that the pilot was not entitled to salvage, for though the vessel while in his charge sheered and the anchor of the vessel had fouled the hawser of one of the tugs, and there was some apprehension that the steamship might leak, the pilot had not done more work or run any greater risk than he would have been called upon to do in the performance of an ordinary pilotage contract. *The Bedeburn* 530

SANTOS (PORT OF).

See *Carriage of Goods*, No. 13.

SEA CARRIAGE OF GOODS ACT.

See *Carriage of Goods*, No. 21.

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SEAMAN.

1. *Death by accident "arising out of" employment—Workmen's Compensation Act* 1906 (6 *Edw.* 7, *c.* 58).—An officer of a ship, who was on duty on deck, disappeared from the ship in broad daylight, in fine calm weather. No one saw what happened to him, but there was evidence that not long before he had complained of feeling sick and giddy. Held, that there was evidence from which the court might infer that he fell overboard from an accident arising not only "in the course of" but "out of" his employment, within the meaning of the Workmen's Compensation Act 1906, and that his dependants were entitled to compensation under the Act. Judgment of the Court of Appeal affirmed. (H. of L.) *Owners of the Ship Swansea Vale* v. *Rice* 47

2. *Accident—Dependency—Workmen's Compensation Act* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.—The principle established by the decision of the House of Lords in *New Monckton Collieries Limited* v. *Keeling* (105 L. T. Rep. 337; (1911) A. C. 648), that dependency is a question of fact, and that there is no legal presumption of dependency even in the case of a wife, applies equally to the case of infant children. Where, therefore, there was no evidence of dependency in fact of infant children on their father, a workman whose death had been caused by an accident arising out of and in the course of his employment within the meaning of sect. 1 of the Workmen's Compensation Act 1906, and there was no evidence that the children had ever been maintained by him, they were held not to be dependants and not to be entitled to compensation under that Act. *Briggs* v. *Mitchell* (1911) 48 Sc. L. R. 606) approved. Decision of the County Court judge reversed. (Ct. of App.) *Lee* v. *Owner of Ship Bessie* 89

3. "*Expenses caused by desertion*"—*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.—During a voyage which was not to exceed three years, a number of the seamen who had signed articles for the whole voyage deserted from the ship at San Francisco, thereby forfeiting the wages then due to them. After these desertions the vessel was chartered for six months to be used as a store ship for coals. For more than five months of this period no new seamen were engaged to take the places of the deserters, and the owners thereby saved a considerable sum in wages. The master then engaged new seamen for the homeward voyage in place of the deserters and these were paid at a higher rate of wages, but the total excess pay of these men amounted to much less than the total of the wages saved to the owners, and in consequence of the desertions the owners saved in wages above 260*l*. Held, that the extra pay of the new men engaged was "excess wages" within sect. 221 of the Merchant Shiping Act 1894, and was "expenses caused by the desertion" within sect. 232 of the Act, and was therefore properly included in the reimbursement account under sect. 28, sub-sect. 1 (b) of the Merchant Shipping Act 1906, and could be set off against the forfeited wages, notwithstanding that the owners had saved a large sum in wages in consequence of the desertions; and, further, that the seamen so engaged were, within the meaning of sect. 221, "substitutes" engaged in place of the seamen who had deserted, although they had not been engaged for more than five months after the desertions. During a voyage a number of seamen deserted in Melbourne, and in consequence of these desertions the vessel was detained one day while the master was engaged in finding substitutes, incurring personal expenses in doing so, and as the vessel was ready to sail in order to save further pier dues he moved to an anchorage in the bay, thereby incurring an expense for pilotage and for the cost of coal to take the vessel to the anchorage. In his reimbursement account the master included (in addition to the cost of pilotage and personal expenses which were allowed) a sum representing the wages and cost of food of the crew for one day and the cost of the coal to take the vessel from the pier to the anchorage. Justices having allowed these items as being expenses caused to the master by the absence of the seamen due to desertion within sect. 28 of the Act of 1906: Held, that these items were not "expenses caused by the desertion," and ought not to be included in the reimbursement account. (K. B. Div. Ct.) *Deacon* (app.) v. *Quale* (resp.). *Neate* (app.) v. *Wilson* (resp.) ... 125

4. *Workmen's Compensation Act* 1906 (6 Edw. 7, c. 58), s. 1.—A seaman employed on board a fishing vessel was engaged in discharging fish from it across a gangway resting on a floating pontoon. While he was standing in the middle of the gangway it became necessary to lower the end of it that rested on the pontoon. Instead of walking off the gangway the seaman caught hold of the stem of another vessel which was moored alongside, and swung himself therefrom. While doing so he slipped and fell into the water, sustaining such serious injuries that he died. Held, that the accident arose "out of" as well as "in the course of" the seaman's employment. Decision of the County Court judge reversed. (Ct. of App.) *Gallant* v. *Owners of Ship Gabir* 284

5. *Workmen's Compensation Act* 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 4, *sub-s.* 1.—Where the owners of a steamship entered into a contract with a contractor to scale the boilers of the vessel, and he engaged certain workmen to do the work, the principals not exercising any control over the workmen, it not being their practice to undertake the scaling of the boilers of their steamships themselves, they always employing an independent contractor to do it, the operation that the contractor had contracted to perform for the principals was held not to be work executed "in the course of or for the purposes of" the principals' "trade or business" within the meaning of sect. 4, sub-sect. 1, of the Workmen's Compensation Act 1906, so that the principals were not liable to pay compensation to one of the workmen who was injured by "accident arising out of and in the course of" his employment. *Spiers* v. *Elderslie Steamship Company* (1909, S. C. 1259; 46 Sc. L. Rep. 893), the reasoning of which was adopted by the Court of Appeal in England in *Skates* v. *Jones and Co.* (103 L. T. Rep. 408; (1910) 2 K. B. 903), applied. Decision of the County Court judge affirmed. (Ct. of App.) *Luckwill* v. *Auchen Steamship Company Limited* 286

6. *Meaning of the word "wreck."*—The word "wreck" in sect. 158 of the Merchant Shipping Act 1894 should be construed in relation to the subject-matter of the section, and the words "wreck of the ship" in that section include such a structural injury to the hull of a ship as will render her incapable of continuing the maritime adventure in respect of which the seamen's contract is entered into. A seaman and fireman entered into an agreement to serve on a passenger steamship, the voyage being described as "from Southampton to New York (*via* Cherbourg and Queenstown) and (or) if required to any port or ports within the North Atlantic and South Atlantic Oceans trading as may be required until the ship returns to a final port of discharge in the United Kingdom for any period not exceeding twelve months." There was also a clause in the agreement which provided that "if from any cause the said ship cannot sail on the date appointed

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or should the vessel put back into port through accidents the said crew will be transferred to any other vessel belonging to the same owners taking the place of the vessel herein named, at the same rate of wages and in the several capacities herein named." The day the steamship started from Southampton she came into collision with a warship, and on the following day returned to Southampton. The Board of Trade required that she should surrender her passenger and free-board certificates. The steamship had to go to Belfast to be repaired; the repairs took about two months to complete. The voyage was abandoned, no other vessel taking the place of the steamship the seamen had agreed to serve on. The seamen were dismissed on the return of the steamship and given three days' pay. They claimed in addition to the three days' wages earned by them a further sum of one month's wages as compensation for being discharged otherwise than in accordance with their agreement without fault on their part and without their consent. This claim was made by them under sect. 162 of the Merchant Shipping Act 1894. The owners refused to pay them compensation on the ground that the service terminated by reason of the wreck of the ship. This contention was based upon the wording of sect. 158 of the Merchant Shipping Act 1894. Held, by the Court of Appeal (Vaughan Williams and Buckley, L.JJ., Kennedy, L.J. dissenting), affirming the decision of Bargrave Deane, J., that on the facts proved the service had terminated by reason of the wreck of the ship, and that the seamen had been rightly dismissed and were not entitled to a month's wages. Held, by Kennedy, L.J. dissenting: The word "wreck" means such a disaster to a ship as destroys her character as a ship, and also that the contract with the seamen was not dissolved by the damage to the ship, so that if the defendant owners of the ship chose for their own pecuniary advantage to discharge the seamen otherwise than in accordance with the terms of their contract, they were liable to pay the compensation contemplated by sect. 162 of the Merchant Shipping Act 1894. (Ct. of App.) *The Olympic* ... 318

7. *Steward—Ship's articles—Wages—Agreement for payment of additional sum not specified in articles—Right to recover—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 113, 114, 742.—The Merchant Shipping Act 1894, s. 113, provides that the master of a ship shall enter into an agreement with every seaman whom he carries to sea as part of his crew. Sect. 114 provides that the agreement shall contain (*inter alia*) the amount of wages which each seaman is to receive. Sect. 742 defines "seaman" as including every person except masters, pilots, and apprentices employed in any capacity on board any ship, and by the same section the word "wages" includes "emoluments." The plaintiff was a ship's steward in the employment of the defendants, who were the owners of a line of steamers. He signed the usual form of agreement of ship's articles under sects. 113 and 114 of the Merchant Shipping Act 1894, in which his wages were stated to be 10*l.* a month. In his evidence at the trial he stated that in addition he was to be allowed 5 per cent. commission on the profits of the bar, which was under his charge. After he had made two voyages on the defendants' ships he had a conversation with the superintendent steward, and it was arranged that, instead of receiving 5 per cent. of the bar profits, he should be paid a fixed sum of 5*l.* a month in addition to the amount to which he was entitled under the ship's articles, such additional sum not appearing therein. In the action the plaintiff sought to recover 10*l.*, being the amount of two months' additional remuneration at 5*l.* a month. Held, that as the plaintiff's duties in connection with the bar were part of the duties for which he was engaged and which he was bound to perform, the payment of 5*l.* a month in respect of those duties formed part of his wages, and not being set out in the ship's articles could not be recovered. (K. B. Div. Ct.) *Thompson* v. *H. and W. Nelson Limited* 351

8. *Wages—Summary Jurisdiction Act* 1879 (42 & 43 *Vict. c.* 49), *s.* 33, *sub-s.* 1—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 164—*Finality of magistrate's decision.*—By sect. 164 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), it is provided that "a seaman or apprentice to the sea service, or a person duly authorised on his behalf, may, as soon as any wages due to him, not exceeding fifty pounds, become payable, sue for the same before a court of summary jurisdiction in or near the place at which his service has terminated, or at which he has been discharged, or at which any person on whom the claim is made is or resides, and the order made by the court in the matter shall be final." Certain seamen made claims upon the appellants, who were shipowners, for extra wages which had been promised to them by the captain of one of the ships of the appellants during the time that the ship was journeying from a foreign port to Southampton, and the justices of Southampton allowed the claims. Upon the application of the respondents, however, the justices agreed to state a special case for the consideration of the High Court. Held, following the case of *Westminster Corporation* v. *Gordon Hotels* (98 L. T. Rep. 681; (1908) A. C. 142), that the judgment given by the justices was final, and that there was no power to state a case. (K. B. Div. Ct.) *Wills and Sons* (apps.) v. *McSherry and others* (resps.) 426

9. *Contract of seaman to serve in ship—Persuading seaman not to join ship—Offence—"His ship"—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 113, 236 (1).—By sect. 236, sub-sect. 1, of the Merchant Shipping Act 1894, if a person persuades or attempts to persuade a seaman to neglect or refuse to join or proceed to sea in or to desert from "his ship," he shall be liable to a fine. The respondent was engaged at Whitby to serve as a seaman on board a British steamship, and the agent who engaged him ordered him to go to Middlesbrough, having advanced his railway fare on orders from the owners. The respondent went on board the ship at Middlesbrough, and his discharge book was taken and kept by an officer of the ship, and on the next day the respondent was ordered by an officer of the ship to go to the Board of Trade offices for the purpose of signing articles, and he left the ship with the object of so doing, but outside the Board of Trade offices he was accosted by the appellant, who attempted to persuade him to refuse to go to sea to board the ship. The respondent afterwards signed articles and received and cashed an advance note, but in consequence of the appellants's conduct he did not proceed to sea. It was not shown that the appellant had any conversation with the respondent after he had signed articles, or that he had attempted to persuade him to refuse to sign articles. The appellant having been convicted under sect. 236: Held, on appeal, that although the respondent had not signed articles at the time when the appellant attempted to persuade him to refuse to join the ship, the ship was then the respondent's ship within the meaning of the section, and the appellant was rightly convicted of attempting to persuade the respondent to refuse to join "his ship." (K. B. Div. Ct.) *Vickerson* (app.) v. *Crowe* (resp.). 446

10. *Wages—Overtime—Seaman required to work overtime—Claim for extra wages.*—When a sea-

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man enters into articles with a shipowner for a voyage, the seaman is as a general rule bound to give his full services for the wages specified in the articles, and he is not entitled to any payment in respect of overtime merely because he is called upon to work for longer hours than was contemplated when the articles were entered into, even though an express promise was made to him by an officer of the ship to pay overtime. A seaman signed articles as a fireman and trimmer on a steamship; he had four-hour watches until the ship reached L., when one fireman was left behind having fallen ill. The remaining firemen were asked by the chief engineer to do six-hour watches, which they did for about a week, the chief engineer promising to pay overtime and saying that if the shipowners did not pay it he would pay it himself. Upon a claim by a fireman against the shipowners in respect of such overtime: Held, on the authority of *Harris* v. *Carter* (3 E. & B. 559), that there was no consideration for the promise made by the chief engineer even if he had authority to make it, which he had not, and that the seaman was not entitled to claim any overtime payment. *Harrison and another* (appe.) v. *Dodd* (resp.) 503

11. *Seaman—Dispute with employer—Reference to superintendent of a mercantile marine office—Adjudication by deputy superintendent—Jurisdiction to adjudicate—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 247, 263, 387.—The Merchant Shipping Act, 1894, s. 387 (1), provides that a superintendent of a mercantile marine office shall inquire into, hear, and determine any dispute either between the owner of a fishing boat and the skipper or a seaman of the boat, or between the skipper of a fishing-boat and any seaman of the boat concerning (ii.) the skipper or seaman's engagement, service, or discharge . . . if any party to the dispute calls on him to decide it, and his decision thereon shall be final and binding on all persons. Sect. 247 (2) provides that "any act done by, to, or before a deputy duly appointed shall have the same effect as if done by, to, or before a superintendent. A deputy superintendent having adjudicated upon a dispute in relation to the discharge of a seaman under sect. 387, Held (on appeal from a County Court judge), that he had jurisdiction to adjudicate. *Mayhew* v. *Tripp* 505

SEAMANSHIP.
See *Collision*, No. 25.

"SEAWORTHINESS ADMITTED."
See *Marine Insurance*, No. 7.

SECOND-HAND MACHINERY.
See *Marine Insurance*, No. 27.

SEIZURE.
See *Marine Insurance*, No. 21.

SHAREHOLDERS.
See *Prize*, No. 3.

SHIFTING OF CARGO.
See *Carriage of Goods*, No. 37.

SHIP.
See *Carriage of Goods*, No. 51—*Collision*, No. 19—*Prize*, No. 1—*Pilotage*.

SHIPPING AGENT.
See *Statute of Limitations*.

SHIPOWNER.
See *Carriage of Goods*, No. 46.

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"SHIP'S RISK."
See *Carriage of Goods*, No. 12.

SHORT DELIVERY.
See *Practice*, No. 7.

SPECIFIC PERFORMANCE.
Constructive total loss — Removal by canal authority—Contract of sale—Delivery order—Transfer of possession—Closing of register—Bill of sale—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 21, 24, 530—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 52 (1)—*Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 60.—On the 22nd March a registered ship was sunk in the fairway of the Manchester Ship Canal and became an obstruction to navigation. The plaintiffs, the owners of the Manchester Ship Canal, gave notice to the owners of their intention to remove the vessel, and exercise their powers under sect. 530 of the Merchant Shipping Act 1894. As the expense of raising and repairing the ship was greater than her value when raised, she was abandoned by the owners, and accordingly sold by public auction on the 1st May, described as a "register ship." The defendant Horlock became the purchaser, the contract providing that on completion of the purchase the seller would deliver to the purchaser a delivery order (these latter words being written in over the words "legal bill of sale" which had been erased) for the vessel. The defendant paid a deposit on signing the contract, and on the 8th May, the day fixed for completion, was prepared to pay the balance of the purchase money and demanded a bill of sale transferring the ship to him. The plaintiffs, however, refused to execute a bill of sale and offered a delivery order in pursuance of the contract, which the defendant declined to accept, or to complete the contract. At this time the ship's register had not been closed, but this was done shortly afterwards by the owners giving notice to the registrar. On the 22nd May the plaintiffs offered a bill of sale, which the defendant refused to accept, the register then being closed. In an action by the plaintiffs for specific performance of the contract and the balance of the purchase money, the defendant contended that the contract was for the sale of a registered ship, and that, notwithstanding anything in the contract to the contrary, he was entitled to transfer by bill of sale under sect. 24 of the Merchant Shipping Act 1894. Held, reversing the decision of Eve, J., that the ship had been constructively lost on the 22nd March 1913, within the meaning of sect. 21 of the Act of 1894, and then ceased to be a registered ship, so that the register was properly closed: that there was no representation in the contract that she was a registered ship at the date of the sale; that no bill of sale was necessary for her transfer or would have been effective if granted: and that the action succeeded. *Manchester Ship Canal* v. *Horlock* 516

SQUADRONS.
See *Collision*, No. 23.

STATUTE OF LIMITATIONS.
Shipping agent—Balance of account—Liability as express trustee.—The plaintiff, who was the sole surviving partner of a French firm of average adjusters carrying on business in Paris, sued the defendant to recover the sum of 96*l.* 11s. 4d. as money had and received in the following circumstances: In 1883 a vessel called the *I.*, which was loaded with coal, became a total wreck near R. The defendant at that time was carrying on business as a shipping

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agent at R., and the plaintiff's firm, acting for the insurers of the vessel, sent over the bill of lading to the defendant with instructions to sell the cargo on the plaintiff's behalf. The cargo was duly sold by the defendant, and after deducting certain payments from the sum received there remained in his hands the sum of 96*l.* 11s. 4d., which amount for several years appeared in the defendant's books as a sum owing to somebody in respect of the *I.* The entry ceased in 1888, and the amount in question had not been paid over to the plaintiff firm or the insurers. In 1906 the plaintiff became aware of the facts in connection with the sum of money, and in 1912 he brought an action to recover it. It was contended by the defendant that the plaintiff's claim was barred by the Statute of Limitations. For the plaintiff it was submitted that the defendant was an express trustee of the money sued for, and that, consequently, the Statute of Limitations did not run against his claim. Held, that in the circumstances the mere fact that at some time there had been a fiduciary relationship in existence did not prevent the Statute of Limitations succeeding as a defence, and that, the case being one of an ordinary commercial agent who had incurred a debt, the statute applied. (K. B. Div. Ct.) *Henry* v. *Hammond* 332

STEAMERS CROSSING.
See *Collision*, No. 29.

STORES.
See *Collision*, No. 17.

STRIKES.
See *Carriage of Goods*, Nos. 5, 9, 11, 25, 27, 31—*Registrar and Merchants*, No. 1.

SUB-CHARTER.
See *Registrar and Merchants*, No. 2.

SUCTION OR INTERACTION.
See *Collision*, No. 29.

SUMMARY JURISDICTION ACT 1879.
See *Seaman*, No. 8.

SUNKEN VESSEL.
See *Mersey Dock Acts.*

"SWERVE."
See *Collision*, No. 29.

TENDER.
See *Enemy—Sale of Goods*, Nos. 4, 7.

TENDER OF SHIPPING DOCUMENTS.
See *Sale of Goods*, Nos. 1, 2, 3.

THAMES.
See *Collision*, Nos. 8, 13, 14, 15, 21, 22.

THAMES BY-LAWS, NO. 40.
See *Collision*, No. 22.

THIRD PARTY NOTICE.
See *Tug and Tow*, No. 6.

TIMBER.
See *Carriage of Goods*, No. 47.

TIME.
See *Carriage of Goods*, No. 33.

TIME CHARTER.
See *Carriage of Goods*, No. 5—*Registrar and Merchants*, No. 2.

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TIME POLICY.
See *Marine Insurance*, No. 28.

TOTAL LOSS.
See *Marine Insurance*, Nos. 17, 25.

TOWAGE CONTRACT.
See *Tug and Tow*, Nos. 1, 6.

TOWING GEAR.
See *Tug and Tow*, No. 1.

TRADING WITH ENEMY.
See *Enemy.*

TRANSFER OF POSSESSION.
See *Specific Performance.*

TRANSHIPMENT.
See *Carriage of Goods*, Nos. 39, 46—*Docks*, Nos. 2, 3—*Sale of Goods*, No. 4.

TRANSIT.
See *Marine Insurance*, No. 20.

TRAWLER.
See *Collision*, No. 3.

TRUSTEE.
See *Statute of Limitations.*

TUG AND TOW.

1. *Towage contract—Defect in gear—Warranty of fitness—Conditions.*—Tug owners contracted to tow a partly laden vessel from a dock in Birkenhead to a dock in Liverpool upon the terms that they would not be responsible for any damage or loss . . . arising from any perils or accidents of the seas or rivers, or arising from . . . towing gear, including consequence of defect therein or damage thereto. They supplied two tugs for the towage. The rivets which fastened the towing gear to the structure of one of the tugs parted, the gear was lost overboard, and in consequence of the breaking of the rivets the ship collided with the dock wall and was damaged. In an action by the shipowner against the tug owner to recover the damage caused by breach of warranty or breach of contract in not providing tugs properly equipped and fit to perform the contract, it was held that the shipowner was entitled to recover, as there was an implied warranty in the contract of towage that the tugs supplied were duly equipped and fit for the service; that even if there was no such warranty, as the damage had been caused by a defect in the tug that might have been ascertained by the exercise of reasonable care on the part of the tug owner, and as no proper inspection of the tug had been made, the damage was recoverable. It was further held that the conditions in the contract did not exempt the tug owner, for they only referred to defects arising during the towage, and not to those in existence when the towage began, and that, even if the conditions were intended to refer to defects in existence before the towage began, the words used were not clear enough to exempt the tug owners from liability. The tug owners appealed. Held, that it was unnecessary to decide the question as to whether the tug owner warranted that the tug was fit to perform the contract, for it was his duty to supply a tug as fit as care and skill could make it, and under the circumstances the onus was on him to show that the accident could not have been prevented by the exercise of care and skill, and that he had not done. Held, further, that

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the words in the conditions of towage referred only to defects coming into existence during the towage. Held, by Vaughan Williams and Farwell, L.JJ. (Kennedy, L.J. dissenting), that the rule of construction that an exception to be efficacious must not be ambiguous only applied to cases in which the exception dealt with a common law liability, and had no application in this case. Held, by Farwell and Kennedy, L.JJ. (Vaughan Williams, L.J. dissenting), that the words "towing gear" did not include the rivets which attached the towing hook and plates to the structure of the tug, and that the defect in the rivets was not a defect within the words of the condition. (Ct. of App.) *The Westcock* ... 57

2. *Collision—Steamship and barge in tow of a tug —Steamship and tug to blame for collision— Barge not to blame—Admiralty rule as to division of loss—Joint tortfeasors—Right of barge owners to recover whole damage against either wrongdoer—Judicature Act* 1873 (36 & 37 *Vict.* c. 66), s. 25, *sub-s.* 9—*Preliminary acts— Character of statements contained in them.*— A tow is not liable in law for the wrongful act of her tug merely because of the relation of tug and tow. Whether a tow is liable or not depends upon the facts in each case. (Ct. of App.) *The Devonshire; The Seacombe* ... 137, 142

3. *Admiralty rule as to division of loss.*—A barge in tow of a tug which had control of the navigation came into collision with a steamship. The collision was brought about by the joint negligence of the tug and the steamship. The tug and the steamship were both found to blame. The barge was free from blame. The owners of the barge and her master and crew claimed to be entitled to recover the whole of their damage against the steamship, contending that they had been injured by the wrongful act of two joint tortfeasors and that they were entitled to recover their loss in full against either wrongdoer. The defendants contended that in accordance with the Admiralty rule as to the division of loss in cases of damage arising from collisions between ships when both vessels were to blame, laid down in *The Milan* (*Lush.* 388), affirmed in *The Drumlanrig* (103 L. T. Rep. 773; 11 Asp. Mar. Law Cas. 520; (1911) A. C. 16), the plaintiffs could only recover half their loss from the owners of the steamship and the balance against the other wrongdoer, the tug. The President held that there was no Admiralty rule in existence before the passing of the Judicature Act 1873, which prevented an innocent person injured by a collision produced by the joint negligence of two other persons from recovering the whole of his loss from either of the wrongdoers, and gave judgment in favour of the plaintiffs for the whole of their damage against the owners of the steamship. The steamship owners appealed. Held, by the Court of Appeal, Fletcher Moulton and Buckley, L.JJ (Vaughan Williams, L.J. dissenting), affirming the decision of Sir S. Evans, President, that before the passing of the Judicature Act 1873 the rule in force in the Admiralty Court as to the division of loss applied only to damage caused by collision between two ships when both ships were to blame, but that there was no such rule with regard to cases of collision causing loss to the owners of a vessel which was towed into collision but which was not to blame, and that the plaintiffs were therefore entitled to recover the whole of their damages from either of the wrongdoers. (Ct. of App.) *The Devonshire* ... 137

4. *Admiralty Rule as to Division of Loss—Preliminary Acts.*—A barge in tow of a tug collided with a steamship. The control of the navigation of the tug and barge was in the hands of those on the tug. In an action for damage brought by the barge owners, the owners of her cargo and the master and crew against the owners of the steamship, the defendants called no evidence, and on the evidence called by the plaintiffs it was held that the tug and tow were to blame and that the steamship was not to blame. In the preliminary act filed on behalf of the defendants, and in the defence it was stated that the steamship slowed her engines and starboarded when she saw the tug and barge, but the judge disregarded statements made in the preliminary acts and defence, and, deciding the case on the evidence given, found the tug and barge alone to blame. The plaintiffs appealed. On the hearing in the Court of Appeal the barge owner obtained leave to call the master of the steamship. Held, by the Court of Appeal, that, on the evidence given, the steamship was to blame for not keeping her course and speed, and that as the tug was also to blame and the barge was not to blame, the plaintiffs, following the decision in *The Devonshire* reported above, were entitled to recover the whole of their damage from the owners of the steamship. Observations by Fletcher Moulton, L.J., as to the binding character of statements made by parties in the preliminary acts filed by them. (Ct. of App.) *The Seacombe* ... 142

5. *Admiralty rule as to division of loss.*—A barge in tow of a tug which had control of the navigation collided with a steamship. The tug and the steamship were both found to blame in the Admiralty Court. The barge was freed from blame. Held, that, as the barge in tow was completely under the control of the tug and did not stand to the latter in the relation of master and servant, the barge was to be considered as an innocent ship in no sense identified with the delinquent tug, and that there was no rule in force in the Court of Admiralty before the passing of the Judicature Act 173 which would prevent the owner of the innocent barge from recovering the whole of the damage which he had sustained from either wrongdoer. Judgment of the Court of Appeal (reported 12 Asp. Mar. Law Cas. 137; 106 L. T. Rep. 241; (1912) P. 21), affirming the judgment of the President, Sir Samuel Evans, set out in the report of the case in the Court of Appeal, affirmed. The appeal dismissed with costs. (H. of L.) *Owners of Steamship Devonshire v. Owners of Barge Leslie and others; The Devonshire* ... 210

See *Collision*, Nos. 2, 4.

6. *Collision between tow and third ship—Towage contract—Third-party notice.*—A tug towing a laden barge brought it into collision with another ship. The barge and her cargo were sunk. The owner of the cargo on the barge brought an action against the tug owners and the steamship owners to recover their damage. The tug owners served a third-party notice on the barge owners claiming an indemnity from the latter for any damage paid or costs incurred in the action against them on the ground that in the requisition under which the towage was performed such an indemnity was implied. Held, that no such indemnity was implied in the requisition, and that the third parties, the barge owners, should be dismissed from the action with costs. (Adm. Div.) *The Devonshire and St. Winifred* ... 314

UNLIQUIDATED DAMAGES.

See *Carriage of Goods*, No. 16.

UNMARKED GOODS.

See *Carriage of Goods*, No. 36.

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UNSEAWORTHINESS.
See *Carriage of Goods,* Nos. 6, 16, 19, 20, 22, 30, 35,

WAGES
See *Seaman,* Nos. 6, 7, 8, 10.

WAREHOUSEMAN.
See *Carriage of Goods,* No. 29.

WARRANTY OF SEAWORTHINESS.
See *Marine Insurance,* No. 3.

WAR RISK.
See *Carriage of Goods,* No. 52—*Marine Insurance,* Nos. 17, 25.

WARSHIP.
See *Collision,* Nos. 1, 6, 23, 28—*Registrar and Merchants,* No. 3.

WEIGHING AND MEASURING.
See *Port of London,* No. 2.

WHISTLE.
See *Collision,* Nos. 1, 9, 11.

WORKMEN'S COMPENSATION ACT 1906
See *Collision,* No. 16—*Practice,* No. 1—*Seaman,* Nos. 1, 2, 4, 5.

WRECK.
See *Marine Insurance,* No. 5—*Registrar and Merchants,* No. 3—*Seaman,* No. 6.

WRIT.
See *Practice,* No. 10.

ERRATA.

In the headnote of *The Cap Blanco* at page 399. the word " bail " should be substituted for the word " brief " in line 24.

REPORTS

OF

Cases Argued before and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 30, 31, *Feb.* 1, *and March* 21, 1911.

(Before Vaughan Williams, Farwell, and Kennedy, L JJ.)

Biddell Brothers *v.* E. Clemens Horst and Co. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Sale of goods—C.i.f. contract—Payment—Tender of shipping documents—Sale of Goods Act 1893 (56 & 57 *Vict. c.* 71), ss. 28, 32, 34.

Where a parcel of hops was sold under a c.i.f. contract and for "net cash" and the contract did not provide for "payment against shipping documents":

Held, reversing a decision of Hamilton, J. (reported 103 *L. T. Rep.* 661; 16 *Com. Cas.* 14) *by Vaughan Williams and Farwell, L.JJ., Kennedy, L.J. dissenting, that the buyers were not bound to pay for the hops on tender of the shipping documents, but were entitled to refuse payment until they had been given an opportunity to inspect the parcel.*

Observations on the effect of the law merchant upon the construction of commercial documents.

Appeal by the plaintiffs from a decision of Hamilton, J. in an action tried by him without a jury.

The plaintiffs' claim was for damages in respect of breaches of two agreements.

On the 13th Oct. 1904 the defendants entered into an agreement with Messrs. C. Vaux and Sons Limited (hereinafter called the buyers) whereby the defendants agreed to sell to the buyers 100 bales equal to or better than choice brewing Pacific Coast hops of each of the crops of the years 1905 to 1912 inclusive.

The hops were to be shipped to Sunderland, and the buyers agreed to pay for the said hops at the rate of 90s. sterling per 112lb. c.i.f. to London, Liverpool, or Hull. Terms, net cash.

It was agreed that the contract was to be severable as to each bale, and the agreement contained a clause

That the sellers may consider entire unfulfilled portions of this contract violated by the buyers in case of refusal by them to pay for any hops delivered and accepted hereunder, or if that contract or any part of it is otherwise violated by the buyers. Time of shipment to place of delivery or delivery at place of delivery during the months inclusive of October to March following the harvest of each year's crop.

On the 21st Dec. 1904 the defendants entered into a further agreement with the buyers whereby they sold them fifty bales of British Columbia hops equal to or better than choice brewing Pacific Coast hops of each of the crops of the years 1906 to 1912 inclusive, the material terms of which were identical with those of the former contract.

On the 11th Aug. 1908 Messrs. Vaux and Sons Limited assigned all their rights and benefits under these contracts to the plaintiffs.

On the 29th Jan. 1910 the defendants, by letter of that date, offered to ship to the plaintiffs 150 bales of hops of the 1909 crop according to the agreement, and they alleged that the plaintiffs on the 1st Feb. 1910 required them as a condition precedent to the shipment of the said hops to submit samples of the hops to be so shipped, and said they would only pay for the hops against the examination of each bale. The plaintiffs alleged that they required the defendants to ship and deliver the hops in accordance with the terms of the two agreements, but that the defendants refused to ship or deliver the hops to the plaintiffs, and they claimed 787*l*. 10*s*. damages.

By their defence the defendants alleged that, as the contract was a c.i.f. contract, payment was to be net cash against documents, and they alleged that by reason of the plaintiffs' violation of the entire unfulfilled portion of each of the agreements, the defendants refused, by letter of the 5th Feb. 1910, to perform the agreements further. The defendants counter-claimed 525*l*. damages for the plaintiffs' refusal to take and pay for the 150 bales of the 1909 crop in accordance with the agreement.

The Sale of Goods Act 1893 (56 & 57 Vict. c. 71) provides:

Sect. 28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions—that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Sect. 32 (1):

Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer,

(*a*) Reported by Edward J. M Chaplin, Esq., Barrister at-Law.

delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be a delivery of the goods to the buyer.

Sect. 34:

(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Hamilton, J. held that where goods were sold under the terms of a c.i.f. contract and for "net cash" the buyer was bound to pay for the goods on tender of the usual shipping documents, even when the goods had not arrived at their first destination, and he gave judgment for the defendants.

The plaintiffs appealed.

The arguments submitted in the court below were substantially repeated, and the cases there cited were again referred to.

Shearman, K.C. and *Eustace Hills* (*Leslie Scott*, K.C. with them) for the plaintiffs.

Atkin, K.C. and *George Wallace* for the defendants.

Cur. adv. vult.

March 21.—The following judgments were read:—

VAUGHAN WILLIAMS, L.J.—I am going, in the first instance, to deal with this case quite apart from any difficulties which arise on the construction of the peculiar conditions of this particular contract, and as if the words were simply, "the parties of the second part shall pay for the said hops at the rate of 90s. sterling per 112lb., c.i.f., to be shipped to Sunderland. Terms net cash." It was argued before Hamilton, J., on behalf of the defendants, that the terms net cash in a c.i.f. contract necessarily mean "cash against documents," and that a c.i.f. contract is performed by the vendor shipping goods of the description specified in the contract, effecting a proper insurance thereon, and then tendering to the buyer the documents representing the goods—*i.e.*, the indorsed bill of lading, invoice, and policy—and that thereupon the buyer has to pay for the goods whether they have arrived or not. Hamilton, J. affirmed the proposition just set forth as to performance of a c.i.f. contract by the seller, but in no way based his conclusion on the assumption that "Terms net cash" means "cash against documents," and expressed his opinion that the words "Terms net cash" in themselves mean only, in the absence of proof of trade custom or trade meaning, no credit and no deduction by way of discount or rebate or otherwise, which the law would have implied. The judgment of the learned judge is based primarily not on *Ireland and others* v. *Livingston* (1 Asp. Mar. Law Cas. 389 (1872); 27 L. T. Rep. 79; L Rep. 5 H. L. 395, 406), or the opinion of Blackburn, J. therein stated, nor indeed upon any other authorities upon the meaning of the terms "cost, freight, and insurance," but is based upon the proposition that the terms c.i.f. "are now settled and I hope I may add well understood." Hamilton, J. goes on to say: "It is not and cannot be contended but that the seller under a c.i.f. contract has first of all to arrange to put on board a ship at the port of shipment goods of the description contained in the contract; secondly, to arrange for a contract of affreightment under which they will be delivered at the destination contemplated in the contract; thirdly, to arrange for an insurance upon the usual terms current in the trade available for the benefit of the buyer, and he has then got to make out an invoice in the manner described by Blackburn, J. in *Ireland* v. *Livingston*, or in some other manner which will express the same thing; and, finally, he has to tender to the buyer those documents so that the buyer may know what freight he has to pay in order to obtain delivery of the goods, if they are intact, or so that he may recover for the loss of them, if they have gone to the bottom."

The plaintiffs contended that in the absence of words providing for payment against shipping documents unless they accepted a transfer of the bill of lading the price was not to be paid until they had had the opportunity of examining the shipment, which could not be done till after the arrival of the ship in this country. There is no evidence as to the practice or course of business between the parties to the contract of the 21st Dec., which was a contract under which the defendants entered into an agreement to sell a quantity of bales of British Columbian hops equal to or better than choice brewing Pacific Coast hops of each of the crops of the years 1906 to 1912 inclusive, the said hops to be shipped c.i.f. to Sunderland; but I understood from counsel for the defendants that the policies of insurance were taken out in the name of the defendants, and that the bills of lading were given out by the ship in the name of the defendants. But as in the first instance I dealt with a c.i.f. contract independently of special clauses in this contract, so I propose to deal with this case independently of *jus disponendi*, the risk under the policy of insurance, or the retention by the defendants of possession under bill of lading until indorsed in exchange for the price, and seek only to determine what is the obligation of payment under a c.i.f. contract which does not state when or under what conditions the payment of the price is to be made and which does not contain a provision that payment of the price is to be made against shipping documents. Such a provision is admittedly a very usual provision, but the mere fact that it is a usual provision does not justify the reading of such a provision into the contract of sale and purchase, but rather leads to an opposite conclusion in a case where you do not find this form of words. The observations of Martin and Parke, B B, in giving their opinions in answer to questions put to the judges by the House of Lords in *Gibson* v. *Small* (1852, 4 H. L. Cas. 353), indicate the view that even in the case of a commercial document the court generally should not read into it a condition which is not expressed unless on the basis of a custom or understanding either proved in evidence long notoriously prevalent and adopted and acted upon in courts of law, in which latter case courts of law would take judicial notice of it without requiring any averment or proof in the particular case, and act upon it and apply it in precisely the

same manner as a rule of law. The case of *Gibson* v. *Small* (*sup.*) was an action on a policy, and the question was whether by the law of England, in a time policy effected on a vessel then at sea, there was an implied condition that the ship should be seaworthy on the day on which the policy is intended to attach. It was held that there was no such implied condition. Martin, B., in his answer to questions put by the House of Lords, says (at p. 370): "The question, therefore, really is, 'Has the existence of such a condition or warranty been notoriously prevalent amongst persons engaged in the business of marine insurance?' and for the present purpose it must be shown that the courts of law have adopted and acted upon the principle of it." Parke, B. says (at p. 396): "The whole of the law upon this subject depends upon one question, whether there is any sufficiently distinct and clear authority in the common law for annexing any condition of this sort to a policy of assurance for time. The policy is a written instrument, which contains a number of express stipulations, but none on the subject of seaworthiness. . . . If, then, there is any such warranty or condition, it must be added to the written policy, as an incident annexed to the contract; and that, either by the usage of trade, or by the common law of the land; from the nature of the policy itself, there is no other way in which it can be added. The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable. This is explained in the case of *Hutton* v. *Warren* (1836, 1 M. & W. 475). But in this case there is no evidence stated on the record of such usage; and none such can be supposed to exist, unless there is evidence of it. Such a condition may, however, be annexed as a necessary incident by the common law. The simple question is, Does the common law annex any such incident? An examination of the authorities, judicial decisions, and dicta, and of text-writers on the common law, from which we derive our knowledge of that law, leaves us without any satisfactory proof that the same implied warranty or condition as to seaworthiness at the commencement of the risk, which confessedly is annexed to voyage policies, or any warranty or condition as to seaworthiness is annexed to time policies." The examination by Lord Campbell in the House of Lords and by Parke, B. in his answer of the grounds on which the Court of Queen's Bench affirmed the existence of an implied warranty of seaworthiness in the case of a time policy from a supposition entertained by the judges of the Queen's Bench of the opinion of all the lawyers of modern times, or from the *obiter dicta* of some judges, show how little judges ought to imply conditions in written commercial contracts from such materials. The origin of the warranty of seaworthiness in the case of a voyage policy was an implication from the nature of the contract, and in the case of *Gibson* v. *Small* (*sup.*) it was sought to argue that a similar implication ought to be made in the case of a time policy. The House of Lords recognised that such a condition might be recognised in the case of a contract, and that it had been so recognised in the case of a voyage policy, but refused to make such an implication in the case of a time policy.

It is said that in the case of a c.i.f. contract an implication ought to be made that payment must be made against tender of shipping documents, and this whether the ship and goods have arrived or not. It is suggested as one of the reasons why this implication should be made that the goods under a c.i.f. contract are carried at the risk of the buyer and must be paid for whether the goods are lost at sea or not, because the policy is taken out on behalf of and in the interest of the buyer. I do not think that any such implication ought to be made, seeing that cash against documents is a term which is frequently included in a c.i.f. contract by express words, and, moreover, because I do not think that the admitted fact that an object of the c.i.f. policy is to enable the goods at sea to be commercially dealt with before the ship arrives compels the buyer to take advantage of this opportunity if for any reason he is not disposed to do so. There is no evidence in the present case of any law merchant or custom which reads such words as payment to be made against shipping documents or words to that effect into the contract. The judgment of Hamilton, J. does not rest on any such basis; what he says is that, because it is now well settled and well understood that the meaning of the terms "cost, freight, and insurance" is that, the seller having tendered the bill of lading, invoice, and policy which complete the delivery of the goods in accordance with the agreement in the contract, the buyer is bound to pay the price of the goods against shipping documents before the arrival of the goods in this country. I gather from the words of the learned judge when dealing with the plaintiffs' case (16 Com. Cas. 17), "A judge, at any rate when he takes the Commercial List, aspires to be both a man of business and a lawyer, but if he cannot be both he must be content to be as nearly a lawyer as he can, and I think the law is as I have laid it down with regard to the plaintiffs' claim," that his decision is based upon his personal knowledge in the Commercial Court. This, of course, is a statement of great weight which must impress everyone, but I do not think we ought to allow this to be the basis of a decision between litigants in an action in a case where there is no evidence whatsoever either as to local usage in England or as to such general usage in England or foreign countries as is a condition of the admission and adoption as part of the law merchant of England of any legal proposition outside the common law. Nor do I think that Bowen, L.J. in *Sanders* v. *Maclean* (1883, 49 L. T. Rep. 462; 11 Q. B. Div. 327), when he made the observation on p. 343 of the Q. B. Div. report, meant that the personal knowledge of an individual judge could suffice for the introduction into the law merchant of England of any proposition outside the common law. The law merchant may, no doubt, govern even the construction of a written commercial document, but in this case, as indeed in every case, there must be evidence in fact of the commercial usage before there can be admission or adoption. When it is said that mercantile law is acted upon by the courts without proof of usage, this means after it has in earlier cases been proved and adopted.

I am not forgetting that in some cases classic legal authorities have been recognised as sufficient evidence of mercantile usage, especially international usage. But even then the authority is in terms recognised as sufficient evidence before the courts give judgment recognising the usage; but no such evidence was referred to in this case. It seems clear on the authorities that the law merchant must be proved as a fact in the sense that the mercantile usage which is recognised as part of the law merchant must be proved, and the fact must, to use the words of Wilmot, J. in *Edie* v. *East India Company* (1761, 1 W. Bl. 295, 299) be reiterated. Once thus recognised the usage becomes part of the law of England and not a mere local usage or custom. Again, Lord Campbell in the House of Lords, in *Brandao* v. *Barnett* (1846, 12 Cl. & F. 787, 805), says: "When a general usage has been judicially ascertained and established, it becomes a part of the law merchant which courts of justice are bound to know and recognise. Such has been the invariable understanding and practice in Westminster Hall for a great many years; there is no decision or dictum to the contrary, and justice could not be administered if evidence were required to be given *toties quoties* to support such usages, and issue might be joined upon them in each particular case."

But in the present case no decision was cited in which the mercantile law relied on had been judicially ascertained and established, and no evidence was given in support of the usage of merchants and shipowners to treat a c.i.f. contract as meaning that cash must be paid against documents whether or not the contract in words makes such a provision. On this point I have only to add that I do not think that the judgment of Kennedy, L.J. (then Kennedy, J.) in *Polenghi* v. *Dried Milk Company* (10 Com. Cas. 42) is in any way inconsistent with the conclusion I have arrived at. On the contrary, it rather affirms the view. Having arrived at this conclusion, it is not necessary that I should give judgment on the difficultiesof construction which arise in this case, nor that I should deal with the argument that the construction put by Hamilton, J. on the c.i.f. contract is inconsistent with the provisions of the Sale of Goods Act 1893, and in particular sect. 28. As to sect. 28 I am not satisfied that there is anything in the present contract which excludes its operation. As to the construction of the contract, I certainly think that the two clauses referred to by Hamilton, J., the first of which contains the words, "The sellers may consider entire unfulfilled portion of this contract violated by the buyers in case of refusal by them to pay for any hops delivered and accepted hereunder," and the second of which contains the words, "Time of shipment to place of delivery or delivery at place of delivery during the months (inclusive) of October to March following the harvest of each year's crop," and the third clause, "If for any reason" the buyers "shall be dissatisfied with or object to all or any part of any lot of hops delivered hereunder, the" sellers "may within thirty days after receipt of written notice thereof ship or deliver other choice hops in place of those objected to," taken together make it very difficult to construe this c.i.f. contract as containing an implied condition for payment of "cash against documents." The appeal therefore must be allowed, and judgment entered for the plaintiffs. As to the amount, I think we have jurisdiction to send the inquiry as to amount to be dealt with by an official referee. (*a*) I think I ought to add that I respectfully differ entirely from the views expressed by Hamilton, J. as to the principle laid down by him when dealing with the counter-claim for ascertaining the loss.

Farwell, L.J.—The first question in this case is whether a contract for hops "c.i.f. to London, terms net cash," but without the words "against documents," means that the price is to be paid against documents, or after the buyer has had the opportunity of inspecting the goods. Hamilton, J. has held, and I agree with him, that the words "terms net cash" add nothing to the contract to pay: they mean only "no credit and no deductions by way of discount or otherwise." The neat question, therefore, remains, whether the fact that the contract is c.i.f. is by itself sufficient to import "payment against documents," or, in other words, whether a contract which does not contain those words is to be read as a contract which does contain them. Now, apart from rectification, with which we are not concerned in this case, there are three ways only in which a provision not expressed in a written document can be added to it. The first is where the words used are elliptical; the second is usage, including in that term the law merchant, whereby, under certain limitations, terms may be added to or phrases may be explained and construed in a written document; and the third is necessary implication as explained in *The Moorcock* (6 Asp Mar. Law Cas. 357, 373 (1889); 60 L. T. Rep. 655; 14 Prob. Div. 64) and *Hamlyn and Co.* v. *Wood and Co.* (65 L. T. Rep. 287; (1891) 2 Q. B. 488, 491), where Lord Esher says: "The court has no right to imply in a written contract any such stipulation, 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. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." The words of the contract here—namely, the parties of the second part shall pay for the said hops at the rate of ninety (90) shillings sterling per 112lb. c.i.f. to London"—are obviously elliptical so far as "c.i.f." is concerned, and on construction mean that the 90s. is to include cost, insurance, and freight, which are to be provided by the seller on behalf of the buyer, but they express no time or term of payment: payment is dealt with in the next sentence—"terms net cash"—and here is the natural and usual place to add "against documents" or the like, if the parties so intend. But Hamilton, J. himself says that "net cash" does not mean "against documents," and I can find nothing in the whole of the words read together, or in any of them read separately, from which any such meaning can be extracted on any rules of construction known to the law. It is, in my opinion, equally impossible to add any term by usage. Usage must be proved by evidence, or must have been so often proved as to be part of

(*a*) By agreement the court at a later date itself assessed the amount of damages recoverable by the plaintiffs.

the law merchant, and to be the subject of judicial knowledge: (see *Gibson* v. *Small*, 4 H. L. Cas. 353), but here no evidence was tendered, nor was it suggested, that there was any usage or law merchant. It is common ground that in the majority of c.i.f. contracts the words "cash" or "bills" or the like "against documents" are expressly inserted, and this very fact is almost conclusive that there is no usage or law merchant, for usage implies a term outside the written document, and is, *primâ facie*, negatived by finding an express clause usually inserted in written documents of the class in question. The clauses usually inserted in a particular form of written contract are quite distinct from clauses not so inserted but added by usage or law merchant: the usage or law merchant dispenses with the express insertion. The omission from a contract of a clause usually inserted in contracts of that class is evidence of the intention of the parties that such clause shall not apply, not that it shall: nor can the court infer from the express insertion of a particular clause in most of the contracts of a particular class any usage justifying the addition of such a clause to a contract of that class in which it is not inserted. If Hamilton, J. had ruled that there was any usage so often proved that he had judicial knowledge of its existence, to the effect that a c.i.f. contract always implied "cash against documents," whether so expressed or not, I should probably have deferred to his great knowledge and experience in commercial cases, but he has not done so, nor has counsel suggested that any such usage has ever been proved, and they could hardly be ignorant of its existence if it had any; in the absence of any such usage the judge cannot *mero motu* add to the law merchant, as to which Foster, J. says in *Edie* v. *East India Company* (*sup.*): "Much has been said about the custom of merchants. But the custom of merchants, or law of merchants, is the law of the kingdom and is part of the common law. People do not sufficiently distinguish between customs of different sorts. The true distinction is between general customs (which are part of the common law) and local customs (which are not so). This custom of merchants is the general law of the kingdom, part of the common law"; and Wilmot, J. says: "The custom of merchants is part of the law of England; and courts of law must take notice of it, as such. There may indeed be some questions depending upon customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful. And even there the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law." Indeed in the court below the respondents' counsel argued on the construction of the words "net cash," and did not suggest that "c.i.f." could be construed as including "payment against documents." This reticence is important when the question is as to the existence of usage—a matter that could hardly be unknown to the counsel of experience who argued this case. There remains, therefore, only the third ground. At common law the delivery of goods by the seller and acceptance and payment by the buyer are regarded as concurrent acts, the buyer being entitled to a reasonable opportunity for inspection before he accepts and pays. It is thus expressed by Rolfe, B. in *Startup* v. *Macdonald* (1843, 6 Man. & G. 593, 610): "Now, it may be observed, that in every contract by which a party binds himself to deliver goods, or pay money, to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or the payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to deliver or to pay can amount only to a tender. But the law considers a party who has entered into a contract to deliver goods or pay money to another as having, substantially, performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods, or the money, tendered in order to ascertain that the thing tendered really was what it purported to be. Indeed without such an opportunity an offer to deliver or pay does not amount to a tender." The general rule, therefore, is payment against inspected goods; and this is simple enough where both parties and the goods are together in the same place. But when goods are shipped from across seas the contract becomes complicated by the fact that the delivery, although not complete until acceptance, commences on a c.i.f. contract on shipment, and the property passes, subject to certain qualifications not necessary now to consider, when the goods are shipped; if the seller fails to ship, or ships goods not according to contract, the breach by him is committed there and then: (*Parker* v. *Schuller and another*, 17 Times L. Rep. 299; *Crozier, Stephens, and Co.* v. *Auerbach*, 99 L. T. Rep. 225; (1908) 2 K. B. 161). But the buyer's acceptance and duty to pay is not on shipment. The c.i.f. contract usually provides for payment against documents, a practice convenient for both parties, as the bill of lading enables financial dealings on the credit of the goods to be carried out before the arrival of the goods; but no one has ever suggested that on a c.i.f. contract, silent as to time of payment, the buyer is bound to pay on shipment of the goods. The result must therefore be that the ordinary rule of law is not displaced—namely, payment against examined goods. It is said that this cannot be so, because under the contract in common form "c.i.f. payment against documents" the buyer has to unload and warehouse the goods at his own expense; whereas the seller would have to bear such expense if he has to afford the buyer an opportunity of inspection before payment can be required. But that is only to state the different consequences flowing from two contracts expressed in different terms: there is no such necessity for any implication as to justify the court in altering the usual incidence of burdens under a contract silent as to this particular burden; and actual physical necessity is not suggested, and would indeed be disproved by the fact that in this very case such inspection before payment has been given by the sellers in one case at any rate during the existence of this contract. I do not suggest that the conduct of the parties under the contract is admissible as evidence of the construction of the contract; I think that it is not—although it would be so in a suit to

rectify on the ground of common error—but it is admissible to show that there is in fact no such impossibility as to render the contract impossible of performance without the addition of the terms suggested. In my opinion Lord Blackburn's statement in *Ireland* v. *Livingston* (*sup.*) throws no light at all on the question before us, and I cannot follow the reasoning of Hamilton, J. in this case on pp. 14 and 15 of the report in 16 Com. Cas. I will assume that as a matter of usage the seller is bound to tender the bill of lading to the buyer when it arrives, and, if the buyer accepts it, he must, of course, pay for the goods on such acceptance, because the delivery of the bill of lading is a symbolical delivery of the goods, and, if the goods are accepted, the right of antecedent (though not of subsequent) inspection before payment is thereby waived, just as it would be in the case of acceptance of the goods themselves without inspection. But I fail to follow the consequence said by the learned judge to ensue. The duty on A. to tender to B. a document before he can require payment does not impose on B. a duty to accept such document as equivalent to goods, if he has a right to inspect such goods before accepting and paying for them. B. has has the option of choosing between two alternative rights: he may accept symbolical delivery or actual delivery, but in the absence of express contract it is at his option, not at the seller's. In the great majority of cases, it suits both buyer and seller better to give and accept symbolical delivery by the bill of lading, and the existence and exercise of this option explains why in cases where the c.i.f. contract does not contain the words "cash against documents," or the like, the contract is in fact often so carried out. But this is no evidence of usage for the buyer to accept in all cases, or, in other words, to waive the option. If the goods were lost at sea, the option would at once cease because inspection would have been rendered impossible, and the buyer would be bound to pay against documents. Then it is said that *Parker* v. *Schuller and another* (*sup.*) is an authority against the appellants. In my opinion, that case has no bearing on the present. The question there related solely to the duty of the seller and the place where the performance of the contract by him was to be carried out. We are here concerned with the duty of the buyer. No one doubts that the seller's breach of a c.i.f. contract arises on failure to ship, but no one suggests that the buyer's duty to pay arises on such shipment; his duty depends on the terms of the contract, and never came into question in *Parker* v. *Schuller and another* (*sup.*) The basis of my judgment is that the buyer has a common law right (now embodied in the Sale of Goods Act) to have inspected goods against payment, and this cannot be taken away from him without some contract expressed or implied, and here I can find neither. In this particular, and very ill-drawn, contract there are words, especially in the clause referring to refusal to pay "for any hops de ivered and accepted hereunder," which bear out the conclusions at which I have arrived, but I prefer to rest my judgment on the general grounds above stated. It is said that this decision will upset mercantile practice, but I fail to see any difficulty in parties who desire it adding against documents" to their contracts—a course hitherto adopted in the majority of c.i.f. contracts. In my opinion the appeal should be allowed and judgment entered for the plaintiffs.

KENNEDY, L J.—This is an appeal of the plaintiffs in the action against the judgment of Hamilton, J., sitting as a judge without a jury for the trial of commercial cases in the King's Bench Division. The action before him comprised a claim of the plaintiffs for damages for breaches of two contracts, partly typewritten and partly printed, and a counter-claim of the defendants for breaches of the same contracts. So far as regards the claim of the plaintiffs which Hamilton, J. has dismissed, his judgment was, in my opinion, right, and, but for the contrary opinion of the other members of this court, from whom I have the misfortune to differ, I should have ventured to think the case a reasonably simple one. The material terms of the two contracts, with the conflicting contentions of the litigants thereon, are carefully stated by Hamilton, J. in the opening portion of his judgment, reported 103 L. T. Rep. 661; (1911) 1 K. B. 214; 16 Com. Cas. 8, 14, and it is needless for me to repeat them here at length. It is sufficient, in order to make clear the reasoning of my judgment, to summarise the statement of the learned judge. Each of the contracts in question is a contract for the sale of foreign hops of specified quality, to be shipped by the defendants, the sellers, from the Pacific coast to Sunderland, and to be paid for by the plaintiffs, the purchasers, at the rate of 90s. sterling per 112lb. c.i.f. to London, Liverpool, or Hull, terms net cash. No point arises, as the learned judge states, upon the question of the calculation of freight being to London, Liverpool, or Hull while the shipment was to Sunderland. Possibly the explanation of this arrangement is that Messrs. C. Vaux and Sons Limited, the original purchasers, who assigned their interest under the contracts to the plaintiffs, carried on business at Sunderland. Anyhow, the fact is, as it has been treated throughout the argument, immaterial. The dispute between the parties is as to the conditions under which, according to the true interpretation of these contracts, the price is to be paid. The plaintiffs' case is that the price was not to be paid until they had been given an opportunity of inspecting the shipment, which could not be given until after its arrival in this country. The defendants contend that the plaintiffs' obligation was to pay for the hops, whether they arrived or not, against tender of the shipping documents. I agree with Hamilton, J., and indeed it was not disputed on the argument before us, that the plaintiffs in the correspondence clearly expressed their intention not to take delivery of the 1909 shipment (which is that to which this litigation is confined) except upon the terms of payment for which they now contend; and, therefore, if they are wrong in that contention, they relieved the defendants from the obligation to tender, and they have themselves broken these contracts so far as regards this particular shipment. Before litigation began the defendants, for the sake of peace, offered as a matter of grace to make the plaintiffs the reasonable and businesslike concession of attaching to the shipping documents certificates of quality of the Merchants' Exchange at San Francisco, or

other competent authority. But this offer was rejected by the plaintiffs, and each of the parties is now standing upon his rights, as he alleges, under the documents which contain the contracts. The court, therefore, has in the present case to decide what are the true conditions of the right of the seller to payment under a c.i.f. contract, if that commercial contract is to be performed strictly according to its tenor. Hamilton, J. has unhesitatingly decided in favour of the defendants. In his opinion it was unnecessary to refer to authorities as to the meaning of the terms "cost, freight, and insurance," because those terms are now well settled and, as he hoped he might add, well understood. But he has given a reasoned judgment, to which I can discover no answer in the argument of the appellants' counsel, which was for all practical purposes the same as that which appears from the report of the case to have been put forward by them unsucessfully in the court below. But for the differing opinion of Vaughan Williams and Farwell, L.JJ., which, of course, raises in my mind a doubt of the correctness of my own, I should have been content to adopt that judgment as it stands. But, in the circumstances, and believing, as I do, that the matter of this appeal affects a large and important branch of import business, it is, I think, right that I should deal with the case in my own way although this will involve a much longer judgment than I should otherwise have thought necessary or justifiable. The plaintiffs'—that is, the appellants'—argument apart from a reference to certain subordinate and subsidiary printed clauses, to which I shall advert after dealing with the main question, hangs upon considerations arising from (a) the absence after the words "net cash" of such words as "against documents," or "in exchange for documents"; and (b) the provisions of sect. 28 and sect. 34 of the Sale of Goods Act 1893 in respect of the buyer's right to have delivery in exchange for the price and to have an opportunity to examine goods tendered for acceptance. In regard to the wording of the contract, I do not think that the comment that the terms might have been more fully expressed helps one way or the other as to the interpretation of the contract as it stands. All that can be said is that, the condition of payment not being expressly stated except in so far as the words "net cash" negative payment by acceptance and the allowance of deduction or discount, it must be settled by the interpretation of the document according to established principles of mercantile law. If any implication is necessary, the law, as stated by Bowen, L.J. in his judgment in *The Moorcock* (*sup.*), desires to give such business efficacy to the transaction as must have been intended, at all events, by both parties, who are business men. This is not a case, as it seems to me, of a contract the terms of which present ambiguity or conflict. There is no contrariety between "cost, freight, and insurance, net cash," and "cost, freight, and insurance, net cash against documents." Both the fuller and the shorter form are in every-day use; examples of both can be found within the covers of modern law reports (see, for example, *Parker* v. *Schuller and another*, *sup.*, and *Sanders* v. *MacLean*, *sup.*), and, although it is probable, I should think—and the present litigation certainly vindicates its expediency—that the fuller form is the more common, it has, so far as I am aware, never before this case been suggested that a contract "cost, freight, and insurance, net cash," or a contract "cost, freight, and insurance, payment by acceptance," may not imply "against documents" in each case. The well-known passage, in the opinion of Lord Blackburn (then Blackburn, J.), in *Ireland* v. *Livingston* (*sup.*), referred to by Hamilton, J., in which a great master of the commercial law stated the course of business in the performance of a cost, freight, and insurance contract as very usual and well understood, plainly cannot be cited for the respondents as an actual decision in their favour, for the statement itself is *obiter*, and the particular contract in *Ireland* v. *Livingston* (*sup.*) contained the words "payment by acceptance on receiving shipping documents." But Lord Blackburn's opinion was delivered in the House of Lords forty years ago, and, speaking for myself, I do not recollect hearing it suggested, until I listened to the argument of the plaintiffs' counsel in this case, that the value of that opinion as setting forth the relative rights and duties of seller and buyer in the ordinary course of procedure under a c.i.f. contract wholly depended upon the insertion of "against (or "in exchange for") shipping documents" after the statement of the mode of payment by cash or by acceptance, as the case may be. Let us, however, leave out of sight altogether for the present all question of usage or judicial recognition of usage. The application of the principles and rules of the common law, now embodied in the Sale of Goods Act 1893, to the business transaction embodied in the c.i.f. contract appears to me to be decisive of the issue between these parties. Let us see, step by step, how according to those principles and rules the transaction specified in such a c.i.f. contract as that before us is, and, I think, must be, carried out in order to fulfil its terms. At the port of shipment—in this case San Francisco—the vendor ships the goods intended for the purchaser under the contract. Under the Sale of Goods Act, sect. 18, by such shipment the goods are appropriated by the vendor to the fulfilment of the contract, and, by virtue of sect. 32, the delivery of the goods to the carrier—whether named by the purchaser or not—for the purpose of transmission to the purchaser is *primâ facie* to be deemed to be a delivery of the goods to the purchaser. Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c.i.f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use, if the goods should be lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative (see the judgments of Bramwell and Cotton, L.JJ. in *Mirabita* v. *Imperial Ottoman Bank* (38 L. T. Rep. 597; 1878, 3 Ex. Div. 164). It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative as consignee. But the vendor, in the absence of special agreement, is not yet in a position to demand payment from the purchaser;

his delivery of the goods to the carrier is according to the express terms of sect. 32 only "*prima facie* deemed to be a delivery to the buyer," and under sect. 28 of the Sale of Goods Act as under the common law (an exposition of which will be found in the judgments of the members of the Exchequer Chamber in the old case of *Startup* v. *Macdonald* (*sup.*) a tender of delivery entitling the vendor to payment of the price must, in the absence of contractual stipulation to the contrary, be a tender of possession. How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading, accompanied in case the goods have been lost in transit by the policy of insurance. The bill of lading in law and in fact represents the goods. Possession of the bill of lading places the goods at the disposal of the purchaser. "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be." That is the language of Bowen, L.J. in *Sanders* v. *MacLean* (*sup.*). The meaning of "delivery" under the Sale of Goods Act is defined by sect. 62 to be "voluntary transfer of possession from one person to another." Such delivery, as the learned draftsman of the Act and its editor remarks in his note to this section, may be either actual or constructive; and, as Bowen, L.J. has pronounced, in the case of sea-borne goods the delivery of the bill of lading operates as a symbolical delivery of goods. But then I understand it to be objected on behalf of the plaintiffs: "Granted that the purchaser might, if he pleased, take this constructive delivery and pay against it the price of the goods, what is there in the 'cost, freight, and insurance' contract which compels him to do so? Why may he not insist on an option of waiting for a tender of delivery of the goods themselves after having had an opportunity of examining them after their arrival?' There are, I think, several sufficient answers to such a proposition. In the first place, an option of a time of payment is not a term which can be inferred, where the contract itself is silent. So far as I am aware, there is no authority for the inference of an option as to times of payment to be found either in the law books or in the Sale of Goods Act. Secondly, if there is a duty on the vendor to tender the bill of lading, there must, it seems to me, be a corresponding duty on the part of the purchaser to pay when such tender is made. Very relevant on this point is the language of Brett, L.J. in his judgment in *Sanders* v. *MacLean* (*sup.*), which applies to this class of contract the general law expounded by Bowen, L.J. in *The Moorcock* (*sup.*). He said: "The stipulations which are inferred in mercantile contracts are always that the party will do what is mercantilely reasonable"; and if it be the duty implied in the c.i.f. contract, as held by Brett, L.J. in that case, that the vendor shall make every reasonable exertion to send forward and tender the bill of lading as soon as possible after he has destined the cargo to the particular vendee, it is, I venture to think, "mercantilely reasonable" that the purchaser should be held bound to make the agreed payment when delivery of the goods is constructively tendered to him by the tender of the bill of lading, either drawn originally in his favour or indorsed to him, and accompanied, in case of loss, by the policy of insurance. For thereunder, as the bill of lading with its accompanying documents come forward by mail, the purchaser obtains the privilege and absolute power of profitably dealing with the goods days or weeks or, perhaps, in the case of shipments from a distant port, months, before the arrival of the goods themselves. This is, indeed, the essential and peculiar advantage which the buyer of imported goods intends to secure by a c.i.f. contract. But, in truth, the duty of the purchasers to pay against the shipping documents, under such a contract as the present, does not need the application of that doctrine of the inference in mercantile contracts that each party will do what is "mercantilely reasonable," for which we have the great authority of Lord Esher. The plaintiffs' assertion of the right under a cost-freight, and insurance contract to withhold payment until delivery of the goods themselves and until after an opportunity of examining them cannot possibly be effectuated except in one or two ways. Landing and delivery can rightfully be given by the shipowner only to the holder of the bill of lading. Therefore, if the plaintiffs' contention is right, one of two things must happen. Either the seller must surrender to the purchaser the bill of lading, whereunder the delivery can be obtained, without receiving payment, which, as the bill of lading carries with it an absolute power of disposition, is in the absence of a special agreement in the contract of sale so unreasonable as to be absurd; or, alternatively, the vendor must himself retain the bill of lading, himself land and take delivery of the goods, and himself store the goods on quay (if the rules of the port permit), or warehouse the goods for such time as may elapse before the purchaser has an opportunity of examining them. But this involves a manifest violation of the express terms of the contract, "90s. per cwt., cost, freight, and insurance." The parties have in terms agreed that for the buyer's benefit the price shall include freight and insurance, and for his benefit nothing beyond freight and insurance. But if the plaintiffs' contention were to prevail, the vendor must be saddled with the further payment of those charges at the port of discharge which *ex necessitate rei* would be added to the freight and insurance premium which alone he has by the terms of the contract undertaken to defray. Finally, let me test the soundness of the plaintiffs' contention that according to the

true meaning of this contract their obligation to pay arises only when delivery of the goods has been tendered to them after they have had an opportunity of examination, in this way: Suppose the goods to have been shipped, the bill of lading taken, and the insurance for the benefit of the buyer duly effected by the seller, as expressly stipulated in the contract. Suppose the goods, then, during the ocean transit to have been lost by the perils of the sea. The vendor tenders the bill of lading with the insurance policy and the other shipping documents (if any) to the purchaser, to whom from the moment of shipment the property has passed and at whose risk, covered by the insurance, the goods were at the time of loss. Is it arguable that the purchaser could be heard to say, "I will not pay because I cannot have the delivery of and an examination of the goods"? But it is just this which is necessarily involved in the contention of these plaintiffs. The seller's answer, and I think conclusive answer, is, "You have the bill of lading and the policy of insurance." It is noticeable that in the course of the argument in *Tregelles* v. *Sewell* (1862 7 H. & N. 579) Martin, B. observes: "The purchaser was to have a policy of insurance which is usually considered as equivalent to the goods," and earlier in the same argument Wilde, B., at p. 578, asked: "If the meaning is 'to be delivered in Hamburg' what necessity is there for insurance?" The contract in that case was a contract in the fuller form—namely, against documents—but it does not seem to me that that affects the value of those observations as to the relative rights of the buyer and seller.

I have only to add as to this, the main question in the present case, a few words in regard to sects. 28 and 34 of the Sale of Goods Act. As I have already said, my own view as to sect. 28 is that the section is satisfied by the readiness and willingness of the seller to give possession of the bill of lading. I am, however, far from saying that the view which is suggested in the course of Hamilton, J.'s judgment—namely, that when the parties have entered into a c.i.f. contract they have "otherwise agreed"—is not one which could be supported, as I hold that a similar view is the true view also in regard to sect. 34, sub-sect. 2. As to sect. 34, sub-sect. 1, there is no difficulty. No one suggests that the plaintiffs, if they pay against documents, become thereby precluded from rejecting the goods if on examination after their arrival they are found to be not goods in accordance with the contract, or from recovering damages for breach of contract if they prefer that course. So far I have tested the validity of the appellants' contention that under a simple c.i.f. contract the seller is entitled to payment only against delivery of the goods themselves and after examination of the goods, altogether apart from authority, by applying established principles and rules of law to a c.i.f. contract so as to give it in Bowen, L.J.'s language such efficacy as must have been intended by the parties to it as business men. But, in truth, the judgment of the Court of Appeal (Smith, M.R., and Collins and Romer, L.JJ.) in *Parker* v. *Schuller and another* (*sup.*) cannot, in my judgment, be reconciled with this contention of the present appellants. In *Parker* v. *Schuller and another* (*sup.*) the case came before the court on an appeal from the judge in chambers who had affirmed an order giving the plaintiffs leave under Order XI., r. 1 (*e*), to issue a writ and serve the defendant to an action in contract, who was a foreigner out of the jurisdiction, with notice of the writ. The validity of the judge's order depended, according to the terms of Order XI., r. 1 (*e*), upon the existence of a breach, or alleged breach, within the jurisdiction. The contract was in every essential point identical with the contract in the present case. It was a simple c.i.f. contract, without mention of payment against documents, the goods sold being goods to be shipped from Germany to Liverpool. The goods had not been shipped. The breach alleged by the plaintiffs in the indorsement upon the writ of summons and in the affidavit in support of their application was the non-delivery of the goods themselves to them in Liverpool. The judge in chambers, Farwell, J., who heard the application *ex parte* in the first instance, and Lawrance, J., who affirmed his order, had held that the non-delivery of the goods in Liverpool did, as the plaintiffs contended, constitute a breach of the contract within the jurisdiction. The Court of Appeal reversed their decision, holding that this non-delivery of the goods themselves upon which the plaintiffs relied in their writ and the affidavit in support of their application did not constitute a breach of the c.i.f. contract; and there is, I think, a noteworthy confirmation of Hamilton, J.'s opinion that the law on this point has long been treated as well settled in the fact that Mr. Horridge (now Horridge, J.), the counsel for the plaintiffs in *Parker* v. *Schuller and another* (*sup.*), expressly declined even to argue the point upon which his clients had obtained their order from the judges appealed from and upon which the plaintiffs in the present case base their appeal to this court, but endeavoured to uphold that order upon the ground, not relied upon in the writ or in the affidavit, that under the c.i.f. contract the seller is bound to deliver to buyer the bill of lading and the policy of insurance with the other shipping documents (if any), and that their unquestionable failure to do this constituted a breach within the jurisdiction which would justify the grant to his clients of the order for service of notice of the writ which they had obtained. According to the judgment of Hamilton, J., and my own also, Mr. Horridge's argument as to the obligation of the seller under a c.i.f. contract, not merely to ship the goods at the foreign port, but to deliver the shipping documents to his buyer here, was well founded, and the judgments of the Court of Appeal in *Parker* v. *Schuller and another* (*sup.*) contain nothing in conflict with that view. But all the members of the court declined to deal with any defence of the order appealed against which rested upon a breach other than that which was put forward in the plaintiff's writ of summons and affidavit; and, being clearly of opinion that under a c.i.f. contract there was no obligation on the seller to deliver the goods themselves in this country, they allowed the appeal. The case is so important that I think it is my duty to quote one passage from the judgment of the Master of the Rolls at p. 300 of the report in the Times L. Rep.: "Upon the appeal the alleged contract to deliver the goods at Liverpool was dropped, the contract being 'c.i.f. Liverpool,' and it was not argued that the contract was to deliver the goods at Liverpool. That was abandoned. The plaintiff was therefore wrong in his

application. It was not contended that a c.i.f. contract was a contract to deliver goods in this country." Then, after referring to Mr. Horridge's argument that the contract did bind the seller to deliver the shipping documents, the Master of the Rolls proceeded: "It was enough in the present case to say that that was not the cause of action indorsedon the writ of summons, nor the cause of action alleged in the affidavit upon which leave to issue the writ and to serve notice thereof out of the jurisdiction was granted. The claim was for non-delivery of the goods. It was not until the case came into this court that the plaintiff set up another cause of action. That could not be allowed."

The case of the plaintiffs on this present appeal that the defendants can demand payment only upon delivery of the goods logically depends upon the alleged obligation of the defendants to deliver the goods themselves in this country; and we cannot, it appears to me, reverse Hamilton, J.'s judgment in this case without holding, as a necessary conclusion, that this court decided wrongly in *Parker* v. *Schuller and another* (*sup.*) when it held, in regard to a simple c.i.f. contract, essentially identical with the c.i.f. contract in the present case, that it created no such obligation on the part of the seller. In regard to the subsidiary or supplemental clauses of the contracts in question, from which the plaintiffs' counsel sought, to some slight extent, to draw support for their interpretation of the principal or governing provisions, with which I have already dealt, I have really little or nothing to add to that which my brother Hamilton has said in considering this part of the plaintiffs' argument. These clauses are printed clauses not very clearly expressed; but apparently intended to meet certain possible contingencies which we have not to consider in deciding the present issue. They do not appear to me to throw any useful light upon the construction of the contracts in regard to the conditions of payment. I may add that the fact that there is a reference to delivery of goods in a c.i.f. contract was held in *Tregelles* v. *Sewell* (*sup.*) not sufficient to alter the effect of the c.i.f. terms. There the contract was in its fuller form—payment upon delivery of bill of lading and policy—but this does not affect the principle if the contracts are to be performed strictly according to their tenor. In my judgment, the judgment of Hamilton, J. was right, and this appeal, so far as relates to the plaintiffs' claim, should be dismissed. The only remaining question upon this appeal is as to the defendants' counter-claim. The learned judge, with some amount of doubt, has come to the conclusion, in regard to one of the two contracts, that the defendants had given sufficient proof of damage to the extent of 175*l.* They proved to his satisfaction an actual genuine bid of 70*s.* as the best they could get at auction in London on an offer to sell exactly on the terms of the contract in question. Hence a loss of 20*s.* on 175cwt. The question is whether or not this proof of damage ought to be treated as sufficient. I quite understand the reluctance of the defendants to incur the great expense of calling witnesses from San Francisco or of obtaining evidence there on a commission to prove what was actually done in regard to the disposal of the hops, which, but for the plaintiffs' wrongful (as I think) repudiation of the contract, would have been appropriated to the fulfilment of it. But, in the absence of such evidence, I feel myself constrained to hold, though not without doubt, that the legal requirement of proof of substantial damage in such a case, according to the authorities (see especially the judgment of James, L.J. in *Dunkirk Hall Colliery Company* v. *Lever*, 39 L. T. Rep. 239; 9 Ch. Div., at p. 25), and as laid down in sect. 50 of the Sale of Goods Act 1893, has not been fulfilled. The utmost, therefore, that the defendants can claim would be nominal damages. (*a*)

Appeal allowed.

Solicitors for the plaintiffs, *Nicholson, Graham, and Jones*; for the defendants, *Parker, Garrett, and Co.*

March 2, 3, 6, 7, *and April* 11, 1911.

(Before Vaughan Williams, Farwell, and Kennedy, L.JJ.)

The Hero. (*b*)

Collision—Single ships approaching squadrons—Whistle signals—"Course authorised or required by these rules"—Collision Regulations 1897, arts. 27, 28, 29—Costs.

In a case of collision between a merchant ship and a warship which was one of a flotilla, the Court of Appeal, having found that the merchant ship negligently ported when close to the warship and failed to sound her whistle when she ported, held, differing from the President, that she was in fault for a breach of art. 28 of the regulations, which provides for appropriate signals when a vessel takes "any course authorised or required by these rules."

Appeal from a decision of the President, Sir S. Evans, holding those in charge of the torpedo boat destroyer *Blackwater* alone to blame for a collision between that vessel and the merchant steamship *Hero.*

The appellants, plaintiffs in the court below, were the Commissioners for executing the office of Lord High Admiral of the United Kingdom and the officers and crew of H.M.S. *Blackwater* (suing for their lost effects). The respondents, defendants and counter-claimants in the court below, were the owners of the steamship *Hero.*

The collision occurred about 11.20 p.m. on the 6th April 1909 about five and a half miles to the eastward of Dungeness, in the English Channel. The wind at the time was a light breeze from the eastward and northward, the weather was fine and clear, and the tide was running to the E.N.E. with a force of about one and a half knots. The *Blackwater* was on a course of N. 63° E., making about eleven or twelve knots through the water.

(*a*) On the 30th March an application was made by the plaintiffs to assess the damages sustained by them by reason of the repudiation by the defendants of their agreement to deliver choice brewing Pacific Coast hops, it having been agreed between the parties that the Court of Appeal had jurisdiction to assess the damages. The Court of Appeal held that the figure ought to be fixed at 10*s.* over the contract price, and, further, that the assessment must take the prices down to the date of the last shipment under the contract—namely, the 31st March.

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

The *Hero* was on a course of S.W. by W. ¾ W. (magnetic), making about ten knots. Both vessels had the regulation lights exhibited and they were burning brightly.

The case was heard in the Admiralty Court on the 9th, 10th, 11th, and 12th May 1910, and judgment was delivered by the President on the 30th May.

The President.—The questions to be determined in this case relate to a collision which occurred in the English Channel during the night of the 6th April 1909, between H.M.S. *Blackwater* and the merchant ship *Hero*. The action is brought by the Commissioners for executing the office of Lord High Admiral of the United Kingdom and the officers and crew of H.M.S. *Blackwater* as plaintiffs against the owners of the steamship *Hero* as defendants. There is a counter-claim by the defendants. It was originally a counter-claim against the captain and navigating officers of H.M.S. *Blackwater*, but, by an amendment which was made by consent at the commencement of the trial, it is now a counter-claim against Commander Warren, R.N., and Henry Irish, a gunner, who were respectively the commander and the officer in charge of the *Blackwater* at the time of the collision. H.M.S. *Blackwater* was a twin-screw torpedo destroyer of the river class, 225ft. in length and 23½ft. beam. The *Hero* was a merchant vessel, a steel screw steamship, 280ft. in length, of 1812 tons gross and 1164 tons net register, of 1500 h.p. indicated, laden with a cargo of general goods, and manned by a crew of twenty hands all told. As the result of the collision the torpedo destroyer was sunk and lost, and the merchant vessel suffered some damage. The torpedo destroyer was one of a flotilla of twenty-one ships proceeding in two columns up the English Channel on a voyage from Portland to the Firth of Forth. The merchant vessel was proceeding on a voyage from Rotterdam to Bristol. The collision took place between five and six miles to the E.S.E. of Dungeness. The weather was fine and clear, and there was nothing unusual in the wind or tide which affected the case. There was some question as to the exact time when the actual collision occurred, and as to whether it took place about the time of a change by the flotilla of a course of N. 74° E. (magnetic) for a course of N. 63° E. (magnetic). The evidence on behalf of the plaintiffs satisfied me that the collision took place about 11.15 or 11.20 p.m., after the flotilla had been for some time, and for some miles, steady on the new course of N. 63° E. (magnetic), under a speed of about twelve knots. This speed was accelerated to fifteen and a half knots, but only just before the impending collision. The speed of the merchant vessel was about ten knots, until just immediately before the collision, when her engines were put full speed astern. Thus the combined speeds at which the torpedo destroyer and the merchant vessel were approaching each other was about twenty-two knots, which would cover one mile in two and three-quarter minutes, or about 730 yards in one minute. The flotilla consisted of one third class cruiser, two scouts, and eighteen torpedo destroyers. It was disposed in two columns (eleven vessels in the port column and ten in the starboard column). The cruiser *Sapphire* was the leading ship, and headed the port column. There were three subdivisions in each column. The port column was disposed as follows: First subdivision, the *Sapphire* (cruiser), the *Colne* (torpedo destroyer), the *Jed* (torpedo destroyer); second subdivision, the *Skirmisher* (scout), the *Siren* (torpedo destroyer), the *Fawn* (torpedo destroyer), the *Racehorse* (torpedo destroyer); third subdivision, the *Forward* (scout), the *Itchen* (torpedo destroyer), the *Ouse* (torpedo destroyer), the *Liffey* (torpedo destroyer). The starboard column consisted of ten vessels, all torpedo destroyers, disposed as follows: First subdivision, the *Kale*, the *Derwent*, the *Chelmer*; second subdivision, the *Foyle*, the *Cheerful*, the *Peterel*, the *Flirt*; third subdivision, the *Blackwater*, the *Arun*, the *Moy*.

The colliding vessel, the *Blackwater*, was therefore the leading vessel in the last subdivision in the starboard column. The vessels in the starboard column kept their stations by those abeam in the port column. In accurate station, there should be a distance of one cable (measuring from foremast to foremast) between each vessel in a subdivision in either column; a distance of four cables (similarly measured) between each subdivision; and a distance of four cables between the two columns, so that a vessel in the starboard column should be four cables to the starboard of the corresponding vessel in the port column. For the purposes of this case the important factors are that in accurate station the *Blackwater* would keep her station by, and be four cables to the starboard of, the *Forward* of the port column; and in the starboard column, seven cables astern of the *Foyle*, six cables astern of the *Cheerful*, five cables astern of the *Peterel*, and four cables astern of the *Flirt*, one cable ahead of the *Arun*, and two cables ahead of the *Moy*. Representative witnesses were produced by the plaintiffs from various of the vessels in the flotilla. Leaving out for a moment the witnesses from the *Blackwater* herself, the witnesses called by the plaintiffs were as follows: From the *Sapphire*, Lieutenant Thom; from the *Kale*, Commander Barlow; from the *Derwent*, Sub-Lieutenant Bowly; from the *Foyle*, Commander Withers; from the *Flirt*, Gunner Penhallurick; from the *Moy*, Commander Rose and Sub-Lieutenant Turnor. The best evidence with regard to the actual position and stations of the vessels in the flotilla after the change of course from the N. 74° E. to the N. 63° E. (magnetic) was, in my opinion, that of Commander Withers, who was in charge of the *Foyle*, at the head of the second subdivision in the starboard column. When the merchant vessel and the flotilla were approaching each other, the first subdivision in the starboard column had got wide of their stations, so that they were about six or seven cables (instead of four cables) away from the corresponding vessels in the port column. The merchant vessel passed the three vessels of the first subdivision within the lines—*i.e.*, she passed them port to port, or red to red, on an opposite course. The four vessels in the second subdivision were in their right stations—*i.e.*, all four cables to starboard of the vessels abeam in the port column, and the merchant vessel passed them on the opposite side—*i.e.*, green to green, and about a cable away on an opposite course. The *Blackwater* and the other two destroyers in the third subdivision were somewhat out of their stations, being nearer

to the port column than the four cables—*i.e.*, being about three or three and a half cables away from the port column. Somewhere between the *Cheerful* and the *Flirt* the merchant vessel ported a little and steered a course which would again get her between the lines of the flotilla. When the vessels in the third subdivision were observed, the merchant vessel intended to pass them port to port, or red to red. For the purpose of this case I decide, as, indeed, I am bound to do after the judgment of the Lords Justices in *H.M.S. Sans Pareil* (9 Asp. Mar. Law Cas. 59, 78; 82 L. T. Rep. 606; (1900) P. 267), that after the merchant vessel passed the second subdivision and as she approached the third subdivision (headed by the *Blackwater*) those responsible for her navigation got her into a wrong position with reference to the flotilla, and that in so doing they were guilty of bad navigation and were negligent in law.

I need not, therefore, pause to deal with the "Notice to Shipowners and Masters" which was issued by the Marine Department of the Board of Trade in April 1897, and which was fully considered in *H.M.S. Sans Pareil* (*ubi sup.*). The notice is as follows: "Single ships 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 a risk of collision, or attempting to pass ahead of, or through, or to break the line of such squadron. The Board of Trade 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."

Further, as regards the liability of the merchant vessel, there remains to be determined the question whether, apart from her faulty navigation or negligence, she was guilty of a breach of any, or of one, of the Regulations for Preventing Collisions at Sea 1897 which would involve a statutory imputation of blame under the Merchant Shipping Act 1894, s. 419. It appears to have been decided that the statutory obligation and penalty under sect. 419 of the Merchant Shipping Act 1894 do not attach to vessels of the Fleet belonging to the Crown, because the Act does not apply to them: (see *H.M.S. Sans Pareil, ubi sup.*). Similar regulations in every respect have been issued for His Majesty's ships by Order in Council in 1899, but they are merely regulations or guides for good seamanship. They were not made under, or by virtue of, the Merchant Shipping Act 1894, and the non-observance of these regulations does not involve His Majesty's ships in the "statutory blame" (to put it shortly) which attaches to private vessels to which the Regulations for Preventing Collisions at Sea 1897 apply. The question has been raised whether, in a collision between a private ship (like a merchant vessel) and one of His Majesty's ships, the merchant vessel escapes the statutory sanction and penalty on the ground that His Majesty's ship is not subject to the like sanction and penalty—*i.e.*, whether there must be a mutuality of liability; or, in other words, whether the statute can apply to one of two vessels, if it does not apply equally to both. The judgments in *H.M.S. Sans Pareil* (*ubi sup.*) in the court of first instance, and in the Court of Appeal, do not appear to agree upon this question. Counsel for the merchant vessel in this case declined to take upon himself the burden of contending that in such a case the merchant vessel would escape the statutory blame, if she was guilty of a statutory breach. In the view I take of the facts, it is not necessary to decide this very important question in this action. There is one other matter to which I must refer before proceeding to discuss where the liability lies for this collision. It appears to be the result of the decisions that, in any event, whether the collision is between private vessels or not, the non-observance of arts. 27 and 29 of the statutory regulations does not involve the penalty of the "statutory blame." Personally, I incline to entertain the doubt as to this which was expressed by Vaughan Williams, L.J. in his judgment in *H.M.S. Sans Pareil* (*ubi sup.*), at p. 286. But, in this case, counsel for the defendants went still further, and contended that a breach of art. 28 of the Collision Regulations, by the omission to sound the appropriate signal on making a change of course, does not involve "statutory blame," and that, in this respect, art. 28 is to be regarded as on the same footing as arts. 27 and 29. I cannot accede to that contention—I am of opinion that a breach of art. 28 would involve the statutory obligation and penalty. I may add that I should be loth to extend the category of articles which might be evaded without incurring the statutory penalty.

Having expressed these opinions, I must now look closely at the circumstances immediately preceding the collision in this case. The evidence was conflicting on many points. When, in the course of this judgment, I state a fact without qualification, it must be taken that that is a fact which I found upon the evidence. First, with regard to the *Hero*. At the time of the collision her captain was below, and only came on deck after feeling the shock of the impact. The officer in charge was the mate, Gracey. He was not called as a witness. Counsel for the defendants intended to call him, and telegrams were received from day to day with reference to the expected arrival of the vessel in which he was employed at the time of the trial. The end of the case was reached, however, before he arrived. Counsel for the defendants did not ask for an adjournment, but elected to close his case without Gracey's evidence. His deposition before the Receiver of Wreck was put in by the Solicitor-General, without objection by counsel for the defendants, but with the reservation that he did not put it in himself as part of his evidence. Nethercott, the look-out man on the *Hero*, died before the trial; Rallo, the man at the wheel, and Shellard, the chief engineer, were the only witnesses called from the *Hero*, other than the captain, who, as stated, was not able to give evidence of the facts leading up to the collision. Secondly, with regard to H.M.S. *Blackwater* (I have before mentioned the witnesses called from the vessels in the flotilla other than the *Blackwater* herself), the witnesses from this torpedo destroyer were Commander Warren, Gunner Irish (the officer on watch), Crossman (the man at the wheel), Blair (the signalman), and Bateman (the engine-room artificer). Deem, the look-out man, was not available, as he had gone to

Australia, but reference was made to the transcript of the notes of the evidence which he gave at a court-martial which had been held to deal with the conduct of Irish. Deem had left his look-out station before the collision. He was under some impression that the commander had called him to the chart-room. He left his station without telling the officer in charge that he was going. He was away from his station for a "minute or two," and on returning he met the signalman (Blair) going down to the commander. Deem saw no lights of the *Hero*, but, after being absent from his station for "a minute or two," he saw the hull of the *Hero* distinctly about two cables away. He did not return to his station, but went below to the mess deck, and piped "Clear lower deck; and hurry up." He did this without orders. The signalman Blair was also intrusted with some look-out duties. He was, however, logging a signal a little time before the *Hero* was sighted. When he sighted her he said she was abreast the *Cheerful*, which would be about six cables distant. Crossman, the man at the wheel, saw nothing of the *Hero* or of her lights before the collision. She was sighted first by Gunner Irish, the officer in charge. He said that he sighted her about eight cables to ten cables distant, bearing a point on his starboard bow, and showing her steaming light and her green light to his own green light. In my opinion she could have been, and ought to have been, sighted much sooner if a proper look-out had been kept on board H.M.S. *Blackwater*. The officer in charge said that when she was about three or four cables distant she altered her course, shutting out her green light and opening her red. He (Irish) then ported his helm from 15° to 20°, in order to pass the *Hero* port to port; he himself went to the wheel to give it the necessary "two turns" for the purpose. He then said in the presence of the quartermaster and signalman, "Red to red, perfect safety; go ahead," or, according to another account, "We will bring them red to red." When he ported his helm he ought, according to the regulations, to have blown a one-blast signal on his siren, but he did not. The reason he gave was that at that time the *Hero* appeared to him to be abreast of the *Flirt* (which in proper station would be four cables ahead), and that if the one-blast signal had been given by him, the *Hero* would be in doubt as to which of the destroyers had given the signal. In the first place, this indicates that the *Hero* was further away from the *Blackwater* when she was sighted than Irish stated. In the next place, in my opinion, the reason given was not an adequate one, and Irish ought to have ordered or given the one-blast signal. If it had been given, apart entirely from the warning which would thereby be conveyed to other vessels, it would quite possibly, and even probably, have affected the situation in so far as the *Blackwater* herself was concerned, because the commander, who was awake in his chart-room, might have heard it, and, if he had, he would have known when he reached the bridge that his vessel was on her port helm. I think, therefore, that Irish was at fault in not giving the signal. Having ported his helm, his vessel answered the helm till he got the *Hero* about one point on his port bow, and his opinion was that he would have safely passed the *Hero* port to port on that helm. Then he wanted to send for the commander, pursuant to the instructions which the commander had given him. He called out for the look-out man Deem in order to send him down to the chart-room. There was no answer, because Deem was not at his post. Then he sent down Blair, the signalman, and Blair went down and informed the commander. A minute or so elapsed, according to the commander's evidence, before he got on the bridge. Probably a minute and a half at least had elapsed since the officer in charge had ported his helm. If so, this would have brought the vessels about five and a half cables, or 1100 yards, nearer to each other when the captain reached the bridge than they were when the officer ported the helm. I am of opinion that when the commander got on the bridge the *Blackwater* was steady on her port helm. The commander said he was not aware of this; he did not ask the officer under what helm she was. I think he ought to have made this inquiry. The officer in charge and the commander do not agree about this matter, or about the bearing of the *Hero* upon the *Blackwater* when the commander reached the bridge. The officer in charge said he told the commander when he arrived that the vessel was under her port helm. If he did not, he ought to have. The commander said that when he got on the bridge the first thing that happened was that he gave an order, "Starboard 30°. Full speed ahead," and that after he had given this order, and not before, the officer in charge told him that he had given her port helm, to which the commander replied, "Well, it is no good." I prefer to accept the commander's version about this, and therefore I think the officer in charge neglected his duty to inform the commander. As to the bearing, the commander said that when he got to the bottom of the ladder and on the bridge the *Hero* showed her red light bearing about two points on the *Blackwater's* starboard bow. The officer in charge said she bore about one point on his port bow, having come to this bearing by reason of his having ported the helm of the *Blackwater*. Immediately the commander came on the bridge, when his destroyer was, as I find, on her port helm, a series of orders was given by him. The accounts which were given of them by the witnesses from the *Blackwater* did not agree. Whatever view may be taken of the orders and directions given by Commander Warren, I desire to put it on record that he gave his evidence in a manly, straightforward, and honourable way, without any attempt to shrink from the consequences of his orders, or to avoid the results which might follow his testimony. According to Commander Warren's recollection, the orders he gave were in the sequence which I shall now proceed to give rather fully. In detailing the orders, I have added some statements of the most material facts and events which acompanied or resulted from the orders, and also some comments which appear to me to be justified. The sequence of the orders was as follows: 1. Thinking the *Hero* was about two cables distant with her red light about two points on the *Blackwater's* starboard bow and not knowing that the *Blackwater* was on a port helm, he ordered "Starboard 30°. Full speed ahead." "Starboard 30°" would be very nearly "hard-a-starboard." It would be within 5° of it. The destroyer's speed at the time was about twelve knots, and she had a reserve speed of another six knots or thereabouts. When the order was given, no signal was sounded. The

appropriate signal would have been two short blasts. Commander Warren in cross-examination said: "It would have been better to have given the signal." It ought to have been given, and I see no adequate reason why it was not. If it had been, the *Hero* might have put her engines full speed astern in time, or manœuvred in some other way to avoid the collision. 2. After the order "Starboard 30°. Full speed ahead" was given, Irish said, "I have already given her a port helm" or "My helm is a-port." Commander Warren replied, "Well, it is no good." 3. Having had more time to look at the *Hero*, the commander came to the conclusion that his vessel must be nearly crossing the *Hero's* line of advance, and, fearing that the stern of his vessel would not clear the *Hero* with the starboard helm, he ordered "hard-a-port." 4. He himself then worked the telegraph to reverse the starboard engine. His object was to hasten the action of the port helm. 5. He ordered Irish to blow "one short blast" (a signal to indicate that he was directing his course to starboard). 6. He said that he thought he must have ordered "full speed astern" by mistake, because while he was telegraphing to reverse the starboard engine, and intending to reverse that alone, the port engine was also reversed by the man attending to its telegraph. 7. Although he ordered one short blast, he heard his siren sound a three-blast signal, which he had not ordered. 8. Immediately or very shortly afterwards he ordered "full speed ahead," although the signal just given indicated the exactly opposite order of "full speed astern." Then his vessel was struck with great violence by the *Hero's* stem or starboard bow, about 40ft. from the stern of the *Blackwater* on her starboard side. The latter's speed had increased between three and four knots during the time the various orders above enumerated were given. So much for the evidence of Commander Warren on these matters. According to Irish, the officer in charge, the sequence of the orders of the commander was as follows: (1) "Hard-a-starboard" (after Irish had told him the vessel was on a port helm). (2) "Full speed astern." (3) "Sound the siren three blasts." (4) "Full speed ahead." He said he did not hear the order of "Full speed ahead" which the commander said he gave with the first order; nor the order "Hard-a-port" or any "port" order; nor an order to sound one blast. Crossman, the man at the wheel, described the orders thus: (1) "Starboard, 30°," and (2) "Hard-a-port." He said that the second order was given when he had only got 15° of the starboard helm on the indicator in obedience to the first order. According to Blair, the signalman, the orders were as follows: (1) "Starboard 30°. Full speed ahead," then a pause—and (2) "Full speed astern." He spoke to no other orders. Bateman, the engine-room artificer, received the following orders in the engine-room: (1) "Full speed ahead." (2) "Full speed astern" (after a few seconds). (3) "Full speed ahead." He said that from the first order to the collision the interval of time was just upon one and a half minutes. The combined distances travelled during that time would be over 1000 yards, and the distance travelled by the destroyer on her first speed alone would be 600 yards. He also proved that this speed had increased, and that the engine made 170 revolutions at the time of the collision, which gave a speed of fifteen and a half knots. It is probable that the commander thought that with the reserve of speed which he could utilise he could have safely crossed the bows of the *Hero*. He very nearly succeeded in doing so, and he would have succeeded if he had had about four seconds more time. But the attempt was a risky one, and unfortunately failed. It is to be remembered, of course, that estimates and calculations of time in such circumstances are uncertain, even more so than estimates of distance. In considering what manœuvres were possible or justifiable on the part of the *Blackwater*, attention must be given to the fact that she was (as all these torpedo destroyers are) a very handy vessel, quick to answer her helm, and easy to work with her engines. It was given in evidence by Commander Warren that by going full speed astern she could be pulled up in from one to two lengths. I have now dealt with the case upon the evidence from the *Blackwater*.

As to the evidence from the *Hero*, unfortunately the court was not assisted by the evidence of Gracey, the officer in charge of the *Hero*, as he was not called, as I have before explained. Referring to his deposition before the Receiver of Wreck, and leaving out the part which has become unimportant in view of my decision that her position established negligence in law on the part of her navigating officers, the account given by Gracey with regard to the *Blackwater* and the other two vessels in her subdivision is shortly as follows: When continuing on his course, the last three vessels were on his port bow, and showed all their lights, being in doubt whether these three vessels could see his side lights, he closed his green, and showed a good red. Immediately his green was closed "the two outside vessels" (by which, I think, he meant the *Arun* and the *Moy*) ported to clear him. The third vessel (by which, I think, he meant the *Blackwater*) came on showing green and red, until when about half a mile distant she showed her red for a brief space, then suddenly starboarded, and apparently attempted to cross his bow. He then, fearing a collision, put his engines full speed astern, and blew three short blasts. The *Blackwater* continued on her course, and the *Hero* struck her between amidships and aft, on her starboard side. Rallo, the only witness called who was on the *Hero's* deck, was at the wheel, in the wheelhouse on the upper bridge. This witness was at times confused in answering questions as to the lights which he saw, and he was in some matters mistaken; but I came to the conclusion that he was a truthful and an honest witness. The result of his evidence with reference to the position of the third subdivision of the flotilla, as I accept it, is shortly as follows: From the three vessels in this subdivision he saw (1) the green lights of all the three vessels; (2) red and green from all three; then, after the *Hero* had ported a point or so, (3) the green light of the *Blackwater* and the red lights of the *Arun* and *Moy*. His evidence as to the sound signals from the *Hero* I shall refer to later. Apart from the evidence of what was done by the *Arun* and *Moy*, the conclusions which I draw from the evidence are these: That the *Blackwater* could, by the exercise of ordinary skill and care by her officers, have avoided the collision by keeping on the port helm which

had been given to her by Gunner Irish; that in the various orders and manœuvres on board the *Blackwater* after the *Hero* was sighted there was confusion, an uncertainty, a want of decision, and an absence of ordinary skill and care; that there was no situation of extreme peril or sudden emergency to account for these things (as in *The Bywell Castle*, 4 Asp. Mar. Law Cas. 207 (1879); 4 P. Div. 219); that her manœuvres were faulty and negligent; that this negligence contributed to the accident; and that, apart from such negligence, the collision would not have happened. In these conclusions the Elder Brethren of the Trinity House who assist me concur.

But the court is not left to speculation as to what might have been done. The matter has been placed outside the region of speculation by the admissions of Commander Warren, and by the evidence of what was actually done by the *Arun* and *Moy* in the like circumstances. Commander Warren admitted that, even if the distance between the two vessels when he got on to the bridge was two cables only, if the *Blackwater* had been kept a-port, she could possibly have cleared the *Hero* port to port; and if the distance was anything like four cables she would certainly have so cleared her. What was done by the *Arun* and *Moy* was described by Sub-Lieutenant Turnor and Commander Rose, who were on the *Moy*, the second vessel behind the *Blackwater*. The sub-lieutenant sighted the *Hero* about abreast the *Peterel—i.e.*, about some seven cables away—and he called the commander, who came on the bridge. At any rate, her helm was ported; so was that of the *Arun*, and at first he observed that the *Blackwater* seemed to have port helm also before she swung round to port. When Commander Rose came on his bridge, he saw the *Hero* six cables away. He waited, and when she was four cables away, and not before, he gave the order to port his helm. The *Arun* ported about the same time, and both the *Arun* and the *Moy* passed all clear of the *Hero* port to port. Commander Rose also stated that when he got on the bridge and saw the *Hero's* light, he thought there was time for the *Blackwater* to get out of the way by porting her helm, and that the effect of starboarding the *Blackwater* was to throw her across the bows of the *Hero*. Clearly the opinion of Commander Rose, who saw the incidents at the time, was that the accident might have been avoided by ordinary skill and care on the part of those responsible for the *Blackwater*. My nautical assessors advise me that what the *Arun* and the *Moy* did the *Blackwater* could have done. There was, therefore, negligence on the *Blackwater*. But, as I have said, there was negligence also attributable to the *Hero* by reason of the position in which she had been placed with reference to the flotilla. Was she, in addition to this negligence, also guilty of a breach of a regulation which would involve "statutory blame," so that, whatever the negligence of those responsible for the *Blackwater* might have been, the *Hero* would be also to blame, and would be responsible for half the damage in accordance with the Admiralty rule. This depends upon whether a sound signal—one short blast—was sounded by the *Hero* when she ported. This question of fact has to be decided upon positive evidence, upon negative evidence, and upon inferences from the evidence and the surrounding circumstances Rallo, the man at the wheel, gave positive testimony that the signal was duly given. Upon being pressed, he was very firm that it was. As against this, reliance was placed by the Solicitor-General upon the omission in the deposition of Gracey of any reference to this sound signal. The negative evidence consists of statements by various witnesses for the plaintiffs that they did not hear the signal, and, by some of them, that if it had been given, they must have heard it. The omission from Gracey's deposition must be put into the scale in weighing the evidence, but I do not attach overwhelming weight to it. The sound signal was stated in the Preliminary Act and in the defence. As to the negative evidence, I have considered it carefully. A short *résumé* of the testimony of the witnesses who were asked as to the various sound signals may be useful in estimating the importance to be attached to it. First of all, there is no dispute (apart from the question which I am now discussing as to whether a one-blast signal was given by the *Hero*) about the other sound signals which were given by both vessels. At any rate, I find that they were in fact as follows: A three-blast signal from the *Blackwater*, and a three-blast signal from the *Hero*. The witnesses who were examined about sound signals were Commander Warren, Irish, Crossman, Blair, Gunner Penhallurick, Sub-Lieutenant Turnor, Commander Rose, and Rallo. Commander Warren said the only signals he heard were the three blasts from his own siren. He probably would not have heard the one blast from the *Hero*, even if it had been sounded, because he was lying down in the chart-room. He did not hear the three-blast signal from the *Hero*, but he said that she may have sounded them without his hearing them. Irish only heard his own three blasts. He thought that if the *Hero* had sounded one blast he would not have missed it. He did not hear the *Hero's* three blasts. Crossman heard no sound signal at all, either his own, or from any other vessel. Blair took no notice of, or did not remember, any sound signal at all, on his own vessel or from the *Hero*. Gunner Penhallurick heard no sound signals at all from either vessel. Sub-Lieutenant Turnor thought he remembered a three-blast signal, and that it was from a siren on the *Blackwater*, but he was not certain about it. He heard no other. Commander Rose said he fancied he heard three blasts from a siren; but subsequently said that the evidence that he gave at the court-martial—viz., that he only heard one blast—was much more likely to be accurate. It was common ground that no signal of one blast was given from the *Blackwater*. Therefore, if he did in fact hear a one-blast signal, it must have been from the *Hero*. The evidence being in this state, I have come to this conclusion that Rallo's positive statement can, and ought to be, accepted, and that when the *Hero* ported, she sounded the appropriate signal of one short blast. If she did, no statutory blame attaches to her in this case. But if she did not, the question would then be whether her failure to do so could, by any possibility, have contributed to the collision? I am satisfied that, even if she did not signal, this did not, in fact, contribute to the accident, because Irish and others saw her port; but I do not think that I could say that it could not by any possibility have

contributed to it. But if I am justified in my finding of fact, the question last referred to may be put aside.

The case, then, in my opinion, stands thus: There is no "statutory blame" on either side —not on the part of the *Blackwater* because she, as a King's ship, is not governed by the statutory regulations made under sect. 418 of the Merchant Shipping Act of 1894; and not on the part of the *Hero* because she is not proved to have been guilty of a breach of art. 28, or of any other statutory collision regulation. But I find that there was negligence on the part of both vessels. This being so, the common law doctrine of contributory negligence must be applied, as in *The Margaret* (5 Asp. Mar. Law Cas. 371 (1884); 9 App. Cas. 873) and *H.M.S. Sans Pareil* (*sup.*). That doctrine is that if A. is injured by B. by the fault more or less of both combined, then if, notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot succeed in an action against B, and if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injuring A., A. can succeed against B. (see per Lindley, L.J. in *The Bernina*, 12 P. Div., at p. 89; 6 Asp. Mar. Law Cas. 75 (1887), and the cases there cited). In the leading case of *Tuff* v. *Warman*, which was a case of collision in the Thames, it was said in the Exchequer Chamber (see 5 C. B. N. S, at p. 585), that the proper question in such cases is "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened." In other cases it has been said that the question is, Whose negligence was the "proximate cause" of the injury? The Solicitor-General contended in this court that the common law doctrine of contributory negligence should not be applied in the same way in the Admiralty Courts as in the common law courts; that, if it was, the ordinary rule of "both to blame and division of damages" which prevails in Admiralty could seldom have effect. He did not suggest what difference there could be in the principle of the application. On the question of fact, in any case, it is obvious that, in arriving at the "proximate cause" of an accident at sea, the difficulty of the task of manœuvring ships of various kinds and dimensions in uncertain states of weather and tide, and in the unforeseen and unforseeable dangers which are met with upon the waters, must always be regarded; and it must often happen, where two vessels are at fault, that it is impossible to say that one of them without the aid of the other could avoid an accident, or that the fault or negligence of one alone is the proximate cause; so that it has to be decided that the combined negligence of both was the common cause, and that the "both to blame and division of damages" principle is to apply. Moreover, that principle must always apply where there is a breach of a statutory regulation, which so often occurs in cases of collision at sea. The "division of damages" rule, although not quite logical, because the damages are not proportioned either to the degree of blame or to the extent of the injuries caused, has been regarded for a long time in this country as a salutary rule in Admiralty cases. Whether the doctrine of contributory negligence derived from the common law which has been imported into Admiralty actions is equally salutary or reasonable is not for me to determine. I have to act upon the settled law that the doctrine does apply in cases where the facts call for or permit its application. The Solicitor-General in his reply called my attention to an unreported case of the steamship *Cambridge*, and he kindly supplied me with a transcript of the notes of the evidence and of the judgments of Sir Francis Jeune (then President of this Division) and of the Lords Justices in the Court of Appeal. The case was decided in this court on the 17th June 1902, and in the Court of Appeal on the 1st July 1903—*i.e.*. about three years after *H.M.S. Sans Pareil* (*ubi sup.*). The President decided that the steamship *Cambridge*, a passenger steamship, and H.M S. *Salmon*, a torpedo destroyer, were both to blame and both liable; the steamship *Cambridge* because she was guilty of bad navigation in shaping to cross the bows of the torpedo destroyer, and H.M.S. *Salmon* because if she had done what she could and ought to have done the collision would have been avoided. After the judgment had been delivered, Mr. Pickford (counsel for the steamship *Cambridge*) called the attention of the President to the case of *H.M.S. Sans Pareil*, and asked him to apply the principle of that case, and to say that H.M.S. *Salmon* was alone to blame. Apparently, thereupon the President said that he found that it would have required extraordinary care and skill—*i.e.*, something quite beyond ordinary care and skill on the part of H.M.S. *Salmon*—to avoid the collision, and accordingly he adhered to his decision that both were to blame, and he divided the damages. Both sides appealed. The *Cambridge* appealed on the ground that the *Salmon* was solely to blame because she could by the exercise of ordinary care and skill have avoided the collision. The *Salmon* appealed on the ground that the *Cambridge* was solely to blame, apparently, (1) because in the circumstances the *Salmon* could not by the exercise of ordinary care and skill have avoided the collision; (2) because the President had misdirected himself by acting on the principle that extraordinary care could be required; and (3) because the *Salmon* was exonerated from liability by reason of a sudden peril of an extreme emergency. Both appeals failed. In the Court of Appeal, so far as I can see from the judgments, the *H.M.S. Sans Pareil* was not cited, or dealt with at all, in any of the three judgments, and the doctrine of contributory negligence as applied to collisions at sea in the cases of *The Margaret* (*ubi sup.*) and *H.M.S. Sans Pareil* (*ubi sup.*) was not considered or even mentioned, except possibly in one passage in the judgment of the Master of the Rolls. I have read the case carefully. Unless it is to be regarded as a case where both vessels were equally to blame and brought about the collision by their common negligence, or where it required some extraordinary skill and care on the part of either vessel to avoid the accident, I find it impossible to reconcile the decision of the Court of Appeal with the decision in *H.M.S. Sans Pareil*. In the case now before the court, I find that the negligence attributable to the *Hero* did not cause any sudden emergency or extreme peril which

required any extraordinary skill or care to be exercised by the *Blackwater*; that the *Blackwater* was not hampered by the *Hero* or by the other vessels of the fleet so as to be unable to manœuvre properly or safely; and that, notwithstanding the negligence of the *Hero*, the collision could have been avoided by the ordinary skill, caution, and care to be reasonably expected from the navigating officers of H.M.S. *Blackwater*. In these findings the Elder Brethren agree with me. I accordingly decide against the plaintiffs' claim. As to the counter-claim, it follows, from what I have before stated in discussing the facts, that Commander Warren and Irish were guilty of negligence which contributed to the collision; and that the *Hero* could not about the time of the collision have avoided it by the exercise of ordinary care and skill by reason of the faulty manuœvres of the *Blackwater*. As to this also the Elder Brethren agree. Accordingly, I decide the counter-claim, too, in favour of the defendants, and order a reference as to damages, if desired. The order of the court, therefore, is that the judgment be entered for the defendants upon the claim and counter-claim.

On the 26th July 1910 the plaintiffs delivered a notice of appeal praying that the judgment should be reversed or varied by pronouncing that the fault or default of the owners, master, and crew of the *Hero* occasioned the collision, and that the defendants' counter-claim might be dismissed and the plaintiffs' claim pronounced for.

The appeal was heard by the court, which had the assistance of two nautical assessors, on the 2nd, 3rd, 6th, and 7th March, when judgment was reserved.

The *Attorney-General* (Sir Rufus Isaacs, K.C.), *Aspinall*, K.C., and *A. D. Bateson*, K.C. for the appellants, plaintiffs.—The court below has found that both vessels were negligent, but has held that the *Hero* is not liable because those on the *Blackwater* could by the exercise of ordinary care and skill have avoided the result of the negligence of the *Hero*. The *Hero* is alone to blame, for she brought about a position of extreme danger, and she cannot complain if those on the *Blackwater* did not do the best thing in the sudden emergency created by the *Hero*'s wrongdoing. In these circumstances those on the *Hero* cannot say that those on the *Blackwater* were negligent:

The Bywell Castle, 41 L. T. Rep. 747; 4 Asp. Mar. Law Cas. 207 (1879); 4 P. Div. 219;
The Frankfort, 101 L. T. Rep. 664; 11 Asp. Mar. Law Cas. 326; (1910) P. 50;
The Cambridge (referred to in the judgment of the court below).

The *Hero* is to blame for a breach of art. 28 of the Collision Regulations. On the evidence it is clear that she gave no helm signal when she ported shortly before the collision.

Laing, K.C. and *Adair Roche* for the respondents, defendants and counter-claimants. — The judgment appealed from is based on the appellants' (plaintiffs) evidence. On that evidence they have been found alone to blame. [Kennedy, L.J.—Is that quite so. Rallo, a witness for the defence, gives evidence as to the *Hero*'s whistle signal.] If the *Hero* broke a statutory rule, she must be deemed to be in fault, for it would be impossible to show that the breach could not by any possibility have contributed to the collision. The question as to the whistle being sounded is one of fact, and this court will be slow to interfere with such a finding. But assume the whistle was not sounded, there was no breach of art. 28. That article only applies to a steam vessel under way taking any course "authorised or required by these rules." The porting of the *Hero* was not such a course. As to what is a course authorised or required by these rules, see

The Uskmoor, 87 L. T. Rep. 55; 9 Asp. Mar. Law Cas 316; (1902) P. 250;
The Bellanoch, 97 L. T. Rep. 315; 10 Asp. Mar. Law Cas. 483; (1907) A. C. 269;
The Anselm, 97 L. T. Rep. 16; 10 Asp. Mar. Law Cas. 438; (1907) P. 151;
The Corinthian, 101 L. T. Rep. 265; 11 Asp. Mar. Law Cas. 20; (1909) P. 260;

The Mourne (83 L. T. Rep. 748; 9 Asp. Mar. Law Cas. 155; (1901) P. 68) shows that mere porting and starboarding is not "taking a course" within the meaning of the rules. The *Hero* cannot be deemed to be in fault unless the rules apply, and they only apply when there is risk of collision, and, on the plaintiffs' story, there was no risk of collision except that caused by the *Blackwater*. *The Bywell Castle* (*ubi sup.*) has no application, for the President has found as a fact that there was no sudden emergency or peril. The *Cambridge*, which is dealt with at length in the judgment of the court below, conflicts with *The Sans Pareil* (82 L. T. Rep. 606; 9 Asp. Mar. Law Cas. 78; (1900) P. 267). The *Hero*'s wrong manœuvre was long before the collision, and the vessels would have gone clear if the commander had not countermanded the orders given by the gunner. That is the negligence which produced the collision.

The *Attorney-General* in reply.—The *Hero*'s case is a wrongful starboarding by the *Blackwater*; the *Blackwater*'s case is a wrongful porting by the *Hero*. Each says the other made the initial mistake. There is no doubt that a position of danger and emergency was created which placed those on the *Blackwater* in a difficulty. The principles which govern the law as to contributory negligence are stated by Lindley, L.J. in *The Bernina* (56 L. T. Rep. 258; 6 Asp. Mar. Law Cas. 75; 12 P. Div. 58). *The Margaret* (*ubi sup.*) is the leading decision on the point; another is *The Monte Rosa* (68 L. T. Rep. 299; 7 Asp. Mar. Law Cas. 326; (1893) P. 23). The *Hero* is to blame, for her negligence continued up to the collision:

The Clutha Boat No. 147, 100 L. T. Rep. 198; 11 Asp. Mar. Law Cas. 199; (1909) P. 36;
The Frankfort (*ubi sup.*);
The Etna, 98 L. T. Rep. 424; 11 Asp. Mar. Law Cas. 30; (1908) P. 269;
The Ovingdean Grange, 87 L. T. Rep. 15; 9 Asp. Mar. Law Cas. 295; (1902) P. 208.

April 11.—The judgment of the court was delivered by

Kennedy, L.J.—We see no reason to dissent from the judgment of the learned President so far as it imputes actionable negligence to the navigation of H.M.S. *Blackwater*. In regard to the *Hero*, he has found that those in charge of the *Hero* were also guilty of negligent and improper navigation in getting her into a wrong position in regard to the flotilla. But he has also found in effect that, although, if the *Hero*

had kept her course after passing the starboard line of the second division, as she ought to have done, and had not ported, as she did, she would have passed the *Blackwater* safely, green to green, yet, after this initial wrongdoing on the part of the *Hero*, the collision might have been avoided by the exercise of not more than ordinary care and skill on the part of those in charge of the *Blackwater* when they saw the wrong manœuvre of the *Hero;* and, so finding, he has held the *Blackwater* solely to blame for the collision. It is, as Bucknill, J. remarked in his judgment in *The Etna* (*ubi sup.*), frequently a matter of extreme difficulty to decide whether or not the negligence of the initial wrong-doer could have been avoided by the other party. In *The Margaret* (reported as *Cayzer* v. *Carron Company* (*ubi sup.*) and *The Sans Pareil* (*ubi sup.*) the question was decided one way, and in *The Etna* (*ubi sup.*) and *The Cambridge*, heard in the Admiralty Court on the 17th June 1902 and in the Court of Appeal on the 1st July 1903, it was decided the other way. It is not, in our view, an easy question to decide in the present case. It is, however, necessarily a question of fact depending upon the special circumstances of each case; and our nautical assessors concur with the advisers of the President in the Admiralty Court that there was no such emergency created by the negligence and bad navigation of the *Hero* as might not have been successfully met by the exercise of ordinary care and skill on the part of those in charge of the *Blackwater.* In fact, Gunner Irish did take the right step by porting the helm of the *Blackwater*, and there would have been no collision but for the later orders of Commander Warren, which, unfortunately, destroyed the effect of this manœuvre. The appeal of the plaintiffs, therefore, fails so far as it depends upon allegations of the liability of the *Hero* for faulty or negligent navigation causing the collision.

There remains, however, for our consideration a very important question as to the liability of the *Hero* to the statutory imputation of blame, under the Merchant Shipping Act 1894, s. 419, for a breach of art. 28 of the Regulations for Preventing Collisions at Sea. The learned President has expressly held, and, we think, rightly held, that an infringement or non-observance of art. 28 does involve statutory blame; and, although there is no express finding on the point, it is, we think, a necessary inference from the language of his judgment, which deals at length with the question of fact as to the sounding of a one-blast signal on board the *Hero*, that, if there were an omission on the part of those on board the *Hero*, when her helm was ported, to sound the one-blast signal, those in charge of her would have been held by him to have been guilty of a breach of art. 28, and, therefore, the *Hero* must in that case be held partly to blame for the collision under the Merchant Shipping Act 1894, s. 419. He states in his judgment that, if at the time of the porting, which ultimately led to the collision, those on board the *Hero* omitted to sound, with the whistle, the appropriate one-blast signal, he could not say that this omission could not possibly have contributed to the collision. But the learned President, finding, as a fact, that this signal was given on board the *Hero*, has, of course, acquitted her of statutory blame. The appellants contend that the evidence did not justify this finding of fact, and we have to consider and decide first, whether the finding of fact was right, and, secondly, if we are of opinion that the finding of fact was erroneous and that the one-blast signal was not sounded on board the *Hero* at the time in question, whether such an omission constituted a breach of art. 28; for the respondents, besides arguing in support of the President's finding of fact in their favour in regard to the sounding of the one-blast signal, further contend that, even if that signal was not sounded, the *Hero* did not violate the provisions of art. 28 by such an omission.

First, as to the question of fact. This court is very slow indeed to differ from the judge of the Admiralty Court on any decision of fact, depending simply upon the choice between affirmation on the one side and denial on the other and the credibility of witnesses who have been examined in open court at the trial. But, if it is convinced that the judge has been guided to his decision by some misapprehension of the effect of evidence, or of the inference to be drawn from it, or of material circumstances, it is, we conceive, the duty of the Court of Appeal to act upon its own view. In the present case, the finding of the learned President that a one-blast signal was sounded with her whistle on board the *Hero* at the time when her wrongful porting originated the collision with the *Blackwater*, depends entirely upon the evidence of a single witness, the helmsman Rallo. Neither of the two other witnesses—the master and the chief engineer—from the *Hero* deposes to hearing such a signal. Neither of them, it is true, was on deck, the master being in the chart-room, and the chief engineer in the engine-room, so that it is just possible that the whistle would have been sounded without being heard by either of them in any case; and, further, so far as regards the master, it appears that he was actually asleep till just before the collision, and was only then aroused by something—"probably," he says, "by the whistle," but "he was not certain of that." It is possible that his conjecture was right, for just before the impact of collision, which he felt before he could get on his boots in order to go on the deck, the *Hero* admittedly sounded the three-blasts reversing signal. The fact remains that in affirmance of a one-blast porting signal, Rallo is the solitary witness from the *Hero;* and from the same ship came negative evidence of a remarkable character. Gracey, the chief officer of the *Hero*, was the officer in charge on deck before and at the time of the porting in question and at the time of the collision. He was not called as a witness for the *Hero* at the trial, but his deposition before the Receiver of Wreck was put in evidence; and, further, the master of the *Hero* in the course of his re-examination stated the version of the events leading to the collision which Gracey gave to him on the bridge of the *Hero* immediately after the collision. Neither in Gracey's deposition nor in the oral narrative given by him to the master is there any mention of the one-blast signal alleged by Rallo—a strange omission, if omission it be, on the part of the responsible officer, who must have ordered the sounding of the signal, of a most important fact, both in his oral report to

the master immediately after the event and in the signed deposition made by him at leisure four days later before the Receiver of Wreck. Before passing on to the evidence of witnesses from the *Blackwater* and two other vessels of the flotilla, we think it is convenient to note, in regard to the testimony of Rallo, that his first mention at the trial of this port-helm sound signal was not spontaneous, but was elicited at the point where he had stated that the mate gave him an order to port, by a question put to the witness by the defendants' counsel, which, necessarily perhaps, involved an obvious suggestion—"Was there any signal blown?"—and, when, in cross-examination he was pressed by the Attorney-General as to the grounds of his persistency in the accuracy of his recollection, the witness to a considerable extent relied upon an alleged invariable practice on board the *Hero*: "Every time you port one blast is blown?" Answer: "Yes, blown, yes." Turning from the evidence of those on board the *Hero* to the evidence from the *Blackwater*, we find that Gunner Irish, the officer in charge, is positive that no such signal was sounded on the *Hero*, for, he says, if it had been sounded, he must have heard it. Neither Crossman at the wheel, nor Blair, the signalman, appears to have taken notice of any sound signals either on their own ship or on the *Hero*. The evidence from the *Flirt* and the *Moy* carries the case no further, one way or the other. The only signal which Sub-Lieutenant Turnor of the *Moy* seems to recollect is a three-blast signal from the siren of the *Blackwater*. Gunner Penhallurick of the *Flirt* does not seem to have noticed any sound signals. Commander Rose of the *Moy* deposed at the trial to hearing what he thought was a three-blast siren signal from the *Blackwater*, but admitted on cross-examination that the evidence which he had given at the court-martial more recently after the event ought to be treated as more correct, and in that evidence he had stated that, before he noticed the bow of the *Blackwater* swing to port, he heard one blast from a siren. Asked whether it might have been a whistle, Commander Rose said: "It might have been, although I did not think so at the time"; but he added, later on, that he should not think that on a fine, clear night, such as this was, he should have any difficulty in distinguishing between a torpedo destroyer's siren and an ordinary steam whistle. The learned President, if we may, with all respect, say so, seems to have treated the blowing of a whistle, which the *Hero* did carry, and the blast from a siren, which she did not carry, as indistinguishable, for he says in his judgment, in regard to the evidence of Commander Rose: "Therefore, if he did, in fact, hear a blast signal, it must have been from the *Hero*." So far we have dealt with the issue upon the question of the sound signal upon the assumption that Rallo's evidence supported the defendants case. We are not sure that, having regard to the positive opposition of Irish's testimony, and Gracey's significant silence upon so important a matter, we should, even on that assumption, have felt ourselves justified in coming to the same conclusion as that which commended itself to the learned President. But he heard the evidence given, and we should have hesitated long before interfering with his judgment in such circumstances. A careful examination, however, of Rallo's evidence, in the light of established or admitted facts as to the relative positions of the *Hero* and the *Blackwater* when the fatal porting of the former vessel took place, and as to the distance between the two vessels at that moment, has brought us to the opinion that the porting which he describes as accompanied by a one-blast signal was not the porting in question. It is, we think, manifest that that porting, which put the *Hero* on a course to cross the bows of the *Blackwater* and, if she escaped collision with the *Blackwater*, to pass between the starboard and port lines of the third division of the flotilla, took place at a time when the two vessels were so close to each other that a collision was rendered imminent unless the *Blackwater* took immediate steps to counteract the negligent and improper navigation of the *Hero*. There is clear evidence of this from the most important of the witnesses on both sides. Irish, in charge of the *Blackwater*, directly he saw the porting of the *Hero*, not content with at once giving the order "Port two turns," himself rushed to the wheel, pushed aside the seaman who was steering on the bridge, and with his own hands put the helm over, "so that," to use his own phrase, "there should be no mistake." He had seen the *Hero* from the time she was eight to ten cables distant, and he says that she was from three to four cables—that is to say, 600 to 800 yards—distant, and about one cable from the *Flirt*, when, by porting, she suddenly shut out her green and opened her red light and created a position of danger, which Irish evidently felt must be met by instant action. The combined speeds of the two vessels, as the learned President finds, would cover 730 yards in one minute. The proximity of the two vessels to each other at the time of the *Hero*'s porting appears equally clear from the account which Gracey, the first officer of the *Hero*, and at the time in charge of that vessel, gave to the master of the *Hero*: "He (the *Blackwater*) was showing a red light and I ported a point, and just as I steadied the wheel again the destroyer starboarded his helm and shot across the bow." We know from Commander Warren that the order to starboard the helm was given by him when he got upon the bridge just before the collision, and the vessels were so close to each other that he thought that a collision was inevitable. If this be so, and Gracey is right in saying that he had only just ported a point and steadied when the starboarding of the *Blackwater* took place, it is clear that the porting of the *Hero* took place when only a short distance separated her from the *Blackwater*. When we know what happened and what there was in fact time to do between the porting and the collision which followed it, we have a safer guide than estimates and calculations of time, which, as the learned President observes in his judgment, "in such circumstances are uncertain, even more so than estimates of distance." The learned President, acting, we think, upon the evidence of Sub-Lieutenant Turnor, who was on board the *Moy*—the last of the three vessels in the starboard line of the third division—places the *Hero*, when she ported, on the starboard side of the second division, somewhere between the *Cheerful* and the *Flirt*—that is to say, at a distance of about five cables, or 1000 yards, from the *Blackwater*. Even if this longer distance of

some five cables, instead of the shorter distance of three to four cables given by Irish, be taken as approximately the true distance between the *Hero* and the *Blackwater* when the *Hero* by porting suddenly created the risk of collision, it is, we think, impossible to accept Rallo's porting accompanied by a one-blast signal. For this witness, whom the learned President thought to be a "truthful and an honest witness," although he "was at times confused in answering questions as to the lights which he saw, and was in some matters mistaken," positively and persistently asserts that the porting and the signalling to which he deposes occurred at a distance of not less than two miles—that is to say, twenty cables, or 4000 yards, from the *Blackwater.* He asserts this in cross-examination by the Solicitor-General, repeats it in answer to a later question (adding that it was not just a little before the collision, and he did not think there was any danger), and repeats it again in re-examination by Mr. Laing, who, at the suggestion of the learned President, had pressed the witness to give the minimum, saying in answer to the question of counsel that the least distance was two miles. It is, in our judgment, plainly impossible to adopt this evidence of Rallo as to a porting at a distance of at least two miles as a description of the porting for the *Blackwater* which led to the collision. It is agreed that it was a fine, clear night, and, after all reasonable allowance is made, as it ought to be made on such occasions, for a margin of error in the estimates of a witness as to distance, it seems to me impossible justly to treat Rallo's porting of the *Hero* at a distance of two miles as the actual, and, as we have termed it, fatal, porting of the *Hero*, whether that occurred at a distance of 600 to 800 yards, or, as the President has put it, somewhere between the *Cheerful* and the *Flirt*—that is to say, at about 1000 yards from the *Blackwater.* A distance of anything like two miles would place the *Hero* as she was when approaching the *Kale*, which was the leading vessel of the starboard column of the first division of the flotilla and was steaming about thirteen cables ahead of the *Blackwater*. And probably it was a porting for the *Kale* which may be the explanation of Rallo's evidence. The evidence of Commander Pratt-Barlow of the *Kale* strongly confirms this supposition. At the commencement of his examination in chief he told the court that he first sighted the *Hero* about half a mile ahead of his vessel, and showing all three lights. "She ported her helm and altered course half a point to starboard, of course, and passed port to port? I cannot swear that she did, but my impression was that she altered course to starboard." The position of the *Hero* given by Rallo for the porting for the *Blackwater* would fit such a porting for the *Kale* as Commander Pratt-Barlow of the *Kale* thought had occurred. Be this as it may, it will not fit the porting for the *Blackwater.* In the face of Rallo's evidence on this point, apart from the "confusion in answering questions," and his "mistakes in some matters," to which the learned President refers in his judgment, we are unable, with sincere respect, to concur with the President in holding that the defendants' case as to the sounding of a one-blast signal when the *Hero* ported across the *Blackwater* was sufficiently established by the defendant's evidence.

There remains the question whether the omission of those on board the *Hero* to sound the one-blast signal at the time in question constituted a breach of art. 28. That article, so far as it is material to quote it for the purposes of the present case, provides that "when vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules, shall indicate that course by the following signals on her whistle or siren—viz., one short blast to mean 'I am directing my course to starboard,'" &c. The contention of the respondents is that the *Hero* in porting as she did was not taking a course authorised or required by the rules. Their counsel argues: "Leave on one side our pleaded case that the *Hero* ported whilst the *Blackwater's* red light, as well as her masthead and green light, was open on the port bow of the *Hero.* Treat, if you please, that story as untrue, and adopt the appellants' contention that, when the *Hero* altered her course by porting, the two vessels were showing green light to green light. If the *Hero* ported, and directed her course to starboard, under those circumstances she was not taking a course 'authorised or required by the rules,' but, on the contrary, she was taking a wrong and improper course—a course, therefore, in no sense 'required' by those rules which prescribe a particular course, or 'authorised' by the rules of general direction, such as arts. 27 and 29, within the interpretation placed upon the word 'authorised' by the courts in *The Uskmoor* (*ubi sup.*), *The Anselm* (*ubi sup.*), and *The Bellanoch* (*ubi sup.*)." We cannot accede to such a contention. If it were sound, the strange result would follow that in the present case, and in all like cases, a vessel which took a proper course either required by the rules or, as a seamanlike course, authorised by the rules, but which omitted to make the appropriate sound signal according to rule 28, would incur the penalty incident to statutory blame, whereas a vessel which in precisely the same circumstances took a wrong and unseamanlike course, neither required nor authorised by the rules, and gave no sound signal to indicate that course, would, so far as regards the absence of an appropriate sound signal, go scot-free. We do not think that the language of art. 28, fairly and reasonably interpreted, involves such a conclusion. We do not think that the words "taking any course authorised or required by these rules" limit the application of the rule to the case of a course which, at the trial of a collision action, is found by the court to have been authorised or required by the rules. We ought, it appears to us, to interpret the words as including any course alleged to have been taken by a vessel acting, whether under art. 27 or 29, or under the other articles, so as to avoid immediate danger. So that where, as here, a vessel charged in an action with having taken, in acting for the other vessel, an improper course causing or contributing to a collision, asserts in that action, as the *Hero* does here, that the manœuvre was a proper course under the rules, she cannot successfully contend that because the court holds that her story of the facts is an untrue story, and that upon the true facts the course taken by her was neither a course required nor authorised by the rules, she thereby gains exemption from liability from statutory blame for not sounding the signal appropriate to that course. It was a course which

those in charge of the vessel professed at the time to take, and the owners of the vessel sought to justify in the action, as a course either authorised or required by the rules. In the result, we are of opinion that the *Hero's* allegation that the port-helm signal was sounded when she ported across the bows of the *Blackwater* has not been established, and that as the absence of that signal may, as the learned President has rightly found, possibly have contributed to the collision, the *Hero* must be deemed to blame for breach of art. 28; and therefore the decree of the court below on the claim and counter-claim must be amended by a finding that both vessels were to blame, and by the insertion therein of the necessary consequential directions. With regard to the costs, as the appellants have failed to establish that they were not to blame, and, in the result, both parties have been found to blame, there will be no costs in the Court of Appeal or in the court below.

Solicitor for the appellants, *Treasury Solicitor*.
Solicitors for the respondents, *Thomas Cooper and Co.*

Thursday, May 25, 1911.
(Before VAUGHAN WILLIAMS, FLETCHER MOULTON, and FARWELL, L.JJ.)

HUTCHINS BROTHERS *v.* ROYAL EXCHANGE ASSURANCE. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Inchmaree clause—Damage to hull through latent defect existing prior to the policy — Latent defect becoming patent through wear and tear during currency of policy.

A policy of marine insurance insuring a ship for twelve months from the 8th Dec. 1908 *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 sternpost 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 sternpost:

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.

Decision of Scrutton, J. (reported 104 *L. T. Rep.* 208) *affirmed.*

APPEAL by the plaintiffs from a decision of Scrutton, J. in an action tried by him without a jury, reported 104 L. T. Rep. 208.

The plaintiffs, who were 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 sternpost condemned because of a crack or fissure.

The claim 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 explosives, 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 defendants alleged there was no loss by perils insured against within the period of the policy.

Scrutton, J. found as a fact that there was a defect in the sternpost when it was originally cast; that it was covered up by the makers and remained undiscoverable by reasonable inspection until after the commencement of the policy, and that it became visible owing to the ordinary wear and tear of a ship's life; and he 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.

The plaintiffs appealed.

Bailhache, K.C., *Dunlop*, and *C. H. Carden Noad* for the plaintiffs.

George Wallace, K.C. and *Chaytor* for the defendants.

VAUGHAN WILLIAMS, L.J.—I think that this appeal fails. I agree with the judgment of Scrutton, J., which I think runs in substance on the lines of the judgment of Walton, J. in *Oceanic Steamship Company* v. *Faber* (10 Asp. Mar. Law Cas. 303; 11 Com. Cas. 179). I desire to refer to the judgment of Walton, J. for this reason, that I entirely agree with it, and it seems to me admirably stated. It is a judgment which is perfectly clear and perfectly logical, and one understands it from beginning to end. We could not possibly assent to the argument which has been put before us by Mr. Bailhache without saying that the decision in *Oceanic Steamship Company* v. *Faber* (*sup.*) was wrong. The passage I wish to refer to begins at p. 185 of the report in 11 Com. Cas. and p. 305 of the report in Asp. Mar. Law Cas.: "I have to construe the clause. It seems to me quite plain that the effect and sense of this clause is not that the underwriters guarantee that the machinery of this vessel is free from latent defects, or undertake, if such defects are discovered during the currency of a policy, to make such defects good. It is plain that that is neither the intention of those who drew this clause, nor is it the sense of the clause itself if reasonably read and reasonably construed. The underwriters agree to indemnify the owner against any loss of or damage to the hull or machinery through any latent defect, so that a

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

claim does not fall within the clause unless there is loss of or damage to hull or machinery or some part of the hull or machinery, and there is no claim unless that damage has been caused through a latent defect, or through one or other of the causes that are mentioned in the clause—in this particular case through a latent defect. Therefore there must be a latent defect causing loss of or damage to the hull or machinery, and causing that loss of or damage to the hull or machinery during the currency of the policy under which the claim is made. If those conditions are fulfilled, the underwriters are liable to indemnify the owners in respect of that loss or damage." That is admirably stated. I agree with the judgment of Walton, J. and his reasoning and every passage of it. What is said against this? It is said, "Oh, but there was an appeal (13 Com. Cas. 28; 10 Asp. Mar. Law Cas. 515) in the same case in which the judgment of Buckley, L.J. differs from the view of Walton, J." It is also suggested (I do not think it can be said) that the judgment of the Lord Chief Justice differs from it or, rather, does not affirmatively agree with it. Now, with regard to the judgment of Buckley, L.J., it is impossible to say that the last clause of his judgment is in any way inconsistent either with the judgment of Walton, J. or with the judgment of Scrutton, J. in this case. But a difficulty arises because it is said that there is an earlier passage which does not seem easy to reconcile with the later passage. Buckley, L J.'s judgments are, as a rule, so clear and so plain that he has justly, if I may use the term, acquired a reputation for singular clearness. I do not profess to explain how this passage and the other one can be reconciled, but am of opinion that this appeal fails and must be dismissed with costs.

FLETCHER MOULTON, L.J.—I am of the same opinion, and I will only add a very few words. In my opinion the Inchmaree clause is emphatically a clause of insurance. It is an insurance against perils, but not necessarily perils of the sea. The House of Lords in *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) decided that you could not recover under a policy of insurance in the form in which it was then drawn for losses which might just as well have occurred in a warehouse or on shore. In that case the valve of the donkey engine had got out of order, and the explosion and trouble resulted therefrom. It had nothing whatever to do with the perils of the sea. The Inchmaree clause was therefore inserted in marine policies in order to extend the policy to risks of that type, and of course we must construe it. We must not start with a predetermined notion of what it was intended to cover, but still it is important to know when and how it was first introduced. Now, the clause begins by saying, "This insurance also specially to cover." It remains, therefore, in the intention of the parties a policy of insurance, and it is to cover loss of or damage to hull and machinery through, among other things, a 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." Now, what are the facts of the case before us? In casting the sternpost of this vessel the casting failed, and it was a defect which made it a most improper sternpost, not fit to be used in a vessel, but—obviously fraudulently made—the defect was concealed; the sternpost was puttied up and put in the vessel. That was the condition of the vessel at the time when the Inchmaree clause began to run. Subsequently, during the currency of the policy, the paint coming off or being scraped off when they were repairing the ship, it was discovered what kind of sternpost she had, and the surveyors instantly condemned it and it had to be replaced. It is suggested that that is loss of or damage to hull or machinery by a latent defect. It was nothing of the kind. It was a latent defect itself. To hold that this Inchmaree clause covers that would be to make it not an insurance clause, but a guarantee clause, a warranty that the hull and machinery were free from latent defects, the consequence of which would be that all defects which could be discovered would have to be repaired at the cost of the insurers. I am satisfied that there are no words within this clause which imply such an interpretation, and the fact that it begins by being an express insurance against loss or damage to my mind negatives the possibility of such an interpretation. But then it is said that it has been so interpreted in this court in the *Oceanic* case by the Lord Chief Justice and Buckley, L.J. The language at the end of Buckley, L.J.'s judgment is conclusive to my mind against that contention, and I cannot help thinking that the ambiguity which exists in the earlier part of the judgment is partly due to this fact, that "breakage of shafts" is specifically referred to in the clause in another and earlier context. I think it is possible that there will arise a difficult question as to whether "breakage of shafts" is not put in a special position—a position in which other defects of machinery and hull are not—and I think it was in considering those particular words, which do not apply to this present case at all, that Buckley, L J. used the words in the earlier part of his judgment which seem to have caused this impression and given rise to apparent ambiguity. I do not think he intended to differ from the admirable judgment of Walton, J., with which I fully agree, or to differ from me when I said "I do not believe for one moment that this clause means that the machinery is insured against the existence of latent defects."

FARWELL, L.J.—I agree. I desire to adopt the admirable judgment of Walton, J. in the earlier case, and I do not wish to add anything to it.

Appeal dismissed.

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

Solicitors for the defendants, *Coward and Hawksley, Sons, and Chance.*

House of Lords.

June 15 *and* 16, 1911.

(Before the Lord Chancellor (Loreburn), Lords Atkinson, Gorell, and Robson.)

Thomas and Co. *v.* Portsea Steamship Company. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Arbitration clause—Bill of lading—Incorporation.

Goods were shipped under a charter-party which contained an arbitration clause by which "any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at the port where it occurs, and the same shall be settled by arbitration." A bill of lading was given to the shipper which provided that freight should be paid "for the said goods, with other conditions as per charter," and in the margin was written in ink, "Deck load 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 sued the bill of lading holders for demurrage at the port of discharge :

Held, that the arbitration clause in the charter-party was not incorporated in the bill of lading so as to make it applicable to this dispute, it being only intended to apply to the method of settling disputes between the parties to the charter-party arising out of its conditions, not to disputes arising out of the bill of lading.

Judgment of the court below affirmed.

Hamilton v. Mackie (5 *Times L. Rep.* 677) *approved and followed.*

Appeal from a judgment of the Court of Appeal (Vaughan Williams, Buckley, and Kennedy, L JJ.), reported 11 Asp. Mar. Law Cas. 530, *sub nom. The Portsmouth*; 104 L. T. Rep. 10; (1911) P. 54, which had reversed a decision of the Admiralty Divisional Court (Sir S. Evans, P. and Bargrave Deane, J.), reported 11 Asp. Mar. Law Cas. 531; 104 L. T. Rep. 10; (1910) P. 293, who had affirmed a decision of the County Court judge of Glamorgan, sitting at Cardiff, staying the action and referring the matter in dispute to arbitration.

The facts appear sufficiently from the headnote above, and from the judgments of their Lordships, and are set out fully in the report in the courts below.

Leslie Scott, K.C. and *Holman Gregory*, K.C., for the appellants, argued that the effect of the marginal clause in the bill of lading was to incorporate all the terms and conditions of the charter-party, including the arbitration clause. They referred to

Weir and Co. v. *Pirie and Co*, 3 Com. Cas. 263;
East Yorkshire Steamship Company v. *Hancock*, 5 Com. Cas. 266;
Russell v. *Niemann*, 10 L. T. Rep. 786; 17 C. B. N. S. 163;
Serraino v. *Campbell*, 64 L. T. Rep. 615; (1891) 1 Q. B. 283;
Larsen v. *Sylvester*, 99 L. T. Rep. 94; (1908) A. C. 295;
Glynn v. *Margetson*, 69 L. T. Rep. 1; (1893) A. C. 351.

Bailhache, K.C. and *A. Parsons*, for the respondents, maintained that the case was covered by the decision in *Hamilton* v. *Mackie* (5 Times L. Rep. 677), and that the decision of the Court of Appeal was right. They also referred to

Manchester Trust v. *Furness, Withy, and Co.*, 73 L. T. Rep. 110; (1895) 2 Q. B. 539;
Gullischen v. *Stewart*, 50 L. T. Rep. 47; 13 Q. B. Div. 317.

Leslie Scott, K.C., in reply, referred to

Restitution Steamship Company v. *Pirrie*, 7 Asp. Mar. Law Cas. 11 (n).

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

The Lord Chancellor (Loreburn). — My Lords: The question in this case seems to me to be whether an arbitration clause found in the charter-party is applicable to the contract evidenced by the bill of lading, and to disputes arising between the shipowners and the holders of the bill of lading under that document. The bill of lading itself is the primary document to be considered. It acknowledges the shipment of the goods in the usual way, and the terms upon which they are to be delivered. There are two paragraphs in it which refer to the charter-party One of them is in the body of the bill of lading and provides that the goods shall be delivered to "William Malcolm Mackay or his assigns, he or they paying freight for the said goods with other conditions as per charter-party with average accustomed." Now, it is well settled that under words of that kind you cannot say that the arbitration clause in the charter-party is incorporated or made applicable. Then there is another paragraph in the bill of lading relating to the charter-party. It is as follows: "Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause." I do not think that this paragraph brings into the bill of lading the arbitration clause any more than the other one does. The arbitration clause is not one that concerns shipment, or carriage, or delivery, or the terms upon which delivery is to be made or taken; it only governs the way of settling disputes between the parties to the charter-party, and disputes arising out of the conditions of the charter-party, not disputes arising out of the bill of lading. In my opinion the Court of Appeal relied rightly upon the decision in *Hamilton* v. *Mackie* (5 Times L. Rep. 677), and, if it is desired to put upon the holders of a bill of lading an obligation to arbitrate because that obligation is stated in the charter-party, it must be done explicitly.

Lord Atkinson.—My Lords: I concur with the judgment of the Lord Chancellor. I think that it is a sound rule of construction that when it is sought to introduce into a document like a bill of lading, a negotiable instrument, a clause such as this arbitration clause, not germane to the receipt, carriage, or delivery of the cargo, or to the payment of the freight, the proper subject-matters with which a bill of lading is conversant, this should be done by distinct and specific words and not by general words such as those written

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

in the margin of the bill of lading in this case. With regard to the other point mentioned by my noble and learned friend, I concur in his opinion.

Lord Gorell.—My Lords: I concur in the judgment which has been delivered by the Lord Chancellor, but I should like to say a few words about this case, because it is one of a class of cases which constantly occur, and these questions as between consignees and shipowners are really of very great commercial importance. The charter-party in this case was made between certain shipowners and certain charterers for the loading of a large cargo of wood goods (of course I am taking it quite shortly) at, I think, the port of Halifax, or some other port, for a port in this country; there was a clause for cesser of liability, and there were provisions as to freight, and the time for loading and the time for discharge; and there was also an arbitration clause in these terms: "Any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at the port where it occurs, and the same shall be settled by arbitration." Under that charter-party a cargo was provided, but it was not shipped by the charterers; it appears to have been shipped by a certain Mr. William Malcolm Mackay, with whom, no doubt, the charterers had arranged for a cargo. The whole cargo appears to have been dealt with in one bill of lading, which, after providing for the usual exceptions, winds up by saying that the cargo is to be delivered "unto William Malcolm Mackay or his assigns, he or they paying freight for the said goods with other conditions as per charter-party, with average accustomed." The bill of lading also has a marginal clause written in in ink: "Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause." Now, I think that it has hardly been argued seriously that the clause as to "paying freight with other conditions as per charter-party" in the body of the bill of lading would incorporate the arbitration clause in this case. There is ample authority against any such view, and I pass from that point. But it is said that the special clause in the margin has in fact had the effect of bringing into the bill of lading the arbitration clause which is found in the charter-party. To my mind the question is one of construction, and, when one turns to the marginal clause in question, I have very serious doubt whether it carries the question one bit further than the clause which is found in the body of the bill of lading, except, of course, so far as it brings in the exceptions in the charter-party, and these exceptions are to include the negligence clause; because it adds, really, in words, to the words in the body "with other conditions as per charter-party," nothing more than that all other terms and conditions are to be those of the charter-party. Now, the case of *Hamilton* v. *Mackie* (*ubi sup.*) has already decided that the words "all other terms and conditions as per charter-party" (I think that those are the exact words) have not the effect of bringing the arbitration clause into the bill of lading. We have not had a full report of that case, so as to enable us to judge whether there was a cesser clause there or not, but I cannot help thinking myself, having regard to the date of that decision, and to the fact that there was a full cargo, as I understand the report, that it is extremely probable that there was a cesser clause in that case, as it had become quite common at the date when that decision was given; and the conclusion to which I come is that that case was rightly decided, and that it really governs the present case; but whether it does so or not, it seems to me that the marginal clause does not contain words which incorporate the arbitration clause in the present case. I think that the true view to take of such a clause is that the "terms and conditions" do not really include more than what refers to those matters which have to be dealt with both by the shipowner and the consignee in relation to the carriage, discharge, and delivery of the cargo. To what extent they include what refers to those matters, or any of them, I do not pause to consider, but I do not see that they deal expressly with the arbitration clause in any way, and of course it is sufficient for present purposes to say that they do not; but my view is that what they deal with is no more than that which I have already stated. Now, that being so, if one considers this case a little more broadly, the shipper is not likely, I think, to have been desirous of consenting to an arbitration clause which possibly places upon him the obligation of deciding by arbitration at any port where a dispute occurs a question in which there is any dispute. Certainly no consignee would ever be likely, naturally, to assent to such a proposition because he might find himself landed in the difficulty of having to go to arbitration at a port of shipment with which he had no further connection than the mercantile one of correspondence. It therefore seems to me, when one looks at the matter broadly, that the true construction to place upon the clause is that which I have already suggested; and that the point may be made still plainer by trying to see what would be the effect produced if this clause of arbitration were actually written into the bill of lading. If it were written in, it would at once be seen that it is not a clause which is consistent in its terms with the terms of the bill of lading. It is consistent with disputes arising under a charter-party, and that again leads to the conclusion that it was never intended to be inserted as part of a bill of lading which was to pass from hand to hand, as bills of lading, being negotiable instruments, usually do. But there is a wide consideration which I think that it is important to bear in mind in dealing with cases of this class. The effect of deciding to stay this action would be that the bill of lading holder, or the shipowner (in this case it would be the shipowner, but it might just as well occur where a bill of lading holder is concerned), who did not wish for an arbitration, would be ousted from the jurisdiction of the courts, and compelled to decide all questions by means of arbitration. Now, I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect, and I am by no means prepared to say that this contract, when studied with care, was ever intended to exclude or carries out any intention of excluding the jurisdiction of the courts in cases between the shipowner and the bill of lading holder. It seems to me that the clause of arbitration ought properly to be confined, as drawn, to disputes arising between the shipowner and the charterer, and therefore I concur in the motion which the Lord

Chancellor has made that this appeal should be dismissed.

Lord Robson.—My Lords: The question here is whether the appellants, who are consignees of the goods, can compel the shipowners to submit to arbitration on a claim for demurrage instead of bringing an action. For this purpose they must show that the bill of lading, which constitutes the contract between the shipowners and themselves, contains a clear stipulation to that effect. There is an arbitration clause in the charter-party applicable to "any dispute or claim arising out of the conditions of this charter-party," and providing that it "shall be adjusted at the port where it occurs, and settled by arbitration." The appellants contend that this clause is incorporated in the bill of lading by reference. There are two references in the bill of lading which purport to incorporate all or some of the terms of the charter-party. With regard to the clause in the body of the document which expresses the obligation of the shipowner to deliver the goods to the consignee, "he or they paying freight with other conditions as per charter," very little need be said. These words have been the subject of a series of decisions which establish that such a reference does not incorporate every clause or term of the charter-party, but only those terms which are *ejusdem generis* as that for the payment of freight. There is, however, written in the margin of this bill of lading a clause which deals with the incorporation of the provisions of the charter-party in somewhat wider terms. It says: "Deck load at shipper's risk, and all other terms and conditions and exceptions of the charter-party are to be as per charter-party, including negligence clause." In these words we have no specific reference to the payment of freight so as to import a limitation on their generality, but I do not think that they differ in effect from the clause in the body of the bill of lading so far as the question in the present case is concerned. Both clauses are subject to the rule that the terms of the charter-party when incorporated or written into the bill of lading shall not be insensible or inapplicable to the document in which they are inserted, and it is not absolutely clear that, when thus tested, this arbitration clause is applicable to a dispute between persons other than the parties to the charter. It relates expressly only to disputes "arising out of the conditions of this charter-party," and would stand in the bill of lading with that limitation. In one sense it is perhaps difficult to imagine any dispute relating to the chartered voyage which might not be said to arise out of the conditions of the charter, but we are dealing here with obligations founded on the bill of lading, which is a different contract, and is made between different parties, though it relates in part to the same subject-matter. The limitation of the clause to the conditions of this charter-party is therefore, to say the least, embarrassing and ambiguous when it comes to be made part of the bill of lading. It requires, indeed, some modification to make it even read intelligibly in its new connection. It is to be remembered that the bill of lading is a negotiable instrument, and if the obligations of those who are parties to such a contract are to be enlarged beyond the matters which ordinarily concern them, or if it is sought to deprive either party of his ordinary legal remedies, the contract cannot be too explicit and precise. It is difficult to hold that words which require modification to be read as part of the bill of lading, and then purport to deal only with disputes arising under a document made between different persons, are quite sufficiently explicit for the appellants' purpose. On the whole, therefore, I think that their contention fails.

Judgment appealed from affirmed, and appeal dismissed.

Solicitors for the appellants, *Botterell* and *Roche*, for *J. D. Rawlings*, Swansea.

Solicitors for the respondents, *Downing, Handcock, Middleton*, and *Lewis*, for *Downing* and *Handcock*, Cardiff.

Feb. 13, 14, *and June* 26, 1911.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Ashbourne, Atkinson, Shaw, and Mersey.)

Moss Steamship Company v. Whinney. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading—Lien for unpaid freight due from limited company—Shipment by receiver—Right to exercise lien against receiver.

A limited company had for many years shipped goods by the appellants' line of steamers to their agents abroad under a bill of lading which contained a clause giving the shipowners a lien on the goods, not only for freight due thereunder, but also for any previously unsatisfied freight due from the shippers or the consignees. The company got into difficulties, and the respondent was appointed receiver, and he shipped goods by a ship of the appellants to the agents abroad, with instructions to "deliver as below, charging to yours respectfully ' the Company ' by A. F. W., Receiver and Manager." The address given for delivery was to the company, care of the agents. The appellants informed the respondent of the amount of freight, and inclosed a bill of lading in the same form as that used on previous shipments by the company. On the arrival of the goods, the shipowners claimed a lien in respect of unsatisfied freight due from the company on shipments before the appointment of the receiver.

Held, that they were not entitled to do so.

Judgment of the Court of Appeal affirmed, Lords Shaw and Mersey dissenting.

Appeal from a judgment of the Court of Appeal (Vaughan Williams and Buckley, L JJ.), Fletcher Moulton, L.J. dissenting, reported 11 Asp. Mar. Law Cas. 507; 103 L. T. Rep. 344; (1910) 2 K. B. 813, which reversed a judgment of Hamilton, J. sitting without a jury, reported 11 Asp. Mar. Law Cas. 381 (1910); 102 L. T. Rep. 177, in favour of the appellants, the defendants below.

The facts and arguments appear sufficiently from the judgments of their Lordships.

Bailhache, K.C. and *C. Robertson Dunlop* appeared for the appellants.

Sir *A. Cripps*, K.C. and *Leck* for the respondent.

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

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

June 26.— Their Lordships by a majority dismissed the appeal and gave judgment as follows:—

The Lord Chancellor (Loreburn). — My Lords: In this case Fletcher Moulton, L.J. and Hamilton, J. were of one opinion, while Vaughan Williams and Buckley, L JJ. held a different view. Your Lordships have, I am sure, felt the difficulty presented by such a conflict of judicial authority. This is eminently one of those cases in which it is most important to appreciate the true business character of the transaction, and to examine the communications between the parties in that light. Messrs. Ind, Coope, and Co. had for some time shipped beer on the vessels of the Moss Steamship Company, and taken bills of lading which provided that the shipowner should have a lien on the goods, not only for the stipulated freight, but also for any unsatisfied freight due on other shipments either from shipper or consignee to the shipowner. That was the course of business between them up to Jan. 1909. On the 5th Jan. an order was made in a debenture-holder's action that Mr. Whinney should be receiver and manager of Ind, Coope, and Co. Nothing special is to be found in that order. Its effect in law was that the company still remained a living person, but was disabled from conducting its business, the entire conduct of which passed into the hands of Mr. Whinney. Mr. Whinney did not close down the business, but continued it, and, among other things, he resolved to send some of Ind, Coope, and Co.'s beer to Malta to the company's representatives there. Accordingly on the 13th Jan. he sent an order to the Moss Steamship Company directing them to ship the beer to Ind, Coope, and Co., care of Turnbull, jun., and Somerville of Malta, and he signed as follows: "Ind, Coope, and Co. Limited, by Arthur F. Whinney, Receiver and Manager." Upon this, Messrs. James Moss and Co., as agents, shipped the beer and made out the bill of lading in the terms theretofore in use, which, as I have said, gave to the shippers a contractual lien, not merely for the freight of 56*l.* payable for this particular beer, but also for any unsatisfied freight due, either from shipper or consignee. Now, there was at that time due from Ind, Coope, and Co. to the shipowner the sum of 171*l.* for unsatisfied freight, and the dispute which your Lordships have to decide is this: Can Mr. Whinney claim delivery of this beer on payment of the stipulated freight of 56*l.* or must he also pay the additional 171*l.* unsatisfied freight due upon earlier contracts from Ind, Coope, and Co. in accordance with the lien clause in the bill of lading? Obviously, if the lien holds good for this sum of 171*l.* the effect of what Mr. Whinney has done is this: he has given security to the unsecured creditors of Ind, Coope, and Co. which placed them in front of the debenture-holders after the latter had got a receiver appointed, in order to realise their floating security over the undertaking of Ind, Coope, and Co. Questions have been raised as to the power of a receiver and manager to hypothecate assets of the company for the payment of unsecured creditors. It is said that such a proceeding would be *ultra vires*, or at all events an excess of authority, of which a trader who knew the position could not avail himself. I do not think that such a question arises in the present case, for the reason stated by Mr. Bailhache. This is an action between the shipowners on the one side and Mr. Whinney on the other. If Mr. Whinney has contracted so to hypothecate these goods, I say if he has done so, he cannot himself compel the shipowners to deliver them without first satisfying the charge which he has created. As between the litigating parties there is a charge. It may be that Mr. Whinney had no power to create it, but if so, then it is for the company to claim the goods and to raise the question of his authority. Of course, a decision upon the ground so taken by Mr. Bailhache would really settle nothing as to the true rights of the shipowners. In my opinion there is another ground upon which this case ought to be decided in favour of the respondent. The shipowners can claim a lien for the sum of 171*l.* unsatisfied freight only if this unsatisfied freight was due by the shippers or consignees of this particular shipment of beer. Who were the shippers and consignees respectively? We must look at the order of the 13th Jan. and the bill of lading together. The order is signed Ind, Coope, and Co. by Mr. Whinney, receiver and manager. Unless qualified by other circumstances absent here, this means that Mr. Whinney ordered the shipment and contracts for it on his personal credit, looking, of course, for indemnity to the assets of the company, of which he is receiver and manager. He is the shipper in the name, it is true, of Ind, Coope, and Co. The shipowners know, from the terms of the order, or ought to know, that Ind, Coope, and Co. are no longer conducting the business, but that Mr. Whinney is conducting it and making contracts for it. So again, when in the bill of lading Ind, Coope, and Co. are named as consignees, the shipowners know that they are so only in name, the real consignee being the same as the real shipper—namely, Mr. Whinney, the receiver and manager. I agree with Moulton, L.J. that the company was still alive and its business was being still carried on by Mr. Whinney, but he was not carrying it on as the company's agent. He superseded the company, and the transactions upon which he entered in carrying on the old business were his transactions upon which he was personally liable. He was really a trustee, and the shipowners dealt with the trustee. No doubt there may be cases in which a receiver and manager is in all senses the agent of the company, and a question may then arise as to the extent of his authority. But here he was not such agent, and this was sufficiently conveyed to the shipowners by the notice that he was receiver and manager. Had they doubted or desired further information they could have asked for it before contracting to carry the goods. They would have found that the person contracting with them was Mr. Whinney. Accordingly, I move your Lordships that the order appealed from be sustained.

The Earl of Halsbury.—My Lords: I think for more reasons than one, that it is desirable to state the circumstances under which this case comes for adjudication, chiefly because the very sensible arrangement made by the parties to have the real question in dispute disposed of before the courts, might be defeated if questions of pleading

or forms of action should interfere with the determination of the real question as I think that it has interfered with the arguments. Another reason is that I think that if the appellants' argument should prevail, it would be a very serious blow to a system at present prevailing, by which an enormous quantity of business is being carried on. A great many joint stock companies obtain their capital, or a considerable part of it, by the issue of debentures, and one form of securing debenture-holders in their rights is a well-known form of application to the Court of Chancery, which practically removes the conduct and guidance of the undertaking from the directors appointed by the company, and places it in the hands of a manager and receiver, who thereupon absolutely supersedes the company itself, which becomes incapable of making any contract on behalf of the company or exercising any control over any part of any property or assets of the company. Now in this case a joint stock company, Ind, Coope, and Co. Limited, a brewery carrying on an extensive business, part of which consisted in exporting beer, &c., to Malta, became embarrassed in its affairs; the debenture-holders became alarmed, and such an application as I have described was made to the Court of Chancery on the 5th Jan. 1909, and on that day an order was made appointing Mr. Whinney, the respondent, receiver and manager. On the 13th Jan. an order was given by Mr. Whinney for the beer which is the subject of this action, but the order was signed by "Arthur F. Whinney, Receiver and Manager," and on the 15th shipping documents were sent from Moss and Co. with a note that one bill of lading had been sent to the consignee by the ship *Rameses*, the exact date when she started on her voyage is not given. Two bills of lading were issued, one stamped, the other an unstamped copy sent to Ind, Coope, and Co. Limited, Burton-on-Trent. No one has suggested that Mr. Whinney ever saw the bill of lading himself; indeed, Hamilton, J. finds that that form of bill of lading was probably not read by anybody. The letter of the 16th Jan., which inclosed it, bore the statement: "One bill of lading sent to consignee. Please check the inclosed 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 it has no reference whatever to the terms of the bill of lading, and it only meant matters to be filled in pursuant to the instructions of the 13th Jan., but that included the description of the consignee and the address of the consignee, and I assume that to that extent the bill of lading was duly checked, and certainly no exception was taken. No doubt Mr. Whinney did not read the bill of lading; it is not proved that he did not, but I think that I should be shutting my eyes to the ordinary course of business if I believed that he did. This is certainly what I should infer, and when the witness at the trial is challenged with this notice of the 16th he says that of course it had reference to the number of the casks. Now, if actual knowledge of this particular stipulation in this particular bill of lading is negatived, as I think it is here, I am unable to take the view that, with all respect to this very learned and experienced judge, and my respect for any judgment of his is very great indeed, that there was any evidence of such a contract as would enable Messrs. Moss and Co. to exercise a lien. Such a phrase as "the usual bill of lading" is entirely misleading unless it is explained with respect to what the word "usual" is to be applied. No doubt there are some things which are so common in commerce as, even when not specially called to the attention of the contracting parties, to be assumed by every business man to be included in a common and well-known form of contract, but no one, I should have thought, could contend that when a company has been so altered in its mangement that a receiver has been appointed who is the only person who can contract, that its former course of business is to be considered as making the very first consignment made to be subject to the forms which were in use when the company and not the receiver were conducting the business. It would be quite intelligible that such a clause as we are here discussing should be included in dealings with the company itself, and the practice would be used justly as proof against those who had been in the habit of using it for ten years. But once a receiver and manager is appointed things are changed, and every man of business would know, and ought to know, that the only person with whom he could contract safely would be the manager appointed by the Court of Chancery. Now to say of such a person that the stipulation in question would form a likely clause would be ridiculous. If it were to be inserted at all, it certainly would require that it should be expressly pointed out to the receiver and manager, who, as every business man would know, is placed in his position of receiver and manager to protect the rights of the debenture-holders. One would suppose, from some of the arguments, that one was dealing here with some quite inexperienced persons, who had never heard of a debenture action before, whereas, as I have already pointed out, we are dealing with thoroughly experienced business men, and I observed that, when Mr. Waller was challenged at the trial as to whether he had not heard of a manager and receiver being appointed, his only answer is that he had not been officially informed. As the late Lush, L.J. pointed out, a bill of lading refers primarily to legal relations between the parties as applicable to the particular consignment to which it relates. The question what would be the consequence if Mr. Whinney had known and understood the contract, which he was supposed to have done, but I find as a fact that he did not, does not arise in this case. I agree with the Lord Chancellor that it is unnecessary to discuss it, and I think that this appeal should be dismissed.

Lord Atkinson.—My Lords: The action out of which this appeal has arisen was not an action to recover damages for breach of a warranty given by Arthur F. Whinney of his authority to make a contract, still less an action to recover damages for a false representation made by him of his authority to make any contract. It was a proceeding instituted by him to try the validity, as between him and the appellants, of a lien given to them, and already enforced by them, on certain goods of which he had possession, the property of Ind, Coope, and Co., shipped on the appellants' ship the *Rameses*, and carried by her to Malta. The lien was given in respect of a

simple contract debt, owed by Ind, Coope, and Co., for freights theretofore earned; and in the circumstances of this case must, I think, be taken *primâ facie* to have had the effect of giving to an unsecured creditor of that company priority over its secured creditors. Arthur F. Whinney was, by order of the Court of Chancery, dated the 5th Jan. 1909, made in an action instituted by the debenture-holders of this company, appointed receiver and manager over "all the undertaking and property whatsoever and wheresoever of the company." The company being directed to deliver over to him, amongst other things, "all the stock-in-trade and effects of" their business, and the possession of the said properties, so far as was necessary for the purposes of such receivership and managership; and it was further ordered that Whinney should forthwith, out of any assets coming to his hands, pay the debts of the company, which had "priority over the claims of the debenture stockholders, under the Preferential Payments in Bankruptcy Amendment Act 1897 and be allowed all such payments on his account." It is not pretended that the debt due for back freights, for which the lien was given, was one of these latter, or that any order had been obtained from the court authorising the giving of the lien, and I do not think that it can be contended successfully that under this order Whinney had any power to give a lien, valid at law against everybody on assets of the company coming to his hands, part of its stock in trade, which would have the effect of giving the priority above mentioned. This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it does entirely supersede the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance. Of all these facts the appellants had notice before this lien was created. That notice was conveyed to them by the description given by Whinney of himself in his letter to them of the 13th Jan. 1909. He describes himself as receiver and manager of Ind, Coope, and Co. That is sufficient: (*Burt and others* v. *Bull*, 71 L. T. Rep. 810; (1895) 1 Q. B. 276). Now, as I understood, the appellants contend that, despite this notice, Whinney could enter into a contract with the appellants, valid and binding as between themselves, that the company should do that which at law it is disabled from doing, and that he himself, Whinney, should do something which at law he is also disabled from doing —namely, that the company should intermeddle with their own goods, that they should become the consignees, if not the shippers of these goods, and should exercise dominion over, and deal with, them in the character of consignees—and that he, Whinney, should, in defiance of the order of the court, give a valid lien over the goods of the company, part of its stock in trade, of which he got possession and control as such receiver and manager in respect of a simple contract debt in the manner and with the result above mentioned; and further, that the lien so given could be enforced, and the receiver be estopped, as it were in a suit such as this, from relying upon its invalidity. It is admitted on both sides that the bill of lading in this case is only evidence of the contract entered into between the shipowner and the shipper, not the complete contract in itself. It is further admitted that it must be construed together with the respondent's letter of the 13th Jan, 1909. It is not denied that the bill of lading is similar in form to those invariably or generally used by the appellants in their business as shipowners, but there is no evidence which I can discover either that its terms were specifically brought to the knowledge of Whinney, or that he was under any necessity or pressure to ship this beer by the *Rameses*, or by any other of the appellants' ships, or indeed to ship it at all. It is not, therefore, in my opinion, open to the appellants to contend that there was some object to be gained by shipping the goods by this ship or by the appellants' line so important in character, that it would have been but reasonable and proper for him, in the efficient and zealous conduct of the business entrusted to him, to accept deliberately the terms contained in the bill of lading, rather than not effect this object. The debt for which the contested lien was given was, by the terms of the bill of lading, a debt due either by the shipper or "consignee." The contention of Sir Alfred Cripps, on behalf of the respondent, on this point was that Whinney was both shipper and consignee of the goods; and that he owed nothing for back freights. That of Mr. Bailhache, on behalf of the appellants was, as I understood it, that, at all events, between the contracting parties the company which did owe back freights is the consignee, and must be so treated; and the judgment of Moulton, L.J. is, apparently, to the effect that the company must, for the purposes of this case, be treated both as shipper and consignee, and that Whinney was only in the position of a general manager of the company appointed by the company itself. This latter point has not, as I gather, been relied upon on behalf of the appellants in argument before your Lordships. The decision of the question turns upon the construction of the letter of the 13th Jan. 1909, since it is admitted that the bill of lading must be read in conjunction with it. In my opinion, Sir A. Cripps is right. I think it obvious that the company were not the shippers. The very words "receiver and manager" convey, according to the above mentioned authority, that Whinney was not an agent of the company, but that he was managing their affairs under the order of the court, and that all their powers were in abeyance. It would seem to me plain, therefore, that the Ind, Coope, and Co., designated as consignee, must be the same company as that first mentioned in this letter—that is, the disabled and superseded company whose powers were dormant; so that the letter must be read as if, after the words Ind, Coope, and Co. Limited, where the same occur for the second time, the words "over whose business the above-mentioned A. F. Whinney has been appointed receiver and manager by the Court of Chancery" had been written into it. Read with that interpolation this letter, in my view, amounts in effect to a direction to consign the beer to Whinney, receiver

and manager, care of Turnbull, jun., and Somerville, Strado Reale, Malta. And if the same interpolation be made in the bill of lading, as I think it must be, then Whinney is himself, under the contract, the consignee, and as he owes nothing for back freights there is no lien.

As regards the second point, the money sued for, was paid under protest to obtain the delivery of the goods, and the question must be determined as if this was a proceeding, instituted by the appellants, to enforce this lien. The question for decision, then, would resolve itself into this: Would Whinney be estopped in such an action as against the appellants from asserting that he had no power to create the lien, and that it was invalid in law? It is to be observed that no evidence whatever was given to show that the appellants refused to ship their goods, or would not have shipped them, except upon the terms of getting this lien. It may well be that the way in which Whinney did this business was the ordinary way in which such business was done by the superseded firm. That, however, in my view, is not enough. He was not the agent of the company, but the officer of the court. His powers were those of such an officer, not those of the company or of an agent or manager appointed by them, who might possibly be held by implication to have conferred upon him power to conduct the business in the mode, and on the lines upon which, it had been theretofore conducted by them. His position would appear to me, therefore, to resemble somewhat that of the directors of a company, who, as I understand the authorities, are not estopped at law from relying on the fact that a contract which they made or act which they did was *ultra vires* and invalid (whether it was an act which could be ratified by the shareholders or not), as against a person who knew, or should be taken to have known, what their powers were, and therefore knew, or should be taken to have known, that the contract or act was *ultra vires*: (see Lindley on Companies, 6th edit, pp. 217, 351, 671). In *British Mutual Bank Company* v. *Charnwood Forest Railway Company* (57 L. T. Rep. 833; 18 Q. B. Div. 714) Bowen, L.J. says: "In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so?" And Fry, L.J. says: "No corporate body can be bound by estoppel to do something beyond their powers" (*Balfour* v. *Ernest*, 5 C. B. N. S. 601; *Kearns* v. *Leaf*, 1 H. & M. 681; *Chapleo* v. *Brunswick Building Society*, 44 L. T. Rep. 449; 6 Q. B. Div. 696). Those two cases turned upon the ignorance of the plaintiffs of the defendants' want of authority to accept bills. But for that ignorance it is obvious that the plaintiffs must have failed to establish personal liability against the directors. It was contended on behalf of the appellants that the inability of the receiver to create the lien contended for was merely a matter between him and the debenture-holders. They may no doubt dispute, before the court which appointed him, his claim to be reimbursed out of the assets of this firm for the sum paid to obtain delivery of the goods, but with this the appellants have no concern. If that reasoning be sound, the receiver could pledge the goods for a personal debt of his own. I do not think that it is sound. The creation of a lien such as that given was not shown to be incidental to or consequential upon those things which the respondent was authorised to do. It was *primâ facie ultra vires* as the appellants must be taken to have known. In my opinion, therefore, the lien was invalid, and the respondent is, on this ground as well as on the other, entitled to receive back the money sued for. The appeal should, I think, be dismissed.

Lord Shaw.—My Lords: The opinion which I have formed in this case differs from those just delivered. I have arrived at it with diffidence, and only after repeated consideration. I shall express briefly how the matter strikes me. The appellants own a line of steamships trading between Liverpool and Malta. For a good many years Messrs. Ind, Coope, and Co., brewers, have been in the habit of sending by the appellants' steamers consignments of beer to themselves, care of their agents, Messrs. Turnbull, jun., and Somerville. In the course of trade the custom had arisen of shipping upon contracts which provided that the shipowner should have a lien over the consignments for the freight applicable to the cargo and for all freights unpaid. In the present case it is admitted that 171*l*. was due from Ind, Coope, and Co. to the appellants in respect of previously unsatisfied freights. A lien was claimed under the terms of the contract accordingly. The lien has been released by payment, subject to the determination of the point whether such a lien was, in the circumstances, enforceable. There can be no doubt that, under the contract and by the terms of the bill of lading, the payment is due; and no one questions that, had certain events not occurred in the history of Ind, Coope, and Co., the lien was good. A few days, however, before this contract was made, a receiver and manager was appointed of the estate of Ind, Coope, and Co., at the suit of debenture-holders. The fact that there was such a receiver and manager was brought home to the appellants, because a week after his appointment—namely, on the 13th Jan. 1909—the shipping instructions to the appellants were: "Please deliver ale as below, charging to, Yours respectfully, Ind, Coope, and Co. Limited, By Arthur F. Whinney, Receiver and Manager, C.C.C." In the instructions the consignees were stated to be, "Ind, Coope, and Co. Limited, c/o Turnbull, jun., and Somerville, Strada Reale, Valetta, Malta," and the bill of lading which followed named the consignees as "Messrs. Ind, Coope, and Co. Limited, c/o Messrs. Turnbull, jun., and Somerville, or to his or their assigns." The bill of lading, following in this the previous practice of the business, created a lien which covered "any previously unsatisfied freight . . . due either from shippers or consignees to the shipowner." It is plain, accordingly, to my mind that, if Messrs. Ind, Coope, and Co. were either shippers or consignees, the contract which Mr. Whinney made would cover debts due by Ind, Coope, and Co., unless either of two things had occurred—namely, (1) that the entity known as Ind, Coope, and Co, had ceased to exist in law, or (2) that Ind, Coope. and Co. still subsisting in law, a contract entered into at that date, naming them as consignees, was a contract made *sub conditione*, and the condition was of such a character as to wipe out completely

that part of the contract which stipulated for a lien in respect of all previously unsatisfied freights. With regard to the first point—namely, whether Ind, Coope, and Co., as a legal entity, was continued after the appointment of a receiver—I respectfully agree with the judgment of Moulton, L.J.: "It was suggested that Ind, Coope, and Co. Limited after the appointment of the receiver and manager, was a different entity from 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 had 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 company. No one but the limited company of that name can carry on the business of Ind, Coope, and Co. 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." I do not desire to put the point in any language of my own, adopting as I do in its entirety this paragraph of the learned Lord Justice's opinion. The second question is: Was a contract containing a clause so specific and clear, a clause which included within the scope of the lien freights previously unsatisfied by Ind, Coope, and Co.—was that clause substantially excised from the contract by reason of the appointment of a receiver? I cannot see my way clear to hold that it was. It may be quite true that the effect of the appointment of a receiver would be to place all creditors for debts of the company outstanding at the date of the appointment in a class separate from those who made advances or rendered service to the company after or during the receivership. But in point of fact what Mr. Whinney did in this contract was himself to make —even although he were considered a different person in law from Ind, Coope, and Co.—a shipping contract, one of the terms of which was that the outstanding debts of the appellants should be paid as the agreed-upon return for the then present service of conveying certain goods under the bill of lading to Malta. It was free to him to make that bargain; and it was free to the appellants, the shipping company, to decline to carry the goods or to stipulate for higher freights or different terms. But in my humble opinion, with the utmost deference to the learned judges who reached a different result, it is not free for him to say that he is not bound by an integral portion of the bargain, or to put forward the plea that he had not read a certain part of the contract which *quoad ultra*, he admits must stand. They were satisfied to go on as before, and the contract was thus made in circumstances which I find clearly expressed in the judgment of Hamilton, J.: "He" (that is Mr. Whinney) "instructed the goods to be shipped on the terms that the contract was to contain the usual clause under 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 as would lead to the inference that any different contract arose in the case of this shipment from the contract that has arisen in the case of prior shipments." The question is raised in several of the judgments of the courts below as to whether the shippers, Ind, Coope, and Co., formerly, and Ind, Coope, and Co. per Whinney, latterly, were the same shippers. There is much to suggest that substantially they were—the continued entity of Ind, Coope, and Co. being as stated. But I do not think it necessary to deal separately with that point; for, in my judgment, it is sufficient to say that by the express terms of the contract, Ind, Coope, and Co. were the consignees of this cargo —stated as such by name. Although the fact of a receivership had occurred in the history of that concern, that fact did not, as I have observed, disable the receiver from making the contract in these terms, or from shipping goods in accordance with the custom which had obtained previously. I do not find sufficient in this case to entitle me to say that I can upset that contract or import into its conditions something foreign to the previous relations of the parties, or excise from the contract what it itself stipulates—namely, that the lien was to cover past freights due to the appellants by the shippers. I admit the difficulties of the case; but I tender my respectful assent to the conclusions reached by Hamilton, J. and Fletcher Moulton, L.J.—remarking, finally, that I take it be somewhat serious that the holders of contracts of that kind should find them substantially modified by events which impinge upon and cut down their terms, and leave it thus open to a receiver to make contracts in comprehensive terms, which he had an undoubted power to make, but upon the construction of which it is open to him to maintain that they are less comprehensive in law than they bear to be on the face of the statement, and, therefore, that the carriers must, on the one hand, stand bound by the contract of carriage, but, upon the other, be limited in their rights of lien and recovery under that contract.

Lord Mersey.—My Lords: It is unnecessary to restate the facts of this case. They will be found set out sufficiently in the judgment of Hamilton, J., and they are not in dispute. It is important, however, to consider two preliminary matters before turning to examine the terms of the contract out of which the action arises. The first is as to the position and powers of Mr. Whinney as receiver and manager of Ind, Coope, and Co. Limited, and the second is as to the nature of the action itself. Mr. Whinney was a receiver and manager appointed by the court; he was not appointed by the debenture-holders, although, no doubt, he was appointed at their instance; nor was he appointed by the company. He was agent for neither the one nor the other, and, therefore, could make no contracts upon which either could sue or be sued. The contract in this case affords a sufficient illustration of what I mean. The debenture-holders could certainly not be sued upon it, for they as a body never had power to carry on the business or to contract in relation to it, nor could the company be sued upon it for they had ceased to be able to make any contracts by an agent or otherwise. Thus no

question of *ultra vires* arises. Mr. Whinney was merely an officer of the court, directed by the court, and by the court alone, to do a certain thing—namely, to carry on the business of Ind, Coope, and Co. Limited, in the ordinary way, until such time as the court might otherwise direct. An obligation was placed on him of making the contracts which might be necessary for so carrying on the business, and annexed to that obligation was a correlative right to be indemnified out of the assets of the company in respect of the liabilities which he might thereby incur. If he were to make contracts not necessary for the carrying on of the business, as, for instance, if he were to buy an excessive quantity of malt or if he were to sell an unduly large quantity of beer, so as to cripple the business, he would be personally liable on the contracts, and when he came to pass his accounts, the court might refuse him any indemnity out of the assets in respect of the liabilities which he had thereby incurred, and might also condemn him in damages for the loss resulting to the business in carrying out the contracts. It would not be for the persons contracting with him to inquire whether the contracts were such as came within the ordinary course of the business. Mr. Whinney, who alone could ascertain whether they were so or not, would have to take the risk of making a mistake in that connection. This was the position of Mr. Whinney with regard to the company of which he was appointed receiver and manager, and with regard to third parties with whom he might contract. As to the nature of the action brought by him, it is sufficient to say that it was an action brought by him in his personal capacity to recover back money of his own which he had paid to the defendants in order to obtain possession of goods on which the defendants alleged, and he denied, that he had created a lien in their favour. The action was not brought to try the right of the company or of the debenture-holders to the possession of the goods. There was nothing in it in the nature of interpleader, and it raised one simple question —namely, had Mr. Whinney created in the defendants a right to hold the goods as against himself, not as against the company, until the alleged lien was discharged? Such was the position of Mr. Whinney in the litigation, and such was the nature of the action brought by him. I have only referred to these matters because I think that some confusion arose during the argument in respect to them. The respondents did not take a different view of them from mine in the courts below, nor do I think that they intended to put forward a different view before your Lordships' House.

I come, therefore, to the question in the case—namely, did Mr. Whinney create a lien on the goods in respect of the back freights? It is said in the first place, that he did not because he could not, inasmuch as the goods were not his. To this contention there are two answers—first, that he was in lawful possession of the goods with power to pass the property in them by virtue of the order of the court under which he was acting. He could certainly sell them and give a good title to a buyer; he could also as part of the carrying on of the business, forward them to the Maltese agency and make such contracts as might be necessary or usual in that behalf; and in the next place it appears to me that if by the contract of affreightment he purported to give a lien, it does not lie in his mouth to deny that the goods were his. It is not a case of warranty that he had an authority from someone else to give a lien. In such a case he would only be liable in damages for breach of the warranty. It is a case in which the goods for all relevant purposes were his own and had been shipped as his own. In the next place it is said that the words of the contract did not create the lien alleged, and this I conceive to be the real question in the case. Now the terms on which the goods were carried are to be found only in the bill of lading, a document which in the ordinary course of business, would be filled up by Mr. Whinney or his clerk, and then presented to the steamship owners for signature. The terms were the same as those on which the steamship company had carried goods for Ind, Coope, and Co. for many years past. The contract, therefore, was one which it was in the ordinary course of Ind, Coope, and Co.'s business to make. These terms gave to the steamship company "a lien and right of sale over the goods shipped in respect of any previously unsatisfied freight, due either from the shippers or consignees to the shipowners." Then who were the consignees? Now, no business man looking at this bill of lading could have any doubt on that point. The goods are "to be delivered (at Malta) to Ind, Coope, and Co. Limited, c/o Messrs. Turnbull, jun. and Somerville, or to his or their assigns." The reference to Turnbull, jun. and Somerville amounts to no more than a notification of an address at which Ind, Coope, and Co. are to be found, and the word "order," which appears in this part of the bill of lading, merely means that the document must be endorsed before the goods can be delivered up in exchange for it. Ind, Coope, and Co. were thus the consignees, and Mr. Whinney did, by the very terms of the contract of affreightment, give to the defendant shipowners the lien which they set up. Both Hamilton, J. and Buckley, L.J. were of opinion that Ind, Coope, and Co. were the consignees mentioned in the bill of lading. Hamilton, J. says "Mr. Whinney had this beer forwarded upon the terms that it should be consigned to Ind, Coope, and Co. Limited," and Buckley, L.J. says: "I agree that the company were in this transaction the consignees," Buckley, L.J. however adds: "but not in the sense in which the defendants seek to affirm that they were such"; and he then goes on to state in what sense the word "consignees" is used in this bill of lading. He says, in effect, that the consignees mentioned in the bill of lading are Ind, Coope, and Co., "by Mr. Whinney as receiver and manager. Here the learned Lord Justice is doubtless referring to the order for shipment of the 13th Jan. 1909, which is an order addressed by Mr. Whinney to the agents of the steamship company directing them to deliver the ale to Ind, Coope, and Co. Limited, Malta. This order is signed "Ind, Coope, and Co. Limited, by Arthur Whinney, Receiver and Manager." But I am at a loss to understand how the fact that the shipper describes himself in the shipping instructions as a receiver and manager can affect the question as to who are the consignees. Ind, Coope, and Co. do not, and, indeed, cannot, exist in two different senses. The company has not been wound-up, nor is it even in

liquidation. The only change that has happened is that, instead of the business being managed by an official appointed by the board of directors, it is managed by an official appointed by the court; but the company is still the same company and the business is still the same business. Mr. Whinney started no new business; he merely continued the old one, and Mr. Whinney himself clearly understood this when on Jan. 6 he telegraphed to Turnbull, jun., and Somerville: "We continue to do business as heretofore, Receiver, Ind, Coope, and Co." It was said during the argument that to let the shipowners have the benefit of the lien would be to make them secured creditors, taking priority over the debenture-holders. The answer is that the shipowners are not concerned with the debenture-holders. They made their contract with Mr. Whinney, and it is the money of Mr. Whinney which they are claiming a right to keep in this action. If Mr. Whinney has provided the money in order to free the goods from a lien, which as against the company he ought not to have created, he will not get the amount allowed in his accounts, and the company will be none the worse. To construe the bill of lading contract as the Court of Appeal has construed it is, in my opinion, to twist it from its plain meaning and to deprive the shipowners of part of the consideration for the carriage of the goods for which they stipulated, which was conceded to them. Another point was taken by the learned Lord Justice in the course of the argument in the Court of Appeal—namely, that Mr. Whinney could not, without the leave of the court, bind the debenture-holders by charging the goods with the back freights. It was a point which had not been taken before Hamilton, J. I think it sufficient to say of it that the same considerations which dispose of the earlier points dispose of this point also. If this contract was one which came within the meaning of carrying on the ordinary business of the company (as I think it was), Mr. Whinney required no leave; the making of it was authorised and, in fact, enjoined by the order of the court appointing him; and if it did not, it is he, and not the shipowners, who must bear the consequences. For these reasons I think this appeal ought to be allowed, and the judgment of Hamilton, J. restored.

The Lord Chancellor.—My Lords: Lord Ashbourne, who is not able to be present to-day, desires me to say that he concurs in the view taken by the majority of your Lordships.

Judgment appealed from affirmed, and appeal dismissed.

Solicitors for the appellants, *Rawle, Johnstone, Gregory, Rowcliffe,* and *Rowcliffe*, for *Hill, Dickinson,* and *Co.*, Liverpool.

Solicitors for the respondent, *Davidson* and *Morriss.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, March 31, 1911.

(Before Scrutton, J.)

Dunford and Co. Limited v. Cia Anonima Maritima Union. (a)

Charter-party—"For six or seven (in charterers' option) consecutive voyages during 1910*"—Construction.*

A charter-party contained the following clause: "This charter to remain in force for six or seven (in charterers' option) consecutive voyages during 1910*."*

On the 3rd Jan. 1910 *the ship was ready to receive cargo at Newcastle, but the charterers were unable to load her in consequence of a strike which lasted till the* 11*th Jan. The ship consequently went on a voyage to Italy for other charterers with a cargo of coal from South Wales, the learned judge finding that this was reasonable. She did not arrive home from her sixth voyage till the* 6*th Jan.* 1911, *when the charterers purported to exercise their option to load her for a seventh voyage.*

Held, on the true construction of the charter-party, that the words "during 1910*" were words of description and protection for both parties, the one being only bound to receive cargo, and the other only bound to supply the ship during* 1910, *and that therefore the charterers were not entitled to exercise the option claimed.*

Pope v. Bavidge (1854) 10 *Ex.* 73) *not followed.*

Commercial Court.

Action tried by Scrutton, J. sitting without a jury.

The plaintiffs (charterers) claimed 298*l.* 2*s.* 6*d*. for breach of a charter-party dated the 26th Oct. 1909. The defendants (shipowners) by their defence pleaded that they had duly performed all their obligations under the charter-party.

The charter-party contained the following clause:

This charter to remain in force for six or seven (in charterers' option) consecutive voyages during 1910. . . . Steamers to have liberty to load homeward cargoes to U.K. or Continent. Steamers to have liberty to dry-dock.

On the 3rd Jan. 1910 the defendants' steamer arrived at Newcastle-on-Tyne, but the plaintiffs were unable to load her in consequence of a strike at the colliery which continued till the 11th Jan. Meanwhile, the ship, being unable to load at Newcastle, went, without any objection by the charterers, to South Wales, where she loaded a cargo for Italy, the round voyage occupying sixty-two days. The consequence was that she did not get home from her sixth voyage till after the 6th Jan. 1911, when the charterers then purported to exercise their option to load her for a seventh voyage, but the shipowners declined to allow this on the ground that it could not be commenced till 1911.

Maurice Hill, K.C. and *Lewis Noad* for the plaintiffs.—The plaintiffs were entitled to load the steamer for a seventh voyage. Unexpected delay in connection with one voyage does not

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

excuse the shipowners from completing the remaining voyages:

Pope v. *Bavidge*, (1854) 10 Ex. 73.

If the seven voyages could not be performed during the year 1910, that position was brought about by the defendants engaging their ship in services of such a kind as made it impossible for them to carry out their contract.

Bailhache, K.C. and *D. Stephens* for the defendants.—The case turns on the construction of the charter-party. As the charter-party provided that the voyages should be made during 1910, the time could not be extended into 1911. More recent decisions have negatived the authority of *Pope* v. *Bavidge (sup.)*, notably *Jackson* v. *Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435 (1874); 31 L. T. Rep. 789; L. Rep. 10 C. P. 125) and *Nickoll and Knight* v. *Ashton, Edridge, and Co.* (9 Asp. Mar. Law Cas. 209; 84 L. T. Rep. 804; (1901) 2 K. B. 126).

Scrutton, J.—In this case the plaintiffs sue the defendants for damages for breach of a charter-party, the agreed amount being 298*l.* 2*s.* 6*d.* The question arises on the true construction of the charter-party. The adventure which the charterers desired to enter into was to send coal to four Italian ports to cover the year 1910 and possibly longer. The following are the material clauses in the charter-party: "This charter to remain in force for six or seven (in charterers' option) consecutive voyages during 1910. . . . Steamers to have liberty to load homeward cargoes to U.K. or Continent. Steamers to have liberty to dry-dock." I construe that clause as meaning that the steamer is to have a reasonable opportunity to load homeward cargoes from ports in the neighbourhood, or on the way, bearing in mind that it is an adventure to carry outward cargoes, and not to exercise unreasonably the liberty to load homeward so as to interfere with that arrangement. A ship does not run over a year without wanting to dry-dock, and there was liberty to do this. The charter-party certainly gives the charterers the right to have six or seven consecutive voyages, and binds them to find cargo for them, and they are to have the option whether there shall be six or seven voyages. Then come the words upon which, in my opinion, the whole case turns, "during 1910." The facts which happened were these: The shipowners provided for homeward cargoes of ore from the Mediterranean, which is a very ordinary form of business, and in the actual working the voyage outward occupied thirty-six days on the average, and the average time of the homeward voyage was twenty-six days, and I find as a fact that there was nothing unreasonable in the shipowner's way of occupying his homeward voyage. The adventure began in this way: The ship had the right to present herself on the 1st Jan., and she was ready to receive coals on the 3rd Jan., but the charterers were not ready to load in consequence of a strike at the colliery, which continued for eight days after the 3rd Jan. What then happened was that the ship, not being able to get coal at Newcastle, went without any objection by the charterers for another voyage from South Wales to Italy. She took sixty-two days on this round voyage, being a similar time to the other round voyages. That threw out the course of events to some extent, and the result was that she did not get home from her sixth voyage, until after the 6th Jan. 1911. The charterers then purported to exercise their option to have seven voyages. The shipowners said the charterers were not entitled to the seventh voyage because it could not be commenced until 1911 instead of 1910. The case turns entirely on the meaning of the words "during 1910," and I read them as words of description and protection for both parties, the one being only bound to load, and the other only bound to supply the steamer during 1910. That being my view, it follows that the plaintiffs' claim fails.

I desire to say a word or two on the case of *Pope* v. *Bavidge (sup.)* on which Mr. Hill relied. In that case the wording of the charter-party was that the charter should be in force for six successive voyages and that they should be made not later than the last day of Feb. 1853. What happened there was that the ship only made four voyages, and the question was what was to happen in regard to the other three. The question being raised by way of demurrer, the court held that the inability to perform the voyages within the time specified did not discharge the contract, or afford any excuse for not commencing the fourth voyage. Unless that case is affected by subsequent decisions, I am, of course, bound by it if it is applicable to the facts. I think, however, that the reasoning and decision in *Jackson* v. *Union Marine Insurance Company (sup.)* and *Nickoll and Knight* v. *Ashton, Edridge, and Co.* *(sup.)* are such that it is difficult to believe that the case would be decided now as it was decided then. In the last case I have cited, the contract being for the sale of cotton-seed "to be shipped by the steamship *Orlando* at Alexandria . . . during the month of Jan. 1900," the sellers did not ship the cargo by the *Orlando* in January because the vessel had become stranded through perils of the sea, and the Court of Appeal held that the adventure contemplated that the ship should be able to perform the contract. Further, that case was a case where the ship did not perform its obligation because it had been damaged. Part, at any rate, of the delay in the present case resulted from the ship not getting through its voyage in time because the charterer did not provide a cargo. That seems to me to make the most material difference. For these reasons I do not consider it necessary to follow *Pope* v. *Bavidge (sup.)*, and on the line of construction I have indicated I give judgment for the defendants with costs.

Solicitors for the plaintiffs, *Rawle, Johnstone, and Co.*, agents for *Cooper* and *Goodger*, Newcastle-on-Tyne.

Solicitors for the defendants, *Ince, Colt,* and *Ince.*

Thursday, July 20, 1911.

(Before HAMILTON, J.)

VINCENTELLI AND CO. *v.* JOHN ROWLETT AND CO. (*a*)

Marine insurance—Sale of goods—C.i.f. contract — Insurance against "all risks"—Meaning of.

By a contract in writing the defendants sold a quantity of citrons to the plaintiffs, and as the plaintiffs stipulated for "complete insurance against all risks," the defendants inserted in the margin of the contract the following words: "Insurance to be effected by us all risks." The defendants took out a policy covering the goods from Piræus to Antwerp for "850l. on 102 casks citrons (in brine). So valued. To pay average as customary." The policy contained an f.p.a. clause and the usual memorandum. There were clauses attached to the policy including one which covered "all risks by land or water (if by sea, at current additional premium)" and a "held covered clause," which provided (inter alia) *that in the case of circumstances which might cause a variation and (or) entire alteration in the risk as contemplated in the policy, a payment in respect thereof should be made by the assured. The citrons, on their arrival at Antwerp, were found to be considerably damaged owing to their having been stowed on deck instead of under deck.*

In an action by the plaintiffs against the defendants for failing to insure the goods against all risks:

Held, on the true construction of the contract, that the defendants were only bound to cover all risks in the sense of the entire quantum of damage, and not to procure a policy covering the plaintiffs against all causes of accident.

COMMERCIAL COURT.

Action tried by Hamilton J. sitting without a jury.

The plaintiffs, who were merchants in Antwerp, sued the defendants for damages for breach of contract and duty in and about the sale of a quantity of citrons.

By a contract in writing, dated the 6th Dec. 1907, the defendants sold to the plaintiffs a quantity of citrons c i.f. her steamer from the Piræus to Antwerp. The following words appeared on the margin of the contract: "Insurance to be effected by us all risks." These words were added in consequence of the plaintiffs having stipulated for "complete insurance against all risks." The defendants took out a policy covering the goods from Piræus to Antwerp for "850*l*. on 102 casks citrons (in brine). So valued. To pay average as customary." The policy contained an f.p.a. clause, the usual memorandum, and (*inter alia*) the following clauses:

1. Including all risks of craft, boats, lighters to and from the vessel, upon whatever terms, as to liability or otherwise, the lighterman may be employed. . . .

2. Including all risk by land or water (if by sea, at current additional premium) from warehouse to manufactory or import vessel, or wherever assured's risk commences, and all risks whilst on quay or elsewhere, awaiting shipment, if shut out by any steamer or steamers not to prejudice the continuity of this risk. . . . Including all risk by conveyance or conveyances and of steam navigation and all liabilities and risks as per the exceptions and conditions in charter-party and (or) bill of lading, including the negligence clause, until safely delivered in the interior or elsewhere to consignee or agent, and the assured's risk ceases. . . .

6. It is hereby agreed that the interest insured under this policy shall, in the event of deviation, be absolutely covered until its safe arrival at its destination, and (or) in the event of any act or neglect on the part of the owners and (or) agents and (or) servants of the vessel in connection with the said interest, and (or) any circumstances whatsoever, whether foreseen or otherwise, which may cause a variation and (or) entire alteration in the risk as contemplated in this policy, and a payment in respect thereof shall be made by the assured, the amount of such payment to be hereafter arranged.

The plaintiffs, on receipt of this policy, objected to its terms on the ground that "it is in fact an ordinary policy, covering the total losses, but not 'all risks without reference to purchase.'" The defendants replied, inclosing a letter from the underwriters, in which the latter stated "that the policy pays average if amounting to 3 per cent. on the value of each cask. We have never heard of such an insurance being effected without a franchise clause, and in fact it is most unusual to cover against other than f.p.a. terms." The plaintiffs persisted in their objection that the policy was not in accordance with the agreement, but eventually took up the shipping documents, adding, "to avoid the return of such inconveniences in future, kindly insure always our goods against all risks without reference to franchise."

The shipment of the citrons took place on an English steamer under an ordinary form of bill of lading, but on arrival at Antwerp it was found that the cargo was damaged to the extent of 297*l*. 11s., the cause being that the cargo was stowed, without the knowledge of the defendants, on deck instead of under deck.

The plaintiffs brought an action against the shipowners in Antwerp, when the court held that the shipowners were protected by the exceptions in the bill of lading; but although the shipment had been by an English vessel, the attention of the Antwerp court did not appear to have been called to the English law on the subject.

The plaintiffs then sued the underwriters, but the action was compromised by the underwriters paying 217*l*. 3*s*. 10*d*. in satisfaction of the plaintiffs' claim and costs.

The plaintiffs brought the present action against the defendants for failure to insure the goods against all risks. Their claim was for 297*l*. 11*s*., the amount of the damage; 8*l*. 13*s*. 11*d*., the costs of the proceedings in Antwerp against the shipowners; and 50*l*. 4*s*. 8*d*., the cost of proceedings against the underwriters. They gave credit for 217*l*. 3*s*. 10*d*., the amount received from the underwriters, leaving a balance of 139*l*. 5*s*. 9*d*.

By their defence the defendants denied that they had failed to insure the cargo against all risks, and pleaded that the plaintiffs had not failed to recover the amount of damage from the shipowners or underwriters by reason of any default or breach of contract on the part of the defendants.

Bailhache, K C. and *Leck* for the plaintiffs.—Having regard to the terms of the contract of

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

sale an ordinary Lloyd's "all risks" policy was inadequate. The plaintiffs contracted to give the defendants a policy to cover all risks, and having omitted to do so they are liable for the damage. The term "all risks" may convey one meaning to a broker or underwriter and a different meaning to a purchaser of goods, and it has been held that under a c.i.f. contract the meaning which the purchaser applied to the phrase must prevail:

> *Yuill* v. *Scott Robson*, 10 Asp. Mar. Law Cas. 453; 11 Asp. Mar. Law Cas. 40; 96 L. T. Rep. 842; 98 L. T. Rep. 364; (1907) 1 K. B. 685; (1908) 1 K. B. 270.

In the present case the plaintiffs stipulated for a contract which would protect them against all risks, and they did not get this unless an extra premium was paid under the held covered clause. The risk of clause 6 coming into operation is one for which the defendants are responsible.

Maurice Hill, K.C. and *Disturnal* for the defendants.—The sellers' obligation under the contract is to make a proper and reasonable contract of carriage: (Sale of Goods Act 1893, s. 32 (2). They must assume that the contract of carriage will be duly performed. They must also effect a policy which will cover everything that may happen within the due performance of the contract. The buyer is to be protected either by the contract of carriage or the policy of insurance, and in order to decide whether reasonable contracts of carriage and of insurance have been made it is necessary to look at them both. If the contract of carriage excepts negligence it would, notwithstanding, be quite reasonable if the policy of insurance covered negligence. In the present case everything that could happen to the goods for which the carrier was not liable was covered by the policy. The special contract of carriage was broken by the stowage on deck, and the shipowners became liable as common carriers. The plaintiffs had their remedy against the shipowners, and that is not affected by the fact that the term "all risks" was mentioned in the contract of sale. That term may mean either "all losses" or "all perils," and from the correspondence which passed between the parties it is quite clear that the plaintiffs were using it in the sense of "all losses." They asked for a policy to cover all risks without reference to franchise, but if the expression be read as meaning "all perils" there was no obligation on the defendants to insure against an intentional breach of the contract of carriage. *Yuill* v. *Scott Robson* (*sup.*) is not relevant as there a well-recognised risk was not provided for. The plaintiffs acted unreasonably in the proceedings at Antwerp. They did not take the point that English law governed the contract and that by English law the exceptions in the bill of lading did not, under the circumstances, afford any protection to the shipowners. As the plaintiffs ought to have recovered the full amount of their loss from the shipowners they cannot claim against the defendants.

Bailhache, K.C. in reply.—Under a c.i.f. contract the seller does not fulfil his contract if in one or other of the two documents he reasonably protects the buyer. The question in the present case is as to what the contract between the parties really amounted to. These sellers were under an obligation to insure against all risks, when, in fact, they left a risk uninsured. They gave the plaintiffs a policy which with reference to a part of the cargo did not attach at all, and therefore they are liable in damages. It was not unreasonable for the plaintiffs to take proceedings in Antwerp:

> *Greenock Steamship Company* v. *Maritime Insurance Company*, 9 Asp. Mar. Law Cas. 364, 463; 89 L. T. Rep. 200; (1903) 1 K. B. 657;
> *Tanivaco* v. *Lucas and others*, 6 L. T. Rep. 697; (1861) 1 B. & S. 185;
> *Ireland* v. *Livingstone*, 1 Asp. Mar. Law Cas. 389 (1872); 27 L. T. Rep. 79; 2 Q. B. 99,

were also referred to.

Hamilton, J.—In this case the plaintiffs, carrying on business in Antwerp, sued the defendants, who are merchants in London, for breach of a contract, dated the 6th Dec. 1907, for the sale by the defendants to the plaintiffs, c.i.f. per steamer to Antwerp, of a quantity of large Naxos citrons packed in brine in barrels. The citrons were shipped on board the steamer *Gulf of Suez*, a vessel of the Westcott and Lawrance line, at Piræus for delivery at Antwerp, and they were, but without the privity of the shippers, stowed, not under deck, but in the bridge space which is technically on the deck, and, although they were not so exposed as the term "on deck" might imply, they were not thoroughly protected from the sea. On arrival at Antwerp they were discovered to be extensively damaged, and the amount of damage has been ascertained at 297*l.* 11*s.*

The breach which the plaintiffs allege against the defendants is this: that either they did not effect an insurance against all risks, so that under the circumstances in question the plaintiffs might recover for the damage to the citrons, or else that if they did effect an insurance against all risks they did so only in such a manner that before it could be made available to the plaintiffs it became necessary for them to pay what the defendants ought to have paid and would not pay, that is, a large additional premium to the underwriters.

The contract is contained in a document of the 6th Dec. 1907 headed "Contract," and it is, as I view the facts, the form into which the parties reduced their bargain. It contains in the margin, inserted after it had been originally drawn up and signed, these words: "Insurance to be effected by us all risks." It is signed by the defendants and addressed to the plaintiffs. The plaintiffs had on the same day telegraphed that they accepted this parcel c.i.f. Antwerp, including the insurance against all risks. They wrote on the same day a letter which must have crossed the letter containing the contract note: "We wired you this morning that we should have bought this lot definitely, providing you sell c.i.f. Antwerp with complete insurance against all risks. We know quite well that this is easily obtained in London and on favourable terms." When the contract note was received the plaintiffs replied on the 7th Dec.: "Please add the agreed clause, that your insurance policy must cover all risks without exception." The words in question were then added, and those words were accepted apparently as expressing what the plaintiffs desired. It seems to me, therefore, that I cannot read into the contract note either that the insurance is to be a

complete insurance against all risks or that it is to be a policy to cover all risks without exception. The words of the contract between the parties are "insurance to be effected by us all risks," and it is suggested that that may mean either "an all risks insurance is to be effected by us" or "we are to insure you against all risks." If the first is the meaning of it, then the effect is to contract to procure an insurance which would be known as an all risks insurance. If the second is the meaning, then the sellers contract, at their expense, and in consideration of the purchase price of the goods, to effect an insurance for the benefit of the buyers against all risks. The matter, I think, is disputable, but it appears to me that the second is the true meaning and that the defendants in this case as sellers contracted to effect an insurance in favour of the buyers against all risks.

Now, the question arises, What is meant by the word "risks"? The plaintiffs say that, having procured a bill of lading in ordinary form, as they were bound to do, the sellers were also bound to effect such an insurance that the buyers would find themselves protected against all marine accidents happening in the course of the agreed transit to the damage of the goods, the subject matter of the sale, and that that should be an insurancce which should be effectual for their protection, and such that they could enforce it. The act of the shipowner or his servants in shipping the goods not under deck had the effect in English law of preventing the shipowner relying upon any of the exceptions contained in the bill of lading, and by English law there can be no doubt that the claim for the whole amount of the damage against him was a claim to which he had no answer. The plaintiffs, however, put that claim in suit before a court at Antwerp, and there they lost their action. They subsequently made their claim upon the underwriters on the policy which had been obtained for them by the sellers, and were met by the perfectly good answer that, as far as the policy itself was concerned, it did not attach to the goods because they were shipped on deck, and not under deck; and as regards the held-covered clause — clause 6 — printed at the bottom of the policy, no premium would, in their view, be adequate to induce them to make themselves liable for the loss that had occurred, except the amount of the loss. The plaintiffs thereupon commenced an action against the underwriters, and that action was compromised, as far as I can see, very favourably to the plaintiffs by the underwriters paying 180*l.* and also paying certain costs of the action, for which sum the plaintiffs give credit in this action.

The plaintiffs' contention now is that the contract of the 6th Dec. meant that they should be effectively insured against all causes of accident and damage to their goods, and that the policy of insurance actually given them is one under which the underwriters were entitled to say, as they did say, that they were not liable at all without an extra premium, because the fact that there had been a breach of the contract of carriage contained in the bill of lading prevented the risk from attaching to the goods at all. I think, therefore, the question turns upon what is meant by the word "risks" in the contract. In the expression "insurance to be effected by us, all risks," it seems to me to be equally consistent with the meaning of the word "risk" in ordinary language that it may be intended to describe the quantum of loss in respect of the accident against which the insurer is to give an indemnity, or to express the cause of the accident producing loss against which the assured is to have protection. I do not think that it does violence to language to speak of a man being insured "all risks," meaning thereby that he receives a full indemity instead of a partial indemnity, or to say that he is insured "all risk," meaning thereby that whatever damage may happen he is to receive an indemnity measured in some way or other. It is quite familiar to those connected with insurance business, and I do not think that it is disputed by counsel in this case, that the word "risk" is used in both these senses, and as an illustration of that well-known fact, I may refer to the discussion before Walton, J. in *Schloss* v. *Stevens* (10 Asp. Mar. Law Cas. 331; 96 L. T. Rep. 205; (1906) 2 K. B. 665). I have had no evidence in the witness-box from either side with regard to the transaction itself or the sense in which the expression "risk" was used, but I have the evidence of the correspondence at the time when the policy was first put forward by the sellers, and from that evidence I must draw my own conclusion on this question of fact. On the 28th Jan. the defendants tendered to the plaintiffs the policy in question, which is dated the 27th Jan. To that the plaintiffs took two exceptions, first, as to the date of the policy; and, secondly, as to its language. "We regret to say," they write, "that this policy is not in conformity with our agreements. It is in fact an fact an ordinary policy, covering the total losses but not 'all risks without reference to franchise.' Besides, you say that the steamer left Piræus on the 4th Jan., whereas your policy is dated the 28th Jan. Consequently, the risks incurred between the 4th and 27th inst. are not covered. We suppose all this is the result of a mistake, and we shall be glad if you will correct same."

On the 31st the defendants reply, first, dealing with the question of date; and, secondly, saying this: "As regards your suggestion of 'all risks without reference to franchise,' we inclose you a letter we have received from the underwriters on this point." That was a letter that the policy paid average if amounting to 3 per cent. on the value of each cask, and saying that they had "never heard of such an insurance being effected without a franchise clause, and in fact it is most unusual to cover against other than f.p.a. terms." The plaintiffs still maintained that they had not got the insurance contracted for, but eventually they paid the money due against the shipping documents with the statement that "we must request you to observe that as per our agreements you owe us the reimbursement of all the risks, and there is no question of any kind of franchise. We can show several policies coming from Lloyd's where it is said literally: 'All risks covered without reference to franchise.' In future kindly insure elsewhere our goods against all risks without reference to franchise." That dispute was for the time being ended.

Now, the plaintiffs, although resident in Antwerp, evidently knew quite well what they wanted, and also knew whether it could be obtained or not, and what they meant when they spoke about

"all risks" is shown in the letter that I have referred to of the 6th Dec.: "It is an insurance easily obtained in London and on favourable terms." Two underwriters have been called on behalf of the plaintiffs. They have not been contradicted, and they say, and I accept their evidence, that to insure citrons in barrels on a winter voyage in the Mediterranean shipped on deck is an insurance which under no conditions would they consent to accept. The mode in which they would safeguard themselves from accepting it is by quoting what they considered a prohibitive premium, and their notions of what would be prohibitive vary a good deal—20, 30, 40, and even 50 guineas, but they preface their statements of these amounts by saying that they have never taken such a risk, and could not imagine themselves doing so, and their notions of these premiums were really notions of premiums that would prevent business instead of leading to it. If that is so, it is quite clear that an insurance under which the underwriter appreciated that he would have to cover carriage of these goods on deck on this voyage was one not easily obtained in London on favourable or any terms whatever. Further, the subsequent letters, which I need not read, show that what the plaintiffs had in mind when they cavilled at the policy tendered was that it did not contain words having the same effect as "all risks without reference to franchise, and I think it is quite plain from that correspondence that as a matter of fact what they were trying to get was an insurance against total loss, partial loss, however small, and, of course, general average loss, which is a loss by perils of the sea. It is said that that cannot be so because if they had read their policy they would have seen that subject to paying an adequate premium so as to get held covered, clause 6 of the additional clauses did cover them against every conceivable cause of loss, and at any rate did cover them against the cause of loss in this case, and hence one cannot infer that when they wrote about the quantum of indemnity and called that "all risks" they were negativing any desire to be held covered against all causes of loss against which it is said they were in fact covered subject to the held covered clause. I do not think that on a question of fact I can impute to these gentlemen, business men in Antwerp, a construction like that, which appears to be in itself subtle, and I think it is clear from their letters that they were not thinking about clause 6 of the policy at all, particularly as it contemplated an additional premium. I think they were quite clearly harping upon the same string as before, that they wanted to be covered against particular average loss without reference to franchise—that is to say, whether in excess of 3 per cent. or not, and they got an assurance from the underwriters with which they were for the time being content, though desiring in future to have their own form of words which they thought would make that clearer still, or which they probably thought would have protected them even although the loss was under 3 per cent.

That being so I think that on the true construction of this contract, in view of the evidence before me, the contract was that the insurance should cover all risks in the sense of the entire quantum of damage, and for the time being the 3 per cent., though not covered, was neither the subject of complaint at the time nor is it in dispute in this action, and I am of opinion that the contract was not to procure a policy which would have the effect of insuring the plaintiffs effectively against all causes of accident, even although arising out of the sheer breaches of the contract of carriage made in a proper form, with proper care, and with a well-known and reputable line of shipowners. This relieves me from the necessity of expressing any opinion upon the contention which has been raised upon the part of the defendants that under a c.i.f. contract all that a seller need procure at his own expense is contractual protection against all risks partly under the contract of carriage, and partly under the contract of insurance, and that it is sufficient if under one or other there is a cause of action for all kinds of damage. It is enough to say that I do not think that this is supported by the authorities referred to, and I think the point is novel and difficult.

The only remaining questions which I ought to deal with are pure questions of fact which I ought to dispose of in view of possible further proceedings. If there has been a breach of this contract, the plaintiffs' duty would have been to mitigate their damages by any reasonable steps they were able to take. I do not see on principle why the bringing of an action may not be a reasonable step to take for the purpose of mitigating damages in such a case as this. That appears to have been the view of the plaintiffs and their advisers, for they, in fact, brought an action in Antwerp. If they took such a step as that, and it was, as I think it was, a reasonable step to take in the mitigation of damages, they were also on the same ground bound to conduct it with reasonable intelligence. I am far from saying that it would be unreasonable for a Belgian subject or merchant domiciled in Belgium to take advantage of the Belgian law, which appears to have enabled the present plaintiffs to get the captain whose ship was in Antwerp placed in such a position that in view of the judgment he could be treated as having been domiciled on board his steamer, which was in territorial waters, and that the plaintiffs should prefer a tribunal of their own country to suing the defendants in their country; but I think that before taking that course it would have been unreasonable for the plaintiffs not to ascertain what their legal position was. Their legal position was, that by the law of England their claim was absolutely undefended unless it could be shown, as I think some attempt was made to show, the damage did not arise from sea perils at all, but from inherent vice—that I gather failed almost at the outset—but as far as the point is concerned of recovering on a bill of lading for goods which by implication were stowed under hatches, but which were in fact stowed on deck, according to the law of England, the law of the flag, and the law governing the contract of carriage, there was no defence. It is admitted that what the plaintiffs relied upon was a provision of the Belgian Code. It is not proved that they ever raised the point that the matter must be determined by English law, and that the English law was conclusive in their favour. I think they are in a dilemma in respect of those proceedings in Antwerp; if English law, which gave them an absolutely clear case, was not admissible in that tribunal, they ought not to have resorted

to that tribunal. It was unreasonable to go to a tribunal where the case, to say the least of it, was in some doubt, when all they had to do was to issue a writ in London and to have a decision that there was no answer to the claim at all. If, on the other hand, it is to be presumed, as technically it must be presumed in the absence of evidence to the contrary, that Belgian law is the same as English law, they had only to raise the point that the law of the flag governed the matter and to refer to a few well-known cases in the English law reports, and they would have got judgment in the Belgian court, for I presume that an Antwerp court would have given effect to English law when called to its attention. In either view the plaintiffs conducted that litigation in a manner which simply led to disaster. There is no reason to suggest that if they had recovered judgment they would not have recovered satisfaction.

I think, therefore, the damage sued for in this action is damage which, if they had acted reasonably, they ought to have mitigated so as to make it non-existent, in which case the only damages recoverable here would have been nominal only.

As regards the other side of the matter, the plaintiffs' contention is that they are entitled to call upon the defendants to procure at their own cost under the held covered clause the additional cover, and that they have paid a sum of money which was reasonable, or, rather, they must be treated as having paid it by reason of their giving up their claim on the policy in consideration of the sum of 217*l.* 3*s.* 10*d.* I think upon this evidence that that was a reasonable sum, and that, if the defendants had been liable, they ought to pay the balance claimed. There will be judgment for the defendants.

Solicitors for the plaintiffs, *Waltons* and *Co.*

Solicitors for the defendants, *Horsley* and *Weightman.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 1 *and* 7, 1910.

(Before THE PRESIDENT (Sir S. Evans) and BARGRAVE DEANE, J.)

THE KINGSLAND. (a)

Charter-party—Demurrage—Delivery according to custom of port—Discharge by port authority—Delay beyond control of charterer.

The plaintiffs entered into a charter-party with the defendants by which they undertook to send their steamship to a port in Finland to be loaded with pit props and to deliver them at Swansea. It was a term of the charter-party that the cargo should be discharged as fast as the steamship could deliver during the ordinary working hours of the port, but according to the custom thereof, and, should the steamship be detained beyond the time stipulated as above, demurrage should be paid at 4d. per net registered ton per day, and pro rata *for any part thereof.*

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

The charter-party further provided that the discharge was to be effected by the receivers' stevedore, the steamship paying so much per fathom.

In a County Court action brought by the shipowners against the charterers for demurrage there was evidence and it was found that there was a custom in Swansea that discharge of pit props was to be done by the harbour authority and not by any stevedore to be named by the receivers of the cargo. Some delay occurred in the discharge. The judge gave judgment for the defendants, the charterers, on the ground that as no time was fixed for the discharge, and as the discharge was, according to the practice of the port, in the hands of the harbour authority, the charterers were not liable for the delay, though there was in fact a delay of three days, which would have entitled the plaintiffs to 90l., caused by the negligence of the harbour authority.

The shipowners appealed.

Held (affirming the decision of the County Court judge), that the charterers were not liable for the delay, for the port authority, who discharged the vessel, were not their servants or agents to effect the discharge, and the delay was due to circumstances beyond their control.

Weir *v.* Richardson (3 *Com. Cas.* 20) *approved.*

APPEAL from a decision of the judge of the County Court of Glamorgan held at Swansea by which he held that the defendants were not liable to pay demurrage for the detention of the steamship *Kingsland.*

The appellants, plaintiffs in the court below, were the owners of the steamship *Kingsland.* The respondents were the charterers of the *Kingsland.*

On the 9th Oct. 1909 a charter-party was entered into between the appellants and respondents by which it was agreed that the *Kingsland* should proceed to Finland and there load a cargo of pit props and proceed with them to Swansea.

The *Kingsland* was loaded in accordance with the charter and left for Swansea.

On the 8th Nov., before the vessel's arrival, the charterers suggested to the port authority at Swansea that the *Kingsland* might be given a berth in the new dock which was to be formally opened on the 23rd Nov.

The vessel arrived in Swansea on the 17th Nov., and on the same day the port authority sent a letter to the charterers stating the rates payable for the discharge of the steamship.

The case made by the appellants was that under the terms of the charter-party the cargo was to be discharged with the customary steamship dispatch as fast as the steamship could deliver during the ordinary working hours of the port, but according to the custom thereof, Sundays, general or local holidays (unless used) excepted. The charter-party further provided that, should the steamship be detained beyond the time stipulated as above, demurrage should be paid at 4*d.* per net registered ton per day, and *pro rata* for any part thereof.

The discharge was to be effected by the receivers' stevedore, the steamship paying 3*s.* per fathom.

The discharge was commenced on the 18th Nov. at 11 a.m. and was completed on the 7th Dec. at 10 a.m., and, excluding Sundays and holidays, the

total number of days occupied in discharging was sixteen, whereas in fact, if the defendants had discharged the vessel in accordance with the terms of the charter-party, she could have been discharged in ten days.

The appellants therefore claimed 180*l.* 16*s.*, being six days' demurrage at 4*d.* a ton on 1808 tons.

The respondents in their defence alleged that the steamship was discharged by the Swansea Harbour Trust acting on behalf of the appellants, whose duty it was under the charter to discharge the vessel, and, if there was any delay in the discharge, the respondents were not liable.

Alternatively, they alleged that if there was any duty on them to take any part in the discharge, the discharge was effected by the Swansea Harbour Trust as agents for both the appellants and respondents.

In the further alternative, they alleged that if the steamship was discharged by the Swansea Harbour Trust acting for and as agents for the respondents alone, the Swansea Harbour Trust used all reasonable diligence in discharging the steamship, and the cargo was discharged with the utmost practicable dispatch, having regard to the custom of the port and the facilities for delivery.

They alleged that the berth allotted to the *Kingsland* was the only available and suitable one for her at the port; that the only practicable means of discharging her was by means of two hydraulic travelling cranes erected on the quay; that there was a general holiday at the dock on the 23rd Nov.; that the weather was wet on the 24th, 25th, 26th, 27th, 28th, 29th, and 30th Nov., and on the 1st, 2nd, 4th, and 6th Dec.; and that on the 3rd Dec. there was a gale which caused the ship's moorings to part, which delayed the discharge; and that by the custom of the port the cargo had to be discharged on to the quay.

The respondents, in the further alternative, paid one day's demurrage—30*l.* 2*s.* 8*d.*—into court with a denial of liability.

During the discharge the ship's brokers and the charterers both wrote to the port authority suggesting that, as there were only two cranes in use, the discharge might be accelerated if the ship's winches were also used, but the port authority considered the suggestion impracticable.

The County Court judge held that there had been three days' delay in the discharge, which would have entitled the appellants to 90*l.*, but that the respondents were not responsible for the delay, and dismissed the action.

The appellants lodged a notice of appeal asking that the judgment might be set aside, and that judgment should be entered for the appellants for 180*l.* 16*s.* or 90*l.* 8*s.*, on the grounds that the judge was wrong in law in holding that the defendants were not responsible for the *Kingsland* being ordered to the King's Dock at Swansea; that the Swansea Harbour Trustees in discharging the cargo were in part the servants or agents of the plaintiffs, and in not holding that the said trustees were the servants or agents of the defendants only; that, if the plaintiffs were right on the foregoing questions, they would be entitled to but three days' demurrage, and in not holding that they were entitled to the six days claimed on the defendants' admissions that the wharf on the said dock at which the discharge took place was only partly equipped, and had only two cranes out of six in use.

The respondents also delivered a cross notice of appeal asking that the judgment should be varied by it being held that the appellants were not entitled to 90*l.* 8*s.*

Leck for the appellants, the owners of the *Kingsland.*—The appeal raises two questions: first, whether the charterers are liable for the delay in the discharge, which was being done by the port authority; secondly, what was the extent of the delay. The delay was really six, not three, days, as found by the County Court judge. The place of discharge was the King's Dock, and when the vessel was ordered there it was not fully equipped only two cranes out of six being in working order. The County Court judge has found there was a negligent delay of three days, and that, if the charterers were liable at all, they would be liable for 90*l.*, but apparently certain dicta in *Weir* v. *Richardson* (3 Com. Cas. 20) prevented him from giving judgment for that amount. He ought in fact to have held there was six days' delay. [*Bailhache*, K.C.—I am not aware that there is any appeal as to the amount.] The question of amount is distinctly raised by the notice of appeal. The charter fixes no time in which the discharge is to be completed; the charterers must use diligence to give her a proper discharge. If they send her to a new dock where there is no proper equipment, and where the port authority are negligent, they are liable. The charterers would have succeeded in the court below to the extent of 90*l.* for three days' delay if it had not been for certain dicta in *Weir* v. *Richardson* (*ubi sup.*). That case is distinguishable, for in that case there was privity of contract between the shipowners and the port authority. In this case it was the consignees, and not the shipowners, who requested the port authority to discharge the vessel. The request is contained in the letter of the 8th Nov. Swansea is not a closed port; anyone might be employed to discharge the vessel. [*Bailhache,* K.C.—The evidence is that the port authority always do discharge pit props at Swansea. The PRESIDENT.—No custom is pleaded.] The inference to be drawn from the correspondence is that anyone might have been employed, and that the charterers accepted the port authority. When the vessel had been in Swansea some days, the shipowners' agents suggested that the discharge should be accelerated by the use of the ship's winches. If no cranes were available and it was practicable to discharge by winches, they should have been used:

Rodenacker v. *May and Hassell*, 6 Com. Cas. 37.

Demurrage is payable here because the discharge was not effected with the utmost dispatch practicable, having regard to the custom of the port and the facilities for delivery:

Hulthen v. *Stewart*, 89 L. T. Rep. 702; 9 Asp. Mar. Law Cas. 403; (1903) A. C. 389.

In this case the only person who employed the port authority was the charterer, which distinguishes this case from that of *Weir* v. *Richardson* (*ubi sup.*), where both shipowners and consignees employed them. In *The Jaederen* (68 L. T. Rep. 266; 7 Asp. Mar. Law Cas. 260; (1892) P. 351) the dock authority acted for

both shipowner and consignee. In *Weir* v. *Richardson* (*ubi sup.*) Bigham, J. only followed *The Jaederen* (*ubi sup.*). The County Court judge was wrong in thinking that the facts in this case were similar to those in *Weir* v. *Richardson* (*ubi sup.*), and that was the reason why he did not give judgment for 90*l.*

Bailhache, K.C. and *Jowitt* for the respondents, the charterers.—The charter clearly intends the discharge to be done by one hand according to the custom of the port. The charterers had a right to nominate the King's Dock, and the evidence is that, if the ship goes to the King's Dock, the port authority always discharges pit prop cargoes there. Where there is no fixed time to complete the discharge, the charterer has to use all the methods and means of discharging which are customary. Where it is customary for the dock company to discharge, he must put them in motion:

> *Temple* v. *Runnal*, 18 Times L. Rep. 822;
> *Lyle* v. *Corporation of Cardiff*, 83 L. T. Rep. 329; 9 Asp. Mar. Law Cas. 128; (1900) 2 Q. B. 638.

The foundation for all the decisions on this point is *Postlethwaite* v. *Freeman* (1880, 42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599). All the charterer has to do is to see that the dock authority is there to do the discharging. If the dock authority were the agents of the charterers, they might be liable for the three days' delay, but they are not the charterers' agents, and, on the authority of *Weir* v. *Richardson* (*ubi sup.*), the charterers are not liable.

Leck in reply.—The decision in *Weir* v. *Richardson* depended on the incorporation in the bill of lading of some terms in the charter which clearly made the port authority the agent of the shipowners. There is no authority for the statement that all the charterer has to do is to supply stevedores. *Hulthen* v. *Stewart* (*ubi sup.*) shows what the duty of the shipowner and charterer is. Even if the facts are within *Weir* v. *Richardson* (*ubi sup.*), the obligation here to pay demurrage is absolute, though the obligation to discharge is not.

The PRESIDENT.—Judgment in this case was postponed in order that we might see the charter-party in the case of *Weir* v. *Richardson.* Through the kindness of counsel for the appellants we have been able to see that charter-party, and the judgment I am now going to read is the judgment of my brother judge and myself. In this case the plaintiffs appeal against the judgment of the learned County Court judge upon the findings of fact, and upon the law. Having regard to the evidence given, and to the course pursued by the plaintiffs at the trial, we do not feel justified in disagreeing with the finding that there was a custom in the port of Swansea that the discharging of cargoes of pit props was to be done by the harbour authority, and not by any stevedore to be named by the receivers of the cargo. It was admitted by the respondents that they could not upon this appeal dispute the finding that, if they (the defendants) were liable in law for the acts of the harbour authority, they were liable for three days' demurrage. Neither are we able to disturb the finding by saying that the number of days' demurrage should be six days, as contended for by the appellants. Therefore in the event of the defendants being liable for any demurrage, the number of days should be three as decided in the court below. As to the law, the learned County Court judge followed the opinions expressed by Bigham, J. in *Weir* v. *Richardson* (*ubi sup.*). That is not a decision; but the opinions were expressed by an eminent judge of great experience in commercial law thirteen years ago. Counsel for the appellants did not argue that the opinions did not state the law accurately, and did not ask us to disapprove of them. We adopt them. But counsel for the appellants contended that the law as so expressed did not apply to the present case by reason of the words in the present charter-party: "Should the steamer be detained beyond the time stipulated as above for loading and discharging, demurrage shall be paid at 4*d.* per net registered ton per day, and *pro ratâ* for any part thereof." Since the hearing we have seen the charter-party and the bill of lading in the case of *Weir* v. *Richardson* (*ubi sup.*), and we find that the following clause appeared in the charter-party and was incorporated in the bill of lading: "It is agreed that for each and every day's detention by default of the said parties of the second part or their agents, 4*d.* sterling or its equivalent per register ton per day shall be paid day by day by the said parties of the second part or their agent to the said party of the first part or his agent." The argument was that the words in the present charter-party amounted to an express contract by the charterers to pay demurrage at a fixed rate if the time stipulated for discharging were exceeded, however the delay was caused. We are of opinion that these words do not create a fresh or independent liability on the defendants, if they are not, according to the rest of the contract, liable at all for demurrage, which is the result of the doctrines of *Weir* v. *Richardson* (*ubi sup.*); and the words relied on in clause 15 do not prevent the application of those doctrines. The principle upon which they are founded appears to be that the charterers are not responsible for the acts of an authority who in the circumstances are not their servants or agents, or are no more their agents than they are the agents of the shipowners. The matter may be regarded from another point of view, in the light of the cases dealing with the liability of charterers for delay due to circumstances beyond their control. By the custom referred to, it was for the harbour authority to discharge the cargo. The defendants could not control the authority or the use made by the authority of the available appliances. They had no more control over the activity of the harbour authority's workmen than they would have over a strike of those workmen, or over other circumstances existing in the dock. It has been laid down in the long list of cases culminating in *Hulthen* v. *Stewart* (*ubi sup.*) that a provision like the one in this charter-party requires the customary steamship dispatch in discharging, "having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in existence at the time, not being circumstances brought about by the person whose duty it is to take delivery, or circumstances within his control." One of the circumstances in existence attending the discharge of this particular cargo was that the discharging was to be done by the harbour authority. There was delay by them in discharging. The circum-

stances leading to the delay were not brought about by the defendants; and the conduct of the authority and their negligence—which has been found—were not within the defendants' control. Upon these grounds we think the decision of the learned judge should be upheld.

Solicitors for the appellants (plaintiffs), *Williamson, Hill*, and *Co.*, for *Ingledew* and *Sons*, Cardiff.

Solicitors for the respondents (defendants), *Trinder, Capron*, and *Co.*

July 8, 10, 11, 12, *and* 21, 1911.

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

THE PRESIDENT LINCOLN. (a)

Collision — Crossing steamships — Duty to keep course and speed—Duty to take compass bearing of lights on approaching vessels — Collision Regulations 1910—*Preliminary to steering and sailing rules—Arts.* 2, 21, 28, 29.

It is the duty of those navigating a ship who see a light on a ship approaching them to see whether it appreciably alters its bearing with reference to their ship, and to test this by compass according to the direction contained in the preliminary paragraph to art. 17 *of the Sea Rules.*

ACTION for damage.

The plaintiffs were the owners of the steamship *Tasso;* the defendants were the owners of the steamship *President Lincoln.*

The case made by the plaintiffs was that shortly before 6 p.m. on the 22nd Jan. the *Tasso*, a steel screw steamship of 1859 tons gross and 1120 tons net register, manned by a crew of twenty hands all told, was in the North Sea, to the northward of the Sandettie Lightship, in the course of a voyage from Antwerp to Swansea with a general cargo. The weather was slightly hazy, the wind variable and light, and the tide about half ebb of the force of about a knot to a knot and a half. The *Tasso*, on a course of W. by S. ¾ S. magnetic, was making about ten knots. She carried the regulation masthead and side lights for a steamship under way and a fixed stern light, 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 the *Tasso* saw from two to three miles off and bearing about two points on the starboard bow the two masthead lights of the *President Lincoln*, and shortly afterwards made out through the glasses her red light. The helm of the *Tasso* was thereupon ported and her whistle was sounded one short blast, and the lights of the *President Lincoln* were brought well clear on the port bow of the *Tasso* and the helm of the *Tasso* was then steadied. Shortly afterwards, as the masthead lights of the *President Lincoln* were observed to be closing into line and thus indicated danger of collision, the helm of the *Tasso* was put hard-a-port, her whistle was again sounded one short blast, her engines were put full speed astern, and her whistle was sounded three short blasts; but the *President Lincoln*, which was approaching with great speed, opened her green light and her red light was shut in, and about the same time she was heard to sound two short blasts on her whistle. Nothing further could be done on board the *Tasso*, and the *President Lincoln*, continuing to come on fast, with her starboard side about amidships struck the port bow of the *Tasso*, doing her serious damage.

Those on the *Tasso* charged those on the *President Lincoln* with not keeping a good look-out; with neglecting to keep their course and speed; with improperly starboarding; 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 shortly before 6.57 p.m. on the 22nd Jan. the *President Lincoln*, a twin-screw steamship of 18,167 tons gross and 11,171 tons net register, manned by a crew of 287 hands all told, was in the North Sea, to the westward of the Sandettie Lightship, on a voyage from New York, *viâ* Cherbourg, to Hamburg. The tide was setting to the northward and eastward, and was of the force of about one knot, the wind was S.E., a gentle breeze, and the weather was dark, but a good night for seeing lights. The *President Lincoln* was on a course of E. ¼ S. magnetic, making about fourteen and a half knots. Her two regulation masthead, side, and stern lights were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

In these circumstances those on board the *President Lincoln* sighted a white light about ahead distant apparently four or five miles. This light was carefully watched, and about five minutes afterwards another white light on the same vessel came into sight, and the vessel was taken for a fishing vessel. The helm of the *President Lincoln* was shortly afterwards starboarded to get her on to her course for the Haaks Lightship, and, while she was starboarding, the vessel showing the two white lights (which proved to be the *Tasso*) sounded a long blast on her whistle. The helm of the *President Lincoln* was then put hard-a-starboard and two short blasts were sounded on her whistle, and when the *Tasso* answered apparently with two short blasts the *President Lincoln* again sounded two short blasts in reply. The *Tasso*, which was now close to and still showing no side light, appeared, notwithstanding her whistle signal, to be porting towards the *President Lincoln*, and the port engine of the *President Lincoln* was stopped and her starboard engine kept full speed ahead to assist the swinging of the ship as the only means of averting a collision. Just afterwards the *Tasso* loomed in sight, and for the very first time a very dim red light was distinguished, whereupon, with the view of making the blow less serious, the starboard engine of the *President Lincoln* was stopped, the port engine was put full speed ahead, and the helm was ordered hard-a-port, one short blast being sounded on the whistle; but the *Tasso* came on at considerable speed, and with her stem and port bow struck the starboard side of the *President Lincoln* a little abaft amidships. Just before the collision the *Tasso* sounded three short blasts.

Those on the *President Lincoln* charged those on the *Tasso* with not keeping a good look-out;

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

with neglecting to have a proper red light; with neglecting to keep her course and speed; with improperly porting; with not easing, stopping, or reversing their engines; and with neglecting to indicate their course by whistle signal.

The following collision regulations were referred to during the arguments and in the judgment:

2. A steam vessel when under way shall carry—(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.

Steering and Sailing Rules.—Preliminary.—Risk of Collision.—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.

21. Where by any one of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

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.

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

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

BARGRAVE DEANE, J.—In this case a collision occurred near the Sandettie Lightship, in the North Sea, on the 22nd Jan. in this year, about six o'clock in the evening, between the steamship *Tasso* and the steamship *President Lincoln.* The *Tasso* is a vessel of 1859 tons gross, manned by a crew of twenty hands, and she was on a voyage from Antwerp to Swansea with a general cargo. The *President Lincoln* is one of the Hamburg-American liners, and is a twin-screw steamship of 18,167 tons gross, manned by a crew of 287 hands all told, and was on a voyage from New York, *viâ* Cherbourg, to Hamburg, with passengers and cargo. The two vessels were approaching each other on converging courses. The course of the Hamburg-American boat was E. ½ S., and that of the other vessel at the time she was sighted W. by S. ¾ S., and that would put them approaching, the starboard side of the *Tasso* to the port side of the *President Lincoln.*

One of the first matters which I find in this case is that at no time before the course was altered on the Hamburg-American boat was the *Tasso* on her starboard side, but always on her port bow. That is a preliminary finding which affects the whole of my judgment.

The story told by the *Tasso* is this: that the master, who had been on the bridge, told the officer of the watch, the second officer, when he went below, that when the Sandettie Lightship was sighted he should alter the course to W. by S. ¾ S., a point more southerly. The captain, then being below, heard one blast blown upon the whistle, which indicated that his vessel was porting, whereas, according to the order he had given before leaving the bridge, she should have starboarded a point. He says that shortly afterwards he went up on the bridge, and both the second officer and he ascertained that the vessel was then heading W. by N. ½ N., a variation of some three and a quarter points. That signal would indicate to any vessel approaching her that she was altering her course, and being on the port bow of the Hamburg-American boat before she altered her course, it would take her still more on to the port bow of the Hamburg-American boat. The *Tasso* continued on that course, the lights of the *President Lincoln* getting as much as three points on the port bow, until the captain and the second officer of the *Tasso* observed that her masthead lights were closing in, indicating that she was under starboard helm. Thereupon the master of the *Tasso* says, and he is corroborated by the other members of his crew, that he ordered the helm hard-a-port and reversed his engines. That, of course, would throw his head still more to starboard, and that was the way in which his vessel was manœuvring at the time of the collision. I cannot find any fault with the *Tasso* so far as her navigation is concerned. She had the duty, having the other vessel on her starboard bow, of keeping out of the way, and, expecting the other vessel to keep her course, she ported and brought the other vessel on her port bow, and when afterwards she saw there was danger of collision she reversed her engines and hard-a-ported, which threw her head still more off to starboard.

Now let me take the case of the Hamburg-American boat. The *President Lincoln* at the moment was proceeding during the second officer's watch, but Captain Hahn was on the bridge; and although it was the second officer's watch, it is not disputed that the captain was the moving spirit in what was done on the Hamburg-American boat. She set a course from the East Goodwin for the Sandettie Lightship, and at the time of the collision—or rather just before the collision, before she altered her course—she had the Sandettie Lightship on her starboard bow. The captain and second officer, on the bridge, say that they saw a white light right ahead. They saw no coloured light, but after a little time they saw another white light a little below the other. What the second white light was we do not know. It may have been a fisherman's light, or it may have been some other vessel which had two lights —but they seem to have taken it for granted very early that they were fishermen's lights which they saw, and accordingly, having another fisherman between that light and the Sandettie Light, they determined to alter their course and make straight for the Haaks Lightship, which meant starboarding their helm and crossing in front of the vessel which was showing a white light. So far as that is concerned, if that is an absolutely satisfactory story, no one can complain about the starboarding if they believed there was nothing but a fisherman fishing in the way; but did they ascertain that it was a fisher-

man? We know as a fact that the other vessel was not a fisherman, but was the *Tasso.* Are the master and the second officer to be relied upon as to this light being right ahead? We have had two look-out men from the *President Lincoln*—one was in the crow's-nest and the other on the forecastle head—and they both say that the light which they saw was on the starboard bow. I find as a fact that is was on the port bow, and the master and the second officer say it was right ahead. That is very unsatisfactory.

What was the duty of those on the Hamburg-American boat? They had a white light ahead of them, and they ought, according to art. 17, to have taken certain steps. Art. 17 has the following preliminary paragraph: "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." That imposes upon people who are navigating a ship the duty of observing a light which is ahead of them, to see whether it appreciably changes its position. You are not left to say: "Oh! I will wait and see if I can see a red light or a green light," but you must look and see if the light appreciably alters its position, and should deal with it by compass bearing. We know perfectly well that if those on the *President Lincoln* had done that they could not have missed seeing that this vessel which, as I have said, was approaching them on the port bow, was getting so many points broader on the port bow and appreciably altering her position. If so, then there was undoubtedly risk of collision if they starboarded. They did not take the trouble to ascertain if the light was altering its position or not, but Captain Hahn and the second officer seem to have taken upon themselves the assumption, without testing it, that this was a fishing vessel. In fact, it was a vessel going ten knots in an opposite direction to themselves, and they were going fourteen knots, which means that these two vessels were approaching each other at the rate of a mile in two and a half minutes.

In my opinion that was faulty navigation on the part of the master of the Hamburg-American boat, and I think that is really the initial cause of this collision. If he had taken proper precaution he undoubtedly would not have starboarded as he did. It was his starboarding which brought about the collision.

I have had, therefore, two questions to determine with regard to this vessel. First of all, I think, from the contradictory story told as to where this light was, that there was defective look-out on the Hamburg-American boat. Beyond that, I think that by not observing the provisions of the preliminary paragraph of the steering and sailing rules there was further neglect of duty on the part of the *President Lincoln.* On that account also she is to blame.

There is one other point which I have to deal with. I have already said that so far as the navigation of the *Tasso* is concerned I have no fault to find; but there is a question raised by the Hamburg-American boat, that the *Tasso* was carrying a defective red light; and they say that if they had seen that red light sooner it would have made a difference in their navigation. The first question I have to decide with regard to that is the distance at which these two vessels were seen one from the other. I think the captain of the *President Lincoln* says that the white light was seen six miles away. Of course, if that was so, he would not have had an opportunity of seeing the red light of the *Tasso.* At that time the red light would not be open to him, even if visible, because the green light would have been open until the *Tasso* ported. Therefore we have got to ask ourselves when it was that the *Tasso* got within two miles of the Hamburg-American boat so as to open her side lights. I have very great difficulty in finding when it was that the green light would change into red by the *Tasso* altering her course to starboard under port helm. It may be, but I am not prepared to find it, that the green light was open before she ported, although it was never seen by the people on the Hamburg-American boat. They all agree it was a good light, because they saw it afterwards. Therefore I must leave out that part of the case, because I do not think it is clearly established that the green light was ever open and in view to the Hamburg-American boat; but undoubtedly the red light was open, and I have got to ask myself whether it was visible.

If it was visible and in view of course the Hamburg-American boat ought to have seen it, and they did not until just before the collision, when I think they say the *Tasso* was only 100ft. away. The red lamp has been produced, and the evidence is very unsatisfactory about that red lamp. The red lamp produced has a short circular chimney, and no doubt that would have the effect of keeping the draught off the flame. The lamp so produced is said to be exactly like what the lamp was at the time of the accident, although the chimney itself was cracked and subsequently was taken out and a new chimney was put in. I do not think that it is by any means clear what sort of chimney was in this lamp at the time. There is a contradiction between the captain and the people who trimmed the lamp. The captain says the lamp was as it is now. The other people say "No! the chimney in the lamp then was a long chimney, with a bulb, elongated into a narrow chimney." The captain says the only thing wrong with the lamp when it was opened was a little smoke round the rim at the top of the chimney. Undoubtedly the chimney at some time got cracked. It was taken out from the lamp after the accident, it was put by the second mate somewhere in the lamp locker, and subsequently it was thrown overboard in Dover Harbour by the man in charge of the lamps. It is very unfortunate that it was thrown overboard, because, except the captain, the other men say it was not that sort of chimney at all. Was it a proper chimney or a chimney which had been put in that day and did not suit the lamp, and which had begun to smoke and caused a good deal of smoke to get into the interior of the lamp apart from the chimney itself? It is said by those on the Hamburg-American boat who looked at the lamp that it was full of smoke inside the lamp, and that that obscured the lamp. It is unfortunate that the chimney was thrown away. It was known at the time that the question of the efficiency of the red lamp was being raised; and the Hamburg-American boat people bring a large body of evidence here to show that complaint was made of the condition of the lamp, and that a man actually went on board the *Tasso*—the saloon

steward, a man of experience—from the Hamburg-American boat, and looked at the lamp, and was satisfied that the lamp was obscured. I cannot reject all this evidence about the lamp being in this condition, and I have come to the conclusion in fact that for some reason or other —I cannot say why, whether it was that the chimney was not suited to the lamp and caused the smoke—but I am of opinion that the lamp was in a faulty condition at the time of the collision, and that blame attaches to those on the *Tasso* for navigating with the lamp in that condition.

I accept the evidence of the Hamburg-American boat that the lamp was not burning brightly, and I hold that both vessels are to blame for this collision.

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

Solicitors for the defendants, *Pritchard and Sons.*

July 21, 22, 24, *and* 25, 1911.

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

THE RAGNHILD. (*a*)

Collision—Steamship—Trawler engaged in trawling—Duty on steamship to keep out of the way —Duty of trawler to keep her course and speed —Collision Regulations 1897, *arts.* 9 (*d*) 1 (1906) 19, 21, 23.

When a steam trawler is exhibiting a triplex light in accordance with art. 9 (*d*) 1 (1906) *of the Sea Rules, she is to be regarded as incapable of manœuvring. It is the duty of approaching vessels to keep out of her way. Her duty is to do nothing but keep her course and speed. There is no duty upon her to stop her engines, except, perhaps, in obedience to the note to art.* 21 *of the Sea Rules.*

ACTION for damage.

The plaintiffs were the owners of the steam trawler *Easington;* the defendants and counter-claimants were the owners of the Danish steamship *Ragnhild.*

The case made by the plaintiffs was that shortly before 5.27 a.m. on the 5th March 1911 the *Easington,* a steel steam trawler of 183 tons gross, was one of the Great Northern fleet of trawlers fishing about 180 miles north-east by east of the Spurn Lightship. The wind was N.N.W., a strong breeze, the weather fine and clear. The *Easington* was trawling with her head about S.W. by W., making about two to two and a half knots; her regulation lights for a steam fishing vessel trawling, including a stern light, were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

In these circumstances those on the *Easington* saw about two and a half to three miles off and about three points on the starboard bow the masthead and red light of the *Ragnhild.* The *Ragnhild* approached as if to cross ahead of the *Easington,* but when she got quite close she shut in her red light and opened her green. The *Easington* at once gave a long warning blast, but could do nothing more as she was incumbered with her trawl. Two short blasts were then heard from the *Ragnhild,* and she came on at great speed and with her stem and starboard bow struck the *Easington* on her starboard side abaft the beam such a severe blow that she sank within a very short time with all her fish and her crew's effects.

Those on the *Easington* charged those on the *Ragnhild* with not keeping a good look-out; with failing to keep clear of the *Easington* and the fleet of trawlers fishing; with failing to keep on her course and cross ahead of the *Easington;* with failing to starboard; with failing to ease, stop, or reverse in due time; and with failing to indicate her course by whistle signal.

The case made by the defendants and counter-claimants was that the *Ragnhild,* a Danish screw steamship of 1494 tons gross and 932 tons net register, whilst bound from Seaham to Kiel with a cargo of coal, manned by a crew of eighteen hands all told, was in the North Sea about latitude 55° N. and longitude 3° 10′ E. The weather was dark but clear, and the wind a strong northerly breeze. The *Ragnhild,* which had altered her course for other lights of fishing vessels, was heading about north-east by east magnetic, and was making about five knots. 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 a white light on the trawler *Easington* was particularly noticed bearing about half a point on the port bow; it seemed to be about a mile distant, but it was in fact nearer. The helm, which had previously been starboarded for another trawler, was ported back a little from N.E. by E., and a good look-out was kept for any coloured or other light which might be exhibited by the *Easington,* but afterwards, when it was seen that the *Easington* was not showing any coloured light and was heading to the south-westward, the engines were stopped and a long warning blast was sounded. The *Easington,* however, came on, and with her starboard side aft struck the *Ragnhild* on her starboard bow, doing her damage.

Those on the *Ragnhild* charged those on the *Easington* with not keeping a good look-out; with exhibiting misleading lights; with not exhibiting proper lights for a steam trawler; with not keeping out of the way and with not taking proper measures to keep out of the way; with not stopping the engines in due time or at all; with not porting, and with wrongly starboarding.

The following collision regulations were referred to in the pleadings during the arguments and in the judgment:

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.

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 twenty feet, and if the breadth of the vessel exceeds twenty feet, 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 forty feet, a bright white light, so constructed as to show an unbroken light over

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

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.

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 six nor more than twelve feet 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. . . . All lights mentioned in subdivision (*d*) 1 and 2 shall be visible at a distance of at least two miles.

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. This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

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.

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.

At the conclusion of the evidence the learned judge stated that in his opinion the evidence as to the steam trawler having her proper trawling lights exhibited was overwhelming.

A. D. Bateson, K.C. and *John B. Aspinall*, for the plaintiffs, were not called on.

Batten, K.C. and *Dunlop* for the defendants.—No doubt the number of witnesses who speak to seeing the triplex light is large, but can the evidence be accepted? It is submitted it cannot be. The steam trawler is to blame for not stopping her engines; if she had stopped them there would have been no collision. This court has never held a trawler free from blame when she failed to stop her engines before the collision. If a trawler stops her engines the trawl acts as an anchor and at once brings the trawler to a standstill. The trawler ought to have stopped under art. 23, and she ought possibly to have kept out of the way in accordance with art. 19. At all events, she is to blame for not making full use of such power as she possessed to avert collision. If the trawler could prove that she did that, she would be free from blame, and that is the foundation of all the cases which have been decided on this point:

The Tweedsdale, 61 L. T. Rep. 371; 6 Asp. Mar. Law Cas. 430 (1889); 14 P. Div. 164;
The Grovehurst, 103 L. T. Rep. 239; 11 Asp. Mar. Law Cas. 440; (1910) P. 316;
The Dunelm, 51 L. T. Rep. 214; 5 Asp. Mar. Law Cas. 304 (1894); 9 P. Div. 164;
The Cockatrice, 98 L. T. Rep. 728; 11 Asp. Mar. Law Cas. 50; (1908) P. 182;
The King's County, (1904) 20 Times L. Rep. 202.

A. D. Bateson, K.C. in reply.—The *King's County* was decided on the question of bad look-out. The present case depends on seamanship. There would have been no collision but for the porting of the *Ragnhild* just before the collision. The right view is that the trawling lights prescribed by art. 9 are intended to notify other vessels that they are to get out of the way: (*The Grovehurst, ubi sup.*). The steamship is alone to blame; she did not keep out of the way while the steam trawler kept her course and speed, which is all she ought to have done in the circumstances.

BARGRAVE DEANE, J.—This is an action for damage brought by the owners of the steam trawler *Easington* against the owners of the steamship *Ragnhild*, a Danish steamer, which was on a voyage from Seaham to Kiel with a cargo of coal.

The *Easington* was trawling in the North Sea, and was one of the fleet known as the Great Northern Steam Fishing Company's fleet. She was, with another vessel, the *Erne*, the most westerly and to a certain extent away from the rest of the fleet. The collision took place at about half-past five in the morning of the 5th March in this year. It was dark but clear, and there was some wind and sea; and the two vessels came together with such violence and with such serious effect that the *Easington* sank. Fortunately her crew were able to get into their boat and get on board the *Erne*, and no life was lost.

Now, the first question in the case is one of fact. Was the *Easington* exhibiting her proper fishing light? Was she carrying an all-round globe white light, a triplex light such as is prescribed for fishermen to carry, and a stern light?

On the one side I have the evidence of those on the *Easington* herself, who swear that the lights were duly exhibited and burning before and at the time of the collision, and I have the evidence of the same people and from the *Erne* that after the collision those lights were still seen to be burning. It is a question of the credibility of witnesses. No fewer than ten men swear to the fact that these lights were burning properly before and at the time of the collision. On the other hand, the whole case of the *Ragnhild* is that the *Easington* was not exhibiting proper fishing lights. It is said that she was exhibiting only a white light, I suppose meaning a globe all-round light. That is sworn to by the second officer of the *Ragnhild*, who was in charge, and in a certain sense it is deposed to by the captain of the *Ragnhild*, who was in his cabin at the time of the collision, and who said that he looked out of his cabin window and only saw one white light, and that he never did see, after the collision, anything but a white light on the vessel with which he had collided. I do not think his evidence is conclusive, even if it is accepted. In regard to the second officer, if his story is absolutely to be depended upon, this trawler was not carrying the proper regulation light. Therefore it is a question of fact, of the credibility of witnesses—am I satisfied or not that the trawler was carrying proper lights? On the one side, as I have said, there are ten witnesses; on the other side only one, and it is perfectly clear that the second officer of the *Ragnhild* did not conduct the navigation of his ship in a seamanlike way. He altered his helm twice without blowing any signal. He had a man on the look-out, by his side, apparently, on the bridge—and it is said that the weather was such that it was not fit to be on the forecastle head—but as far as I can understand there was no report of this vessel; and the misfortune is that I am told that both the man at the wheel and the man who had been on the look-out have deserted and cannot be brought here as witnesses. It is unfortunate, and I am very sorry that is so, but I have to act upon the evidence which is put before me, and the conclusion I have arrived at is that the trawler's lights were properly exhibited and burning. In addition to the evidence I have got to look at the probabilities. Here is a fleet of vessels. It is essential for their own safety, one from another, that they should be carrying proper lights. It is highly improbable that they would not be exhibiting the proper lights. The argument put forward is that it is quite likely they did not trim their lights, but allowed them to go out, and so on. I do not think it is probable. Of course it is possible—we know what these fishermen are—they are excellent seamen, but no doubt rough and ready in their ways—but still the conclusion I have come to is that the lights were burning. If the lights were burning the evidence of the second officer of the *Ragnhild* is not of much value. On the other hand, I have got to look at what he actually deposed to. He says that when he saw a white light and a green light he starboarded. That is the same story as that told by the *Easington*, that on their starboard bow they saw this steamer, showing her red light, and that she opened her green light, showing she was starboarding. The second officer said that having starboarded and got green to green he then saw a white light, and that as he appeared to be running into that white light he ported. That, again, corroborates the story of the *Easington* that the vessel having starboarded and become green to green then ported and ran into them. I cannot help thinking that the second officer having got among these fishing vessels, did not know where he was or what he ought to do, and that in the hurry of the moment he starboarded and then ported. It was simply a matter of bad seamanship. If that is the case, of course his vessel must be held to blame.

It is suggested by counsel for the defendants, however, that the case is not concluded by the finding; that here was a trawler which, though it is true she was hampered by having her trawl down, was bound—I do not think he goes so far as to say keep out of the way—to stop as soon as she saw a collision was imminent. The word "imminent" is very awkward. It does not mean when there is possible risk of collision; it means when by doing something you can avoid it or can hope to avoid it. In this case the *Easington* kept her course and speed—she did not stop—her engines were going ahead at the time of the collision. She was struck right aft on the starboard side—both parties agree about that—and the angle was a fine angle, leading aft.

Now, the Elder Brethren have gone into this question of stopping, and first of all I will deal with it from the seamanship point of view. Those on the trawler see on their starboard bow a vessel showing a red light. The vessel starboards, which brings her green to green, a perfectly safe course, and so they continue, green to green, until just before the collision, when suddenly the vessel ports and opens her red light again. A vessel which adopts that sort of manœuvre is a very difficult vessel to deal with, and I am advised, and I agree with the advice, that in this particular case there is no reason to say that for the non-stopping of her engines when that second alteration of the *Ragnhild's* helm took place, namely, the porting, immediately before the collision, any fault is to be found with the seamanship of the *Easington*. I go a step further, although I need not do so, because if from the seamanship point of view the trawler is not to blame for not stopping her engines, then it decides the question; but I go a step further than the case of *The Grovehurst* (*ubi sup.*), which was a somewhat similar case to this. In that case, at the last moment, when the collision was practically inevitable, the trawler did stop her engines, just as the blow was struck. My opinion of the law as to this case is based upon the decision in *The Grovehurst* (*ubi sup.*). I agree that as soon as the rules of navigation were altered, making it absolutely incumbent upon a trawler with her trawl down to carry a triplex light, there was some object in altering the law. What was the object? The Court of Appeal, in dealing with *The Grovehurst* (*ubi sup.*), were unanimous that the alteration in the law was this, that the trawler was put into the position of an unnavigable vessel which any vessel approaching, whether steamer or sailing vessel, had to keep out of the way of. It followed from the decision that if that duty is incumbent upon the approaching vessel to keep out of the way, it is necessary that the trawler should do nothing, but keep her course and speed under

art. 21. The Court of Appeal practically said that in *The Grovehurst* (*ubi sup.*). Vaughan Williams, L.J. says this: "In the case of *The Tweedsdale*—decided at a time when the exhibition of the triplex light was discretionary—it was held that a steam trawler, going slowly with a 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 the 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 light is absolute."

It stands to reason from the seamanship point of view that if you are conducting the operations of the steamer or the sailing vessel and you see an object in your way exhibiting a light which indicates to you that she cannot get out of your way, then the whole duty is on you to keep out of her way and the whole duty on her is to do nothing, except, perhaps, if anything can be done at the last moment to prevent the collision being brought about. I think art. 21 becomes plain directly you find that this new art. 9, which was made law in 1906, becomes operative. Under art. 9 here is a vessel which has to keep out of the way of the other, and under art. 21 the other vessel must keep her course and speed; and I think that if she were to stop at a time when the other vessel was going to clear and a collision happened she would be held to blame. You hamper the movements of a vessel which has to keep out of the way if you do not keep some regular system of movement which the other vessel can see and appreciate and act to avoid. In my view, therefore, it follows as a natural course that where the duty is imposed upon one vessel to keep out of the way, it is the duty of the other vessel to keep her course and speed. Buckley, L.J. takes the same view. He says in *The Grovehurst* (*ubi sup.*): "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 of giving that information 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." Then the President of this Division (Sir S. T. Evans), who was the third judge, comes to the same conclusion. He says: "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." That, of course, means that they cannot direct their operations unless they know what the other vessel is doing, and if it is understood that the other vessel is to do nothing then they are not incumbered in their navigation in having to deal with her; whereas if the other vessel altered her helm or speed and moved about in all sorts of directions, perhaps trying to go astern, it is obvious she would incumber the vessel which had to keep out of her way. The only rational course is to say that one vessel shall keep her course and speed, and the other vessel shall keep out of the way.

In my opinion, in this case the trawler is not to blame for her manœuvring, or rather for her want of manœuvring, and the whole cause of this collision was faulty look-out on the *Ragnhild*, and she is alone to blame.

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

Solicitors for the defendants, *Stokes and Stokes*.

HOUSE OF LORDS.

Friday, May 5, 1911.

(Before the LORD CHANCELLOR (Loreburn), Lords ASHBOURNE, ALVERSTONE, and SHAW.)

OWNERS OF THE SHIP SWANSEA VALE *v.* RICE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Employer and workman—Death by accident "arising out of" employment—Disappearance of sailor from ship—Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58).

An officer of a ship, who was on duty on deck, disappeared from the ship in broad daylight, in fine calm weather. No one saw what happened to him, but there was evidence that not long before he had complained of feeling sick and giddy.

Held, that there was evidence from which the court might infer that he fell overboard from an accident arising not only "in the course of" but "out of" his employment, within the meaning of the Workmen's Compensation Act 1906, *and that his dependants were entitled to compensation under the Act.*

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal (Cozens-Hardy, M.R. and Moulton, L.J., Buckley, L.J. dissenting) reported 102 L. T. Rep. 270; 29 C. C. C. Rep. 425, who had affirmed a decision of the County Court judge of Glamorganshire sitting at Swansea.

The respondents were the widow and daughter of William Rice, who was mate of the ship *Swansea Vale*, of which the appellants were owners, and was drowned at sea under circumstances which appear sufficiently from the headnote above, and are more fully set out in the report in the court below.

The respondents applied for compensation under the Workmen's Compensation Act 1906, and the learned County Court judge held that there was evidence from which he could infer that the deceased man lost his life from an accident "arising out of and in the course of his employment" within the meaning of the Act, and awarded compensation.

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

The employers appealed, but the decision of the County Court judge was affirmed, as above mentioned.

Atkin, K.C. and *L. M. Richards*, for the appellants, contended that the respondents had not discharged the onus which lay upon them of proving that Rice lost his life by an accident "arising out of" his employment. There is no evidence at all as to what happened to him except that he disappeared. See *Bender* v. *Owners of the Steamship Zent* (100 L. T. Rep. 639; (1909) 2 K. B. Div. 41; 29 C. C. C. Rep. 175) and *Marshall* v. *Owners of the Wild Rose* (11 Asp. Mar. Law Cas. 251, 409; 103 L. T. Rep. 114; (1910) A. C. 486; 29 C. C. C. Rep. 531), which were very similar cases, though the learned County Court judge thought that they were distinguishable. As to what is meant by an accident "in the course of" employment, but not "arising out of" such employment, see *Barnabas* v. *Bensham Colliery Company* (103 L. T. Rep. 513), where it was held in this House that there must be some definite evidence to bring a case within the Act, and that a guess or conjecture is not sufficient.

D. Villiers Meager and *R. C. Ollivant*, for the respondent, maintained that there was evidence sufficient to justify the County Court judge in arriving at the conclusion that Rice lost his life from an accident arising out of his employment. It is very like the case of *Wilkes* v. *Dowell* (92 L. T. Rep. 677; (1905) 2 K. B. 225; 27 C. C. C. Rep. 164) where a man engaged in unloading a ship had a fit, and fell down into the hold and was injured. See also the Scotch decisions:

Mackinnon v. *Miller*, 1909, Sess. Cas. 372; 46 Sc. L. Rep. 299;
Grant v. *Glasgow Railway Company*, 45 Sc. L. Rep. 128.

There is no suggestion of suicide or murder.

Atkin, K.C. did not reply.

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

The Lord Chancellor (Loreburn).—My Lords: I am glad that the learned counsel who addressed to your Lordships such a concise and admirable argument recognised the true value of decided cases in connection with an argument like this. Cases are valuable in so far as they contain principles of law. They are also of use to show the way in which judges regard facts. In that case they are only used as illustrations. Judges are not laying down law when they are explaining their reasons for coming to a conclusion of fact. It seems to me that you have to decide each case upon its own facts, the question here being whether there is any evidence to justify the County Court judge arriving at the conclusion at which he did arrive. I must point out that what is evidence and what is merely guessing is a matter which cannot be defined. What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other. In the present case employment on board ship necessarily exposed this unfortunate man to the danger of falling overboard. We have knowledge of certain things. He was on board this ship in the course of his employment, and therefore the accident, if it were one, happened in the course of his employment. Unquestionably he fell overboard in one way or another. That is obvious. Under these circumstances, if you exclude the possibility of suicide or murder, it must have been an accidental falling overboard, and there was an injury arising out of an accident in the course of his employment. Was it an injury or accident arising out of his employment? We know that this man at an early hour complained of being sick and giddy. He was on deck discharging a most responsible office at the very time when he disappeared from the ship. It is natural to suppose that he might be at the side of the ship for the exact purpose of his duty. It was possible also that he might have been there because he was seized with a feeling of sickness. If he fell overboard, as undoubtedly he did, by slipping or losing his balance while at the side discharging some duty, that would be an accident arising out of and in the course of his employment—looking out, for example, or anything of that kind, then unquestionably the accident arose out of his employment. If he was taken giddy while at the side, of course the accident arose out of his employment. I think that it would be the same if, taken by nausea, he went to the side to vomit. That also would be an accident arising out of his employment. He might have been going to examine the lifeboat. All these things were possible and not an improbable explanation of what happened. The other alternatives were suicide or murder. If you weigh the probabilities one way or the other, the probabilities are distinctly greater that this man perished through an accident arising out of and in the course of his employment. I am quite certain that the County Court judge was entitled to come to this conclusion. Under the circumstances I agree with the opinion of the Court of Appeal. I think that this appeal ought to be dismissed with costs.

Lord Ashbourne.—My Lords: I agree. I think on the facts that there was ample warrant for the County Court judge to arrive at the conclusion at which he did arrive. This man met with his death by accident arising out of and in the course of his employment. Here was a man of experience, of good character, with everything to make him careful, in charge of a new ship, the principal officer beginning his watch and requiring to have his eyes about him. He was there without any suggestion of suicide or any criminal act on the part of others which could have led him into danger or difficulty. He went on his watch not feeling well, but with an attack of giddiness. Is it a strong presumption to reach the conclusion that it must have been by some accident that a man of this character met his death by falling into the sea? It is impossible to measure the facts of one case by the facts of another, but I have no difficulty in arriving at the conclusion that this appeal should be dismissed with costs.

Lord Alverstone.—My Lords: I concur.

Lord Shaw.—My Lords: This case appears to me to raise no difficulty with regard to the distinction between inference in the ordinary case and conjecture. The facts are simple. A man engaged in a variety of duties is sent in a sick and giddy condition to perform those duties.

In such a position his duty takes him into a position of danger. He has to pace to and fro upon the deck. I tender my assent to the proposition that it is impossible in all cases of precedent or alleged precedent to go by analogy of facts. Few cases arise in ordinary life, or in the law courts, in which such analogy is complete, and unless it is complete it must lead to dangerous conclusions. In the case of *Marshall* v. *Owners of the Wild Rose* (*ubi sup.*) I specially reserved the case of a sailor whose life is sacrificed under circumstances of mystery. I see no occasion to differ from, but much to incline me to agree with, the judgment in the case of *Mackinnon* v. *Miller* (1909) Sess. Cas. 372), and in particular with the judgment of Lord Dunedin.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Botterell* and *Roche*, for *William Cox*, Swansea.

Solicitor for the respondents, *John T. Lewis*, for *Llewelyn, Howell*, and *Williams*, Swansea.

May 2, 11, 12, *and June* 28, 1911.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, Alverstone, Shaw, and Robson.)

Thames and Mersey Marine Insurance Company *v.* Gunford Ship Company.

Southern Marine Mutual Insurance Association *v.* Same. (*a*)

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

Marine insurance—Warranty of seaworthiness—Competency of master—Non-disclosure of material facts—Valued policy on hull—Concurrent policies on freight and disbursements—Honour policies—Over-insurance—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 18, 19, 20.

Two policies of insurance were taken out by the owners of a ship upon her hull without disclosing to the insurers the fact that the master appointed for the voyage had not been to sea for twenty-two years, that he had lost his last ship, and had had his certificate suspended. The hull was in fact over-insured. There were other insurances on gross freight and disbursements. There was no insurable interest in part of the disbursements. The insurance upon them was by an "honour policy," otherwise a "p.p.i. policy." The managing owner (to whom money was due from the ship) had effected "honour policies" to a large amount on disbursements to protect his own interests. The ship was lost on the voyage by the default of the master. In an action brought by the shipowners against the insurers on the policies:

Held, affirming the decision of the Court of Session, that the ship was not unseaworthy by reason of the incompetence of the captain, and that there was no breach of warranty of seaworthiness; that there was no duty on the owners to disclose the master's record to the insurers, and that such non-disclosure was not non-disclosure of a material circumstance within the meaning of the Marine Insurance Act 1906.

Held, also, reversing the decision of the Court of Session, that the omission to disclose the over-insurance of the hull and the existence and amount of the "honour policies" did amount to the non-disclosure of material circumstances, and that the two policies were void owing to the concealment of material facts.

Appeals from two judgments of the First Division of the Court of Session in Scotland, consisting of the Lord President (Lord Dunedin), Lords Kinnear and Johnston, who had affirmed decisions of the Lord Ordinary (Lord Salvesen) in favour of the respondents, the owners of the ship *Gunford*, in actions brought against the appellants on policies of insurance.

The cases are reported 1910, Sess. Cas. 1072: 47 Sc. L. Rep. 860.

The two cases raised the same questions, and they were argued together.

In the case of the Thames and Mersey Marine Insurance Company, the respondents claimed as for a total loss upon two policies of insurance. Each policy was for 1000*l.* upon the hull of the *Gunford*, valued at 18,500*l.*, on a voyage from Rotterdam to Hamburg and thence to Santa Rosalia. The managing owner was Mr. Francis Briggs, of Glasgow. The total insurances upon the ship at the time of the voyage amounted to 35,800*l.*, including a p.p.i. policy for 4500*l.* by Mr. Briggs for his own account. The justification for the 35,800*l.* insurance was based, the appellants said, upon the fact that to repay the original capital, to pay off the debts of the company, and to cover freight and insurance would require 40,000*l.* The appellants refused to pay, on the alleged ground that Captain Sember, who was the master, had last been to sea twenty-two years before; that from 1885 to 1907 he was a stevedore in Glasgow; that he lost the *Perthshire* off the Falkland Islands, in 1885, on a voyage to Santa Rosalia. The appellants therefore resisted the claim of the respondents on the ground that there was a breach of warranty of seaworthiness under the policy by reason of the fact that the ship did not sail with a competent master, and that excessive and speculative insurances had been effected upon freight and disbursements.

Briefly, the ship *Gunford* was wrecked on the Brazilian coast in 1907, while bound from Hamburg to Santa Rosalia, and as the result of a Board of Trade inquiry the master's certificate was suspended for twelve months, and the court considered that the insurances were excessive. A large proportion of the underwriters denied liability, and pleaded (*inter alia*) that there was concealment by the assured of the following material facts—namely, that a captain had been appointed who had not been to sea for twenty-two years and had had his certificate suspended for six months for losing his last ship; that the ship consequently was unseaworthy; and that in addition to insuring a vessel not worth 10,000*l.* for the sum of 18,500*l.*, the assured had effected honour or disbursement policies for 11,000*l.*, so that a loss would be highly advantageous to them. A prominent London underwriter gave evidence on behalf of the Institute of London Underwriters that the facts not disclosed were material, but the Lord Ordinary repelled the defences and gave judgment for the pursuers, the present respondents. He found that the defenders had failed to prove that the *Gunford* was unseaworthy

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

by reason of the incompetence of the master. The First Division affirmed the judgment of the Lord Ordinary, as above mentioned, although Lord Johnston had considerable doubt on the question of unseaworthiness.

Leslie Scott, K.C. and *F. D. Mackinnon*, for the appellants, argued that there had been a breach of the warranty of seaworthiness, and also a concealment of material circumstances known to the assured which would have influenced the judgment of a prudent insurer within the meaning of the Marine Insurance Act 1906. If there was a breach of the warranty of seaworthiness the question of over-insurance does not arise. The facts show that the master was not a competent person to command the ship, and in any case his previous record should have been communicated to the insurers. They should also have been informed of the excessive valuation and over-insurance, and that it was to the interest of the assured that the vessel should be lost. See

Ionides v. *Pender*, 2 Asp. Mar. Law Cas. 266 (1874); 30 L. T. Rep. 547; L. Rep. 9 Q. B. 531;
Hutchinson v. *Aberdeen Sea Insurance Company*, 3 Rettie, 682.

J. Avon Clyde, K.C., *C. D. Murray*, K.C. (both of the Scottish Bar), and *Raeburn*, for the respondents, contended that the negligence of the master and crew was one of the perils insured against. Seaworthiness is not a question of degree. A ship is either seaworthy or not. If the master was incompetent it would have appeared at the beginning, not at the end of the voyage. If the assured honestly believed that he was competent it is sufficient, and there was no necessity to make any communication to the underwriters. The facts as to the insurances were not material. A policy on the hull is not the same as a policy on the ship, and it is not void because the managing owner had taken out p.p.i. policies in his own name from which the owners could get no benefit. It is a common practice to insure hull, freight, and disbursements cumulatively. They referred to

Baker v. *Scottish Sea Insurance Company*, 18 Dunlop, 691;
Haywood v. *Rodgers*, 4 East, 590;
Beckwith v. *Sydebotham*, 1 Camp. 116;
Gladstone v. *King*, 1 M. & S. 35;
Roddick v. *Indemnity Mutual Marine Insurance Company*, 8 Asp. Mar. Law Cas. 24; 72 L. T. Rep. 860; (1895) 2 Q. B. 380;
1 Park on Insurance, p. 493;
Marshall on Insurance, p. 474;
Arnould on Insurance, sects. 356, 619, 620.

Leslie Scott, K.C. in reply.—The fact of over-insurance is material if it is more advantageous for the insured that the ship should be lost, because of the conflict between interest and duty. The standard laid down by the statute is the "judgment of a prudent insurer," and therefore speculative over-insurances should be disclosed.

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

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

The Lord Chancellor (Loreburn).—My Lords: The facts of this case have been exhaustively considered in the opinion about to be delivered by the Lord Chief Justice, which I have had the advantage of reading, and therefore I need not recapitulate them. I agree with the First Division in thinking that there was no breach of the warranty of seaworthiness and that there was no concealment of material facts in regard to the qualifications and career of the master. There is, however, one further ground of defence—namely, the non-disclosure of material facts as to other insurances effected upon hull, freight, and disbursements. Upon this point I am constrained to differ from the First Division with much reluctance because of its great authority. No actual circumstance is in dispute affecting this point, but the question is what ought to be the conclusion of fact. Were the circumstances which the assured or his agent failed to disclose material in the sense described by the statute? Now, it is common ground that owners and agent between them (for I cannot discriminate) effected policies upon her hull, freight, and disbursements for 35,600*l.*, apart from master's effects valued at 200*l.* If the insurances be split up, they were as follows: Upon hull, 19,000*l.*; on freight, 5500*l.*, the freight for the voyage being about 4800*l.*, of which one-half had been paid in advance and was not at risk; on disbursements, 4600*l.*, and additional on hull and disbursements (including debts of ship to her managing owners and others) against total loss, 6500*l.* The actual value of the hull was about 9000*l.* No insurable interest could be shown in respect of the greater part of the items stated to have been insured under the denomination of disbursements, and full indemnity for actual disbursements would in the event of loss be recovered by reason of the high valuation of the hull. It was admitted that it would be a great deal better for the shareholders if the ship were lost. If she completed the voyage she would earn 2400*l* freight and be worth herself some 9000*l.*, in all 11,400*l.* If she were lost her owners and agents stood to receive 35,600*l.*, less a sum of 2400*l.* freight already paid. Their theory of insurance was to insure the original capital of the company which owned her, and to add to that the debts of the company. Accordingly I ask myself, in the language of the statute, would these circumstances influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk? I can answer this question only in one way. In truth the witnesses for the most part answered it in the same way. It is very possible that some underwriters do not ask and do not expect to be told what are the insurances, and that some underwriters gamble. But I do not believe that prudent underwriters would treat as immaterial such over-insurance and such large sums placed on disbursements as were effected in this case. I am requested by Lord Macnaghten to say that he concurs in this opinion.

Lord Alverstone.—My Lords: This is an appeal which arose out of an action brought in the Scottish court upon two policies of insurance for 1000*l.*, each effected with the appellants, the Thames and Mersey Marine Insurance Company, on behalf of the owners of the sailing ship *Gunford*. The defenders, the present appellants, resisted payment of the amounts insured on the

grounds that there was a breach of the warranty of seaworthiness and of non-disclosure of material facts (*a*) as to the captain of the vessel; (*b*) as to the other insurances effected in connection with the ship. The facts material to those points were not in dispute. The Gunford Shipping Company Limited was managed by Francis Briggs, by whom all the business of the ship, including the employment of her officers and the effecting of insurances, was transacted. The captain of the vessel on the voyage in question was A. W. Sember. The *Gunford* sailed from Hamburg on the 12th Oct. 1907 with a full cargo of patent fuel, coke, and machinery, on a voyage round Cape Horn to Santa Rosalia. In the course of the voyage on the 10th Dec. 1907 she went ashore near Cape San Roque and became a total loss. All the policies for voyage and time contained a warranty of seaworthiness. The appellants alleged that this warranty was broken, in that the ship was not seaworthy, because Captain Sember was not a competent master. Lord Salvesen, the Lord Ordinary before whom the case was tried in the first instance, came to the conclusion that there was no breach of the warranty of seaworthiness. He found, after considering the evidence, that the *Gunford* was not unseaworthy by reason of the captain's incompetence. Upon this part of the case your Lordships did not call upon counsel for the respondents. There is, in my opinion, ample evidence on which the learned judge could find, as he did, that the captain was not incompetent, and the appeal, so far as it is based upon that ground, fails. Upon the second ground—namely, that there was concealment of material facts in connection with the employment of the captain—there was a great deal of evidence on both sides. The facts relied upon by the appellants were that a period of twenty-two years had elapsed since Captain Sember had last been at sea, he, during that time, having been engaged as a stevedore; it was further said that his engagement as captain was made without sufficient inquiry, and the circumstances under which he was engaged were such that it was material to the underwriters to be informed of the previous history and experience of the captain. A great many witnesses were called for the appellants, who stated that, in their opinion, it was material to the underwriters that they should be informed of the circumstances connected with the captain's experience above referred to. The Lord Ordinary, in his judgment, came to the conclusion that, under ordinary circumstances, underwriters rely upon the information at their own disposal with regard to the competency of masters, that the name of the master is, as a rule, not inserted in the policy, and that it is only on very rare occasions that underwriters make any inquiry as to his name or history, and that they rely on the shipowners to engage a competent master. There is no doubt that in this case the information at the disposal of the underwriters would not have afforded the necessary information, because Captain Sember was not appointed master of the *Gunford* until the 19th July, and the records of information as to masters at the disposal of the underwriters at the date when the policies were effected would not have contained his name. I am, however, not prepared to differ from the Lord Ordinary and the Court of Session upon this part of the case. The fact upon which most reliance was placed was that the underwriters were not told that the master had been on shore for twenty-two years; but this fact could not well be stated by itself without further information as to other matters put before Mr. Briggs as to the qualifications of Captain Sember, and, looking to the well-established usage, I concur in the view taken, as appears in the judgments in the court below, that there was no concealment of any material fact in regard to the captain. I have now to deal with the remaining point in the case, and that is whether or not there was concealment of material facts by reason of the non-disclosure of the insurances effected upon the ship. Before discussing this matter it is desirable to state briefly the law applicable to the case. It is, in my opinion, quite unnecessary to do more than refer to the sections of the Marine Insurance Act 1906. Sect. 17 is in the following terms:

A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Sect. 18 (1). Subject to the provisions of this section the assured must disclose to the insurer before the contract is concluded every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which in the ordinary course of business ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract. (2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. (3) In the absence of inquiry the following circumstances need not be disclosed—namely: (*a*) Any circumstance which diminishes the risk. (*b*) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge and matters which an insurer in the ordinary course of his business as such ought to know. (*c*) Any circumstance as to which information is waived by the insurer. (*d*) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty. (4) Whether any particular circumstance which is not disclosed be material or not is in each case a question of fact. (5) The term circumstance includes any communication made to or information received by the assured.

Sect. 19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed where an insurance is effected for an assured by an agent the agent must disclose to the insurer: (*a*) Every material circumstance which is known to himself. And an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by or to have been communicated to him.

The two policies to which the appeal now under consideration relates were dated the 30th and 31st Aug. 1907, but the material date for the purpose of the question under consideration—viz., the date of the initialling of the slip—was the 3rd Aug. The policies were effected upon the instructions of Mr. Briggs. The actual amount of freight due under the charter-party was 4790*l*., of which one-half, 2395*l*., was paid in advance at Hamburg. The disbursements and other outlay which had been incurred in order to earn the freight were stated to amount to 5280*l*. Some portion of this amount would not have created any insurable interest, having regard to the provisions of sect. 16, but in the view which I take

it is unnecessary to say how much. Moreover, it was conceded that the only source from which these disbursements could be repaid was the freight earned by the ship, which freight was itself insured. The insurances which were effected on behalf of the owners amounted to 29,300*l.* as follows: Hull, valued at 18,500*l.*, 19,000*l*; freight, valued at 5500*l.*, 5500*l.*; master's effects, valued at 200*l.*, 200*l.*; disbursements, p.p.i. policy, 4600*l.*; total, 29,300*l.* In addition, Mr. Briggs took out for his own protection insurances to the amount of 6500*l.* by p.p.i. honour policies, making in all 35,800*l.* The evidence established that the actual value of the property at risk was hull 9000*l.* and freight about 5000*l.*, but the underwriters accepted a policy upon which the hull was valued at 18,500*l.* Assuming that no part of the disbursements should be taken into consideration as being included in the difference between 9000*l.*, the actual value of the hull, and 18,500*l.*, the insured value of the ship, there was still a double insurance in respect of the alleged disbursements to the extent of 4600*l.* in addition to the 6500*l.* insurances effected by Briggs. If the difference between the declared 18,500*l.* and actual 9000*l.* value was represented by any insurable interest in disbursements, the over-insurance or over-valuation would be correspondingly increased. It was proved in evidence that no dividends had been earned by the ship for about seven years; it was further established that the object of the insurances was to cover debts owing by the company in the event of the loss of the vessel. There was further evidence that the profits which were being earned by the ship could not stand the amount paid in respect of premiums of insurance. All the disbursement policies were valued policies —that is to say, in the event of the ship being lost the full amount would be paid—and it was admitted by Mr. Briggs that it would be a great deal better for the shareholders if they lost their ship under the policies than if they had to realise their ship by sale, unless they got the Spanish Government to buy or a war took place. Even assuming the value of the ship to be taken at 18,500*l.*, the total amount at risk did not exceed 23,500*l.* before the moiety of the freight was paid at Hamburg, and a little over 21,000*l.* after the vessel left Hamburg. Some distinction was attempted to be made between over-valuation and over-insurance, but, inasmuch as all the polices were valued policies, the question becomes immaterial. There was on the evidence over-valuation to the extent of 11,100*l.*, without taking into consideration the difference between the declared value, 18,500*l.*, and the actual value, 9000*l.* Apart, then, from evidence in the particular case, it seems to me that the statement of the facts is sufficient to show that, looking to the provisions of the Act of 1906, the circumstances were material as being those which would influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk. Before proceeding to examine the evidence bearing upon this part of the case, I think it well to consider the grounds upon which judgment was given for the pursuers in the court below. Lord Salvesen, in the first instance, left out of view the honour polices; he further held that the pursuers were not concerned with the policies for 6500*l.* taken out by Briggs, because their manager entered into these contracts for his own behoof, and without the authority of the pursuers; and he also held that it is not in accordance with the principles and calculations on which underwriters in practice act, that there should be any disclosure with regard to policies covering other risks which the particular underwriter is not asked to accept. The Lord President adopted in terms the reasoning of Lord Salvesen, and further, in a passage at the end of his judgment, appears also to put out of view the policies which were effected by Briggs. Lord Johnston considered that as soon as it was ascertained that the policies in question were valued policies, the case was at an end. I refer to these reasons because, with the greatest respect for the opinions of the learned judges, they do not seem to me to have considered sufficiently the question of concealment as it arises upon the sections of the statute to which I have called attention, and have not, so far as I can follow their judgments, considered the evidence bearing upon this part of the case. Before I refer to that evidence, I think it well to say that I cannot accept the view that the 6500*l.* honour policies, effected it is said by Mr. Briggs for his own protection, can be put out of view on the grounds suggested by the judgments. Briggs was the managing owner of the ship; the disbursements, in respect of which he was purporting to insure, were moneys due from the ship to him, and in considering whether there was over-valuation or over-insurance, and in this case, as I have pointed out, the terms are synonymous, which ought to have been disclosed to the underwriters, I cannot, having regard to the provisions of sect. 19 of the Act, put out of view the 6500*l.* policies effected by Briggs, nor does it, to my mind, make any difference in regard to the duty of disclosure that the policies covering this 6500*l.* and the policies for the 4600*l.* also for disbursements were honour policies. These policies were void under sect. 4 of the Act, but they go to swell the sum which would be payable in the event of the ship being lost, and the total amount being upwards of 35,000*l.* whereas the value actually at risk did not exceed 14,000*l.*, there was a very large over-valuation which might well make a prudent underwriter hesitate both as to undertaking the risk and consider the premium which he should require before doing so. I am aware of the doubt suggested by the Court of Appeal in *Roddick* v. *Indemnity Mutual Marine Insurance Company* (8 Asp. Mar. Law Cas. 24; 72 L. T. Rep. 860; (1895) 2 Q. B. 380), as to whether the effecting of honour policies was a breach of a warranty not to insure, but, in my opinion, the view taken by Kennedy, J. in that case was correct, and at any rate the point does not affect the question now under consideration. Dealing now with the evidence in the case, the whole of which I have considered carefully, though, having regard to the terms of the statute, and the duty of the assured, I doubt whether a great part of it was relevant or admissible, the practice of underwriters as to accepting any risks or not making inquiries on particular points cannot, in my opinion, affect the duty as defined by statute, and cannot properly be received as evidence of waiver in any particular case. I have, however, come to the conclusion that the evidence as given establishes, beyond any reasonable doubt, that the matters to

which I have referred were material to be disclosed.

Taking first the evidence of the pursuer, it is to be noted that, although Mr. Lockhart, one of the principal witnesses for the pursuer, stated that it is not the practice for underwriters, now, to be informed or to inquire as to what are the current insurances on other interests, such as freights or disbursements, the witness admitted in cross-examination that, had he not known, he would want a satisfactory explanation as to the large amount of the total insurances, and that without explanation he would probably not take the risk. It is to be noted that Mr. Lockhart was well acquainted with all the facts of the case, and knew the reasons which had induced Messrs. Briggs to insure to the extent which they had done. Mr. Dixie, who was the manager to Messrs. Howard Houlder and Co., had done the *Gunford's* insurance ever since 1893, and knew all the facts; and it was his firm that had effected the policies with the underwriters. Mr. Boyd, also a witness for the pursuers, stated that the value of the hull was far too high; and Mr. Shankland, who stated that the underwriters would not be in the least concerned by other policies for disbursements, does not appear to have given satisfactory answers to the questions put to him in cross-examination. On the other hand, the evidence of Mr. Jervis, Mr. Douglas, and Mr. Lemon seems to me to be entitled to great weight, as well as that of Mr. Swan and Mr. White. I have referred to this evidence in some detail, because I felt it right to consider how far the view which I have formed, apart from the evidence, as to the materiality of the facts not disclosed is borne out by the testimony given in court, and speaking for myself I unhesitatingly come to the conclusion that, both from the point of view of fixing the premium and determining whether he would undertake the risk, the over-valuation was a matter material to be considered by the underwriters. As regards the amount of premium, this view is confirmed by the correspondence which passed between the brokers, Howard Houlder and Co. and Francis Briggs and Co., when the insurances were being effected. I will not refer to the letters in detail, but when the brokers were being asked on the 30th July to insure 13,000*l*. on hull, 6000*l*. on freight, 6000*l*. on disbursements, and 200*l*. effects they replied: "The market is very difficult for this outward voyage, and, as we have already mentioned to you, we see no possible chance of placing the lines you wish covered on freight and disbursements at anything like a reasonable price; indeed, we would go further and say that we do not think that there is a market for such amounts at any price." Your Lordships were informed by counsel for the respondents that this correspondence was not referred to during the arguments in the court below. I have only mentioned it because it cannot be said in any way to displace the inference of fact which I have drawn from the evidence which I have quoted. A distinction was drawn in argument by Mr. Clyde between insurances on hull, or hull and materials, and insurances on ship. For some purposes, I agree that there may be a distinction, but it is wholly immaterial in this case, having regard to the difference between the valuation of the interests and the amount insured as contrasted with the value actually at risk. In my opinion the appeal should be allowed, and judgment given for the defenders upon the ground that the policies were void owing to concealment of material facts. In the second appeal, which is brought by the Southern Marine Mutual Assurance Association, upon the main point the facts and arguments were the same, but it was alleged, on behalf of the respondents, that the defenders were not entitled to the benefit of the objection because they received payment of premium after they knew of the facts, and had, with the same knowledge, agreed that the ship should remain insured with the association until her arrival. I am satisfied that the appellants had not full knowledge of the facts when they received payment of the premium, and that the agreement to keep the vessel covered was made at a time when they were disputing their liability under the policies. No distinction should, therefore, be drawn between the two cases.

Lord SHAW.—My Lords: In this action the respondents, the Gunford Ship Company Limited and the liquidator thereof, seek to recover a total loss upon two policies of insurance, each for 1000*l*. effected upon the hull of the ship *Gunford* for the voyage from Rotterdam to Hamburg, and thence to Santa Rosalia. The one policy is dated the 30th Aug., and the other the 31st Aug. 1907. The insurances were effected through the agency of one Francis Briggs, the managing owner of the *Gunford*. He was also the manager of the Gunford Ship Company, which appears to have been an ordinary one-ship company. The claim is resisted by the appellants on various grounds. Two of these alone have been the subject of argument, the first—namely, that the contract is void because the vessel was not seaworthy at the inception of the voyage; and the second that the contract is voidable by reason of concealment by the assured and their agent of facts material to be known by insurer. The *Gunford* was towed from Rotterdam, and on the 12th Oct. 1907 she left Hamburg with a full cargo apparently. She was wrecked on the 29th Nov. near Cape San Roque on the Brazilian coast. After various ineffective tackings for the purpose of weathering the cape, she struck badly on a rock or reef, and become a total loss. The crew of twenty-six reached the shore in safety, but ten sailors, unfortunately, died of a fever caught after landing. A Board of Trade inquiry was held upon the circumstances, and there seems no reason to doubt the soundness of its findings, that the stranding was caused by default of the master. His certificate of competency was suspended for twelve months. Having come to the conclusion which I shall mention in a little while that the contract of insurance is not enforceable on the ground of the concealment of material facts, it is not necessary that I should enter upon the merits of the plea of unseaworthiness, a plea which is founded upon the alleged incapacity of Captain Sember for the responsible post of master of this sailing vessel. Sember's record was not good. He had not been to sea for twenty-two years, having been acting mostly as a stevedore during that time. When he was last at sea his conduct had been such that his certificate had been suspended for six months, his ship having been lost. The certificates which he produced, although good, should have prompted inquiry into his record. But he answered an

advertisement and was appointed as mate of a vessel named *Belford*, at 9*l*. a month, and within a few days he was appointed master of the *Gunford*, at 20*l*. a month. The interviews at which these appointments were made only lasted a few minutes. They were held with Briggs, whose relation to the vessel and to the company will be mentioned afterwards. I am not satisfied in my own mind that Sember was a competent master, and I incline strongly to the opinion that his record was such as to impose a duty upon the assured to explain to the insurers the peculiar, and, as I hope, the unique circumstances of the appointment. Upon either view the claims under the policy would fail. I have, however, sufficiently indicated my doubts as to this part of the case; and I do not think it necessary to dissent from your Lordships' opinion upon it, having after much consideration no doubt that the defenders should be assoilzied on the second head of the argument. By the policies the insurance is "declared to be upon hull and materials, valued at 18,500*l*." The vessel was an old vessel, and, from the point of view of realisation in the market, was apparently worth 9000*l*. Had this over-valuation been tainted by fraud, the contract of insurance could not have been enforced. Where there is a heavy overvaluation, fraud is *à priori* not very far to seek. But fraud is not pleaded here, and upon the general question it ought to be remembered that to the insurer using a ship as part of the going concern of a business, a statement of value going much beyond the amount to be realised if the concern was stopped, and the asset put upon the market, is intelligible and legitimate. It is not discountenanced by the Marine Insurance Act 1906, but on the contrary is, apart from fraud, held under sect. 27, sub-sect. 3, of the statute to be conclusive of the insurable value. It was not argued that this part of the transaction was assailable in law. Much more serious considerations, however, follow. There were insurances on freight to the extent of 5500*l*., and insurances on disbursements to the extent of 4600*l*. The latter policies, those on disbursements, were p.p.i. policies. They were bound to be so, because, in point of fact, as was admitted in argument for the respondents, the disbursements were the very things which had been already accounted for in the freight, and, when the ship became a wreck, the payment on these policies was not to be a payment of indemnity, but a present to the assured of this sum of money, a present falling due to be made in the event of the wreck and loss of the vessel. The story, however, does not stop there. There were also insurances on disbursements on behalf of Briggs. There were time policies current during the voyage to an amount of no less than 6500*l*. Briggs had made advances to the bank on behalf of the company, and he was in other ways deeply involved as a creditor. Any payments made under these insurances would, again, not be payments to indemnify Briggs for loss, but would also be in the nature of presents—presents made upon the issue of a gamble upon the life of the vessel, and the issue to be favourable to Briggs when the vessel was lost. It needs no words of mine to point out that property at sea and the lives of seamen stand in the greatest peril if business of that character obtains the sanction of the law. These policies are admitted to be p.p.i. policies—that is to say, without further proof of interest than the policy itself. They are, therefore, by sect. 4, sub-sect. 2, of the Act of 1906, deemed to be gaming or wagering contracts, and, by sub-sect. 1, "Every contract of marine insurance by way of gaming or wagering is void." The sub-sections simply express the principles of the law anterior to the Act; but, to judge from the facts of the present case, the abolition of gambling, involving danger to property and life at sea, has not been much furthered by these plain words of the Legislature. Indeed, the argument of the respondents, an argument which succeeded in the Court of Session, is this, that the policies are policies of insurance without real insurable interest; that they are gambling and wagering policies, but that the shipping and insuring world is aware that such things go on; and that every insurer of ships or hull takes his risk that the scales may be weighted in favour of the destruction of the vessel by that kind of underwriting.

This argument raises, in my humble judgment, something much more serious than a mere question of the duty of disclosure; it is necessary to examine fundamentally the position of an owner who has made legitimate insurances upon ships, cargo, or freight, and also made separate gambling insurances. It appears to me that, wherever owners enter into gambling transactions of this kind, these transactions themselves are not only invalid but they infect and invalidate the entire insurances which the same assured have made upon vessel, freight, or cargo. The reason of that is this: the voyage is one, and the ship, its earnings, its cargo, its crew, all are involved in that one and single hazard which has been undertaken and is, by the gambling transaction, improperly weighted towards loss—a loss which, falling upon the ship, would not rest there but spread to unsalved cargo, and to freight, not to speak of the peril to human life which would be thus encountered. The line of plain duty for all parties to the contract is that the ship shall be preserved; but when a gamble has been made by one of the parties for gain upon the event of the loss of the ship, although the subject of the particular gamble be not the ship itself, the interest of that party is that the ship shall be destroyed. This hazard against the life of the vessel humbly appears to me to taint every policy entered upon by the same gambling adventurer, and no such policy thus depending upon the same hazard is enforceable. The rule governing this is simple and familiar—viz., that the law will not countenance or enforce a transaction which is thus tainted by conflict between duty and self-interest. The rarity and difficulty of a right adjustment of the wavering balance swayed by self-interest have been memorably phrased. But the law does not attempt the task; the penalty against such a conflict between interest and duty is the invalidation of the bargain. I remark, however, that the foregoing observations are not directed to the case of insurances upon ships in which third parties have acquired, in ignorance of the other and over-insurances, and in good faith and for valuable consideration, separate interests. The rights of such parties would require to be separately and fully considered. The case as presented, although it touched and could not but touch this fundamental ground, was taken as an issue on the duty of

disclosure, and I accordingly proceed to treat it on that footing. So dealing with it, I do not find myself able to agree with the judgment of either House of the Court of Session. It follows upon the nature of the argument there presented that no duty rests upon the owners, or agent, to disclose to the insurers of the hull facts of the character found in this case. I cannot assent or give any countenance to such a view. The learned Lord Ordinary says: "I cannot see that there is any duty whatever on the part of the assured to disclose to the underwriter on hull, who accepts the vessel at a declared value, that he is also effecting insurances upon freight and disbursements." The opinion of all your Lordships is to an opposite effect, and I humbly agree with that opinion. So far as the effecting of insurances upon freight is concerned that is sound business, because it is grounded upon a stipulation for true indemnity; but so far as disbursements, wherever they are duplications of freight, are concerned, these, when freight has already been insured, form no part of a contract of indemnity, but the insurance upon them is merely a gamble, discountenanced by sound principle and not enforceable by law. It forms a distinct temptation of self-interest to business and to conduct which are nefarious. In point of fact, however, these illegitimate, dangerous, and unenforceable policies are entered upon because of the knowledge that in the majority of cases, if the hazard placed against the life of the vessel be won, the stake will be paid. The competition in the underwriting world seems to be such that, with premiums paid down, no questions will be asked, and nothing will be said should loss ensue. It is this which, in fact, constitutes the peril to property and life, and I am not surprised that in this case witnesses like Mr. Douglas, speaking apparently with the authority of large associations of underwriters, condemned the practice. "If I had known," says Mr. Douglas, "that so much was on the vessel, I would not have touched her with a 6ft. pole, because I consider that such insurances are a direct incentive to loss." In another passage Mr. Douglas remarks with force, "She is insured for loss and not against loss." As I have observed, the practice is continued because underwriters pay upon such policies. They go by the much-abused name of "honour"; and the illegitimate "honour" policies constitute that incentive of self-interest towards the destruction of the vessel which the law holds, quite apart from proof of fraud in the specific transaction, to be enough to make the policy void. It appears to me—differing in this by a very wide diameter from the judgment of the court below—that when insurances of that illegitimate character are also effected by the owner and insurer of the hull, the duty of disclosure of that material fact is plain. Their non-disclosure can, in my humble judgment, be pleaded as an answer to liability upon any policy effected over the hull. I have already referred to the honour policies for 6500*l.*, taken out by Briggs as an individual. The Lord President says that he feels difficulty "in holding that a policy upon the hull, for the ship, should be held as bad, because a person who was acting as managing owner or managing director did not disclose that he, as an individual, had honour policies in connection with the same venture." Lord Salvesen is also of this opinion. He holds that the insurers are not concerned with the honour policies at all, and that the fact that the director "entered into contracts which are not legally enforceable for his own behoof, and without their (the owners') authority is, in the absence of fraud, as irrelevant as if an outsider had had a gamble on the fate of the *Gunford*." "Moreover," adds the learned Lord Ordinary, "I think that it is not in accordance with the principles and calculations on which underwriters act in practice, that there should be any disclosure with regard to policies covering other risks which the particular underwriter is not asked to accept." If this be the law, it is manifest that a most dangerous situation has arisen, for, as I have already pointed out, the importation of self-interest in favour of loss is thus permitted and unchallenged by law, although it is that very thing which, in principle and by repeated authorities, stands condemned and disallowed. But I do not labour this matter of the policies and the position of Briggs; nor do I cite the decisions; because it appears to me that sect. 19 of the statute of 1906, puts plainly a duty of disclosure upon the agent:—"The agent of the assured must disclose to the insurer (*a*) every material circumstance which is known to himself." It is admitted that the honour policies for 6500*l.* were known to Briggs, being in fact his own insurances. The circumstances of these heavy gambling policies having been entered into were, in my opinion, most material to disclose to insurers of the hull. How such knowledge on the part of Briggs, and the duty of disclosure arising from it, should be held not to fall under the plain provisions of the statute, I am somewhat at a loss to understand. These Briggs honour policies for 6500*l.* fall to be added to the other disbursement policies of a gambling nature for 4600*l.*; and it thus appears that to the extent of 11,100*l.* no disclosure was made, and the ship was sent to sea, the scale of self-interest in favour of her destruction being as stated. I am of opinion that, these being the facts, the objection taken to the liability on the policies is good, and that the appeal should succeed.

Lord Robson.—My Lords: The first question which arises in this case is whether or not the *Gunford* was unseaworthy by reason of the incompetence of her captain. The learned judge at the trial, Lord Salvesen, has answered that question in favour of the plaintiffs, and there is ample evidence to justify his finding. The next question is whether, notwithstanding that the captain was in fact competent, his record was so suspicious and unsatisfactory that the plaintiffs must be found guilty of concealing material facts in not communicating to the insurers such knowledge as they possessed of his antecedents. It is easy to state the case against the plaintiffs on this head in a way which raises suspicion as to their conduct, but, on the whole, I think that they were entitled to the exoneration which they have received at the hands of the learned trial judge in answer to this question. They may fairly plead in their favour that they believed in the strong testimonials, from most respectable firms, with which the captain supported his application for employment. A firm of high standing wrote that they had employed him for thirty years, first as mate, then as master, and latterly as stevedore, and, during the whole of that time, found him an active, energetic, and competent man, adding that

they recommended him to anyone requiring his services. They did not think it necessary to state that he had been on shore for the preceding twenty-two years. The nearest approach to that information was made by a gentleman of position in the shipping world, who, in strongly recommending the captain, said he had known him for over twenty years, first as master in a line of sailing ships, "but for most of that time he had been engaged in stevedoring and superintendence." There were other testimonials equally emphatic and equally imperfect. At the same time the inquiries, if any, made by the plaintiffs were of the most perfunctory kind. They made the appointment with a minimum of trouble, and the best which can possibly be said for them is that, in the then existing circumstances, it was necessarily made in a hurry. But the most important question in the case arises in connection with the insurances. The appellants say that they were excessive. So far as the excess consisted of over-valuation on the legitimate policies no complaint is open to the appellants, for the values were agreed and so bind the insurers. That part of the case is, therefore, put forward by them only as showing that the legitimate policies more than covered the risks, and left no excuse for the making of wager or "honour" policies. Their complaint rests in substance on the non-disclosure of those wager policies. The vessel had originally cost 20,750*l.* At the date of the policies now in question she was fifteen years old, and was worth about 9000*l.* to sell. For the purposes of insurance of the hull and materials her value was agreed at 18,500*l.* The underwriters, of course, were well aware that this was an over-valuation. Knowing, as they did, the age and type of the vessel and the rate of annual depreciation, they could tell, almost as exactly as her owners, what she was worth; and, moreover, they had, as it happened, regularly insured her for years past. Although the contract of insurance is expressed to be a contract of indemnity, and the indemnity is properly based on market value at the time of the loss, yet the law allows the insured value to be agreed between the parties, and the agreed value, though frequently, and perhaps generally, in excess of the market value, is binding in the absence of fraud. There are often legitimate business reasons for this discrepancy between the selling value and the insured value, and it should not be assumed that it necessarily creates any actual conflict between duty and interest on the part of the shipowner in regard to the safety of the thing insured. The assured naturally aims at re-instatement rather than bare indemnity, and the insurer has also his own reasons for preferring that the values should be high so long as they do not constitute a temptation to loss. In order that he may be saved the trouble of small claims, which are often of a doubtful character, he stipulates that the ship shall be warranted free from average under 3 per cent., and where the total agreed value is high, the insurer's protection under this clause is increased. Again, in claims for constructive total loss, the higher the value, the more difficult it is for the assured to establish that the cost of repairs will exceed the repaired value, so as to entitle him to treat the vessel as lost and leave the wreck on the insurer's hands. The insurer is, therefore, willing to undertake the risk of a certain amount of over-valuation, relying no doubt on the character of the assured and also on the interest which the managing owners or managers have in preserving the ship as a source of business profit to themselves. In addition to the hull and materials, the plaintiff insured the gross freight at 5500*l.* This policy also involved an over-valuation as it made no deduction for the expenses of earning the freight, but the insurance of gross instead of net freight is expressly allowed by our law, and is of great practical convenience in avoiding a troublesome, uncertain, and possibly litigious inquiry into working expenses. By the foregoing policies the plaintiffs secured that in case of loss they would receive more than a strict indemnity based on existing values, but perhaps not quite enough to replace the article insured without some slight loss. They proceeded, however, to effect a valued policy for 4600*l.* on "disbursements." A list of the payments comprised under this head was put in by the plaintiffs and amounted to 5280*l.* as against a total chartered freight of 4790*l.* So far as these payments consisted of current working expenses necessary to earn freight, they were covered by the insurance on the gross freight and so far as they consisted of repairs, output, and insurance premium on hull, they would ordinarily be included in the policy on ship and materials. This policy was, therefore, an over-insurance by double insurance. The plaintiffs could not legally avail themselves of it to enforce recovery of any sum in excess of the indemnity allowed by law, but this was a "p.p.i." or honour policy, *i.e.*, it was made "without further proof of interest than the policy itself." In other words, it was a wager, and it is well known that the sums insured under such policies are, under ordinary circumstances, paid with the same regularity as if they were legally due. A further policy of the same character for 6500*l.* was taken out on his own account by Mr. Briggs, the plaintiffs' manager, who had the conduct of the whole transaction, and is, by sect. 19 of the Marine Insurance Act 1906, made responsible for disclosure of every material circumstance within his knowledge. The question to be determined by your Lordships is, whether it was material to the insurers of the hull and freight to be informed of these honour polices, and that depends on whether they were among the circumstances which would "influence the judgment of a prudent insurer in fixing the premium or in determining whether he will take the risk." This is a question of fact, and there was evidence both ways about it in the form of underwriters' opinions on the point. Without depreciating the value of those opinions I think that a jury, or a court of law acting as a jury, when once made acquainted with the general conditions of marine insurance, can easily decide for themselves how far any particular circumstance would influence the judgment of a prudent insurer. The proposition laid down by Blackburn, J. in the case of *Ionides* v. *Pender* (2 Asp. Mar. Law Cas. 266 (1874); 30 L. T. Rep. 547; L. Rep. 9 Q. B. 531), that excessive and speculative insurance has "a direct tendency to make the assured less careful in selecting the captain, and to diminish the efforts which in case of disaster he ought to make to diminish the loss" can scarcely be contested, and, however willing individual insurers may be to take the risk of such insurance, their opinion cannot

bind others of more prudent temperament. So long as the parties to a policy are dealing only with agreed values on ship or freight, high as those values may be, the ordinary course of insurance business provides substantial safeguards both to the legitimate insurers and the seamen, against the dangers referred to by Blackburn, J., but those safeguards are materially diminished when the owners or managers take to wager policies with other underwriters. The insurers can make sure ordinarily that the agreed value shall fall short of what is necessary for complete reinstatement. Even when the agreed value is high enough to give a profit to the shareholders, the insurers can estimate the heavy loss of business and management profits which the destruction of the ship may impose on the managers, and it is to the managers that they look for vigilance and care in securing her safety. But when, as in the present case, the wager policies increase the amount recoverable by the owners on a total loss to a figure far in excess of what is needed for reinstatement, and, worse still, when the managers themselves stand to make a large profit under such policies in case of loss, the incentive to care over the safety of the ship begins to be substantially affected, and the insurers are entitled to form their own opinion as to how far they will trust the assured under such circumstances. I think, therefore, that the existence and amounts of the wager policies were circumstances material to be disclosed, and that this appeal should be allowed.

The LORD CHANCELLOR.—With regard to the costs, the judgment of your Lordships' House will involve the respondents paying the costs here and in the courts below, but, having regard to the issues of fact found in favour of the respondents, that ought to be less half the cost of the proof before the Lord Ordinary.

Judgment appealed from reversed. Respondents to pay the costs in this House and in the courts below, less half the costs of the proof before the Lord Ordinary.

Solicitors for the appellants, *Waltons* and *Co.*, for *J.* and *J. Ross*, Edinburgh.

Solicitors for the respondents, *W. A. Crump* and *Son*, for *Webster, Will*, and *Co.*, Edinburgh, and *Wright, Johnston*, and *Mackenzie*, Glasgow.

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 27, 28, *March* 1 *and* 2, 1911.
(Before VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L.JJ.)

THE WESTCOCK. (a)

Towage contract—Defect in towing gear—Warranty of fitness—Duty to use reasonable care to provide a fit tug—Conditions of towage.

Tug owners contracted to tow a partly laden vessel from a dock in Birkenhead to a dock in Liverpool upon the terms that they would not be responsible for any damage or loss . . . arising from any perils or accidents of the seas or rivers, or arising from . . . towing gear, including consequence of defect therein or damage thereto. They supplied two tugs for the towage. The rivets which fastened the towing gear to the structure of one of the tugs parted, the gear was lost overboard, and in consequence of the breaking of the rivets the ship collided with the dock wall and was damaged. In an action by the shipowner against the tug owner to recover the damage caused by breach of warranty or breach of contract in not providing tugs properly equipped and fit to perform the contract, it was held that the shipowner was entitled to recover, as there was an implied warranty in the contract of towage that the tugs supplied were duly equipped and fit for the service; that even if there was no such warranty, as the damage had been caused by a defect in the tug that might have been ascertained by the exercise of reasonable care on the part of the tug owner, and as no proper inspection of the tug had been made, the damage was recoverable. It was further held that the conditions in the contract did not exempt the tug owner, for they only referred to defects arising during the towage, and not to those in existence when the towage began, and that, even if the conditions were intended to refer to defects in existence before the towage began, the words used were not clear enough to exempt the tug owners from liability.

The tug owners appealed.

Held, that it was unnecessary to decide the question as to whether the tug owner warranted that the tug was fit to perform the contract, for it was his duty to supply a tug as fit as care and skill could make it, and under the circumstances the onus was on him to show that the accident could not have been prevented by the exercise of care and skill, and that he had not done.

Held, further, that the words in the conditions of towage referred only to defects coming into existence during the towage.

Held, by Vaughan Williams and Farwell, L.JJ. (Kennedy, L.J. dissenting), that the rule of construction that an exception to be efficacious must not be ambiguous only applied to cases in which the exception dealt with a common law liability, and had no application in this case.

Held, by Farwell and Kennedy, L.JJ. (Vaughan Williams, L.J. dissenting), that the words "towing gear" did not include the rivets which attached the towing hook and plates to the structure of the tug, and that the defect in the rivets was not a defect within the words of the condition.

APPEAL from a decision of the President by which he held that shipowners were entitled to recover the damage they had sustained by their ship falling against a jetty while in tow of the appellants' tug, in consequence of the towing gear carrying away.

The appellants, defendants in the court below, were the owners of the steam tugs *Westcock* and *Southcock*.

The respondents, plaintiffs in the court below, were the owners of the steamship *Araby*.

The owners of the *Araby* entered into a contract with the owners of the *Westcock* and *Southcock*

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

under which the latter agreed to tow the *Araby* from Birkenhead to Liverpool upon the following terms :

Conditions of Towage.—The tug owners are not to be responsible for any damage or loss to the ship they have contracted to tow or to the cargo aboard her arising from any perils or accidents of the seas, rivers, or navigation, collision, stranding, straining, fire, explosion, or arising from boilers, steam, machinery, or towing gear (including consequence of defect therein or damage thereto), and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence, default, or error in judgment of the pilot, master, officers, engineers, crew, or other servants of the tug owners, nor are they to be responsible for damage done by any ship they have contracted to tow even if occasioned by the negligence of the tug owner's servants, and in employing the tug the shipowner is to be deemed to have expressly agreed to indemnify the tug owners for any damages they may be called upon to pay any person by reason of such damage by the ship in tow.

The facts as to the construction of the towing gear and the accident are fully stated in the judgment of the President.

The plaintiffs alleged that the tug owners warranted that their tug was fit for the towage, or that they undertook to use reasonable care to see that the tugs supplied were properly equipped and fit for the towage.

The defendants denied the warranty, and alleged that they took all reasonable care to see that the tugs supplied were properly equipped and fit, but that, if they had not done so, they were protected by the conditions set out above. They further alleged that the plaintiffs had been guilty of contributory negligence in ordering the tugs to tow in the weather which prevailed, and set up a counter-claim, based on an implied term in the contract, that the plaintiffs were to indemnify the defendants for the loss of the towing gear.

No evidence was called in support of the counter-claim, and it was not proceeded with.

The action was tried before the President on the 17th, 18th, 19th, and 31st Oct., when judgment was delivered.

The PRESIDENT.—This is an action for breach of a contract of towage. The plaintiffs are the owners of the steel screw steamer *Araby*, and the defendants are the owners of the tug *Westcock*. The contract was made on the 12th Jan. 1909 for the towage of the *Araby* from the Morpeth Dock, Birkenhead, to the Canada Dock, Liverpool. Two tugs belonging to the defendants were engaged—namely, the *Westcock* and the *Southcock*; but, for the purposes of this case, the tug *Westcock* is the only one that need be considered. The substance of the case for the plaintiffs is that, by reason of the inefficiency of the tug *Westcock*, the towing gear of the tug carried away and fell overboard; and that, as the result of this, the *Araby* was driven against the knuckle of the pierhead at the entrance to the Canada Dock, and was damaged. There is a counter-claim by the owners of the tug against the owners of the steamer, which will be dealt with later. The facts were gone into in ample detail at the hearing. The theories advanced on either side were many and contradictory. It would not serve any useful purpose to attempt to set out all the facts and theories in this judgment. It is only necessary to state such of the facts, theories, and contentions as will make the conclusions at which I have arrived intelligible. The distance from the Morpeth Dock to the Canada Dock is about two miles along and across the Mersey. For part of this distance the *Westcock* had been towing ahead of the *Araby*, with the tug *Southcock*. When near the end of the towing voyage, just outside the entrance to the Canada Dock, the *Westcock* came away from ahead, and was made fast to the stern of the *Araby*. This was done pursuant to the directions of the dockmaster, in order that the stern of the *Araby* might be pulled to the northward and westward, so that she might be properly headed for the entrance into the Canada Dock. The *Westcock* was made fast by two sets of ropes. The ropes were 6in. manillas, and were supplied by the *Araby*. Each set consisted of an end and a bight on and round a hook on the *Westcock*, hereinafter called the tug. Each set had therefore three lines of 6in. rope. On the tug were two hooks, one called the centre hook and the other the starboard hook. One set of ropes led from the starboard quarter of the steamer and was made fast to the centre hook of the tug, and the other from the port quarter to the starboard hook. These two hooks were placed between an upper plate and a lower table, to which they were connected by vertical pins. The table and plate were both connected with angle bars, which were fastened to an iron bulkhead or casing by means of rivets. The two hooks could move horizontally. There was a contest as to the vertical motion. The angle bar to which the top plate was connected was fastened to the bulkhead by eight rivets. The heads of the rivets were on the other side of the bulkhead—that is, the side of the bunker hold. While the towing was still proceeding, just outside the entrance to the Canada Dock, the top angle bar, the top plate, and the two hooks carried away and were lost overboard. They were never recovered. Of the towing gear, only the lower table and what was below it remained. The cause of the carrying away of the top angle bar, the top plate, and the hooks was the breaking of the eight rivets referred to. They broke on the towing gear side of the bulkhead. Some of the broken rivets projected on that side about one-eighth of an inch from the surface of the bulkhead, and the others were broken flush with the bulkhead. The rivets, apart from the small broken parts, remained in the bulkhead, and the heads were on the bunker side of it. On the day after the accident the towing gear of the tug was temporarily repaired. In effecting these repairs the broken rivets were knocked out from the towing gear side into the bunker on the other side. The broken rivets were never produced after the accident. It is to be regretted that they were not preserved and produced. There was some correspondence about them, the effect of which in substance was that the defendants said that all the towing gear was lost overboard, and that there was nothing to produce. The plaintiffs, in their letter of the 25th Feb. 1909, asked specifically for the parts of the broken rivets or bolts. They were met with the same answer, that all the towing gear had been lost overboard. It was clear, and beyond question, that the breaking of the rivets was the cause of the carrying away of the towing gear, and was, therefore, the cause of the *Araby* striking

against the pier and suffering the damage which was alleged by the plaintiffs. As to the rivets, the plaintiffs alleged that the equipment of the *Westcock* was unfit in that (*inter alia*) (1) the attachments of the top plate and the top angle bar by rivets were not strong enough; (2) undue strains were transmitted to the rivets by reason of the structure of the towing hooks. In answer to this, the case for the defendants was that all eight rivets were broken together by some great, unusual, and unexpected strain, alleged to be due wholly or partly to the weight of the tow, the wind, the sea, the tide, and the scope of the hawser between tug and tow. If the rivets had been in good condition the evidence on both sides was that they ought to have stood a very heavy, steady strain—namely, from 90 to 99 tons. The plaintiffs attacked the design of the tug, and contended that it was faulty and rendered the tug inefficient. They alleged that the two gear hooks were rigid, had no vertical hinge or swivel, or vertical play, and that in consequence great leverage strains were transmitted to the fastenings of the gear Elaborate calculations of these alleged leverage strains were given. Upon the evidence I find that the centre hook was a swivel or hinge hook, and that the starboard hook had enough vertical play; and I find, and am also advised by the Elder Brethren, who are assisting me, that the tug was not faulty in design, and was not inefficient upon that ground. Upon the other hand, the defendants contended, as I have said, that there was an unusual and excessive strain upon the towing gear and its connections, because (1) the scope of the towing hawser was too short, and (2) because the wind, sea, and height out of the water of the *Araby* were unusual and unexpected. It was pleaded by the defendants that the scope of the hawser was given and determined by the *Araby*. This was not so. It was determined by the master of the tug. In this latter event the defendants contended that, if the tug master was wrong in deciding the scope of the hawser, they (the defendants) were exempted from liability by the conditions of the contract. Upon the evidence I find, and I am also advised, that there was no unusual or excessive strain, and no strain that might not reasonably be expected, due to the alleged causes, or any of them. The ropes did not part, and there was no buckling or disturbance of the casing. Without going in further detail into the evidence, I will state the conclusions at which I have arrived as to the cause of the accident.

I find that the accident was due to the weakness, fatigue, and defective condition of the eight rivets, and that at the time of the contract, and of the commencement of the towing operations, the tug *Westcock* was inefficient on this ground to perform the towage services which the defendants contracted to perform. I further find upon the evidence—in case these further findings should turn out to be material—that this inefficiency could have been ascertained by reasonable care, skill, and attention on the part of the tug owners; that no proper inspection of the tug was made by them or their servants before the towage contract was entered into; and that the last inspection before the contract was only an ordinary and perfunctory one, and did not extend to an examination of the rivets or fastenings between the towing gear and the bulkhead casing.

The question which has to be determined is whether the defendants are liable in these circumstances in view of the terms of the contract. The contract for the towage was verbal. Although there was an issue upon the pleadings as to the terms of the contract, there did not remain, after the evidence, any contest upon the matter. The contract was an ordinary contract for towage, subject to the conditions set out in the defence. These conditions are as follows: "The tug owners are not to be responsible for any damage to the ship they have contracted to tow arising from any perils or accidents of the seas, rivers, or navigation, collision, straining, or arising from towing gear (including consequence of defect therein or damage thereto), and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence, default, or error in judgment of the pilot, master, officers, engineers, crew, or other servants of the tug owners." Apart from any special terms or conditions, I endeavoured in *The Maréchal Suchet* (11 Asp. Mar. Law Cas. 553 (1910); 103 L. T. Rep. 848), after a careful examination of the authorities, to state what I thought were the obligations of a tug owner under a towage contract. They were stated as follows: "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." These obligations can, however, be got rid of or modified by express and apt terms in the contract, just as the obligations of a shipowner may be got rid of or modified, in the case of the duty or obligation to provide a seaworthy vessel under a charter-party or a contract of affreightment. The primary obligation of a tug owner under a towage contract may be described as a duty to provide a tug which, at the time of the contract or at the commencement of the operations of towage under the contract, is efficient to perform the towage services which the tug undertakes to perform in circumstances reasonably to be expected; or as a representation, or an engagement, or a contract, or an implied engagement that the tug is reasonably efficient for that purpose. If my findings of fact in this case are justified, it matters not whether this primary obligation is an absolute one, so as to amount to a warranty of fitness or efficiency, or whether the obligation is satisfied by the tug owner proving that the unfitness or inefficiency was not discoverable or preventable by any care or skill, or by his proving that he was not aware of the unfitness or inefficiency, and that it could not be discovered by an ordinary inspection. Unless the special conditions in this contract exonerate the defendants, upon my findings the defendants would be liable in any of the above views of their legal obligations. But, lest my findings of fact may not commend themselves to

an appellate tribunal, it is necessary for me to state my view more particularly as to what the obligations are, apart from special conditions or exceptions. In my opinion it is not sufficient for a tug owner in an action like the present to prove that he was not aware of any unfitness or inefficiency, or that it could not be discovered by an ordinary inspection. At the lowest I think his obligation is to prove that the unfitness or inefficiency was not preventable or discoverable by care and skill. But is not the obligation at the outset greater than this? Is it not an obligation which is absolute and which therefore amounts to a warranty? I think it is. It is well established that the obligation under a charter-party or a bill of lading to provide a vessel which is seaworthy, in the commercial and legal sense, is an absolute one and amounts to a warranty of seaworthiness; and this obligation has been described as "a representation and an engagement—a contract—by the shipowner that the ship . . . is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform" (per Lord Cairns in *Steel* v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72, at p. 76); "and as a duty on the part of the person who furnishes or supplies the ship . . . unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy, and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty' not merely that they should do their best to make the ship fit, but that the ship should really be fit": (per Lord Blackburn, 3 App. Cas., at p. 86). It is as important that a tug which undertakes to tow a vessel in some cases for long distances and in varying circumstances, with lives and property at risk, should be efficient for the accomplishment of its work, as it is that a cargo-laden ship should be seaworthy, and in this sense fit for the purposes of the service undertaken under a charter-party. The foundation of the obligation is the same in either case—namely, the fitness of the tug or the ship for the purpose of the service to be performed. This appears to be the ground of the decision in *The Undaunted* (5 Asp. Mar. Law Cas. 580; 54 L. T. Rep. 542), and I observe that that case has been taken by text-writers to establish that a tug owner warrants the fitness of the tug: (see Carver on the Carriage of Goods by Sea, 3rd edit., sect. 112, at p. 140). The late Mathew, L.J., in *Hyman* v. *Nye* (44 L. T. 919), states that "the warranty of seaworthiness in the case of a ship has been traced in many recent cases to its source in the ordinary contract for hiring an article for a specific purpose." In the *Minnehaha* (Lush. 335) Lord Kingsdown, in giving the decision of the Privy Council, says: "When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so, and will do so, under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equipments as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by *vis major*, by accidents which were not contemplated, and which may render the fulfilment of her contract impossible, and in such a case, by the general rule of law, she is relieved from her obligations, But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted or cannot be completed in the mode in which it was originally intended, as by the breaking of a ship's hawser." This, I think, means, or at any rate is consistent with the construction, that there is, in a towage contract, first a warranty that at the outset the crew, tackle, and equipments are efficient, and afterwards an implied obligation that competent skill and best endeavours should be exercised in the performance of the work. It has been argued before me that the judgment of Lord Halsbury in the House of Lords in *The Ratata* (8 Asp. Mar. Law Cas. 236, 427; (1898) A. C. 513) shows that only reasonable care and skill in providing an efficient tug is required by the contract; but it seems to me that the argument is not well founded. I think that the headnote is an accurate statement of the decision in that case. It runs: "Held, that the appellants were bound to exercise reasonable care and skill in the conduct of the towage, and that, there being evidence of failure in that respect, the respondents were entitled to sue the appellants for damages." The facts of that case were peculiar. When Lord Halsbury refers to "reasonable care and skill," and says that there was no contract of warranty, I think he was referring to the conduct of the towing operations after the towing had commenced. The decision is not, in my judgment, any authority for the proposition that the tug owners did not warrant the efficiency of the tug for the towage at the commencement of the towage. If the matter were, or is, *res integra*, I see no reason whatever why the same kind of obligation as to efficiency or fitness should not attach to a marine contract of towage as attaches to a marine contract of carriage. But the ordinary contract being (as I think it is) a warranty of fitness, or an implied obligation to provide a tug in a fit and efficient condition so far as skill and care can discover its condition, a serious question remains—namely, whether, under the special terms of exemption in the contract in this case, the defendants are relieved from liability. Whatever the exact obligations of the tug owners may be, there are exceptions under which they seek to avoid, restrict, or minimise those obligations, and they must clearly make out that they are protected by these conditions. I think that the canon of construction to be applied is similar to that which has so frequently been applied in "seaworthiness" cases. Many illustrations can be given. In *Nelson Line (Liverpool) Limited* v. *James Nelson and Sons Limited* (10 Asp. Mar. Law Cas. 581; (1908) A. C. 16, at 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* (10 Asp. Mar. Law Cas. 24; (1905) A. C. 93, at p. 96), 'an ambiguous document is no protec-

tion.'" In *Owners of Cargo of Steamship Waikato* v. *New Zealand Shipping Company* (8 Asp. Mar. Law Cas. 442; (1899) 1 Q. B. 56, at p. 58) Collins, L.J. said: "I am not sure that the shipowners did not really mean to cover by the exception all defects at the beginning of the voyage whether latent or patent. I am inclined to think that they probably did mean to do so. But they are the persons setting up the exception, and who have to make out their exemption. I do not think they can sustain that onus, unless by unambiguous language they have excluded the liability which would *primâ facie* rest upon them. I think that the language used in this case is far too ambiguous for that purpose." This passage was cited and approved by Vaughan Williams, L.J. in *Rathbone Brothers and Co.* v. *D. MacIver, Sons, and Co.* (9 Asp. Mar. Law Cas. 467; (1903) 2 K. B. 378, at p. 384); and Lord Selborne, in the well-known passage in his judgment in *Steel* v. *State Line Steamship Company* (*sup.*) said: "The excepted perils are capable of, and ought to receive, a construction, not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken."

In the case now before the court I think the reasonable construction to place upon the conditions, and the construction which the owners of the *Araby* might reasonably, and would probably, put upon them, is that they apply to circumstances occurring after the commencement of, and during, the towage, and not to the state of things existing before the towage began. It is hardly conceivable that the conditions should be read as meaning "We will be responsible for inefficiency in any part of the tug except in the towing gear, but we will not be responsible for inefficiency in the towing gear itself"—that being one of the most important parts of the tug in respect of the service it has to perform. The words of exception relied upon by the defendants occur in the middle of a clause which appears to deal with matters which happen during the towing voyage. The clause begins with words obviously referring to the towing voyage, and ends with an exemption from the negligence of the tug owner's servants, and the pilot, who, of course, would only come upon the scene in the course of the towing voyage. In corroboration of this construction I may refer, by way of illustration, to an American case decided in the Supreme Court of the United States (*The Caledonia* (1895) 157 U. S. 124, at p. 138), where the exceptions in a bill of lading were much in the same terms and order as in the present case, although they were more extensive. It was there held in accordance with the English decisions that the exceptions were to be construed most strongly against the shipowner, and that he was not exempted from liability for damage through the breaking of a shaft due to a latent defect which existed before and at the commencement of the voyage. The following passage occurs in the judgment of the court: "Moreover, the words 'delays, steam, boilers, and machinery, or defects therein,' formed part of a long enumeration of the causes of damage, all the rest of which related to matters subsequent to the beginning of the voyage, and, by another familiar rule of construction, they should be treated as equally limited in their scope." I respectfully agree with that passage and with the judgment of that eminent tribunal. This case was followed in the same court by a later one, *The Carib Prince* (1898) 170 U. S. 655, at p. 659, and the following passage (referring to *The Caledonia*) is taken from the judgment: "The principle upon which the ruling rested was that clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and were not to be extended by latitudinarian construction or forced application so as to comprehend a state of unseaworthiness . . . at the commencement of the voyage."

The principles and canon of construction adopted and applied in these cases ought also, in my judgment, to be applied in the construction of the towage contract in the present case. For instances where the language was held not to be sufficiently express and unambiguous to exempt the shipowner seeking to reply upon exceptions, see *Owners of Cargo on Ship Maori King* v. *Hughes* (8 Asp. Mar. Law Cas. 65; 73 L. T. Rep. 141; (1895) 2 Q. B. 550) and *Owners of Cargo of Steamship Waikato* v. *New Zealand Shipping Company* (*sup.*). If the tug owners in the present case wished to escape their *primâ facie* liability for defects or inefficiency existing before the towage began, they ought to have made that clear by express and unmistakable words, as was done, for example, in the *Cargo ex Laertes* (6 Asp. Mar. Law Cas. 174 (1887); 57 L. T. Rep. 502; 12 P. Div. 187) and in *Rathbone Brothers and Co.* v. *MacIver, Sons, and Co.* (*sup.*), although in the latter case the shipowners were held not exempted by reason of subsequent words in the contract. In my judgment the words used in the conditions in the present case are not sufficiently clear to exempt the tug owners from liability. A reasonable and sufficiently wide meaning is given to them by reading them as referring only to perils, accidents, defects, damage, negligence, default, or error in judgment after the work of towing began, and during the performance of the work. I may add, although I do not desire my judgment to rest upon it, that the defendants could not complain if a strict meaning were given to the words "towing gear" in the conditions by holding that they describe merely the actual towing gear itself, and not the rivets or attachments between the gear and the bulkhead. This is the meaning the defendants themselves have given to the words. They persisted in the correspondence that "all the towing gear" was lost overboard. The rivets were not so lost. The defendants knew they had remained in the bulkhead casing. If this be the right meaning, the defect, which caused the accident, is not within the words of the conditions at all. As to the counter-claim, it is based upon an alleged agreement by the plaintiffs to indemnify the defendants against any damages. No such agreement was established. Indeed, no evidence at all was given to support the counter-claim, either in law or in fact. Judgment will accordingly be entered for the plaintiffs on the claim and counter-claim, with costs, and there will be the usual reference on the claim.

On 21st Nov. 1910 the defendants gave notice of appeal praying that the judgment should be set aside, and that the plaintiffs' claim should be dismissed with costs.

The appeal was heard on the 27th and 28th Feb. and 1st and 2nd March 1911.

Aspinall, K.C. and *Dunlop* for the appellants (defendants).

Leslie Scott, K.C. and *A. T. Miller* for the respondents (plaintiffs).

The arguments of counsel as to the meaning to be attached to the words in the conditions of towage "or towing gear (including consequence of defect therein)" appear in the judgments, and the following case was cited on the point:

The Caledonia, U. S. Rep., vol. 157, p. 124.

The following authorities were cited and referred to on the point as to whether the tug owner warranted that the tug was fit to perform the towage:

The Undaunted, 54 L. T. Rep. 542; 5 Asp. Mar. Mar. Law. Cas. 580; 11 P. Div. 46;
Hyman v. *Nye*, 44 L. T. Rep. 919; 6 Q. B. Div. 685;
The Minnehaha, 4 L. T. Rep. 810; Lush. 335;
The Ratata, 78 L. T. Rep. 797; 8 Asp. Mar. Law Cas. 427; (1898) A. C. 513;
The United Service, 48 L. T. Rep. 486; 5 Asp. Mar. Law Cas. 55, 170; 8 P. Div. 56;
Kopitoff v. *Wilson*, 34 L. T. Rep. 677; 3 Asp. Mar. Law Cas. 163; 1 Q. B. Div. 377;
Nugent v. *Smith*, 34 L. T. Rep. 827; 3 Asp. Mar. Law Cas. 198; 1 C. P. Div. 423;
Liver Alkali v. *Johnson*, 1 Asp. Mar. Law Cas. 380; 31 L. T. Rep. 95; 2 Asp. Mar. Law Cas. 332; L. Rep. 9 Ex. 338;
Stanton v. *Richardson*, 2 Asp. Mar. Law Cas. 288; 33 L. T. Rep. 193; 3 Asp. Mar. Law Cas. 23;
Steel v. *State Line*, 37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72;
Maori King v. *Hughes*, 73 L. T. Rep. 141; 8 Asp. Mar. Law Cas. 65; (1895) 2 Q. B. 530;
Redhead v. *Midland Railway*, 20 L. T. Rep. 628; L. Rep. 4 Q. B. 379;
Brass v. *Maitland*, 6 E. & B. 470;
Bamfield v. *Goole and Sheffield Transport Company*, 103 L. T. Rep. 201; (1910) 2 K. B. 96;
Carver's Carriage by Sea, s. 112;
Rathbone v. *MacIver*, 89 L. T. Rep. 378; 9 Asp. Mar. Law Cas. 467; (1903) 2 K. B. 378;
Nelson v. *Nelson*, 98 L. T. Rep. 322; 11 Asp. Mar. Law Cas. 1; (1908) A. C. 16;
Elderslie v. *Borthwick*, 92 L. T. Rep. 274; 10 Asp. Mar. Law Cas. 24; (1905) A. C. 93.

Vaughan Williams, L.J.—I do not propose to deliver a long judgment, or to attempt to dispose of all the questions which have been argued in this case. I may as well say at once that I think this appeal fails, and that the judgment of the President ought to be supported; but I do not think that it will be sufficient for me to state merely the main ground upon which I propose to base my judgment, though, of course, it is a very good rule that judges ought not to decide more than is really necessary for the decision of the case. The ground which I am going to give for the decision of this case, if it is a sound ground, disposes of it altogether, and therefore, in accordance with the rule I have just mentioned, I shall not deal at length with matters that, from the point of view that I am going to take in my judgment, it is really unnecessary to discuss. I may as well begin my judgment by stating the ground upon which I propose to support the decision of the President, but I wish to say at once that I have approached this case with more than usual anxiety, because I think, both in the case of *The Maréchal Suchet* (*ubi sup.*) and in this case the President, in, if I may venture to say so, the most clear and forcible way, has really between those two cases laid down generally what are the duties and liabilities of a tug owner to the people who employ him. Therefore I approach with some anxiety the present judgment, for it is the judgment of a judge who has so recently had the whole of this subject before him, who has really dealt with it with wonderful clearness which admits of no mistake. The ground upon which I am going to base my judgment is wholly irrespective of the principle of construction which was laid down in many cases, including the case of *Rathbone* v. *MacIver* (*ubi sup.*), which was a case in this court of which I was a member, which principle is: that if there is a common law liability in a shipowner or a tug owner (and I make no difference between shipowner and tug owner for this purpose) he can only relieve himself of that common law liability, which is a common law warranty, by showing by plain and unambiguous words that the intention of the contracting parties was to relieve the tug owner from such liability. I do not myself feel inclined at the present moment to affirm the proposition that that rule of construction applies to anything beyond the common law liabilities, common law absolute warranties, absolute in the sense that the person who complains of the ship or the tug has not to give any evidence whatever of negligence. He has got to show, of course, the fact that the warranty was not complied with, that the ship was unseaworthy, or that the ship was unseaworthy in the sense that it was unfit to receive the cargo which was put upon it, but he has not to prove negligence. I think that the cases are not strong enough to justify me upon this occasion in doing more than to say that, as at present advised, I do not see any case cited which carries that rule of construction further than that, to make it apply to a case where the words are said to relieve the shipowner or the tug owner, or whoever it may be, from a common law liability. I think it is convenient at this moment to say that I am not myself, as at present advised, disposed to decide this case upon the basis that we should read the words "towing gear" as not including the attachments. In my opinion the hooks and the upper and lower plates connected with the angle bars and fastened to the iron bulkhead by means of rivets were essential to the working of the towing gear, and are covered by the words "towing gear" in the exceptions which form part of the conditions of towage. I think, therefore, that we cannot rest a judgment against the *Westcock* on the ground that the words "towing gear" do not include the attachment which I have described. This attachment was for the purpose of towage, and could be used only for that purpose. With regard to the answer that the assessors were good enough to give us, that sailors would call this permanent structure on the ship, which was to my mind essential to carrying out a towage, part of the ship, that answer does not, to my mind, really affect the construction of the contract that we have before us. Having said that, as the shortest way of dealing with the points that I think I ought to refer to, I propose to read in the first instance a headnote which gives a shorter and terser account of the question raised in this case than I could give if I

substituted language of my own. This is the headnote in the present case as reported in (1911) P. 23: "Whilst the defendants' tug was towing the plaintiffs' vessel from Birkenhead to the Canada Dock, Liverpool, the towing gear of the tug carried away, with the result that the plaintiffs' vessel fell against the pierhead at the entrance to the dock and sustained damage. In an action for breach of the contract of towage, the defendants relied on a condition in the contract by which they were not responsible for any damage to the ship they have contracted to tow arising from any perils or accidents of the seas, rivers, or navigation, collision, straining, or arising from towing gear (including consequence of defect therein or damage thereto), and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence, default, or error in judgment of the pilot, master, officers, engineers, crew, or other servants of the tug owners." The actual contract is rather longer, but that sets out, to my mind, all the material part of it. It was held by the President "That the defendants were liable, as there was an implied warranty in the contract of towage that the tug supplied was duly equipped and fit for service; but the cause of the damage sustained by the plaintiffs' vessel was the defective condition of the rivets attaching the towing gear of the tug to her bunker casing. This defect was not covered by the contract, the conditions of which only applied to circumstances occurring after the commencement of and during the towage, and not to the state of things existing before the towage began." My judgment is based upon that last proposition being absolutely correct. I think that these words, reasonably construed, do not extend to defects existing before the towage began. It is not necessary for me, except in the shortest possible manner, to refer to the arguments which were put forward on either side, but I may just say that counsel for the appellants, the tug owners, referred to two matters which he said should lead one to the conclusion that these exceptions were intended to apply to matters and circumstances before the towage began as well as to matters and circumstances after the towage began. The two matters that he referred to were these: One was that when you read the words in brackets, "including consequence of defect therein or damage thereto," the suggestion was that the "defect therein" referred to defects existing before the towage began, and that "damage thereto" referred to circumstances subsequently arising, to damage of the ship after the towage had begun. That was the argument on one side. The argument on the other side was that if you look at the words in this exception clause, from the beginning to the end, there is not, if you leave out the contention of counsel for the appellants about the effect of the word "defects," a single instance mentioned which would not be of matters arising after the towage commenced. That was the way counsel for the respondents put it. Having read the judgment carefully, and treating this contract as an ordinary contract outside the rule which renders it necessary to include a matter in the contract by plain and unambiguous language, I have come to the conclusion that on a reasonable reading of this contract it was not intended that the defects existing, the shortness of equipment or the defects in equipment, at the time the contract was entered into, should be covered by this clause. When I say this, I am not at all taking the view that was taken by Stirling, L.J. on the contract before him in *Rathbone* v. *MacIver* (*ubi sup.*), or by Collins, L.J. in the case of *The Waikato* v. *New Zealand Shipping Company* (*ubi sup.*). That suggested that the probable intention, at all events, of the tug owner was to protect himself against having to be made liable for damage done to the towed ship by reason of matters like these existing before the towage began. The more I read this contract the more I come to the conclusion myself that it was the intention of both parties to deal only with the defects and damage arising in the course of the towage.

Having said that, I wish to say that generally I accept the conclusions in fact of the learned President. I think that generally speaking that is the rule that the Courts of Appeal have laid down for themselves when dealing with these Admiralty appeals, but it must not be taken, from my saying that, that I mean that that rule is an exclusive rule. There may arise cases in which the court would think it was its duty to differ from the judge of the Admiralty Court upon mere questions of fact upon which he has given a finding with the assistance of the Elder Brethren, but one does not do it except in cases where there is very strong ground for thinking the finding in fact wrong. I have set out, for my own convenience, the conclusions in fact of the President. The accident was due to weakness or fatigue of the rivets. I accept that conclusion, and I wish to say with reference to this that I now take the view of the onus of proof in these cases which was not entirely present to my mind during the whole of the argument. I think myself that, quite apart from any warranty at all, but taking an ordinary contract in which the contracting party has the obligation to use reasonable skill and care without any warranty of equipment or anything of the sort, when he is entering into a contract to tow, and in the course of the contract to tow an accident happens which damages the towed ship, that fact alone is sufficient to shift the onus. The moment that has occurred, the onus is on the defendant to explain the accident, if I may use the expression. Until it has been proved that the accident occurred in the course of the towage, the onus is on the plaintiff, the person who complains that his ship has been injured in the course of the towage. But when you show that the ship has been injured in the course of the towage, I think the onus shifts, and it is for the tug owner to explain how the accident occurred, and to relieve himself from liability for that accident by showing exactly what was done, and how that which was done shows that he was guilty of no negligence, but that he was using reasonable skill and care. I leave out the word "equipment," because, in the sense in which it has been used before us in this argument, there is no difference between equipment and warranty really. Then, subject to that, I accept the finding of the learned judge here. I do not mean that I say that I should have come to the same conclusion that in this tug the rivets in the plates came away by mere weakness, making them unable to stand the strain of 22½ tons or 45 tons, whichever way it is put.

I think it is quite possible that I should have come to the conclusion that the pulling and the inability to stand the strain was not the real cause, but something in the nature of a jerk, for which, of course, if there was an absolute warranty, they would have to bear the liability. The learned President finds in terms that at the time of the contract the *Westcock* was inefficient to perform the towage services, and that this inefficiency could have been ascertained by reasonable care, skill, and attention on the part of the tug owners; that there was no proper inspection of the tug; and if there was any testing by a hammer, it was only a perfunctory inspection. On those facts there is nothing more, I think, really that it is necessary for me to say. The learned judge does refer to his own decision in *The Maréchal Suchet* (*ubi sup.*), and he does in the course of that make observations which he bases on the decision in the case of *The Ratata* (*ubi sup.*) and the observations of Lord Halsbury. In so far as he draws the inference as to the shifting of the onus entirely, I agree, but in so far as regards what he says of the judgment of Lord Halsbury—I will not occupy time by reading the passage now from the judgment of Lord Halsbury—that it justifies the statement that there is a common law warranty in this case, I cannot agree. I should think that of the two the judgment is rather the other way, that it was no authority for that proposition. However, it is not necessary that I should go through these matters at length; I have been through the cases, beginning with *The Minnehaha* (*ubi sup.*) and I make the same observation that I do as to *The Ratata*. Then really as to the other cases, they are all cases which, to my mind, refer to a different contract entirely, a contract of carriage. It is sufficient for me to say, not that the conclusion of the learned President which he has expressed so clearly is wrong—I have not got to say that—but what I have got to say is that it must not be taken from my judgment that I assent to anything except the proposition that this particular exception is limited to matters coming into existence after the time the towage began and does not apply to matters existing before it began. I think this appeal must therefore be dismissed.

Farwell, L.J.—I also am of opinion that this appeal fails. I see no reason whatever to doubt the correctness of the findings of fact of the learned President, and, accepting those facts, really it would be unnecessary to go further, because, as the learned President himself says in his judgment: "If my findings of fact in this case are justified, it matters not whether this primary obligation is an absolute one, so as to amount to a warranty of fitness or efficiency, or whether the obligation is satisfied by the tug owner proving that the unfitness or inefficiency was not discoverable or preventable by any care of skill, or by his proving that he was not aware of the unfitness or inefficiency, and that it could not be discovered by ordinary inspection." But, inasmuch as the learned President has himself, in a most learned and careful judgment, if I may venture to say so, gone very fully into matters, and as the case has been discussed in this court for nearly three days, I feel bound to say one or two words on the two questions raised. The first is, what is the liability apart from the special words of the contract; secondly, what is the construction of the contract. The learned President has said that there is an absolute obligation amounting to a warranty, which he likens to the obligation under a charter-party or bill of lading, to provide a vessel seaworthy in its commercial and legal sense. I am not, as at present advised, prepared to say that I assent to that. I do not say that I dissent from it. I should require very much more time to consider all the authorities if I had to pronounce a final opinion upon that, but I will say just in two or three sentences why I feel a difficulty at present in accepting it. "Seaworthiness," according to Parke, B. in *Gibson* v. *Small* (4 H. L. C. 397), is part of the common law of England, and "there is ample authority that a warranty or condition of seaworthiness at the commencement of the risk is implied in all voyage policies, whether it has been adopted originally from the law merchant, or implied from the very nature of the contract itself"; and that, he says, is the common law of England. The majority of this court, of whom I was one, have recently seen our way to imposing or inferring from the common law liability of a common law carrier a corresponding liability on the consignor who calls upon him to perform the duty to him which he is bound by common law (with certain qualifications) to accept. It appears to me to be quite a different matter to say that you can extend the category of common law warranties by adding another one to them—that is to say, by adding to tugs and tug service to ships the liability for cargo carried. As at present advised, I desire to express no opinion on that at all. On the other two points I agree with the learned President and with my Lord also. I think the liability may be very well stated as Lindley, J. put it in respect to carriage in *Hyman* v. *Nye* (*sup*). He says—I read it as applying to a tug owner—"His duty appears to me to be to supply a tug as fit for the purpose for which it is hired as care and skill can render it; and if whilst the tug is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident not preventable by any care or skill." Then a little lower down he says: "As between him and the hirer the risk of defects in the tug, so far as care and skill can avoid them, ought to be thrown on the owner of the tug. The hirer trusts him to supply a fit and proper tug; the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses." That, in my opinion, applies as much to a tug as to a carriage. The same principle was adopted in the case of the refrigerator: (*The Maori King* v. *Hughes* (*ubi sup.*). I therefore think that on that point the learned President was amply justified in the judgment that he gave.

Then there is the second question, Is there anything in the express words of the contract to deprive the shipowner of that protection? In my opinion there is not. Again, I adopt what my Lord has said. I do not call in aid the somewhat stringent rule of construction which has been

adopted, and which I think certainly depends on the necessity of very clear words in order to exclude a common law obligation as distinguished from a contractual obligation, a rule which amounts practically to this, that the words must bear the meaning contended for, not merely that they may bear it on one of two possible constructions. When you are dealing with obligations arising *ex contractu* from the parties themselves, no such rule can properly be invoked, and therefore I do not in any way rely on the case of *Nelson* v. *Nelson* (*ubi sup.*), or any of those cases, and to that extent I venture respectfully to differ from the learned President in the court below. But on the construction itself I really have nothing to add to what has been already said, both in this court and in the court below. It is clearly, to my mind, limited to the period of towage. The liability was an antecedent liability, and it is impossible to read the word "defect" as extending the protection to a period beyond that which governs the whole period. Such a forced rule of construction I think never would be applied, and certainly not in a case like this. Further, speaking for myself, I do not agree with the view the learned President has taken as to the meaning of the words "towing gear." We, unfortunately, have mislaid the written answers given us by our assessors, but, speaking from recollection, the answers were, first of all, that the bulkhead itself, into which the rivets were fixed, is part of the ship and not part of the towing gear; and, secondly, that the rivets and the angle iron are both of them not parts of the towing gear, but that by which the towing gear is attached to the ship. That, to my mind, is a most material circumstance. Without saying that "towing gear" is a technical phrase in the sense that you would take evidence of it and be bound by the answers of the experts who gave that evidence to you, I think it is material to consider what towing gear means amongst seafaring men; and as they take that view, and particularly as it entirely accords with my own, I propose to adopt that reading of it. That is another reason why counsel for the appellants cannot succeed, and therefore I think the appeal must be dismissed.

Kennedy, L.J.—I am of the same opinion. This appeal must be dismissed. Very many interesting questions have been discussed in the course of the argument in this case, upon which we have had very great assistance from learned counsel on both sides. I do not propose to decide this case upon a decision as to the correctness or incorrectness of the view so clearly expressed in the judgment of the learned President, that, in the relation (for I desire to use a neutral term) between the shipowner who employed the tug owner and the tug owner who undertakes to provide a tug for service, the choice of the tug remaining with the tug owner, there is to be implied, whether you call it a duty or an obligation or a warranty, an engagement of an absolute nature that the tug shall be in all respects absolutely fit for the service. It is expressed by the learned President in the words: "The canon of construction to be applied is similar to that which has so frequently been applied in seaworthiness cases. It is stated above. 'A warranty of fitness, or an implied obligation to provide a tug in a fit and efficient condition.'" The ordinary contract is, he says, "a warranty of fitness." That is the extreme view. Now, I do not wish to decide a point on this case which is not necessary in my opinion. I only desire to say that I do not myself feel assisted, in dealing with the question, by considering whether or not such a warranty, in the cases where it is implied, as in the case of the carrier of goods, is to be treated as arising from an implication in a contract or is to be treated as arising from a common law duty. I may say that, looking at the authorities, it is very difficult to say which of the two views is more correct. It is quite true that, as is put in the passage quoted by Farwell, L.J., the warranty of seaworthiness which a carrier has to give has been historically treated as a warranty arising directly out of the common law; but, on the other hand, authorities to whom I should humbly bow have repeatedly spoken of the obligation as one arising out of the contract itself as an implied term. In *Steel* v. *State Line Steamship Company* (3 App. Cas. 72) there is the judgment of Lord Cairns, L.C. I am not going to quote the whole of pp. 76 and 77 of the report in the App. Cas., but one sentence; but the most interesting argument, if one may say so with deference to so great an authority, which he there presents as a dilemma to the shipowner, is based upon a consideration of the obligation of seaworthiness arising as an implied term of the contract. He summed it up in this sentence: "But, my Lords, if that is so"—that is to say, if the dilemma I have put is correct—"it must be from this, and only from this, that in a contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle I think there can be no doubt that this would be the meaning of the contract." Lord Blackburn, on p. 86, dealing with the same argument, says: "I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty'"—that is reported, and doubtless was intended to be, in inverted commas—"not merely that they should do their best to make the ship fit, but that the ship should really be fit." I desire to reserve my opinion as to whether the relation between the tug owner and the owner of the ship who enters into arrangements with him for towage is or is not one which carries that implied duty or warranty or obligation, whichever be the preferred term, of an absolute nature. The facts of this case render it unnecessary to decide that matter here, because unquestionably you have got no less an engagement than was the engagement which is dealt with by the Divisional Court in the case of *Hyman* v. *Nye* (6 Q. B. Div. 685). There were considered judgments of Lindley, J. and Mathew, J., as they then were. And it cannot be said, I should think, that, in this case, where you are taking a tow, there is a less duty than existed there. As

I understand that judgment, and as I understand the law, the point is whether or not the duty of the man who supplies a thing, whether he sells goods or is a person who lets out a vehicle on hire, is largely, if not wholly, dependent upon it being known what specific use is to be made of the thing lent or sold or hired; and in that case Hawkins, J. had, in the opinion of the court, left the question to the jury in the wrong way, because, as put shortly by Mathew, J. on p. 689: "The learned judge appears to have considered that the plaintiff, by his pleadings, had undertaken to prove negligence, and to have told the jury that if they thought reasonable care and precaution had been taken by the defendant to ascertain that the carriage was safe, they might find that it was safe. In other words, the question whether the carriage was safe was treated as if it were the same with the question whether the defendant might have reasonably believed it to be safe." That is the view distinctly disapproved of by the decision in *Hyman* v. *Nye.* So in the present case it would clearly, in my view, have been insufficient, and was treated by the learned President in regard to this further point to be insufficient, if the defendants had been able to prove that they might have reasonably believed this tug to be safe. The fact is that, as Lindley, J. expressed it, if that is not the right view, if the right view in a case of this kind was that something was to be used for a specific purpose known and intended by both parties at the time of making the contract, there is very little to choose between the absolute duty and the relative duty. As he puts it at the foot of p. 688, after speaking of what he calls the slightly ambiguous expression "reasonably fit and proper," which requires explanation, he says: "In a case like the present, the carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner"; and a little below he says: "A carriage not fit and proper in this sense would not be reasonably fit and proper, and *vice versâ.* The expression 'reasonably fit' denotes something short of absolutely fit; but in a case of this description the difference between the two expressions is not great." What I do wish to express, speaking for myself, is the view that it would be entirely wrong, in a case of this kind, for the tug owner to say: "No reason has been shown by the plaintiff that I might not reasonably have believed it to be safe." That is condemned by the case of *Hyman* v. *Nye,* and I think rightly, because a greater burden lies upon him, the burden of proof that in fact it was as reasonably fit and proper a tug as care and skill could make it for use. The difference, therefore, obviously is very slight. Very much the same view as that which is there elaborated has been expressed in a much older case, to which counsel for the appellants was kind enough to give me the reference, the case of *Robertson* v. *Amazon Tug and Lighterage Company* (46 L. T. Rep. 146; 7 Q. B. Div. 598). There the reason which I have given has the high authority of Brett, L.J. who says, at p. 606: "When there is a specific thing, there s no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made." Here, therefore, I desire, in accordance with that judgment, to say that a different set of considerations again would have arisen if the owner of the ship had picked the particular tug, and not left it to the defendants to supply the article which they knew was an important matter, and knew was to be supplied for the purpose of towing and docking this vessel, the *Araby*, in the Liverpool river. If that is the contract as laid down in *Hyman* v. *Nye,* which is the second and alternative view pointed out by the President as sufficient, the appeal equally fails as if the contract was absolute. He describes this what I may call qualified obligation as "an implied obligation to provide a tug in a fit and efficient condition so far as skill and care can discover its condition," and I accept that myself as quite correct at any rate, even if there is not a fresh absolute liability, and the facts show that the judgment on that view was right. With regard to those facts, I should be exceedingly slow to differ on any question of fact from the judge who heard the evidence. I should be so in any case, but I think it has been held by the highest tribunal that, especially in Admiralty cases ought that rule to be as strictly observed as reason can permit, because not only is it the decision of the judge who hears the evidence, but the decision of a judge in highly technical matters in which he has the assistance of skilled assessors, and if they advise him upon questions of fact and within the sphere of their duty, which is that of technical and professional assistants, I for one, short of proved mistake or misunderstanding, should not dream of interfering with the decision of the court below; but that, of course, does not apply to mere inference; I am speaking of facts. Now, the facts here, as found by the court below, were that this was an ordinary service, not even at sea, but in the Liverpool river, an ordinary service in weather which cannot be called in the least extreme, and in the nature of service which is performed every day—the towing by two tugs across the river of a large ship undoubtedly, rather high out of the water, and the docking of her safely in the Canada Dock. The Elder Brethren advised the judge in that matter, and I see no reason whatever for supposing that there was a mistake or misunderstanding. They further advised him that: "There was no unusual or excessive strain, and no strain that might not have been reasonably expected due to the alleged causes or any of them"; and you have got, further, the fact, which is on the face of the evidence itself, that it was proved that no one had ever heard, in the circumstances of such a towage, of the ropes not breaking, but the structure of the vessel, whether you call it part of the towing gear or not, parting first; that is the evidence given by two experienced and skilled witnesses, and there was no suggestion that that evidence was not absolutely correct. Therefore there being clearly a duty, as is pointed out in *Hyman* v. *Nye* (*ubi sup.*), to satisfy what I will call the qualified condition of fitness, the burden of proof lay upon the

defendants, as is pointed out in that case, and I think is pointed out by Lord Halsbury in the case, which was referred to in argument, of *The Ratata* (*ubi sup*), to show that there was something which excused the failure to perform the service as such. In the present case, the evidence being that, so far from there being an explanation, it was an unheard-of thing that such a thing should happen as did happen, the defendants did not satisfy the burden of proof, which was a burden which lay upon them. The passage I was referring to of Lord Halsbury, when Lord Chancellor, is in the case of *The Ratata*: "The fact that it was an inefficient tug on this occasion is proved by the defendants themselves, when they show how on other occasions it had properly and efficiently performed its functions. If it was suggested that it was some extraordinary and unusual event, and as this was not a contract of warranty the defendants would have been entitled to insist on that as a defence, it was for the defendants to prove it." That is so even on the qualified contract suggested at the trial. It appears to me that upon that ground it is quite sufficient to deal with the case. I am not quite sure that I have the concurrence of the other members of the court, but I am myself inclined to think that even if it was a qualified contract, and not an absolute contract of fitness, if it is implied in the contract, then the principles which have been so often referred to, of seeing, where there are exceptions, whether those exceptions are sufficiently clear to avoid the obligation of the implied contract, would have to be considered in this case. In other words, what is called the ambiguity question would arise just as much as it would arise in the case of an absolute contract. If there is the implied contract, as I have said, correctly expressed in the judgment here: "An implied contract to provide a tug in a fit and efficient condition so far as skill and care can discover its condition," then if, as the defendants contend, you are to apply these terms as making away with the implied contract, you have to find those special terms are sufficiently clear, just as much as if the contract had been one of an absolute nature. I certainly do not think that they are sufficiently clear as they stand if they are to be read as meaning by the word "defect" that the implied contract or obligation of providing the tug in a fit and efficient condition is varied. If it means we have negatived this by the word "defect," I think they should clearly put in their contract that the word "defect" is to cover antecedent defects as well as such defects as may arise in the course of the contract of towage. But I also think that we are relieved from that difficulty by the advice which we have received from our assessors as it stands, which I now quote exactly as the questions have been found. The first question is: "Is the bulkhead of the tug to which the angle bar was attached usually called 'towing gear'? Is it spoken of by sailors as part of the ship, or part of the towing gear? The answer is, We should not call the bulkhead of the tug, as spoken of by sailors, part of the towing gear. The next question is, Does your answer extend to the rivets or attachments as well? The answer is, From a sailor's point of view, the rivets and attachments (angle bars) are not termed the towing gear. The rivets secure the plates and the angle bars to which the towing gear is attached. And there is a further question, Would the effect of the hawser being only 15 fathoms materially increase the jerking strain on the rope?—Yes." I should not presume on matters of this kind to differ from them if and so far as they are questions of technical and nautical skill. The learned President in the court below, in referring to the words "towing gear," says: "I may add, although I do not desire my judgment to rest on it, that the defendants, could not complain if a strict meaning were given to the words 'towing gear' in the conditions by holding that they describe merely the actual towing gear itself, and not the rivets or attachments between the gear and the bulkhead. This is the meaning the defendants themselves have given to the words. They persisted in the correspondence that 'All the towing gear was lost overboard.'" I must say I cannot help joining in the regret of the President that the defendants did throw away those rivets, instead of keeping them for inspection after so unusual and extraordinary an occurrence as the carrying away of this part of the ship, whether you call it part of the ship itself or part of the towing gear, and instead of subjecting them to a fair examination by both sides. That would probably have saved this action from proceeding as it has, because, as counsel for the appellants said, if it had turned out that these rivets were fatigued I do not think this question would have arisen in the form in which it has. But unfortunately, instead of taking what I should have thought was obviously the more desirable course, those broken rivets or whole rivets, whichever they were, were thrown away, although the bulkhead to which that attachment was fixed with the angle iron was not either buckled or otherwise disturbed, and therefore the natural inference would be to think, even if they might think the strain excessive: "What a curious coincidence; the strain has burst and carried overboard the towing gear, and yet with an undamaged bulkhead, without straining or buckling, away have gone the rivets so far as holding any further is concerned." However, I think the fair inference is that those rivets and the bulkhead would not be treated as part of the towing gear, in which case, as those are the important words in connection with the preceding word "defect," upon which the defence is based, the defence would fall to the ground. I think, therefore, that this appeal ought to be dismissed on all these grounds.

Solicitors: for the appellants, *Hill, Dickinson, and Co.*; for the respondents, *Lightbound, Owen, and MacIver.*

June 21 *and* 22, 1911.

(Before VAUGHAN WILLIAMS, FLETCHER MOULTON, and BUCKLEY, L JJ. and Nautical Assessors.)

THE HIGHLAND LOCH. (*a*)

Collision—Conflict of duties—Ship being launched colliding with ship at anchor—Right of shipbuilders to launch—Duty of ship at anchor to get out of the way.

Shipbuilders, who were about to launch a vessel, gave notice to the harbour authority, to the pilots of the port, and to persons using the port of their intention to launch a vessel at a particular time on a certain day. On the morning of the launch the vessel to be launched was dressed with flags, and tugs and boats were in attendance to warn passing vessels. The launch being timed to take place at 12.30 *p.m., preparations for releasing the vessel were begun at* 6 *a.m. About* 10.30 *a.m. a ketch drifting up the river with her anchor down fouled some moorings in the river and brought up a little below the slipway from which the launch was to take place. Messages were sent to her at* 10.30 *a m. and* 11.30 *a m. from the shipbuilding yard that she had better move, and about noon a tug was sent to advise her to buoy her anchor and let the tug tow her away to a place of safety. Those on the ketch refused this offer, as they did not think the ketch was in the line of the launch, though they offered to move if the shipbuilders would give them a new anchor. The shipbuilders delayed the launch fifteen minutes to enable the tug to move the ketch. The tidal conditions were favourable at the time fixed for the launch. Had it been further delayed they would have been unfavourable. The shipbuilders, being apprehensive of danger to their vessel and the lives of their men and the public using the river, if the launch was delayed, and, not thinking that there was any substantial risk to the ketch, launched the vessel, which collided with the ketch, the collision being due to the vessel not going across the river, but being swept a little down river by the tide, which, owing to the delay, had begun to set down river along the river bank.*

In an action for damage by the ketch owners it was held that, though the ketch had no right to be where she was, the shipbuilders could have prevented any damage to her by postponing the launch, and judgment was given for the amount of the damage claimed by the ketch owners. The shipbuilders appealed to the Court of Appeal.

Held, by the Court of Appeal, reversing the decision of the Admiralty Court, that the claim of the ketch owners should be dismissed, and that judgment should be entered for the shipbuilders, who had been placed in a position of difficulty and had adopted a reasonable course of action, and had without negligence chosen the lesser of two evils.

APPEAL from a decision of Sir E. Evans, President, holding that the owners of the steamship *Highland Loch* were alone to blame for a collision between their vessel and the ketch *Frances*, which occurred while the *Highland Loch* was being launched.

The case made by the appellants, the owners of the *Highland Loch*, who were defendants and counter-claimants in the court below, was that the *Highland Loch*, a screw steamship of 4675 tons register, was built in the Tranmere Yard of Cammell, Laird, and Co. on the river Mersey, and her launch was arranged to take place at 12.30 p.m. on the 17th Jan. 1911. The date had been fixed for several days, and they had given all the usual and necessary notices. A launch and two tugs, the *East Cock* and *South Cock*, which were in attendance, were dressed with flags, and two row boats were stationed in the river, one on each side of the launch ways, each carrying a red flag, and a red flag was flying at the pier head at their yard. In these circumstances the ketch *Frances* was seen about 11 a.m. on the morning of the 17th Jan. to come to rest in a position in the river nearly opposite the launch ways and about from 500 to 600 yards out from them, where she lay with her anchor down. A message was at once sent out to her by the dock master to tell those on board that there was going to be a launch and that the *Frances* should move. The master of the *Frances* told the messenger that his anchor was foul of some moorings, and he was then advised to slip his chain or knock a pin out of the shackle, attach a rope to it, and buoy the anchor, but he refused to do anything. About 11.30 a.m. another message was sent by the tug *East Cock* to warn the master of the *Frances* that he must move away as his position was an unsafe one on account of the impending launch. The *Frances*, however, did not move, her master alleging that he could not lift his anchor. Shortly after noon the tug again went out to the *Frances*, carrying a messenger with a third message of warning, and the master of the ketch was then urged to slip his cable and let his vessel be towed by the *East Cock* out of the way, but the master refused to slip his cable. The tug then got hold of a rope from the *Frances* and pulled her to the northward over her anchor in order to see if the anchor could be got in by that means, but this attempt to get the anchor in was unsuccessful. At 12.40 p.m. a warning signal gun was fired from the shore, indicating that the launch was to take place in about five minutes, and, as the master of the ketch still persisted in his refusal to slip his cable (which, if slipped, could have been buoyed so as to be easily picked up again), the tug, being unable to do anything further for the safety of the ketch, returned to the launch. At 12.45 p.m., it being then considerably past the time appointed for the launch, which could not with safety to life and property be further delayed, the *Highland Cock* was let go from the ways. Immediately she took the water her anchor was let go, but, before it held her, an ebb current which was running near the shore took effect upon the stern of the *Highland Loch*, causing her to take a sheer more to the northward towards the place where the *Frances* lay, and the port quarter of the *Highland Loch* struck the ketch a glancing blow on the latter's port side.

The appellants alleged that those in charge of the *Frances* knew or had full notice and means of knowing of the intended launch and that it could not with safety be postponed, and that they had ample time to move the ketch or allow her to be moved out of the way, but they neglected and refused to do so.

The appellants charged those on the *Frances* with neglecting to move out of the way and refusing to take the assistance offered by the *East*

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

Cock; and with neglecting to slip the anchor chain or run out more cable, or take any steps to enable the *East Cock* to tow the *Frances* into a place of safety.

The appellants further alleged that the collision and damage consequent thereon were solely caused by the negligence of the respondents.

The appellants also pleaded that the *Highland Loch* was in charge of a compulsory pilot, and that, if the collision was caused by the fault of anyone on board the *Highland Loch,* it was caused by the fault of the pilot, but this defence was abandoned.

The case made by the respondents, the owners of the ketch *Frances,* who were plaintiffs in the court below, was that shortly before 12.45 p.m. on the 17th Jan. 1911, the *Frances,* a ketch of 71 tons, whilst bound from Pentewan to Runcorn with a cargo of china clay, manned by a crew of four hands, was at anchor in the Mersey to the northward and eastward of the appellants' shipyard. The weather was a little hazy, the wind calm, and the tide flood. A good look-out was being kept on board the *Frances.* Her anchor was foul of some ground moorings, and the crew were doing their best to get the anchor clear in order to shift their berth, but were not succeeding, although assisted by the appellants. In these circumstances the appellants launched the *Highland Loch,* and did so in such a way that she came out into the river at high speed, stern first, and her stern sheered down river, and with her stern and propeller she struck the *Frances* on the port side, doing damage.

The respondents, the owners of the *Frances,* alleged that those launching the *Highland Loch* were negligent in launching her at a time when and in a manner which they knew or ought to have known would endanger the *Frances* and the lives of those on board of her, and in not keeping her clear of the *Frances* or taking proper precautions or measures to do so.

On the 12th Jan. Cammell, Laird, and Co. sent out notices to the harbour-master of the Mersey Docks and Harbour Board, to the Superintendent of Pilotage of the Mersey Docks and Harbour Board, and to the manager of the Birkenhead Corporation Ferries, whose vessel plied across the Mersey, in the following form:

Highland Loch.—We beg to inform you that we intend launching this vessel at 12.30 p.m. on Tuesday next, the 17th inst.

On the same day Cammell, Laird, and Co. sent to the Cunard Steamship Company the following notice:

Highland Loch.—We beg to notify you that we intend launching this vessel on Tuesday next, the 17th inst., at 12.30 p.m., and, if you think it necessary to remove the buoy, we shall be glad to bear half the expense of doing so.

The buoy referred to was a permanent mooring which the Cunard Company had in the river.

On the 13th Jan. the Cunard Company replied as follows:

We beg to acknowledge the receipt of your letter of the 12th inst., and note that you intend to launch the above vessel on Tuesday next, the 17th inst. We think it necessary to remove the buoy, and are making arrangements to do so, and will debit you with half the cost.

On the 17th Jan. 1911, shortly before the launch, Cammell, Laird, and Co. sent the following letter to the master of the *Frances:*

The Captain, schooner *Frances.*—Dear Sir,—We observe that you are in the line of the launch of our steamship *Highland Loch,* and, as all preparations are made, we must launch the ship at 12.30 to-day. We cannot be responsible for any damage done thereby to your ship, and would advise you to slip your anchor and clear away at once.—Yours truly, Cammell, Laird, and Co. P.S. We also cannot be responsible for any accident to any person on board your ship.—C., L., and Co.

The case was heard by the President (Sir S. Evans), assisted by Elder Brethren, on the 11th and 12th May 1911, and judgment was delivered on the 18th May.

The President.—The plaintiff's ketch the *Frances* was damaged by the launching of the defendants' vessel, the *Highland Loch,* in the river Mersey, about or shortly after 12.45 p.m. on the 17th Jan. last.

The ketch's anchor had dragged and got foul of some moorings in the river in the vicinity of the slip from which the launch was to take place.

All proper notices of the intended launching were given, and particular warning was given to the *Frances.* The launching was timed for about 12.30 p.m. About 10.30 a.m. the defendants sent a message to the master of the *Frances* by a boatman that there was going to be a launch, and that he (the master) was to get his vessel out of the way.

About 11.30 a.m. another message was sent by one of the tugs in attendance at the launch to a similar effect and the master was told he must slip his anchor.

Shortly before 12.30 p.m. one Lang, the assistant yardman of the defendants, went out in the same tug, and took with him a letter from the defendants' manager to the master [set out above].

Lang delivered this letter to the master, who showed reluctance in accepting it, and he did not in fact open it until after the collision. Lang, however, told him that the launch was coming off and he must get out of the way, and he tried to persuade him to slip his cable.

The attitude taken by the master was in substance this: "I cannot heave my anchor, and will not slip my cable, unless you will pay, or be answerable for it, or for a new anchor and take my ketch away in safety."

The answer of Lang in substance was: "I have nothing to do with paying for an anchor, and I have no authority to become answerable for it; but, if you will slip your cable, I will tow you away to a place of safety."

At the request of the master of the ketch, the tug made fast in order to draw her up to her anchor, and tried to heave her anchor, or to get her clear in that way.

Meantime Lang sent a boatman on shore to report the position.

The tug did not succeed in heaving the anchor, and the ketch was only moved a very short distance, and was not, in fact, cleared out of the way of the launch.

The boatman reported to the defendants' manager that the master would not slip his anchor, but that the tug was going to tow him

as far to the north as possible, in order to try to get him clear.

It had been arranged between Lang and the defendants' manager that, if the master was going to slip his anchor, Lang would blow a signal of three blasts from the tug, and then the manager would delay the launch for about fifteen minutes. No signal was blown. When the message above referred to was given to the manager, he immediately ordered the defendants' steamer to be launched, having, as he said, considered beforehand what to do if the master would not slip the anchor. The launch had been delayed about a quarter of an hour.

When the first gun was fired Lang was still on the ketch, to which the tug was made fast. On hearing the gun he went on the tug and ordered the tug to throw over the ketch's rope. The tug then steamed away. The ketch would soon regain her first position, from which the tug had moved her only a few yards. A second gun was fired, and the launch was made.

The master hoped and expected that his ketch was in a safe position.

The defendants' manager, however, had written that it was in the line of the launch, and he ordered the launching to take place, without heeding the consequences to the ketch or to any person on board of her.

The launched vessel collided with the ketch, and caused the damage, to recover which the action is brought. The plaintiffs allege, in these circumstances, that the *Highland Loch* was launched at a time when, or in a manner which, the defendants knew would endanger the *Frances* and the lives of those on board.

The defendants plead in answer that the master of the ketch refused to slip the anchor and to get out of the way, and that the launching could not with safety be postponed.

The steamer could not go into the water till the hydraulic stopway was removed. It was not proved to my satisfaction that, apart from inconvenience and possible cost, there was any danger in postponing the launch.

The question is, Who in these circumstances is responsible for the collision?

The obligations of those who cause a launch to be made, and of those who navigate the river in the vicinity at the time, have been discussed in various cases. They are *The Blenheim* (4 No. Cas. 393); *The Vianna* (Swab 405); *The United States* (2 Mar. Law Cas. O. S. (1865); 12 L. T. Rep. 33); *The Glengarry* (2 Asp. Mar. Law Cas. 230 (1874); 2 P. Div. 235); *The Andalusian* (4 Asp. Mar. Law Cas. 22 (1878); 2 P. Div. 231); *The Cachapool* (4 Asp. Mar. Law Cas. 502 (1881); 7 P. Div. 217); *The George Roper* (5 Asp. Mar. Law Cas. 134 (1883); 8 P. Div. 119).

If proper notice is given, vessels navigating the river or anchored in it must take all reasonable precautions to avoid a collision.

On the other hand, those intending to launch a vessel must take precautions, and "the utmost precautions," against any injury being caused by the launch; and the burden of showing that such precautions have been taken lies upon those managing the launch.

These precautions are necessary, not merely to safeguard property, but to protect lives which may be in danger. For this purpose, amongst other things, there is a duty upon those about to launch a vessel to keep a good look-out, and, before giving the final order for launching, to ascertain that no ship is passing, or lying near, so as to be endangered by the launch: (see *The Blenheim, ubi sup.*; and *The Vianna, ubi sup.*).

As to the two vessels which collided, I am of opinion that the master of the *Frances* was at fault in not slipping and buoying his anchor, and dropping, or being towed to a place of safety. He had no right to make it a condition, before taking the proper steps which good navigation required him to take in order to perform his obligation, that the anchor should be paid for, or that an undertaking should be given to pay for it or to replace it. The question is, not whether his conduct in making the demand in the interest of his owner was reasonable conduct in a servant, but whether he took reasonable steps in navigation to avoid danger.

As to the defendants, they were, in my opinion, at fault also, in ordering the *Highland Loch* to be launched, knowing the danger to the *Frances* and to those on board, and in deliberately disregarding such a danger. If those managing a launch are to blame for not keeping a good look-out, and for not ascertaining, as well as circumstances permit, before the final order to launch is given, that no ship was within a dangerous zone, they are still more to blame, if, having kept a look-out, and knowing the proximity of a vessel in danger, they launch a steamer which will not only probably but almost certainly, cause loss of life or injury to property.

The question remains whether the liability for injury attaches to both, or one only of these two vessels which have been negligently managed?

In some of the cases cited both the vessels were held to blame, and in others one only. In *The Cachapool* (*ubi sup.*) the steamer at anchor in the river was held alone to blame. That case must be looked at in the light of the particular facts. The steamer there was, although late, being towed away, and there is nothing to show that the launch was ordered with the anticipation or expectation of danger, and with the threat that those managing it would not be responsible for loss of life, or injury to property. Moreover, the court held that the launch was "delayed as long as it was prudent to do so." I am not sure whether that phrase was intended to convey that the court was satisfied that "the launch could not with safety to life and property be further delayed," as pleaded in par. 5 of the defence.

In the present case, there was some slight evidence that "it would not have been safe to postpone the launch altogether," but it fell far short of establishing the plea of danger to life and property; and, indeed, the defendants' counsel did not contend that the plea had been established, or rely on it as a defence.

The case of *Davies* v. *Mann* was cited in argument in *The Cachapool*, but it was not dealt with in the judgment. That is, perhaps, the most familiar of the cases which illustrate the doctrine that was further established in the later cases of *Tuff* v. *Warman* (5 C. B. N. S. 573) and *Radley* v. *London and North-Western Railway Company* (35 L. T. Rep. 637; 1 App. Cas. 759).

Tuff v. *Warman* was a case of a collision between two vessels, although it was an action at common law, and it is now well established that the doctrine laid down in the three last-

named cases applies to actions for collision brought in the Admiralty Division, where the facts call for its application. The following passage in the address of Lord Penzance to the House of Lords in *Radley* v. *London and North-Western Railway Company* has constantly been referred to as a clear statement of the doctrine: "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first—namely, that, though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet, if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

It is no doubt inconvenient and may be productive of monetary loss if, by the negligent or unreasonable action of those in charge of a vessel in a river near a launching place, a launch is postponed. Fortunately, by the reasonable management of navigating vessels, such postponements are hardly ever caused. If any action of such an unreasonable kind is anticipated, the the harbour and dock authorities have generally full powers to cause the removal of the offending vessel.

But I conceive it would have been no answer to the plaintiff's claim in *Davies* v. *Mann*, if it had been shown that the defendant was hurrying to catch a particular train, and that he would be a great loser monetarily if he lost it, or to the plaintiff's right to recover in *Tuff* v. *Warman*, if it had been proved that the defendant's vessel was making haste to reach a particular dock in order to enter on a particular tide.

In the present case, the defendants, for their own purposes, determined to launch at the particular tide, whatever the consequences might be to the plaintiffs' vessel and its crew. They did so, to the plaintiffs' injury.

This being so, the plaintiffs' negligence does not excuse the defendants, because they could, by the exercise of care, have avoided the mischief which their deliberate action caused.

I therefore pronounce the defendants solely to blame.

On the 30th May 1911 the defendants served the plaintiffs with a notice of appeal asking that the judgment should be reversed, and that the *Frances* should be held alone to blame.

The appeal was heard on the 21st and 22nd June 1911.

Laing, K.C. and *Keogh* for the appellants, the owners of the *Highland Loch.*—The appellants were not guilty of negligence. They had given general notice of the launch, and had sent a note to the master of the ketch informing him of the launch. [Vaughan Williams, L J.—Is there any power in anyone to compel the ketch to move?] The harbour authority possibly might do so, but it was very doubtful if it was necessary to move her. [Vaughan Williams, L.J.—There being that doubt, you launched, and you have been held guilty of negligence.] We submit that those on the ketch were negligent to stay there; she could have slipped her anchor up to the last minute, and we sent a tug to take her to a place of safety. It is wrong to say that the launch was ordered without heeding the consequences to the ketch, and we did not launch at a time which would almost certainly cause loss of life or injury to property. Such findings cannot be supported. The evidence shows that Mr. Boyd did not think that the ketch was in serious danger, and the President himself thought it was unreasonable to ask the builders to postpone the launch until another tide. The danger to life and property if the launch was delayed was proved. [Vaughan Williams, L.J.—Is your submission that you have no right to launch if you know that the vessel will be hit, but that you may launch if there is only a chance of its being hit?] There was practically no chance of the ketch being hit. If it was the duty of the ketch to get out of the way, and the builders were not negligent in launching, they are not to blame. The launch had been delayed as long as was prudent, so the builders were not guilty of negligence:

> *The Cachapool*, 43 L. T. Rep. 171; 4 Asp. Mar. Law Cas. 502 (1881); 7 P. Div. 217.

In any event, there is negligence in both ships, and both ships should be held to blame, for the negligence continued right up to the collision:

> *The Margaret*, 52 L. T. Rep. 361; 5 Asp. Mar. Law Cas. 204 (1884); 9 App. Cas. 873.

The ketch was negligent to be where she was:

> *City of Lynn*, 11 Fed. Rep. 339.

The ketch constituted a nuisance, and the builders are not debarred from launching because someone is obstructing the river, unless it is clear that they will inevitably do damage:

> *Grand Trunk Railway of Canada* v. *Barnett*, 104 L. T. Rep. 362; (1911) A. C. 361;
> *Petrie* v. *Rostrevor*, 1898, 2 Ir. Q. B. 556;
> *Dimes* v. *Petley*, 15 Q. B. 276.

Bailhache, K.C., *Bateson*, K.C., and *Dunlop* for the respondents.—The ketch in this case is not a trespasser, nor did she constitute a nuisance. The ketch came up the river not knowing anything about the intended launch and was trapped in moorings which were unmarked, and they were unmarked because the buoy attached to them had been removed by those launching the vessel. The conduct of the ketch was not unreasonable, and the right of the ketch to use the river was wholly disregarded by those conducting the launch. [Buckley, L.J.—If the vessel is warned of the launch, has she a right to stay?] If the ketch is free to move, perhaps the launch might have a prior right to the use of the river for a time. [Fletcher Moulton, L J.—Surely the ketch must act reasonably. Which is the greater evil to risk, damage by delaying the launch or the possible loss of the anchor of the ketch?] No choice of evils entitles a man to commit an act of trespass by allowing his vessel to collide with another. If he does that and damage ensues he is liable. This case is not similar to *The Cachapool* (*ubi sup.*), for in that case the anchored vessel might have moved without any loss to herself. To delay the launch might possibly have caused loss to the shipbuilders, or to the public using the river, but the shipbuilders had no right to prevent

the possibility of that loss at the expense of the ketch owner:

Whalley v. *Lancashire and Yorkshire Railway Company*, 50 L. T. Rep. 472; 13 Q. B. Div. 131.

Laing, K.C.—It is suggested that the mooring constituted a trap. Even if that is so, it was not a trap set by the shipbuilders, and when the ketch was in the trap the shipbuilders offered to take the ketch out of the trap, but the ketch refused the assistance of the tug which was sent by the shipbuilders, and which was ready to keep the ketch in tow until the launch was over.

VAUGHAN WILLIAMS, L.J.—This case raises the question under what circumstances those who have charge of the launching of a ship can safely take the risk of damage to property or persons in case the launched ship should collide with a ship lying in the river where the launch is to take place, and also the question how far the unreasonable refusal of such a ship anchored in the river to slip her anchor and go out of danger would be an answer to any action by which the ship unreasonably refusing to move claimed to recover the damage occasioned by a collision resulting from the launch.

We have asked our assessors the following question, and received the following answer: "What was the reasonable course for (*a*) the master of the ketch and (*b*) the owner of the launch to take when 12 30, the hour fixed for the launch, arrived?—(*a*) That he would slip his cable, provided the tug kept hold of him and towed him to a place of safety, and brought him back to his cable; (*b*) to suggest to the ketch the obvious course, when they knew the launch must take place.

Before dealing in detail with the facts in this case and the findings of the learned judge in relation thereto, I will make some observations as to the principle of law determining this case. It is clear that in the course of using a highway, whether by water or land, the mere fact that one of the persons using the highway negligently, unreasonably, or wrongfully obstructs the way will not exonerate any person who is using the highway from the duty to take care to avoid injuring the obstructing person or in this case the obstructing ship; and, *a fortiori*, will not justify the infliction of wilful injury: (*Davies* v. *Mann*, 10 M. & W. 546). In each of these cases of wrongful or unreasonable conduct which I have indicated the wrongful conduct of those obstructing the highway still leaves the duty on the persons obstructed to take care not to injure the obstructor. Parke, B. says upon p. 549 of the report of that case: "Were this not so a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." This duty may, of course, be limited by the force of surrounding circumstances. It might be that the avoidance of injury to the obstructor or his property would involve a risk of injury to an innocent third person using the same highway, and in such a case the obstructed person might reasonably, even deliberately, run against the obstructor of the highway, or his property, and yet have a good defence to any action by the obstructing person for injury done to his person or property. In the case of *The Cachapool* (*sup.*), a case very like the present in its circumstances, the head note runs thus: "A barque was at anchor in the Mersey, in the way of the *C.*, a vessel about to be launched. The launch was delayed as long as was prudent, but the barque not having been got out of the way in time was struck by the *C.* in coming off the ways, and both vessels were damaged. Reasonable notice had been given of the launch, and a steam tug had been sent by those superintending the launch to tow the barque out of danger, and would have done so in time to have prevented the collision but for the obstinacy of those on board the barque." Sir R. Phillimore in his judgment says: "A question which has been much considered by the court is whether even after the *Gladstone* was taken hold of by the tug at half-past nine or a quarter to ten o'clock, those on board the *Gladstone* did anything which contributed to the collision, or neglected to do anything which would have prevented it. The Elder Brethren are of opinion that if the *Hercules* in the first instance, instead of giving the warnings she did, had taken the *Gladstone* in tow, the result would have been different, and also that if those in charge of the *Gladstone* had not been obstinate and had allowed the *Hercules* to take their vessel to the north-east, the launch would have gone clear."

Those words might be read as meaning that the fact that the *Gladstone* in that case had been guilty of unreasonable conduct alone constituted a defence to any action brought by the *Gladstone* for damage which was incurred by the launch being sent forth into the water as it was. I do not think that Sir R. Phillimore intended to say that the mere fact of unreasonable obstinacy on the ship run down would constitute a defence if the running down might have been avoided, and still less when the risk of running down had been deliberately taken by the owners of the *Cachapool*. The facts alleged, if proved, would show that those in charge of the launch could reasonably suppose there was no risk. I agree entirely with the judgment of Sir R. Phillimore.

The questions, therefore, in this case, on the evidence, will be: (1) Did the defendants reasonably suppose that there was no risk? (2) Did they reasonably choose to launch the *Highland Loch*, rather than to postpone the launch as being the lesser of two evils, one of which had to be taken in the presence of a real dilemma? Before calling attention to the judgment of the President as a whole, it is convenient to call attention to a particular part of it, which deals with these questions. "The master hoped and expected that his ketch was in a safe position." That is the finding of the President, and in my judgment it is entirely justified by the evidence. "The defendants' manager, however, had written that it was in the line of the launch, and he ordered the launching to take place, without heeding the consequences to the ketch, or to any person on board of her. The launched vessel collided with the ketch, and caused the damage, to recover which the action is brought." It is convenient at this point that I should read the letter which was written on behalf of the defendants, with reference to this subject: "The Captain, schooner *Frances*.—Dear Sir,—We observe that you are in the line of the launch of our steamship *Highland Loch*,

and, as all preparations are made, we must launch the ship at 12.30 to-day. We cannot be responsible for any damage done thereby to your ship, and would advise you to slip your anchor and clear away at once.—Yours truly, Cammell, Laird, and Co. Limited. (Signed) W. Boyd, Manager. Jan. 17, 1911. P.S. We also cannot be responsible for any accident to any person on board your ship.—C., L , and Co., W. B."

It is rather difficult, in the face of that letter, to avoid the conclusion of the President that those who were conducting the launch were conscious of a real risk to property and person. I do not suppose that anyone would say that a mere possibility of an accident in the course of the launch would be sufficient to prevent those in charge of the launch saying, "Oh, we acted quite reasonably in launching our ship. It is quite true that there was a possibility of an accident, but so slight a possibility that it was a negligible fact, and a fact that reasonable persons could neglect"; but I think it is rather difficult to say that in the face of this letter. On the other hand, it has been suggested that the letter does not indicate the state of mind of the writer of the letter, but only indicates the fact that he wanted to bring pressure; that he might perfectly well have written that letter although he agreed with what the master of the ketch subsequently stated —namely, that it was quite safe. If that is so he was acting in full accordance with the principle of law laid down by the judgment of Parke, B. in *Davies* v. *Mann*, and if that was so the judgment would be wrong which held the defendants here to be solely to blame, or indeed to be to blame at all.

Again, another point is made here. It is said that even if there were strong grounds present to the minds of those who launched the ship for supposing that there was very great risk of collision with the ketch, yet they might reasonably launch, because if they did not launch it might be the cause of very great danger to persons other than the master and crew of the ketch; because there would be danger, if it was attempted to put back the blocks, to the men who were putting back the blocks, and danger also, if the blocks were not put back, that the ship might of herself, I think is the expression used, glide down the ways and be launched. It is said that that would be a danger to people using the river, because such a launch at an uncertain time would come upon those using the river unexpectedly. I confess myself that I do not think, on the face of the evidence, that this was such a pressing danger as to justify this choice of the lesser evil and refusing to postpone the launch; but I am told it is not open to the court to say that because of a conversation which took place between counsel for the defendants and the President in the course of the case. Counsel for the defendants was pressing the witness to admit that there would be a very serious danger of the sort I have described if the launch were postponed. He asked the witness this question: "I want to ask you about the danger, if any, of postponing the launch. Supposing you had not launched her that tide at all, what would have had to have been the course adopted by you, about giving notices, and the danger there may have been, if any, to your people"? and the witness replied: "Well, we would have had to have renewed the notices." Thereupon the President said: "With as much difficulty as there was, Mr. Laing, I do not think it was reasonable to ask these people to postpone the launch till the next tide." I agree, if I may say so, with the learned President. The learned President there, as he did in his judgment, is taking exactly the same view as is indicated in the answer given to the question put by the learned counsel. Then this occurs:—"Mr. Laing: The object of my question was to meet an observation your Lordship made yesterday as to whether there was any possible risk to their own people by keeping the launch suspended without some proper supports. —The President: Yes, you asked him about the next tide. His waiting another quarter of an hour or twenty minutes is another matter. I do not think it was reasonable to ask these people, in the face of as much difficulty as there was, to postpone the launch till another tide. The danger of postponing it on this tide for another quarter of an hour, or twenty minutes, that is another thing."

It is quite clear that the learned President was not affirming that last proposition of Mr. Laing.— "Mr. Laing: I want to deal with both propositions. You put it off for a quarter of an hour, and that quarter of an hour made the ebb tide stronger, you told me?—Yes."

So Mr. Laing took the same view. He was not satisfied with this question. He then asked the following questions: "Supposing you had had to postpone it for a tide, could you have done so on the next tide?—No, we would have done it on the next daylight tide, two tides later. You would have had to keep her for two tides?—Yes. What would you have had to do, with regard to these notices that you had given?—We would have had to renew them all. Because, I dare say you know, they are sent around?—They are sent to everyone in that port. The President: You need not pursue this, after what I have said, need you?"

The learned President was referring again to that which he had said before when a similar question was put—that it was not a reasonable thing for those people to ask for a postponement of the launch. As far as danger is concerned there is no admission whatsoever, and the learned President manifestly meant that the question of danger must be proved, and there is nothing in what he stated to show that he was satisfied upon this point. Mr. Laing then asked the witness: "Leaving the launch in her condition, and being ready for the launch, would there be any danger to the ship herself, or to any of your men?" It is obvious that Mr. Laing did not think the President relieved him from the obligation to prove the danger. The answer of the witness was: "It is a very dangerous thing at all times to let a launch be delayed. It is a very critical moment, and the launch might take charge, and go off at any moment, and with risk to both life and property in the yard." If that evidence stood alone, uncross-examined to, it might be unnecessary to consider the matter any more, but counsel for plaintiffs, in cross-examination, asked these questions: "You have a hydraulic stopway for this purpose?—We have, yes. Did you mean what you said in your letter to the captain of the schooner *Frances*?— Certainly. You did?—Yes. And, of course, if she is in the line of the launch she will be in serious

danger, will she not?—Well, in the possible line of the launch; you cannot say what way the launch will come off. And if she is in the possible line of the launch, she is in serious danger, is she not?—Not in serious danger. There are many chances against her being struck. And many chances in favour of her being struck?—I should say one in twenty, perhaps. And you took the chance?—It was the lesser chance."

Now, I do not want to lengthen my judgment, but in the earlier part of the evidence there was evidence given plainly enough to indicate that the view was not unreasonable that, if you had got a hydraulic stop there, even though you had knocked away the wooden support, yet still, generally speaking, the hydraulic stop would be quite enough to keep the launch in its position on the ways until the time of launching came. I should hesitate if there was a finding specifically by the learned President on this matter of fact, but when one reads the other part of the evidence one sees the really great effect that the postponement of twenty minutes, or whatever the time was, had upon the tide and upon the direction which the launched ship would take; and one notices that if the ship had taken the line which she might have been expected to take if she had been launched at 12.30, the risk of striking the ketch would have been very small. I think it was really very small at the time, and that is the opinion not only of the witnesses for those who had charge of the launch, but it is the expressed opinion of the master of the ketch. His opinion is that if it had not been for the increased force and altered direction of the tide between 12.30 and the time when the launch actually took place, the launch really would have been effected without any danger or any substantial danger of collision. With regard to the question as to whether in the circumstances the risk of launching was one which those in charge of the launch might reasonably, as reasonable men, take, I think there is a good deal to say for that, and I should not be disposed to differ from my brethren, who have a strong view upon that question. As to the question of the choice of the lesser evil, there is evidence both ways as to what would have been the danger of postponing the launch; but again I say that I shall not differ from my brethren.

I think I ought to call attention to one or two observations which the learned President made in the course of his judgment—a judgment in which he found the *Highland Loch* solely to blame. Of course a possible finding would have been that they were both to blame, and *primâ facie* I should have been disposed to agree with that view. I have not the slightest doubt but that the ketch was to blame; but as to the *Highland Loch* I can only say that if those in charge of the launch took the view that there was danger to life and property and that they would take the risk, I think the facts are such as to justify a verdict against them, whether it is the common law verdict against them, or whether it is an Admiralty verdict against them—which would give them the benefit of both to blame.

The learned President in his judgment said: "The attitude taken by the master was in substance this: I cannot heave my anchor, and will not slip my cable, unless you will pay, or be answerable for it, or for a new anchor, and take my ketch away in safety." One must bear in mind in this case that the ketch would never have been put in the position in which she was if it had not been for the fact that the Cunard Buoy had been taken away and that the moorings were left at the bottom of the river, and were left there a source of danger; and that this was done at the instance of those who had the launching of the *Highland Loch*, who paid half the expenses of the removal of the buoy. The learned President continued: "The answer of Lang, the messenger sent to the ketch by the defendants, in substance, was: I have nothing to do with paying for an anchor, and I have no authority to become answerable for it; but, if you will slip your cable, I will tow you away to a place of safety. At the request of the master of the ketch, the tug made fast in order to draw her up to her anchor, and tried to heave her anchor, or to get her clear in that way." I have already read the paragraph with regard to the hope and expectation of the master of the ketch, and the letter written by the defendants. I have already said that I think it is possible to come to the conclusion that although that letter did express a fear of an accident to person and property, yet in fact those who conducted the launch may have thought there was no substantial danger. I say nothing more, excepting that the law is laid down by the President as follows: "If proper notice is given, vessels navigating the river or anchored in it must take all reasonable precautions to avoid a collision. On the other hand, those intending to launch a vessel must take precautions—and the utmost precautions—against any injury being caused by the launch; and the burden of showing that such precautions have been taken lies upon those managing the launch." These precautions are necessary, not merely to safeguard property, but to protect lives which may be in danger. For this purpose, amongst other things, there is a duty upon those about to launch a vessel to keep a good look-out and, before giving the final order for launching, to ascertain that no ship is passing or lying near so as to be endangered by the launch: (*The Blenheim*, *sup.*; *The Vianna*, *sup.*). The learned President continues: "As to the two vessels which collided, I am of opinion that the master of the *Frances* was at fault in not slipping and buoying his anchor, and dropping, or being towed to a place of safety. He had no right to make it a condition before taking the proper steps which good navigation required him to take in order to perform his obligation, that the anchor should be paid for"—I agree he had no right. "The question is not whether his conduct in making the demand in the interest of his owner was reasonable conduct in a servant; but whether he took reasonable steps in navigation to avoid danger." The learned President, after referring to the cases of the *Cachapool* and *Davies* v. *Mann*, said in the *Cachapool* the steamer at anchor in the river was held alone to blame. That case must be looked at in the light of the particular facts. The steamer there was, although late, being towed away, and there is nothing to show that the launch was ordered with the anticipation or expectation of danger, and with the threat that those managing it would not be responsible for loss of life or injury to property. Moreover, the court held that the launch was 'delayed as long

as it was prudent to do so.' I am not sure whether that phrase was intended to convey that the court was satisfied that 'the launch could not with safety to life and property be further delayed,' as pleaded in par. 5 of the defence. In the present case, there was some slight evidence that 'it would not have been safe to postpone the launch altogether.'" — I think there was very strong evidence, which I have read—"but it fell far short of establishing the plea of danger to life and property, and indeed the defendants' counsel did not contend that the plea had been established, or reply upon it as a defence." I think that must be a mistake, because Mr. Laing is always particularly careful, and he takes the exactly opposite view. The learned President continues: "In the present case, the defendants, for their own purposes, determined to launch at the particular tide, whatever the consequences might be to the plaintiffs' vessel, and its crew. They did so to the plaintiffs' injury." I unhesitatingly say myself that if that statement of fact by the learned judge is correct, the judgment as delivered by him ought to stand, and that the *Highland Loch* ought to be found solely to blame. I wish to say in the most emphatic manner that if it be true that "the defendants, for their own purposes, determined to launch at a particular tide, whatever the consequences might be to the plaintiffs' vessel, and its crew," the *Highland Loch* was in the wrong." The learned President concludes: "This being so, the plaintiffs' negligence does not excuse the defendants, because they could, by the exercise of care, have avoided the mischief which their deliberate action caused." As I have said, those statements by the learned judge which I have just read are statements of fact, which certainly are not uncontradicted by the evidence. There is direct evidence on the one hand that those who were conducting the launch, notwithstanding the letter written, really thought, as the master of the ketch thought, that there was no serious risk, and that at the moment when the launch began there was not any risk. Also, there is strong evidence that there was so much danger to be anticipated from the postponement of the launch that this choice of the lesser evil arose. When one considers what they really did, we cannot leave entirely out of consideration the fact that the demand for payment in case the anchor was really lost was causing the dilemma in which the unfortunate vessel was. In all the circumstances I think the decision of the learned President cannot stand, and must be reversed on the ground I have mentioned, and I do not think, as at one time I thought might be the case, that we ought to find both to blame.

Fletcher Moulton, L.J.—This is a case which turns upon the conflict of duties that arises when the parties are put in a position of danger and difficulty by the improper action of one of them, and the decision of the court in such a case must, in my opinion, turn upon the facts in the particular case; and a very small difference in the facts of two cases may lead the court to come to different conclusions in the two cases. Therefore I think it of very little value to discuss as a preliminary part of my judgment hypothetical cases, so as to lay down a rule of law. It is better to ascertain the exact facts of this case, and then see if there is any doubt as to the rule of law which we ought to apply. Further, I think in such cases the court is bound to pay very close attention to the evidence. It is the duty of the parties to put evidence before the court as to the facts of the case, sufficient to enable it to draw the necessary legal inferences.

What are the facts of this case? The accident occurred on the occasion of the launching of a vessel from the shipyard of Cammell, Laird, and Co. The launching of a vessel on tidal waters is unquestionably a proper and lawful user of the river. It is a user of a very peculiar kind. To a certain extent it is for the moment an exclusive user, which interferes with the ordinary lawful user of the waters by ships going up and down. On the other hand, if it is a lawful user, the persons who are using the highway must, on the rare occasions that such an event happens, respect it and adapt their conduct to the necessities of the launch. In the present case the plaintiffs' ketch came into the river at a time when all proper warnings and notices had been given that this launch was to take place at 12.30. In addition there was all the display of flags which is associated with a launch, and two tugs were out with flags on them. I should have thought it was reasonable to suppose that vessels coming into the Mersey and knowing launches might take place would have paid sufficient attention to these signals, and would have known what was going to occur. However, the evidence is that the plaintiffs' master did not know of it until he cast anchor in a place nearly opposite the shipbuilding yard, and unfortunately his anchor fouled some moorings.

Now, a launch has to be prepared for. The ship must be built in a perfectly stable position. The consequence is that, as everyone knows, there are very solid though temporary structures built round it, so that it is in a position of complete safety during the long period occupied in its building. When you come to the time of the launch, for hours before the launch you are taking away all these structures which give stability and safety to the ship while being built, and at last you come to a condition in which the ship is unquestionably in a most insecure position as it lies; and can be freed and allowed to go into the water by the mere release of the hydraulic brake. These operations of freeing the ship of supporting structures had been going on from six o'clock in the morning, and therefore it takes, even with the strong gangs of the shipbuilding yard, something like six hours to free the ship. So far as I can see the position of the plaintiffs' vessel was discovered about 10.30, and warning was given to it to clear out of the way. That was repeated at 11.30, and then, finally, there was a very express intimation to the master that he must get out of the way a little after twelve o'clock. What was the position he took up? He took up the position that he had come there, his anchor was fast, and being there he had a right to remain there, and he could name his own terms for going. In my opinion he was entirely wrong. He had no business there. The reasonable user at that moment of the waterway required that the position in which he was should be left vacant for the purposes of the launch, and even though he could not go away without some inconvenience to himself, yet he was bound to do so in order to leave the proper user of the waterway for the launch on the occa-

sion on which it was fixed. The user of the highway is a good example of the proverb "Live and let live." People have to use it reasonably, respecting the fact that their fellow-countrymen also have the power of using it reasonably.

I do not think there was any doubt in the court below, nor is there any doubt in the mind of any of us, that the position which the master of the ketch took up was thoroughly unreasonable. It was a position in which he was not exposed to serious inconvenience in clearing away. All he had to do was to slip and buoy his anchor, and when he came back he could get hold of the chain and be in exactly as good a position as he was at the moment when he was required to go away. He stubbornly refused to go and his refusal in all its details shows that he took not only a thoroughly unreasonable position, but he was attempting to use the position which he had accidently acquired, and which he had no right to maintain, for the purpose of gaining an advantage. He offered to go if they would give him a new anchor. He had no right to make such terms at all. His duty was to do all he reasonably could to permit the launch to go on. What was the consequence of this? In my opinion it created a position in which the defendants were obliged to choose between two evils. One was to postpone the launch: the other was to let the launch take place; and I further say that the necessity of choosing between those two evils arose at the last moment and after twelve o'clock was past; in other words, when the launch was all ready to take place, when the vessel was absolutely denuded of the structures which had rendered it safe during the period of building, and when there was only a slight, though no doubt efficient, obstacle, which prevented it from going into the water of its own accord.

The defendants put forward plainly in evidence the danger of postponing the launch at that late hour, and the reason why I differ from the conclusions to which the learned President came is that I think that he did not appreciate the seriousness with which the defendants insisted on this, which I consider to be their true defence, and the absolutely uncontradicted character of the evidence in its favour. I have gone through the evidence, and I find that no evidence at all was given by the plaintiffs upon this point—not even expert evidence—but when the yard-manager of the defendant company was called he says, "We started at six o'clock in the morning to remove the shores and keel blocks, and we were working at that right up to about twenty minutes past twelve. When you have taken these shores and keel blocks away, is it safe, or not safe, to postpone the launch altogether?—It is not safe. What might happen? The vessel might go off the ways. Go off, on her own account?—Go off, on her own account, also the ways might possibly sink below her."

Then a little later he is cross-examined in this way: "Suppose you had known, by launching when you did, that four men would have been drowned, would you still have launched the *Highland Loch?*—No, I do not think I would. You could have avoided that. You would have kept her there?—I would have tried to. And you could have done so?—I am not sure. You have a stop-way, have you not, that prevents her going into the water until you want her to go?—Yes. And until you remove the stop-way she will not go. Will she?—No. And it is a hydraulic stop?—It is. And I suppose you can get cables, if necessary, to hold her, can you not, to strengthen your stop-way, if you do not feel very confident about it?—It would be a difficult matter. But you could do something, I suppose, could you not?—Yes. You knew there were men on this craft?—Yes."

Then he is cross-examined on these lines: "If you were certain there would be a fatal accident if you launched, would you postpone the launch?" and I cannot think how any humane man could say otherwise than that if he knew it was going to be fatal to his fellow-creatures he would have accepted whatever risk there was and postponed the launch. But that carries the plaintiffs' case with regard to it a very little way. In re-examination counsel for the defendants goes into the matter fully:—"With regard to the launch of the *Highland Loch* you told me, I thought I might have misunderstood you, that the vessel might launch herself.—She might. Then you were asked by Mr. Bateson whether you had not to remove the stop-way?—Yes. The two answers do not seem to me to be consistent. Can she launch herself notwithstanding the stop-way?—Something might go wrong with the stop-way. You mean the stop-way might remove itself?—Yes. Well, would it be safe, supposing you had wished to postpone this launch, to leave her without putting back these shores and stops and dogs, whatever you call them?—It would not. And would it be a safe job for the men to put them back?—No, it would not." The President: 'Was it an apprehension of some possibility of danger that made you go on with the launching, or the fact that you had made all preparations for it?'—The possibility of danger."

I take next the evidence of the manager of the shipbuilding department, Mr. William Boyd. He is asked: "I want to ask you about the danger (if any) of postponing the launch. Supposing you had not launched her that tide at all, what would have had to have been the course adopted by you, about giving notices, and the danger there may have been (if any) to your people?—Well, we would have had to have renewed the notices."

Then the President interrupts and observes: "With as much difficulty as there was, Mr. Laing, I do not think it was reasonable to ask these people to postpone the launch till the next tide," and Mr. Laing says: "The object of my question was to meet an observation your Lordship made yesterday, as to whether there was any possible risk to their own people by keeping the launch suspended without some proper supports." Then the President says: "Yes, you asked him about the next tide. His waiting another quarter of an hour or twenty minutes is another matter. I do not think it was reasonable to ask these people in the face of as much difficulty as there was to postpone it till another tide. The danger of postponing it on this tide for another quarter of an hour or twenty minutes, that is another thing." Then, in my opinion, Mr. Laing finishes that point by one question. He asks the witness: "You put it off for a quarter of an hour, and that quarter of an hour made the ebb tide stronger, you told me?—Yes. Supposing you

had had to postpone it for a tide, could you have done so on the next tide?—No, we would have done it on the next daylight tide, two tides later."

What I refer to is this: I think the learned President did not see that the postponement increased the danger. The conditions of this river are very clearly described. While the flood tide is still going up in the centre, near high tide, there comes an ebb tide running down by the side. If that is very weak a launch can shoot through it to the middle and then it follows the flood tide and goes in the direction of the flood. If, however, the ebb tide near the shore is strong, while the launch is passing through the region of the ebb it gets turned in the direction of the ebb; and it was its being turned in that direction, contrary to expectation, which made it strike the ketch. This idea of the President that the reasonable course would have been to wait twenty minutes more shows that he had omitted the complicated nature of the position and the unseen dangers which might have arisen. In my opinion every minute of postponement would have increased the danger, and therefore the defendants' manager was in this position: he must decide at once which was the right thing to do, because if he postponed it the danger got greater to the ketch, and in fact soon the only way would have been to postpone the launch for a couple of tides, with all the attendant danger to the defendants' own men. But the President says. "You need not pursue this after what I have said, need you?" Then Mr. Laing asked this question: "Would there be any danger to the ship herself or to any of your men?—It is a very dangerous thing at all times to let a launch be delayed. It is a very critical moment, and the launch might take charge and go off at any moment, and with risk to both life and property in the yard." Now, if one thinks of what the consequences would be of a launch taking place not at the proper time but taking place while they were securing the vessel, waiting for the next tide, when probably there would be vessels going up and down in front of the shipyard, one sees that the dangers of postponing the launch were serious; and, unless we are to disbelieve this witness, he, as a man of experience, thought they were greater than the dangers of letting the launch go on, because he distinctly says he took the lesser chance of doing damage. That is the whole of the evidence with regard to the consequences of postponing the launch.

Now let me turn to the evidence of the probable consequences of allowing the launch to take place. Here we come to a very strange state of things The plaintiffs' evidence—evidence of fact given by two men, the master of the ketch and, I think, the mate—is emphatic that there was no danger at all in their opinion.

The master is asked these questions: "How did she come?—She came off and then turned stern down towards us. She would have gone away clear of us if she had gone straight off altogether. She came half off, and then turned stern towards us. When you were hung up by the moorings were you lower down the river?—Just below the line of the yard. Do you know this place well enough to say whether you were opposite the basin, or whether you were opposite the yard?—No, I could not say exactly now. At any rate you were below the line of the launch?—Yes, just below the line of the launch. And if she had gone out straight, she would have gone out all clear, would she?—Yes."

Then he was asked: "Did you think she would touch you when she was launched?" and his answer was "No." Then the President says: "The question is, if the launch was going to take place, did you think you were safe?—Yes, I did not think she was coming on us. Do you mean that if the vessel was launched, you would still be safe?—Yes, I thought the vessel would come off above us." The other witness called for the plaintiffs, Frederick Murt, was asked by Mr. Laing, "Did you think you were in any danger from the launch before it came off?—No, we did not know if the ship was in danger, or not. Did you think so?—No." The consequence is that the effect of their evidence is that there was no ground for thinking there would be a collision. When I turn to the evidence called on behalf of the defendants, it indicates that the danger of the ketch being struck was very slight. The yard-manager says, "I thought there was a slight risk." Then he was asked, "But you were willing to run it?" He answered, "I thought it was so very slight." Again, Lang, the assistant yard-manager, says, "There was very little danger." Counsel then asks, "But you thought there was some?—Very little." Then, in the evidence of Mr. Boyd, this passage occurs: "So far as your experience taught you, did you think the *Frances* was in a position of serious danger?—Not serious. I thought it safer to warn the ship to get out of the way. The question I asked you was did you think she was in a position of serious danger or in a position in which you ought to warn her?—Not of serious danger." Then the witness is asked: "And if she is in the possible line of the launch, she is in serious danger, is she not?—Not in serious danger. There are many chances against her being struck. And many chances in favour of her being struck?—I should say one in twenty, perhaps. And you took the chance?—It was the lesser chance." I have read the whole of the evidence and I intend to abide by the evidence as to the consequences of the two alternative courses of conduct.

In my opinion the manager of the defendants realised that there was a serious danger in postponing the launch, and certainly he must have realised that the magnitude of the risk of an accident arising from such circumstances would be very much greater than the magnitude of an accident arising from collision with the ketch. I think it is clear also that everybody thought that the danger from collision if the launch took place at once was remote, and I am quite satisfied that the manager realised that the general danger would be increased by delay, and that he must act at once.

Now, what is the legal principle to be applied? In my opinion, if by their unreasonable conduct the plaintiffs put the defendants into a position where there had to be an immediate choice of one of two actions, both of which involved risk, they do not succeed in their case unless they show that the choice which under those circumstances the defendants made was one which was negligently and improperly made. They do not succeed if they say, "You knew that the course which you took brought with it a risk of injury,"

The defendant has a right to say, "You didn't give me the opportunity of avoiding danger—danger to life in this case—and our duty was to do that which minimised the danger." On the evidence I am satisfied that that is what the defendants did; but even if I was not satisfied it is for the plaintiffs in such a case as that to satisfy me that the choice that the defendants made was an unwarranted one. It is no use saying that letting the launch go was an act and that not letting it go was doing nothing. There are cases when doing nothing is as much an act and as responsible an act as doing something; and in this case the leaving the ship in that position instead of letting her go into the water was in my opinion reasonably considered by the defendants to be causing a greater risk to life as well as to property than to let her go and to complete the launch as was intended.

For these reasons I am of opinion that no case of negligence or improper conduct has been made out against the defendants, and that those in charge of the plaintiffs' ship were solely to blame.

I cannot but think from the very accurate enunciation of principles of law which I find in the judgment of the President, that he would have come to the same conclusion if he had not by inadvertence thought that he was relieved from considering the question of the danger of postponing the launch by reason of its not being relied upon as the main line of defence.

I feel satisfied that it was relied upon and relied upon as the first line of defence, but I can understand how it was that the President thought that the defendants' case was a different one, for this point on which they, in my opinion, succeed is very shortly stated, and the evidence is very conclusive, but they have raised before us a second line of defence which, I confess, I have not understood, and which I feel incapable of formulating; but just because it is not so conclusive and was not so clear and definite it certainly occupied the majority of the time during which counsel for the appellants were addressing us. I cannot help thinking that by holding on to this second and weaker line of defence they must have made it loom so large in the mind of the President that he forgot it was only a second line of defence and that there was a first and impregnable one, which rested on the evidence and the short principle that if by your own fault you put a man into a position where he is obliged to choose between two evils, then, if there is no negligence in his choice, but he chooses what he honestly believes to be the lesser evil, you cannot blame him.

Buckley, L.J.—There are two questions to be decided—first, whether the ketch is to blame; and, secondly, whether the launch is to blame. It is not worth while to discuss the first question at any length. The President, from whom this appeal is brought, all the members of this court, and our assessors are all of opinion that the ketch was to blame. The President summarised the evidence upon this part of the case in these words: "The attitude taken by the master was in substance this: I cannot heave my anchor, and will not slip my cable, unless you will pay, or be answerable for it or for a new anchor, and take my ketch away in safety." The answer of Lang in substance was: "I have nothing to do with paying for an anchor, and I have no authority to become answerable for it; but, if you will slip your cable, I will tow you away to a place of safety." Upon that the President says: "The master of the *Frances* was at fault in not slipping and buoying his anchor and dropping, or being towed to a place of safety. He had no right to make it a condition before taking the proper steps which good navigation required him to take in order to perform his obligation, that the anchor should be paid for, or that an undertaking should be given to pay for it, or to replace it." In all those observations I entirely agree. If I had myself to travel through the evidence, there would have been some further observations which I would make, but they would not have been in favour of the master of the ketch. As regards our assessors, a question was put to them as to what was the reasonable course for the master of the ketch to take, and they said he should have slipped his cable, provided the tug kept hold of him, towed him to a place of safety, and brought him back to his cable. That was offered him, and he refused. To state the position in my own words, it was this: The ketch had sustained a misfortune. She was coming up dragging her anchor, and it caught in some moorings and she could not lift it. She had no business to be there in the sense that though this was a highway for the use of all vessels, it was reasonable at this moment that the ship being launched should use it. The defendants were entitled for the purpose of the launch reasonably to say to persons navigating the river: "Go away, I am going to make an extraordinary use of the highway for a short time." The master of the ketch was bound to act reasonably. He had, as I have said, become entangled and could not go unless he did a very simple act. He was not permanently fixed to the anchor. The anchor may have been said to have been for the moment inextricably fixed to the bottom, but he had only got to slip and buoy his cable and he could be taken away in safety and brought back in safety. There was no difficulty about the matter at all. He refused to do it, and under those circumstances he was, in my opinion, to blame for not clearing the highway for the proper user of the highway by the launch for a temporary purpose.

The second question is this: Was the launch to blame? Here the learned judge says this: "It was not proved to my satisfaction that, apart from inconvenience and possible cost, there was any danger in postponing the launch." He also says: "There was some slight evidence that 'it would not have been safe to postpone the launch altogether,' but it fell far short of establishing the plea of danger to life and property; and, indeed, the defendants' counsel did not contend that the plea had been established or rely upon it as a defence." This case, I think, shows the disadvantages that arise from postponing a judgment. You lose all the advantage of dealing with the matter when the evidence which has been adduced, and the arguments which have been presented, and the incidents that have occurred in the course of the trial are all present to the mind. The learned President postponed his judgment for six days, and it is plain that he had forgotten what had taken place in the course of the trial.

It is clear that the learned judge said he was satisfied upon the question of the danger of postponing the launch till a later tide than this one, but that as to postponing till a later moment on this tide, that was another matter. The President said to counsel for the defendants: "You need not pursue this after what I have said, need you?" That, to my mind, is perfectly plain—that the President was saying, "I have told you that I am satisfied as regards the danger of postponing to a subsequent tide, although I am not satisfied as to the danger of postponing to a later moment on this tide." It is clear that with regard to the danger of postponing the launch to a later tide, counsel for the defendants had been relieved by the learned President of the obligation to call further evidence. In those circumstances it seems to me that the fact that there was substantial danger to life and property in postponing the launch to another tide is a matter which must be taken to be established in this case. In that state of things what was the position of the owner of the launch? There was this ketch lying in the river, and I am satisfied, if it is material, that the mental attitude of the master of the ketch was that it was perfectly safe. What was the mental attitude of the owner of the launch? Upon the evidence I hold that to his mind there was some risk as regards striking the ketch, but that it was a negligible risk. It was a possibility—the thing might happen, and in point of fact it did happen—but his position of mind was that he thought it was a negligible risk—a factor in the situation which he had to bear in mind, but not the only factor to be borne in mind. The other significant factor was this: that if he did not launch on this tide he was confronted with this danger—there was the ship in a position in which she was held up by the hydraulic stop, and which, if a gale got up, might, I suppose, be blown over, and which, if the tackle gave way, might take charge and launch herself at any moment. Unless he launched on this tide he had to face that state of things. Moreover, he could not launch on a later tide without serving fresh notices. In the meantime he was in peril. He must either leave the ship as it was and take the risk or he must replace the shores. On the evidence I think it is established that there was a serious danger to life and property, and he was confronted with this state of things: "There lies that ketch in the river; I may strike her. I do not think I shall, but it is possible I may. It is a slight and a negligible risk. On the other hand, I am confronted with this: that, unless I launch within the next five minutes, I have to face the possibility of this ship launching herself, and the public generally will be at great risk on resuming the ordinary navigation of the river." What was he to do? Can it possibly be said it was unreasonable of him, taking all the circumstances, to accept the risk of striking the ketch? To my mind it was not unreasonable. It was perfectly plain he had done everything reasonable by way of seeking to induce the ketch to go away, and in my opinion there was no negligence, in this state of facts, in letting the launch go on. If that be so the defendants, owing a duty to the ketch and also to others who might be injured by the course which they chose to take, reasonably discharged their duty to all those to whom they owed a duty by accepting the responsibility of launching the vessel as they did.

For these reasons, in my judgment, the defendants were not to blame, and there was blame to be attached to the ketch.

I only want to say one word on a sentence of the judgment of the learned President: "In the present case, the defendants, for their own purposes, determined to launch at the particular tide, whatever the consequences might be to the plaintiffs' vessel and its crew." If the evidence had established that state of facts I should have agreed with the judgment of the President, but I desire to say that to my mind the evidence does not establish that state of facts. I think that by the stubborn, obstinate conduct of the master of the ketch the defendants were placed in a position of considerable embarrassment and difficulty, and I think they adopted the reasonable way out of it, and were not considering their own purposes only and disregarding the consequences to the ketch. I think they were weighing all the consequences which they ought to have weighed and which would determine their course of action; and I think they adopted a reasonable course of action. In my opinion judgment ought to be entered for the appellants, and the ketch *Frances* pronounced alone to blame.

Solicitors for the appellants, *Rawle, Johnstone, and Co.*, agents for *Laces and Co.*, Liverpool.

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

HOUSE OF LORDS.

Monday, Oct. 30, 1911.

(Before the LORD CHANCELLOR (Loreburn), Lords ATKINSON, SHAW, and MERSEY.)

BROWN AND ANOTHER v. TURNER, BRIGHTMAN, AND CO. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Time charter—Exceptions—Strikes.

A ship was chartered under a time charter which contained the following clause: "Mutual exceptions: The owners and charterers shall be mutually absolved from liability in carrying out this contract in so far as they may be hindered or prevented by" (inter alia) *"strikes." The charterers in good faith, in the ordinary course of trade, sent the ship to load a cargo of coal at a port where to their knowledge there was a strike at the collieries. The ship could have been employed in other ways, but was retained by the charterers within the area of the strike. In consequence of the strike she was delayed for some time in obtaining a cargo.*

Held, that the charterers were liable to pay the agreed hire for the period of such delay.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal (Cozens-Hardy, M.R, Fletcher Moulton and Farwell, L.JJ.), who had reversed a judgment of Bray, J. upon a special case stated by an arbitrator.

The question arose under a time charter-party, dated the 16th Oct. 1908, of the steamship *Zambesi*,

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

made between the respondents as owners and the appellants as charterers, by which the *Zambesi* was chartered for a period of twelve months, renewed by agreement for a further period of twelve months. It appeared that during a colliery strike in New South Wales in the early part of 1910 the charterers were prevented from loading a cargo of coal on board the steamer at Newcastle, N.S.W., for an intended voyage to Manila. The arbitrator found that when the charterers ordered the steamer to Newcastle they knew that a strike was in operation, and that there were other trades in which the steamer might have been employed which would not have been interfered with by any strike.

The charter contained the following clause:

Mutual exceptions: The owners and charterers shall be mutually absolved from liability in carrying out this contract in so far as they may be hindered or prevented by [*inter alia*] strikes.

In view of this clause the arbitrator determined that the hire ceased to be payable for the period in question subject to the opinion of the court. Bray, J. delivered judgment in favour of the charterers, holding that the charterers, having sent the steamer to Newcastle *bonâ fide* and in the ordinary course of their business, it was no answer to say that they might have sent the ship elsewhere and perhaps obtained another cargo. The shipowners appealed to the Court of Appeal, which set aside the order of Bray, J., holding that the charterers had not been hindered or prevented in carrying out the contract merely because the strike prevented the most beneficial use of the ship.

Atkin, K.C. and *Leck* appeared for the appellants.

M. Hill, K.C. and *Adair Roche*, who appeared for the respondents, were not called on to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The Lord Chancellor (Earl Loreburn).—My Lords: I agree with the conclusion at which the Court of Appeal has arrived.

The question is a very short one. It turns upon the construction of a clause in this charter-party—whether the charterers were prevented from carrying out this contract by the strike. If by carrying out the contract is meant merely performing the obligation due from the charterers to the owner, or the owner to the charterers, then it is quite clear that the strike did not prevent the charterers from paying the hire of the ship. If upon that clause it can be said that the charterers were prevented from carrying out this contract because they were prevented from enjoying the rights bestowed upon them, then equally I think that the strike has not prevented that. They used all their rights all the time. They took the ship to the port; they chose to keep her there, but the only misfortune was that they could not get a cargo. It was no part of the obligation of the owners to see that they got a cargo. To my mind the real meaning of this clause is that placed upon it by the Court of Appeal. Even if it were not so I do not think that the appellants could succeed, for the reasons which I have stated.

Lord Atkinson.—My Lords: I concur.

Lord Shaw.—My Lords: In this case the arbitrator found that there were other trades in which vessels might be employed within the limits of the charter which would not have been interfered with by any strike. That has been put in purposely by the arbitrator in order to have some effect given to it. When I look to the contract I observe, as is usual in such cases, that the charterers have a right to direct the movements of the vessel. In sending this vessel at a certain date they knew that they were sending it within the area of the strike. Under the charter-party it was clear that they had the power of withdrawing it from the area and placing it elsewhere, and according to the finding of the arbitrator they could have done so, so that the vessel might have been employed in carrying cargo during that period. They, however, exercised the option of retaining the vessel within the area of the strike.

Under those circumstances I do not see my way to differ from the view reached by the Court of Appeal on the construction of this clause. The same result is reached by the fact that the charterers have themselves to blame for the results which have followed, and they cannot rely upon this clause.

Lord Mersey concurred.

Judgment appealed from affirmed, and appeal dismissed.

Solicitor for the appellants, *J. Wicking Neal.*

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

Friday, Nov. 3, 1911.

(Before the Lord Chancellor (Loreburn), Lords Atkinson, Gorell, and Shaw.)

E. Clemens Horst Company *v.* Biddell Brothers. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Sale of goods—C.i.f. contract—Payment—Tender of shipping documents—Sale of Goods Act 1893 (56 & 57 *Vict. c.* 71), *ss.* 28, 34.

Where goods are sold under the terms of a c.i.f. contract for net cash the buyer is bound to pay for the goods on tender of the usual shipping documents, even though the goods have not arrived at their destination.

Judgment of the Court of Appeal reversed.

Appeal from a judgment of the Court of Appeal (Vaughan Williams and Farwell, L.JJ.), Kennedy, L.J. dissenting, reported 12 Asp. Mar. Law Cas. 1; 104 L. T. Rep. 577; (1911) 1 K. B. 934, reversing a judgment of Hamilton, J., reported 103 L. T. Rep. 661; (1911) 1 K. B. 214, at the trial before him without a jury.

On the 13th Oct. 1904 an agreement was entered into between the appellants of the first part and Messrs. C. Vaux and Sons, of Sunderland, of the second part, whereby it was agreed that the parties of the first part were to sell to the parties of the second part 100 bales equal to or better than choice brewing Pacific Coast hops of each of the crops of the years 1905-1912 inclusive. The hops were to be shipped to Sunderland. The parties of the second part were to pay for the hops at the rate of 90s. sterling per 112lb., c.i.f. to

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

London, Liverpool, or Hull. Terms net cash, the contract to be severable as to each bale. The sellers might consider entire unfulfilled portions of the contract violated by the buyers in case of refusal by them to pay for any hops delivered and accepted hereunder or if the contract or any part of it be otherwise violated by the buyers. Time of shipment to place of delivery or delivery at place of delivery during the months (inclusive) of October to March following the harvest of each year's crop. And if for any reason the parties of the second part be dissatisfied with or object to all or any part of any lot of hops delivered hereunder the parties of the first part might within thirty days after receipt of written notice thereof ship or deliver other choice hops in place of those objected to.

On the 21st Dec. 1904 a second contract was entered into between the same parties which provided that the parties of the first part agreed to sell to the parties of the second part fifty bales equal to or better than choice brewing Pacific Coast hops, British Columbian hops, of each of the crops of 1906 to 1912 inclusive; the hops to be shipped to Sunderland. The parties of the second part were to pay for the said hops at the rate of ninety shillings sterling per 112lb., c.i.f. to London.

This second contract provided for cash payment, the severable nature of each bale, and continued in the same form as the contract of Oct. 1904.

On the 11th Aug. 1908 Vaux and Sons assigned both contracts to the respondents, and on the 28th Sept. 1908 the respondents gave notice to the appellants of such assignment. During the year 1909 the full quantity of hops was delivered under the contracts by the appellants to the respondents, but in no case were the respondents asked to pay for the same until they had been given an opportunity of inspecting them.

On the 29th Jan. 1910 the appellants wrote to the respondents as follows:

We are now ready to make shipment to you of the entire 150 bales 1909 crop of the contracted quality and according to the terms of the contract. . . . For the invoice price less freight we will value on you at sight with negotiable bills of lading and insurance certificates attached to draft, and if you wish we will also attach certificates of quality of the Merchants' Exchange, San Francisco, or other competent authority to cover the shipments.

This letter was replied to in the following terms:

We are prepared to take delivery of the fifty bales of British Columbian hops, contract the 21st Dec. 1904, and 100 bales of Pacific Coast hops, contract the 13th Oct. 1904, of the quality contracted for and on the terms of the contracts respectively. . . . It is in accordance with the universal practice of the trade and the custom adopted by you in your dealings with other purchasers of your hops, and it has also been your custom with our assignors to submit samples and the samples having been accepted to give delivery in bulk in accordance with the samples, but if you decline to adopt the usual and undoubtedly most convenient course we can only pay for the hops against delivery and examination of each bale. We cannot fall in with your suggestion of accepting the certificate of quality of the Merchants' Exchange, San Francisco.

On the 5th Feb. 1910 the appellants' solicitors, by a letter of that date to the respondents, refused to deliver the hops, alleging that the respondents' letter of the 1st Feb. was a breach of the contract, and the appellants never delivered or tendered the hops or any of them. After further correspondence between the parties and their solicitors the respondents on the 11th March 1910 issued a writ against the appellants, claiming 787*l.* 10*s.* damages for the appellants' failure to deliver the hops. The appellants delivered points of defence and counter-claim, alleging that it was not the appellants who had refused to deliver, but the respondents who had refused to accept the hops, and counter-claimed 525*l.* damages for non-acceptance of the hops. On the 3rd June 1910 the respondents delivered points of reply.

Hamilton, J. gave judgment for the defendants on the claim and the counter-claim on the ground that a tender of documents of title to the hops by the appellants constituted a sufficient tender of the hops; that a tender of the documents was dispensed with by the letter of the 1st Feb. 1910, and he assessed the damages at 175*l*.

The Court of Appeal set aside the judgment, and entered judgment for the plaintiffs on their claim and on the counter-claim on the ground that the ordinary rule of law applied and that the plaintiffs were only bound to pay against examined goods; that there was no agreement to the contrary, and that, as regards the counter-claim, even if there had been a breach by the plaintiffs, there was no evidence of any loss to the defendants, and as to this Kennedy, L.J. concurred. On the 30th March 1911 the court, with the consent of the parties, assessed the damages at 481*l.* 5*s.*, and judgment was entered for the plaintiffs on the claim for 481*l.* 5*s.* and on the counter-claim.

The defendants appealed to the House of Lords.

The Sale of Goods Act 1893 (56 and 57 Vict. c 71) provides:

Sect. 28. Unless otherwise agreed delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for the goods.

Sect. 34 (1). Where goods are delivered to the buyer which he had not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. (2) Unless otherwise agreed when the seller tenders delivery of goods to the buyer he is bound, on request, to afford the buyer a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

Sect. 62. "Delivery" means voluntary transfer of possession from one person to another.

Atkin, K.C. and *F. D. Mackinnon* appeared for the appellants.

Shearman, K.C. and *Eustace Hills* for the respondents.

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

The Lord Chancellor (Earl Loreburn).—My Lords: In this case there has been a remarkable divergence of judicial opinion. Hamilton, J. and Kennedy, L.J. holding one view, and Vaughan Williams and Farwell, L JJ. another. The contract, no doubt, is one of a special and

peculiar kind, as might be inferred from the difference of opinion to which I have referred. For my part, I think it reasonably clear that this appeal ought to be allowed. The admirable and remarkable judgment of Kennedy, LJ., illuminating, as it does, the whole field of controversy, relieves me from the necessity of saying much.

This contract is what is known as a cost, insurance, and freight, or c.i.f. contract, and under it the buyer was to pay cash. But when? The contract does not say. The respondents say on the physical delivery and acceptance of the goods when they have come to England. Sect. 28 of the Sale of Goods Act 1893 says in effect that, unless otherwise agreed, payment must be made on delivery—that is, on giving possession of the goods. It does not say what is meant by delivery. Accordingly, we have to supply from the general law the answer to that question. The question is, when is there delivery of goods on board ship? That may be quite different from delivery of goods on shore. The answer is that delivery of the bill of lading when goods are at sea may be treated as delivery of the goods themselves. That is so old and so well established that it is unnecessary to refer to authorities on the subject.

In my judgment, it is wrong to say, upon this contract, that the vendor must defer tendering the bill of lading until the ship has arrived in this country, and still more wrong to say that he must wait until the goods are landed and examination made by the buyer. Upon the counter-claim I am of opinion that the Court of Appeal were right. The result will be that Hamilton, J.'s order will be restored as to the claim, and that, as to the counter-claim, there must be judgment for the defendants, with 1*s.* damages, without costs.

Lords Atkinson, Gorell, and Shaw concurred.

Judgment of the Court of Appeal on the claim reversed. Judgment of Hamilton, J. restored. Respondents to pay to the appellants the costs in this House and below. Judgment on the counter-claim affirmed without costs.

Solicitors for the appellants, *Parker, Garrett, and Co.*

Solicitors for the respondents, *Nicholson, Graham,* and *Jones.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 20, 21, *and* 22, 1911.

(Before Vaughan Williams, Buckley, and Kennedy, L.JJ.)

Virginia Carolina Chemical Company *v.* Norfolk and North American Steam Shipping Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Loss by fire—Fire caused by unseaworthiness—Liability of shipowner—Exceptions in bill of lading—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 502.

The owner of a British sea-going ship is exempted by sect. 502 *of the Merchant Shipping Act* 1894 *from liability for loss or damage by reason of fire on board the ship where the loss or damage happens without his actual fault or privity.*

A bill of lading contained a clause providing that the shipowner was not responsible for any loss of or damage to the goods received for carriage occasioned by . . . fire or unseaworthiness, provided all reasonable means had been taken to provide against such unseaworthiness.

Held, by the Court of Appeal, that a shipowner is not deprived of the protection of sect. 502 *merely because the fire is caused by unseaworthiness, but that the operation of the section may be ousted by special contract and the owners be liable where a breach of the warranty of seaworthiness is proved.*

Decision of Bray, J. affirmed.

Trial of preliminary points of law by Bray, J. sitting without a jury.

The points of claim, so far as material, were as follows:

(1) The plaintiffs were the holders of a bill of lading dated the 18th Aug. 1910, signed by the master of the steamship *West Point* on behalf of the defendants as owners of the vessel, by which the defendants acknowledged that 8986 bags of sulphate of ammonia had been shipped in apparent good order and condition on board the vessel, to be delivered in like good order and condition at Charlestown. (2) The plaintiffs alleged that the defendants failed to deliver the goods in good order and condition or at all. (3) Alternatively, that the *West Point* was unseaworthy and unfit for the carriage of the goods on shipment and at the commencement of the voyage, as the fittings of a low-pressure oil tank containing 120 gallons of paraffin oil were defective, whereby the oil escaped on the 27th Aug. 1910 and became ignited and the vessel took fire and foundered with the goods on the 29th Aug. 1910.

The plaintiffs claimed the value of the goods, 11,785*l.*

The defendants admitted that the vessel took fire, and that by reason thereof she sank and the plaintiffs' goods were lost, but that the fire and consequent loss of goods happened without their actual fault or privity, and that by reason of sect. 502 of the Merchant Shipping Act 1894 they were not liable to make good the loss. They denied that the *West Point* was unseaworthy or unfit for the carriage of the goods, and, alternatively, that they were exempted from liability by the terms of the bill of lading, which provided that they should not be liable for

> Any loss, detention of, or damage to the goods, or the consequences thereof, or expenses occasioned by any of the following causes—viz.: . . . fire on board, in hulk, or craft, or on shore; explosions, heat, defects in hull, tackle, engines, boilers, machinery or their appurtenances, or accidents arising therefrom; perils of the seas. . . . and all accidents of navigation . . .; nor for any act, neglect, or default of the pilot, master, crew, stevedores, engineers, or agents of the shipowners . . . or by unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any other cause whatsoever.

By order of the court the following preliminary questions of law were tried before the trial of the

(*a*) Reported by Edward J. M. Chaplin and Leonard C. Thomas, Esqrs., Barristers-at-Law

action: (1) Whether the defendants could rely on sect. 502 of the Merchant Shipping Act 1894 in answer to the plaintiffs' claim based on unseaworthiness as alleged; and (2) whether the defendants were precluded from setting up the said section by reason of the special contract contained in the bill of lading.

Sect. 502 of the Merchant Shipping Act 1894 provides (*inter alia*) that "the owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases—namely: (1) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship. . . ."

Atkin, K.C., *Maurice Hill*, K.C., and *R. A. Wright* for the plaintiffs.—The defendants are not entitled to rely on sect. 502 of the Merchant Shipping Act 1894 as that section does not apply where there is a breach of the initial obligation to provide a seaworthy ship, and the loss involved in the present case was occasioned by such initial breach:

The Diamond, 10 Asp. Mar. Law Cas. 286; 95 L. T. Rep. 550; (1906) P. 282.

The section does not apply in this case, because the parties have superseded it by special contract.

Sir *R. B. Finlay*, K.C., *Bailhache*, K.C., and *Dawson Miller* for the defendants.—A proviso cannot be read into the section that shipowners are not to be protected where the loss by fire is due to unseaworthiness. The only exception provided by the section is where the loss is due to the actual fault or privity of the shipowner. No other exception can be implied. There cannot be the same implication in regard to a statute as to a contract. Sect. 503 of the same Act limits in certain cases the shipowner's liability for loss of life or injury or damage to property where such loss takes place without the shipowner's actual fault or privity, but it has never been suggested that the shipowner is precluded from limiting his liability if the ship was originally unseaworthy. There is no inconsistency between the bill of lading exceptions and sect. 502, and therefore the section is not superseded. The exceptions against liability in the case of fire and unseaworthiness are separate, and cannot be read together. The exception in the bill of lading should be read as limiting the shipowner's liability for loss by fire except when caused by his own privity or default. In Carver's Carriage by Sea (5th edit., sect. 76, p. 102) it is stated that the exemptions from liability by statute apply notwithstanding the form of the bill of lading.

Atkin, K.C. in reply.

Bray, J.—In this case the point in dispute is whether the liability of the defendants for damage by fire to the plaintiffs' goods is to be governed by the provisions of sect. 502 of the Merchant Shipping Act, and two questions have been formulated for my decision. They are—whether the defendants can rely on sect. 502 in answer to the plaintiffs' claim based on unseaworthiness as alleged in the points of claim, and whether the defendants are precluded from setting up the section by reason of the special contract contained in the bill of lading.

The first question is based on the assumption that the contract for the carriage of the goods by the ship in question contained no special terms relating to damage by fire; the second on the assumption that the goods were carried on the terms of the bill of lading referred to in the pleadings. If the plaintiffs are right as to either of the questions for the purpose of to-day they succeed. I have come to the conclusion that on the second point they are right, and, therefore, it might be unnecessary for me to answer the first question; but as it has been argued I think I had better state the opinion I have formed, although I cannot say that I am very confident that I am right. The question is undoubtedly a difficult one. The plaintiffs' contention is this:

Their claim, they say, is for damages for breach of the warranty of seaworthiness, and the section does not touch that warranty. The section is to be treated as creating an excepted peril, and according to *Steel* v. *State Line Steamship Company* (3 Asp. Mar. Law Cas. 516 (1877); 37 L. T. Rep. 333; 3 App. Cas. 72) excepted perils in a bill of lading do not, as a rule, relieve the shipowners from the consequences of a breach of the warranty unless so expressly provided. The defendants say that the words are perfectly general, and apply to all cases where there has been damage to goods on board by fire, and that to construe them in the way suggested would be to add to the section the words "unless caused by unseaworthiness." I have been referred to previous Acts, first the Act of George III. The section there has a similar ambiguity and does not help me.

The Act of 1854 contains a section in which almost the same language is used as in the Act of 1894. No doubt the Act of 1894 was to a large extent a consolidating Act. In 1854 the law was not as clearly settled as it has been since. It had, of course, been settled that there was the warranty of seaworthiness, but it was not, perhaps, fully realised how extensive that warranty was, and that it involved the obligation that the ship was properly protected against fire. Nor had it been decided that the excepted perils did not relieve the shipowners from the consequences of breach of the warranty. I think it is quite possible that the Legislature in 1854 had not in view the particular case which has arisen here. Under these circumstances I think my duty is to give to the words of the section their most literal interpretation. [His Lordship, having read the section, continued:] Construed literally, I think those words apply whenever there has been damage to goods by fire without the shipowners' actual fault or privity and that whether there has been a breach of the warranty of seaworthiness or not. This section was intended to apply in the absence of special provisions. There is always, in the absence of some special provision in a contract of carriage by sea in a ship, a warranty of the seaworthiness of the ship, and therefore the section is intended to apply to a contract where there is such a warranty; therefore in the absence of some special provision I think it applies even though there has been a breach of the warranty; in effect it limits the liability for such a breach. I

think the fact that the following section which limits the damages clearly applies to damage consequent on breach of the warranty tends to confirm the view I have taken. I think I must answer the first question in favour of the defendants.

I come now to the second question. It is conceded that it is open to the parties to exclude the section by their contract. *The Satanita* (7 Asp. Mar. Law Cas. 580 (1895) and 8 Asp. Mar. Law Cas. 190 (1896); 75 L. T. Rep. 337; (1897) App. Cas. 59) is sufficient authority on that point. That case also decides that the section need not be excluded in so many words; it is sufficient if it appears from the contract between the parties that they intended to exclude it. It becomes, therefore, a question of what is the true construction of this bill of lading.

In this bill of lading we have this provision, that the goods are to be delivered in the like good order and condition subject to the clauses and conditions expressed in this bill of lading, which constitutes the contract between the shipowners, shippers, and consignees. I think this is a strong indication that the bill of lading contains all the terms; if not in every case, at all events where these terms deal with a particular subject matter.

Now, there are three possible cases of damage by fire. (1) Where it is caused by accident; (2) where it is caused by the negligence of the master or crew, or, indeed, of anyone except the owner himself; and (3) where it is caused by some negligence or fault on the part of the owner. The bill of lading deals with each of these cases. The statute does the same. They both cover the same subject-matter. I think the parties, by providing expressly for each of these cases, have shown their intention to substitute their own provisions for the provisions of the statute. I think the fact that they followed the same course with regard to robbery tends to show the same intention.

It was strongly pressed on me that the provision in the bill of lading with regard to unseaworthiness is negative and not affirmative; but the parties are dealing with excepted perils and the form in which the earlier part of the clause is drawn made it more natural to put it in a negative form. Anyone, I think, reading the clause would conclude that it was clearly intended that the owner should be liable in case he had failed to take reasonable means to provide against unseaworthiness. My answer, therefore, to the second question is in favour of the plaintiffs.

The defendants appealed and the plaintiffs gave notice of a cross-appeal.

Sir *R. B. Finlay*, K.C., *Bailhache*, K.C., and *Dawson Miller* for the defendants.

Atkin, K.C., *Maurice Hill*, K.C., and *R. A. Wright* for the plaintiffs.

The arguments adduced in the court below were substantially repeated, and the cases there cited were again referred to, with the addition of the following:

Forward v. *Pittard*, 1 Term Rep. 27;
Amies v. *Stevens*, 1 Str. 128;
The Warkworth, 5 Asp. Mar. Law Cas, 194, 326 (1884); 51 L. T. Rep. 558; 9 P. Div. 145;
Sutton v. *Orient Steam Navigation Company*, 12 Com. Cas. 270;
Tattersall v. *National Steamship Company*, 5 Asp. Mar. Law Cas. 206 (1884); 12 Q. B. Div. 297;
Lyon v. *Mells*, 5 East, 428.

VAUGHAN WILLIAMS, L.J. read the following judgment:—This is a case in which two preliminary questions were ordered to be tried before the trial of the action.

The action is an action against shipowners for non-delivery of sulphate of ammonia shipped on board the steamship *West Point*. The preliminary questions are the following: (1) Whether the defendants can rely on sect. 502 of the Merchant Shipping Act 1894 in answer to the plaintiffs' claim, based on unseaworthiness, set out in paragraphs 3 and 4 of the points of claim. (2) Whether the defendants are precluded from setting up the said section by reason of the special contract contained in the bill of lading.

As to the first question, I agree entirely with Bray, J. If you read the general words of sect. 502 as qualified or limited by the warranty of seaworthiness implied by law, to so hold would be to change the words of the section from "a British sea-going ship" into "a British sea-going seaworthy ship." [His Lordship read sect. 502 of the Merchant Shipping Act, and continued:] I think that this section by clause 1 exonerates the shipowner from both the common law liability in cases of loss from fire and, what is perhaps more important in this case, from liability for loss of goods from fire, even though the cause of the fire may be the unseaworthiness of the ship. The answer to the first question is based on the assumption that the contract for the carriage of the goods by the ship in question contained no special terms relating to damage by fire. Bray, J. deals with the second question on the assumption that the goods were carried on the terms of the bill of lading referred to in the pleadings, and on this assumption comes to the conclusion that the plaintiffs are right, because the defendants are precluded by reason of the special contract contained in the bill of lading from setting up sect. 502 in answer to the claim of the plaintiffs.

The question is, as Bray, J. says, a difficult one. I have had great doubts in the course of the argument as to the proper answer to the second question, and have been not a little influenced towards the conclusion at which I have arrived by the opinion of Kennedy, L.J., whose experience and knowledge of the course of decision on questions of merchant shipping is very great. My doubts have arisen, not only on the question whether, according to the true construction of the bill of lading, its provisions are so inconsistent with sect. 502 as to warrant the conclusion that the parties to the contract of freight intended to preclude the shipowners from setting up sect. 502 as an answer to the claim of the plaintiffs in respect of the non-delivery of the goods on board the ship destroyed by fire, but have arisen also in respect of the question whether, when the terms of the contract contained in the bill of lading relied on as precluding the defence based on the statute are ambiguous, the statutory defence ought to be excluded, or whether the statutory defence only ought to be excluded when the intention to exclude is made plain by the terms of the bill of lading.

I know of no direct authority on the point, but I gather from the arguments of counsel on both sides that it was not substantially contested that, however difficult and ambiguous the construction of the bill of lading may be, yet if the conclusion of an intention to exclude the statute can be reasonably arrived at, that is sufficient to exclude the statute. The points on the bill of lading in favour of exclusion are, first, that the bill of lading says that the said goods are to be delivered in good order and condition, subject to the clauses and conditions expressed in this bill of lading, which constitutes the contract of freight between the shipowners, shippers, and consignees.

Then the clause, negativing the responsibility of the shipowner for loss or damage to goods occasioned by any of the following causes, expressly mentions fire on board, which was unnecessary if reliance was intended to be placed on the statute, although some effect might be given to the clause in respect of matters outside sect. 502, *e.g.*, where the loss did not occur without the actual fault or privity of the shipowner. Again, the last words of the catalogue of causes set out in the clause are "by unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any other cause whatever." The words of the proviso are certainly very different from and inconsistent with the words "without his actual fault or privity" which constitute a proviso on the general words of the section.

I only mention these points as being the most salient, for there were other points based on the words in the bill of lading which were urged upon us by the counsel for the respondents. It must always, however, be remembered that the whole of the clause on the face of it seems to be intended to be in favour of the shipowner, and in that sense to point rather to the extension of the protection afforded by the section and not to its exclusion. Mr. Bailhache, in his admirable argument on behalf of the appellants, accepted the proposition that what he was arguing for amounted to a contention that the section would prevail, even though the cause of the fire was the unseaworthiness of the ship and all reasonable means had not been taken to provide against the unseaworthiness and such unseaworthiness was the cause of the fire, the immediate cause of the loss being the fire and not the unseaworthiness. He pointed out that the words of the bill of lading relied on by the respondents were negative and not affirmative words, which one would have expected if the intention was to exclude the operation of the section. On the whole, I have come to the conclusion, not without doubt, that the decision of Bray, J. on the second question was right, and our judgment must be for the respondents, and the appeal dismissed with costs.

Buckley, L.J.—There were two questions to be decided in this case by the learned judge. At the commencement of his judgment, after reading the two questions, he said this: "The first question is based on the assumption that the contract for the carriage of the goods by the ship in question contained no special terms relating to damage by fire. The second is based on the assumption that the goods were carried on the terms of the bill of lading referred to in the pleadings." That, I think, was quite right. In fact counsel have argued it before us upon that footing, and I propose to answer the two questions upon the assumption there made. I think it is rather a pity that the order as drawn up did not introduce that assumption, and I think the learned judge's answer to the first question would have been more aptly expressed by saying, "upon the assumption that the contract contained no special terms relating to damage by fire, then answer the first question in the affirmative," but that is what he meant, and there is no question about that at all. I propose to deal with the two questions on those assumptions.

The first question is as regards the true construction of sect. 502 of the Merchant Shipping Act 1894. Apart from statute, a shipowner was at common law under two liabilities, the one being that of an insurer arising from the fact that he was a carrier and therefore bound to produce the goods which had been intrusted to him for carriage, and the other under an implied warranty of seaworthiness. The statute in the case of fire, if I rightly understand it, relieved him from both the first and the second of those liabilities if the fire happened without his actual fault or privity. It relieved him not only from the liability as an insurer, but also from the liability under an implied warranty of seaworthiness. To express the same thing in other words, the section is not to be read as if it were "the owner of a seaworthy British sea-going vessel"; it is the owner of any British sea-going ship, be it seaworthy or unseaworthy, shall not be liable for damage by fire unless it happens with his actual fault or privity. That is the construction which I place upon the section, and it answers the first question. If there is no special contract, then, according to my opinion, the defendants can rely on the section construed as I have construed it.

But in that state of things, and that being the liability of the shipowner, the contract was made which is contained in this bill of lading, and I think the true construction of the contract is this. I will read it as if the shipowner said: "I know that I am under these two liabilities, the one as insurer and the other under an implied warranty of seaworthiness, but I further know that in respect of both those liabilities I have the benefit of sect. 502 of the Merchant Shipping Act 1894, unless I contract myself out of the statute"; it is common ground that it is competent for him to do so if he chooses, and he does so in this case by apt words. That being the state of affairs, the bill of lading commences by saying that the shipowner is to deliver the goods "in the like good order and condition." Of course if the clause stopped there, and there were nothing more, the shipowner would be liable under both heads of liability, subject, of course, to the protection afforded by the section, but the clause goes on to say that he is to do that "subject to the clauses and conditions expressed in this bill of lading, which constitutes the contract of freight," and I have to go on and see whether the liability thus assumed, with the protection which sect. 502 has given him, is varied somehow or other by what I am coming to in this special contract.

Then I come to a clause on which, in my opinion, the whole contest arises. It is a long

clause commencing with the words, "The shipowners and (or) charterers are not responsible," and ending with the words "unseaworthiness, or by any other cause whatever." I read that clause as divided into two parts, the first being virtually the whole of the clause with the exception of the last line and a half; the second half is the last line and a half, and it is addressed to unseaworthiness. It is short; I will read it: "Shall not be responsible for damage to goods by unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any other cause whatever." Now, it seems to me that by that portion of the clause the shipowner was contracting as to what was to be his liability under the head of implied warranty of seaworthiness, and it is his liability in respect of that which is defined there. In my opinion the earlier part of the clause is to be read as if it said: "As for unseaworthiness, I am going to deal with that presently. In this first part of the clause I am not going to deal with it at all. For the first part of this clause I am content to take it that my ship is to be a seaworthy ship." I think the first part of the clause expresses this: "If my ship is seaworthy my contract is that I shall not be liable for fire on board as insurer against fire, and that exemption is to apply not only in the cases mentioned in sect. 502, but in any case whatsoever." Having done that, he has finished with his liability as insurer. Then he takes up his liability on his implied warranty of seaworthiness. The next words, I think, define all his liability in respect of that. He says—by negative words, I agree—"I will not be liable for unseaworthiness provided all reasonable means have been taken to provide against such unseaworthiness." Now, there the words are negative words—he says, "I will not be liable for that"—but I think they are pregnant words and infer an affirmative, and that what he has said in that clause is this: "I will be liable for unseaworthiness if I have not taken all reasonable means"

The particular question which we have to consider here is this, and Mr. Bailhache most plainly put it, as I thought, in commencing his argument: For the purpose of testing the case you have to make the hypothesis that a fire has occurred by unseaworthiness against which reasonable precautions have not been taken, but that the fire happened without the actual fault or privity of the shipowner. Under those circumstances is he liable?

The answer to this question, which in substance is this—namely, whether the defendants are precluded from setting up the section by reason of the special contract—involves this, can they set up sect. 502 and say: "This fire did not happen with our actual fault or privity; therefore we are not liable, although it is agreed that we did not take all reasonable precautions to provide against such unseaworthiness—*i.e.*, against such fire?" To my mind that is excluded by the terms of the contract.

I think, therefore, that both questions were rightly answered, and that really no difficulty occurs as to the one conflicting with the other, because one has to bear in mind that the first question is put on one assumption and the second on another. The first question, I think, is rightly answered in the affirmative upon the assumption on which it is made, and the second question, I think, is also rightly answered in the affirmative upon the words of the contract. For these reasons I am of opinion that both the appeal and the cross-appeal ought to be dismissed with costs.

Kennedy, L.J.—This is unquestionably, to my mind, a difficult case; but it has been argued so thoroughly and so lucidly by the learned counsel on both sides that I know that I should gain nothing by further consideration. There are two questions which were before the learned judge in the court below. If the first of those questions had been answered by him differently, if he had held that the words of sect. 502 of the Merchant Shipping Act 1894 in regard to the liability of a shipowner in the case of a fire were to be read in a sense unfavourable to the present appellants, there would be nothing further to be said on their behalf; but the learned judge has answered that question in their favour. Dealing with that question first, for myself I must say that I think it the more doubtful part of this case. There is, in my judgment, a great deal to be said for the view that the Legislature did not lose sight of the law which, unquestionably, had been settled before the date of the statute, that there is, in every contract with regard to the carriage of goods in a ship, an absolute warranty, and that warranty is that the vessel must, at the time of sailing with the goods, have that degree of fitness, as regards both the safety of the ship and also the safe carriage of the cargo in the ship, which an ordinarily careful and prudent owner would require his vessel to have at the commencement of the voyage, having regard to the probable circumstances of that voyage and its nature. It is possible—and my brother Bray had that, I think, fully in his mind when he used the language that he did in his decision upon that section—that someone, quite reasonably, might come to the conclusion that the implied warranty was not intended to be, as it were, abrogated by the section in regard to damage by fire, and that the exemption from liability to the extent to which that section gives it is an exemption which, so far as the owner was concerned, was mainly intended to relate to those circumstances in which the owner was either the captain on board, or, as is the case on small ships, was, perhaps, actually the fitter-out of the ship, if not the master, for the voyage. Of course, if that view were taken, and the section was read subject to the implication, there could be no further contest on behalf of the appellants; but I am not prepared to differ from Bray, J.

Upon the whole, I think that he has come to that which is, from the lawyer's point of view, the more correct conclusion, and it is obviously the safer, for one good general reason, that the words are unqualified in their terms, and, as has been pointed out by Vaughan Williams, L.J. and by Buckley, L.J., and also by Bray, J., if you are to read in the implication, you are virtually reading in the word "seaworthy" in addition to the word "sea-going" as the epithet of the vessel. I assume, therefore, because, on the whole, I think, it is the better conclusion, that this section is to be read without any qualification that the vessel should be seaworthy at the commencement of the voyage, and that under the protection of that

section, whatever it is, the owner, in a case where a fire happens on board his ship, which is not proved to have originated or been directly caused by his actual fault or privity, is exempt.

Then, assuming the first question to be answered, as it was answered, we come to the second question in this case, which is, I think, again a difficult one to answer; but I am of opinion that the view which Vaughan Williams, L.J. and Buckley, L.J. have expressed here in concurrence with that expressed by Bray, J. in the court of first instance is right. Without analysing in detail the language of an exceedingly ungrammatical document, I have come to a conclusion, which I can state in very few words, upon what I consider to be the real sense and effect of the clause in the bill of lading which contains the exceptions in which fire and unseaworthiness are mentioned. It appears to me that the appellants' contention—that is, the contention of the shipowners—with reference to the terms as to unseaworthinesa, which are contained at the close of the paragraph which we have been discussing almost exclusively, which begins with the "act of God, enemies, pirates, theft," and ends with "unseaworthiness or any other cause whatever" compels them to say that the terms as to unseaworthiness which, if I understand rightly, the learned counsel say are unquestionably of effect in relation to matters arising in connection with the other perils mentioned do not constitute a contract with the parties in regard to fire. Indeed, it was argued for the appellants here that the unseaworthiness clause has so much that it can unquestionably operate upon in regard to the other perils, that you need not treat the last clause as to unseaworthiness as having any relation to the words "fire on board" as one of the perils, because there were so many other subjects of peril to which the unseaworthiness clause might be referred. It was said (I think I am quoting the exact words) by the learned counsel, Mr. Bailhache, with his usual clearness and frankness, that the words "fire on board" on his contention were in fact redundant. I am unable, however, to treat the words as superfluous when, in the natural concatenation of the sentences, I find no distinction drawn between fire on board and other perils; and when it is conceded that the part of the clause as to unseaworthiness and the liability of the shipowner therefor in its limited shape, as it appears in the bill of lading, has a reference to all the other perils, I cannot construe the clause in such a way as to say that, because liability for fire is dealt with by statute, I am to treat that part of the clause as having effect as to all other perils, and having no effect as regards fire on board. It is not as if the Act of Parliament had itself provided in terms for what was to be the position of the shipowner in regard to fire caused by unseaworthiness; on the contrary, the argument of the appellants itself is that it has not done so, but has placed a different limitation upon the shipowner's liability —namely, in so far as it has exempted him from liability for fire unless caused not by unseaworthiness, but by his actual fault or privity.

It seems to me, construing this document upon its face in its natural way, that I cannot accept an interpretation which isolates fire and puts it in a different position from the other perils, and if that clause applies to fire on board, as it undoubtedly does to the other perils dealt with in the same connection, and, in the same sentence, if it be conceded, as it must be, that the clause as to unseaworthiness creates a contract between the parties, then I have found that I have got a contract; and if that contract as to unseaworthiness does refer to fire, it does seem to me that you then have the same position as that which had to be considered by the House of Lords in the case of *The Satanita* (*ubi sup.*). I have got a clause which says as regards all perils, and among them the peril of fire, that the liability as to unseaworthiness shall exist—it is put negatively here, but I think nothing really turns upon that—but the liability of the shipowner will be taken away if he has used all reasonable means to provide against such unseaworthiness, or, putting it negatively, the shipowner shall not be liable for the unseaworthiness of the ship, provided all reasonable means have been taken by him to provide against such unseaworthiness. In *The Satanita* (*ubi sup.*) the question was whether the words of the contract between the parties to pay for all damage must be taken to exclude the provisions as to liability in the Merchant Shipping Act 1894, and it was held that if they were sufficiently clear they did, and if I find a contract by which the parties have said, "A particular form of degree of liability for unseaworthiness shall exist in relation to all the mischiefs that may happen upon the ship, which I catalogue, and which include fire," it seems to me, following the reasoning of the House of Lords, there being nothing to prevent sect. 502 being dealt with by such an independent contract, I ought to give effect to the contract between the parties which arises from their express bargain, and, in so doing, I uphold the judgment which has been pronounced upon this second question.

Appeal and cross-appeal dismissed.

Solicitors for the plaintiffs, *Parker, Garrett,* and *Co.*

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

Dec. 12 *and* 14, 1911.

(Before COZENS-HARDY, M.R. and FARWELL, L.J.)

NORTHFIELD STEAMSHIP COMPANY LIMITED v. COMPAGNIE L'UNION DES GAZ. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Delay in discharging cargo — Inaccessibility of wharf — Impossibility of getting to berth alongside—Loss occasioned by delay—By whom to be borne—Exceptions— Strikes—Ejusdem generis.

A steamer was chartered to proceed to named ports ordered on signing bills of lading and there deliver her cargo alongside any wharf and (or) vessel and (or) craft as ordered. The cargo was to be taken from alongside by the consignees at the port of discharge at a specified rate, "provided steamer can deliver it at this rate." If longer detained the consignees were to pay steamer demurrage at specified rate. "Time to commence when steamer is ready to unload and written

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

notice given, whether in berth or not. . . . 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."

On the arrival of the steamer at one of the named ports on the 20th Sept. it was found that all the berths alongside the wharf were occupied by other vessels and the steamer could not get to a berth alongside the wharf until the 25th Sept.

By a regulation the shore labourers would not discharge vessels until they were in a berth alongside a wharf; and cargo was brought to the rail by them, the ship's crew not being employed.

Held, first, that the parties must be assumed to know the regulations at the port, and time commenced not when unloading in fact began, but when the steamer was ready to unload, "whether in berth or not."

Held, secondly, that the words "provided the steamer can deliver" had no bearing on the case, as they were only concerned with the mechanical facilities of the steamer for delivery.

Held, thirdly, that delay occasioned not by a strike or by anything analogous thereto, but by a regulation of the shore labourers of the port, did not fall within the exception in respect of strikes, &c.

Decision of Hamilton, J. affirmed.

APPEAL by the defendants from the decision of Hamilton, J. sitting without a jury.

The facts of the case sufficiently appear from the headnote and judgments.

The appeal, although from a final order, was by the consent of the counsel engaged therein, duly filed before the hearing thereof, heard before two judges of the Court of Appeal, instead of three, under the provisions of sect. 1 of the Supreme Court of Judicature Act 1899.

Atkin, K.C. and *S. A. T. Rowlatt*, for the appellants, referred to

Kishche v. *Compagnie l'Union des Gaz*, before Pickford, J., unreported;

Owners of Steamship Knutsford v. *E. Tillmanns and Co.*, (1908) 2 K. B. 385; on appeal, 11 Asp. Mar. Law Cas. 105; 99 L. T. Rep. 399; (1908) A. C. 406;

Larsen v. *Sylvester*, 11 Asp. Mar. Law Cas. 78; 99 L. T. Rep. 94; (1908) A. C. 295;

Leonis Steamship Company Limited v. *Joseph Rank Limited*, 10 Asp. Mar. Law Cas. 398; 99 L. T. Rep. 513; (1908) 1 K. B. 499, at p. 514.

Bailhache, K.C. and *Adair Roche*, for the respondents, referred to

Budgett and Co. v. *Binnington and Co.*, 63 L. T. Rep. 493, 742; 25 Q. B. Div. 320; (1891) 1 Q. B. 35;

Thorman v. *Dowgate Steamship Company Limited*, 11 Asp. Mar. Law Cas. 481; 102 L. T. Rep. 242; (1910) 1 K. B. 410.

S. A. T. Rowlatt was heard in reply on the first point only.

Cur. adv. vult

Dec. 14, 1911.—The following written judgments were delivered :—

COZENS-HARDY, M.R.—This appeal raises a question on the construction of a charter-party, the material facts being agreed. By clause 1, the steamer was to load a cargo of coal at Sunderland and proceed therewith to Genoa or Savona as ordered and there deliver her cargo alongside any wharf and (or) vessel and (or) craft as ordered.

By clause 8, the cargo was to be taken from alongside by consignees at port of discharge at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted, "provided steamer can deliver it at this rate." If longer detained, consignees to pay steamer demurrage at the rate of 4*d.* per net register ton per running day. "Time to commence when steamer is ready to unload and written notice given, whether in berth or not."

The steamer was ordered to Savona, and arrived and was moored at the Punta inside the port and harbour of Savona on the 20th Sept. All the berths alongside the wharf were occupied by other vessels, and the steamer could not get to a berth alongside the wharf until the 25th Sept. The question in substance is this, Who has to bear the loss occasioned by the delay?

Now, it is admitted that by reason of certain rules made by the shore labourers, and recognised and sanctioned by the port authorities, shore labourers will not discharge vessels until they are in berth alongside a wharf, and, further, that the cargo is not brought to the rail by the ship's crew, but by the shore labourers. It must, I think, be taken that these rules are and have for several years been part of the regulations of the port of Savona which the parties to the charter-party must be assumed to know. This being so, the express provision of clause 8 applies. Time commences, not when unloading in fact begins, but when the steamer is ready to unload, "whether in berth or not." She was ready to unload on the 22nd Sept., though not in berth, and written notice was given on that day. It is, however, contended that the earlier words, "provided the steamer can deliver," point to a different conclusion, as the steamer was not in fault; and could not deliver earlier. But those words seem to me to have no bearing upon the case. They only deal with rate of discharge of the cargo when once the discharge has begun, and are concerned with what I may call the mechanical facilities of the steamer for delivery.

Then it is said that the final sentence in clause 8 exempts the charterers: "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." But delay occasioned, not by a strike or by anything analogous to a strike, but by a regulation of the port of Savona, cannot fall within this exception.

It follows that, in my opinion, the judgment of Hamilton, J., following a decision of Pickford, J. on the same charter-party, in favour of the plaintiffs is correct, and this appeal must be dismissed with costs.

FARWELL, L.J.—The question in this case depends on the construction of the charter-party of the 25th Aug. 1909, on which three points arise.

The vessel was chartered to proceed to Genoa or Savona, as ordered on signing bills of lading, and there deliver her cargo alongside any wharf and (or) vessel and (or) craft as ordered. The consignees were to take the cargo alongside at port

of discharge. "Time to commence when steamer is ready to unload and written notice given, whether in berth or not."

The first question arises on those words. There was no berth vacant at Savona at which the vessel could be unloaded until four days after her arrival, and accordingly she did not get a berth until the fifth day. There was no other means of unloading her except alongside the wharf when there was a berth vacant. In my opinion the words "whether in berth or not" were inserted to meet this very case. I do not think it possible to read them as equivalent to "although she be moored alongside a vessel or craft and not in berth." Want of space to berth is of very frequent occurrence, and the parties appear to me to have expressly provided for it. And this disposes also of the contention that the ship was not "ready to unload." She was ready so far as she was concerned, and the fact that she was not in a berth is rendered immaterial by this clause.

The next question arises on these words: "The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to steamer, at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate." At Savona it is the course of business, recognised since 1907 by the port authorities, that steamers are not discharged until they are in berth alongside a wharf, and that shore labourers will only work in connection with the discharging of vessels when they are in berth alongside the wharf; and that all the work is done by shore labourers, the crew not being employed to bring the cargo to the rail. In my opinion these facts are irrelevant in considering the question whether "the steamer can deliver it at this rate." These words refer to the structural capacity and fittings of the vessel, not to her position in the harbour as to the supply of labour from the shore available for the consignees.

The third question is the strike 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." I have no doubt that the other causes must be restricted to causes *ejusdem generis*, and I think it impossible to say that a regulation made by the shore labourers as to the terms on which they will work, recognised and sanctioned by the port authority for four years, is *ejusdem generis* with a strike. The course of business at Savona was well known to both parties at the date of the charter-party, and if this possible absence of labour was contemplated as within this exception, it should have been clearly stated.

I think that the judgment of Hamilton, J. should be affirmed.

Appeal dismissed.

Solicitors for the appellants, *Waterhouse* and Co.

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

Oct. 26 *and Nov.* 7, 1911.

(Before COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.)

LEE v. OWNER OF SHIP BESSIE. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.

Employer and workman—Death caused by accident—Compensation—Claim by dependants—Infant children—Absence of evidence of dependency—No presumption of dependency — Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The principle established by the decision of the House of Lords in New Monckton Collieries Limited v. Keeling (105 *L. T. Rep.* 337; (1911) *A. C.* 648), *that dependency is a question of fact, and that there is no legal presumption of dependency even in the case of a wife, applies equally to the case of infant children.*

Where, therefore, there was no evidence of dependency in fact of infant children on their father, a workman whose death had been caused by an accident arising out of and in the course of his employment within the meaning of sect. 1 *of the Workmen's Compensation Act* 1906, *and there was no evidence that the children had ever been maintained by him, they were held not to be dependants and not to be entitled to compensation under that Act.*

Briggs v. Mitchell (1911) 48 *Sc. L. R.* 606) *approved.*

Decision of the County Court judge reversed.

AN arbitration under the Workmen's Compensation Act 1906 was requested between the widow of a deceased workman and his employer as to the liability of the latter to pay compensation under that Act to herself and her two legitimate infant children as the dependants of the former in respect of the injury caused to them by his death through an "accident arising out of and in the course of the employment" of the deceased.

It appeared that the widow had been deserted by her husband, and subsequently, on the report of his death, cohabited with another man and had done so for eight years. She had several illegitimate children by him.

During the whole of the eight years she had the custody of her two legitimate children by her husband (aged ten and eight respectively at the death of their father), and had maintained them without his assistance.

According to the evidence, the husband had not maintained the children at all since the year 1903.

The case came on to be heard at the County Court of Somersetshire holden at Bridgwater, when it was decided by the learned County Court judge that the widow was not a dependant of her deceased husband. But His Honour found that the two infant children were dependants, and accordingly awarded them the sum of 195*l*.

From that part of the decision the employer now appealed.

Alexander Neilson, for the appellant, referred to

New Monckton Collieries Limited v. *Keeling, ante,* p. 276; 105 L. T. Rep. 337; (1911) A. C. 648;
Briggs v. *Mitchell*, 4 Butterworth's C. C. 400.

Rayner Goddard for the respondents.

Alexander Neilson replied.

Cur. adv. vult.

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

Nov. 7.—The following written judgments were delivered :—

COZENS-HARDY, M.R.—This is an appeal from an award of 195*l.* in favour of two infant children of a deceased workman. The award can only be supported on the ground that the children were dependants—*i.e.*, "wholly or in part dependent upon the earnings of the workman at the time of his death."

Now, it has recently been held by the House of Lords in *New Monckton Collieries Limited* v. *Keeling* (105 L. T. Rep. 337; (1911) A. C. 648) that dependency is a question of fact, and that there is no legal presumption of dependency even in the case of a wife. It is my duty loyally to follow that decision, and I can see no ground for not applying it to the case of infant children. In the recent case of *Briggs* v. *Mitchell* (4 Butterworth's C. C. 400) the Court of Session, differing from the view of this court which was overruled by the House of Lords in *New Monckton Collieries Limited* v. *Keeling* (*ubi sup.*), held that there was no presumption in the case of infant children. This Scotch decision must, I think, be regarded as good law.

Now, in the present case there was no evidence of dependency in fact. Since 1903 the infant children have not been in any way maintained by their father. They have resided with and been maintained by their mother, who has been living in adultery with a man by whom she has had several illegitimate children. All this is beyond dispute. The learned County Court judge gave his decision before the House of Lords had overruled the decision of this court. I am bound to say the decision of the learned County Court judge cannot now be supported.

It has been argued that the case ought to be sent back to the County Court judge in order that he may consider whether a case can be established on behalf of the infants of dependency in fact. I think it would be wrong to do this. No evidence was adduced in favour of dependency in fact, and it was for the applicants to establish their case.

In my opinion there is no course open to us but to allow this appeal.

Having regard to the position in life of the infants and the serious question involved, we appointed the official solicitor to defend the appeal, and by our order we provided for his costs. And I desire to add that Mr. Goddard has greatly assisted the court by his argument on behalf of the infants.

FLETCHER MOULTON, L.J.—In this case the widow of Robert Lee applied on behalf of herself and his two legitimate infant children as dependants for compensation in respect of his death by an accident arising out of and in the course of his employment by the respondent, the owner of the ship *Bessie*. No question arises as to the accident or the employment, the sole question being whether the widow and children were dependants of the deceased man. The widow had been deserted by her husband, and subsequently, on the report of his death, lived with another man. The learned County Court judge found that the widow was not a dependant, and from that decision no appeal is brought. But he found that the two infant children (who were aged ten and eight respectively at the death of the father) were dependants, and awarded them the sum of 195*l.* accordingly. From this decision the respondent appeals.

It is now settled law that dependency is wholly a question of fact, and therefore, if there was any evidence to support the decision of the County Court judge that the infant children were dependants, we ought not to allow the appeal. The note by the County Court judge of the evidence is very meagre. There is no dispute as to the ages or the legitimacy of the children. It would seem that at the hearing the widow gave evidence that her husband left her and lived with another woman, and that she heard four years afterwards that he was dead. She gives no evidence as to his having given her money for the support of the children. The mother of Robert Lee also gave evidence and stated that the deceased used to give her money from time to time, and that he made an offer to support his children. She also states that on one occasion he gave her money to give to the wife, but that the wife refused to take it, saying that he ought to send her money regularly himself to support his children, and that after he had assaulted her he had left her and never paid anything to support his children. Although the widow does not seem to have been asked any question on the subject of this conversation with the mother of the deceased, I think it must be taken that he never actually gave any money to his wife for the support of the children. I am unable to find from the judge's note at what date the widow left the husband, but the learned judge expresses himself satisfied that her adultery was brought about by her husband's desertion of her and his reported death. This refers to a report spoken to in the evidence of the widow, and stated by her to have occurred about four years after her husband's desertion. I conclude on the whole that this desertion must have taken place when the younger child was little more than an infant, though this is mainly conjecture. The case was argued on the basis that, since the desertion by the father, the mother had supported the children by her own labour, or that they had been supported by the man with whom she was living, but I can find no express reference to this in the judge's notes.

The law as to what constitutes dependency in the case of a wife has been fully laid down by the House of Lords in their decision in the case of *New Monckton Colleries Limited* v. *Keeling* (*ante*, p. 276; 105 L. T. Rep. 337; (1911) A. C. 648). There is no presumption of law that a wife is dependent on her husband's earnings merely because of his legal obligation to maintain her. But, on the other hand, this legal obligation is not to be ignored in deciding on the fact of her dependency. In the leading opinion, Lord Atkinson, after laying down these principles, goes on to say: "On the contrary, the existence of the obligation, the probability that it will be discharged, either voluntarily or under compulsion, the probability that the wife will ever enforce her right if the obligation be not discharged voluntarily, are all matters proper to be considered by the arbitrator in determining the question of fact whether or not the wife, at the time of her husband's injury, looked to his earnings for her maintenance and support in whole or in part. It is one of the many elements to be taken into account." Of the other learned Law Lords who took part in the

appeal, the Lord Chancellor formally agreed with the opinion of Lord Atkinson from which I have already quoted. He adds a few remarks in which again he makes it clear that in his opinion the fact that a legal duty lies upon the workman to provide maintenance is an element to be considered. Lord Robson was of the same opinion, as is shown by the following extract: "The wife does not necessarily cease to be dependent on the husband simply because the latter refuses to recognise or perform his obligation and succeeds in throwing the burden of her maintenance for the time being on the wife's parents or friends or on the State. They may fulfil the husband's duty for him, but the wife's legal dependence is still on him and not on them, and his death deprives her of the proper stay and support on which alone she is entitled to rely." He also expresses his approval of several previous decisions in which a wife who was living separate from her husband at the date of his death and receiving no support from him was yet held to be dependent upon him.

In my opinion the effect of this decision is that legal obligations to support must not be taken at their theoretical value, but at their practical value. For instance, the mere fact that a husband is bound to support his wife does not establish that she is totally or at all dependent upon him within the meaning of the Act if the circumstances are such that there is no reasonable probability that her rights would have been practically and effectually asserted. But if on the evidence there is any fair probability that the legal rights would at any future time have been actually and effectually asserted by the wife, then there is evidence of dependency, and the compensation must be regulated by an estimate of her practical loss subject to the provisions of the Act. That this is so is made very clear by a passage in the opinion of Lord Robson. In the course of his opinion he says: "The money coming to a widow under the Act is not a present in consideration of her status; it is a payment by a third person to compensate her as a dependant for her actual pecuniary loss by her husband's death; and where her husband's death does not, in the circumstances of the particular case, involve any real detriment to her pecuniary position, there is no rule of law to prevent the arbitrator from finding that, though married to the deceased, the applicant was now in fact dependent upon him."

I have now to consider in the light of this decision the position of the children. Up to a certain age, a father is compellable by law to support his infant children. It may well be that the compulsion is indirect, and can only be effected through the medium of the Poor Law. To my mind this is immaterial. We have to consider the practical value of the existence of this legal duty, and, though this may be modified by the indirectness of the machinery by which it is enforced, it is not taken away. Indeed, in certain respects I think that the practical value of the obligation to support infant children is more likely to survive their absence from the father than is the practical value of the obligation to support a wife. The wife's absence from her husband is often the result of her own choice or of her own conduct, and, where she has done nothing to disentitle her to support from her husband, it must be more or less by her own choice that she does not compel him to contribute to her support, since he is legally bound to do so if she chooses to enforce her legal rights. But no such thing can be said in the case of infant children, at all events so long as they are incapable of work and cannot do anything themselves to decide by whom they are to be maintained or with whom they shall live. One can easily imagine cases in which they ought to be held to be almost wholly dependent on the father, as, for instance, when they are being supported by a mother who is herself too ill to be able much longer to work.

In my opinion, therefore, the decision of the House of Lords in the case of *New Monckton Collieries Limited* v. *Keeling* (*ubi sup.*), although it does not refer to the case of infant children, logically carries with it the result that in their case the County Court judge is bound to consider the practical value of the father's legal obligations to support them, and that, if he comes to the conclusion that there is a reasonable probability that this will be enforced in the future, he is entitled and bound to hold them to be dependants, and to award compensation accordingly.

In applying this law to the facts of the present case I am met with two difficulties. In the first place, the extreme meagreness of the notes leaves me in great doubt as to the material which the County Court judge had for the purposes of his decision. For example, the question whether the mother was likely to be able to support her children if the man with whom she was living refused to do so may have been partly answered by the appearance of the woman herself, who gave evidence. The mode in which she was able to support them in the past does not seem to have been gone into. It is said that it is for the applicant to make out his case. This is beyond question, but we must, I think, look closely into what passed at the trial in the case of infant children under circumstances such as the present to see that their rights were duly considered. This leads me to the second difficulty, which to my mind is a very serious one. I do not think that the learned County Court judge appreciated rightly the issue which he had to try, and this by no fault of his own, but from the position in which the decisions stood at the time. The decision in the House of Lords in *New Monckton Collieries Limited* v. *Keeling* (*ubi sup.*) was not before him, and I have no doubt that he thought he was justified in acting on legal presumptions unless the case were such as to afford very strong evidence in rebuttal. I hesitate, therefore, on the one hand, to accept his finding of dependency as binding upon us by virtue of its being a finding of fact, and, on the other hand, I do not think it fair for us to decide on the meagre note taken by him in the view that he was entitled to act on the legal presumption of dependency.

The proper course for this court to adopt, therefore, in my opinion would be to send the case back for a rehearing, when the County Court judge would be able to determine whether there was such a reasonable probability that in the future the father would be called upon to fulfil his legal obligations to support his children as would justify him in finding that there was to some extent dependency. But as my brethren are of a different opinion their views must prevail.

Farwell, L.J.—I am of opinion that this appeal succeeds.

The award of the County Court judge is obviously founded on decisions of this court which have since been overruled by the House of Lords. It is now settled beyond controversy that dependency is a question of fact and not of law. As Lord Atkinson says in *New Monckton Collieries Limited* v. *Keeling* (at p. 650 of (1911) A. C.): "It may be that her husband was in law bound to maintain her, but it is by the discharge of this obligation, not by its mere existence in law, that a husband supports and maintains his wife"; and Lord Shaw says: "The Act of Parliament seems to say, among the relations of the deceased workman if there be those who depended for support upon his earnings and who by his death have lost that support upon which they depended, then let them be compensated for that loss."

In the present case the wife had been living with another man for the last eight years and had had children by him. During the whole of those eight years she had the custody of the appellants her two legitimate children by her husband, and had maintained them without his assistance. It appears that at some time unfixed the husband made an offer to his own mother to support his children, and once at some unknown date gave his mother some money to give to his wife which she (the wife) refused. It is clear on the evidence that the husband has not maintained his children at all since 1903. But then Lord Atkinson's observations (at p. 653 of (1911) A. C.) are relied on. In my opinion they have no reference at all to a case like the present, but refer to a case such as that mentioned (at p. 657 of (1911) A. C.) of a man leaving his wife and children dependent on charity for a month or two in order to go and look for work and dying while away. It would be impossible in such a case to hold that the mere fact that the man at his death was earning nothing and that his wife and family were supported by charity was sufficient to take them out of the Act.

But I cannot think that Lord Atkinson meant that the possibility that the guardians of the poor might make the father pay for the support of his children or of any of the other persons for whom he is liable to the guardians—such as his own parents and grandparents—makes them dependants when they have not in fact been supported by him either at all or for years before his death. Such a construction is inconsistent with the whole tenor of the judgment. Moreover, the liability to support a wife, which was the case before the House, is of a different character from the liability to support a child. The former can be enforced by the wife herself by her power to bind the husband to pay for necessaries; the latter cannot, and is really a liability to the guardians, not to the child: (see *Shelton* v. *Springett*, 11 C. B. 452, and the observations of Maule, J., at p. 454). The Scotch decision in *Briggs* v. *Mitchell* (4 Butterworth's C. C. 400) is in accordance with my view.

Appeal allowed.

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

Solicitor for the respondents, *The Official Solicitor.*

Oct. 24 *and Nov.* 7, 1911.

(Before COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.)

PANAGOTIS *v.* OWNERS OF SHIP PONTIAC. (*a*)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.

Employer and workman — Seaman — Injury by accident—Compensation—Order for detention of ship in port—Appeal by shipowners—Whether direct to Court of Appeal—Practice—Jurisdiction — Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58), *s.* 11; *sched.* 2, *s.* 4.

In any proceeding under sect. 11 *of the Workmen's Compensation Act* 1906, *an appeal from an order therein made by the judge of a County Court does not lie direct to the Court of Appeal, but to the Divisional Court. Such an order is made by the judge of a County Court in exercise of his general jurisdiction and not as arbitrator, and an appeal therefrom is by the ordinary procedure as to appeals from County Courts.*

So held by the Court of Appeal, Farwell, L.J. dissenting.

AN application was made by a seaman under the provisions of sect. 11 of the Workmen's Compensation Act 1906 to the judge of the County Court of Glamorganshire, holden at Barry, for an order to detain the ship on which he was employed which was lying in the port of Cardiff.

The ground of the application was that the employers, the owners of the ship, were liable as such owners to pay compensation under that Act in respect of personal injuries by accident arising out of and in the course of the employment caused to the "workman" by whom the application was made.

The learned County Court judge found that the owners of the ship were probably liable as such to pay compensation as claimed by the applicant and that none of the owners resided in the United Kingdom, and accordingly his Honour made the order applied for.

From that order the employers appealed.

On the appeal coming on to be heard the preliminary question was raised whether, in a proceeding under sect. 11 of the Act, a direct appeal would lie from the County Court to the Court of Appeal; or whether an order on such a proceeding ought to be considered to be made by the judge of the County Court in the exercise of his general jurisdiction as such and to be subject to an appeal in accordance with the ordinary procedure for appeals from the County Courts.

By sect. 11 of the Workmen's Compensation Act 1906 it is provided as follows:

(1) If it is alleged that the owners of any ship are liable as such owners to pay compensation under this Act, and at any time that ship is found in any port or river of England or Ireland, or within three miles of the coast thereof, a judge of any court of record in England or Ireland may, upon its being shown to him by any person applying in accordance with the rules of the court that the owners are probably liable as such to pay such compensation, and that none of the owners reside in the United Kingdom, issue an order directed to any officer of customs or other officer named by the judge requiring him to detain the ship until such time

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

as the owners, agent, master, or consignee thereof have paid such compensation, or have given security, to be approved by the judge, to abide the event or any proceedings that may be instituted to recover such compensation and to pay such compensation and costs as may be awarded thereon; and any officer of Customs or other officer to whom the order is directed shall detain the ship accordingly. (2) In any legal proceeding to recover such compensation the person giving security shall be made defendant, and the production of the order of the judge, made in relation to the security, shall be conclusive evidence of the liability of the defendant to the proceeding. (3) Section six hundred and ninety-two of the Merchant Shipping Act 1894 shall apply to the detention of a ship under this Act as it applies to the detention of a ship under that Act, and, if the owner of a ship is a corporation, it shall for the purposes of this section be deemed to reside in the United Kingdom if it has an office in the United Kingdom at which service of writs can be effected.

By sect. 4 of the 2nd schedule to the same Act it is provided as follows:

The Arbitration Act 1889 (52 & 53 Vict. c. 49) shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the County Court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be fined, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal, and the judge of the County Court, or the arbitrator appointed by him, shall, for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the County Court.

Alexander Neilson, for the appellants, referred to

Workmen's Compensation Act 1906, s. 11; sched. 2, s. 4;
Moss v. Great Eastern Railway Company, 29 C. C. C. Rep. 186; 100 L. T. Rep. 747; (1909) 2 K. B. 274.

[FLETCHER MOULTON, L.J. referred to Shipowners' Negligence (Remedies) Act 1905 (5 Edw. 7, c. 10), s. 1.]

Albert Parsons and *Gathorne-Hardy* for the respondent.

No reply was called for. *Cur. adv. vult.*

Nov. 7, 1911.—The following written judgments were delivered:—

COZENS-HARDY, M.R.—This is an appeal from an order made by the County Court judge at Barry under sect. 11 of the Act of 1906 for the detention of a ship found in the port of Cardiff. The order is in accordance with form 28. Sect. 11 of the Act of 1906 is obviously an adaptation of sect. 1 of the Shipowners' Negligence (Remedies) Act 1905. It does not confer any jurisdiction upon a Scotch court. It authorises an order to be made at any time, whether before or after an application for arbitration, and by a judge of any Court of Record in England or Ireland words which plainly include any judge of the High Court. On the construction of sect. 11, it seems to me clear that the order for detention is only in aid of the arbitration and is not part of the arbitration.

I arrive at this conclusion for several reasons. The order may be made before any proceedings are instituted, and by a judge before whom no such proceedings can be taken. It may be made in England though the arbitration must be in Ireland or in England. In my opinion the order under appeal was made by the County Court judge not as arbitrator having jurisdiction in all matters arising in the arbitration, but as a County Court judge acting in a judicial character. The exclusion of Scotch arbitrations supports this view. The question arises to whom does an appeal lie from such an order. It is said that it lies to this court under the express language of sect. 4 of the 2nd schedule, but I am unable to assent to this view. That clause begins with the words, "the Arbitration Act 1889 shall not apply to any arbitration under the Act, but," and then follow words which apply only to arbitrations under the Act. It is plain that clause 4 would have no application if the order were made by any judge of a court of record except a County Court judge, and I think it is almost equally clear that sect. 4 would not apply where the order is made by a judge of County Court A and the arbitration proceedings are pending in County Court B.

This is the conclusion at which I have arrived on consideration of sect. 4 taken by itself, and it is, I think, assisted by the language of sect. 1, sub-sect. 3, of the Act which alone refers to the 2nd schedule and refers to the schedule as containing the provisions in accordance with which arbitration proceedings are to be carried on. I think the only appeal to this court from any decision given, or order made, by the County Court judge is where the decision or order is given or made by him as arbitrator. It follows that in my opinion we have no jurisdiction to deal with the present appeal. The appeal lies to the Divisional Court.

FLETCHER MOULTON, L.J.—In this case an application was made to the judge of the County Court of Glamorganshire for an order to detain the ship *Pontiac* under the provisions of sect. 11 of the Workmen's Compensation Act 1906. The ground of the application was that the owners of the ship were liable as such owners to pay compensation under the Act in respect of personal injuries by an accident arising out of and in the course of his employment caused to Peter Panagotis on whose behalf the application was made. The ship was in the port of Cardiff. On the material before him the County Court judge found that the owners of the said ship were probably liable as such to pay such compensation and that none of the owners resided in the United Kingdom, and accordingly made the order applied for. The present appeal is brought from that order, and there arises the preliminary question whether in a proceeding under sect. 11 of the Act there is a direct appeal from the County Court to this court, as in the case of awards under the Act, or whether such an order ought to be considered to be made by the judge of the County Court in the exercise of his general jurisdiction as such and to be subject to an appeal in accordance with the ordinary procedure for appeals from the County Court.

There is nothing in sect. 11 itself which relates to the question of appeal. The powers are given to "a judge of any court of record in England

or Ireland." The procedure is no doubt in aid of enforcing any award that may be made in arbitration proceedings, but the jurisdiction does not depend on such proceedings having been instituted. No arbitration proceedings need be pending at the date of the application. The judge to whom the application is made need not be, and probably, in most cases, would not be a judge who would have jurisdiction in such arbitration proceedings. Indeed, it might well be that an application would be made under this section to a judge in England in respect of arbitration proceedings which could only take place in Scotland or Ireland. Special provisions are made in the rules for the registrar of the court in which the order is made to transmit certified copies of all records made with reference to the matter and other necessary documents to any court in the United Kingdom where proceedings for arbitration may be instituted in the matter.

In the absence of any special provision as to appeal, and from the fact that the section empowers judges not only of the County Court but of the Supreme Court and other courts of record to hear the applications, I am of opinion that the appeals from orders thereunder ought to follow the rules of procedure with regard to appeals in general from the particular court where the application is made unless special provisions can be found in some other part of the Workmen's Compensation Act 1906 to the contrary. The counsel for the appellant claims that this is the case, and refers us to sect. 4 of the second schedule which says (omitting non-relevant words) that "the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal." This, he contends, is wide enough to cover orders made under sect. 11.

It may be taken that if these words were to be found without qualification in the enacting portion of the Act the language is wide enough to cover orders made under sect. 11 of the Act. But you cannot judge from the words of a schedule alone the enacting effect of those words. The schedule only takes that place in the enactment which is given to it by the words in the enacting portion of the Act which refer to it, and thereby show its relation to the enacting portion of the Act. In the present case the schedule is only referred to in sect. 1, sub-sect. 3, and exists only for the purposes of that sub-section. This sub-section reads as follows: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this Act, be settled by arbitration, in accordance with the second schedule to this Act." Sched. 2 therefore is simply a code of rules regulating arbitrations under the Act, and its effect is the same as though sect. 1, sub-sect. 3 had terminated in the words "in accordance with the following rules" and sched. 3 had been set out in full immediately after as part of that sub-section. It follows, therefore, that the wide language of sect. 4 of the second schedule, while sufficient to cover all orders made by the County Court judge in arbitration under the Act, has no reference whatever to orders made under sect. 11 which are not made in the course of arbitrations.

For this reason, I am of opinion that the order was made by the County Court judge in virtue of his statutory jurisdiction as such and that the appeal must be governed by the general statutory provisions as to appeals from County Courts. The appeal therefore ought to have been brought to a Divisional Court, and we have no jurisdiction to hear it.

Farwell, L.J.—In this case I regret that I am unable to agree with the other members of the court. The Act of 1906 is divided into three parts, the first part being in the usual form of Act followed by three schedules; I do not know the reason of such division, which is extremely inconvenient for purposes of reference, but, in my opinion, the schedules must be treated as parts of the Act, and the Act must be read as if it were divided into parts with sections running on in the usual way. As Lord Esher says in *Attorney-General* v. *Lamplough* (38 L. T. Rep. 87; 3 Ex. Div. 214, at p. 229): "With respect to calling it a schedule, a schedule in an Act of Parliament is a mere question of words. The schedule is as much a part of the statute and is as much an enactment as any other part." And in *Allen* v. *Flicker* (10 Add. & Ell. 640) both Denman, C.J. and Pattison, J. treat it as possible for an earlier Act to be repealed by the construction of a schedule to a later Act. It must, of course, depend in a great measure on the nature and wording of the schedules. Thus in the present Act the third schedule contains a list of diseases and processes without more. This schedule has reference to and is restricted by the enactments in the body of the Act. But scheds. 1 and 2 contain words of express enactment, and are as much actual enactments as the body of the statute itself.

Now the present Act provides that the employer shall be liable to pay compensation in accordance with the 1st schedule sect. 1 (1), and that if any question arises in any proceedings under the Act as to the liability to pay compensation under the Act or as to the amount or duration of such compensation, the question shall be settled by arbitration in accordance with the 2nd sched. sect. 1 (3). Then sect. 11 introduces a clause not germane to the arbitration, but for the purpose of securing to the workman the fruits of the arbitration if any. [His Lordship then read the section and continued:] It is a procedure analogous to that of the old Court of Chancery, a procedure *ad interim* referred to in Mitford on Pleading (p. 5) and explained in *Hayward* v. *East London Waterworks Company* (52 L. T. Rep. 175; 28 Ch. Div. 138, at pp. 145, 146). And in *Stevens* v. *Chourn* (84 L. T Rep. 796; (1901) 1 Ch. 894, at p. 901) and applied in cases where it was necessary for the court to interfere in order to keep things *in medio* until the rights of the parties were determined by another court which alone had jurisdiction to settle their rights. In sect. 11 the judge "of any court of record in England or Ireland" includes, but is certainly not confined to, County Court judges, and the procedure is obviously no part of

the arbitration, because the security to be given is "to abide the event of any proceedings that may be instituted to recover such compensation."

So far, therefore, the Act has given compensation, and has provided the means for ascertaining it, and has also given in the case of ships an independent power outside the arbitration to secure such compensation. Then comes sect. 4 of sched. 2, and I think that on a fair reading of the Act and schedules as a whole, the words "or where he gives any decision or makes any order under this Act" are not restricted to arbitration, but are general and extend to orders made under sect. 11 of the Act. The Act enables orders to be made not only by County Court judges but by any judge of record. It is true that sect. 1, sub-sect. 3, of the Act deals only with arbitrations, and is the only section that refers to the 2nd schedule. But the Act creates in sect. 11 a power in the County Court judge, outside and irrespective of the arbitration, and contains in sched. 2, sect. 4, words wide enough to cover orders made under that power. The judge referred to in this section is obviously the County Court judge, and the words "where he gives any decision or makes any order under this Act" ought not in my opinion to be restricted to orders made in arbitrations only, when the Act has given him power to make other orders outside the arbitration.

I am influenced by the unnecessary trouble and expense caused to suitors by any other construction. If the order under sect. 11 is made by a judge of the High Court in England or Ireland, the appeal is to the Court of Appeal in England or Ireland as the case may be, and in all orders made in arbitrations under the Act the appeal is the same. It seems impossible that the Legislature can have intended that in the one case of an order made by a County Court judge under sect. 11, the appeal should be to the Divisional Court before it comes to the Court of Appeal. Apart from the unnecessary multiplication of appeals, there is the practical consideration that orders under sect. 11 are urgency orders calling for speedy determination, and that the Court of Appeal is always accessible, while Divisional Courts have to be formed and sit only from time to time. In a case where the words are at least ambiguous, I think that these considerations ought to have weight, and I accordingly am of opinion that the appeal is rightly presented to this court.

Solicitors for the appellants: *Botterell* and *Roche*, agents for *Donald Maclean* and *Handcock*, Cardiff.

Solicitors for the respondent, *Burton*, *Yeates*, and *Hart*, agents for *J. A. Hughes*, Barry.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION

Thursday, Nov. 23, 1911.

(Before BRAY, J.)

RELIANCE MARINE INSURANCE COMPANY v. DUDER. (a)

Marine insurance — Reinsurance — Risk—Intention of assured.

A ship was insured by three policies issued by the plaintiffs. The first two were for 500l. each for a voyage from "Newcastle, N.S.W., to port or ports, place or places in any order or rotation on the West Coast of South America." The vessel was valued at 12,000l. in them, and the risk was to continue until thirty days after arrival at final port of discharge or until sailing on next voyage, whichever might first happen. The third was for 1000l. for a voyage "at and from Valparaiso and (or) port or ports, place or places in any order or rotation on the West Coast of South America" to the United Kingdom, or Continent, or the United States. The vessel was valued in this policy at 10,000l., and the risk was to commence from the expiration of the previous policy. The plaintiffs reinsured the vessel with the defendant for a voyage "at and from Valparaiso and (or) any port or ports, place or places on the West Coast of South America" to the United Kingdom, Continent of Europe, or the United States. The valuation of the vessel was the same as in the original policy. The plaintiffs gave instructions to their brokers to effect this reinsurance for a voyage "at and from Valparaiso and (or) W.C.S.A. or h/c to U.K. and (or) Cont., or to U.S.A. or h/c . . . warranted nitrate or h/c. Valuation clause. Hull, &c., vd. 10,000l. or v.o.p."

The vessel was chartered to load a cargo of coal at Newcastle, N.S.W., and under the charter-party the charterers directed her to discharge the cargo at Valparaiso, and bills of lading were accordingly issued making it deliverable at that port. The vessel was then under a second charter-party to proceed to Tocopilla to load a nitrate cargo for a European port, and when she reached Valparaiso it was agreed between the owners and charterers under the first charter-party that, instead of delivering the whole of the cargo of coal at Valparaiso, she should proceed with 800 or 900 tons of coal still on board and deliver same to charterers at Tocopilla. By this arrangement it was unnecessary for the captain to take ballast on board for the voyage from Valparaiso to Tocopilla, and on this voyage the vessel stranded and became a total loss. The plaintiffs paid the owners of the ship for a loss under the first two policies, and now brought an action on the policy of reinsurance.

Held, that the defendant was liable as there was no evidence of an intention on the part of the plaintiffs to cover only their liability under the third policy.

COMMERCIAL COURT.

Action tried by Bray, J. sitting without a jury. The plaintiffs' claim was to recover for a loss

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

under a policy of reinsurance upon the vessel *Kynance.*

By their points of claim the plaintiffs pleaded that they caused themselves to be insured by a policy dated the 9th Aug. 1910, which was expressed to be a policy of reinsurance for 500*l.* upon the vessel *Kynance*, valued as in original policy, against the risk of total or constructive total loss only, subject to the same terms, clauses, and conditions as the original policy or policies, and to pay as may be paid thereon. The voyage insured was "at and from Valparaiso and (or) any port or ports, place or places on the West Coast of South America" to the United Kingdom or Europe or the United States. They alleged that on the 29th July 1910 the *Kynance* while on the insured voyage from Valparaiso to Tocopilla, whence she was to sail to the United Kingdom, was totally lost by perils insured against—viz., perils of the sea.

They also alleged that at the time of the loss they were fully interested in the policy of the 9th Aug. 1910 in that they had executed and delivered to the owners of the *Kynance* two policies of insurance on the vessel, dated the 6th and 11th May 1910 respectively, each for 500*l.* Each of these policies insured the vessel from Newcastle, N.S.W., to port or ports, place or places in any order or rotation on the West Coast of South America. The vessel was valued at 12,000*l.*, and the risk was to continue until thirty days after arrival at final port of discharge or until sailing on next voyage, whichever might first occur.

The defendant by his defence pleaded that the *Kynance* was also insured by the plaintiffs under another policy for 1000*l.*, dated the 4th Aug. 1910, for her homeward voyage, which was described as "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 the United Kingdom or Continent or the United States. The vessel was valued at 10,000*l.*, and the risk was to continue until thirty days after arrival, however employed, or until sailing on next voyage, whichever might first occur.

The policy contained a provision :

In the event of total and (or) constructive total loss of the vessel, underwriters' subscriptions to be limited to 50 per cent. of their lines. Warranted nitrate or held. covered at a premium to be arranged.

The policy also contained a proviso :

Risk to commence from expiration of previous policy.

The defendant also alleged that the risk intended to be reinsured by his policy was the risk under the plaintiffs' policy of the 4th Aug. 1910, and he said there had been no loss under that policy, and that the risk never attached, the *Kynance* having been lost before the expiration of the previous policy, and also that there had been a breach of the warranty : "Warranted nitrate."

The plaintiffs had given written instructions to their brokers, dated the 14th July 1910, to negotiate the reinsurances with the defendant. These instructions were for a reinsurance on a voyage

At and from Valparaiso and (or) W.C.S.A. and h/c to U. K. and (or) Cont. or to U.S.A. or h/c. Leave to call, &c., against the risk of T. and (or) C.T. Loss only (wd. nitrate or h/c). Valuation clause. Hull, &c., vd. 10,000*l.* or v.o.p.

The facts with regard to the voyage were as stated in the report of the *Steamship Kynance Company Limited* v. *Young* (11 Asp. Mar. Law Cas. 596 (1911); 104 L. T. Rep. 397), as follows :

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.

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' agent 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.

In an action upon a policy of insurance similar to the policies of the 6th and the 11th May, Scrutton, J. held that the owners of the *Kynance* and the charterers were entitled to vary the mode of performing the charter-party by discharging the coal at two ports of the West Coast of South America instead of at one, and that the policy

covered such an adventure, and therefore the owners were entitled to recover under the policy.

Bailhache, K.C. and *Mackinnon* for the plaintiffs.

Atkin, K.C. and *Leck* for the defendants.

Cur. adv. vult.

Bray, J.—This is a claim by the plaintiffs under a reinsurance policy subscribed by the defendant. Many of the facts in this case are the same as those in *Steamship Kynance Company* v. *Young* (*sup.*). They are stated in the judgment of Scrutton, J. and need not be repeated here. The *Kynance* was insured by three policies issued by the plaintiff company. The three policies covered the whole round voyage from Newcastle, N.S.W., to the West Coast of South America and home to the United Kingdom or other ports. The first two, for 500*l.* each, were dated the 6th and 11th May 1910, and the third, for 1000*l.*, dated the 4th Aug. 1910. The voyages were described substantially in the same way as in the policies in the case before Scrutton, J. In the first two the ship was valued at 12,000*l.*, and the risk was to continue for thirty days after arrival at final port of discharge, however employed, until sailing on next voyage, whichever may first occur, and in the third the ship was valued at 10,000*l.*, and the risk was to commence from the expiration of the previous policy. Under the decision of Scrutton, J., the liability of the plaintiffs for the loss which occurred between Valparaiso and Tocopilla arose under the first two policies and not under the third. The plaintiffs have paid under the first two policies. They now claim to be repaid under a reinsurance policy dated the 9th Aug., subscribed by the defendant. Mr. Atkin, for the defendant, did not argue, and could not, in my opinion, successfully argue, that the loss did not fall within the words of that policy, but he contended that the general words must be limited by the intention of the assured, and that the intention of the assured was to reinsure only his liability under the third policy, dated the 4th Aug. That is the point I have to decide. The defendant relied first on the instruction given by the plaintiffs to Messrs. J. A. Pemberton and Co., and through them to Messrs. Hamilton, Smith, and Co., the brokers who negotiated the insurance with the defendant. The instructions are in writing, and dated the 14th July 1910. In these the voyage is described as at and from Valparaiso and (or) W.C.S.A. (West Coast of South America) or b/c, hull covered, to United Kingdon and (or) Continent or U.S.A. or b/c. Nothing is said as to the risk commencing from the expiration of any previous policy. So far this shows an intention that the risk shall commence with the voyage from Valparaiso if the vessel went to Valparaiso, and serves as an indication that the risk is to cover something more than the risk covered by the policy of the 4th Aug. because of the absence of the limitation of the risk in the latter policy. The next important words are "warranted nitrate or b/c." This is an indication that the cargo would be nitrate, but the addition of the words b/c, hull covered, shows that the cargo might be different, and that it was intended to cover the cargo whatever it was. Then come the words "valued 10,000*l.* or v.o.p." It appears that the underwriters usually, or perhaps always, require to know the amount for which the ship is valued, and the smaller the amount the greater, according to their view, is the risk. Ten thousand pounds was the valuation of the third policy, and in any event a large part of the risk would be under that policy, but, again, the addition of the words "or v.o.p.," which I interpret as meaning "valued in original policy," is an indication that the value might be something different. The instructions from Pemberton to Hamilton, Smith, and Co. do not seem to me important. Then entries in the plaintiffs' books were put in, but I do not think they carry the matter further. Lastly, there was evidence by Mr. Duder and another underwriter that they always did ask the broker the insured value, but they did not pretend to say that they recollected this particular occasion nor the answer that was given if the question was asked. I could not find on this evidence that the question was asked, or that Mr. Duder was told that it was 10,000*l.* Then comes the slip. That does not mention the insured value of 10,000*l.*, or that the cargo was warranted nitrate or b/c. I do not attach much importance to this, but it is some indication that Messrs. Hamilton, Smith, and Co. read their instructions as showing that their principal intended that the policy should cover as much as possible. In my opinion the most important part of the evidence is the instructions of the plaintiffs to insure, but, taking it altogether, I am unable to find that the intention of the plaintiffs was to cover only their liability under the third policy. It might be true to say that they expected the liability to arise under the third policy, but I find it is not true that their intention was to cover that liability only. There must be judgment for the plaintiffs, with costs.

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

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

Wednesday, Dec. 6, 1911.

(Before Bray, J.)

Steamship Den of Airlie Company Limited v. Mitsui and Co. Limited, and British Oil and Cake Mills Limited. (a)

Charter-party — Bills of lading — Assignment — Cesser of shipowner's liability—Submission to arbitration—Arbitration Act 1889 (52 & 53 *Vict. c.* 49), *s.* 6.

The plaintiffs, owners of the steamship Den of Mains, *chartered her by charter-party dated the* 26*th April* 1911 *to the defendants M. and Co., to load a cargo of beans at Vladivostock, and to proceed to a port in the United Kingdom and there deliver the cargo "agreeably to bills of lading." On the* 10*th June a cargo of about* 6000 *tons was loaded, and bills of lading made out to the order of the defendants or their assigns were signed by the master and handed to the defendants' representative. They had*

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

had, by a contract dated the 27th April 1911, *sold the cargo to the other defendants the B. Company on the terms of a "basis delivered" contract, by clause* 10 *of which the contract was to be void as regarded any portion shipped which might not arrive. On the 12th June the defendants M. and Co., under the contract of the 27th April, declared to the B. Company that the beans had been shipped by steamship* Den of Mains. *On arrival of the vessel at Liverpool, the port of discharge, M. and Co. handed to the B. Company the bills of lading indorsed against a payment. When the discharge had been completed it was alleged that there was a shortage of* 171 *bags, and, the B. Company having paid only in respect of the quantity actually delivered, M. and Co. instructed them to make a corresponding deduction from the freight, but the plaintiffs refused to acknowledge the claim for short delivery. A dispute having thus arisen, M. and Co. gave notice that they demanded an arbitration under a clause in the charter-party which provided for arbitration "by arbitrators, one to be appointed by each of the parties to this agreement, if necessary the arbitrators to appoint a third," and formally required the plaintiffs within seven clear days to appoint their arbitrator.*

The plaintiffs did not appoint an arbitrator, and the defendants after the expiry of the seven days gave notice of the appointment of a gentleman to act as sole arbitrator.

On a summons for directions taken out by the plaintiffs:

Held, (1) *that there was nothing in the contract or the circumstances of the case to satisfy the court that it was the intention of the shipowners and charterers that the responsibility of the former under the charter-party had ceased; and* (2) *that the submission to arbitration came within sect.* 6 *of the Arbitration Act* 1889.

Commercial Court.

Summons for directions before Bray, J. adjourned to open court for argument.

The facts and arguments are sufficiently stated in the written judgment of Bray, J.

Bailhache, K.C. and *Mackinnon* for the plaintiffs.

Atkin, K.C. and *Leck* for the defendants.

Bray, J.—The summons for further directions in this case asks that the defendants Mitsui and Co. Limited be restrained until after the hearing of this action from proceeding with a certain arbitration; alternatively, that leave be given to the plaintiffs to revoke the submission to arbitration, and, alternatively, that the notice dated the 10th Nov. 1911, purporting to be given by H. D. Blyth and Co. on behalf of the defendants, Mitsui and Co. Limited, appointing Mr. Howard Glover sole arbitrator be set aside, and that the plaintiffs have seven days in which to appoint their arbitrator. The facts are shortly as follows: The defendants, Mitsui and Co. Limited, whom I will call the first defendants, on the 28th April 1911 chartered from the plaintiffs the steamship *Den of Mains*, to load a cargo of beans at Vladivostock and to proceed to a port in the United Kingdom or other ports and there discharge. The charter-party contained an arbitration clause, to which I shall have to refer, with other terms, later. On the 27th April the first defendants, by a contract of that date, sold 6100 tons of beans, more or less, to the defendants, the British Oil and Cake Mills, whom I will call the second defendants, upon terms which I shall also refer to. On the 10th June, the cargo (about 6100 tons) having been loaded, two bills of lading comprising the whole cargo were signed by the master and handed to the first defendants' representative. They were made out to the order of the first defendants or to their assigns. On the 12th June the first defendants under the contract of the 27th April declared to the second defendants that the beans had been shipped by the steamship *Den of Mains.* On the arrival of the *Den of Mains* at Liverpool, the port of discharge, the first defendants, under clause 4 of the contract, handed to the second defendants the bills of lading duly indorsed against a payment. When the discharge had been completed it was alleged that there was a shortage of 171 bags representing about fourteen tons, and a difference in weight of thirty-six tons. The second defendants have only paid in respect of the quantity actually delivered, and the first defendants, in consequence of the shortage, instructed the second defendants to deduct from the freight a sum of 103*l.* 1s. 6*d.*, the value of the bags alleged to be short delivered, and this was done.

The plaintiffs refused to acknowledge the first defendants' claim for short delivery, and eventually the first defendants gave notice that they demanded arbitration under the charter-party, and on the 1st Nov. gave a formal notice to Galbraith, Pembroke, and Co., on behalf of the plaintiffs, that they had appointed Mr. Glover their arbitrator, and formally required the plaintiffs within seven clear days to appoint their arbitrator. The plaintiffs did not appoint an arbitrator, and on the 10th the first defendants gave notice of the appointment of Mr. Glover as sole arbitrator. On the 8th Nov. the plaintiffs issued their writ claiming (1) balance of freight, 103*l.* 1*s.* 6*d.*; (2) a declaration that the defendants, Mitsui and Co. Limited, having indorsed over to the defendants, the British Oil and Cake Mills Limited, the bills of lading for 27,132 and 44,280 bags of oil beans under circumstances in which the property in the goods referred to in such bills of lading passed to the indorsees, have no further rights under the contract evidenced in such bills of lading; (3) a declaration that the notice dated the 1st Nov. 1911, purporting to be given by H. D. Blyth and Co. on behalf of the defendants Mitsui and Co. Limited, calling upon the plaintiffs to appoint an arbitrator under the terms of a charter-party of the steamship *Den of Mains*, dated the 26th April 1911, is bad in law and of no effect; (4) an injunction to restrain the defendants, Mitsui and Co. Limited, from proceeding with the said threatened arbitration, and on the 17th this summons was issued. Meanwhile, the second defendants, on the instructions of the first defendants, paid the balance of freight claimed into court. Two affidavits were filed, one on behalf of the plaintiffs, and the other on behalf of the first defendants. Mr. Atkin, on behalf of the plaintiffs, made three points: (1) That the first defendants had no power to appoint Mr. Glover as sole arbitrator; (2) that the notices of the 1st and 10th Nov. were bad, as they were not served on the plaintiffs, but only on Galbraith,

Pembroke, and Co.; and (3) that the obligation of the plaintiffs under the charter-party to deliver the beans had ceased.

I will deal with these points in their order. As to the first, the defendants allege that this case comes within the words of sect. 6 of the Arbitration Act 1889, which provides that: Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, &c. "(b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent: Provided that the court or a judge may set aside any appointment made in pursuance of this section."

Does the submission here so provide? I think it does. The submission is in these terms: "Should any dispute arise under this charter-party, same to be settled in London by arbitrators, one to be appointed by each of the parties to this agreement, if necessary the arbitrators to appoint a third, whose decision to be final and binding upon both parties to the agreement. And it is further agreed the submission hereby made shall be made a rule—if in the United Kingdom or Continent—of Her Majesty's High Court of Justice, upon the application of either party." In my opinion until the arbitrators differ, and it becomes necessary to appoint a third arbitrator, the reference is to two arbitrators, and one is to be appointed by each party. It is none the less a reference to two arbitrators because it may at a later stage be necessary to call in a third. It is said on the other side that this is a reference to three arbitrators, and that two cannot make an award; it must be made by the three. That would be an absurd construction of the submission because in that case to enable a valid award to be made it must always be necessary to nominate a third whether the two differ or not, whereas the submission contemplates that it may be necessary to nominate a third. It is further said that if a third arbitrator is nominated the award must be made by all three. I do not agree with this. It would make an award almost impossible, because the third arbitrator is only to be appointed when necessary, that is, when the first two differ, and the dissenting arbitrator by refusing to join could make an award impossible. I ought to read this submission so as to make it workable if I can do so without unduly straining the language. I have no difficulty in reading this submission as entitling the two originally appointed to make an award, and if they have to appoint a third, as entitling the third to make an award. Read thus, I think the submission comes within sect. 6.

I now come to the second point, and as to this it is sufficient to say that, reading the affidavits and correspondence, I come to the conclusion that Galbraith, Pembroke, and Co. were the plaintiffs' agents to receive the notices; but even if this were not so, the plaintiffs in fact received the notice on the 2nd Nov., which was seven clear days before the notice of 10th Nov.

The last point is the real point between the parties. It was said for the plaintiffs that they are impeaching the agreement which contains the arbitration clause, and that on the authority of *Kitts* v. *Moore* (71 L. T. Rep. 676; (1895) 1 Q. B. 253) I am bound to restrain the arbitration till this question has been determined. Two answers are made: (1) that the plaintiffs are not impeaching the agreement, but are merely saying that one of the obligations under it has ceased; and (2) that I have all the facts before me to enable me to decide whether the obligation has ceased, and I ought to decide that now. I think I have all the facts, and, sitting as the judge in the Commercial Court, I think I ought, in order to save delay and expense, to decide this now. If I decide wrongly the case can go, if necessary, to the House of Lords. Being of that opinion I adjourned the summons into court so that I might have it thoroughly argued. Having heard the arguments and considered them, I have come to the conclusion that the right to claim damages if there has been a short delivery still remains in the first defendants.

The charter-party provides that the ship being loaded shall proceed to a certain port or certain ports and there deliver the cargo agreeably to bills of lading. The first defendants say that the plaintiffs have broken their contract contained in the charter-party by not delivering the whole quantity shipped. Mr. Atkin, for the plaintiffs, says that the obligation ceased, but he had some difficulty in saying when. First, he said it ceased when the defendants received the bills of lading with the intention of assigning them. That obviously raised a difficulty because, so far as the owners were concerned, that would leave them in doubt as to whether the charterers had the intention or not, and it might happen that they had one intention at one time and another later. Mr. Atkin was then driven to this: that it ceased when the charterers received assignable bills of lading. Now, as in practice all bills of lading are now assignable, the contention really amounts to this that the obligation ceases as soon as bills of lading are given. I asked Mr. Atkin how he would frame his plea to the defendant's claim, and I understood him to say that the original contract was varied by the bills of lading. I think, perhaps, another and better way of putting it would be that the giving of the bills of lading operated as an exoneration and discharge before breach. Could either plea be heard? Now the charter party contemplates that bills of lading will be issued, but it contains no provision that the liability under the charter-party shall cease. There is the usual clause (clause 15) providing for the cesser of the charterers' responsibility, but none for any cesser of the owners' responsibility. Both parties relied on the words "there deliver the cargo agreeably to bills of lading." These words seem to me to be in favour of the charterers, because this obligation cannot commence until there are bills of lading, yet according to Mr. Atkin it is to cease the moment they are given. Practically the obligation would never exist at all. Why am I to imply any cesser of liability? I have no right to so imply it unless I can see clearly that both parties so intended. If I am to look at the circumstances of this case there was certainly no such intention on the part of the charterers

Under the contract of the 27th April, as I read it, the buyers were only to pay for what was delivered. It is "Basis Delivered" contract, and by clause 10 the contract is to be void as regards any portion shipped that may not arrive. The charterers, therefore, will lose the value of any portion short delivered. Their object, therefore, would be to retain the remedy against the owner, not to give it up.

Nor can I see any sufficient reason why the shipowner should ask that his liability should cease. He cannot in any event be liable for more than the value of the goods short delivered. If the charterer has parted with his interest in all the goods shipped, he can only recover, at most, nominal damages. If, as here, he has not parted with his interest in any goods that do not arrive, the holder of the bill of lading can at most recover nominal damages. I doubt if he would have any cause of action. It was said that he could bring an action for conversion and recover the value of the goods. In my opinion he could not. He was not entitled to the bill of lading under the contract, and he did not in fact have it till the ship arrived, and for any conversion before that day he could not sue, for any conversion after arrival he could, of course, sue; but in such a case he would have to pay the charterers the price of the goods, as they arrived, and the charterer could only recover nominal damages. I do not think it is necessary to decide whether, when a bill of lading is indorsed under a contract of this kind where it is to be void as regards goods that do not arrive, the property in the goods passes to the indorsee. That point might be left to be decided at some future time. It is sufficient for me to say that I can find nothing in the circumstances of the case to satisfy me that it was the intention of the shipowner and charterer that their liability should cease, and apart from authority I can find no ground for making the implication.

Then what authority is there in favour of the implication? Although it is more than fifty years since the passing of the Bills of Lading Act there is no authority whatever in favour of it. I must hold that the obligation by the shipowners to the charterers for short delivery still remains. The parties have agreed that any dispute shall be referred to arbitration, and there is no ground for restraining the first defendants from proceeding with the arbitration. No sufficient ground has been shown for revoking the submission, or setting aside the notices.

If I am right the question is reduced to one of fact whether there has been a short delivery, and to what extent. Mr. Leck, for the defendants, has offered to allow the plaintiffs to appoint an arbitrator, and they shall have an opportunity of doing this within seven days, but they must pay the costs of this application in any event.

Solicitors for the plaintiffs, *Lightbound, Owen, and Co.*

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

HOUSE OF LORDS.

Nov. 24, 27, *and Dec.* 19, 1911.

(Before the Lord Chancellor (*a*) (Earl Loreburn), the Earl of Halsbury, Lords Atkinson, Gorell, and Shaw.)

Crawford and another v. Allan Line Steamship Company. (*b*)

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

Bill of lading—Through carriage—Liability of shipowner for damage.

Goods were dispatched from Minneapolis to Glasgow, viâ New York, under a through bill of lading which covered the whole transit both by land and water carriers.

The bill of lading was signed by an agent representing both the inland carriers and the shipowners "on behalf of carriers severally, but not jointly," and contained clauses that the goods were "received in apparent good order except as noted," and that "no carrier shall be liable for loss or damage not occurring on his own road or his own portion of the straight route, nor after the property is ready for delivery to the next carrier or consignee."

The receipt given at New York by the respondents—the shipowners—to the inland carrier stated that a small quantity of the total shipment was damaged. On discharge from the respondents' vessel at Glasgow a much larger quantity was found to have similar damage. There was evidence to show that at New York the goods were hurriedly shipped without adequate examination as to the condition of delivery from the inland carrier, and there was also some evidence that during the shipment at New York rain had fallen which might have caused the damage.

Held, that the shipowners were liable for the whole loss except that notified to the inland carriers at New York.

By Lord Shaw: The principle of The Peter der Grosse (3 *Asp. Mar. Law Cas.* 195 (1876); 1 *P. Div.* 414; 34 *L. T. Rep.* 749) *as to onus of proof approved.*

Judgment of the Court of Session reversed and decision of the Lord Ordinary restored.

Appeal from a judgment of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice-Clerk (Macdonald), Lords Ardwall and Salvesen, who had reversed a decision of the Lord Ordinary (Lord Mackenzie) in favour of the appellants, the pursuers below, in an action brought by them against the respondents to recover damages for injury to a cargo of flour, under circumstances which appear sufficiently from the head note above, and from the judgments of their Lordships. The case is reported (1911) Sess. Cas. 791; 48 Sc. L. Rep. 648.

Bailhache, K.C. and *D. P. Fleming* (of the Scottish Bar), appeared for the appellants.

T. B. Morison, K.C. and *C. H. Brown* (both of the Scottish Bar) for the respondents.

Campania Naviera Vascongada v. *Churchill* (10 Asp. Mar. Law Cas. 177; 94 L. T. Rep. 59;

(*a*) The Lord Chancellor was present during the argument, but took no part in the judgment.

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

(1906) 1 K. B. 237) was referred to in the course of the arguments.

Fleming was heard in reply.

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

Dec. 19, 1911.—Their Lordships gave judgment as follows :—

The Earl of Halsbury. — My Lords: The importance of this case depends not so much on the amount sued for as the effect to be given to what is called a bill of lading, a document which goes somewhat beyond what in commercial circles is generally known by that name. It is a written document dealing with the carriage of a cargo of bags of flour to be carried from Minneapolis, in Minnesota, one of the Northern States of America, to Glasgow. This transit, involving, as it does, carriage by railroad, inland lake, and ocean voyage, comprehends the handing over of the goods to be carried by several independent carriers. It has been found convenient both to the carriers and to the owners of merchandise to devise this which is in some respects a novel form of bill of lading, so as to fix the responsibility of each of the successive carriers in turn for any damage or loss of or to the goods so carried under this contract during the period of transit.

The facts may be very briefly stated. The flour was in 41,000 bags, in good order and condition, and was so delivered to the first carrier. Its route was prescribed. It was to go *viâ* New York, and each carrier in turn was to certify by a system of checking the state and condition of the goods carried in handing them over to his successor, and the succeeding carrier was to receive them in like order and condition, and to be responsible for himself delivering them to his own successor on the route, except so far as they were checked. It is proved that this course was pursued at New York (whether this was accurately done is another matter with which I will deal presently). A somewhat trifling number were checked at New York, but a very large number, upwards of 4000 bags, were discovered at Glasgow to have been damaged.

Here I may say that it appears to me irrelevant to discuss what is the nature of the damage done. In respect of the question as applicable to these 4000 bags and upwards which were caked, the question of principle may be separated entirely from the question of the amount of damages which may be recovered. It is enough to say that there is no doubt that these 4000 and odd bags had been damaged, and the sole question, to my mind, is the responsibility which arises upon these bills of lading. It seems to me that the whole question is one of law, because, as a matter of fact, it does not appear to me that upon the facts stated there is any real dispute between the parties. The sole question is the validity of this form of bill of lading.

It is proved, as I have said, that this course of business was pursued from New York to Glasgow, and whether what I have described as the course of business was carried out accurately or not at New York does not appear to me (if the bill of lading as it is called is valid at all) to be very material, because, as I think the Lord Ordinary has pointed out, it is quite clear that the liability is one which follows. One must assume that each of these carriers in turn receives the things in good order and condition except so far as they were marked and checked in the manner which has been described.

The Lord Ordinary decided after proof that the defenders were liable by reason of the contractual engagement by the two documents called bills of lading, one signed at Minneapolis and the other at New York, but both signed by authorised agents.

Of course this part of the arrangement was most important, since but for this neither carrier nor merchant could fix responsibility for loss or damage, as there is an express engagement that no one of the independent carriers should be responsible for loss or damage except on his own part of the line. This obligation amongst others was duly signed by Mr. P. R. Jarvis on behalf of the defenders. The successive obligations and responsibilities of each succeeding carrier are absolutely essential to such a system as is established by the through bill of lading, enforced as it is by the contract to which all are parties, that none of them shall be held answerable for loss or damage beyond his own line, and I am wholly unable to agree to the passage in Lord Salvesen's judgment in which he says that no bill of lading of any kind was signed by the master or agent of the steamer at New York. Of course, the learned judge does not merely mean that it must have been signed at New York. He has, I think, omitted to notice that the bill of lading which is given to us as a specimen of all the bills of lading was signed by the master or agent expressly on behalf of the steamer which was to carry the flour from New York to Glasgow—that is, on behalf of the defenders themselves—is the only question which can arise in the cause. He appears not to have noticed this fact upon which the whole question turns. If this bill of lading is valid according to its true construction, I do not think it necessary to go into the question of the incorporation of the contract, because it seems to me that the bill of lading described with considerable accuracy what is to be done and what is to be assumed if no such marks as are indicated are found upon the bags on their arrival. This has been done, and it appears to me that the judgment of the Lord Ordinary is perfectly right and ought to be restored.

Lord Atkinson.—My Lords: This is an appeal from an interlocutor of the Second Division of the Court of Session, pronounced on the 17th March 1911, recalling an interlocutor of the Lord Ordinary dated the 23rd Dec. 1909. The action in which the last mentioned interlocutor was pronounced was raised to recover damages alleged to amount to 167*l.* 12*s.* 6*d.* for injury done to 4132 bags of flour, portion of a cargo of 41,110 bags loaded at New York on the 19th Dec. 1903 and following days on the respondents' steamship *Corinthian*, and carried by her for freight to the port of Glasgow, and there delivered to the consignees, the appellants, on the 11th Jan. 1904 and the days following.

It was not disputed by the respondents that these 4132 bags of flour were, when delivered in Glasgow, "caked." Caking was the damage complained of, and means that, the texture of the bag getting wet, the wet got through the bag and wetted a portion of the flour immediately contiguous to its inner surface, turning the flour into dough, which, when dry, hardened and became

what was called a cake. It was admitted on both sides that this caking did not injure the uncaked portion of the flour contained in the bag; and it was further admitted that the caking in this case resulted from the bags having been wetted by fresh water, and that this wetting did not take place in the hold of the steamer *Corinthian*, though, of course, the caking might and almost certainly would take place there if the bags were wet when placed in the hold.

It was admitted further that the bill of lading was not drawn up, delivered, or signed by the master of the ship, and that it was not conversant exclusively with the ocean voyage from New York to Glasgow. The goods had been purchased from the Pilsbury Washburn Flour Mills Company Limited, carrying on business at Minneapolis. Minn., in the United States of America, and were on the 10th Oct. 1903, delivered to the Lehigh Valley Transportation Company, consigned to Glasgow, to the order of this milling company, to be carried, as the appellants alleged, the entire way to this Scotch port under the terms of certain bills of lading. somewhat peculiar in form, for a through freight. It was signed P. R. Jarvis, agent, "on behalf of carriers severally but not jointly," and immediately above this signature appeared the following paragraph: "In witness whereof the agent signing on behalf of the said Lehigh Valley Transportation Company, and of the said Ocean Steamship Company or ocean steamer and her owner severally, and not jointly, hath affirmed two bills of lading, all of this time and date, one of which bills being accomplished, the other to stand void."

The sum sued for is of small amount, but the proper construction of through bills of lading such as this, which are common, and the determination of the rights and obligations of the parties concerned under them, are of vast importance. It is for the purpose of getting these matters finally decided that this litigation was, admittedly, commenced. The bill of lading contains on the face of it a statement that the flour was received "in apparent good order except as noted." The provision immediately following is to the effect that the goods so received "are to be carried to the port of New York, and thence by Allan State Line to the port Glasgow, Scotland . . . and to be there delivered in like good order and condition as above consigned, or to the consignee's assign." It then proceeds to provide that in consideration of the freight named, the service stipulated for is to be performed thereunder subject to the conditions, whether printed or written, contained in it. Then follow eleven conditions dealing with the service up to the port of New York.

It is only necessary to refer to three of these—namely, No. 1, providing that no carrier shall be liable for loss or damages caused, amongst other things, by "heat, frost, wet, or decay." No. 3 providing that "no carrier shall be liable for loss or damage not occurring on his own road or his portion of the straight route, nor after the property is ready for delivery to the next carrier or consignee" . . . and also that "claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property or after due notice of delivery thereof, no carrier should be liable thereunder," and No. 11 providing that the contract is executed and accomplished, and all liability thereunder terminates on the delivery of the property to the steamer, her master, agents, or servants, or to the steamship company, and that the inland freight and charges should be a just lien due and payable by the steamship company.

The second part of the bill of lading deals with the service after delivery at New York, and until delivery at Glasgow. It contains nineteen separate paragraphs. Of these No. 1 provides, amongst other things, that the steamer should not be liable for inland damage, and No. 11 that the steamer should only be responsible for such part of the goods as are actually delivered to her at the port of New York, and should not be liable for any loss or damage that might have occurred before such delivery, while agreeing to present promptly to inland carriers for account of owners of the goods any claim for shortage, loss, or damage that may have occurred before delivery of goods at the port of New York. It is, I think, plain that by these provisions for the prompt delivery of claims for damage, contained in par. 3 (dealing with inland carriage) and in par. 11 (dealing with ocean carriage), it was designed to set up machinery to protect on the one hand each carrier from claims for damages not occurring on his portion of the through route, and to secure on the other hand for the owner of the goods the means of enforcing any claim which he might have against the carrier on whose portion of the through route his goods were, in fact, lost or damaged. The shippers contracted with the transport company to carry these goods in the way and by the means stipulated for to their destination at Glasgow. The shippers were neither bound nor entitled to interfere with the cargo *en route*, and if, on the arrival of the goods at Glasgow in a damaged condition, the consignees were left to discover for themselves on what part of the route the damage was caused, they would be absolutely at the mercy of the carriers. It suits the interest of these carriers to carry goods in this way for through freights; but if they adopt that method of doing business for their own gain, it is but reasonable that, if they are to escape liability themselves, they should be bound by noting the condition of the goods when received by them in order to protect the interest of their customers, the shippers.

The second part of the bill of lading contains two other important provisions: first, by par. 2 it provides that the shipment until delivery at Glasgow is to be subject to all the provisions of the American statute of 1893, called the Harter Act. By sect. 4 of that Act the owner, master, or agent of every vessel transporting goods from an American port to any foreign port is bound to issue to the shippers a bill of lading containing, amongst other things, a statement of the apparent order and condition of the property delivered and received by the owner, master, or agent of the vessel for transportation, which document is thereby made *primâ facie* evidence of the receipt of the merchandise described in it; and, secondly (par. 18), a condition to the effect that the property covered by the bill of lading is to be subject to all the conditions expressed in the regular forms of bill of lading in use at the time by the steamship company. One of these so-called

ocean bills of lading is printed. It commences with the statement, "Received in apparent good order and condition by the Allan State Line from the . . . to be transported by the good British ship *Corinthian* . . . to be delivered" in like order and condition at the port of Glasgow.

Unless, therefore, the respondents violated the American law the bill of lading so signed by Jarvis must be taken to be a bill of lading issued by them or their agent for the ocean voyage, and Jarvis must be taken to be their agent for that purpose. I am quite unable, therefore, to follow the reasoning of Lord Salvesen when he says, as he is reported to have said, that the admission contained in the through bill of lading as to the condition in which the flour was received applies, and can only apply, to Minneapolis. That condition is that the goods are in apparent good order and condition except as notified. It is more restricted than what is required by the Harter Act or by the ocean bill of lading. Neither can I follow his reasoning where he says; "It would, of course, have been different if there had been a bill of lading signed on behalf of the ship acknowledging receipt of the flour in good order, and undertaking to deliver it on the same order, for there would have been a contractual obligation which it would lie on the ship to excuse itself from discharging. Here, as I hold, there was nothing of the kind." But what are the facts? The flour arrived at New York in due course. It was there warehoused. On the 12th Nov. 1903 H. C. Davis, the foreign freight agent of the Lehigh Valley Railway, wrote to Austen Baldwin and Co., the agents of the respondents, to notify them of the arrival of flour "engaged with you for Glasgow," and asking for a shipping permit.

The only way in which the flour was "engaged" with the respondents for Glasgow was under the through bill of lading. On the 12th Dec. these same agents of the respondent sent a permit authorising the receiving clerk of the *Corinthian* to receive this flour from the Lehigh Valley Company. That is followed by the delivery of the goods to the steamer on the 19th and subsequent days of Dec. 1903, in presence of the respondents' officials, their receiving clerk having been sent there for the purpose of checking the delivery and giving receipts therefor. He gave receipts on a printed form, I presume, headed "received for shipment on board steamship *Corinthian*, bound to Glasgow, subject to the exceptions and restriction contained in the usual bills of lading of the company." But these latter are the bills of lading incorporated into the through bill of lading by par. 18 of the latter. It would therefore appear to me impossible to hold that whether or not Jarvis, when he signed the general bill of lading purporting to act as agent for the respondents, amongst others, had antecedent authority from them so to do, they have not adopted, acted upon, and taken the benefit of the contract of carriage into which he purported to enter on their behalf, and can no more be permitted now to disclaim any liability which it may by its terms impose upon them then if they had placed the seal of the company under Jarvis's name on the 10th Oct. 1903. Neither can I concur in the suggestion of Lord Salvesen, that the inland carrier who tendered this flour to the ship was, as regards the loading, the agent of the original shipper, and that accordingly the consent of this carrier to have the goods loaded in rain binds the appellants. I think that Mr. Bailhache is quite right in his contention that the shippers had contracted with the first carrier to transport and deliver these goods to the steamship, just as the steamship had contracted to receive them when delivered, that the relation between the shipper and the inland carrier was the contractual relation thereby created, and that the carrier was no more the agent of the shippers to see to the proper delivery of the goods than was the steamship company their agent to see to the proper reception and stowage of them.

It is not suggested that this flour got wet in the warehouse. If it did it must have been caked when delivered, and this should have been readily detected. It is admitted that it must have got wet before it was placed in the hold of the steamer, though the caking might, and possibly did, take place there. I concur with the Lord Ordinary in thinking that the respondents have failed to prove that these bags of flour had either caked before they came into their custody or got so wetted before they came into their custody that as a necessary consequence they caked afterwards. If anything of that kind occurred the evidence, I think, shows that it could have been readily detected in the process of loading, and, if detected, it should have been notified so as to preserve the appellants' remedy against the wrongdoer. It has not been notified, and, that being so, I think that the respondents are bound by the statement contained in the bill of lading, that the flour was received in good order and condition save as noted—*i.e.*, save as to the 111 bags which were noted and are not included in the 4132 for which damages are claimed. I think that the interlocutor appealed against was, therefore, erroneous, and that of the Lord Ordinary was right, and should be restored, and this appeal allowed with costs.

Lord Gorell.—My Lords: The appellants in this case claim for damage to certain sacks or bags of flour carried on the respondents' steamship *Corinthian* from New York to Glasgow. The Lord Ordinary found that the respondents were liable to the appellants in respect of 4022 bags "caked," but the Second Division recalled the interlocutor of the Lord Ordinary, and assoilzied the respondents from the conclusions of the action. The summons in the action was as far back as May 1904, and the amount in dispute is not large, but the Lord Ordinary states that the object of the action was to stop the loading of flour at New York in wet weather. The flour was dispatched under through bills of lading from Minneapolis for Glasgow. It is admitted that the sacks or bags of flour when delivered to the inland carriers were apparently in good condition. According to the bills of lading the goods were stated to be received at Minneapolis "in apparent good order (except as noted) contents and condition of contents of package unknown," to be carried to New York, and thence by the Allan State Line to Glasgow, and there delivered in like good order and condition." The conditions of the bills of lading were divided into two parts. The first dealt with the service by the inland carriers, the Lehigh Valley Transportation Company, to the port of New York which terminated with delivery to the steamer

(clause 11). The delivery in this case was from the inland carrier's lighters, when the sacks or bags were placed in the steamer's slings to be hoisted on board the steamer. The second part dealt with the service after delivery to the steamer until delivery at Glasgow. By condition 1 of the second part the steamer was not liable for inland damage, and by condition 2 of that part the shipment was subject to all the terms, provisions, and exemptions in what is known as the "Harter Act," an Act of the United States of 1893. By condition 11 of the same part the steamer was only responsible for such part of the goods as were actually delivered to her at New York, and not liable for any loss or damage which might have occurred before such delivery, "while agreeing to present promptly to inland carriers for account of owners of goods any claims for shortage, or loss of goods, or damage which may have occurred before delivery of goods at the port first above mentioned," that is at New York. Condition 18 of the said second part provided "that the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein." The through bill of lading was signed by an agent on behalf of the carriers severally but not jointly.

The receipts given by the respondents at New York to the inland carriers were headed "Received for shipment on board steamship *Corinthian*, bound to Glasgow, subject to the exceptions and restrictions of liability contained in the usual bills of lading of the company." I understand that these receipts notified that twenty-six sacks or bags were "caked," and that eighty-four were wet; but on delivery at Glasgow it was found that 4132 were "caked." "Caking" appears to be a well-recognised form of damage to flour resulting from wet. A layer next to the covering becomes hard, and the covering seems to be hard and firm to the touch. It is not disputed that the caking in question was caused by fresh water. Caked flour requires to be reconditioned, and the expense of this process to 4022 sacks or bags, the difference between 4132 bags found caked at Glasgow, and the 110 notified at New York as wet or caked, 167*l.* 2*s.* 2*d.*, is claimed in this action. The Harter Act, which will be found given conveniently in the late Judge Carver's work on Carriage by Sea, sect. 103, requires the giving of an ocean bill of lading or shipping document in case of goods carried out of the United States by sea, and such bill of lading must state, *inter alia*, "the apparent order and condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *primâ facie* evidence of the receipt of the merchandise therein described." The through bill of lading in question in effect incorporates, by clause 18 of the second part, the respondents' form of ocean bill of lading, which begins: "Received in apparent good order and condition," and provides for delivery "from ship's deck, where the shipowner's responsibility shall cease, in like order and condition at the port of Glasgow," and it also incorporates the Harter Act.

In my opinion the effect of these documents is to charge the respondent with the receipt of the flour in apparent good order and condition, except so far as they notify the inland carrier that this is not the case. Here they notified 110 sacks or bags as caked or wet. There were also notifications in respect of other matters not material to the case. Thus the appellants have an admission that the goods were received by the respondents in apparent good order and condition, except to the extent of 110 sacks or bags, and except as to other matters not material, and I think that it would be for the respondents to show, if they could, that the damage complained of was in fact done before they received the goods. The Lord Ordinary found that they had not discharged the onus of proving this.

During part of the time during which the cargo was loaded, after intimation from the steamship agents that the steamer was ready for cargo, the weather was wet, and precautions appear to have been taken to prevent the goods from being wetted as they were being taken on board from the lighters in which they came alongside. The Lord Ordinary found that there had not been negligence in the attempts to protect the goods, but it seems reasonably clear that they, in fact, became wetted in the loading, although it is said the loading was stopped when heavy showers or storms came on. If the bags were wet when taken on board the steamer it would be apparent, and if they were at that time caked the Lord Ordinary finds that "caking is damage to the contents of the bag indicated by external appearance."

In these cases of through bills of lading the consignors and consignees have no control over the transit, and the convenience of business requires that the shipowner, when he receives from the inland carrier, shall be careful to see what the apparent order and condition of the goods then is. If he accepts them as in apparent good order and condition, he takes the responsibility of delivering them in that order and condition, except so far as it is shown that the damage complained of was done before he received the goods or was caused by perils excepted in his part of the contract. None were relied on in this case. If they are not in apparent good order and condition he must notify the inland carrier, against whom the owner of the goods may claim, subject to any answer which that carrier has. It is said that this imposes a heavy duty on the shipowner, but I do not see that it places him in any worse position than would be the case were he the first receiver of the goods, as in any ordinary case of shipment from port to port, where for his own protection he must be careful not to sign bills of lading for goods as in apparent good order and condition when the goods are not so in fact.

The result is that in this case goods are admitted to have been received by the respondents in apparent good order and condition, to have been discharged in a damaged state, and no sufficient proof is given by the respondents that the damage was in fact done before they had possession of the goods, or by perils excepted after they had such possession.

If it had been established that the damage had in fact been done before the steamer took delivery of the goods, the question would arise as

to the duty imposed on the respondents to notify the inland carriers, and I think that they would be liable for breach of duty in this respect if they did not make a reasonable and proper inspection in the circumstances, and notify the results to the inland carrier by qualifying the receipts accordingly.

The Lord Ordinary finds that the loading of what was a very large cargo was pressed on, with the result that the examination, which would have disclosed caking, was not properly made. It seems to me that the evidence shows this. An experienced witness, Mr. Maloney, states it was about the biggest shipment of flour that he ever saw. The owners were evidently anxious to get the steamer away on her sailing day, and it would seem that they could not do this without going on loading notwithstanding the state of the weather, and that the result was an inadequate and hurried examination. It is not an excuse that the respondents desired to keep to the steamer's sailing date. If the shipowners do not notify, they in effect admit that the goods are received by them in apparent good order and condition, and if they wish to protect themselves they must make a proper examination. If they do notify, then the cargo owners must look to the inland carriers so far as the latter are not excused by the terms of their contract.

I am of opinion that the appeal should be allowed, and the decision of the Lord Ordinary restored.

Lord Shaw.—My Lords: There are two questions in this case. One is a question of law—namely, what is the proper construction of a document called in these proceedings a "through bill of lading." The other is a question of fact—as to the time and cause of certain damage suffered by a cargo covered by that bill. On both of these questions I agree with all of your Lordships that the conclusions reached by the learned Lord Ordinary were correct, and with the greatest respect to the learned judges of the Second Division, that their judgment, as expressed in the opinion of Lord Salvesen, was erroneous, and falls to be recalled.

The "through bill of lading" was for the transport of goods from Minneapolis to Glasgow *viâ* the Great Lakes. It was most natural that the consignor in such a case should make a contract for the entire journey and know his rights throughout, and most natural that the transporting interests should combine to facilitate such business. Your Lordships have given the details of the document. It was signed by P. R. Jarvis, agent, "on behalf of carriers severally but not jointly," the document bearing that the agents signed "on behalf of the said Lehigh Valley Transportation Company and of the said Ocean Steamship Company or ocean steamer and her owner." There are stipulations in it, also perfectly natural, that no carrier is to be liable for loss or damage by causes beyond his control, or not occurring on his own road or his portion of the through route; and it is provided that claims must be made in writing to the agent at the point of delivery promptly after the arrival of the goods, and if delayed for more than thirty days after delivery no carrier to be liable.

A special branch of contract with a special series of provisions applies to the sea-going portion of the route, and the earlier portion just referred to only bears upon this case as illustrating that the provisions of the entire contract point to liability for damage being promptly localised and the damage being paid, the particular carrier being thus ascertained, by that carrier. In the second portion of the contract, into which the form of an ocean bill of lading is imported by reference, it is provided, entirely in accordance with the general scheme of the bargain just mentioned, that the steamer is not to be liable for loss which may have occurred before delivery to it, while the ocean carrier agrees to present promptly to the inland carriers "any claims for shortage or loss or damage that may have occurred before delivery of goods at the port."

In the document as a whole the flour, which was the cargo, was acknowledged as received at Minneapolis in apparent good order, and it is further admitted by the joint minute of parties that each bag and sack of flour when delivered to the inland carrier was in good condition. In the adopted form of ocean bill of lading precisely the same language—"Received in apparent good order and condition"—was used. It is admitted that the Allan Line Company, the respondents, accepted delivery of the goods at New York, taking exception to the caked condition of about only 100 sacks (I proceed upon the concessions as to figures quite properly made in argument), and that when the goods were ready for discharge at Glasgow over 4000 sacks were discovered to be caked.

Were it not for the judgment of the Second Division, it would be rather difficult to discover what, upon the facts, constitute difficulties in the way of construing this contract. These difficulties, however, in so far as they have led to the reversal of the Lord Ordinary's judgment, appear to be reduced to two. It has been held, to use Lord Salvesen's words, that "the admission contained in the through bill of lading as to the condition in which the flour was received applies, and can only apply, to Minneapolis, and the obligation to deliver in the like good order and condition, while it is undertaken by the agent who signs it on behalf of all the carriers severally, but not jointly, does not apply in terms to successive carriers." I can only say that the very opposite appears to me to be the case. "In the second place, I think," says the same learned judge, "it may well be argued that the inland carrier, by whose servants the flour is tendered for shipment, is the agent for that purpose of the original shipper." It humbly appears to me that this is not the contract of the parties. Under a proper construction of this contract the several carriers must, in the view which I entertain, be held bound, unless notification to the contrary is promptly made, to the fact that the goods were received in apparent good order; and with regard to the shipowners for the Atlantic voyage, it appears to me, first, that they are expressly bound by the terms of the through bill of lading signed by Jarvis, who was agent for them as well as for the other carriers, that bill of lading stating that the goods were received in apparent good order and condition; while, further, it must be borne in mind that, under the law of the United States, such an obligation could not be dispensed with. It would appear to me to be a curious

result if, by the device of a through bill of lading, a means of escape could be provided from the general shipping law of the United States. Once, however, the point of law is settled in the sense which I have indicated, I do not find in Lord Salvesen's opinion that there would be any doubt in the mind of that learned judge as to the legal consequences which would follow. "If there had been a bill of lading, signed on behalf of the ship, acknowledging receipt of the flour in good order, and undertaking to deliver it in the same order . . . this would have been a contractual obligation which it would lie on the ship to excuse itself from discharging." I entirely agree in that view. As, accordingly, I am, along with your Lordships, of opinion, that there was such a bill of lading on behalf of the ship in this case, I think that the contractual obligation referred to rests upon the respondents. When the judgment of the Inner House is analysed, it is, however, to be observed that a consideration of the facts and of points as to the onus of proof is made from the opposite point of view—namely, that there was no such contractual obligation, and that the onus under a contract, worded like the present, for through carriage by land, lake, and ocean, rests upon the consignor to prove how the damage was caused, and to localise where it occurred. This might be singular as a matter of business; and it appears to me to be out of keeping, not only with the provisions, but with the scheme of the bargain of the parties.

The construction of the contract being as stated, the determination of the case upon fact is greatly simplified. If there had been no proof whatever, notwithstanding the contract, the principle of *The Peter der Grosse* (3 Asp. Mar. Law Cas. 195 (1876); 34 L. T. Rep. 749; 1 P. Div. 414) would apply. That principle is thus expressed by that very learned judge Sir Robert Phillimore: "Fairly construed and giving all due weight to the legal effect of the marginal note, the result must be that apparently and so far as met the eye and externally they were placed in good order on board this ship. Well, then, if that be so, if the plaintiffs have shown by *primâ facie* evidence, that having placed these bales and bags in good order on board the ship, they were taken out in bad order externally and internally. I agree with the observation which was made that it is not incumbent on them to show either how or when the damage was done." I may add, however, that quite apart from any question of onus, I could not have seen my way to differ from the view of the evidence taken by Lord Mackenzie. It appears to me that the respondents were extremely anxious for business reasons for the speedy loading of the *Corinthian* with this exceptionally large cargo of flour, and that they took weather risks, they, however, having the complete option on the documents, under "the condition that such cargo can, in the judgment of the steamer's agent (having regard to weather and other circumstances) be put on board the steamer in proper time." I do not follow the reasoning as to the weather not being exceptionally rainy for New York, or the introduction into this case of the custom of the port. If it had been necessary to fix time and cause for the damage to this cargo of flour, I think that it is fairly established that the appellants have done so, and that the responsibility rests with the shipowners.

Judgment appealed from reversed. Judgment of the Lord Ordinary restored, with costs in this House, and the courts below.

Solicitors for the appellants, *Woodhouse* and *Davidson*, for *Gill* and *Pringle*, Edinburgh, and *James Ness* and *Son*, Glasgow.

Solicitor for the respondents, *Pritchard* and *Sons*, for *Webster, Will*, and *Co.*, Edinburgh, and *Wilson, Caldwell*, and *Tait*, Glasgow.

Monday, Jan. 29, 1912.

(Before the LORD CHANCELLOR (Earl Loreburn), the Earl of HALSBURY, Lords MACNAGHTEN, and ATKINSON, with Nautical Assessors.)

OWNERS OF THE FRANCES v. OWNERS OF THE HIGHLAND LOCH; THE HIGHLAND LOCH. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Launch — Right of shipbuilders to launch—Duty of ship at anchor to get out of the way.

Where a person, through no fault of his own, is placed in a position in which he is obliged to take one of two risks, he is justified in taking what appears to be the lesser risk, and will not be held liable for damage so caused to the party whose act occasioned the risk.

Shipbuilders were preparing to launch a ship, and had given all the necessary notices that they intended to launch at a certain hour on a certain day. About two hours before the time fixed for the launch a vessel anchored in a position in which it was possible, though not probable, that she might be injured by the launch. Her master was warned that the launch was about to take place, and was requested to move, but refused to do so. There was evidence that if the launch had not taken place at the time fixed it must have been delayed for twenty-four hours, and that, after all preparations had been made, such delay would have caused considerable risk to life and property. The launch took place, and the vessel launched collided with the vessel at anchor and injured her.

Held, that the vessel at anchor was solely to blame for the collision.

Judgment of the court below affirmed.

APPEAL from a judgment of the Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley, L.JJ.) with nautical assessors, who had reversed a judgment of the President of the Admiralty Division (Sir S. Evans) with nautical assessors.

The case is reported 12 Asp. Mar. Law Cas. 68; 105 L. T. Rep. 764; (1911) P. 261.

The action was brought by the appellants for damage sustained by their ketch *Frances* by reason of a collision between that vessel and the steamship *Highland Loch*, which was alleged to have been caused by the negligence of the respondents.

The respondents denied the alleged negligence on their part, and counter-claimed for the damage sustained by the *Highland Loch* in the collision.

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

The respondents were shipbuilders who had a shipbuilding yard and slipways known as Tranmere Yard, on the river Mersey. The steamship *Highland Loch*, a vessel of 7493 tons gross and 4729 tons net register, was built by the respondents in this yard; and her launch was fixed to take place at 12.30 p.m. on the 17th Jan. 1911. The usual and proper notices had been given of the impending launch, and all usual precautions were taken on the day of the launch to prevent danger to vessels in the river.

On the morning of the 17th Jan. 1911 the final preparations for launching the *Highland Loch* were made by removing the shores and keel blocks from under her, so as to let the vessel rest on the sliding ways. This work of removal was begun at 6 a.m., and was so timed as to be completed only just before the hour fixed for the launch. Whilst these preparations were in progress the *Frances*, which was proceeding up river, was observed by those in charge of the launch to bring up, at about 10.30, in a position, out in the river, a little below—*i.e.*, to the northward of—the line of the launch. A message was at once sent out from the yard to the master of the ketch, informing him of the impending launch, and warning him to move away, so as to be clear of all danger. The master was unable to get his vessel away without slipping his anchor, which was foul of some moorings at the bottom; and this he failed to do.

About 11.30 a.m. another message was sent out, urging the master to slip and buoy his anchor, and shortly after twelve noon the assistant yard manager of the respondents was sent out with a third message to the same effect, which was accompanied by an offer to tow the ketch away, if the master would slip his anchor. The master refused to slip, unless the respondents would undertake to be answerable for the anchor or to pay for a new one. The respondents, after causing the usual warning guns to be fired, then launched the *Highland Loch* at 12.45—a quarter of an hour later than the time originally fixed.

Contrary to expectation, the *Highland Loch*, after taking the water, instead of turning up river, took a turn down river, in the direction of the *Frances*, being caught by the tide, which had begun to ebb, in consequence of the delay in the launch, and came in contact with the latter vessel, giving her a sliding blow on her starboard side.

On the 20th Jan. 1911 the appellants commenced an action *in rem* against the respondents in the Admiralty Division of the High Court of Justice, claiming judgment against the respondents and their bail for the damage so caused, and a reference to the registrar and merchants to assess the amount thereof; and the respondents put in a counter-claim in such action claiming judgment against the appellants and their bail for the damage sustained by the *Highland Loch* in the collision, and a reference to the registrar and merchants to assess the same.

The President of the Admiralty Division found as a fact that the respondents ordered the *Highland Loch* to be launched when they knew the danger to the *Frances*; that they deliberately disregarded such danger, and launched her when they knew that she would almost certainly cause loss of life or injury to property.

The President was of opinion that the master of the *Frances* ought to have slipped his anchor, and had no right to make it a condition that the anchor should be paid for, but that his conduct did not excuse the respondents, because they could, by the exercise of care, have avoided the mischief which their deliberate action caused.

The case was carried to the Court of Appeal which reversed the judgment of the court below, and pronounced the collision to have been solely caused by the fault of the *Frances*.

There was evidence that if the launch had not taken place when it did it must have been delayed for twenty-four hours, till the daylight tide on the following day, and that there would have been considerable danger to the ship and to the men employed in the yard if she had been left on the sliding ways, for that time after the removal of the shores and keel blocks.

Bailhache, K.C. and *C. Robertson Dunlop* appeared for the appellants.

F. Laing, K.C. and *G. D. Keogh*, who appeared for the respondents, were not called on to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Earl Loreburn).—My Lords: I think that there are no nice questions of law in the case, nor any questions of law at all. It is purely a question of fact. It is very clear to me that the ketch was to blame for acting unreasonably. It is unnecessary to dwell upon that, because all the learned judges have agreed upon that subject. I should say, if the vessel could get out of the way fairly, finding herself in this position, that acting as this ketch did, offers a typical illustration of unreasonableness. Then you have to see whether the defendants were at fault. I cannot see where negligence or breach of duty on their part arises in the circumstances. It is an exceptional state of things when a launch is to take place, because temporary and exclusive use is required for a short time of the water by those who have to launch the vessel. Others must do what is reasonable to facilitate that lawful and exceptional use of the water, and the owner of the ship to be launched must do the same. I have been watching to see what grounds were alleged of neglect of duty on the part of the owners of the launch. So far as I can see, these are the things suggested: that they ought to have taken precautions to see that the mooring chains should not be a source of obstruction at the bottom of the river. That suggestion was made by the junior counsel for the appellant, but I find it nowhere suggested in any other part of the case. That, I think, is so remote that we need not trouble ourselves about it. The defenders were not owners of the buoy or the mooring chains. The second suggestion was in not warning the ketch against the trap lying at the bottom of the river. That is also a great deal too remote. You could not imagine that the vessel would drag her anchor, and that she would come foul of a mooring chain. The next complaint was that there was not a ship below the yard to warn coming vessels. This ketch was warned after she got into difficulty two hours before the launch. The fourth suggestion was continuing the removal of blocks and shores after

it was known that the ketch could not be cleared. I do not see how the respondents could have been supposed to know that anyone would act in so unreasonable a manner. The next thing was that the owners of the launch ought to have paid the value of the anchor. That is a most unreasonable contention. I see nothing in that, nor in the complaint that there should have been a tug to move the ketch and keep her till she got back to her anchor. If the master of the ketch thought that desirable, he could have asked for it and he might have got it, but it never occurred to him until the litigation. In regard to the last point, that the launch ought not to have taken place, and that, having taken place, the collision was caused without any inevitable necessity, I have only to say this: The owners of the launch were placed in an extremely difficult position. I am quite satisfied, upon the evidence, that it would have been a dangerous thing to the men in the shipbuilding yard, and also to this craft in the river, if this launch had been postponed. The master of the ketch was thoroughly unreasonable in refusing to move her, as he could have done by slipping his anchor. The owners of the launch were placed in a position in which they had to take one of two risks. It seems to me that they took the lesser risk. Under the circumstances, they did nothing to which the law can attach any blame, or fix any penalty in the way of damages. I say no more, because I am entirely satisfied with the judgment of the Court of Appeal.

The Earl of HALSBURY.—My Lords: I am entirely of the same opinion. This is a question of fact. I am quite satisfied that the judgment which the Lord Chancellor has given disposes of all the facts which it is necessary to dispose of in order to arrive at the same conclusion as was arrived at by the Court of Appeal.

Lords MACNAGHTEN and ATKINSON concurred.

Judgment appealed from affirmed and appeal dismissed with costs.

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

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

Jan. 30 *and* 31, 1912.

(Before the LORD CHANCELLOR (Earl Loreburn), the Earl of HALSBURY, Lords MACNAGHTEN and ATKINSON, with Nautical Assessors.)

OWNERS OF THE HERO v. LORDS COMMISSIONERS OF THE ADMIRALTY, and Cross-appeal; THE HERO. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Collision—Both to blame.

A merchant steamship met a flotilla of warships proceeding upon an opposite and parallel course. The warships were proceeding in two columns each divided into three subdivisions. The merchant ship passed inside the first subdivision of the starboard column, which was a little out of its station to starboard, and outside the second subdivision, passing it green to green. On approaching the third subdivision she ported her helm, and ran across the bows of the leading vessel of that subdivision, causing risk of collision. The helm of the warship was first ported, and then starboarded, and a collision took place by which the warship was sunk.

Held, that both vessels were to blame as both had contributed to the accident.

Judgment of the court below affirmed.

CROSS-APPEALS from a judgment of the Court of Appeal (Vaughan Williams, Farwell, and Kennedy, L.JJ.) finding both vessels to blame for a collision which took place between the steamship *Hero* and H.M.S. *Blackwater* in the English Channel on the 6th April 1909.

The case is reported 12 Asp. Mar. Law Cas. 10; 105 L. T. Rep. 87; (1911) P. 128.

The President of the Admiralty Division (Sir S. Evans), sitting with Nautical Assessors, held the *Blackwater* alone to blame.

H.M.S. *Blackwater* was a twin-screw torpedo-boat destroyer, and at the time of the collision was proceeding up the English Channel to the eastward of Dungeness in the course of a voyage from Portland to the Firth of Forth. The *Hero* was a steel screw steamship of 1812 tons gross and 1164 tons net register, and at the time of the collision was proceeding down the English Channel in the course of a voyage from Rotterdam to Bristol laden with a cargo of general goods.

On behalf of the respondents and cross-appellants it was proved or admitted that shortly before 11.20 p.m. on the 6th April 1909, the wind being from E. to N.E., force 2 4, the weather fine and clear, and the tide running to E.N.E. about $1\frac{1}{4}$ knots, a flotilla of twenty-one of His Majesty's ships was proceeding up channel in two columns, disposed abeam to starboard. The ten vessels in the starboard column were somewhat out of position; the leading subdivision being to starboard of their position, the second subdivision being in position, and the third subdivision to port of their position. H.M.S. *Blackwater* was the leading ship of the rear subdivision in the starboard column, and, like the rest of the flotilla, was steering a course of N. 63 E. magnetic; she was making about 11-12 knots through the water, her regulation lights and also those of the entire flotilla were duly exhibited and burning brightly, and a good look-out was being kept.

In these circumstances, the *Hero*, which was meeting the fleet on practically an opposite and parallel course, passed down between the subdivisions of the starboard column, passing port side to port side with the leading subdivision and starboard side to starboard side with the second subdivision, and it was when she was passing this subdivision that those on board the *Blackwater* observed the masthead and green lights of the *Hero* at a distance estimated about 8-10 cables away and bearing about one point on the starboard bow. This was a position of perfect safety so that each vessel could pass starboard side to starboard side by keeping on their respective courses, and the *Hero* could have passed the rear subdivision just as she had passed the second one.

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

The *Blackwater* therefore kept her course and speed, but the *Hero*, when about two or three cables away, suddenly ported without giving any signal to indicate her manœuvre and tried to cross the bows of the *Blackwater*.

The helm of the *Blackwater* was immediately ported to try to go clear of the *Hero*, but the vessels being too close together for this to be effective, the helm was changed to nearly hard-a-starboard. The *Hero*, however, came on and with her starboard bow struck the starboard quarter of the *Blackwater* such a severe blow that she sank shortly afterwards.

F. Laing, K.C. and *Adair Roche* appeared for the owners of the *Hero*, appellants in the first appeal and respondents in the cross-appeal.

The *Attorney-General* (Sir R. Isaacs, K.C.), *Butler Aspinall*, K.C., and *Bateson*, K.C. for the respondents and cross-appellants.

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

The Lord Chancellor (Earl Loreburn).—My Lords: I do not think that there is any necessity for entering upon the history of what took place in this case, all of which has been most admirably presented by counsel for the appellants and respondents. The Court of Appeal found that there was statutory blame, and, therefore, thought that both vessels were in fault. In my opinion, and I think it is shared by your Lordships, I arrive at the same conclusion, upon the ground that both these vessels were, in fact, at fault. The *Hero* ported at the time, and under circumstances which have not been explained, and, to my mind, are, as presented, quite unintelligible. She ran across the bows of three torpedo destroyers, which were coming in an opposite direction. I think that in the ordinary, plain common-sense of this business, the *Hero* not only contributed, but mainly contributed, to this accident. On the other hand, the *Blackwater*, I think, also was not free from fault, because after she had ported, her commander came on the bridge and gave other orders, which contributed to the accident. I am quite aware of the disinclination —I will not enter upon it further—which has been expressed in this House, to differ in matters of fact from conclusions arrived at by both tribunals below. In this instance they have not agreed together upon their view of the facts. Besides that, I do not think that we are differing from any particular fact in this case which has been found by the President. We rather differ from the conclusion and the aspect which they ought to bear when those facts were ascertained. I accordingly move that this appeal be dismissed, coming as I do, not upon the same ground, but a different ground, to the identical conclusion of law to that arrived at by the Court of Appeal.

The Earl of Halsbury and Lords Macnaghten and Atkinson concurred.

Judgment appealed from affirmed. Appeal and cross-appeal dismissed with costs.

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

Solicitor for the respondents, *The Solicitor to the Treasury.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Nov. 8, 9, 10, 11, 16, 1910, *and Feb.* 3, 1911.

(Before Madden, Kenny, and Wright, JJ.)

Langham Steamship Company Limited v. James Gallagher. (a)

Charter-party—Strike clause, effect of—"Workmen essential to the discharge of the cargo,"—"Loading" and "discharge"—Demurrage.

A charter-party contained a "strike" clause: "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 of discharging shall not count during the continuance of such strike or lock-out." On the arrival of the ship at the port of discharge, a strike of carters was in existence, in consequence of which the docks had become congested; this condition of affairs rendered it impossible for the defendant, who was consignee, to accept delivery of the cargo, there being neither space for the cargo in the docks nor means of taking it away when tendered over the ship's rail.

Held, in the circumstances, that the carters were not a "class of workmen essential to the discharge" within the meaning of the clause, and that the defendant was not protected by the clause as discharge was not made impossible by the strike.

Held, also, that "discharge" is a joint act, necessitating co-operation on the part of the ship and the receiver of the cargo, and that the obligation of the ship under this term is fulfilled when its crew or its stevedore's men are in a position to offer, and do offer, delivery to the consignee over the ship's side.

Motion for a new trial.

The plaintiffs claimed demurrage at the rate of 4*d*. per ton on their steamer's gross register tonnage for seventeen days from the 30th July to the 17th Aug. 1907. The action was tried before Gibson, J., without a jury, at the Spring Assizes 1909. The trial commenced at Belfast and was adjourned to Dublin, owing to the illness of his Lordship.

The material facts of the case appear in the judgments of the court, and in the following report of the judge at the trial, which was as follows:—

This action was tried by me at Belfast and Dublin, the trial having begun at Belfast Spring Assizes 1909, and having, in consequence of my illness there, been adjourned to Dublin, I thought that the case had been settled, when in April I was asked to resume the hearing, and dispose of the action. The action was for demurrage. Three defences were relied on: (1) That the defendant was protected by the strike clause in the charter-party; (2) that there was a special contract that defendant was not to be liable for demurrage beyond three and a half days (which amount was lodged in court); (3) that there was a special contract that partial days were not to count as full days. The notice of motion impugns findings, and conclusions of fact and law, on all points.

(a) Reprinted by kind permission of the Council of Law Reporting for Ireland from the Irish Law Reports.

A shorthand writer was, by consent, sworn. I refer to his note for the oral evidence. In addition to such evidence all the correspondence (letters, telegrams, &c.) was entered, with bill of lading and charter-party, and the following proofs: (1) An analytical summary of the discharge, with days and modes of disposition; (2) the number of gangs employed, with days and hours of work; (3) summary of defendant's sales; (4) the ship's log; (5) the official record of the various vessels discharging in Dufferin and York Docks respectively, during the period in controversy.

I gave a written judgment, to which I refer. The main questions argued before me were on the first and second defences.

The material dates were as follows: "The carters' strike began about the 4th July; defendant bought the cargo afloat on the 15th July; the vessel arrived on the 26th July, and was ready for discharge in Dufferin Dock on the 27th July; the discharge began on Monday, the 5th Aug., and was completed on the 17th Aug.; and the strike ended on the 16th Aug.

There were important interviews between Ballingall (manager of plaintiffs) and defendant on the 24th July and the 10th Aug., and between Hamilton (representing plaintiffs) and defendant on the 7th Aug.

The charter-party fixed sixteen running days as the time for loading and unloading, and threw on the consignees (apart from the strike clause) an absolute obligation to discharge within two and a half days, thirteen and a half days having been spent in loading.

There were two questions on the strike clause— (1) Did it apply to demurrage after the running days had expired? In the absence of authority the other way, I held that it did apply to the contract period of demurrage, though no doubt the exclusion of Sundays in the demurrage periods may supply an adverse argument, Sundays being expressly excluded from the running days.

The second question was as to the effect of the strike clause, within which, as an exception, the defendant had to bring himself.

There never was a strike of stevedore's men at the ship save on part of one day, and the difficulty of disposing of the cargo was argued to be a reflex or indirect consequence of the carters' strike.

I held that defendant was liable for the ten days, from Thursday, the 8th Aug., to Saturday, the 17th Aug., as discharge overside was not shown to be impossible by defendant, on whom the onus lay, but I allowed credit for half a day, when work was stopped by partial strike. I also thought that defendant, in any view, was responsible for not slabbing on the quay at an earlier period, and also probably for the 8th Aug., on which day no work at all was done. Whether defendant might or might not be excused by stoppage of outlets caused by external strikers, whether in carting, railway service, or otherwise, appeared to me a difficult question, and I did not deem it necessary to decide it.

Assuming that defendant might be so excused for at east a portion of the ten days, I found that in existing conditions, as regards land discharge at that particular dock, defendant had done all in his power and was not to blame save to the limited extent above indicated. I found against the special contracts.

The case was treated in argument on the basis that defendant's liability, if it existed, extended to the entire number of days sued for; but I held that, on the course of dealing, demurrage could not be carried further back than the 8th Aug. I stayed execution and extended time for moving.—(Signed) J. G. Gibson.

The strike clause referred to is set out in the judgments of Madden, J. and Kenny, J., *infra*.

The following judgment was delivered by Mr. Justice Gibson at the trial:—

The defendant being sued for demurrage in respect of a cargo of wheat carried by the *Langham*, which he bought on the 15th July 1907, on the terms that he should have six days to discharge, relies on three defences, two going to the entire cause of action, one only an answer in part. They are — (1) He is absolutely protected by the strike clause in the charter-party; (2) there was a special contract that demurrage should be calculated at three and a half days only; (3) portions of days should not be reckoned as full days.

The charter-party, incorporated in the bill of lading, by clause 7, gave sixteen running days for loading and unloading, and ten days for demurrage at 4*d.* per ton; and clause 13 contained an exemption from liability where the cargo could not be discharged by reason of strike of any class of workmen essential to discharging, the days for discharging not to count during the continuance of such strike. Thirteen and a half days having been spent in loading, there were only two and a half running days left for discharge, as between the ship and the consignee, though the latter had, has against his vendor, the right to six free days.

But for the strike clause, under a charter-party of this type with a rigid time limit, there was an absolute obligation on the cargo owner to discharge, which could not be affected by strikes, inability to handle or dispose of the cargo from want of shed accommodation, or of cartage, or otherwise: (*Budgett* v. *Binnington*, 6 Asp. Mar. Law Cas. 549, 592; (1891) 1 Q. B. 35; *Hick* v. *Raymond and Reid*, 7 Asp. Mar. Law Cas. 23, 97, 233; (1893) A. C. 22; *Hulthen* v. *Stewart*, 9 Asp. Mar. Law Cas. 285, 403; (1903) A. C. 389). The *Langham* was an arrived vessel on the 27th July, whether she was in berth or not: (*Leonis Steamship Company Limited* v. *Rank Limited*, 10 Asp. Mar. Law Cas. 398; 11 Asp. Mar. Law Cas. 142; (1908) 1 K. B. 499).

The strike clause must be read as an exception from the unqualified obligation on the charterer. Two questions arise on it: (1) Does it apply to a strike outside the ship's and stevedore's work, affecting the ability of the charterer to get away and dispose of the cargo? (2) Does it apply to demurrage after the running days had expired? With regard to this latter question, as the running days might be exhausted in loading, and there is an agreed-on period of demurrage at a price, I am inclined, in the absence of authority the other way (and none was cited), to hold that the strike clause, where applicable, extends to the demurrage days proper.

The first, the large, question is one of difficulty. The onus is on the defendant to bring himself within the exception. Does the word "discharged" cover the time and series of acts outside the vessel after the merchant would in ordinary course have received and possessed disposing power over the cargo, the ship's duty having been completely performed?

The process of discharge is accomplished on board, partly by the ship's gang, who fill, hoist, and carry; and partly by the merchant's gang, who receive bags, weigh, and carry out. Here there was the same stevedore for ship and consignee, with double duty. The normal mode in which the consignee disposes of cargo when received is by shedding, carting, trucking, by putting overside into lighters, usually for purchasers *ex* ship; and towards the end of discharge, portion may be slabbed on the quay. Such modes of handling the cargo, when discharged from the ship, are, I suppose, common in most ports, and can hardly be described as customs binding the ship's discharge.

In the *Helios* case (8 Asp. Mar. Law Cas. 244; (1897) 2 Q. B. 83), cited by Mr. M'Grath, there was a true custom in relation to the ship's duty in discharging. Here there is no question as to the extent and duration of such duty, the point raised relating to inability of the merchant to take away the cargo if, and when, delivered. Ordinary business methods are not custom—that is a local law binding all coming to the port. But for the strike clause, the defendant would, beyond doubt, have been liable for all

detention not attributable to fault or breach of contract on the ship's part. In the present case, there was no strike of the dock labourers' gangs employed in discharge, save for half a day on the 13th Aug. They worked perhaps with less willingness than usual; but there is no tangible proof of delay from this cause. The ship would have been discharged without substantial delay, if there had been sufficient shed accommodation and there had been no cartage obstruction. Mr. Gordon contends that these matters are entirely outside the scope of the strike clause, and he points out that discharge over side was always practicable, as I think it was. The congestion of the sheds, as a consequence of the carters' strike in relation to the cargoes of other vessels, is also said to be merely an indirect consequence, which could not be treated as caused by such a strike as the clause contemplates. Before I state my conclusion as to the effect of the strike clause, I shall first briefly summarise the facts. There has been some controversy in the oral evidence, but many facts are admitted, or are established by certain proof; such as (1) the admittedly accurate summary of quantities discharged, with dates, and modes of discharge; (2) the defendant's sales book; (3) the list of gangs at the various holds, with days and hours; (4) the official records as to vessels discharging in the York and Dufferin Docks; (5) the log; (6) the correspondence. All this last was treated as entered; most of the letters, &c., not passing between the parties would have been evidence on cross-examination, or could have been used to refresh the memory; or, as in *Reg.* v. *Coll* (24 L. Rep. Ir. 522), not as substantive evidence, but to set up the credit of the witness, and to show that his evidence was not the result of subsequent invention.

The history of the case is as follows: The dock labourers' strike began early in July, but was at first confined to a certain class of business and to a certain area. It had not affected Burns' ability to discharge up to the 17th July (see his letter of that date). M'Cann's evidence is to the same effect. Events marched, or were supposed to be marching, rapidly, for on the 22nd July Burns wrote to the plaintiffs that work into sheds was completely stopped, and, save into lighters or coasters, discharge was then impossible. But that Burns' statement was exaggerated, or, at least, falsified in result, appears from the actual discharges proved to have taken place. On the 15th July the defendant had bought the cargo, so that both he and the plaintiffs were faced with an anxious and difficult problem. Ballingall having received from the Shipping Federation a telegram, dated the 23rd July, to the same effect as Burns' letter of the 22nd July, came over and had an important interview with the defendant (which I postpone for the present). The vessel arrived on the 26th, and would have berthed in the York Dock but for want of available shed accommodation there (see Burns' letter, the 26th July).

She was brought to the Dufferin Dock, east side, on the 27th July, when she was ready to discharge, and was an "arrived" ship. Another vessel, the *Gael* was already at that side; the quay was partly incumbered with cargo; there was no shed accommodation; and for that reason, and not directly on account of the strike, no discharge was attempted at the east side. Tinsley's evidence shows this. The dilatory behaviour of the *Gael* is not easy to account for in view of what was being done in the case of other vessels. There were on the 26th, 27th, and 29th July, in Dufferin Dock discharging, the following vessels besides the *Gael*: the *Helder* with a wood cargo, the *Noemi*, and the *Bardowie*. This last vessel was consigned to the defendant, and was occupying a shed berth at the west side. Her captain refused to move out until his cargo was unloaded, which was done on Saturday, the 3rd Aug., when the *Langham* moved in and took that berth. No discharge was attempted that day for want of bags, which the defendant alleged he could not get to the dock in consequence of the carters' strike. How the bags were brought afterwards does not appear. At this time the west shed was largely filled with the *Bardowie's* grain.

The discharge began on Monday, the 5th Aug., and was continued at various rates of progress and with varying gangs till Saturday, the 17th Aug., when the vessel, being completely unloaded, went away, having been chartered on the 12th Aug. for a voyage to begin on the 19th. The analysis of each day totals, and of the disposal of the output over the side, into sheds, waggons, carts, and on the quay is important. No work at all was done on Thursday, the 8th Aug. This is variously explained. The log states that the shed was full, though the telegram of the same day says that the shed would hold 300 tons more. Burns' letter of the 8th Aug. accounts for the cessation, in part, by the non-arrival of a coaster—a risk obviously to be borne by the defendant. On the 13th half a day was lost owing to the men refusing to carry to the Midland waggons. This was the only direct strike in connection with the discharge. The quantities each day varied considerably, and my conclusion is that the delay was caused, not by the refusal of men to hire or work, but by shed accommodation not being adequate, carting being restricted, and over-side discharge not being employed more extensively.

Important interviews took place on the 7th Aug. between Hamilton, representing the plaintiffs, and the defendant; and between the plaintiffs and the defendant on the 10th, which I will refer to in connection with the contract to forego demurrage relied on by the defendant.

The strike ended on the 16th. On that and the following day a large proportion was carted. On the 15th and 16th slabbing was resorted to for the first time 127 tons 10cwts. being so disposed on the former day, 40 tons 16cwts. on the latter. In my opinion at least 400 tons could have been slabbed without obstructing egress or circulation; and, had this expedient been adopted earlier, two days would have been saved. For slabbing, permission was required, but this was more or less a formal matter. Such permission was asked for on the 14th Aug., and given on the 15th. Had it been asked before, it would have been granted in the same way.

With regard to other vessels being discharged in the Dufferin Dock, the history of the *Noemi* and the *Gael* shows how hard it is to draw any satisfactory inference as to the effect of the carters' strike. The *Noemi*, a sailing vessel with wheat cargo, arrived in the middle of June, and her discharge, with a short interruption for repairs, took thirty-five days. The *Gael* arrived on the 15th July (at a time when Burns and M'Cann were operating without difficulty), and was left without any attempt at discharge till the 16th Aug., when the strike was over. In both these cases it is hard to suppose that what was possible for the *Langham*, arriving later, was not equally possible for them if they had wished, and had made any real effort to unload. The case of these two vessels shows how difficult it is to bring shed congestion into the strike clause, when such congestion may have resulted from default of other owners, and their lack of resource and energy. It would be an impossible inquiry to ascertain how far the fact of the sheds being full was due to strike, or to apathy and default of shed-owners. The *Gael*, after the strike was over, took fifteen days to discharge 2700 tons. In the Dufferin Dock there were unloading, besides the *Langham*, from the 13th to the 17th Aug., inclusive, one or two other vessels, as we know from the harbour figures, but no details as to discharge of these are given in the evidence.

The York Dock had a number of vessels discharging continuously from the 26th July to the 17th Aug., sometimes five, sometimes more. Discharge was also going on in the Spencer Dock.

The gangs employed on the *Langham* all belonged to the Dockers' Union, which, though in sympathy with the Carters' Union, was not part of, or identified with,

the latter union. No striking carters were included in these gangs; but such strikers were included in the gangs of other vessels, their object being apparently to make up for the loss of their carters' wages—an object which could only be obtained by the discharging gangs neither going on strike themselves nor obstructing the free passage of the cargo discharged. Still there was a certain amount of restlessness and insubordination.

With regard to the shed capacity in the Dufferin Dock, and the available accommodation there, and as to the impossibility of getting away the cargo by carting to a greater extent than the defendant did, I accept the evidence of the defendant and his witnesses. Given the weather conditions and the strike dangers, I also think that slabbing would not have been a safe or reasonable mode of disposing of the cargo as a whole, though towards the end of the discharge such mode was reasonable, and I find that slabbing, owing to the state of the quay, could not have been used to a greater extent than I have already indicated.

I also find that the defendant, as regards landward discharge, did what was reasonably possible to dispose of the cargo, and did not intentionally, or for any purpose of his own, delay the unloading. Burns, however, his stevedore, only put on the gangs necessary to discharge the quantity which could be accommodated and dealt with; and had there been available shed space, I have no doubt that, as far as gangs were concerned, the cargo could have been unloaded in six days or thereabouts. The ship could not unload if there was no one to receive; and the duty of ordering gangs, if dependent on the capacity of the receiver, would rest on Burns as merchant's stevedore, not on Burns as stevedore of the ship. It is not necessary to discuss the strike evidence in detail. The effect, influence, and contagion of the strike are exaggerated on the one side, and minimised on the other. In result the strike proved more restricted in character and extent than was at first feared, as the history of the various docks in relation to discharge shows. It is sufficent to state my conclusions of fact.

I am of opinion that defendant is not protected by the strike clause, as discharge was not made impossible by the strike. On the authorities cited by Mr. Gordon it is doubtful whether the clause applies to obstructions affecting the disposal of the discharged cargo, especially where such obstructions consist of want of storage accommodation caused by the congestion of cargoes, the result of the carters' stoppage. Here there was no strike of stevedore's men, or of any directly employed, in discharge. Assuming, however, that the clause may apply to stoppage of outlets by external strikers, I think that overside delivery never was impossible, and that slabbing, to the limited extent above stated, was possible, and should have been resorted to at an earlier date in order to accelerate the clearing of the steamer. I see great difficulty in bringing shed congestion within the strike clause. The degree and cause of such congestion—particularly in the York Dock, where there was continuous discharging—are uncertain. The defendant preferred the Dufferin Dock. Possibly, if in the York Dock, the vessel could have been unloaded more speedily. Again, sheds might be occupied for an unnecessarily long time owing to apathy, or for the convenience of merchants. Further, supposing that the strike of carters had been over on the 27th July, but sheds were then full, would that have fallen within the strike clause? Or, suppose the sheds were burnt in course of a carters' riot? When the clause is extended to obstruction, external to the ship and her duty of discharge, the difficulty of application is very great, depending, as it would, on accidental conditions outside the ship, after the ship's duty had been discharged. Subject to the question of the special contract to forego demurrage, the defendant is liable for demurrage. But where does the liability begin? The defendant had only two and a half days to unload. Looking at the whole evidence, the atmosphere of compromise in this critical situation, the defendant's letter of the 6th, and the plaintiffs' letter to Hayes of the 6th Aug., and his telegram, and the demurrage notices, I think the plaintiffs dealt with the defendant on the footing that, though further demands might be open, the two and a half days were not to be taken to expire before the 7th Aug.; and that demurrage, as per charter-party, only began to run on and from the 8th Aug. The question of liability on and from the 8th Aug. was let stand over, but both parties acted on the faith and assumption that the discharge was to be taken as beginning on the 5th. It would be contrary to good faith and the accepted course of discharge to go behind that date and carry the defendant's liability further back. The 5th was adopted as the first day of discharge proper, and represents a tacit compromise of doubtful rights as to which neither party was confident. The defence can, if necessary, be amended to carry out this view, if the point is not open on the traverse of demurrage. The 5th was accepted on both sides as the starting-point from which the unexhausted residue of running days was to be reckoned. The arrangement as to partial days not being reckoned as full days is explicable only in the view that the days before the 5th (during which there was no discharge whatever) were to be struck out altogether, so as to make the 5th the first lay-day. This point was not argued by counsel, who assumed that it was a question of all or none.

As against such demurrage, the defendant is fairly entitled to credit for half a day on the 13th, as on that occasion I think the gangs on board would not, in any circumstances, have worked. I decide this on the assumption that the strike clause applies to the contractual period allowed for demurrage. With regard to the special defences as to portions of days not being reckoned as full days, I have incidentally dealt with it above. The plantiffs' concession was expressly limited to the past, and cannot be enlarged to embrace the whole period of delivery—the future as well as the past. The repeated demurrage notes excluded any possibility of misunderstanding. The defendant is bound by the terms of the telegram, which he accepted without objection.

This brings me to the last point in the case, on which, if the defendant succeeds, the action fails, and must be dismissed with costs. Did the plaintiffs contract on the 24th July, that the defendant was to be relieved from all demurrage liability beyond three and a half days? At the time the alleged bargain was made the vessel had not arrived; the future was alarming, but quite uncertain. I think neither party knew their exact rights under the charter-party and the operation of the strike clause. The defendant believed — honestly believed—that the strike freed him from liability for demurrage. Did the plaintiffs contemplate that if and though the defendant was unprotected by the strike clause, he was to be absolved from all demurrage if he paid three and a half days, and did what he could to expedite delivery?

Ballingall struck me as a rather stolid, unimpulsive man, hardly likely to enter hastily into such an apparently one-sided bargain; the defendant was already bound to do what was reasonably possible, and there is nothing in the proof to indicate that he ever did anything in excess of the duty thrown on him by the charter-party. The defendant's defence rests on his own oral evidence, supported to some extent by Tinsley, Burns' foreman. The plaintiffs' denial is based on their own oral testimony, and that of Captain Hayes and Mr. Hamilton, aided by the correspondence and acts of the parties. Some confusion was caused by the method of cross-examination in Belfast. I think Ballingall supposed that the alleged contract was founded on something that took place on the 10th Aug., and he was not asked in detail as to the terms of the conversation of the 24th July. At this distance of time it is difficult to be

certain as to sequence, or the words of question and answer; the only thing anyone could be confident about would be the object and result of the interviews. As to the interview of the 7th Aug., Hamilton was not cross-examined about it in Belfast. Hence at the close of the case I allowed Ballingall and Hamilton to be recalled at the end of the defendant's case. Without going into minute details, I am satisfied that the defendant has put a false construction on the conversation, and has mistakenly turned what took place into a contract to forego contractual rights. Mr. Ballingall was not a good witness; he was dull in appearance and manner; he was influenced to some extent by a desire to evade anything that might tell against his case—a remark which, in some degree, applies to the defendant also. On the whole, I accept the version of Ballingall, Hayes, and Hamilton respectively, in preference to that of the defendant and Tinsley. The latter represented Burns, and it is hard to understand why the plaintiff wrote to him as he did, knowing that Tinsley had been present at the interview of the 24th, if there had been any such firm concluded bargain as the defendant now states. In the face of the repeated demurrage notes the defendant only disclaimed liability generally, and made no distinct reference to any contract till the 19th Aug., when in his letter to Messrs. Burns he states that on the first day of discharge he made an arrangement with them, and that the owner had confirmed such arrangement. This letter shows how unreliable is his present professedly accurate recollection of these conversations with question and answer. With the facts fresher in his mind he puts the initial bargain on the first day of discharge, which would be the 5th Aug., whereas the contract of the 24th July was before the vessel had arrived. The primary bargain is stated to have been with Burns' and to have been confirmed by the plaintiffs, Of such initial bargain there is no trace in the evidence. Why does not the writer appeal to his correspondent's own representative, Tinsley, who was present at the alleged bargain of the 24th? He speaks of the confirmation as of something not known to Burns. The interview of the 24th only took a few minutes, and resulted in a letter to Derry which might have solved all difficulty. The conduct of both parties appears quite inconsistent with the supposed contract; see letters of the 26th July, Ballingall to Hayes; 27th July, Burns to Ballingall; 31st July, Ballingall to Hayes; 1st Aug., Hayes to plaintiffs; telegram, 3rd Aug., plaintiffs to Burnes, "without prejudice to all questions on either side"; 6th Aug., Gallagher to Burns; 6th Aug., plaintiffs to Burns; 6th Aug., plaintiffs to Hayes; 7th Aug., telegram; 7th Aug., notice of demurrage; 7th Aug., Hamilton to plaintiffs; 7th Aug., plaintiffs to Hamilton; 8th Aug., plaintiffs to Burns; 8th Aug., Burns to Gallagher; 8th Aug., plaintiffs to Burns; 10th Aug.; 12th Aug.; defendant's letter of the 19th. Mr. M'Grath, for the defendant, suggested that in writing to Burns on the 6th Aug., as he did, the defendant's object was to spur Burns to exertion as, if he had stated his bargain with Ballingall, Burns might have relaxed his efforts. But Tinsley knew all about the alleged contract, and the defendant's letter of the 19th Aug. entirely disposes of the suggested explanation. I find it impossible to reconcile these letters with such a contract as is now relied on—a contract that, even if the defendant was not protected by the strike clause, the plaintiff was to release the defendant from all demurrage claims beyond three and a half days. The limited concession made as to the two and a half days seems decisive that demurrage *ultra* was not abandoned or released. To prove rescission or variation of a charter-party or any other written business contract, the clearest proof would be necessary. The defendant's counsel suggested that Ballingall was wilfully and knowingly seeking to evade a bargain he had made. On the letters no other course was open. The plaintiffs' counsel made no similar counter-charge. Colouring the past by the present, and misunderstanding his legal rights, the defendant construed what was said in his own interest, and has come to believe that the idea which was behind his own mind was expressed in words and became a contract. Whatever the defendant may have thought, the plaintiffs did not assent to discharge demurrage: they were never *ad idem* with the defendant. The defendant is not consciously misrepresenting, but intrinsic probability is strong, and the letters seem to me decisive, against the defendant's version and understanding of the interview. He, no doubt, all through believed that he was protected by the strike clause. I therefore find for the plaintiffs for demurrage, as claimed in the notice of the 17th Aug., from the 8th Aug. to the 17th Aug., inclusive, less half a day on the 13th, making altogether 435*l.* 2*s.*, and give judgment for that amount with costs. The amount lodged in court, 160*l.* 6*s.* will be paid in part satisfaction. The costs will include the shorthand writer and his notes.

The judge found for the plaintiffs for demurrage on and from the 8th Aug. to the 17th Aug. 1907, inclusive, as per charter-party, less half a day on the 13th Aug., making together the sum of 435*l.* 2*s.*, and gave judgment for the plaintiffs for the sum of 274*l.* 6*s.* over and above the sum of 160*l.* 6*s.* lodged in court by the defendant, with costs.

Defendant now moved to have this judgment set aside, or for a new trial, on the grounds that the findings of the learned judge were wrong in law and contrary to evidence and the weight of evidence, and that the learned judge misdirected himself in law.

The arguments and authorities cited appear fully from the judgments.

The Right Hon. *J. H. Campbell*, K.C., *Ronan*, K.C., *M'Grath*, K.C., and *Hanna* for the defendant.

Gordon, K.C., *Chambers*, K.C., *M'Gonigal*, and *Fitz Stephen Burke* for the plaintiffs.

Cur. adv. vult.

Madden, J.—The plaintiffs in this action are the owners of the steamship *Langham*, in which certain goods were carried from Selina to the Port of Belfast under a bill of lading of which the defendant was assignee. By the terms of the charter-party, which were incorporated with the bill of lading, sixteen running days (Sundays and certain holidays excepted) were allowed for loading and unloading, and ten days on demurrage at a certain rate per running day calculated on the tonnage. The charter-party contained the following clause: "If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out. A strike of the receiver's men only shall not exonerate him from any demurrage for which he may be liable under this charter if, by the use of reasonable diligence, he could have obtained other suitable labour; and, in case of any delay by reason of the before-mentioned causes, no claim shall be made by the receivers of the cargo, the owners of the ship, or by any other party under this charter."

The plaintiffs allege that the goods were carried in their ship from Selina to Belfast, the port of discharge, and there delivered to the defendant, who kept the ship on demurrage for the full period of ten days, from the 1st to the 10th Aug., at the rate of 45*l.* 16*s.* *per diem*.

The ship arrived in Belfast, and was ready for discharge on the 27th July. Discharge com-

menced on the 5th Aug. and was finished on the 17th. Of the sixteen running days allowed by the charter-party, thirteen and a half days had been spent in loading, leaving only two and a half days for discharge. It was part of the agreement between the vendor and the assignee of the cargo that the latter should have six days for discharge. This agreement did not affect the mutual rights of the shipowner and the charterer or his assignee, and if there were nothing more in the case, the plaintiffs would clearly be entitled to claim for demurrage. No question has been argued before us as to the amount allowed by the learned judge. As against the claim of the shipowner, the defendant relies on the following defences, each going to the entire right of action. First, he relies on the clause of the charter which I have quoted, alleging that the delay was caused by a strike of workmen essential to the discharge of the cargo; and, secondly, he alleges an agreement between the plaintiffs and the defendant that, in consideration of the defendant making special efforts and arrangements for the discharge of the cargo during the continuance of the strike, the demurrage should be calculated at three and a half days only, and they bring into court an amount for demurrage calculated on this basis.

There is no substantial controversy as to the condition of affairs at the Port of Belfast when the *Langham* arrived on the 27th July. A strike of carters had been for some days in progress, which did not terminate until the 16th Aug. There was no strike of dock labourers. The slackness in working on their part was the result of there being little work for them to do; and, when the carters' strike was over, the vessel was rapidly discharged. The cargo of the *Langham* consisted of grain in bulk. It was found as a matter of fact that a cargo of this kind when discharged over the ship's rail to the quay in sacks is customarily disposed of as follows: (1) It may be conveyed to its destination on carts; (2) stored in sheds; or (3) "slabbed" on the quay. The last-mentioned mode of disposal is under the direction of the quay authority. The harbour-master on the 16th Aug. gave permission for slabbing on the quay to a limited extent, and, as the cargo amounted to about 4000 tons, it is evident that only a small proportion of the cargo could be disposed of, after discharge, in this manner. Another mode of discharge is over the ship's rail into lighters. It is stated that this practice is resorted to only for the purpose of conveying to purchasers grain which had been already sold; this is intelligible, for if a destination was not thus provided for the grain, it would have to be utimately discharged from the lighters to the quay, and then disposed of by cartage, shedding, or slabbing. Carting was impossible during the continuance of the strike. I am satisfied upon the evidence that there was not sufficient accommodation in the sheds, and that this congested condition was in consequence of the strike of carters. Gibson, J. was of opinion that at least 400 tons could have been slabbed without obstructing egress or circulation. Even adopting this estimate, the conclusion is irresistible that the cargo, if discharged from the ship's rail on the quay or into lighters, could not have been carried away or disposed of by the consignee. In this state of facts, it was practically impossible for him to accept discharge of the cargo. I say "practically," for it was physically possible that the sacks should have been delivered over the ship's rail into lighters, regardless of its ultimate destination, or discharged on the quay, and thence dropped into the water. But for all practical purposes there was no alternative open to the consignee of the cargo other than the detention of the ship to the termination of the strike.

That this view of the position was taken by all parties concerned appears from the correspondence. On the 22nd July the stevedores (Burns Brothers) wrote to the plaintiffs' agents: "Work in the sheds is now completely stopped, as there is not an inch of spare ground. . . . The open quays are similarly situated with timber . . . the carters are on strike, so that conveyance by this means from the ship's side is impossible . . . unless cargo was going overside into lighters or coasting steamers, we may tell you candidly, discharging would be impossible as matters are at present." It appears from a letter written by the defendants on the 24th July that an attempt was made to have the ship discharged in Londonderry, and that the owner was ready to order her from Belfast to Londonderry, on the terms of the charter-party, without any extra freight, 'six days to be allowed for discharge.'" This suggestion could not be carried into effect in consequence of the opposition of the Londonderry dock labourers. The owners' proposal is relied upon as evidence that they did not believe that the expense of detention at Belfast by reason of the strike would fall on the consignees. I do not take this view of the correspondence. Both parties were involved in a common difficulty, and it was in the interest of both to avoid the risk of detention at Belfast for an indefinite period, by which the ship might be prevented from fulfilling engagements elsewhere. However this may be, the view of their rights under the charter-party taken by the owners of the ship could not affect the construction of this document, although it would be a matter to be taken into account in considering the evidence relating to the special agreement alleged by the defence.

I now proceed to consider the terms of the charter-party, and their application to the state of facts disclosed by the evidence. Sixteen running days are to be allowed "for loading and unloading." "Unloading" and "discharge" are in this document convertible terms. This appears from the use of the phrase "port of loading" in par. 1, and "port of discharge" in par. 10, as denoting the port where the vessel is to be unloaded. If there were nothing more in the charter, the contract to pay demurrage would be an absolute one. The nature and effect of such a contract are clearly pointed out by Lord Esher in *Budgett and Co.* v. *Binnington and Co.* (6 Asp. Mar. Law Cas. 549, 592; (1891) 1 Q. B. 37): "It has been held that the demurrage contract, where a fixed number of lay days is mentioned, is a contract by the freighter, that, if the ship is detained over those days, he will pay demurrage for so long as the ship is in such a condition that she cannot be handed back for the use of the shipper. This has been called an absolute and independent contract, and it is obvious that a contrast is intended to be drawn between such a contract and a conditional one, and that by an absolute contract is meant an un-

conditional one. The only condition attached to it is that lay days shall have commenced and run out, and that condition being fulfilled the obligation arises. Directly the shipowner shows this state of facts he has proved his case, and it lies on the other side to show, not that there has been no breach of contract, but that he is excused from the performance—in other words, his case is one of confession and avoidance, and the whole burden of proof is on him."

If the shipowner were by any act of his own, or one for which he was responsible, to prevent the discharge, the charterer or consignee would be excused on the general principle that a breach of contract is excused when the party committing the breach has been prevented from carrying out his contract by the other party to it. But where the nonperformance of his part of the contract by the shipowner is the consequence of the acts of persons over whom he has no control, as, for example, a strike of dock labourers, this principle does not apply, and the contract to pay demurrage being absolute and unconditional, must be performed by the consignee of the cargo.

It is, of course, open to the parties to a contract for demurrage to import into the contract such express conditions and exceptions as they think proper. In the present case an exception has been inserted in the charter-party, which would have excused the consignee if it had been present in *Budgett* v. *Binnington* (*ubi sup.*) and which may have been introduced into contracts of this kind in view of the state of the law as laid down in that case.

Dock labourers are certainly essential to the discharge of the cargo, for it would be impossible without them to carry out the process, as described in the evidence. The question for our decision is, whether carters are essential to the discharge of the cargo; or, it may be stated in more general terms, are appliances of any kind, used for the purpose of disposing of the cargo when delivered over the rail of the vessel, essential to the discharge of the cargo, within the meaning of the clause in the charter under consideration.

In order to answer this question, it is necessary to ascertain the precise meaning of the word "discharge" in the charter-party. And here we get assistance from the consideration of the correlative term "loading." Loading and unloading, or discharge, have this in common, that they depend on the joint action of the shipowner and another person. What, then, is this joint action in the case of loading, and how far does it extend? This question was considered by the House of Lords in *Grant and Co.* v. *Coverdale* (5 Asp. Mar. Law Cas. 74, 353 (1884); 9 A. C. 470). A ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner a complete cargo of bar-iron. There was a fixed number of lay days, and ten days on demurrage over and above. The charter-party contained an exception in the following terms: "Except in case of hands striking work, or frost or floods, or any other unavoidable accidents preventing the loading or unloading, in which case owners to have the option of employing the steamer in some short-voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship." A substantial portion of the iron, without which a complete cargo could not be loaded, was to be supplied by a firm named Crawshay. When the ship arrived at the East Bute Dock, the Crawshays had their portion of the cargo ready to be conveyed to the ship and there loaded. It was proved that the only practicable mode of conveying this portion of the cargo from the Crawshays' wharf to the ship as she was lying in the East Bute Dock was in lighters, along a canal which was rendered impassible by ice during the days in question. The East Bute Dock was never frozen over, and the ship would have been loaded with slight delay only, and dispatched to sea if the iron could have been conveyed from Crawshays' wharf to the unfrozen dock where the ship lay. The referee, to whom matters of fact had been referred at the trial, found as a fact that the delay in loading was caused by the frost alone. The House of Lords, affirming the decision of the Court of Appeal, held that in this state of facts the case was not taken out of the demurrage clause by the exceptions. "The exception in the contract being limited to 'accidents preventing the loading,' the only question is what is the meaning of 'loading,' and whether this particular frost did in fact prevent the loading. There are two things to be done; the operation of loading is the particular operation in which both parties have to concur. . . . No doubt, for the purpose of loading, the charterer must also do his part; he must have the cargo there to be loaded, and tender it to be put on board the ship in the usual and proper manner. Therefore, the business of both parties meets and concurs in that operation of loading. When the chartererer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everthing before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation—everything before that is the charterer's part only. It would appear to me to be unreasonable to suppose, unless the words made it perfectly clear, that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with which he has nothing whatever to do, which precede altogether the whole operation of loading, which are no part whatever of it, but which belong to that which is exclusively the charterer's business." Lord Selborne would appear from these words to have been influenced to some extent by the generality of the words in the exception; but it is evident from his judgment that the decision of the House would have been the same if the exception had been limited, as in the present case, to a single cause of delay. This appears even more clearly from the judgments of Lords Bramwell and FitzGerald —"The words, to my mind, are tolerably plain; they relate entirely to something which prevents the loading—that is to say, the actual putting on board of the cargo, and I think when you couple that with the expression in the earlier part of the charter-party, that the vessel is to 'proceed to the East Bute Dock, or so near thereunto as she may safely get, and there load,' the exemption or exception really does relate to the very act of loading. Then that being so, in the present case frost did not prevent the loading: what it did

was to prevent the particular cargo which the charterer had provided from being brought to the place where the loading would not have been prevented" (per Lord Bramwell, at p. 478). "It seems to me that the exception applies only where the accident prevents the loading at the place of loading, and not where it prevents or retards the transit or conveyance of the cargo to the place of loading" (per Lord FitzGerald, at p. 479).

These conclusions, and the reasoning upon which they are founded, are applicable, *mutatis mutandis*, to the operation of unloading. The operations of loading and unloading have this in common that they are both conducted jointly by the charterer and by the shipowner. The receivers in loading are the shipowner and his servants, and, in unloading, the charterer and his servants. The exception deals in terms with the receiving of the cargo at the port of discharge. It provides that a strike of the receiver's men only shall not exonerate him from demurrage if by the use of reasonable diligence he could have obtained other suitable labour. The sixteen lay days are expressly allowed for the joint operation of "loading and unloading." An exception in any instrument must be read and construed in the light of the provision on which it is engrafted, and the extension, under certain circumstances of the lay days, must be read as referable to the same operations.

The strike in the present case was of a class of labourers who were required not for the unloading of the cargo, but for disposing of it after it had been unloaded, and delivered over the rail of the ship. This strike was undoubtedly the cause of the delay in unloading and the consequent detention of the ship, as the frost was the cause of the failure to load in *Grant* v. *Coverdale* (*ubi sup.*). The argument addressed to the House of Lords in that case is the same, *mutatis mutandis*, as that which was addressed to us on behalf of the defendant. "The exception," it was said, "applies to all cases in which the loading was directly and in fact prevented by frost, and in which the cargo would in fact have been duly loaded but for the occurrence of such frost." The House of Lords recognised that operations connected with the bringing of the cargo to the ship's side "are so essential to the operation of loading that they are conditions *sine quibus non* of that operation." But they held that everything before the operation of loading is the charterer's part only. On the same principle everything after the operation of unloading is the part of the charterer, and applying to the case of unloading the observations of Lord Selborne, it would be unreasonable, in the absence of express words, to suppose a contract on the part of the shipowner that his ship might be detained for an unlimited time on account of impediments to those things with which he has nothing whatever to do, which follow on the operation of unloading, are no part of it, and belong to that which is exclusively the charterer's business. The decision of the House of Lords in *Postlethwaite* v. *Freeland* (4 Asp. Mar. Law Cas. 129, 302 (1880); 5 A. C. 599) was strongly relied on in the able argument addressed to us on behalf of the defendant. The question in that case was a different one from that which we have to decide; there were no fixed lay days, and the question was as to the extent of the obligation cast upon the charterer under the following stipulation: "The cargo is to be discharged with all dispatch according to the custom of the port," the House of Lords, affirming the decision of the Court of Appeal, held that the obligation under such a contract is fulfilled if the consignee employs all the means and facilities for discharge available at the port. It appears that the result would have been the same in the absence of express reference to the custom of the port. The case is expressly distinguished from one in which lay days are prescribed by the charter. "For whatever reason the parties who framed the charter-party in this case, and that in the case of *Wright* v. *New Zealand Company* (4 Asp. Mar. Law Cas. 118 (1878); 4 Ex. Div. 165), did not choose to have lay days for the discharge of the vessel, and, consequently, it is left to the court to say what is the contract implied by law" (per Lord Blackburn, at p. 619). No such question arises when lay days are defined; there is then an express contract, absolute and unconditional as to any question of diligence or available means of discharge. The case of *Postlethwaite* v. *Freeland* (*ubi sup*) is an authority for the proposition that in considering the question of reasonable dispatch in discharging a cargo the existence of appliances for the purpose of taking the cargo from alongside the ship should be taken into consideration. If the contract in the present case were the same as in *Postlethwaite* v. *Freeland* (*ubi sup.*), I should certainly hold that the action for demurrage would not lie, inasmuch as reasonable dispatch had been used by the assignee of the cargo, having regard to the absence of the means customarily available, and used for the purpose of moving the cargo when discharged alongside the ship.

Postlethwaite v. *Freeland* (*ubi sup.*) is the leading authority as regards the agreement which is implied on the part of the charterer when no fixed time for unloading is prescribed by the charter to discharge the cargo within a reasonable time. It was followed by a number of cases conversant with an obligation of a similar character, most of which are referred to in the judgment of the Court of Appeal in England in *Lyle Shipping Company* v. *Cardiff Corporation* (9 Asp. Mar. Law Cas. 23, 128; (1900) 2 Q. B. 638). In that case and in *Good* v. *Isaacs* (7 Asp. Mar. Law Cas. 148, 212, 366; (1892) 2 Q. B. 555) there were no fixed lay days. We have been referred to passages in the judgments in several of these cases. But it will be found, on examination, that the observations which were relied on were directed to an implied contract such as I have referred to, and that they are inapplicable to an absolute and unconditional agreement to discharge within a definite limit of time. Nor do they afford any assistance in construing an exception such as that which exists in the present case. In cases of this kind the courts had to consider what was practically possible, not whether an absolute undertaking had been violated. In *Ford* v. *Cotesworth* (L. Rep. 5 Q. B. 544) the discharge of the goods was rendered practically impossible by an order of the authorities of the port. Kelly, C.B. says: "Although it might not have been rendered physically impossible to put the goods over the side of the ship, yet the whole process of landing was prevented by a cause over which neither party had any control." Mr. Ronan quoted the follow-

ing passage from the judgment of Lord Blackburn in *Sheppard* v. *Henderson* (7 App. Cas. 69), in which, adopting the language of Maule, J. in *Moss* v. *Smith* (9 C. B. 94), he says: "We are dealing with a mercantile matter, we are dealing with mercantile law, and where a thing cannot be practically done in a mercantile contract, we think it cannot be done at all. If you cannot practically get a ship out, it is impossible to get her out." This principle was applied by the Court of Exchequer in *Ford* v. *Coatesworth* (*ubi sup.*) to the performance of the implied obligation imposed on a charterer when there are no fixed lay days prescribed. That it is inapplicable to an absolute and unqualified obligation in regard to loading has been decided by the House of Lords in *Grant and Co.* v. *Coverdale* (*ubi sup.*), for reasons which, in my opinion, are equally applicable to unloading or discharge. Loading was practically impossible in that case, as in the present instance unloading or discharge was impossible.

The case of *Hulthen* v. *Stewart* (*ubi sup.*) before the House of Lords cited on behalf of the defendants is only relevant to the present case in so far as it illustrates the distinction between the absolute and unconditional obligation when fixed days are prescribed, and the implied obligation to discharge within a reasonable time. An attempt was made to read into the charter a limitation of time involving an unconditional liability. This was unsuccessful, for, in the words of Lord Macnaghten, "In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished." It was there found that the charterers had done all they reasonably could to discharge the vessel, and the claim for demurrage was dismissed.

We have been referred to a case decided by the Court of Sessions in Scotland which involved the consideration of an exception to a demurrage clause in a charter-party, similar to that in the present case. The general system of jurisprudence in Scotland differs from ours, but a decision of the Court of Session upon the construction of mercantile contract, although not binding on us, is entitled to respectful consideration. There the charter-party, which allowed forty-eight lay days, contained an exemption in very wide terms, "in case of strikes . . . detention by railway or cranes . . . or any other cause beyond the control of the charterers which may impede the ordinary loading and discharge of the vessel." There was evidence that the charterers could not have removed the cargo, which consisted of coal, faster than they did, owing to a railway strike, and they contended, citing *Postlethwaite* v *Freeland* (*ubi sup.*) that their case was covered by the word "strikes" or by the general clause in the charter-party. The court held that a strike of railway servants was not covered by the exception. The observations of some of the members of the court are applicable, in principle, to the present case. Lord Young, dealing with the suggestion that it would be unreasonable to say that the charterers should have taken delivery on the quay, though there were no means available for removing the cargo, says, "I should rather have been disposed to say that it was unreasonable to expect the ship to remain till the charterers found means for removing the cargo." Lord Traynor says, "It has not been shown that any of the excepted causes existed which prevented the cargo in question being discharged in the ordinary way, over the ship's side. The owner of the vessel has absolutely no concern with the difficulties which the charterer may have in removing the cargo from the quay on which it has been discharged."

For these reasons I am of opinion that the defendant has failed to bring himself within the terms of the exception on which he relies. It remains to consider his second line of defence; a contract on the part of the shipowner that, in consideration of the defendant making special efforts and arrangements for the discharge of the cargo during the continuance of the strike, the demurrage should be calculated at three and a half days only. The proof of this alleged agreement rests on oral evidence only. The most that can be said of the lengthy correspondence that is in evidence on behalf of the defendant's case is, that it is not absolutely inconsistent with the existence of such an agreement, although it is difficult to reconcile the existence of such an agreement with the formal notices of demurrage running from day to day that were served on behalf of the shipowner. The burden of proving the alleged agreement rested on the defendant, who was encountered with the extreme improbability that the shipowner exchanged valuable rights for a shadowy undertaking. Gibson, J. held that no such agreement had been proved. He had the advantage of hearing the examination and cross-examination of the witnesses. A study of the notes of the evidence and of the correspondence has led me to the same conclusion at which he arrived.

On this branch of the case, I am satisfied to adopt his conclusion, and the reasoning upon which it is founded.

Kenny, J.—It has been settled beyond question that, in the case of a charter-party which provides a distinct time limit for the discharge of the cargo, there is an obligation on the consignee to discharge within that time, no matter what obstacle—other than the act of God, the King's enemies, or any other specially excepted occurrence—presents itself. The charter-party in the present case is of that character. It provides a certain number of running days for loading and unloading and thus fixes a distinct period from which the ship is to be on demurrage. If there were no strike clause, no question could possibly arise as to the liability of the consignee for demurrage from the expiration of the running days, provided the ship was ready to carry out its portion of the duty of discharge, and the case could not come into the category of those where the custom of the Port or the reasonableness of the time for discharge entered into consideration. The bargain between the shipowner and charterer would be regarded as a hard and fast one in which the latter took all the risks for the delay beyond the stipulated free time under any circumstances that were not under the control of the ship. *Budgett* v. *Binnington* (*ubi sup.*) is strongly illustrative of a contract where the principle was applied. In such cases as *Ford* v. *Cotesworth* (*ubi sup.*), *Postlethwaite* v. *Freeland* (*ubi sup.*), *Good* v. *Isaacs* (*ubi sup.*), and *Hulthen* v. *Stewart* (*ubi sup.*) the contract was an open one in the sense that there was no

definite time agreed on for the conclusion of the discharge and the commencement of the liability for demurrage, and the decisions turned on the special facts in relation to custom and reasonable time. No such considerations are applicable in the present case, and the meaning and applicability of the strike clause alone have to be determined.

The clause is a somewhat elaborate one, and it will be remarked that, while it draws a distinction between the ship's men and the consignee's men, it confines its operation most strictly to men engaged in the work of discharge. The exact wording of the clause is important:

"If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out. A strike of the receiver's men only shall not exonerate him from any demurrage to which he may be liable under the charter, if, by the use of reasonable diligence, he could have obtained other suitable labour; and, in case of any delay by reason of the before-mentioned causes, no claim for damages shall be made by the receivers of the cargo, the owners of the ship, or by any other party under this charter."

The clause applies to the men of both parties—shipowner and consignee—but extends to no class other than those essential to the work of discharge. In my judgment the wording of the clause is quite clear in this respect, and the only subject of controversy possible is the meaning of the word "discharge" in the connection in which it is here used. The consignee took the risk of a strike or lock-out of men in that category—but, if "discharge," so far as the shipowner is concerned, means delivery of the cargo over the ship's side, it seems to me that the shipowner never took the risk of a lock-out or strike of any section of the community except stevedore's men employed in the actual reception of the cargo from the ship's men. What, then, was within the contemplation of the parties when they used the phrase "essential to the discharge" of the cargo? Is it to be confined to the stevedore's men alone employed in the direct transfer from the ship's side, or is it to be extended to a class outside and beyond these—who, though most essential to the removal or disposal of the cargo after receipt by the stevedore's men, were not men employed in the actual receipt and removal of the goods from alongside the ship?

The act of "discharge" is a double or joint one. It necessitates co-operation on the part of the ship and of the receiver of the cargo. The primary obligation of the ship, in the absence of agreement to the contrary, is delivery over the ship's side. That obligation is fulfilled when its crew or its stevedore's men are in a position to offer, and do offer, delivery to the consignee over the ship's side. If there were any doubt about that—the nature of the ship's duty in the present case—it seems to me to be removed by the provision in the charter-party that the cargo is to be "brought and taken from alongside the steamer at freighter's expense and risk." The class to whom it is sought to extend the protection of the clause are carters whose duty it was to remove the cargo after the stevedore's men had taken it from alongside. They are a class who no doubt were essential in the interest of the consignee to the ultimate removal of the cargo from the quay—but how can they be said to be essential to the "discharge" of the cargo from the ship? They were essential to its "disposal," but its transfer from the vessel did not come within their duties, and I find it impossible to enlarge the meaning of the word "discharge" so as to include any acts beyond those of delivery by and receipt from the ship. If the word be capable of greater expansion, the true construction of the charter-party would make the liability to demurrage conditional not only on there being no strike amongst the stevedore's men—but on there being no delay caused by the action of other more remote parties, such as railway companies or lightermen, who could not be regarded as within the control of the shipowner. Furthermore, I am of opinion that the charter-party affords internal evidence that the process of carting was not regarded as the only one capable of being resorted to for the disposal of the cargo. Lighters were within the contemplation of the parties for the purpose of lightening the vessel when necessary, and though their use is only stated to be in connection with the work of lightening, still they are regarded as a possible means of landing portion of the cargo—and there were no words which would restrict their service to lightening.

I concur, therefore, in holding that the strike clause does not in the circumstances of the case afford any protection to the consignee or save him from a demurrage claim.

I need only add a few words on the other branch of the defendant's case, which relied on a special contract at the port of discharge that the delay caused by the strike was not to result in a claim for demurrage. Gibson, J. in his judgment at the trial dealt very exhaustively with the evidence put forward in support of the alleged contract, and he came to the conclusion on the correspondence and the oral evidence that there had never been a concluded bargain for the surrender or abandonment of the plaintiffs' rights. I am of opinion that his finding on this branch of the case is well founded, and that the minds and intentions of the parties were never *ad idem*, and consequently that the alleged special contract cannot be supported.

Wright, J.—By the charter-party in the present case (clause 7) sixteen running days, Sundays, &c., excepted, are to be allowed the freighters for loading and unloading, and ten days on demurrage over and above the said lay days at 4*d.* per ton on the steamer's gross register tonnage per running day.

Apart from the strike clause, there is here an absolute and independent contract on the part of the defendant to discharge within a fixed specified number of day, and in default to pay demurrage, unless he can show that he was prevented from discharging within the time allowed for that purpose by the act of the master or those for whom he was responsible: *Budgett* v. *Binnington.* To quote shortly from *Postlethwaite* v. *Freeland* (*ubi sup.*), at p. 608: "If by the terms of the charter-party he has agreed to discharge within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to

be detained in his service beyond the time stipulated.

Clause 13 of the charter-party is in the following words: "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 first question, or one of the two questions, raised and argued in the case is, whether on the facts proved and on the proper construction of this clause, the delay in discharging the cargo came within the strike clause, so as to absolve the charterer from damages for the period during which discharge was impossible.

Several modes of discharging or unloading of a cargo were, by the evidence—which seems to me to be on this point rather loose and inexact—stated to be usual and customary in the port of Belfast, I think four in all, discharge into sheds; discharge overboard into lighters or barges alongside—this generally applied only to portions of the cargo previously sold; slabbing or dumping the grain on the quay—only a very small portion of this cargo could have been so discharged; and discharge into carts. Several of these modes of unloading or discharging were either physically impossible, or under existing conditions were so inconvenient as to be practically impossible, and the contention of the defendant is, that there remained only one practical method of getting the cargo from the ship—namely, by carriers' carts, and that this was rendered impossible owing to a strike of carters, that this is within clause 13, the "strike" clause, and that he is hereby protected. The evidence proves that there was no strike of dock labourers, with the possible exception of a strike for portion of one day, and the learned judge has so found. There was slackness among the dock labourers, and they worked badly, but it is certain that they did not strike. The strike which caused the delay and kept the ship idle was a strike of carters, which began on the 4th July, and accordingly was in full operation when defendant bought the cargo on the 15th July, and did not terminate until the 16th Aug.

The mode of discharging grain is described in the evidence. Tubs are put into the hold, filled there with grain, and hoisted up by the winch; the contents are then canted into the merchant's sacks, the bags are weighed and tied, and taken from the bridge and delivered unto the rail. Carts are largely used for taking the grain away from the ship's side.

Is this cartage, or removal of the grain in carts from the ship's side, part of the unloading or discharging within the meaning of the strike clause in the charter-party?

The learned judge has left this question undecided. A decision of this question seems to me to be essential. On the other and earlier operation, that of loading, the case of *Grant and Co. v. Coverdale, Todd, and Co.* (*ubi sup.*) may be usefully referred to. By the charter-party in that case the vessel was to proceed to East Bute Dock, Cardiff, and there load, time to commence from the vessel being ready to load and unload, and ten days on demurrage, over and above the lay days, at 40*l.* per day (except in the case of hands striking, or frosts or floods, or any other unavoidable accidents preventing the loading and unloading).

The ship reached the East Bute Dock, and part of the cargo was loaded; a frost then set in, and made a canal which communicated with the dock impassable, so that the remainder of the cargo, which was ready at a wharf on the canal, could not for several days be brought in lighters to the dock. The cargo could not have been brought into the dock by carting or otherwise at any reasonable expense. The dock itself was not frozen over, and if the cargo had been in the dock the loading might have proceeded. It was argued for the charterers that, the canals being frozen, the frost in fact prevented the loading as much as if the East Bute Dock had been frozen over. The House of Lords unanimously held against that contention. Lord Selborne discusses the meaning of loading, which, he says, is an act in which both parties have to concur.

The shipowner has to do his part, and so must the charterer. "He must have the cargo there to be loaded, and tender it to be put on board the ship in the usual and proper manner. . . . When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading—those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation—everything before that is the charterer's part only" (p. 475); and he cites as specially applicable to mercantile cases the maxim *Causa proxima non remota spectatur*.

Clause 7 of the charter-party in the present case gives sixteen days for "loading and unloading." Clause 9 declares that freight is to be paid on "unloading and delivery of the cargo," if in the United Kingdom in cash, &c., and clause 13 ("strike" clause) deals with the case of the discharge of the cargo being prevented by strike or lock-out of workmen essential to the discharge of the cargo. I construe this in exactly the same way as if the word used had been "unload" and not "discharge." Unloading and discharging have, in my opinion, exactly the same meaning.

In *Petersen* v. *Freebody* (8 Asp. Mar. Law Cas. 55; (1895) 2 Q. B. 294) the charter-party speaks of "loading or discharging," and of the "delivery" of the cargo by the ship, "the ship to discharge over side into lighters or otherwise if required by the consignees." Lord Esher, in his judgment, treats discharging the cargo and delivery of the cargo as synonymous. He says that the delivery under the charter-party was to be a delivery in the ordinary way by a joint operation in which each was to take his part, and A. L. Smith, L.J. says that, in ordinary cases of discharging cargo, the ship's crew does the work, until the goods are over the rail, and then the receiver takes his part in the operation.

The taking away of the bags in carts is no part of the unloading or discharging. It is a further stage in the process of bringing the goods to their destination; it is an act of the consignee solely and for his purposes; and while, in a sense, it is a fact that what prevented discharging was the strike of the carters, it was not, in my judgment, the cause within the meaning of the strike clause.

The services of carters and carts which, according to the evidence, were at some distance from the ship, only arose after the delivery to the consignee, and when the unloading or discharging had been completed and ended. Accordingly, I am of opinion that the discharge of the cargo was not prevented by a strike of workmen essential to its discharge. As to the second question—this is a question of fact. It is a question which depends on the evidence. I have come to the conclusion on reading the evidence, and on looking at the notes, that the written agreement was not given up. And I may say that upon this matter it would take the very clearest evidence to convince me that the parties abandoned their rights under a written contract, and substituted for that contract a mere parol one.

For all these reasons, I have come to the conclusion that the learned judge was right in his conclusion, and I see no reason for disturbing it.

Solicitor for plaintiffs, *Martin J. Burke*.

Solicitors for defendant, *Carson* and *M'Dowell*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 7 *and* 8, 1911.

(Before Sir S. EVANS, President, and BARGRAVE DEANE, J., and Elder Brethren.)

THE KENNET (*a*)

DIVISIONAL COURT.

Collision—Navigation round bend of river—Duty of vessel proceeding with tide to whistle—Duty of vessel proceeding against tide to stop—Speed.

Where vessels are approaching each other at Baldwin Point in Bow Creek, which is a blind corner and a difficult bend to navigate, good seamanship requires that a vessel going up with the tide shall give such warning as will enable vessels which may be coming down against the tide to approach the bend in such a way as to prevent any collision.

It is the duty of vessels coming down against the tide to proceed cautiously, and if necessary stop above the bend altogether.

In the City of London Court the learned deputy judge held that a vessel going up with the tide approaching this bend was alone to blame for a collision with a down-comer for failing to warn her. The Divisional Court varied this order on appeal, holding that both vessels were to blame, the one going up for not giving sufficient warning, and the one coming down for proceeding carelessly at such a speed that she could not have avoided a collision with an innocent vessel if she met one at the bend.

APPEAL from a decision of the deputy judge of the City of London Court, Sir John Paget, K.C., by which he held the *Velox* alone to blame for a collision which occurred between the dumb barge *Ribble*, which was in tow of the *Velox*, and the steam tug *Kennet*. The collision occurred about 10.35 p.m. on the 28th March 1911 off Baldwin Point, Bow Creek.

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

The case made by the appellants was that the dumb barge *Ribble*, in tow of the steam tug *Velox*, was proceeding up Bow Creek, and about 10.35 p.m. on the 28th March 1911 was at the bottom of Glasshouse Reach, Bow Creek, about abreast the Great Eastern Railway Wharf. The wind was from the north-east a light air, the weather was fine and clear, and the tide flood of the force of about one knot. The *Velox* was proceeding up the creek with engines going easy ahead and slowly rounding the bend off the railway wharf, making about two knots. The *Velox* was carrying the regulation under-way and towing lights for a tug and her craft, and there was a white light aft on the *Ribble*, and a good look-out was being kept on board of her.

In these circumstances those on the *Velox* saw the masthead and towing lights of the *Kennet* 100 yards off bearing broad on the port bow of the *Velox*. The *Velox* sounded one short blast on her whistle, to which the *Kennet* replied with a short blast. The *Velox* was then rounding the bend under slight starboard helm, and the *Kennet* was coming down the creek hugging the point. When the *Kennet* cleared the point, those on the *Velox* saw the *Kennet's* green light. The *Velox* was kept as close as possible to her side of the channel, and sufficient way was kept on the tow to prevent them getting out of position, but the *Kennet*, which appeared to smell the ground, shot off the point and with her stem struck the port bow of the *Ribble*, doing her damage.

The owners of the *Ribble* charged those on the *Kennet* with bad look-out; with approaching the point at too high a speed; with failing to pass port to port; with failing to stop and reverse her engines in due time; with neglecting to wait above the point until the vessels bound up had rounded clear; and with navigating too near to the south side.

The case made by the respondents, who were defendants and counter-claimants in the court below, was that the tug *Kennet* with a barge in tow was proceeding down Bow Creek and about 10.35 p.m. on the 28th March 1911 was approaching Baldwin Point. The wind was westerly, light, the weather fine and clear, and the tide flood of the force of about a knot. The *Kennet* was rounding Baldwin Point on her starboard side of the channel, making about three knots. The *Kennet* was exhibiting the regulation masthead, side, and towing lights, and a good look-out was being kept on board of her. In these circumstances those on the *Kennet* saw the masthead and towing lights and almost immediately the port light of the *Velox* 200ft. off broad on the starboard bow. The helm of the *Kennet* was put hard-a-port and her engines full speed ahead for the purpose of forcing her on to the mud bank on her side of the channel, there being no other measure which she could take to avoid collision; but the fore part of the *Kennet* would not remain on the bank, so her engines were put full speed astern, and the stem of the *Kennet* collided with the port quarter of the *Ribble*. The *Velox* sounded one short blast when she was first seen, which was at once answered by the *Kennet* with one short blast.

The owners of the *Kennet* charged those on the *Velox* with failing to keep a good look-out; with navigating at an excessive speed; with failing to stop and reverse; with failing to give any warning

of their approach; and with failing to keep to the starboard side of the channel.

The following Thames by-laws were referred to:

39. When two steam vessels are in sight of each other and are approaching with risk of collision, the following steam signals shall be intimations of the course they intend to take: (a) One short blast of the steam whistle of about one second's duration to mean "I am directing my course to starboard." (b) Two short blast of the steam whistle, each of about one second's duration, to mean "I am directing my course to port." (c) Three short blasts of the steam whistle, each of about two seconds' duration, to mean "My engines are going full speed astern."

42. The words "short blast" used in this by-law 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 by-laws shall indicate that course by the following signals on her whistle—viz.: One short blast to mean "I am directing my course to starboard." Two short blasts to mean "I am directing my course to port." Three short blasts to mean "My engines are going full speed astern."

46. When two steam vessels or steam launches proceeding in opposite directions, the one up and the other down the river, are approaching each other so as to involve risk of collision, they shall pass port side to port side.

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.

The deputy judge gave the following judgment:

Aided by my assessors, I have come to the conclusion that in this action the *Velox* was solely to blame for the collision, on the ground that she did not give the customary warning before rounding this point, which involved both ships in damages. There will therefore be judgment for the defendants, the owners of the *Kennet*, on the claim and counter-claim. We find that the *Kennet* did everything possible to avoid the collision.

From that decision the owners of the *Ribble* appealed.

Bateson, K.C. and *Balloch* for the appellants.—The *Kennet* came up to this blind corner and rounded it at too high a speed; she also should have given warning of her approach, and should not have gone ahead to try to put herself on the mud. The *Velox* was held to blame for not sounding a customary signal. Even if the custom is held to be proved, it was a custom for a vessel proceeding towards the point to sound a warning signal. The *Velox* was only starting from a wharf which is on the edge of the curve opposite the point. If the *Velox* is to blame for not sounding a warning signal, the *Kennet* is also to blame for the same reason. The alleged custom is really contrary to the Thames rules, for rule 43 provides that no other signal by whistle or sound signal except those mentioned in rules 32 and 49 shall be made by any vessel. [BARGRAVE DEANE, J.—Do you say it would have been wrong for you to sound a signal at all?] Yes, for there is no rule which directs it to be done. If it is to be done, both should sound one, for each should warn the other. The *Kennet* clearly did wrong to approach this point at such a speed that the only chance of avoiding a collision was to run ashore.

Laing, K.C. and *Nelson* for the respondents.—The speed of the *Kennet* was moderate. She had only just started from the opposite end of the wharf from which the *Velox* had started, though neither could see the other owing to Baldwin Point shutting them out from each other's view; it was quite impossible, therefore, for the *Kennet* to have much way. The custom that was proved was a custom for the vessel navigating with the tide to sound a signal to warn other vessels coming against the tide, that they may stop above the point. The custom is reasonable, and, whether it was proved or not, seamanship demands that such a signal should be given. The manœuvre the *Kennet* adopted was the best one possible. The *Velox* cannot complain; the absence of her signal put the *Kennet* into a difficulty, and those on board the *Velox* did all they could to avoid the collision. There can be no doubt that the *Velox* should have given some warning of her approach.

Bateson, K.C. in reply.—The *Kennet's* case in the court below was that the *Velox* was coming too fast. There is no charge in the preliminary act of not sounding a customary signal.

The PRESIDENT.—The collision in this case took place at a very sharp bend in the river, and it is obvious that vessels either proceeding up the river or coming down the river ought to navigate very carefully in approaching the bend, because craft may have to pass each other at that particular spot.

The learned deputy judge in this case has found that the *Velox* was to blame because she, going with the tide, did not give any warning to any ship or vessel which might be on the other side of the bend, upon which, of course, the duty would be to stop or take steps to prevent a collision. I see no reason at all for disturbing the judgment of the learned judge, which he came to upon the evidence and upon which he was advised by the nautical assessors. On the contrary, I entirely agree with it. I think, whether this vessel, the *Velox*, was starting with a couple of barges from the wharf or whether she was proceeding straight up, it was her duty to give such a warning as would enable the vessel upon the other side to approach the bend in such a way as to prevent any collision. Therefore, the *Velox* was to blame for this collision.

The question which has raised difficulty in my mind, in this case, is whether or not the other vessel is to blame. She was going down river. The tide, which was one knot in favour of the *Velox*, was one knot against the *Kennet*. The collision, in fact, took place by reason of a manœuvre on the part of the *Kennet* just in the bend, which threw her on to a sloping bank, where she could not stick and where it was hardly to be supposed, I think, that the master thought she would stick, though he probably hoped perhaps she would. She consequently went athwart the river, which is narrow at that point. Counsel for the respondents says, and it is his case, that that manœuvre was the best manœuvre which could be executed by those navigating the *Kennet*, in the circumstances. Assuming, without deciding, that it was the best manœuvre, we find this: The *Velox* was in a place in the bend where any innocent vessel might be. In this particular case, as I have said, the *Velox* was to blame, but there might have been in that particular spot an innocent vessel, a sailing vessel or a barge; and we find that the *Kennet* proceeds

down in such a way that at this particular juncture she has got to take what is described by counsel for the respondents as the best possible manœuvre, but which nevertheless brings about the collision. In my view the evidence establishes this, that the *Kennet* in approaching this difficult bend must have been navigated carelessly before she got herself into such a position, which made a collision inevitable, on her own story, if any innocent vessel happened to be where the *Velox* was. In the result the appeal must be allowed, and both vessels must be held to blame.

BARGRAVE DEANE, J.—I am of the same opinion. I think that under arts. 27 and 29 the rules of good seamanship, at this particular place approaching this bend, or in the bend, it is the duty of a vessel going up with the tide to give a warning blast or blasts—more than one, if necessary, because the bend is a long one—to warn vessels which may be coming down that she is proceeding up on the tide. My impression is that she ought to have done that before she got up to the place where she dropped some of her barges, and certainly she ought to have done it when she started on after dropping her barges. That would have given a warning to any vessel coming down that there was this obstruction in the way, and she should not only proceed cautiously, but, if necessary, stop above the bend altogether. It is perfectly clear—and the court below was right in holding—that the warning should have been given, not because it is the practice—I do not care about the practice—but under the rules of good seamanship. So much for the judgment of the court below with regard to the *Velox*.

But I am strongly of opinion that the other vessel, the *Kennet*, coming down against the tide, with a barge in tow, and knowing the place as she did, should have been proceeding at very much less speed than four knots over the ground. She was going over three and probably nearly four knots. She knew perfectly well that she could not tell, till she got a very short distance from the bend, whether there was any obstruction in the bend or not. There might have been sailing vessels, or dumb barges, which could not signal in the bend, and the *Kennet* might at any moment be called upon to pull up and keep out of the way of something. She admittedly went on at such a speed that she could not pull up, and she tried to do that which we must not blame her for doing, because she did it at the last moment in the hope of avoiding the collision. I think both tugs were to blame for this collision—initially the *Velox* for not giving warning blasts, and the *Kennet* for coming at too great a speed to a spot where admittedly she could not see more than 100 yards or so ahead.

Solicitors for the appellants, *J. A.* and *H. E. Farnfield*.

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

June 26 *and July* 28, 1911.

(Before Sir S. EVANS, President.)

THE DUPLEIX. (*a*)

Collision—Action in rem*—Arrest of foreign ship—Appearance by foreign defendants—Bail—Liability of defendants—Actual value of ship and freight—Statutory limit of liability.*

The owners of a British ship instituted an action in rem *to recover the damage they had sustained by reason of a collision between her and a French barque. The French barque was arrested and her owners, foreigners, entered an appearance in the action and gave bail to obtain the release of the vessel, the amount of the bail being equal to the appraised value of the barque and the agreed amount of the freight. The foreign owners defended the action and counter-claimed for the damage they had sustained.*

On the hearing of the action the French barque was held alone to blame, and a decree was drawn up condemning the defendants and their bail in the amount of the damage sustained by the plaintiffs with the costs of the claim and counter-claim.

On motion by the defendants to vary the decree by limiting its terms so that the plaintiffs should not be entitled to recover more under it than the appraised value of the vessel, the freight, and costs:

Held, on the authority of the principles laid down in The Dictator (67 *L. T. Rep.* 563; 7 *Asp. Mar. Law Cas.* 251; (1892) *P.* 304), *approved by the Court of Appeal in* The Gemma (81 *L. T. Rep.* 379; 8 *Asp. Mar. Law Cas.* 585; (1899) *P.* 285), *that, as the appearance of the defendants was voluntary and they had submitted to the jurisdiction of the court, the decree had been rightly drawn up and judgment should be given against them personally for the whole of the damage sustained by the plaintiffs, subject to the right of the defendants to limit their liability under the provisions of the Merchant Shipping Act* 1894.

MOTION to vary a decree in an action *in rem* to recover damage caused by a collision.

The plaintiffs were the Anglo-American Oil Company Limited, owners of the British barque *Eclipse*.

The defendants and counter-claimants were the owners of the French barque *Dupleix*.

On the 4th June 1910 a collision between the two vessels occurred in the South Atlantic, about 400 miles east of Pernambuco, while the *Eclipse* was on a voyage from New York to China, and the *Dupleix* was bound from Port Victoria, South Australia, to Falmouth.

The *Eclipse* put into Pernambuco for temporary repairs and then went to New York, where the repairs were completed, and she then resumed her voyage.

The *Dupleix* after the collision came into Falmouth, where she was arrested in an action *in rem* brought by the owners of the *Eclipse* for the purpose of recovering the damage they had sustained by the collision. The owners of the *Dupleix* entered an appearance and gave bail in an amount which was equal to the appraised value of the vessel and the agreed value of the

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

freight. A statement of claim was delivered by the plaintiffs, and the defendants delivered a defence and counter-claim seeking to recover the damage they had sustained.

On the hearing of the action the *Dupleix* was found alone to blame, and judgment was given for the plaintiffs against the defendants and their bail with costs, the counter-claim was dismissed with costs, and the amount of the damage was referred to the registrar and merchants.

The decree as drawn condemned the defendants and their bail for the amount of the damage sustained by the plaintiffs and for the plaintiffs' costs of claim and counter-claim.

On the 10th Nov. 1910 the defendants moved to vary the decree by limiting its terms so that the plaintiffs should only be entitled to recover an amount equal to the appraised value of the *Dupleix* and the value of the freight and costs.

The claim filed by the plaintiffs amounted to 24,000*l.* The value of the *Dupleix* as appraised and the agreed value of the freight was not more than 9900*l.*

The statutory amount which the defendants would have to pay if they limited their liability under the provisions of the Merchant Shipping Act 1894 was about 15,000*l.*

On the hearing of the motion it was pointed out that if the claim was cut down by the registrar below the figure of 9900*l.* the motion might be unnecessary, so by consent it stood over until the claim had been assessed.

The motion was restored and came on for hearing on the 26th June 1911.

Laing, K.C. and *C. R. Dunlop*.—The foreign owner could not have been served with a writ in an action *in personam*. Their appearance was not voluntary; their property had been seized by the court, and they appeared to defend it and the value of it, and the plaintiffs cannot recover judgment in this action *in rem* for more than the value of the *res* and the freight and costs. *The Dictator* (*ubi sup.*) and *The Gemma* (*ubi sup.*), which will be relied on by the plaintiffs in the action, are not decisive of this point. The case of *The Dictator* (*ubi sup.*) is wrong. It rests on a misconception of the early practice. This is pointed out in

Williams and Bruce's Admiralty Practice, 3rd edit., 1902, pp. 18 to 26.

The case of *The Gemma* (*ubi sup.*) really turns on the form of the decree.

The following cases were referred to on the point that an action *in rem* became a claim *in personam* on the owners entering an appearance:

The Bold Buccleuch, 7 Moo. P. C. 267;
The Parlement Belge, 42 L. T. Rep. 273; 4 Asp. Mar. Law Cas. 234; 5 P. Div. 197;
The Longford, 60 L. T. Rep. 373; 6 Asp. Mar. Law Cas. 371; 14 P. Div. 34;
The Mullingar, 26 L. T. Rep. 326; 1 Asp. Mar. Law Cas. 252.

And on the point that in an action *in rem* judgment could not be obtained for more than the value of the *res*, the following cases were cited:

The Volant, 1 W. Rob. 383;
The Hope, 1 W. Rob. 154;
The John Dunn, 1 W. Rob. 159
The Triune, 3 Hagg. 114;
The Dundee, 1 Hagg. 109;
Clerke's Praxis, 1743 edit.

H. C. S. Dumas (*Aspinall*, K.C. with him).—Unless the defendants limit their liability under the provisions of the Merchant Shipping Act 1894, the plaintiffs should recover from them the full amount of the damage, and judgment should be given for that sum. The cases of *The Dictator* (*ubi sup.*) and *The Gemma* (*ubi sup.*) are authorities for the proposition that in a collision action *in rem* where the defendants appear to contest their liability and judgment passes against them it can be enforced to the full amount of the claim if the damage claimed is proved by the plaintiffs. It is not limited to the value of the *res* or the bail given for the release of the *res*.

Dunlop in reply.—The appearance by the defendants makes them liable for the costs over and above the value of the *res*. With that exception judgment should in this case be limited to the value of the *res* and the freight.

Judgment was reserved and was delivered on the 28th July.

The PRESIDENT.—This was a collision action. The defendants' ship was arrested. The defendants entered appearance in the action, and gave the usual bail. They defended the action and also counter-claimed against the plaintiffs.

I found upon the trial that the defendants' vessel was solely to blame, and pronounced judgment in favour of the plaintiffs on the claim and counter-claim with costs. This entailed, in the ordinary course, a judgment against the defendants and their bail for the damages sustained by the plaintiffs and for the plaintiffs' costs on the claim and counter-claim. The defendants, however, applied that the judgment should be so framed as to be limited to the value of the defendants' arrested ship and freight, and to the costs.

The proposition of the defendants was that in an Admiralty action *in rem* in which the defendants appear and contest the action the plaintiffs cannot obtain judgment for, or recover, more than the value of the *res*, that is, the ship found to blame, and which was, arrested, and her freight—or the bail that represents the ship and freight—together with the costs.

The plaintiffs opposed the defendants' application and asked for judgment against them personally and their bail for the full amount. They relied upon the case of *The Dictator* (*ubi sup.*) and *The Gemma* (*ubi sup.*).

The defendants argued that those cases did not determine the point now raised, as they were not decisions directly upon the point. Speaking strictly, it may be true that these two cases are not binding decisions upon the matter in question, but in *The Dictator*, after an elaborate examination of the authorities, Sir F. Jeune stated that the law was that in a collision action *in rem* where the defendants appeared to contest or reduce their liability, judgment passed against them, and could be enforced against them, to the full extent of the damages proved by the plaintiffs, and was not limited to the value of the *res*, or of the value of the bail which represented the *res*. In *The Gemma* the Court of Appeal approved of that statement of the law. In the course of

his judgment A. L. Smith, L.J. said: "Now, apart from authority, it appears to me that when persons, whose ship has been arrested by the marshal of the Admiralty Court, think fit to appear and fight out their liability before the court, the form of the proceedings in the Admiralty Court show—and it is not disputed that the forms I have referred to are those which have been in use, according to the practice of the court, from olden times—that the persons so appearing, as the defendants have done in the present case, become parties to the action, and thereby become personally liable to pay whatever in the result may be decreed against them; and the action, though originally commenced *in rem*, becomes a personal action against the defendants upon appearance. For what purpose does a party appear to an action *in rem?* There are, as it seems to me, three reasons for the appearance: first, to release the ship, so that it may go on trading for the owner; secondly, to contest the plaintiffs' allegations that the ship had been in default; and, thirdly, in order to prevent its being sold. The President, in a judgment full of learning and research, in which he dealt with all the cases from the earliest time, whether in conflict or not with each other, has held in the case of *The Dictator* that a person appearing in an action *in rem* becomes personally liable, and considering that no real argument was addressed to us to impeach this judgment, and having considered it, and the principles appertaining to the present case, I do not doubt that the President came to the correct conclusion, and I adopt it."

In that case, as in the present one, the owners were foreigners domiciled abroad, who could not have been served with process in an action *in personam.*

Whether the two cases referred to were decisions directly in point or not, it would not be respectful of me to disregard the elaborate and precise statements of the law to be found in the judgments and to treat them as *obiter dicta,* even if I ventured to hold views differing from them. Where general principles of law have been laid down by learned judges in considered judgments, it does not appear to me to be right, or in the public interest, to look minutely at the facts of the particular case, and to say that the case might have been decided on narrower grounds, and that the general principles need not have been enunciated, and that therefore they are to have no judicial authority. In saying this I do not wish it to be supposed that I hesitate to adopt the views expressed by the learned judges in the two cases referred to. On the contrary, having given my best consideration to the question, I desire humbly to express concurrence in them without reservation.

Regarding the matter historically, and legally, the form of judgment, which has been adopted for generations, where owners appear in an Admiralty action *in rem,* whether in cases of collision or otherwise, is right in fixing liability upon the owners personally to the full extent of the claim established in the action.

The origin of commencing Admiralty suits by arrest is stated, I believe, correctly, in the volume of the Selden Society Series containing Select Pleas in the Court of Admiralty (vol. 1, p. 71) in the following passage: "The ordinary mode of commencing the suit was by arrest either of the person of the defendant, or of his goods. Arrest of goods was quite as frequent as arrest of the ship; and it seems to have been immaterial what the goods were, so long as they were the goods of the defendant, and were within the Admiral's jurisdiction at the time of the arrest . . . scarcely a trace appears of the modern doctrine of arrest founded on a maritime lien: the fact that goods and ships had no connection with the cause of action, except as belonging to the defendants, were subject to arrest, points to the conclusion that arrest was mere procedure, and that its only object was to obtain security that judgment should be satisfied. The form of the article upon first decree shows that the defendant was always cited 'at'—*apud*—the goods or ship arrested, and that if he did not give bail to satisfy judgment the suit proceeded against him in his absence, as well as against the *res.*"

Moreover, upon general principles applicable to the effect of entering appearance, I think that where the defendants appear, as in this case, not only to obtain the release of the ship which happens to have been arrested upon giving sufficient bail, but also to contest their liability, and to endeavour to exonerate themselves from any claim for damages and further to put forward, by counter-claim, and try to establish a claim for damages against the plaintiffs, they submit themselves to the jurisdiction of the court, and thereby become liable personally for the full damages.

It is no doubt true that the law as to the effect of appearance in the courts of this country by foreigners, or in the courts of foreign countries by our citizens, where the appearance is not voluntary is not clearly settled. In *Schilesby* v. *Westenholz* (L. Rep. 6 Q. B. 155) the court said: "We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal." In the words of Bowen, L.J. in *Voinet* v. *Barrett* (55 L. J. 39, Q. B.), "The stream of authority is to the effect that appearance, unless it be appearance under duress, is an election to submit to the jurisdiction from which the process issued."

In my opinion, an appearance not merely for the purpose of obtaining a release of property arrested, but also for the purpose of attempting to obtain a judgment freeing defendants from all liability for a collision and for the further purpose of trying to recover a judgment upon a counter-claim—which is equivalent to a cross-action—is not an appearance "only to save property in the hands of a foreign tribunal," nor an "appearance under duress." In these proceedings the plaintiffs' vessel was not arrested to answer the counter-claim. If the plaintiffs had failed in their action, and their vessel had been found solely to blame, the defendants would have been entitled to recover the whole of their damages against the plaintiffs personally. It would be a strange inequality in the event of the defendants failing, if the plaintiffs could only recover such part of their loss as the *res* might be sufficient to meet. It is true that by statute there is a possible limitation of liability in cases of collision, but apart from the cases to which the statute applies a sense of justice seems to demand that persons should be liable to the full extent of the damage caused by them or their

servants, and that no technicality should protect them from such a liability, or should prevent persons injured from obtaining judgment for the whole of their loss and from recovering it so far as possible by due process of execution.

The law as stated in *The Dictator* and *The Gemma* is in consonance with this sense of justice, and I am of opinion that it is sound. The application of the defendants is accordingly dismissed with costs, and the judgment is to be drawn up in the accustomed form, condemning the defendants and their bail in the plaintiffs' damages, and in costs.

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

Solicitors for the defendants, *Stokes and Stokes.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION

Dec. 14 *and* 15, 1911.

(Before Lord Alverstone, C.J., Hamilton and Bankes, JJ.)

Deacon (app.) *v.* Quale (resp.).

Neate (app.) *v.* Wilson (resp.). (a)

Seamen — Desertion—Excess wages paid to substitutes — Net saving of wages to owner — Detention of ship caused by desertions—Expenses due to detention—Reimbursement account —"Expenses caused by desertion"—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.

During a voyage which was not to exceed three years, a number of the seamen who had signed articles for the whole voyage deserted from the ship at San Francisco, thereby forfeiting the wages then due to them. After these desertions the vessel was chartered for six months to be used as a store ship for coals. For more than five months of this period no new seamen were engaged to take the places of the deserters, and the owners thereby saved a considerable sum in wages. The master then engaged new seamen for the homeward voyage in place of the deserters and these were paid at a higher rate of wages, but the total excess pay of these men amounted to much less than the total of the wages saved to the owners, and in consequence of the desertions the owners saved in wages above 260l.

Held, that the extra pay of the new men engaged was "excess wages" within sect. 221 *of the Merchant Shipping Act* 1894, *and was "expenses caused by the desertion" within sect.* 232 *of the Act, and was therefore properly included in the reimbursement account under sect.* 28, *sub-sect.* 1 (*b*) *of the Merchant Shipping Act* 1906, *and could be set off against the forfeited wages, notwithstanding that the owners had saved a large sum in wages in consequence of the desertions; and, further, that the seamen so engaged were, within the meaning of sect.* 221, *"substitutes" engaged in place of the seamen who had deserted, although they had not been engaged for more than five months after the desertions.*

During a voyage a number of seamen deserted in Melbourne, and in consequence of these desertions the vessel was detained one day while the master was engaged in finding substitutes, incurring personal expenses in doing so, and as the vessel was ready to sail in order to save further pier dues he moved to an anchorage in the bay, thereby incurring an expense for pilotage and for the cost of coal to take the vessel to the anchorage. In his reimbursement account the master included (in addition to the cost of pilotage and personal expenses which were allowed) a sum representing the wages and cost of food of the crew for one day and the cost of the coal to take the vessel from the pier to the anchorage. Justices having allowed these items as being expenses caused to the master by the absence of the seamen due to desertion within sect. 28 *of the Act of* 1906:

Held, that these items were not "expenses caused by the desertion," and ought not to be included in the reimbursement account.

Deacon (app.) *v.* Quale (resp.).

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

At the Thames Police-court an appeal was entered by Samuel Quale, being the master of the sailing ship *Beacon Rock* (hereinafter called the respondent), under 6 Edw. 7, c. 48 (the Merchant Shipping Act 1906), s. 28, against the decision of William H. G. Deacon (hereinafter called the appellant) for that the appellant had wrongfully refused to allow certain sums amounting to 109*l.* 10*s.* shown on the reimbursement accounts to be deducted from the amounts due on account of wages shown in the delivery accounts of sixteen seamen of the crew of the said ship who had deserted from the said ship at San Francisco in the United States of America.

Upon the hearing of the appeal the following facts were admitted or proved before the magistrate:—

(*a*) The respondent is and was at all times material the master of the sailing ship *Beacon Rock*. The appellant was the superintendent of the mercantile marine office, Dock-street, London, and was the proper officer referred to in sect. 28 of the Merchant Shipping Act 1906.

(*b*) Between the 12th and 15th Aug. 1907 the captain and a crew of twenty-five officers, seamen, and apprentices signed articles, a copy of which was appended to the case, at Antwerp.

(*c*) In the course of the voyage the ship arrived at San Francisco, in the United States of America, on the 19th Jan. 1908.

(*d*) Between the 25th Jan. 1908 and the 26th March 1908, while the ship was at San Francisco engaged in discharging her cargo and taking in ballast, the sixteen seamen in question deserted.

(*e*) At the time of the last desertion—namely, the 26th March 1908—there were due to all the said seamen wages to the total amount of 89*l.* 13*s.* 9*d.*

(*f*) The facts of the desertions were duly entered in the official log (a copy of which was

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

appended to the case) in accordance with the provisions of the Merchant Shipping Acts.

(*g*) On the 17th Feb., on the instructions of the owners, the master began to take in ballast in anticipation of proceeding under canvas, and by the 13th March, 365 tons of ballast had been shipped. On the 13th March 1908 (by which date fifteen men had deserted) the master (the respondent) received the following cablegram from his owners in Glasgow:

Combined with homeward charter at combination rates, have chartered at a lump sum for a period of six months at five hundred dollars per month to be used for store ship, this is your authority for signing contract on our behalf,

and the respondent did sign such contract.

(*h*) From time to time the owners in Glasgow had been advised by the master that desertions were taking place among his crew, and they had also been advised by cable on the 22nd Jan. that the vessel would be ballasted and ready to proceed on the 28th Feb.

(*i*) From the 23rd March 1908 until the 23rd Sept. 1908 the ship was used as a store ship or hulk for coals, and was stationed at Sansalito Bay near San Francisco.

(*j*) Between the 26th March 1908 and the 2nd Sept. 1908, a period of five months and seven days no seamen were engaged to take the places of any of the sixteen deserters.

(*k*) The wages of sixteen seamen for the said period of five months and seven days would have amounted to more than the sum of 109*l*. 10*s*. mentioned in sub-sect. (*o*) of this paragraph.

(*l*) It was at all times possible for the master to secure additional seamen by giving two or three weeks' notice to a shipping master at San Francisco, and the master did secure additional seamen when he wanted them for his voyage homeward. On the 2nd Sept. Wilson, the cook, and on the 12th Sept. 1908, two new seamen Maitland and Harris, were signed on and sailed with the ship on her homeward voyage.

(*m*) Between the 12th Oct. 1908 and the 24th Oct. 1908, according to the articles of agreement, produced with this case, fourteen other new seamen were signed on, and sailed with the ship on her homeward voyage.

(*n*) The ship sailed from San Francisco on the 27th Oct. 1908, and arrived at London on the 7th April 1909.

(*o*) Upon the ship's return to London on the termination of her voyage the respondent furnished to the appellant, the proper officer under sect. 28 of 6 Edw. 7, c. 48 (the Merchant Shipping Act 1906): (1) Delivery accounts, showing the total wages due to the sixteen deserters up to the time of desertion—namely, 89*l*. 13*s*. 9*d*. (2) Reimbursement accounts, showing the expenses alleged to have been caused by the desertion of the sixteen seamen and the hiring and excess pay of their alleged substitutes—namely, 109*l*. 10*s*. [Copies of these accounts were appended to and formed part of this case.]

(*p*) The appellant disallowed the sums shown in the reimbursement accounts.

(*q*) No evidence or proof was asked for by the appellant, nor supplied to him, save the said accounts.

(*r*) The excess pay of the alleged substitutes was no more than would have been paid if the substitutes had been hired immediately after the desertion.

On the part of the appellant it was contended that the said sum of 109*l*. 10*s*., the total of the reimbursement account, was not properly chargeable against the wages, *videlicet*, 89*l*. 13*s*. 9*d*., of the sixteen deserters because: (i.) Having regard to the lapse of time (five months and seven days) between the last of the desertions and the engagement of the sixteen other seamen to work the ship, the sixteen other seamen could not be said to be substitutes within the meaning of sects. 221 and 232 of the Merchant Shipping Act 1894, and the expenses of engaging and employing such seamen were not, within the meaning sect. 28, sub-sect. 1 (*b*) of the Merchant Shipping Act 1906, expenses caused to the master or owners of the ship by the absence of the seamen. (ii.) Alternatively, that if the sixteen other seamen were substitutes within the meaning of sects. 221 and 232 of the Merchant Shipping Act 1894, the proper officer was entitled to take into consideration the saving made by the master or owners of the ship by reason of the non-engagement and employment of any seamen during the said period of five months and seven days, and to set off the sum so saved against the expenses of and incidental to the engagement and employment of the sixteen other seamen.

On the part of the respondent it was contended that the said sum of 109*l*. 10*s*. was an expense due to the desertion of the sixteen seamen within sect. 28, sub-sect. 1 (*b*), of 6 Edw. 7, c. 48 (the Merchant Shipping Act 1906), and that that sum was properly chargeable by the respondent in his reimbursement accounts against the wages of the sixteen deserters, and that the appellant should have allowed the same.

The learned magistrate was of opinion that the said sum of 109*l*. 10*s*. ought to have been allowed in the reimbursement accounts and was properly chargeable against the wages, *videlicet*, 89*l*. 13*s*. 9*d*., of the sixteen deserters. With regard to the first contention of the appellant, he found that there was no abandonment of the adventure by the master or owners; and with regard to the second contention, there was no evidence that it was either more or less profitable to use the ship as a coal hulk than in the ordinary way.

In the articles of agreement the voyage was described as "a voyage from Antwerp to San Francisco and (or) any ports or places within the limits of 75 degrees north and 65 degrees south latitude, the maximum time to be three years' trading in any rotation and to end at the final port of discharge of cargo in the United Kingdom or continent of Europe between the Elbe and Brest inclusive, calling for orders if required."

In the accounts appended to the case the total amount of wages saved by the absence of the sixteen seamen who deserted was put down as 370*l*. 6*s*. 8*d*.; the increased cost of the substitutes as claimed on account was 109*l*. 10*s*. The saving to the owners on wages was 260*l*. 16*s*. 8*d*., and the saving to the owners on keep, at 1*s*. 6*d*. per day, was 281*l*. 2*s*. Total saving to owners on wages and keep 541*l*. 18*s*. 8*d*. The account was made out with regard to each one of the sixteen seamen, and the amount of wages saved by the absence of the seaman, the increased cost of the substitute for that seaman, the saving to the owners on wages as to that seaman, and the saving to the owners on

keep at 1*s.* 6*d.* per day, were given, making the totals above mentioned.

Neate (app.) *v.* Wilson (resp.).

Case stated by justices of the peace for the city of Cardiff on the hearing of an appeal as provided by sub-sect. 3 of sect. 28 of the Merchant Shipping Act 1906 (6 Edw. 7, c. 48) by A. E. Wilson, master of the British steamship *Mountby*, of West Hartlepool (hereinafter called the respondent) against a decision made by Reginald Neate, an officer of the Board of Trade, superintendent of the mercantile marine office at the port of Cardiff (hereinafter called the appellant), when dealing as the proper officer under sect. 28 of the Merchant Shipping Act 1906 with the reimbursement account of certain seamen who had deserted from the said British steamship in the course of a voyage which terminated at the port of Cardiff on or about the 27th June 1910.

The appellant was the superintendent of mercantile marine, an officer of the Board of Trade at the port of Cardiff, and the proper officer referred to in sect. 28 of the Merchant Shipping Act 1906, and the respondent was A. E. Wilson, master of the British steamship *Mountby*, of West Hartlepool.

The appellant appeared before the justices on an appeal entered against his decision as the proper officer under sect. 28 of the Merchant Shipping Act 1906, with reference to the reimbursement accounts of the respondent in respect of alleged expenses amounting to a sum of 25*l.*, caused to the respondent or the owners of the British steamship *Mountby*, by the absence of certain seamen—namely, W. Main, W. Woolward, John Casey, B. Lally, J. Blakeman, H. Smith, J. Martinson, and G. Chappell, belonging to the British steamship *Mountby*, due to the desertion of the said seamen.

Upon the hearing of the appeal by the justices the following facts were proved:—

(1) That the steamship *Mountby* was a British ship registered at the port of West Hartlepool, and that at the times material to this case the respondent was her master.

(2) That by articles of agreement entered into at the port of South Shields on the 14th Dec. 1909—which articles, together with the official log of the steamship for the voyage and the delivery and reimbursement accounts of the seamen and the summary of those accounts were produced in evidence before the justices, and were appended to and formed part of this case—there were engaged as members of the crew of the steamship, amongst others, for a voyage "not exceeding three years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at the Tyne, proceeding thence to Melbourne and (or) any other ports within the above limits, trading in any rotation and to end at such port in the United Kingdom or Continent of Europe (within the home trade limits) as may be required by the master," the following seamen: Main (mess-room steward), Woolward (fireman and trimmer), Casey (fireman and trimmer), Lally (fireman and trimmer), Blakeman (sailor), Smith (A.B.), Martinsen (sailor), Rodgers (A.B.), and Stewart (fireman and trimmer).

(3) The G. Chappell, mentioned in par. 5, signed the articles at Melbourne or Williamstown, in the State of Victoria, on the 23rd March 1910, and deserted from the steamship at Durban, in the Union of South Africa, on the 2nd May 1910.

(4) That on the 2nd March 1910 the *Mountby* arrived at the port of Melbourne or Williamstown aforesaid, where four members of the crew (Martinsen, Casey, Rodgers, and Main) deserted from the ship, and the master of the *Mountby* was compelled to employ four substitutes in their stead.

(5) That the master endeavoured to have entered on the articles the names of the substitutes in place of the deserters, but the superintendent of mercantile marine at Melbourne refused to indorse the articles certifying the four members of the original crew to be deserters until the day of sailing. Accordingly the four substitutes were engaged to work on the vessel day by day on the understanding that they would be engaged for the voyage in the event of the deserters failing to return, and it was agreed that they were to be "signed on" for the voyage immediately the superintendent indorsed the articles.

(6) That on the 21st March, when the *Mountby* had completed loading and was in readiness to sail early on the 22nd March 1910 from the port of Melbourne or Williamstown aforesaid, four more members of the original crew (namely: Blakeman, Smith, Lally, and Stewart), together with the four substitutes mentioned in pars. (4) and (5) deserted from the ship *Mountby*.

(7) That in consequence of these desertions the *Mountby* was unable to sail from the port of Melbourne or Williamstown aforesaid on the 22nd March, and the master, in order to save payment of further pier dues, arranged that the steamer be moved from the pier whilst substitutes were being found to take the places of the eight men who had deserted.

(8) That on the 22nd March the master and mate of the *Mountby* were engaged in finding substitutes, and at 8 p.m. on that day—the 22nd March—they returned to the steamer with eight substitutes.

(9) That upon the return of the master and mate to the *Mountby* on the evening of the 22nd March, it was discovered that another member of the original crew—(namely, Woolward), had deserted, for whom a substitute was found by twelve o'clock on the same night.

(10) That on the 23rd March the *Mountby* sailed from the port of Melbourne or Williamstown aforesaid, having been detained one whole day by reason only of the desertions mentioned in pars. (4), (6), and (9) hereof.

(11) That on the 1st May 1910 the steamship touched at the port of Durban (Port Natal) in the Union of South Africa, where G. Chappell deserted.

(12) That the steamship arrived at the port of Cardiff aforesaid on the 26th June 1910, and on the day following the crew were paid off before a deputy superintendent of mercantile marine, the master being then called upon to render to the appellant as proper officer, accounts of the wages and effects of the ten seamen aforesaid who had been left behind abroad by reason of desertion.

(13) That in accordance with the provisions of sub-sect. 4 of sect. 28 of the Merchant Shipping Act 1906, the respondent elected to deal with the accounts collectively; and the accounts were

furnished to the appellant as proper officer on the 30th June 1910. No vouchers for any of the sums claimed in the reimbursement account were furnished or demanded, save that a copy of an account dated the 21st March 1910, containing an item of 2*l.* 10*s.* for Bay removal, was shown to the appellant.

(14) That in the reimbursement account of G. Chappell no item was claimed.

(15) That in each of the accounts of Main, Woolward, Casey, Lally, Blakeman, Smith, Martinsen, Rodgers, and Stewart, the sum of 3*l.* 2*s.* 2*d.* was claimed in the reimbursement account. The total of these nine sums of 3*l.* 2*s.* 2*d.* amounted to 27*l.* 19*s.* 6*d.* The particulars of these sums in the respective reimbursement accounts were "Proportion of detention as per master's letter."

(16) That the master's letter in the last paragraph mentioned was dated the 30th June 1910, and was addressed to the superintendent, Mercantile Marine Offices, Cardiff. It contained the following statements:

Please note the *Mountby* finished loading at Williamstown, Australia, on the afternoon of Monday, the 21st March 1910, and in the ordinary course of events should have sailed the following morning, but, owing to the great difficulty in engaging substitutes for the deserters, it took me from 10 a.m. to 5 p.m. on the 22nd. *Mountby* did not sail until the morning of Wednesday, the 23rd March 1910. I therefore claim reimbursement for one day's detention, 25*l.* During this detention, in order to avoid payment of extra quay dues, I had to shift *Mountby* to an anchorage in Hobson's Bay, the cost of pilotage being 2*l.* 10*s.*, as per enclosed account. I also claim reimbursement for this amount, together with 9*s.* 6*d.* as my personal expenses incurred.

(17) That the total of the items in the last paragraph mentioned was 27*l.* 19*s.* 6*d.*, and the total of the nine sums of 3*l.* 2*s.* 2*d.* made up an equal amount.

(18) That the appellant as proper officer disallowed the said sum of 25*l.*, claimed by the master as "detention of the ship, &c.," and accordingly struck out from the reimbursement account of each of the men mentioned in par. (15) the item of 3*l.* 2*s.* 2*d.* But in substitution therefor there was inserted and allowed by the appellant as proper officer in each of the said reimbursement accounts a sum of 6*s.* 7*d.* for proportion of pilotage and expenses. The total of these nine sums of 6*s.* 7*d.* amounted to 2*l.* 19*s.* 3*d.*, which approximately made up the total of the two items for the cost of pilotage when shifting the ship—2*l.* 10*s.*, and 9*s.* 6*d.* for the master's personal expenses claimed in the letter of the 30th June.

(19) That the wages of the crew of the steamship amounted to 4*l.* 16*s.* 2*d.* *per diem*, and the cost of food for the crew was 1*l.* 16*s.* 3*d.* *per diem.* Eight tons of coal of the value of about 10*l.* were consumed in getting up steam to take the steamship from the pier to the anchorage where she lay under banked fires from the 22nd to the 23rd March 1910.

It was contended by counsel for the respondent that the damage suffered by the master of the *Mountby* flowed from the desertion, and should be reimbursed from any money that might be due to the seamen who had deserted at Williamstown. The sum claimed for deduction in the letter of the 30th June 1910 had been made up in a particular way, but he (counsel) was not satisfied that that was the proper basis upon which the damages ought to be made out. He submitted that the proper basis was the amount of expenses proved to be caused to the master by reason of the desertion. The claim was the same—namely, one for damages or expenses caused by desertion—but the mode of arriving at the correct amount had been changed. He contended that the said sums of 4*l.* 16*s.* 2*d.*, 1*l.* 16*s.* 3*d.*, and 10*l.* (making a total of 16*l.* 12*s.* 5*d.*) were out-of-pocket expenses incurred by the master, and that inasmuch as they were expenses that would not have been incurred but for the desertion of the men, but were expenses directly attributable to the desertion, they fell within the meaning of sect. 28 of the Merchant Shipping Act 1906, and as such should be allowed by the court.

It was contended by counsel for the appellant (*a*) that the sums of 4*l.* 16*s.* 2*d.*, 1*l.* 16*s.* 3*d.*, and 10*l.* were not expenses caused to the master by reason of the desertion of the seamen within the meaning of sect. 28; (*b*) that the detention, if any, was due, at least in part, to causes other than the absence of the seamen; (*c*) that one of the causes of such detention, if any, was the failure on the part of the substitutes, who promised to take the place of some of the seamen, to fulfil their promises, and that it was against the meaning of the statute to charge the wages of those seamen with the expenses caused by the default of other persons, or to apportion the expenses between the varying classes of persons other than the said seamen by whose default they had been incurred, and that on that account the claim was bad on account of remoteness of damage; (*d*) that there had been an amendment of the original claim, and under sub-sect. 3 of sect. 28 of the Merchant Shipping Act 1906, under which the hearing before the justices took place, the hearing was an appeal and not a rehearing and therefore it was not open to the justices to allow an amendment of the claim and a substitution of other items for those which had been disallowed. He relied on the words in sub-sect. 3 aforesaid contained, that "the master of the ship shall be entitled to be reimbursed any sums shown in the reimbursement account," as excluding the power to introduce on appeal substituted items not originally shown in the accounts. Further, he submitted that damages for detention were not expenses within the meaning of the section. "Expenses" meant out-of-pocket expenses already incurred at the time of the rendering of the accounts and capable of being vouched by existing vouchers. Damages, on the other hand, were something which had to be assessed by authority.

With regard to the contention of the appellant's counsel that it was not open to the justices to allow an amendment of the claim and a substitution of other items for those which had been disallowed, the justices were of opinion that there was no amendment of the claim inasmuch as the claim before them was the same as that originally presented to the superintendent of mercantile marine at Cardiff—namely, a claim by the master to have reimbursed to him from the wages of certain seamen such expenses as were caused to him by reason of the desertion of the seamen.

The original claim presented to the superintendent of mercantile marine was for 27*l.* 19*s.* 6*d.*, of which sum 2*l.* 19*s.* 3*d.* was allowed in respect of cost of towage and personal expenses of the master; but with regard to the sum of 25*l.* for detention of the vessel, particulars as to how the amount was made up were neither asked for nor given, but the claim was disallowed. The justices were further of opinion that it was competent to them, on hearing the appeal, to inquire whether the sum of 25*l.* or any lesser amount had been incurred by the master as expenses caused to him by the desertion of the seamen, and to allow him such sum as they found to be properly chargeable. Having regard to the facts that the vessel was detained for one day by reason only of the desertion of the seamen, and that owing to such detention the master had incurred an expense of 16*l.* 12*s.* 5*d.*, being 4*l.* 16*s.* 2*d.* for extra wages to the crew, 1*l.* 16*s.* 3*d.*, cost of food supplied to the crew, and 10*l.*, the cost of coal consumed, the justices decided that that sum of 16*l.* 12*s.* 5*d.* was an expense caused to the master by the absence of seamen due to desertion within the meaning of sect. 28, and they accordingly allowed such sum to be reimbursed to him out of the wages due to those seamen who had deserted from the vessel at Melbourne.

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 subsequently 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)—an Act to amend the Merchant Shipping Acts 1894 to 1900—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, one (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 section two hundred and twenty-one 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 seamen 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. . . . (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 ; . . .

Sir *Rufus Isaacs* (A.-G.) (with him Sir *John Simon* (S.-G.), *Rowlatt*, and *Hamar Greenwood* in the first case, and Sir *John Simon* (S.-G.), *B. W. Ginsburg*, and *Rowlatt* in the second case) for the appellant.—The material sections upon which the question turns are sects. 221 and 232 of the Merchant Shipping Act 1894 and sect. 28 of the Merchant Shipping Act 1906. Sect. 221 enacts that if a seaman deserts from his ship he shall be liable to be punished as provided in that section. He is liable to forfeit his effects left on board and the wages which he has then earned, and also 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. Then sect. 232 deals with the application of the wages and effects so forfeited, and provides that the wages and effects which under the Act are forfeited for desertion "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," so that under that section what has to be reimbursed to the master or owner out of the forfeited wages and effects is "the expenses caused by the desertion." Then the next important section is sect. 28 of the Merchant Shipping Act 1906, which deals with the wages and effects of seamen left behind; and in sub-sect. 1 (*b*) it says that on the termination of the voyage the master must furnish to the proper officer accounts, one, called "the delivery account," of the effects and wages of the seaman left behind, and the other, called "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." Sub-sect. 3 says that the master shall be entitled to be reimbursed out of the wages and effects any sums shown in the reimbursement account which appear to the proper officer to be properly chargeable, and under sub-sect. 4 the master may deal with the delivery and reimbursement accounts collectively instead of individually. Upon these sections the question is one of reimbursement of "expenses" caused by the desertion; it is not a question of damages for breach of contract. If the master was not out of pocket by the desertions, then there were no "expenses," and that is really the test. In this case the fact was that the shipowners gained some 500*l.* in consequence of the desertion; and, that being so, they cannot recover these expenses amounting to 109*l.* 10*s.*, as being "expenses caused by the desertion." The word "expenses" is not co-extensive with loss, because all that a shipowner can recover is the expenses which he has been put to in consequence of the desertion. If the owner got a better freight by the delay of the ship, then he would have suffered no loss by the desertion and there would be no "expenses caused" by it. The expenses here were caused, not by the desertion, but by the new contract entered into, and there is no finding of fact that this contract was made in consequene of the desertion, and before there is a right to reimbursement of expenses it must be shown that they are expenses caused by the desertion. During the five months in question several hundred pounds were saved to the owners in wages, because if the desertions had not taken place the owners would have had to pay the wages of these sixteen men for that period of five months. If we add up the wages that would have been paid if there had been no desertion, and then add up the wages that have in fact been paid, the "excess wages" is the sum by which the wages in fact paid exceeds the wages that would have been paid but for the desertion. Here there was no "excess of wages" within the meaning of sect. 221 (*a*), because although the master may have had to pay 1*l.* a month more to the alleged substitutes, there has to be set against that the saving in wages, amounting to 370*l.*, during the whole of the time when no wages were paid either to these men or to any substitutes for them. It therefore cannot be said that he has paid any "excess wages" or that he has suffered "expenses" in that respect caused by the desertion. He has in fact gained by the desertion. The expenses to come into the reimbursement account must be a loss in respect of wages or excess wages paid in consequence of the desertion. Secondly, the excess of wages referred to in sect. 221 is an excess of wages paid to a "substitute." The seamen engaged here were not within the meaning of that section substitutes at all for the men who had deserted some five months before. They were simply men who were employed to bring the vessel home under a newcontract and a new voyage, and although in one sense they were substitutes to bring the vessel home, they were not substitutes within the meaning of the Act. In the case of *Deacon* v. *Quale*, therefore, the magistrate was wrong in allowing the 109*l.* 10*s.*, the excess wages, to be included in the reimbursement account and charged against the forfeited wages.

With regard to the case of *Neate* v. *Wilson*, the same principles apply. It is submitted that the proper officer was right, on the facts before him, in disallowing the claim for the one day's detention of the ship, and that the justices were wrong in allowing a sum which in fact included damages for the detention. The expenses so allowed were not "expenses caused by the desertion" within sect. 232 of the Act of 1894, because, so far as the act of any one of the seamen was concerned, the vessel would have remained there in any case, and it cannot be said that the act of any one of the seamen in deserting caused the detention. In fact it was a case of expenses being caused to the master by the absence of all those who deserted, and not by the absence of any one of the seamen in particular, and if any expenses arose therefrom they cannot be divided between the seamen so deserting, so as to include in the reimbursement account of each seaman a porportionate part of such expenses. Again, it was never contemplated that the master should recover damages for detention, because if the section is so construed it would make expenses mean damages for breach of contract, which it certainly does not. These so-called expenses represent profits which the master has failed to make. The loss of those

profits is not expenses within the meaning of these sections, and the master is not entitled to them.

Alexander Neilson (*W. Norman Raeburn* with him) for the respondent in each case.—The fallacy in the argument advanced on behalf of the appellant is that in order to arrive at the "excess wages" which the deserting seaman is to satisfy, you must add up the wages saved in consequence of all the desertions and compare the total amount with the total amount of the wages paid to the substitutes and see what the net result is. That cannot be the meaning of sect. 221 of the Act of 1894. Sect. 221 defines what the offence of desertion is and specifies the consequences of it, and it provides that the deserting seaman, in addition to forfeiting his wages then due and his effects on board, is to satisfy any "excess of wages" paid to any substitute, so that the forfeited wages are made liable to satisfy the excess wages paid to a substitute. That means that in the case of any particular seaman who deserts he is to satisfy any excess of wages paid to the substitute who takes his place, and there is an "excess of wages" if the substitute is paid a higher sum, but that is very far from saying that in order to see whether there is an excess of wages you must add up the wages saved to the master and deduct therefrom the total of the wages paid. Then sect. 232 refers to wages which under the Act are forfeited (that is under sect. 221), and says that the forfeited wages are to be applied towards reimbursing the expenses caused by the desertion. The "expenses caused by the desertion" must refer to the excess wages paid to a substitute, and must include those excess wages at least, and probably something more: (*Halliday* v. *Taffs*, 104 L. T. Rep. 188; (1911) 1 K. B. 594). Sect. 28 of the Act of 1906 deals with the wages and effects of a seaman who is left behind, and in sub-sect. 1 (*b*) provides for a delivery account and a reimbursement account, and the reimbursement account is to be an account of the expenses caused to the master or owner by the absence of the seaman where the absence is due to desertion. Those expressions in the two sections, "expenses caused by the desertion" in sect. 232 of the Act of 1894, and "expenses caused by the absence of the seaman . . . due to desertion" in sect. 28, sub-sect. 1 (*b*), of the Act of 1906, mean the same thing. The word used in both these sections is "expenses," and sect. 28, sub-sect. 1 (*b*), in terms refers to sect. 221 of the Act of 1894, because it says that the reimbursement account is to include the expenses caused by the absence of the seaman due to desertion, "or any other conduct constituting an offence under sect. 221 of the principal Act," and it is therefore to include the excess wages mentioned in sect. 221. Therefore, if there was any excess of wages paid to the new men shipped on board—as there was in this case—the forfeited wages were liable to satisfy this excess, and these excess wages must come within sect. 232 as "expenses caused by the desertion," and within sect. 28 as "expenses caused by the absence of the seaman due to desertion." Secondly, it is said that these new men were not "substitutes," but the magistrate has found that they were substitutes, and it was a question for him to find. It was all one voyage, and the names of the new men appeared in the articles. They were, within the meaning of sect. 221, "substitutes" engaged in the place of the men who had deserted, and as they were engaged at a higher rate of pay there was an "excess of wages" which the forfeited wages were liable to satisfy. The magistrate was therefore right in allowing the 109*l*. 10*s*. in the reimbursement account. In the case of *Neate* v. *Wilson*, the ship was delayed one day in consequence of the desertions, and the expenses allowed by the justices were properly allowed as being expenses coming within sect. 28. The expenses caused by desertion are not limited to the mere excess wages paid to the substitutes. The intention of the Legislature was that any expenses that could fairly be said to have been caused by the absence of the men who deserted should be paid. Under sect. 28 these sums if not allowed to the master in the reimbursement account are to be paid into the Exchequer, and that is a reason for saying that the words ought not to receive so narrow a construction as in other cases. The justices have found that the sums representing the one day's wages to the crew, the cost of one day's food, and the 10*l*. as the cost of the extra coal, were "expenses" caused by the absence of the seamen due to desertion within sect. 28, and from a business point of view they were right.

Rowlatt in reply.

Lord ALVERSTONE, C.J.—These two cases raise important points under somewhat different circumstances. The question which we have to consider is whether certain payments or expenses charged by the master of the ship in his reimbursement account are properly chargeable against the wages of the seamen who deserted; and it turns practically or entirely on sects. 221 and 232 of the Merchant Shipping Act 1894. We have to consider a section of the later Act of 1906, but only for the purpose of seeing whether there is any light thrown on the main question before us.

The facts in the first case may be very simply stated. There were a certain number of seamen who had shipped on articles for a voyage not exceeding three years to go to San Francisco and different ports and places, and to be finally discharged on the vessel coming to the United Kingdom or certain ports in Europe. At San Francisco sixteen of these men deserted, and, there being a difficulty as to what should be done and the vessel not having a charter at the time, the master commenced to put on board ballast in order that she might go elsewhere seeking cargo. At that time the master received a cablegram from his owners in Glasgow stating, "Combined with homeward charter at combination rates, have chartered at a lump sum for a period of six months at 500 dollars per month to be used for store ship, this is your authority for signing contract on our behalf." The result of that combined state of circumstances was this: the men having deserted and the vessel being partly loaded with ballast and the owners having made that arragement, the vessel remained for nearly six months at San Francisco employed as a store ship. Before the vessel left San Francisco sixteen men were shipped in the place of the sixteen who had deserted, and to those sixteen men so shipped in the place of the deserters a higher rate of

wages per month had to be paid. The vessel then came home with cargo under a new charter to some port in the United Kingdom. The state of things then was that there was a sum of about 87*l*. odd due in respect of wages to the men who had deserted, and who had therefore forfeited their wages. One hundred and nine pounds ten shillings was the extra amount said to have been paid by the master, made up of expenses in obtaining substitutes, boat hire, shipping fee, and extra wages at an extra 1*l*. per month.

In these circumstances it has been contended by the Attorney-General that although he would admit that the 109*l*. 10*s*. is *primâ facie* a proper item to be included in a reimbursement account, yet it ought not to be included in that account in this case for two main reasons: first, that these seamen who were taken on could not be said to be in substitution for those who had deserted; and, secondly, in respect of wages paid to the crew on the whole account being taken, there was a saving to the ship of some amount, as he said between 400*l*. and 500*l*. He agreed that this was to be in respect of wages only, and I think he was bound to limit it to that But at any rate, dealing with the finding in par. (*k*) of the case that "the wages of sixteen seamen for the said period of five months and seven days would have amounted to more than the sum of 109*l*. 10*s*.," he said that inasmuch as on that transaction of wages in connection with this voyage and in the circumstances of this desertion the master has saved five months' payment of sixteen men—although he had to pay 1*l*. per month for the extra men that came home with the vessel—he has not been put to any loss or expense, and therefore he ought not to include these payments in the reimbursement account.

With regard to the question as to the men being substitutes, the first point taken before the magistrate was that having regard to the lapse of time between the last of the desertions and the engagement of the sixteen other men, these men could not be said to be substitutes, and that the expenses of engaging these seamen were not, within the meaning of sect. 28, sub-sect. 1 (*b*), of the Act of 1906, expenses caused to the master or owner of the ship by the absence of the seamen where the absence was due to desertion. As to that contention the magistrate found that there was no abandonment of the adventure by the master or owners, and he has found that the men were in substitution for those who had deserted. I am not disposed to differ from that finding. I think I should probably have come to the same conclusion myself, but at any rate I see no ground for differing from it. The men who deserted would have been bound by their articles to have stayed on the ship and to have come home in her. The men who were shipped to bring her home were undoubtedly shipped in place of the sixteen men who deserted. Therefore, *primâ facie*, they were men taken on in substitution for those who had deserted. The magistrate has found, and I agree with him, that the adventure was not abandoned, and in these circumstances it seems to me that we ought not to differ from the view that the men were men shipped in substitution and came within sect. 221 of the Act of 1894 as substitutes engaged in the place of those who had deserted.

The second question is more difficult, and in order to consider it we must look at the sections of the Act dealing with the matter. Sect. 221 of the Merchant Shipping Act 1894, which is the first section, says if a seaman "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." That is a section strongly in favour of the master and the shipowner, and intended to be so, because not only does it forfeit the wages and not only does it forfeit the effects and say that the seaman is to be liable to satisfy the excess of wages, but it says that they may also take proceedings against the owner of any other ship in which the seaman so deserting may earn wages until his next return to the United Kingdom.

Sect. 232 deals with reimbursement. It says: "Where any wages or effects are under this Act forfeited for desertion from a ship . . . those wages and 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." For the purposes of such reimbursement, the master or his agent may, if the wages are earned subsequently to desertion, recover them in the same way as the deserter could have recovered them if they had not been forfeited.

To my mind those sections deal with the simple question of wages forfeited (which will go to the Exchequer unless the master gets them reimbursed to him) and of expenses incurred in connection with the substituted men. There is nothing in either of those sections, to my mind, to open up the general question as to whether there has been with the wages account, including or not including the food account, a saving of expense to the master of the ship. The common instances of desertion are where there is a higher rate of wages at the port of arrival, and men do constantly desert at such port soon after the vessel has arrived there. The vessel is not infrequently there for a month, six weeks, or even two months, and in cases of desertion fresh men are not shipped to take the vessel home until the end of that time. Therefore in a great majority of cases some question could be raised by the Board of Trade as to whether there had not been a saving in respect of wages, or less expense than the master claims in respect of the wages account. There is nothing in either of those two sections—sects. 221 and 232—to indicate to me that such an inquiry was ever intended to be entered upon.

Then the Merchant Shipping Act of 1906 is mainly, if not entirely, by sect. 28, machinery for carrying out this previous scheme. That section says that if any seaman is left behind out of the British Islands, on the termination of the voyage during which the seaman was left behind, the master shall within forty-eight hours after the

arrival of the ship deliver accounts in a form approved by the Board of Trade, one, 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 section two hundred and twenty-one of the principal Act." That is obviously dealing with sect. 221 of the Act of 1894, and in my opinion that again points to the conclusion that what was intended to be dealt with was the comparatively simple question of what expenses have been incurred by the master in connection with the desertion of that particular seaman. I do not find any indication of the suggestion made that you might enter into the sort of account which is illustrated by the table put in by the Board of Trade of the number of days' wages saved, and of the food saved, and of the net result to the employer of the men having left the ship. I think that would open up a question of very great difficulty, and would render this comparatively simple matter as to how much of the wages was to be paid over to the Treasury a question of great difficulty not intended to be entered into upon such a proceeding.

I do not think the later sub-sections of sect. 28 have much bearing upon this matter, but I think sub-sect. 4, what I may call the collective section, has some bearing on this very point. It provides that where during the voyage two or more seamen have been left behind, the delivery and reimbursement accounts 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 shall be entitled to be reimbursed out of the total amount of the wages and effects of the seamen 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 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 as properly chargeable on the reimbursement accounts.

That, to my mind, points in the same direction. It was intended that it should be a collective calculation of how much was due in respect of the total amount of wages of these particular seamen and how much was due in regard to the reimbursement accounts, and I think that if it had been intended to open up the general question as to how much had been gained or lost by the shipowner very different provisions would have been made. That appears to me to be practically the view which was expressed, although only expressed as *obiter*, by my brother Hamilton in the case of *Halliday* v. *Taffs* (*ubi sup.*) in the following passage (1911) 1 K. B., at p. 602): "When one looks at the use of the word 'expenses' in both sect. 221 and sect. 232 of the Act of 1894 it seems to me clear from the context that the word refers to expenses directly caused, such as disbursements in the nature of payments for service substituted for that which the deserter ought to have rendered." I think that that view expressed in anticipation is supported by the arguments we have heard in this case.

Therefore in the first case—the case of *Deacon* v. *Quale*—I am of opinion that the contention for the respondent is right, and that the appeal must be dismissed upon the ground that these expenses were properly incurred in substituting seamen for those who had deserted, and that, in order to prevent the reimbursement of these items from being allowed, the Attorney-General can only succeed by entering into an inquiry as to what was the net result, upon the whole adventure, of these men deserting. I am of opinion that that was not an inquiry which was intended to be entered upon, and that therefore the claim of the Board of Trade to disallow those particular expenses must fail.

Applying that principle, which I need not enumerate again, to the second case—the case of *Neate* v. *Wilson*—the facts there were somewhat different. The facts were that a certain number of men having deserted, and some further desertions having taken place, the vessel was detained a day. I do not enter into the question as to what may be called the degree of expense caused by the desertion of the particular men. The Attorney-General contended very strongly that you could not make the claim at all because you had to apportion the amount according to the master's contention between a number of seamen, as to some of whom their desertion might have contributed very largely to the delay, and as to some others very little to the delay; and that is rather an instance of the difficulty of entering into such an inquiry.

The items disallowed here by the proper officer were the proportion of the sum claimed, which was originally put at 25*l.*, for the detention of the ship for one day, and which was then changed before the magistrates to 16*l.* 12*s.* 5*d.* This latter sum was made up of wages, the cost of food, and coal; that is to say, it amounted to 16*l.* 12*s.* 5*d.*, which was said to be the actual damages for the detention on that day. I think this again is too remote and not a part of the inquiry intended to be entered upon. It is quite true the vessel was detained a day, and in respect of the expenses actually incurred in getting the men—namely, the pilotage and personal expenses—they have been allowed. Possibly that is not quite so plain, but there is no real dispute about that matter. It is a very small matter, but in regard to the other part of the claim it is in fact a claim that the result of the men's desertion was to detain the ship, and therefore to put the ship to an extra day's expense.

I think that that is not the class of expenses intended to be allowed and to be included in the reimbursement account. In my opinion those again are damages for detention of the vessel, remote from what may be said to be the actual expenses incurred in getting the seamen, and might sometimes involve considerations as to whether there might not have been a little saving by sailing on a later day instead of the earlier one. In those circumstances I think the items included in the second account were improperly included, and the appeal must be allowed.

Hamilton, J.—I am of the same opinion. We start with sect. 221 of the Act of 1894, which imposes upon the deserting seaman, by way of punishment for his offence, three classes of liability: first, the forfeiture of wages and effects; secondly, the personal liability 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, thirdly, in the United Kingdom a liability to be imprisoned. As a result of enforcing that section there is created a fund consisting of the wages earned up to the date of desertion, often a very considerable sum, which, after forfeiture and until the end of the voyage, will be in the hands of the shipowner or the master on his behalf.

That, therefore, brings us to sect. 232, under which primarily these cases arise, although it is necessary to bear in mind the provisions of sect. 221, because that is the foundation of the whole matter. "Where any wages or effects are under this Act forfeited," provision is made for their destination. And as, under sect. 233, forfeiture does not involve the adjudication of a forfeiture in a criminal proceeding against the seaman, but may be decided and "determined in any proceeding lawfully instituted with respect to those wages" (such as this proceeding), notwithstanding that the seaman himself has not been proceeded against, it has been common ground throughout these cases that upon the admitted desertion of the seamen in question their wages were not liable to forfeiture, but were forfeited. Under sect. 232, sub-sect. 3, where wages are forfeited otherwise 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." Comparatively, however, those are trivial matters because in the case of desertion, which is much the more frequent offence, the amount of the forfeiture is also immensely greater than anything which can be forfeited for such matters as offences against discipline under sect. 225, and the seaman who, after a voyage of several months, yields to the temptations of the shore and deserts, constantly leaves behind in the master's hands a very substantial sum indeed for wages honestly earned and forfeited by this desertion.

Accordingly, as regards such wages a separate provision is made, probably because the circumstances I have indicated might lead to the forfeiture of wages upon desertion being an unintended source of revenue to the shipowner, and in those cases under sub-sect. 1 of sect. 232 it is provided that the forfeited wages shall be paid into the Exchequer and carried to the Consolidated Fund, subject to a right—and the word is imperative—on the part of the master or owner to have them first of all applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship. That subsection is the root of the shipowner's right to reimbursement. The machinery, and to a certain extent a further definition of the right, is to be found in the whole of sect. 28 of the Merchant Shipping Act 1906. In both those sections—sect. 232 of the Act of 1894 and sect. 28 of the Act of 1906—a practically identical expression is used: "Shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship"; and the reimbursement account, under sect. 28, is to be one "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." Then those sums becoming properly chargeable in the reimbursement account, the officer or, in the case of an appeal, the Board of Trade shall allow sums shown in the reimbursement account and properly chargeable to be deducted from the amount due on account of wages shown in the delivery account.

It is to be observed that although the expression in sect. 232 "expenses caused by the desertion to the master or owner of the ship" is in itself somewhat wider than the words of sect. 221, and is wide enough to include not only the excess of wages paid to the substitute, but also incidental expenses connected with the hiring of the substitute, the word used is still "expenses" and not "damages," or anything in which the principles governing the measure of damages would be applicable. It appears to me that in the present case what is to be observed noticeably with regard to the case of *Deacon* v. *Quale*, but also with regard to the other case of *Neate* v. *Wilson*, is that the expense which is incurred by the master in connection with the engagement of the substituted seaman is in itself an expense incurred in a self-contained and complete transaction long subsequent to the termination of the master's liabilities to the seaman who has deserted.

As soon as the master engages and subsequently pays in pursuance of his engagement the substituted seaman in consequence of the desertion of the original seaman, to the extent of the excess rate of pay which he agrees to pay to the substituted seaman he incurs an expense, and he incurs it through the desertion, and, in this particular case, the expense is the extra sum that he has to pay. Had there been any question of rebate or discount, no doubt that might have been taken off in order to ascertain the real expense of paying the substituted seaman, but as there is none, the expense which consists of the excess wages to the substituted seaman is then and there a complete "expense caused" within the wording of sect. 232.

It is quite true that six months earlier in the first of these cases, but not so much earlier in the second case, the master had been saved another expense in consequence of the desertion, because he had been saved the expense of continuing to pay wages to the seamen who had quitted the ship; but that is no part of the transaction of engaging a substitute. It is a different expense. It is measured by different figures, and it arises at a different time, although it arises from the same cause. It appears to me, therefore, that upon the words "reimbursing the expenses caused by the desertion to the master or owner," the facts in both these cases fully satisfy those words by taking into account in the one case the excess wages paid to the substituted seaman, and in the other case the expenses that are properly incurred in dealing with the ship because of the desertion.

If the Crown is to succeed in its contention in *Deacon* v. *Quale*, a much wider meaning has to be attributed to the word "expenses," a meaning so wide that it seems to me it must be made almost equivalent to "damages for the breach of contract caused by the desertion," or to "compensation for the desertion," or to "an indemnity at the conclusion of the contract of service with the seaman against prejudice caused upon the whole by his desertion," all of them expressions perfectly well

known to the law, and perfectly easy to have inserted, and quite distinct from "expenses caused by the desertion." It is probably true that the Legislature, when this section was being framed, had no intention of enabling shipowners to make a windfall out of the circumstances of desertions. It is certain that the expression "reimbursed" is used throughout in this connection, and that that expression is not used in sect. 221, but is only used in sect. 232 of the Act of 1894 and sect. 28 of the Act of 1906.

It does not, however, appear to me that the word "reimbursement" can be strained so far as to enable the Crown to set off against an expense which was caused by the desertion in connection with the engaging of the substitute, a saving effected at an earlier date by reason of the deserter having ceased to earn any wages; and it appears to me that it could never have been intended that the reimbursement should involve the taking of a voyage account, possibly two years or more after the desertion in question, because this was an engagement which might last for three years. It would be a voyage account differing from a ship account—the account of a voyage from a *terminus a quo* to a *terminus ad quem*—and it would be a voyage account co-extensive with the engagement between the master and the deserting seaman, and one as to which all sorts of considerations of a very complicated kind would have to be taken into account before it could be ascertained whether, upon the whole, the desertion had caused the master some expense that had not been ultimately adeemed by other circumstances in the course of the voyage. I think an expense was none the less caused to the master by engaging the substitute in September, although another expense was saved to the master at another date, by—it is true—the same cause, namely, the desertion, and if it had been intended to sweep both those matters into the one account so as to ascertain a balance in the end, some language ought to have been used which would connote a debtor and creditor survey of the entire transactions of this protracted voyage.

If "expense" were used in a sense sufficiently wide to support the argument for the Crown in *Deacon* v. *Quale*, it appears to me that that would be a sense so wide that in *Neate* v. *Wilson* the shipowner would be entitled to reimbursement, under his reimbursement account, of the distinctly problematical and controversial amount that might be claimed in an action for breach of contract by detaining the vessel at the port of loading. The suggestion made when first the reimbursement account in *Neate* v. *Wilson* was presented to the proper officer was the ordinary suggestion that damages by way of demurrage to the extent of 25*l.* ought to be allowed because the ship was detained one day, a claim which in an ordinary civil action is constantly made and has to be investigated having regard, on the one hand, to the ship's running expenses, coal, wages, provisions, and so forth, plus an insurance and plus an allowance for capital sunk, and, on the other hand, to freight earned and received at the port of discharge, a dispute which involves some kind of allowance for the uncertainties of the voyage and for the risk, for although the ship appeared to be detained one day in port she may thereby escape many more days' detention by adverse winds, and so forth. That sort of inquiry the argument for the Crown in the second case convinces me has never been intended. What is intended is that those expenses which are directly caused to the owner or master by the desertion, not confined to the excess wages paid to the substitute, but other expenses due to this desertion, should be reimbursed.

With regard to the facts of the two cases, applying the view I take of the sections, the matter can be rapidly disposed of. The question of the causation came before the magistrate in considering whether the excess expense of the substituted seamen engaged in September in San Francisco was an expense caused by the desertion. Causation is a matter of fact. The tribunal which decides that matter of fact must direct itself correctly in law, and it has not been suggested in this matter that there is any principle of law which says that the engagement of a substituted seaman would be too remote to be a legal consequence of the original desertion. Therefore, to my mind, the decision of the magistrate is conclusive. But I would further say that it seems to me to be an inevitable conclusion which one as a matter of mercantile experience must draw, because the seamen who deserted were engaged to serve for the whole round voyage. The intermediate employment of the vessel on this voyage must be left to the owner and is often made by cablegram, and often made at a time when the master himself is at sea and is not informed as to what his next employment is going to be. It is true the combined employment as a hulk for six months with a homeward charter is somewhat unusual, but it is a legitimate employment, and had this vessel been detained by some necessity for repairs, or by taking the opportunity to prepare her to pass some portion of one of her Lloyd's surveys whilst waiting for another engagement, or had she been making a ballast voyage down the coast and then returning to San Francisco for the carriage of the autumn wheat, this interval of time would have been part of the service of the seamen, and the number of men to be engaged would be dependent upon the service that was going to be performed. When she makes her final homeward ocean voyage her complement must be made up. In the meantime there is no necessity and no obligation to make it up.

With regard to the other case of *Neate* v. *Wilson*, as I understand the facts, the expenses which were contended for on behalf of the master and were allowed are to be treated as being found in fact by the justices to have been direct and exceptional expenses caused in this way. With regard to the items I wish to say this: the 4*l.* 16*s.* 2*d.* wages of the crew *per diem* is a claim as to which it cannot be said that the expenditure of that sum of money in paying the crew was caused by desertion. The crew had to be paid just the same. The same is true as to the 1*l.* 16*s.* 3*d.*, the cost of food for the crew *per diem*, and, although it may be said that the voyage was prolonged for a day and therefore the master had to pay in respect of one day—though not that day—more for the expenses of the voyage than otherwise would have been incurred, that is a matter of uncertainty and one to be considered in connection with damages and not in connection with expenses directly caused by the desertion. I take the same view as

to the expenditure on coal, because, although the facts are not as clear as they might have been, it would appear that the expenses were all treated in the same way, and it was said that as there was an additional expenditure on coal in the course of the voyage that ought to be treated as part of the sum to be reimbursed. There is no contract to show that the voyage might not have taken in any case long enough to involve precisely the same coal bill as it in fact did.

Therefore on the view I take of those facts, it appears to me that the claim in the second case was in principle one of damages for detention of the vessel in port whereby the voyage was prolonged, and therefore the profit side of the account was diminished, and consequently those expenses are not to be included in the expenses caused by the desertion, whereas the sums to be allowed, the small sums of personal expenses in going to seek substitutes, are all illustrations of the kind of expenses which ought to come within the wording of the section.

There is only one other observation to be made. A point was made, but only faintly, upon the words "any sums shown" in the reimbursement account, in sub-sect. 3 of sect. 28 of the Act of 1906, and it appears to me that those words have been rightly treated ultimately on both sides as equivalent to "any items shown." The word "sum" is used throughout, but is manifestly not intended to be limited to the figures of the claim stated, but is intended to refer to the claim for that item, indicating both its nature and its amount.

BANKES, J.—I agree that the first appeal should be dismissed and that the second appeal should be allowed.

The questions which have been argued before us on these two appeals depend upon what is the true construction of sects. 221 and 232 of the Merchant Shipping Act 1894 and sect. 28 of the Merchant Shipping Act 1906. Sect. 221 (*a*) deals with the offence of desertion by seamen. It provides first of all, for the forfeiture of the effects and wages of a deserting seaman, and then proceeds to deal with the case where the owner has had to pay an increase of wages to a substitute procured to take the deserter's place. It is important to notice the particular form of words used in this part of the section. It speaks of any excess of wages paid by the master or owner to any substitute engaged at a higher rate of wages than the rate stipulated to be paid to the deserter. The excess there spoken of is an excess of wages paid to the substitute, which seems to me to limit the period of time over which a calculation of wages for the purposes of this section is to be made, to the period during which wages are paid to the substitute.

The only thing indicated in the section as to what constitutes an excess is a comparison between the rate of wages paid to the substitute with the rate of wages payable to the deserter. If the former is higher than the latter, then according to the language of the section there is an excess of wages. The sum total of that excess will be determined when the period over which that excess is paid is ascertained. If this section had stood alone, the owner's remedy to recover the excess would have been by action against the deserter. Sect. 232, however, provides that the owner shall have a further remedy—namely, a remedy by way of set-off—and it enacts that the owner may convert the deserter's effects into money, and out of that money and any forfeited wages he may reimburse himself any expenses caused by the desertion. Those expenses may, of course, include matters other than excess wages, but if they consist to any extent of excess wages the excess must, in my opinion, be ascertained in manner provided by sect. 221. The section further provides that subject to this right of set-off the forfeited wages and the effects, or their proceeds, shall be paid into the Exchequer and carried to the Consolidated Fund. It is material to notice that the expenses which are referred to in this section are strictly limited. They are expenses, and not damages. They are expenses caused by the desertion, and not expenses of and occasioned by the desertion.

We now come to sect. 28 of the Act of 1906. This section provides machinery for carrying out the above-mentioned provisions by means of accounts to be furnished by the master to the Board of Trade, and does not, in my opinion, extend the rights of an owner against the deserting seaman. These accounts are called respectively "delivery account" and "reimbursement account," and these are to contain, on the one hand, a statement of what would have been due to the seaman had he not deserted, and, on the other hand, a statement of the set-off claimed by the owner, which has been given to him under the provisions of the earlier statute to which I have already called attention.

We were invited to read these sections as though they provided for the taking of a voyage account in respect of wages, in which account it would be ascertained, on the one side, what sum would have become payable to the deserter for the full voyage had he not deserted, and, on the other side, an account of what sum would, but for the desertion, have become payable to the deserter down to the time of desertion, and what sum had become payable to the substitute for the remainder of the voyage. It was argued that no excess would arise under the section unless the two last-mentioned sums added together were greater in amount than the first-mentioned sum. I cannot so read the section, as I do not find in it any words which admit of any such interpretation.

If the above is the correct construction of the sections in question, it follows in the case of *Deacon* v. *Quale* that there was an excess of wages paid by the owners or master to the substitutes who were engaged at a higher rate of wages than the rate stipulated to be paid to the deserters to the extent claimed by the owners and allowed by the magistrate, and that the matters sought to be introduced by the Board of Trade in order to show that no such excess in fact existed, are not matters which are under the statute admissible to establish a contrary conclusion.

I have nothing to add to what has been said in the case of *Neate* v. *Wilson* with regard to the character of the alleged expenses which it is sought to set off because, in my opinion, they were not expenses at all; they were damages, and not expenses which come within the strict language of the section to which I have referred, and which limits the right of set-off or

reimbursement to the expenses caused by the desertion.

Appeal in Deacon *v.* Quale *dismissed. Appeal in* Neate *v.* Wilson *allowed. Leave to appeal.*

Solicitor for the appellant in each case, *Solicitor to the Board of Trade.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

July 10, 11, 12, 13, *and Dec.* 1, 1911.

(Before VAUGHAN WILLIAMS, MOULTON, and BUCKLEY, L.JJ., and Nautical Assessors.)

THE DEVONSHIRE. (a)

Collision—Steamship and barge in tow of a tug—Steamship and tug to blame for collision—Barge not to blame—Admiralty rule as to division of loss—Joint tortfeasors—Right of barge owners to recover whole damage against either wrongdoer—Judicature Act 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.

A tow is not liable in law for the wrongful act of her tug merely because of the relation of tug and tow. Whether a tow is liable or not depends upon the facts in each case.

A barge in tow of a tug which had control of the navigation came into collision with a steamship. The collision was brought about by the joint negligence of the tug and the steamship. The tug and the steamship were both found to blame. The barge was free from blame.

The owners of the barge and her master and crew claimed to be entitled to recover the whole of their damage against the steamship, contending that they had been injured by the wrongful act of two joint tortfeasors and that they were entitled to recover their loss in full against either wrongdoer. The defendants contended that in accordance with the Admiralty rule as to the division of loss in cases of damage arising from collisions between ships when both vessels were to blame, laid down in The Milan (Lush. 388), *affirmed in* The Drumlanrig (103 *L. T. Rep.* 773; 11 *Asp. Mar. Law Cas.* 520; (1911) *A. C.* 16), *the plaintiffs could only recover half their loss from the owners of the steamship and the balance against the other wrongdoer, the tug.*

The President held that there was no Admiralty rule in existence before the passing of the Judicature Act 1873, *which prevented an innocent person injured by a collision produced by the joint negligence of two other persons from recovering the whole of his loss from either of the wrongdoers, and gave judgment in favour of the plaintiffs for the whole of their damage against the owners of the steamship.*

The steamship owners appealed.

Held, by the Court of Appeal, Fletcher Moulton and Buckley, L.JJ. (Vaughan Williams, L.J. dissenting), affirming the decision of Sir S. Evans, President, that before the passing of the Judicature Act 1873 *the rule in force in the Admiralty Court as to the division of loss applied only to damage caused by collision between two ships when both ships were to blame, but that there was no such rule with regard to cases of collision causing loss to the owners of a vessel which was towed into collision but which was not to blame, and that the plaintiffs were therefore entitled to recover the whole of their damages from either of the wrongdoers.*

APPEAL from a decision of Sir S. Evans, President, by which he held that the owners, master, and crew of the barge *Leslie* were entitled to recover the whole of the damage they had sustained by reason of a collision between their barge *Leslie* and the steamship *Devonshire,* which collision was caused by the joint negligence of the tug *St. Winifred,* towing the barge *Leslie,* and the *Devonshire,* from the owners of the *Devonshire.*

The appellants, defendants in the court below, were the owners of the steamship *Devonshire*; the respondents, plaintiffs in the court below, were the owners of the barge *Leslie,* and her master and crew suing for their lost effects.

The case made by the plaintiffs in the court below was that shortly before 4.50 a.m. on the 4th Feb. 1911 the *Leslie,* a wooden dumb barge of eighty tons register, manned by two hands, was in the river Mersey off Woodside bound from Runcorn to Morpeth Dock, Birkenhead, with a cargo of Manchester goods. The weather was fine and clear, the wind about N.E. a light breeze, and the tide ebb of the force of about three knots.

The *Leslie,* in tow of the steam tug *St. Winifred,* which had the control and management of the navigation, was proceeding towards the Morpeth Dock, having just crossed the river from the Brunswick Dock, Liverpool, where the *St. Winifred* had left two barges she had been towing with the *Leslie.* The *Leslie,* which was following her tug, was heading down the river with a slight angle towards the Cheshire shore and was making about three knots through the water. She carried the regulation side and stern lights and her tug the regulation masthead towing and side lights and a white light abaft the funnel, all duly exhibited and burning brightly, and a good look out was being kept.

In these circumstances those on the *Leslie* heard the *St. Winifred* sound two short blasts on her whistle, and thereupon the helm of the *Leslie* was starboarded to follow her tug, which was approaching the entrance to Morpeth Dock. Shortly afterwards those on board the *Leslie* observed distant between a quarter and half a mile and bearing on the starboard bow the red light of a steamship, which proved to be the *Devonshire,* and which, had she kept her up-channel course, would have passed the *Leslie* and her tug well clear starboard side to starboard side. After a short interval the *St. Winifred* again sounded two short blasts on her whistle, and afterwards the usual docking signal—one prolonged blast—and the *Leslie* continued to follow her tug. Notwithstanding the signals made by the *St. Winifred,* the *Devonshire* came on at great speed under a port helm, and with her stern struck the *Leslie* on the starboard side

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

about amidships, cutting into her and causing her to founder.

Those on the barge *Leslie* charged those on the *Devonshire* with bad look-out; with improperly porting; with failing to keep her course; with neglecting to ease, stop, or reverse; and with neglecting to keep clear of the *Leslie*.

The case made by the appellants, the defendants in the court below, was that shortly before 4.50 on the 4th Feb. 1911 the *Devonshire*, a screw steamship of 500 tons gross and 176 tons net register, manned by a crew of twelve hands, was proceeding up the river Mersey, well on the west side of the river below the Woodside Ferry stage, in the course of a voyage from Belfast to Manchester with a general cargo. The *Devonshire* was on an up-river course, heading about south magnetic, and was making about ten knots through the water with her engines working full speed. Her regulation lights for a steamship under way were duly exhibited and burning brightly, and a good look-out was being kept on board of her.

In these circumstances the masthead, towing, and red lights of a tug which proved to be the *St. Winifred*, with the *Leslie* in tow, were seen about a point on the port bow of the *Devonshire*, and about a mile off. The helm of the *Devonshire* was ported slightly, and one short blast was sounded on her whistle. Shortly afterwards the *St. Winifred* opened her green light, but no signal was heard from her. The *Devonshire* repeated her one short blast signal and ported her helm a little more, which signal she shortly afterwards repeated as the *St. Winifred* kept her green light open. The *St. Winifred* then sounded two short blasts, and came on swinging under starboard helm, disclosing the green light of the *Leslie*, which was being towed astern of her. As soon as the *St. Winifred* sounded two short blasts the engines of the *Devonshire* were stopped and put full speed astern, and her helm was put to starboard. The *St. Winifred* continued to come on under starboard helm, crossing the bows of the *Devonshire*, and as she then appeared to be losing headway she was loudly hailed to go ahead as the only chance of drawing her tow clear, and when it was seen that the flat would not go clear she was hailed to slip the tow rope, but the *Leslie* with her starboard bow struck the stern of the *Devonshire* and afterwards sunk.

Those on the *Devonshire* charged those on the *St. Winifred* and the *Leslie* with bad look-out; with improperly starboarding; and with not keeping to the starboard-hand side of the fairway. They charged the *St. Winifred* with neglecting to indicate her course by whistle signal, and with neglecting to slacken her speed or stop or reverse, and they charged those on the *Leslie* with neglecting to cast off the tow rope and failing to port.

The case was heard by the President on the 9th and 10th May 1911, when he delivered judgment, finding both the *Devonshire* and the *St. Winifred* to blame. The following is the material part of the judgment:—

The PRESIDENT.—I have come to the conclusion on the evidence, looking also at the preliminary act and pleadings of the defendants, who do not call any witnesses, that this is a case of crossing vessels.

That being so, I think the tug, to whose navigation I must look in this case, because the barge, of course, was navigated by the tug, must be held to blame, because she did not observe arts. 19 and 22 of the collision regulations, which are in force as statutory rules in the river Mersey. Art. 19, of course, 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 is the ancillary article: "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."

The duty, therefore, of the tug, which was responsible for the navigation of the tow here, was to keep out of the way of the *Devonshire*, and her duty also was, if the circumstances of the case admitted it, to avoid crossing ahead of the *Devonshire*. It is quite clear here that the circumstances of the case did admit it. There was a tug with some barges in tow, which had gone a little ahead of this tug, which did the right thing, and avoided crossing ahead by going under the stern of the *Devonshire*. That could have been done, and ought to have been done by the tug in this case, and therefore, whatever the legal position is, I find that the tug is to blame for a breach of arts. 19 and 22.

With regard to the *Devonshire* her duty was to keep her course and speed. She did not keep her course, she ported more than once. Counsel for the plaintiffs held his opponents closely to the preliminary act, and said that she ported to a green light. The answer of counsel for the defendants is "not necessarily to a green light, but probably to the three lights—the red, green, and white lights." I think that is rather too fine a point. I am advised that if the three lights continued to be visible, and it was not a case where the green light alone came into view, shutting out the red, there was not any danger of collision at all. She might have gone on. However, I think on the evidence, and reading fairly the preliminary act and the defence, that the green light alone was showing at this time. As I have said, they were porting on more than one occasion; it is said to be a slight porting at first, and a further porting, I think is the way it is stated, with regard to the second manœuvre, porting further. I think she must have ported very considerably, she would not be coming down the river as close to the stages as the spot where this collision took place; that spot has been pretty accurately defined by the witnesses as being 250ft. or 300ft. out from the northern end of the Woodside Ferry Stage. She came into that position, trying, no doubt, to get past the tug and the barge. She got into that position by porting twice, according to her own story. That was, of course, not keeping her course, and, therefore, I think, she is also to blame for a breach of the rule which prescribes that she ought to keep her course and speed. I also think, with regard to the *Devonshire*, that, in any case, she failed to stop, or reverse, soon enough, under the rules of good seamanship. The decision, therefore, is, that both the tug, which was in charge of the tow, and the *Devonshire* the defendants' vessel are to blame for this collision.

The plaintiffs then contended that they were entitled to recover the whole of their loss against

the owners of the *Devonshire* as they had been injured by the joint negligence of the *Devonshire* and the *St. Winifred.*

The defendants contended that the plaintiffs could only recover half their loss against the *Devonshire* as they alleged that the Admiralty rule as to division of loss applied.

The President reserved his judgment on this point, which was delivered on the 29th May 1911.

The President.—This action is brought by the owners of the dumb barge *Leslie*, and her master and mate, against the owners of the steamship *Devonshire*, for damages sustained by the barge in a collision between the barge and the steamer. Upon the facts I found that the collision was due to the fault of the steamer and of the steam tug, the *St. Winifred*, which was towing the barge. Applying the principles adopted in *The Quickstep* (6 Asp. Mar. Law Cas. 603 (1890); 63 L. T. Rep. 713; 15 P. Div. 196) and the cases following it, I decided that the tow was not in any way to blame and that the plaintiffs were entitled to judgment. The question now is, whether the plaintiffs are entitled to recover the whole of the damages against the defendants, or only a moiety. This depends upon whether, in the circumstances of the case, there was an Admiralty rule, giving a moiety only, in force before the coming into operation of sect. 25, sub-sect. 9, of the Judicature Act 1873: (see *The Drumlanrig*, 11 Asp. Mar. Law Cas. 451, 520; (1911) A. C. 16). If there was, only a moiety can be recovered against the defendants. The plaintiffs would, of course, in that event, have a claim for the other moiety against the tug, apart from any special contract. If there was not any such rule, the common law rule applies, by which the plaintiffs would be entitled to recover the whole of the damages against the defendants. They would in such a case be entitled to recover the whole damages either against the defendants, or against the tug which was in fault, or against both, if they framed their action for that purpose. As between two ships both to blame and in collision, the Admiralty rule is of course established beyond question. As between innocent cargo-owners in in a ship to blame and another ship also to blame, it is now settled by *The Drumlanrig* that the same rule applies. How far does the rule extend? Is the rule in a case of innocent sufferers confined to cargo owners whose cargo is in one of the negligent vessels; or does it extend to cases of innocent owners of craft or of cargoes not being, or in, a vessel in fault? Does the case of *The Drumlanrig* define and comprehend the rule, or is it only an instance of the application of the rule? Various opinions have been held and expressed as to whether the Admiralty rule or the common law rule is the more conformable in the average case to fairness and justice. I think, upon the whole, that in Admiralty cases the division of the damages recoverable into moieties, where an innocent person suffers from the negligence upon two other ships at fault, is fairer and more conducive to cautious navigation.

When the Act of Parliament speaks of "rules hitherto in force in the Court of Admiralty," I should be glad to find a rule applicable on some general principle to various instances of innocent owners suffering loss by collisions, and not to have the "rule" confined to what would appear to be only an instance or illustration of a rule, as in the case of an innocent owner of cargo laden on one of the ships at fault. Lord Esher in *The Bernina*, in the Court of Appeal (5 Asp. Mar. Law Cas. 577 (1886); 12 Prob. Div. 58), in referring to *The Milan* (Lushington, 388), does use terms of general import when he says that the decision of Dr. Lushington in *The Milan* proceeded upon the ground that "it has always been the practice there [in the Admiralty Court] 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." But he immediately adds: "He (Dr. Lushington) said in terms that the plaintiff must sue the owner or owners of the ship in which his cargo was for the other half." I see no logical distinction between the case of an innocent owner of cargo in a ship at fault and an innocent owner of a dumb barge attached to a tug at fault; or why in the one case only a moiety of the loss sustained can be recovered against a vessel to blame, and in the other the whole. But in our jurisprudence we cannot always find logic; and indeed for the particular rule of "moieties if both to blame" in the special system of jurisprudence prevailing in the Admiralty Court, no logical basis can be stated.

I must therefore inquire whether there was, in fact, before the Judicature Act of 1873 any rule adopted in practice which would justify me in saying that the innocent owners of the dumb barge in this case are restricted to a moiety of the damage sustained in an action brought by them against any one of the ships whose negligence jointly produced the collision. The somewhat strict application of the doctrine of identification between tug and tow which obtained in years gone by might account for the absence of instances exactly like the present case. The eminently sensible doctrine which was adopted in *The Quickstep* (*sup.*) from the decision of the Supreme Court of the United States of America in *Sturgis* v. *Boyer* (1860, 24 How, 110), although its adoption had been foreshadowed by Sir James Hannen in *The Stormcock* in 1885 (5 Asp. Mar. Law Cas. 470), was not applied until 1890. Until then in most cases, and for almost all purposes, a tug and tow were considered as one vessel. That being so, it is not a matter of surprise that examples of innocent owners of tows attached to guilty owners of tugs are wanting. I have therefore to inquire how other innocent owners of craft (apart from innocent owners of cargo in negligent vessels, as in *The Milan, sup.*) were treated in the Admiralty Court. I have been unable to find a single case of an innocent sufferer by a collision at sea (other than the aforesaid cargo-owner) who was restricted to the recovery of a moiety of his loss. In the Supreme Court of the United States of America ("whose decisions," as Lord Herschell has said, "on account of its high character for learning and ability, are always to be regarded with respect"), in an action brought by a vessel at anchor against a tug and tow, claiming damages for a collision between the vessel at anchor and the tow, it was found that the vessel at anchor and the tug were both to blame, and that the tow was not; and it was held that the tow was not liable, but that the loss was to be equally divided

between the former vessel and the tug: (*The James Gray* v. *The John Fraser* (1858, 21 How, 184). In that case the tow was defendant and succeeded It does not aid in showing whether as plaintiff, if damaged, she could recover all or half. In America also in *The Sterling* and *The Equator* (1882, 16 Otto, 647), and in *The City of Hartford* (1877, 7 Otto, 323), it was held that in actions by innocent owners of the tow and her cargo, against a third vessel and the tug both found to blame, the decree should be against each for a moiety of the damage, the right being reserved to collect the entire amount from either in case of the inability of the other to answer for her portion. Sir Charles Butt refused to apply these cases in England.

In *The Stormcock* (*sup.*), to which I have already referred, a tug and tow, both to blame, collided with an innocent vessel, The plaintiffs, owners of the latter (having obtained by an agreement a provisional payment of some of the damage from the tow, which accepted responsibility for the tug) brought an action against the tug alone. The plaintiffs were held entitled to recover all the damages occasioned by the collision from the defendant tug. In *The Niobe* (6 Asp. Mar. Law Cas. 300; 59 L. T. Rep. 257; (1888) 13 P. Div. 55), the plaintiff's steamer collided with a tug, by reason of the negligence of the tug and her tow. The case is reported as between the plaintiffs and the owners of the tow. I have looked up the files and records and I find that the owners of the tug admitted liability; and that after the finding against the tow, the plaintiff recovered judgment for full damage against both the tug and the tow. In *The Avon and Thomas Joliffe* (6 Asp. Mar. Law Cas. 605; 63 L. T. Rep. 512; (1891) P. 7) an action was brought by an innocent vessel against a tug and tow, both found to blame. The decree condemned the owners of both in the full damages. The court was afterwards moved to amend the decree by making each set of owners liable severally only for half the damages. Sir Charles Butt refused to adopt the decisions in the American cases of *The Sterling* and *The Equator* and *The City of Hartford* (above referred to), and declined to alter the decree or to apply the Admiralty rule "as to the apportionment of damages, where both vessels, that of the plaintiffs and of the defendants, are to blame." In *The Englishman and The Australia* (7 Asp. Mar. Law Cas 603, 605; 72 L. T. Rep. 54; (1894) P. 239) the plaintiffs' steamer collided with the defendants' tug, and the plaintiffs' vessel and the tug and tow (both defendants) were all found to blame. The President (Sir F. H. Jeune), in adjusting the cross-claims, was asked to draw up the judgment so as to make the tug and tow primarily liable for a moiety only of the sum recoverable against them, with a remedy over against each in default of the other, but he declined to do so, saying that the point was concluded by the judgment in *The Avon and Thomas Joliffe*. In *The Morgengry and The Blackcock* (8 Asp. Mar. Law Cas. 591; 81 L. T. Rep. 417; (1900) P. 1) the plaintiffs' vessel and the defendants' tug and tow were all held to blame. Judgment was signed by default against the tow for the whole of the damage. The tow was sold and the proceeds brought into court. It was held that the plaintiffs were entitled to the proceeds in court in part satisfaction of the whole of their damage under the decree by default against the tow, and were also entitled to a moiety of their damage as against the tug under the decree of both to blame. That is not a decision in point, but it is an instance where, apparently, it was admitted that one of two vessels to blame was liable for the whole loss. In the foregoing cases it will be observed that the third vessel was not connected with another as a tug with a tow. In the last case to which I shall refer—viz., *The Harvest Home* (10 Asp. Mar. Law Cas. 18; (1904) P. 409; and in the Court of Appeal (10 Asp. Mar. Law Cas. 118; (1905) P. 177), a pilot cutter, held in the court of first instance to be innocent, was lashed alongside the tow on which the pilot was. It was a complicated case. The action was brought by the owners of the pilot cutter against the owners of a vessel held to be innocent of blame and against the owners of two tugs, found to blame, both of which belonged to the same owners. The owners of the innocent vessel counter-claimed against the owners of the pilot cutter and the owners of the tugs. It was held in the court of first instance that the pilot cutter and the innocent vessel were entitled to succeed against the tugs. In the Court of Appeal, on the appeal of the owners of the tugs, it was held that the pilot cutter was also to blame; and accordingly the liability of the tugs was reduced to a moiety of the claim of the pilot cutter. It appears that although the tow to which the pilot cutter was lashed was not sued, she was admitted or decided to be guilty of blame. In the court of first instance, therefore, although the pilot cutter was lashed to a guilty tow, she recovered her full damages against the owners of the two guilty tugs, and her claim was only reduced in the Court of Appeal to a moiety because she was also found to blame.

In reviewing the authorities I have come to the conclusion that it cannot be said that there was before the Judicature Act 1873 or that there has been since, an Admiralty rule in force which would entitle the defendants to say that the plaintiffs could only recover a moiety of the damage they suffered by the collision. If this is so, *The Drumlanrig* prevents my saying that the plaintiffs are only entitled to a moiety. I refrain from saying anything as to whether it follows that the common law doctrine of no contribution between tortfeasors applies, or whether the defendants would be entitled on the principle adopted in *The Frankland* (9 Asp. Mar. Law Cas. 196; (1901) P. 161), or otherwise, to any claim over against the owners of the tug. The question may be raised in a case which I understand is now pending. In the present case I have come to the conclusion that the plaintiffs are entitled to judgment as against the defendants for the whole of their loss, and I decree accordingly, and order the usual reference to the registrar and merchants. The plaintiffs are also entitled to their costs.

On the 3rd June the owners of the *Devonshire* delivered a notice of appeal seeking to set aside the judgment of the President and to obtain a decree that they were liable only for a half of the damage.

The appeal was heard by the Court of Appeal on the 10th, 11th, 12th, and 13th July when judgment was reserved.

Leslie Scott, K.C. and *Dawson Miller* for the appellants, the owners of the *Devonshire*.—The tug and the steamship have been held to blame, and the barge in tow of the tug has been held free from blame. The collision regulations in force in the Mersey are statutory regulations, and the barge is a vessel within the meaning of the rules. The tug had the control of the navigation. If the barge owners choose to delegate their statutory duty to a tug they remain responsible for the performance of it. [Vaughan Williams, L.J.—I suppose you say that *Hardaker* v. *Idle District Council* (74 L. T. Rep. 69; (1896) 1 Q. B. 335) is an authority for that proposition?] That is so. [Fletcher Moulton, L.J.—Then it is impossible for a tow to escape liability if a tug is guilty of a breach of a statutory regulation.] That may be so; a tow cannot divest itself of responsibility for a breach of a statutory rule by the tug by saying that the tug had the motive power and control, and the owner cannot escape liability by voluntarily handing over the control to some one else. If the motive power is in the tug and the governing power is in the tow, tug and tow are considered to be one vessel and the tow is responsible:

> *The Cleadon*, 4 L. T. Rep. 157; 1 Mar. Law Cas. O. S. 5; Lush. 158; (1860) 14 Moo. P. C. 92;
> *The Englishman and Australia*, 70 L. T. Rep. 846; 7 Asp. Mar. Law Cas. 605; (1894) P. 239;
> *The Devonian*, 84 L. T. Rep. 675; 9 Asp. Mar. Law Cas. 179; (1901) P. 221.

The common law rule of no contribution between tortfeasors had no application in Admiralty cases:

> *The Milan*, Lush. 388.

And now sect. 25, sub-sect. 9, of the Judicature Act 1873 provides that the rules hitherto in force in the Admiralty Court, if at variance with the rules in force in the courts of common law are to prevail in cases such as this. The words "rules in force," mean the principles to be found in the cases which are instances of the rule. The rule as to the division of loss was recognised by the House of Lords in *Hay* v. *Le Neve* (2 Shaw's Scotch App. Cas. 395). That rule is to prevail in proceedings for damages, and it is to apply in every court, even in inferior courts: (Judicature Act 1873, s. 91). The Admiralty Court had jurisdiction to try this case, for it was damage done by a ship. (Admiralty Court Act 1861, s. 7):

> *The Malvina*, Lush. 493; (1865) Br. & L. 57.

Thorogood v. *Bryan* (8 C. B. 115) was never followed in Admiralty cases. The common law said that where damage was done by two joint tortfeasors there should be no contribution between them; in the Admiralty Court the rule was that the wronged person recovered half against each wrongdoer. *The Drumlanrig* (103 L. T. Rep. 773; 11 Asp. Mar. Law Cas. 520; (1911) A. C. 17) is an instance of this rule. The basis of the rule is half of the loss from each wrongdoer. Another instance of the rule is that of damage to ships when one of the ships has a compulsory pilot on board. In such a case if one ship has a compulsory pilot on board and both vessels are to blame and the fault of one is the fault of the pilot alone the ship with the compulsory pilot on board only recovers half her loss. The same rule applies to cases where masters and crew sue for their lost effects. The principle contended for is stated in the argument in *The Avon and The Thomas Joliffe* (63 L. T. Rep. 712; 6 Asp. Mar. Law Cas. 605; (1891) P. 7). The history of the rule is set out in Marsden's Collisions at Sea, p. 140. *The Drumlanrig* (*ubi sup.*) decided this case. That case recognises that the Admiralty Court administered a rule which recognised a quantitative liability for the wrong done, and this rule is now stereotyped into half from each of two wrongdoers. The cases which give rise to actions for negligence are stated by Lindley, L.J. in *The Bernina* (5 Asp. Mar. Law Cas. 577; 6 Asp. Mar. Law Cas. 112; (1886) 12 P. Div. 58, at p. 59). In America the Admiralty rule has been worked out logically and *The Avon and Thomas Joliffe* (*ubi sup.*) would have been decided differently in that country. *The Hector* (48 L. T. Rep. 890; 5 Asp. Mar. Law Cas. 535; 8 P. Div. 218) is an instance of the rule applied in the case of a collision between ships on one of which there is a compulsory pilot. When the vessel which has the compulsory pilot on board is alone to blame but the fault is the fault of the pilot, the owners are not liable for anything at all:

> *The Maria*, (1839) 1 W. Rob. 95;
> *The Annapolis*, 1 Mar. Law Cas. O. S. 69; 4 L. T. Rep. 417; (1861) Lush. 295.

The single ship only recovered a moiety of her damages against the tug and tow in *The Englishman and Australia* (*ubi sup.*). The case of *The Avon and Thomas Joliffe* was wrongly decided. The owner of the barge here has voluntarily handed over his barge to a tug and must suffer if the tug is negligent. This case is not like the case of *The Bernina* (*ubi sup.*), which was not within sect. 25, sub-sect. 9, of the Act of 1873, nor is it similar to *The Quickstep* (63 L. T. Rep. 713; 6 Asp. Mar. Law Cas. 603; 15 P. Div. 196), for no statutory rule was broken in that case. The following cases were also referred to

> *The Energy*, 3 Mar. Law Cas. O. S. 503; (1870) 23 L. T. Rep. 601; L. Rep. 3 A. & E. 48;
> *The Mary*, (1879) 41 L. T. Rep. 351; 4 Asp. Mar. Law Cas. 183; 5 P. Div. 14;
> *The Lemington*, (1874) 32 L. T. Rep. 69; 2 Asp. Mar. Law Cas. 475.

Bailhache, K.C. and *Stephens* for the respondents, the owners of the barge *Leslie*.—The judgment is right. The tow is not to blame at all. The question is whether the Admiralty rule has any application in this case. The respondents ought not to be called on to argue this case on the footing that the barge is to blame, but if the barge is to blame the point on *The Milan* (*ubi sup.*) will not arise, for the tug and tow will both be to blame. The liability to compensate must be fixed, not merely on the property, but also on the owner through the property:

> *The Castlegate*, 68 L. T. Rep. 99; 7 Asp. Mar. Law Cas. 284; (1893) A. C. 38, at p. 52.

Tug and tow are not necessarily considered one for all purposes:

> *The W. H. No.* 1, 103 L. T. Rep. 677; 11 Asp. Mar. Law Cas. 497; (1911) A. C. 30.

The Admiralty rule as to division of loss is confined to cases in which the colliding ships are both in fault:

> *The Woodropp Sims*, (1815) 2 Dods. 83, at 85.

Though it has been extended to cargo on a ship:

The Milan (*ubi sup.*).

In that case it is said that identification is not the reason for the judgment, but it is difficult to believe it was not the reason for it. Some doubt was thrown on the decision in *The Milan* case in the case of

The Frankland, 84 L. T. Rep. 395; 9 Asp. Mar. Law Cas. 196; (1901) P. 161, at 167.

[Vaughan Williams, L.J.—It is wrong to say that *The Milan* rests on the principle of identification.] It is extremely difficult to see what principle the rule rests on. See the observations in

The Drumlanrig, (1910) P. 249, at p. 260.

The true origin of the rule is probably to be found in the fact that ship and cargo often belonged to the same man. The case of *The Lord Melville* (2 Shaw's Scotch App. Cas. 402) mentioned by Lord Blackburn in *The Khedive* (4 Asp. Mar. Law Cas. 567; 47 L. T. Rep. 198; 7 App. Cas. 795, at 819) shows that this rule had not always been recognised even in cargo cases. The rule has no application to cases arising under Lord Campbell's Act:

The Vera Cruz, 52 L. T. Rep. 474; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. 59.

It never could apply to a case of damage to the person such as occurred in *The Sylph* (3 Mar. Law Cas. O. S. 37; 17 L. T. Rep. 519; L. Rep. 2 A. & E. 24), for though the court had jurisdiction under the statute to try such a case, it is impossible to conceive a case in which the injured man and the ship were both to blame. The rule as to the division of loss does not apply to a case in which two ships are to blame for a collision with a third. In *The Frankland* (*ubi sup.*) the two wrongdoers were in collision, and the damage caused by the collision between one of them and the barge was damage which was consequential on the collision between the two ships. A tug and tow are not always regarded as one ship:

The American and Syria, 31 L. T. Rep. 42; 2 Asp. Mar. Law Cas. 350; L. Rep. 6 P. C 127.

It is suggested that the tow must be to blame if the tug breaks a statutory rule, but the cases show that such a contention is wrong:

The Harvest Home, 93 L. T. Rep. 395; 10 Asp. Mar. Law Cas. 118; (1905) P. 177;
The Millwall, 93 L. T. Rep. 426; 10 Asp. Mar. Law Cas. 15; (1905) P. 155;
The W. H. No. 1 (*ubi sup.*).

The general statements of Alverstone, C.J. (in *The Devonian* (*ubi sup.*) must be read in the light of the facts in that case. The essence of the rule is that the two ships which collide are both in fault. The rule in *The Milan* (*ubi sup.*) has no application in the case of a third ship injured by the negligence of two others; such a case is not within sect. 25, sub-sect. 9, of the Judicature Act 1873.

Leslie Scott, in reply, referred to

Boucher v. *Clyde Shipping Company*, Ir. Rep. 1904, II., 129.

The court reserved judgment, and it was delivered with the judgment in *The Seacombe* reported *post* on the 1st Dec. 1911.

June 19, 27, 28, 30, *and Dec.* 1, 1911.

(Before Vaughan Williams, Fletcher Moulton, and Buckley, L.JJ., and Nautical Assessors).

The Seacombe. (a)

Collision—Steamship and barge in tow of a tug—Steamship and tug to blame for collision—Barge not to blame—Admiralty rule as to division of loss—Joint tortfeasors—Right of barge owners to recover whole damage against either wrongdoer—Judicature Act 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9—*Preliminary acts—Character of statements contained in them.*

A tow is not liable in law for the wrongful act of her tug merely because of the relation of tug and tow. Whether a tow is liable or not depends on the facts in each case.

A barge in tow of a tug collided with a steamship. The control of the navigation of the tug and barge was in the hands of those on the tug. In an action for damage brought by the barge owners, the owners of her cargo and the master and crew against the owners of the steamship, the defendants called no evidence, and on the evidence called by the plaintiffs it was held that the tug and tow were to blame and that the steamship was not to blame.

In the preliminary act filed on behalf of the defendants, and in the defence it was stated that the steamship slowed her engines and starboarded when she saw the tug and barge, but the judge disregarded the statements made in the preliminary acts and defence, and, deciding the case on the evidence given, found the tug and barge alone to blame. The plaintiffs appealed.

On the hearing in the Court of Appeal the barge owner obtained leave to call the master of the steamship.

Held, by the Court of Appeal, that, on the evidence given, the steamship was to blame for not keeping her course and speed, and that as the tug was also to blame and the barge was not to blame, the plaintiffs, following the decision in The Devonshire *reported above, were entitled to recover the whole of their damage from the owners of the steamship.*

Observations by Fletcher Moulton, L.J. as to the binding character of statements made by parties in the preliminary acts filed by them.

Appeal from a decision of Bargrave Deane, J., dismissing a claim made against the owners of the steamship *Seacombe* by the owners, master and crew of the barge *Dolly* and the owners of her cargo for damage caused by a collision between the *Dolly* while in tow of the tug *J. M. Stubbs* and the steamship *Seacombe*.

The appellants, plaintiffs in the court below, were the owners of the barge *Dolly*, and her master and crew, and the owners of her cargo and freight; the respondents, defendants in the court below, were the owners of the steamship *Seacombe*.

The case made by the appellants, plaintiffs in the court below, was that shortly before 8.5 a.m. on the 9th Jan. 1911 the *Dolly*, a barge laden with about 100 tons of maize, manned by a crew of two hands, was being towed by the tug *J. M. Stubbs* from the Huskisson Dock to Birkenhead. The tug was in sole control of the navigation. The

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

weather was hazy, the wind light southerly airs, and the tide ebb of the force of from two and a half to three knots. The *Dolly* was being towed across the Mersey to the southward and westward at a speed of about seven knots through the water. The regulation lights were being duly exhibited and burning brightly, and a good look-out was being kept.

In these circumstances the ferry steamer *Seacombe* showing her masthead and red lights, was seen about quarter of a mile off and broad on the starboard bow. The *Dolly* was kept in the wake of her tug, and shortly after the *Seacombe* was seen the tug starboarded and sounded two short blasts, and the *Dolly* also starboarded. The *Seacombe* did not reply to the tug's signal, but came on under starboard helm towards the *Dolly*, and although the bargeman just before the collision ordered the tow rope to be let go and put his helm hard-a-port to try, if possible, to let the *Seacombe* pass between the *Dolly* and the tug, the *Seacombe* with her stem struck the starboard bow of the *Dolly* near the stem and sank her immediately.

Those on the *Dolly* charged those on the *Seacombe* with not keeping a good look out; with not keeping clear of the barge; with not starboarding; with not easing, stopping, or reversing their engines; with not indicating their course by whistle signal; and alternatively with not keeping her course and speed.

The case made by the respondents, defendants in the court below, was that about 8 a.m. on the 9th Jan. 1911 the *Seacombe* was proceeding from the Seacombe Landing-stage to the Liverpool Landing-stage, the tide being ebb of the force of from three and a half to four knots. The *Seacombe* was proceeding about south-east at full speed making about seven knots. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept.

Under these circumstances those on the *Seacombe* saw the tug *J. M. Stubbs* with the *Dolly* in tow about two to three points on the *Seacombe's* port bow, at a distance of about 500 yards. The *Seacombe* starboarded her helm, slowed her engines, and then stopped them. The tug and *Dolly*, however, instead of keeping clear of the *Seacombe*, ported her helm, whereupon the port engine of the *Seacombe* was reversed full speed, and the tug altered her course to port, and went across the *Seacombe's* bows. The *Dolly* came on under a port helm and with her starboard bow struck the *Seacombe* on her starboard bow.

The respondents alleged that the servants of the appellants on the *Dolly* and the tug *J. M. Stubbs* were negligent in not keeping a good look out; with not keeping out of the way of the *Seacombe*; in first porting and then starboarding across the bows of the *Seacombe*; in not easing, stopping, or reversing the engines of the *J. M Stubbs*; in not indicating their course by whistle signals; and in not casting off the tow rope of the *Dolly* and in porting her helm after the tug starboarded.

The case was heard in the Admiralty Court on the 22nd March.

The appellants in the court below called the master of the tug *J. M. Stubbs* and the man on the barge *Dolly*. Their evidence showed that the *Seacombe* kept her course and only reversed her engines at the last moment.

The respondents called no evidence.

The following judgment was delivered by Bargrave Deane, J.:—

BARGRAVE DEANE, J.—This was a collision between the *Seacombe* ferry boat and the flat *Dolly* in tow of a tug called the *J. M. Stubbs* about mid-river, in the Mersey at 8 a.m. on the 9th Jan. last, when it was to all intents and purposes, daylight, although both vessels still had their lights up. The tug and the tow having passed up the river on the east side as far as Princes Landing Stage, then started to get across the river to the Birkenhead side, and I have not the smallest doubt that, instead of cutting straight across, they, whom I will call the plaintiffs, cut across in a sort of bend, under a slight port helm, heading up-river, and gradually coming across. I do not say the plaintiffs were always under a port helm, but porting their helm, and going in the ordinary course to get across the tideway, and when they had got very nearly half way across they saw the *Seacombe*, which had just left the Seacombe Landing Stage on her way across. They were approaching each other at a fairly broad angle. The tug describes the *Seacombe* as being about four points on her starboard side, 300 to 400 yards away. That would put them on crossing courses, and the rule, although the tug master does not accept it, is that the vessel that has the other crossing on her starboard side shall keep out of the way, and that the other vessel shall keep her course and speed. That rule applies in this case, although the master of the tug will not have it; he quietly tells us that it was the duty of the *Seacombe* to keep out of his way, and he says he expected her to starboard and she did not. He says if she had starboarded there would have been no collision. She did not starboard. He blames her for not starboarding and keeping out of the way. The plaintiffs, on the other hand, instead of keeping out of the way as the rule directs, kept on at full speed, starboarded a couple or three points, and dragged the tow right across the bows of the *Seacombe*, causing imminent risk of collision, and, at the last moment, there not being time, although it was intended, to let go the rope from the bow of the tow, the helm of the tow was hard aported, which threw her bow on to the bow of the *Seacombe*. In all probability, if that had not been done, the *Seacombe* would have struck the tow somewhere amidships, with probably the same result—namely, that the tow would have sunk.

The only evidence that I have before me is the evidence from the tug and tow. Neither of those people say that anything was done except to starboard on the part of the tug, and the final porting. The tug and tow did not keep out of the way of the *Seacombe* and did not obey the rule; therefore the plaintiffs are to blame. I am not dealing now with the question of the tug or the tow, but the tug and tow combined are to blame for not keeping out of the way of the *Seacombe*. But apart from that, I have to deal with the question of the *Seacombe*. I have no evidence whatever from the *Seacombe*. I have got before me a preliminary act, and I have got before me

a statement of defence, and in those two documents certain statements are made. There have been cases in which this court has been asked to deal with the case, by consent, on the pleadings, but that is not this case. I have got no consent to treat the pleadings as being accurate, and, without that consent I cannot treat the pleadings as being anything more than certain statements put before the court by pleaders, who have pleaded certain facts which, as we know in this court, are often not supported by evidence. The evidence is all one way, that the *Seacombe* did not starboard, and there is evidence from the plaintiffs' witnesses that the *Seacombe's* engines were reversing just at the time of the collision. Assuming that I act on the evidence, and do not act on the preliminary act and defence, the evidence is all one way, that the *Seacombe* did not starboard, but that the *Seacombe* did reverse at the last moment, but not before, and kept her course and speed until the last moment. In these circumstances, acting as I do on the evidence, and not acting on the pleadings, I am of opinion that the *Seacombe* is not to blame for this collision.

That is all I can decide. I cannot decide any question between the tug and the tow at all. If the tug were the servant of the tow, I suppose she might be responsible, but that is not a question which I have to decide. I only have to decide whether the *Seacombe* is responsible. The action is brought against the *Seacombe*, and I am of opinion that the plaintiffs are to blame, and, on the other hand, the *Seacombe* is not to blame. Therefore the action will be dismissed and there will be judgment for the defendants.

On the 8th April the plaintiffs delivered a notice of appeal seeking to obtain an order reversing the judgment and praying that judgment should be entered for the plaintiffs.

The case was before the Court of Appeal on the 19th, 27th, 28th, and 30th June, when judgment was reserved.

During the hearing of the appeal the appellants obtained leave from the court to call the master of the ferry boat the *Seacombe*.

Laing, K.C. and *C. R. Dunlop* for the appellants, the owners of the barge *Dolly* and her master and crew and the owners of the cargo on board her.—The *Seacombe* was to blame as well as the *St. Winifred*. The *Seacombe* did not keep her course and speed and she did not indicate her course by whistle signal:

The Corinthian, 101 L. T. Rep. 265; 11 Asp. Mar. Law Cas. 264; (1909) P. 260.

If both the steamship and the tug are to blame the barge owner is entitled to recover the whole of his loss against either steamship or tug for the tow is not liable for the negligence of the tug:

The Quickstep (*ubi sup.*);
The W. H. No. 1 (*ubi sup.*).

The barge is not in the position cargo on the tug would be in. *The Drumlanrig* (*ubi sup.*) has no application. The respondent must show that the Admiralty rule as to the division of loss applied to a case such as this before the passing of the Judicature Act 1873. [VAUGHAN WILLIAMS, L.J.—The rule might be in force, although facts had not arisen which admitted of its application.]

Bateson, K.C. and *Maxwell* for the respondents the owners of the *Seacombe*.—The *Seacombe* is not to blame; the story of the tug or the story of the *Seacombe* is untrue. The tug's story is the one which should be accepted. The appellants' witnesses deny the truth of the *Seacombe's* story as told in the Court of Appeal. The argument as to whether the barge owners could recover the whole of their loss against the *Seacombe* or only half of it against the *Seacombe* and half against the tug, followed the same lines as the argument in the *Devonshire*.

Dunlop in reply.

The following cases were cited on the point that the defendants were bound by statements made in their preliminary act:

The Inflexible, (1856) Swab. 32, at p. 34;
The Vortigern, 1 L. T. Rep. 307; (1859) Swab. 518;
The Biola, 34 L. T. Rep. 185; 3 Asp. Mar. Law Cas. 125 (1876);
Tildesley v. *Harper*, 39 L. T. Rep. 552; 10 Ch. Div. 393.

On the points whether the tow was liable for the fault of the tug and the amount of damage recoverable by the tow the following cases, in addition to those cited in the *Devonshire*, were referred to:

The Niobe, 65 L. T. Rep. 502; 7 Asp. Mar. Law Cas. 89; (1891) A. C. 401;
The Ticonderoga, (1857) Swab. 215;
The Ripon City, 77 L. T. Rep. 98; 8 Asp. Mar. Law Cas. 304; (1897) P. 226;
The Snark, 82 L. T. Rep. 42; 9 Asp. Mar. Law Cas. 50; (1900) P. 105;
The Ruby Queen, (1861) Lush. 266.

At the conclusion of the arguments judgment was reserved for the case of the *Devonshire* to be argued, and judgment dealing with both cases was delivered on the 1st Dec.

VAUGHAN WILLIAMS, L.J.—We have been considering two cases, *The Seacombe* and *The Devonshire*, which raise somewhat similar and difficult questions as to the survival and area of the application of the rule of Admiralty jurisprudence which divides the loss arising from collision of ships at sea. It is, I think, beyond controversy that this rule applies as between two ships both to blame, and it has now been decided by the House of Lords in *The Drumlanrig* that, as between innocent cargo-owners in a ship to blame which has come in collision with another ship to blame, the same rule applies. This is the doctrine of *The Milan* case—decided by Dr. Lushington in 1861. The subjection of the cargo-owner to this rule of Admiralty jurisprudence has nothing to do with any negligence of the cargo-owner or any relation of master and servant existing between him and the master of the ship carrying his goods. It is a doctrine which flows largely from the Court of Admiralty having always treated the ship as a *res* or subject-matter on which a ship injured by a collision at sea has a lien for the satisfaction of the loss or damage arising from the collision. The frequent epithet of "innocent" applied to the cargo-owner shows that innocence and blame have nothing to do with the application of the Admiralty rule of division to cargo-owners to whom neither of the colliding ships

belong. Admiralty jurisprudence holds that those whose goods have been injured by the collision of ships at sea can only recover damages for loss on the same basis that rules recovery for loss by collision of ships at sea between the ships themselves. Originally, as between the colliding ships at sea, those who administered marine law throughout the world tried to apportion liability for loss to quantum of blame. After a time the High Court of Admiralty in England, and many other courts administering marine jurisdiction in various parts of the world, substituted, in consequence of the difficulty of ascertaining with anything like precision the quantum and therefore the just apportionment of blame, equal division—*judicium rusticorum*, as it has been called, for precise apportionment.

This Admiralty rule has, of course, always been in conflict with the common law of England. The ships to blame were in a sense joint tortfeasors — at common law, of course, an individual, being one of several joint tortfeasors, might be sued alone and compelled by execution to pay the damages compensating for the whole loss; nay, more, if all were sued, and judgment obtained against all, execution might go against one and the whole of the damages might be obtained from him, and in no case would there be any contribution among tortfeasors obtainable by action at law. I have neither obligation nor right to discuss which of these conflicting systems of law—the common law and the Admiralty law—is the more just. Perhaps the one may be more just on land and the other at sea.

I have only to consider what portion of Admiralty jurisprudence has survived the Judicature Act 1873. Sect. 25 (9) of that Act provides: "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall have been found to be 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." This sub-section was much discussed in the House of Lords in *The Drumlanrig.* The discussion in that case, so far as it affects the case now before us, related mainly to the question whether the effect of the Judicature Act 1873, sect. 25 (9) is to stereotype the Admiralty rules which were in force in 1873, where they varied from the common law rule, even if it should afterwards appear that they ought not to have been in force, and it was held in the House of Lords that the opposite construction would ignore altogether the words of the Act "hitherto in force," and the House refused to do this. The judgments in *The Drumlanrig* do not seem to me to decide definitely what is the meaning of the words in the section "rules hitherto in force," although the question of the meaning of these words was more or less touched upon in the respective judgments of the noble Lords. There is no suggestion that "rules in force" means rules published or formally adopted by the court, and I think the question is left open whether the area included in the words "rules hitherto in force" is limited or defined by the particular cases determined hitherto from time to time before the Judicature Act 1873, or whether such cases are to be regarded as instances of a rule, or I would rather say "principle of jurisprudence," upon which such cases have been decided. Lord Halsbury, in his speech, says "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." Again he says: "There is no doubt that the difference of administration of the Lord High Admiral by this 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 . . . administered differently from the law of England." And again he says later, after tracing the cosmopolitan rise of the system of jurisprudence administered in the Court of Admiralty, without reference to what was the true view of the law, "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," and concludes his judgment by saying 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 "hitherto in force" stopped 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."

These quotations throw some light on the question which the President puts to himself in his judgment in the *Devonshire,* the case which we are considering together with the *Seacombe.* "Does the case of *The Drumlanrig* define, or comprehend, the rule, or is it only an instance of an application of the rule?" The House of Lords in *The Drumlanrig,* in my opinion, were not, by their decision, defining or comprehending the rule which they held was in force in 1873, but were merely deciding that, according to a practice in force at that date, the Admiralty rule under which a plaintiff is only entitled to recover a moiety of the damages sustained by him from a collision of two ships both to blame extended to a case of an innocent cargo-owner plaintiff, whose goods were "cargo" on board one of the colliding ships. The House of Lords did not decide that the Admiralty rule substituting division for apportionment only applied in cases where the ships to blame for the collision were the two colliding ships. I do not think that the House of Lords intended by their decision to exclude from their operation of sub-sect. 9 every rule of Admiralty jurisprudence excepting so far as it had, prior to 1873, been applied in particular or specific cases. New cases, as time progresses, must raise the question of the application of the respective Admiralty rules regarding apportionment of liability between tortfeasors in navigation, unless, indeed, such apportionment is in future to be superseded by the common law rule.

Thus far I have dealt only with the question of the survival, after the passing of the Judicature Act of 1873, of the rules or principles of Admiralty jurisprudence, but both the cases with which we

have to deal raise questions as to the respective liabilities or responsibilities of tug and tow where there has been a collision with a third ship, and raise the question of the identity of the tug and tow—that is to say, whether for the purposes of navigation tug and tow are to be regarded as one vessel. Of course, if they are to be so regarded, there is in the case of a collision between the composite vessel, constituted by tug and tow, and another vessel, a collision between two vessels, the composite vessel and the independent vessel, but if the tug and tow are to be regarded as separate vessels, to the extent that the one may be to blame and the other not, according as one has the control of the navigation, there will be three vessels and not two, and it will follow that a vessel, be it tug or tow, which has not the control of the navigation, may, in a case of collision with an independent ship to blame, sue such independent ship. But we have to consider whether the tow, in a case where the collision results from the bad navigation respectively of the tug and the third vessel, can recover the whole damage, or whether it can only recover half from each of the tortfeasors according to the Admiralty rule.

This question of identity of tug and tow is of vital importance in the cases we have to consider. In *The Seacombe*, the composite vessel, constituted by the tug *J. M. Stubbs* and the tow *Dolly*, on the one hand, and the *Seacombe* on the other hand, were each to blame; and in *The Devonshire* the composite vessel, constituted by the tug *St. Winifred* and the tow, *Leslie*, on the one hand, and *The Devonshire* on the other hand, were each to blame, and the Admiralty rule of division beyond question will apply; but if there is no indentification of tug and tow, either on the ground that safety of navigation requires that tug and tow should be under one command, as Dr. Lushington used to hold, or on the ground that the tow is the master whom the tug has to obey, then one has to deal with three ships: (1) the tug, (2) the tow, (3) the innocent independent ship. And the main question in the present case is whether the Admiralty rule of division applies. In both cases the statement of claim alleges the navigation of the tug and the tow to be in the sole control and management of the respective tugs. In the case of *The Devonshire* the President finds in terms that it is to the navigation of the tug that he must look in that case, because the barge *Leslie* was navigated by the tug *St. Winifred*. In the case of the *Seacombe*, Bargrave Deane, J. made no express finding as to the control of the navigation, because, as he did not find the *Seacombe* to blame, the question whether the tug or the tow had the control of the navigation became immaterial. I am of opinion that in both cases the respective tugs had the control of the navigation. I do not propose to deal with the question raised by the President as to whether the Admiralty rule or the common law rule is the more conformable in the average case to fairness and justice, seeing that, in my opinion, we have no obligation or right to raise any such question. As to the doctrine of identification between tug and tow, the President says that until 1890, in most cases and for almost all purposes, a tug and a tow were considered one vessel. In 1890 Sir James Hannen and Butt, J., in the case of *The Quickstep* (*sup.*), decided that the question whether a tow is liable for the negligence of the tug which causes a collision is a question of fact in each case, and depends upon whether in the circumstances those in charge of the tug were so far under the control of the master of the tow as to be the servants of the owners of the tow. It does not seem to me that this decision is consistent with the Admiralty cases decided prior to 1873, nor do I think that the decision of Dr. Lushington in *The Milan* case, whereby he decided that the Admiralty rule of division applied to an innocent owner of cargo carried in one of two ships to blame for a collision, was in any way based on negligence or blame of the cargo-owner, but on the refusal in Admiralty jurisprudence to adopt the common law rule.

This being my opinion, I shall ask myself in each of these cases of *The Seacombe* and *The Devonshire* the question whether the circumstances bring the case within the principle upon which Dr. Lushington, in the case of *The Milan*, or the Court of Admiralty, in any other case prior to the Judicature Act 1873, held that the innocent cargo-owner could only recover from each of the ships to blame for the collision half the damage his cargo sustained. I do not think that the cargo case was decided upon the ground of identification of the cargo with the ship. In fact, Dr. Lushington, when criticising the judgment in *Thorogood* v. *Bryan*, distinctly repudiates the doctrine of identification of cargo with carrying ship. So I doubt in these two cases which we have to decide the conclusiveness of the case of *The Quickstep* and other cases turning upon the identity of tug and tow on this question of division of loss. The basis of the Admiralty rule of division, as I have already said, is, in my opinion, the right of arrest, the right *in rem* by which the cargo-owner can only get a remedy in the Court of Admiralty compatible with the rights, remedies, and liabilities of the two colliding ships *inter se*. I am uncertain on the authorities whether the lien for damages caused by collision, or the arrest of the ship, extends to the loss of or damage to the cargo. If it does, this would itself be a ground for restricting the claim on behalf of the owner of cargo damaged in a collision to the recovery against each of the ships to blame and their owners of one half only of the damage. Be this how it may, there can be no doubt but that in the case of damage caused by collision at sea the Court of Admiralty does not recognise the common-law principle that each tort feasor is liable to be sued for the whole of the damage caused by the joint tort. It was because those who had to administer maritime law did not recognise the justice of the common-law principle when applied to damage arising from collisions of ships at sea that they in early days of administration of maritime law adopted the principle of apportionment of liability in proportion to the quantum of blame in cases where two ships were to blame. Then the difficulty, in the case of ships colliding at sea, of apportioning with any precision the blame led to the Admiralty rule of division. The application of the rule in cases where the blame lies with two colliding ships, and the application of it to cargo on board one of the two colliding ships to blame, although no blame or responsibility can be attached to the cargo-owner is, of course, well-established, and what we have

to determine is, does this rule of division, based on the consideration which I have set forth, apply to a case where only one of the two ships to blame is in collision with a third ship not to blame? The principle of apportionment of blame, whether carried by precise apportionment or by *judicium rusticorum*, seems of the essence of maritime law. The difficulty of precise apportionment of blame in the case of collision at sea is the foundation of the Admiralty rule of division.

What the court has to decide on these appeals is whether this rule applies to a case where one of the two ships to blame and a third ship come into collision—*i.e.*, in *The Seacombe* case, where the flat *Dolly* comes into collision through the faults of the tug *Stubbs* and the *Seacombe*, and in *The Devonshire* case, where the barge *Leslie* comes into collision through the faults of the tug *St. Winifred* and the *Devonshire*. I have come firmly to the conclusion that the principles of law, based on the considerations to which I have referred, logically extend to the case in which the damage complained of results from the collision of a ship to blame and an innocent ship caused by the negligence of two ships, one of which is not a colliding ship, but which renders both liable to be sued by the innocent ship in collision as both, by the negligent navigation of their respective ships, contributed to the accident. Every principle of law which leads to and justifies the division of the damages between two colliding ships "to blame" applies, in my opinion, to the case of two ships to blame for the collision, one of which only is a colliding ship. I cannot believe that the Admiralty Court, which, in the case of damage caused by the collision of two ships, refused to recognise the common-law rule making each tort feasor liable for the whole of the damage without any right of contribution from the other tort feasor, would have recognised the self-same common law rule in a case in which one of the tort feasors was not a colliding ship, but only one of the two ships whose negligence caused the collision. Apart from any difficulty arising from the construction of sect. 25, sub-sect. 9 of the Judicature Act 1873, I should certainly come to the conclusion that the innocent ships injured in the respective collisions could not recover from one of the ships to blame the whole damage, but only half. I have already expressed my opinion, not without doubt, that this section saves or preserves Admiralty practice and rules as flowing from the principles of Admiralty jurisprudence, and not merely as applied in particular cases. With regard to the construction of sub-sect. 9 of sect. 25 of the Judicature Act 1873, the decisions in *The Quickstep* and the other cases, subsequent to 1873, rejecting the decisions of Dr. Lushington treating, at all events *primâ facie*, the tug as the agent or servant of the tow, and identifying for almost all purposes the tug and the tow as one vessel, throw some light on the construction of this sub-section, for it is clear, as pointed out by the President in his judgment in *The Devonshire*, that "until then, in most cases, and for almost all purposes, a tug and tow were considered as one vessel," and "that being so, it is not a matter of surprise that examples of innocent owners of tows attached to guilty owners of tugs are wanting." Dr. Lushington treated the tug as the agent or servant of the tow, and did so on the ground that the tug and the tow ought to be considered as one vessel; but the fact that there are Admiralty decisions to the effect that the tug and the tow are not so identified with one another that the tow cannot recover against the tug that which the tow has been obliged to pay as compensation for the negligence committed by the tug: (see per Sir James Hannen in *The Stormcock*, 1885, 5 Asp. Mar. Law Cas. 472) made Sir James Hannen doubt Dr. Lushington's decisions on this point, and made Sir James Hannen and Butt, J. arrive in *The Quickstep* at the conclusion that "whether the relation of master and servant exists between the owners of the vessel in tow and the crew of the tug, so as to make the former liable, depends upon the circumstances of each case." This conclusion, in my opinion, could only have been justified in 1890 upon the basis that the words "Rules hitherto in force" mean not rules affirmed in particular cases but the rules to be inferred from the principles adopted in Admiralty jurisprudence on an examination of all the previous decisions.

I will now try and apply the conclusions of law at which I have arrived to the facts of the two cases before the court. First then, I will take the case of *The Seacombe*. In that case Bargrave Deane, J. found for the defendant on the ground that there was no evidence that the *Seacombe* was to blame. We have had before us an additional witness, and I am of opinion that the ferry steamer *Seacombe* was also to blame for the collision between it and the *Dolly* (the tow). Bargrave Deane, J. also found that the tug *J. M. Stubbs* and the tow (the *Dolly*) combined were to blame for not keeping out of the way of the *Seacombe*. I think this is wrong. There is no evidence showing that the tow (*Dolly*) was to blame. The learned judge also found the *Dolly* to blame because of her combination with the tug *J. M. Stubbs*, which clearly was to blame. This decision conflicts with *The Quickstep* (*sup.*), which decides that the question whether a tow is liable for the negligence of the tug which causes a collision is a question of fact in each case and depends upon whether, in the circumstances, those in charge of the tug were so far under the control of the master of the tow as to be the servants of the owners of the tow. But, on the other hand, the decision in *The Quickstep* is hard to reconcile with the numerous cases decided before the passing of the Judicature Act 1873, which cases, as the President, Sir Samuel Evans, points out in his judgment, show that the Court of Admiralty, until *The Quickstep*, 1891, in most cases and for almost all purposes considered the tug and the tow as one vessel, and suggested that the somewhat strict application of this doctrine may account for the absence of instances raising the point which is raised before us both in the *Seacombe* and the *Devonshire*. I think that we ought to act upon the decision in *The Quickstep*, not as a new rule since the Judicature Act, 1873, nor as a rule to be found in the decision of any prior reported cases, but because the judgment in *The Quickstep* is justified by consideration of the principles of the decisions prior to 1873, which, as pointed out by Sir James Hannen in *The Stormcock* (*sup.*) negatived the universality of the identity of the tug and tow asserted in the prior decisions in the Court of Admiralty.

Having arrived at this conclusion, the only question I have to deal with is the quantum recoverable, and, for reasons which I have already given, I think that in the case of a collision between one of two ships both to blame for the collision and a third vessel in collision, but not to blame, the Admiralty rule as to division of damages applies, and the plaintiffs, the owners of the innocent vessel, can only recover half the damages from each tortfeasor.

Secondly, I will take the case of *The Devonshire*, which collided with the barge *Leslie*, which was not to blame, but collided through the combined negligence of the tug *St. Winifred* and the *Devonshire*. The only point to be decided is the same point which I have already dealt with in *The Seacombe*. The result is in my opinion that in each case the Admiralty rule of division applies, and the plaintiffs can only recover half the damages from each tortfeasor.

I want to add a statement, that I think it is of the utmost importance, having regard to the international character of Admiralty law, that nothing should be done to so alter the Admiralty law as to make it a part of the common law and not a part of a separate system of jurisprudence in which all the nations of the world are interested. It is true that the half-and-half rule is not adopted by all nations, but the principle is accepted that the liability must be divided between the wrong-doing ships by apportionment as distinguished from the *judicium rusticorum*; but precise apportionment and apportionment in the rougher English method was equally inconsistent with the common law rule negativing contribution between joint tortfeasors.

FLETCHER MOULTON, L.J.—This is my judgment in *The Devonshire*.

In this case the *Leslie* was a dumb barge adapted solely for being towed. At the time of the accident it was being towed by the tug *St. Winifred* down the river Mersey. The *Devonshire* was a steamer proceeding up the Mersey, and a collision took place between the *Devonshire* and the *Leslie*. The court below has held both the steamship *Devonshire* and the *St. Winifred* to blame, and this decision is not appealed against. The negligence of which the steamship *Devonshire* and the *St. Winifred* have been found guilty consisted in the steamship *Devonshire* not keeping her course and speed and the *St. Winifred* not giving way. The persons managing the *Leslie* are not guilty of any negligence. The control of the navigation was necessarily in the tug entirely, and nothing that those on board the *Leslie* could have done would under the circumstances have affected the matter of the collision. In a considered judgment the President of the Admiralty Division, who tried the case, has declared the plaintiffs—namely, the owners of the barge *Leslie*—and her master and mate, suing for the loss of their effects, entitled to recover from the defendants—namely, the owners of the steamship *Devonshire*—the whole of their loss. It is from this judgment that the present appeal is brought.

The appellants put forward two contentions: (1) That the negligence of the tug is constructive negligence on the part of the tow, at all events in cases where the tug has been found guilty of a breach of the statutory regulations; (2) that even if the tow is entitled to sue as an innocent vessel, the rules of law that prevail in the Court of Admiralty require that the blame of the collision should be apportioned equally between the tug and the colliding vessel; the tow, therefore, can recover only one-half of the loss from the latter. In support of the first contention the appellants rightly pointed out that it has long been laid down in the Admiralty Court that for many purposes the tug and the tow must be regarded as one vessel. It is evident that this must be the case in deciding what is the duty incumbent on the tow and the tug with regard to the other vessel, as, for instance, the course that they should steer. Inasmuch as they are physically connected, it would be impossible to allow such a matter to be indenendently decided for each vessel, lest the result should not be the same for both. In all such matters, therefore, what the tug does the tow must also do. But neither the reason upon which such a principle is based nor the decisions in which it has been applied go so far as to say that for all purposes the tow and the tug must be identified, so that the blameworthy conduct of the one must be treated as bringing blame on the other. In considering this question it is necessary to bear in mind that the relations between the tow and the tug vary in different cases. In the case of sea-going ships that are in tow the whole direction is as a rule in the hands of the persons navigating the tow, and the tug and her crew are for navigating purposes in the position of their servants. In such a case the tow is clearly responsible for herself and the tug. But an equally well-known operation is the towing of barges or other craft of the like kind, either singly or in groups. In such cases the tow has no control over those navigating the tug. The tug is in the position of an independent contractor who performs the service of towing the barge to its destination, and who chooses for himself how he shall perform that service. I can see no reason why the misconduct of such an independant contractor should be imputed to the innocent tow, who is, in fact, no party to the wrongful act. So to impute it, would be inconsistent with the general principles of our common law, and I should decline to do so unless I found a well-settled principle of Admiralty jurisprudence evidenced by a course of consistent decisions which required me to do so.

When the decisions are examined, the contrary is found to be the case. In the year 1874 the case of *Union Steamship Company* v. *Owners of the Aracan, the American, and the Syria* (*ubi sup.*) came before the Privy Council on appeal from the Court of Admiralty in England. The plaintiffs were the owners of two steamships, the *Syria* and the *American*. On calling at Ascension the master of the *American* found the *Syria* lying there disabled, and proceeded to tow her home. On the voyage a collision occurred between the *Aracan* and the *Syria* by reason of the negligence of the *American*. In the Admiralty Court the judge held that the *Syria* was not to blame for the collision, but that she and the *American* were by intendment of law one ship, and therefore he gave judgment against her. Their Lordships reversed this decision and held that, inasmuch as the governing power was wholly in the *American*, the *Syria* could not be

deemed in intendment of law one vessel with *The American*, or liable for her negligence. In 1890 the Court of Admiralty (Sir J. Hannen and Butt, J.) applied the same law in the case of *The Quickstep*, holding that, where a barge is in tow, and the governing power is wholly in the tug, the tow is not liable for the negligence of the tug. Finally, in 1910, the House of Lords, in the case the *Owners of the Comet* v. *Owners of the W. H.* 1 (*ubi sup.*), held a barge not to blame where it was in tow, although the tug was held to blame, a decision utterly inconsistent with the contention that under such circumstances a tow and its tug are by intendment of law one vessel for all purposes of legal liability. Other cases of a like kind are *The Mary* and *The Millwall*. Lord Watson's remarks in his opinion in the case of *The Niobe* (*sup.*) fully sum up the law on this point. The appellants sought to establish that this rule does not apply where the fault of the tug is a breach of the regulations. I wholly fail to appreciate the contention. The grounds on which the courts have held that in such circumstances the tow and the tug are not in intendment of law one vessel do not depend on the nature of the misconduct of the tug or its relation to the regulations. Indeed, in this case of *The American* the negligence was actually a breach of those regulations. But apart from this I am of opinion that the object and effect of the regulations is to fix duties and not to apportion legal liabilities. It is absurd, therefore, to say that a barge, which *ex concessis* has done all that it ought to do, is by reason of the regulations made legally liable for the negligence of a tug that has not. Towing is a lawful and well-recognised operation, and is even referred to in the regulations, and I can see nothing whatever in them which bears in any way on the question whether, where the governing power is wholly in the tug, there should be an intendment of blame in the tow where those on board it have performed all their duties. I am, therefore, of opinion that the first contention of the appellants wholly fails.

The second contention raises a point of great legal importance. It is put very broadly by the appellants. They contend that it is principle of the Admiralty law, if there is a collision due to the negligence, concurrent negligence, of two ships, then for all purposes, whether affecting the delinquent ships themselves or outsiders, each ship has to bear only half the blame and has to pay only half the damages. Before examining the argument by which it is sought to support the legal proposition, there are certain general considerations which will tend to throw light on the question under discussion. In the first place such a principle as that contended for could only have arisen in the Admiralty Court. No such principle as apportioning liability is to be found in our common law. If, therefore, it exists at all, it exists in that court only, unless by statute it has been made to obtain in courts of common law also. In the next place the alleged principle does not come within the provisions of sect. 25 (9) of the Judicature Act 1873, by which the Admiralty rule laid down and acted on in the well-known case of *The Milan* was preserved and made of general application in all the courts. The sub-section reads as follows: "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."

The collision in this case was between the *Leslie* and the *Devonshire*, and both those ships were not held to blame—the *Leslie* having been completely exonerated. The facts of this case do not, therefore, bring it within the scope of the sub-section. This is not mere verbal criticism. The language of the sub-section exactly represents the rule as applied in all the cases to which we have been referred, or which I have been able to discover, which were decided before the Judicature Act. I have no doubt that the language of the sub-section was deliberately chosen so as to apply solely to cases where the two colliding ships are both to blame, to which cases alone had any special rule of the Admiralty Court been theretofore applied. Even if I was of opinion that the restricted ambit of the sub-section was due to mere inadvertence (for which view I can find no warrant either in the history of the then condition of the Admiralty practice or otherwise) it would make no difference to my judicial duty. The restriction is clearly expressed in the language used in the Act, and we have no right to substitute for the language of an Act of Parliament other language which we may think the Legislature might have employed with more advantage. It follows, therefore, that the rule contended for even if it did exist in the Admiralty Court prior to 1873 is not preserved or extended to the courts by sub-sect. 9 of sect. 25 of the Judicature Act of that year. This is a matter of great importance, because the decision of the House of Lords in the case of *The Drumlanrig*, which finally established the rule in *The Milan* in all its fullness, was entirely based on the principle that the rule in question was expressly preserved by sub-sect. 9 of sect. 25 of the Judicature Act 1873. This decision, therefore, can afford no assistance to the contention of the appellants in this case.

But the effect of this consideration goes much deeper. The Admiralty Court did not possess exclusive jurisdiction in the matter of collisions between ships. Actions for collisions between ships in territorial waters might be, and in fact were, occasionally brought in courts of common law. But prior to the Judicature Act the law administered in such cases was different in the two courts. If contributory negligence was proved, the plaintiff lost his cause in the court of common law; whereas in the Admiralty Court the losses were borne in equal halves. It is evident from sect. 91 of the Judicature Act 1873, that one of its objects was to provide that one and the same law should be administered in all the divisions of the Supreme Court, and it was evidently for this purpose that sub-sect. 9 of sect. 25 was inserted. By reason of its presence the law administered by the courts of common law in the case of collisions between ships where both are to blame was changed, and those courts are now bound to administer in such cases the law which had previously been administered by the Admiralty Court alone. If the contention of the appellants is to prevail, we re-introduce a conflict of law in the different branches of the court. This action might have been brought in a court of common law, and the plaintiff would then have been entitled to recover full damage as he now does under the judgment appealed from. If we give

effect to the contention of the appellants and vary the judgment by giving to the plaintiffs only half his damages, we shall therefore be making the Admiralty Court administer a different law to the court of common law. I should be very loath to hold that the Judicature Act had so signally failed in one of its main objects. I see no ground whatever for holding that this is the case. I am of opinion, on the contrary, that by sub-sect. 9 the only point of difference in the law administered concurrently by the two courts was finally removed, and that from that time the rights of the plaintiffs in cases arising out of collisions of ships have been and are the same in whatever division of the Supreme Court they may bring their actions.

The contrast between the rule suggested by the appellants and the rule of the common law is very striking. The proposition put forward by them is that where there are three ships A, B, and C (as in the present case), and without any fault on its part, A is run into by B through the combined negligence of B and C, A can only recover half of its damages from B, the ship that has committed the trespass. At common law B and C are at the highest joint tortfeasors, and either can be sued separately. Even if sued jointly the judgment could be enforced in full against either. This is to my mind far more just than that which it is proposed to substitute for it. But for B's own negligence he would not have committed the trespass on A. The negligence of C may have caused or increased the difficulties of B's position, just as any other sudden danger of the sea might do, whether caused by the misfeasance of others or not; but B has the full value of this as a defence. If he behaved reasonably—namely, without negligence under the new difficulties, he is entitled to succeed in the action. A only succeeds if he proves that, after making all allowance for the difficulties of his position, B was negligent and the accident was due to that negligence. I am not enamoured of a rule that would under such circumstances prevent A from recovering from the ship that has committed the trespass the full amount of the damages caused thereby. The whole argument of the appellants rested in truth on a passage in the judgment of Dr. Lushington in the well-known case of *The Milan*. That was an action brought by the owners of cargo on board the *Lindisfarne*, which was sunk by a collision with the *Milan*. The defendants were the owners of the *Milan*. Both ships were held to blame, and the question for the decision of the court was whether the plaintiffs were entitled to recover any, and if so what part, of the damage caused by the collision. At that time the decisions at common law had established a doctrine, since pronounced by the House of Lords to be erroneous, that a passenger (and by analogy cargo) on board a vehicle was so far identified with the vehicle as to be unable to recover damages on account of a collision if there had been negligence on the part of those in charge of the vehicle. The defendants sought to apply this principle to collisions at sea, and they claimed that the defendants were in the position of joint tortfeasors with the owners of the ship on which the plaintiffs' cargo was carried, and that therefore the plaintiffs could recover no damages from the defendants. On the other hand, the plaintiffs contended that they were innocent parties, and entitled to recover the whole of the damage against the defendants under the rule of the common law that one of two joint tortfeasors can be sued separately and is liable for the whole of the damage. In delivering judgment Dr. Lushington went fully into the questions raised, but dealt more especially with the questions of the practice of the Court of Admiralty. He expressly declined to follow the rule of common law in preference to such practice. He decided that there was a settled rule and practice in the Admiralty Court that the plaintiff under such circumstances could recover damages from the delinquent ship, but that only one half of the actual damage suffered could be so recovered, by reason of the fact that the ship in which the plaintiffs cargo was carried was also to blame.

It is in dealing with this last point that there appears a passage which it seems, it is suggested, gives support to the appellants' contention, and, as it is so important in this respect, I shall give it in full: "It remains, then, only to determine whether the plaintiffs can recover damage for the whole loss. There is, I apprehend, no doubt at common law that they could so recover, if they could recover at all; but I must be governed, where they apply, by the rules and practice of the Court of Admiralty. It is true, as I think, that the owner of a cargo is to be considered a perfectly innocent person, and that he does not stand in the same position as the owner of one of two delinquent ships; and if the sole ground upon which the Admiralty rule rests is the joint culpability of the plaintiff and the defendant, it might well be that the owner of a cargo would recover his whole damage against the adverse ship, but this is not exactly the view taken by the Admiralty law; it endeavours, whether wisely or not I do not say, to administer more equitable justice, and generally, where both ships are delinquent, it makes the owner of each bear a moiety of the loss, and a moiety only. I apprehend that, carrying out this principle, the Court of Admiralty must say, 'You, the innocent owners of cargo, proceeding against one only of two delinquent ships, shall recover only half your damage, because we can affix to this vessel proceeded against only half the blame, and you shall be left, with respect to the other half of your loss, to your remedy against the owner of the other vessel, which we hold to be equally delinquent.' It may be very true that this conclusion is not conformable with the rule of common law, and much might be said as to its equity, or otherwise, but I think it is most conformable to the Admiralty rule acted upon in *Hay* v. *Le Neve* and other cases, and, therefore, my decree must be that the plaintiffs do recover a moiety of the damage only." Upon this passage the appellants found the argument that it was in 1861 the rule and practice of the Admiralty Court that, in a case of a collision between ships where two vessels (not necessarily the two colliding ones) are to blame, each vessel is liable as against all parties, whether connected with any one of the vessels or not, to bear half the liability of the collision. I am of opinion that this contention is not supported by the judgment in *The Milan* for the following reasons: (1) The case before the court did not involve the decision in any way of the rights of the parties not connected with one of the delinquent ships. There

is no word from the beginning to the end of the judgment which refers in any way to the rights of such parties. Indeed, the language of the judgment, if it be closely scanned, makes it clear that the learned judge was thinking only of the two delinquent ships and the cargoes carried thereon. Moreover, he does not purport to be administering new law, but on the contrary, expressly states that he is only applying a settled rule of the Admiralty Court, and he quotes cases in support, all of which deal with the same question. And when the learned judge formulates the questions which he considers to be before the court, and to which, of course, his judgment is directed, he does so in these words: "It is this. Whether apart from the statute, both ships being to blame, the owner of goods carried in one ship is entitled to recover against the other ship, and, if so, whether the whole of his loss or a moiety only"—language which is only applicable to the narrower question, and clearly does not refer in any way to the rights of outsiders. Nor is there any case on record in which the old Court of Admiralty applied the rule as to division of liability to cases other than those of collision between two delinquent ships. (2) The passage, which for the reason I have already given could only be regarded as a dictum so far as the rights of third parties are concerned, does not purport to lay down that there was any rule or practice of the Admiralty Court to the effect contended for by the appellants. It only purports to explain the reasoning by which the learned judge considers the Admiralty Court must have arrived at the rule or practice which existed in the limited case before him.

Such a statement, though entitled to all respect, does not rise above the status of a dictum, and does not justify the contention that this suggested explanation of an existing rule was itself in all its breadth an existing rule at that date. Indeed, the learned judge guards himself by the introduction of the word "generally" in his statement of the practice of the Admiralty Court with regard to division of liability. The cases that have been decided since the Judicature Act show no indication of an extension of the rule as it prevailed before that Act, which would make it affect third parties. The appellants, therefore, are asking the court for the first time to introduce a rule of law conflicting with the rules of the common law as amended by sect. 25 of the Judicature Act. To my mind they have shown no justification for our so doing, or indeed, any jurisdiction so to do.

Accordingly, I have come to the following conclusions: I find that prior to 1873 there was a clear rule and practice in the Admiralty Court relative to apportionment of the damages in actions arising out of the collision of two ships where both are to blame, but none applying to any other cases. I find a statutory enactment preserving the Admiralty rules in the above case, but in none other, and directing that they should be observed in all courts. It is not competent for the Admiralty Court since the Judicature Act to introduce, and it has not introduced, any new rules of law at variance with the rules of law obtainable in other branches of the Supreme Court. It follows, therefore, that the plaintiffs are entitled to recover their full damages from the defendants in this case, and that the judgment appealed against was correct, and that this appeal must be dismissed with costs.

This is my judgment in *The Seacombe.*

In this case the owners of the barge *Dolly* and her master and crew are suing for their lost effects, and the owners of her cargo and freight sue the owners of the steamship *Seacombe* in respect of the sinking of the barge by collision with the *Seacombe* in the river Mersey in January last. The *Dolly* was a flat without any means of propulsion of her own, carrying two hands and laden with about 100 tons of maize, and at the time of the accident it was being towed by the tug *J. M. Stubbs* from the Huskisson Dock to Birkenhead. The tug was necessarily in sole control of the navigation The collision took place about eight o'clock in the morning. The *Seacombe*, which was a large ferry steamer, had just left the Seacombe landing stage on the Birkenhead side on her way across. There is no dispute that when the vessels first saw one another they were about 400 yards off, and the tug had the *Seacombe* about four points on its starboard bow. Under these circumstances the respective duties of the two ships are clear. They were on crossing courses, and therefore it was the duty of the tug to keep out of the way, and for the *Seacombe* to keep her course and speed. Unquestionably the master of that tug did not do his duty in this respect. His evidence on the point is most remarkable. He insisted that it was the duty of the *Seacombe* to keep out of his way, and deposed that he kept on at full speed. The learned judge in the court below accordingly found that the tug was to blame, and this decision of fact was not contested before us. No evidence was called on behalf of the *Seacombe*, but in the preliminary act of the defendants it was stated that when the barge was sighted the engines of the *Seacombe* were slowed and her helm starboarded, which was in violation of her duty, which was to keep her course and speed; and the allegations in the statement of defence were to a like effect. At the conclusion of the case the learned judge refused to act on the statements in the preliminary act, treating them as being nothing more than statements put before the court as in pleadings, which could not in the absence of consent be treated as accurate. Accordingly, seeing that the evidence of the plaintiffs' witnesses did not support the starboarding of the *Seacombe*, he held that it was not to blame. In my opinion the learned judge took a wrong view of the nature and status of the statements in the preliminary act. They are not mere pleading allegations. They are statements of fact made under such circumstances that they rank as formal admissions of fact, binding the parties making them, perhaps, as strongly as any admissions of fact can do. Admission of fact, as such, does not constitute an estoppel. It may be shown that it was made under a mistake, and the court may be satisfied that such was the case. But it is evidence against the party making it, its strength varying according to the conditions under which it is made. An admission, under circumstances which necessitate that it must have been made after full consideration, has an eventual value far higher than a casual admission made without any opportunity of such reflection or verification. The statements of fact in a pre-

liminary act are statements which must be presumed to be made after the most careful examination and consideration. To my mind they carry such weight, from the nature of a preliminary act and from the circumstances under which it is made, that I should doubt whether otherwise than under the most special circumstances, and with the special leave of the court, a party would be allowed to depart from the admissions in his preliminary act, at all events as far as evidence-in-chief in concerned. The judge was therefore, in my opinion, wrong in refusing to take the statements in the defendants' preliminary act into consideration in arriving at his decision. On hearing of the appeal, plaintiffs' counsel asked leave to call the master of the *Seacombe* as his own witness, and under the circumstances permission was granted. His evidence left no doubt in my mind that the statement in the preliminary act was correct, and that the *Seacombe* starboarded and did not keep her course and speed as it was her duty to do. I therefore am of opinion that the *Seacombe* was also to blame for the collision. No one suggests that the barge did anything which contributed to the collision, or was itself to blame in any way. Hence the case is one in which a barge which is being towed by a tug which has complete control of the navigation suffers collision from a third vessel by the joint negligence of the tug and the third vessel. It is thus identical in all respects with the case of *The Devonshire*, on which we have just given our decision. I am of opinion, therefore, that the plaintiffs are entitled to recover from the defendants the whole of their respective damages, with costs of action, and that this appeal must be allowed, with costs.

Buckley, L.J.—The dumb barge *Leslie* was in tow of the tug *St. Winifred*. The *Leslie* and the steamship *Devonshire* came into collision. The *St. Winifred* and the *Devonshire* were both to blame. The *Leslie*, in a cause of collision brought by her against the *Devonshire*, to which the *St. Winifred* is not a party, has recovered judgment against the *Devonshire* for the whole of her damage. The learned President has not in so many words said that, but from his judgment it necessarily follows that he held the *Leslie* not to blame. The appellants say that the Admiralty rule of division of loss applies, and that the *Leslie*, although innocent, can recover against the *Devonshire* only half her loss. We have to determine whether this contention is right.

The *Leslie* was a tow. For some purposes tug and tow are, by intendment of law, regarded as one ship. The judgment under appeal has of course, not treated them as one. If they were one, the *Leslie* would have been to blame, and could not have recovered more than half. The first question is whether, for the present purpose, the *St. Winifred*, which was to blame, and the *Leslie*, which was not, are to be treated as one ship. As matter of fact, tug and tow are two separate floating bodies. Each may be, and generally is, furnished with separate means of propulsion. Each may be, and generally is, furnished with separate means of steering. The tow may be a steamship or a sailing vessel, and she may, and sometimes does, use her own means of propulsion to assist the tug in their joint voyage. The tow can, by her helm, command, within limits, her direction of motion. She does, in fact, owe the maritime duty towards other vessels of using her helm and, under circumstances, her steam or other means of propulsion or control, so as to avoid collision. She is not, like cargo, a passive spectator of the manœuvres. She owes a duty to play a part in them, and is to blame if she plays a wrong part. In this I am not speaking of the responsibility of the tow for the conduct of the tug, but of her responsibility for her own conduct. Upon the principle which often applies, that the tug is the servant of the tow, the latter may be to blame for the acts of the former. Of this *The Ticonderoga* (*sup.*), where the collision was between a third vessel and the tow, is one example, and *The Niobe* (*sup.*), where the collision was between a third vessel and a tug, is another. *The Niobe* came up again (1891) A. C. 401) in an action against the underwriters upon the policy of insurance. In that instance the question of the meaning of the policy was, of course, involved. But the tow is not necessarily liable. If the governing as well as the motive power is wholly with the tug, the tow may not be liable in damages for the collision, even where the tow has herself been in collision with the third vessel: (see *The American and The Syria; The W. H. No.* 1, *sup.*). The last-mentioned case is instructive upon the existence in the tow, as distinguished from the tug, of duties of manœuvring by the use of her own helm. *The Quickstep* (15 P. D. 196) was again a collision between tug and third vessel. The County Court judge found the tug only to blame, but held tug and tow both liable. On appeal by the tug, and on appeal by the tow, the third vessel and the tug were pronounced both to blame, and the tow was held exempt from liability for the negligence of the tug. From these decisions it results, unless we are prepared to differ from them, that tug and tow are not necessarily one vessel, and that even a tow in collision may successfully say that not she, but the tug, was to blame. The proposition is easier when not the tow, but the tug, has been in collision, and the fault is with the tug. Of this *The Mary* (*sup*) is an instance. The tow was there not liable, because she was in charge of a compulsory pilot. The collision was between the tug and a third vessel. The tug was found alone to blame. It was held that she was not exonerated by the fact that the tow was in charge of a compulsory pilot, and judgment was given for the third vessel against the tug. If the collision had been between tow and third ship by the fault of those on board the tow, there is no difficulty. The tow is liable to the third ship for damage caused by those on board the tow.

From these considerations it is, I think, clear that if there are three floating bodies, tug, tow, and third ship, there are *primâ facie* three ships, and not two ships, for the purpose of investigating liability for collision between any two of the three, and that it is only under circumstances of which there are many illustrations in the books, that two out of the three—viz., tug and tow—are to be regarded as one vessel, so as to reduce the number of vessels constructively for purposes of liability from three to two. The appellants are not in a position to argue, and have not argued that, as a matter of fact, the tow was here to blame, for the judge has found her not to blame, and they have not sought to review his finding of

fact. They have sought to argue that, as matter of law, she is responsible for the wrongful acts of the tug. But this, I think, is not open to them. No part of the evidence has been brought before us. We have been invited to deal with the case upon the judgment alone, and upon the points of law involved in the judgment. It follows from what I have said that a tow is not, in my opinion, liable in law for the tug, merely because of the relation of tug and tow. Whether she is liable or not depends upon facts, and by finding the tow free from blame the learned judge must have found those relevant facts in favour of the tow.

The result thus far is that the right to damages is here to be considered upon the footing that there are three ships, and that the innocent ship has been injured by one of the two ships to blame: A innocent; B and C to blame. Collision between A and C. Is A entitled to recover from C whole or half damages? The origin and history of the Admiralty rule as to division of loss, as laid down in *Hay* v. *Le Neve* (2 Shaw's Scottish Appeals, 396) and subsequent cases, might form the subject of a treatise. If the case be one of collision between two ships, both to blame, the rule that each shall pay half the loss of the other may rest upon either of one of two principles, if it rests upon any principle at all: The one is that neither wrongdoer shall be rendered liable for more than his share of the injury. This, if adopted, would logically lead to proportional incidence of loss, a result which has prevailed in the maritime codes of other countries, but not of this country. The Admiralty Court has abandoned proportion and adopted equality. The rule is that, as both are to blame, a rough division shall prevail, and, as each caused some of the injury, each shall bear half the loss. It does not require much argument to show that in such a rule there is not much principle. The principle (if it be one) is a principle which looks at the misfortune from the wrongdoer's point of view and holds him free from liability, except to such fraction as is to be attributed to him, and arbitrarily fixes that fraction at one half. The other principle is that in a loss arising from a common fault equality of participation is justice. Mr. Leslie Scott urged the former strongly upon us, and said truly that this principle, if adopted as of application, not only to collision between two ships, both to blame, but also to all cases of collision, will furnish an explanation for the decisions that cargo (although innocent) is within the rule of division of loss—*The Milan* (*sup.*) —and that where one of two ships is in charge of a compulsory pilot she can recover but half damages, although not liable herself in damages at all: (*The Hector*, *sup.*). There are, I think, grounds for saying that it was upon such a principle that *The Milan* was decided. The judgment emphatically repudiates identification of cargo with ship, and proceeds, I think, upon that which is found in the concluding words of the judgment: "You, the innocent owners of cargo proceeding against one only of two delinquent ships, shall recover only half your damage, because we can affix to the vessel proceeded against only half the blame." But, on the other hand, if this be the principle which the Court of Admiralty has regarded as right, then it seems to me to follow that in the Admiralty Court a plaintiff who claims damages for personal injury not resulting in death, and an innocent third ship which suffers injury from the wrongful acts of two other ships, which are to blame, ought each to recover from either of the two wrong-doers but half his damages. In the former case, however, the plaintiff recovers full damages, although we have not been referred to any reported case in which his right so to do has been considered and affirmed, and in the latter there is express authority in *The Avon and Thomas Joliffe* (*sup.*) that at the suit of the innocent third ship each of the two ships to blame is liable for the whole. The last-mentioned case is open to review in this court, but I cannot see that the present appellant can succeed, and that case remain good law. It is true that the two ships to blame were tug and tow, but nothing turned upon that fact. Butt, J. decided the case upon the footing that the Admiralty rule as to apportionment (I prefer to say division) of damage where both vessels are to blame did not apply. The fact that where the injury results in death damages under Lord Campbell's Act are recoverable in full (*The Bernina*, *sup.*) does not assist the matter one way or the other, for the Court of Admiralty had no jurisdiction to entertain such an action, and the Judicature Act 1873, s. 25 (9), did not apply.

The second supposed principle, that in a loss arising from a common fault equality of participation is justice, is one which furnishes an explanation applicable in the case of two ships both to blame, but fails to explain any other case. This origin of the rule seems to be traceable in Sir William Scott's words in *The Lord Melville* (2 Shaw's Scottish Appeals, 402): "The ancient rule of the Admiralty was that it should be considered a common loss to which they (the two parties) were jointly (not justly) liable"; and in *The Woodroop Sims* (2 Dods, 85), "the loss must be apportioned between them as having been occasioned by the fault of both of them." Mr. Marsden says that "The principle of the rule is said to be equality in participation in a loss arising from a common fault." It is obvious, however, that this principle by its very terms is applicable only as between parties who are guilty of a common fault. To an innocent party it has no application. It cannot be that the Court of Admiralty applied to the case of an innocent cargo owner a principle which for its application required that he should be regarded as party to a common fault, unless it attributed to him a fault by identification. Identification, however, is expressly disclaimed in *The Milan.* The principle fails altogether to explain the case either of cargo or of compulsory pilotage, and contains within it nothing which can govern the case of a person who has been no party to a common fault.

Neither of these suggested principles being capable of satisfying a critical investigation, I should, even if the case with which I had to deal fell within the Judicature Act 1873, s. 25 (9), have hesitated to say that neither of them constituted a "rule hitherto in force in the Court of Admiralty." I agree that those words import not merely concrete cases, in which a particular course has been taken—*e.g.*, the particular case of cargo—but import a rule of which concrete cases furnish an illustration, and if I had to deal with a case within those words, I should look for a principle, and not confine myself to

looking for concrete cases. But it seems to me that sect. 25 (9) does not apply here. It is confined to the case of "collision between two ships, if both ships shall be found to have been in fault." The present is the case of a collision between two ships, of which only one has been found to be in fault. There was a third ship, which was also in fault, but she was not in collision. I am therefore left unfettered by the Judicature Act to say what is the liability of the *Devonshire* to the *Leslie*, when the *Leslie* was not to blame.

First, in principle: If A had suffered by the combined effect of wrongs done by B and C the case may differ according as B and C concur in doing one and the same wrongful act (*e.g.*, concur in assaulting A), or as B and C each do separate acts, with the result that from the combined effect of their separate negligent or unlawful acts A suffers injury (*e.g.*, where one omnibus negligently sets A down in the middle of the road, and another negligently runs over him). The present case is one of the latter kind. As between A, on the one hand, and between B and C on the other, why should not each be liable for the whole, although as between B and C, *inter se*, it may be just that each should only bear his share. This, which would be theoretical justice as between all parties, has at common law been defeated by the common-law rule forbidding contribution between tort feasors. But the common law did not, by reason of that fact, refrain from giving A that to which he, as an innocent party, was entitled. On principle it seems to me that A is entitled to recover the whole from either one, and is not to go unsatisfied because one of the tort feasors may be insolvent; or that at any rate, he is entitled to the whole from that one which did him the injury by in fact wrongfully coming into collision with him. At common law A would be entitled to recover the whole. Is there any tide of authority to show that he has not the same right in the Court of Admiralty? There are these authorities to show that he has: *The Avon and The Thomas Joliffe, The Englishman and The Australia* and *The Frankland* (*sup.*). We have not been referred to any authority to show that he has not. In this state of the authorities I feel myself at liberty to adopt the rule which seems to me to be right, and to hold that the innocent *Leslie* is entitled, as against the blameworthy *Devonshire*, which wrongfully collided with her, to recover, not half, but the whole of her damage; and I so hold. The result is that the appeal should, in my judgment, be dismissed, with costs.

This is my judgment in *The Seacombe*. The *Seacombe*, in my opinion, was to blame. Her duty was to keep her course and speed. By their preliminary act her owners stated that, after the *Dolly* was first seen, the engines of the *Seacombe* were slowed, and her helm starboarded. By par. 3 of their defence they stated that, having observed the tug and tow at a distance of about 500 yards, the *Seacombe* starboarded her helm, slowed her engines, and then stopped them. The owners of the *Dolly* called the master of the *Seacombe*, who stated that his order was "starboard, we will work astern of the flat," and that by starboarding he was going to get out of the way of the flat, and in cross-examination that he did not think it necessary to give that order so as to avoid a collision, and that he starboarded before the tug altered her course; and in re-examination that, inasmuch as the tug and tow showed no signs of going astern of him, he thought he would go astern of her, and, further, that he blew no helm signal. The *Seacombe* has no answer to these admissions on the pleadings and this evidence of her own master, except that some evidence called by the *Dolly* was to the effect that those on board the *Dolly* did not see the starboarding by the *Seacombe*. It is, in my opinion, really impossible to contend that upon these pleadings and this evidence the *Seacombe* was not to blame. This being so and the tug being also to blame, it remains to determine what are the rights of the owners of the tow, and the owners of the cargo and effects on board the tow, when no blame is attached to the tow as distinguished from the tug. I have discussed this point at length in my judgment in *The Devonshire*. It results that the appellant is, I think, entitled to succeed, and that judgment ought to be entered for the whole of their damages, with the costs of the action and of this appeal.

Solicitors for the appellants the *Devonshire*, *Collins, Robinson*, and *Co.*, Liverpool.

Solicitors for the respondents the barge *Leslie*, *Batesons, Warr*, and *Wimshurst*, Liverpool.

Solicitors for the appellants the barge *Dolly*, *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the respondents the *Seacombe*, *H. W. Cook*, Wallasey.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Nov. 1 *and* 6, 1911.

(Before Lord Coleridge, J.)

Jenkins v. Great Central Railway Company. (*a*)

Railway—Steamer—Bill of lading—Carriage wholly by sea—Exemption of liability for negligence—Validity—Railway and Canal Traffic Act 1854 (17 & 18 *Vict.* c. 31), s. 7—*Railways Clauses Act* 1863 (26 & 27 *Vict.* c. 92), ss. 30, 31.

By sect. 31 *of the Railways Clauses Act* 1863 *the provisions of the Railway and Canal Traffic Act* 1854 *are extended to the steam vessels of the railway company, and to the traffic carried on thereby.*

Therefore a railway company, whose private Act incorporates the Railways Clauses Act 1863, *is not protected by a condition in a bill of lading in respect of goods carried by them by sea only that they shall not be liable for the negligence of the master or mariners navigating their steam vessels, as such a condition is not reasonable.*

Action.

The plaintiffs, who are merchants at Belfast, dispatched goods by sea to Grimsby for carriage thence by sea by the defendants, by the steamship *Blackburn*, to consignees at Antwerp. Messrs. Sutcliffe and Son signed the bill of lading at Grimsby. It was contended by the plaintiffs that they signed the bill of lading as agents for the defendants, not as agents for the plaintiffs.

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

The bill of lading contained the following exception:

Any act, neglect, default, or error in judgment whatsoever of the pilot, master, or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted.

The steamship *Blackburn* sailed from Grimsby on the 7th Dec., and that night foundered owing to a collision for which both the *Blackburn* and the ship that collided with her were found to blame, and the goods were lost.

The question was whether the defendants were liable for the loss.

By their private Act—the Manchester, Sheffield, and Lincolnshire Railway Act 1864 (27 & 28 Vict. c. ccexx.)—the defendants were authorised to work steam and other vessels between Great Grimsby and (*inter alia*) Antwerp. Part 4 of the Railways Clauses Act 1863 was incorporated in that private Act.

By sect. 30 of the Railways Clauses Act 1863:

Where a railway company incorporated either before or after the passing of this Act is authorised (by a special Act hereafter passed and incorporating this part of this Act) to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working, steam vessels, then and in every such case tolls shall be at all times charged to all persons equally and after the same rate in respect of passengers conveyed in a like vessel passing between the same places under like circumstances; and no reduction or advance in the tolls shall be made in favour of or against any person using the steam vessels in consequence of his having travelled or being about to travel on the whole or any part of the company's railway, or not having travelled or not being about to travel on any part thereof, or in favour of or against any person using the railway in consequence of his having used or being about to use or his not having used or not being about to use the steam vessels, and where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway.

And by sect. 31:

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.

By sect. 7 of the Railway and Canal Traffic Act 1854:

Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof 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 animals, articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned—(that is to say) for any horse, fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge, and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute eleventh George Fourth and first William Fourth, chapter sixty-eight, and shall be binding upon such company in the manner herein mentioned: Provided also, that the proof of the value of such animals articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act of the eleventh George Fourth and first William Fourth, chapter sixty-eight, with respect to articles of the descriptions mentioned in the said Act.

Radcliffe, K.C. and *H. W. Liversidge* for the plaintiffs.

Sankey, K.C. and *H. M. Robertson* for the defendants.

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

Riggall v. *Great Central Railway*, 11 Asp. Mar. Law Cas. 303 (1909); 14 Com. Cas. 259;

Doolan v. *Midland Railway Company*, 37 L. T. Rep. 317; 2 App. Cas. 792;

The Stella, 9 Asp. Mar. Law Cas. 66; 82 L. T. Rep. 390; (1900) P. 162.

Nov. 6, 1911.—Lord COLERIDGE, J. read the following written judgment:—[His Lordship, after stating the facts, continued:] The first point is whether sect. 7 of the Railway and Canal Traffic Act 1854 applies, and whether the provisions in sect. 7 are applicable to the case.

It is said by the defendants that this section does not apply, and for this reason: The Railway and Canal Traffic Act 1854 only applied to land carriage and canal navigation, and this is neither.

Historically, dealing with this point, I come to the Railways Clauses Act of 1863, of which Part 4 applies to steam vessels, and sect. 31 enacts 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." That, therefore, makes the provisions of the Railway and Canal Traffic Act 1854 contained in sect. 7 applicable to the Railways Clauses Act 1863, which deals in Part 4 with steam vessels. Then by a private Act in 1864, the year after the Railways Clauses Act came into operation, the defendants, who were then the Manchester, Sheffield, and Lincolnshire Railway, by sect. 2 incorporated Part 4 of the Railways Clauses Act 1863 with the private Act, and it was made to form part of the private Act. If the matter rested there, no dispute could arise as to whether

or not the provisions of sect. 7 of the Railway and Canal Traffic Act 1854 were applicable to steam vessels, for by sect. 31 of the Act of 1863 those provisions were extended to that nature of carriage. The Act of 1863, however, was a Clauses Act not applicable generally, but only to such persons as chose to incorporate it, and thereby gain the benefit of its provisions.

Next in order of date came the Regulation of Railways Act 1868, which was a public Act of general application to railways, and by sect. 16 of that Act it was enacted 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." It therefore took the clause above quoted out of the Act of 1863 and embodied it in the Act of 1868. The identical clause to which I am referring then remained in both Acts.

I come to the next point. After 1868 came the Railway and Canal Traffic Act of 1888, and that repealed the above provision—namely, that portion of sect. 16 which I have quoted in the Act of 1868. What is the effect of that repeal? The identical clause remained at one time in both Acts; it remained in the private Act and it remained in the Act of 1868; it remained in the Act of 1863, applicable to those companies which incorporated that Act in their private Act, and it remained in the Act of 1868, applicable also to those which did not. Is the effect of this course of legislation to strike out of the defendants' private Act the incorporated clause from the Railways Clauses Act of 1863? I have had no authority quoted to me to show that the one is merged in or absorbed by the other. No authority has been quoted to me for the proposition that where a clause from a public Act has been incorporated with and forms part of a private Act, that part of the private Act is repealed by a subsequent repeal of the public Act.

A local and personal Act may incorporate into its clauses the provisions of a former Act although that former Act has been repealed (*Boden* v. *Smith*, 18 L. J. 121, C. P.), and the repeal of a statute does not repeal such portions of the statute as have been incorporated into another statute: (*Clarke* v. *Bradlaugh*, 46 L. T. Rep. 49; 8 Q. B. Div. 63). Nor in general is a local Act of Parliament, in the absence of any indication of intention on the part of the Legislature, repealed or superseded by a general Act subsequently passed: (*Fitzgerald* v. *Champneys*, 5 L. T. Rep. 233; 30 L. J. 777, Ch).

Here the Act of 1888 expressly repeals only the portion of sect. 16 of the Act of 1868 which was taken from sect. 31 of the Act of 1863. In the first place, sect. 31 of the Act of 1863 is not expressly repealed by the Act of 1888. It can only be said to be impliedly repealed because similar words in the Act of 1868 have been repealed. There is, therefore, no indication of intention on the part of the Legislature to repeal sect. 31 of the Act of 1863. It cannot be said that the reason is because sect. 31 of the Act of 1863 was already repealed by the Act of 1868. You do not repeal an Act by putting words from that Act into a later Act. I have already said that I can find no authority for the doctrine of merger or absorption, and under such circumstances I think the legal effect is to leave the defendants bound by the private Act and their incorporation into it of the Act of 1863 so far as it applies to this case.

Then it follows that the Railway and Canal Traffic Act 1854 is still in force, with the extension of sect. 7 of that Act to steam vessels under Part 4 of the Act of 1863. Does that include sea carriage *simpliciter*, or only carriage by sea where carriage by land forms one part of a continuous transit? I can see no valid ground in the statute for such a limited interpretation. Sect. 30 of the Act of 1863 contemplates carriage from port to port, and I can see no valid reason for putting so absurd a construction on the statute as to say it applies where the whole carriage except an infinitesimal portion is by sea, yet that infinitesimal portion of the carriage by land is necessary to make the Act apply.

On these grounds I must hold that sect. 7 of the Act of 1854, as enlarged by the Act of 1863, applies to carriage by sea only.

If so, are the conditions of the contract of carriage reasonable? It was not seriously contended that they were. Without giving an alternative rate, the defendants exempted themselves from all liability for damage due to their own negligence, and I do not think the conditions in the bill of lading binding on the plaintiffs. Whether Sutcliffes signed the bill of lading as agents for the plaintiffs or for the defendants, or for both, seems to me to be in this respect immaterial, but I have arrived at the conclusion that they were agents for the defendants at any rate. They so describe themselves on their note-paper, and they write on the 9th Jan. 1911 saying, "We say we do make the statement 'the ship is not responsible' as authorised agents of the railway company," and the plaintiffs do not pay any commission for their services to Messrs. Sutcliffe as forwarding agents.

Judgment for the plaintiffs.

Solicitors: *Leader, Plunkett,* and *Leader; D. H. Davies.*

Monday, Dec. 11, 1911.

(Before BRAY, J.)

DAMPSKEBSSELSKABET SKJOLDBORG AND C. K. HANSEN *v.* CHARLES CALDER AND CO. (a)

Charter-party—Cargo when signed for to be at ship's risk until shipped on board—"In all other respects the act of God," &c., excepted—Loss before cargo shipped on board—Liability of shipowner.

A charter-party contained the following clause: "The cargo to be ordered by the captain as required, and when signed for to be at ship's risk until shipped on board . . . but in all other respects the act of God, perils of the sea . . . are always mutually excepted." The cargo, consisting of sleepers, was brought alongside the vessel in rafts and a number of sleepers were lost after being signed for on behalf of the shipowner through certain excepted perils before they were shipped on board.

Held, that "at ship's risk" meant that the sleepers were at the absolute risk of the shipowner during the period between their being signed for and

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

being shipped on board, as the excepted perils did not apply to that period.

Commercial Court.

Action tried by Bray, J. sitting without a jury.

Action brought by the plaintiffs, the owners of the steamship *Skjoldborg*, to recover 22*l.* 3*s.* 9*d.*, balance of freight, from the defendants as receivers of a cargo of wood goods carried in the steamship *Skjoldborg* under two bills of lading dated the 31st Dec. 1910 and the 2nd Jan. 1911, which incorporated the terms of a charter-party dated the 31st Dec. 1911, made between the plaintiffs and the defendants, of which bills of lading the defendants were indorsees and to whom the property in the goods passed by such indorsement. In the alternative the plaintiffs claimed to recover the sum of 22*l.* 3*s.* 9*d.* as freight payable by the defendants under the charter-party.

By way of defence and counter-claim the defendants alleged that the plaintiffs short delivered fifty-two blocks and thirty-eight sleepers of the value of 22*l.* 3*s.* 9*d.*

The charter-party provided (*inter alia*) that the *Skjoldborg* should, with all convenient speed, proceed to Memel, and there load

A full and complete cargo of square fir sleeper blocks . . . and being so loaded shall therewith proceed to King's Dock, Swansea, and deliver the same in the customary manner. . . . The cargo to be ordered by captain as required, and when signed for to be at ship's risk until shipped on board, and to be delivered to the ship free alongside, as customary, and taken from alongside the ship at merchants risk and expense, but in all other respects, the act of God, perils of the sea, loss or damage from fire on board, in hulk, or craft, or on shore, damage howsoever or by whomsoever caused, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers and people, collisions, stranding, and accidents of navigation, strikes and (or) combinations of workmen, whether partial or general, are always mutually excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners, or of the charterers, or their stevedores or servants. . . . The freight to be paid in cash, on unloading and right delivery of cargo . . . less value of any goods lost or damaged. The bills of lading shall be conclusive evidence against the owners of the quantity of cargo shipped on board as stated therein; and in case of short delivery the owners shall produce the log book and an extended protest, showing the cause of such short delivery, before the balance of freight becomes due or payable.

The following facts were admitted:—

1. On the arrival of the vessel at the loading port, the sleepers mentioned in the bill of lading were brought alongside of her in rafts. The rafts were composed of 1000 to 2000 pieces and were secured by ropes.

2. Immediately after the sleepers were brought alongside, and before the loss hereinafter mentioned occurred, the sleepers were signed for on behalf of the shipowners, mate's receipts being given for them.

3. After the sleepers were brought alongside they were handled exclusively by stevedores employed by the shipowners' agent. The said stevedores were skilled and experienced persons, being well accustomed to the handling of wood cargoes.

4. At the time of loading the sleepers the weather was snowing and very stormy. There was a strong wind and a strong current running with ice drifts. In order to load the sleepers the lashings of the rafts had to be cast off, and in consequence of the wind and current some of the sleepers floated away and could not be recovered, and the remainder of the sleepers that were lost disappeared and could not be recovered.

5. The value of the sleepers that were lost amounted to 22*l.* 3*s.* 9*d.*, and this sum had been deducted by the defendants from the amount of the freight paid to the plaintiffs.

It was stated in evidence by the master of the *Skjoldborg* that some of the sleepers sank as soon as the rafts were unlashed, being too heavy to float; that other sleepers slipped out of the slings by which they were being hoisted on to the ship owing to their being very slimy from lying long in the water and from their being covered with ice and snow. Some of these sleepers came down with so much force into the water that they stuck in the mud at the bottom, and other sleepers were carried away by the current and lost. The master was unable to say how many sleepers were lost in respect of each of those classes.

Bray, J. held that the plaintiffs had not proved that any of the sleepers were lost because they were too heavy to float. The master signed the bills of lading under protest for sleepers lost during the loading.

Bailhache, K.C. and *Jowitt* for the defendants.—During the period between the signing for the goods and being shipped on board they are at the absolute risk of the ship. Having regard to the fact that the words "but in all other respects" come before the excepted perils, the exceptions can only apply to the voyage after the goods are shipped. The expression "at ship's risk" does not mean at the absolute risk of the shipowner, but at such risk as is attachable when the goods are on board:

Nottebohn v *Richter*, 18 Q. B. Div. 63.

In *Salvesen* v. *Gabriel* which is unreported except in the *Timber Trades Journal*, June 22, 1901, Mathew, J. held on the construction of a similar charter-party that the ship was responsible for goods lost during the loading and that none of the exceptions applied.

Maurice Hill, K.C. and *Dawson Miller* for the plaintiffs.—The risks for which the shipowner would be liable if there were no excepted perils is covered by the expression "at ship's risk." The words "but in all other respects" which come before the excepted perils do not prevent the common law exception for "act of God" from applying. The sleepers were lost by natural causes and therefore come within the common law exception of "act of God." In *Nugent* v. *Smith* (3 Asp. Mar. Law Cas. 87, 198 (1876); 34 L. T. Rep. 827; 1 C. P. Div. 423) James, L.J. said: "The 'act of God' is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not be prevented by any amount of human foresight and pains and care reasonably to be expected from him."

Bray, J.—In this case the plaintiffs, in my opinion, are not entitled to recover. The first

thing I have to do is to construe this charter-party, and I do not find any difficulty in doing so. It is quite true that but for the words "but in all other respects the act of God, &c.," I might have to construe the words "at ship's risk" differently from what I propose to do. The charter-party provides that the cargo when signed for is "to be at ship's risk" until shipped; those words are certainly quite capable of meaning that the ship is responsible for anything which may happen during that period. The words, however, do not necessarily bear that meaning, so that I must look at the rest of the clause in order to see whether in fact they do bear that meaning. But when I find that the clause goes on to provide "but in all other respects the act of God, the perils of the seas . . . are always mutually excepted," then I am obliged to come to the conclusion that the earlier part of the clause does mean that the goods, when signed for, are "to be at ship's risk" until shipped in the sense that the ship is to be responsible for anything which may happen during the period between the time when the goods are signed for and when they are shipped. That clause, therefore, deals with perils of the seas and any such act of God, if there was any such act, as occurred here. The loss was not caused by an extraordinary storm; there was nothing more than an ordinary storm coupled with frost which, I expect, always happens at Memel at this period of the year. I can quite understand that the loading of the sleepers is a very difficult matter, and that is why the parties when they entered into the agreement provided that the loading should be undertaken by the ship, and that the ship was to be responsible for anything that might happen during the loading. The shipowner could protect himself if the weather was too rough or too dangerous to continue loading by the captain refusing to proceed with the loading, but, of course, in that case the shipowner runs the risk of his ship being delayed, and, therefore, one can quite well understand why it pays him to run a certain risk. My interpretation of the words "at ship's risk" is that the shipowner is to be responsible for everything that happens during the loading; but that they do not make him responsible for a loss which is really the fault of the shipper, and, therefore, if I could see that the plaintiffs had proved that the sleepers were lost because they would not float, I should say that to that extent the ship was not responsible, but, looking at the evidence given on behalf of the plaintiffs, I am unable to come to that conclusion. There must therefore be judgment for the defendants.

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

Solicitors for the defendants, *Trinder, Capron,* and *Co.*

Dec. 12, 13, *and* 19, 1911.

(Before BRAY, J.)

HALL *v.* HAYMAN. (a)

Marine insurance—Constructive total loss—Cost of repair—Value of wreck—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 60, 91 (2).

By reason of the provision contained in sub-sect. 2 (*ii.*) *of sect.* 60 *of the Marine Insurance Act* 1906, *there is a constructive total loss of a ship where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.*

The effect of the section is to alter the law as laid down by the House of Lords in Macbeth v. Maritime Insurance Company Limited (11 *Asp. Mar. Law Cas.* 52; 98 *L. T. Rep.* 594; (1908) *A. C.* 144).

For the purpose of determining whether a ship can be treated as a constructive total loss within the meaning of the above Act, the value of the wreck cannot be taken into consideration, and the assured is not entitled to add the value of the wreck to the cost of repairs.

COMMERCIAL COURT.

Action tried by Bray, J. sitting without a jury.

The case set up in the pleadings by the plaintiffs was that by a policy of marine insurance dated the 30th June 1908 Mr. James Holliday, the owner of the *King Edward*, insured the vessel for fourteen months from the 23rd May 1908 against all the usual perils. The policy was for 5000*l.* upon the steamer, which was valued at 34,000 dollars, and it was underwritten by the plaintiffs for 1313*l.*

The plaintiffs reinsured themselves by a policy dated the 31st July 1908, for 1044*l.*, upon the *King Edward*, for twelve months from the 13th May 1908. This policy was expressed to be a reinsurance of the original policy, and to pay as may be paid thereon; was on a steamer valued at 34,000 dollars, and was against the risk of total or constructive total loss only.

On or about the 16th Nov. 1908 the *King Edward* was driven ashore by a gale at English Bay, Anticosti, and on the 12th March 1909 Mr. Holliday gave notice of abandonment to the plaintiffs.

On the 25th March 1909 he issued a writ against the plaintiffs, claiming for total loss under the policy. Subsequently the *King Edward* was floated by salvors employed by the Salvage Association on behalf of the plaintiffs and other underwriters, and was brought to Quebec. The ship proved to be a total constructive loss by reason of the fact that the cost of repairing her, plus the cost of salvage and other expenses, and plus the value of the unrepaired wreck, would exceed the repaired value, or, alternatively, the insured value of 34,000 dollars. The plaintiffs paid Mr. Holliday 90 per cent. of their subscriptions under the insurance policy, and also paid to the Salvage Association in respect of the expenses incurred a further sum amounting to more than 10 per cent. of the subscriptions.

The plaintiffs pleaded that in the circumstances the defendant became liable to pay to the plaintiffs a total loss on the policy taken out by them, and

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that they were asked to do so on the 14th Oct. 1909, but refused.

By his defence, the defendant asserted that the policy subscribed by him was against the risk of total and (or) constructive total loss only, no claim to attach thereto for salvage charges, and it provided that the insured value should be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. The *King Edward* was not a constructive total loss, and the defendant denied that he became liable to the plaintiffs. The defendant further said that the *King Edward* was not a wreck, and that the value of the vessel should not be added.

In the plaintiffs' particulars it was stated that the repaired or insured value was 34,000 dollars, while the cost of repairs, salvage charges, &c., amounted to 37,733 dollars, to which they added the value of the wreck—viz., 14,000 dollars, the total being thus 51,733 dollars.

The following were the material sections of the Marine Insurance Act 1906 to which reference was made:

Sect. 60 (1). Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure has been incurred. (2) In particular, there is a constructive total loss (i.) where the assured is deprived of the possession of his ship or goods by a peril insured against and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or (ii.) in the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations, and of any future general average contributions to which the ship would be liable if repaired.

Sect. 91 (2). The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

Bailhache, K.C. and *Mackinnon* for the plaintiffs.—In determining whether there has been a constructive total loss of the vessel the value of the wreck must be added to the cost of repairs. It was decided in *Angel* v. *Merchants' Marine Insurance Company* (9 Asp. Mar. Law Cas. 406; 88 L. T. Rep. 717; (1903) 1 K. B. 811) that the value of the wreck ought not to be added to the cost of repairs, but prior to that decision it had been decided that the value of the wreck should be added to the cost of repairs:

Young v. *Turing*, (1841) 2 Man. & G. 593;
Marten v. *Sydney Lloyds*, *Times* Dec. 19, 1896;
Beaver Line v. *London and Provincial Marine Insurance Company*, (1899) 5 Com. Cas. 269;
Wild Rose Steamship Company v. *Jupe*, (1903) 19 Times L. Rep. 289.

In *Macbeth* v. *Maritime Insurance Company* (*sup.*), which arose before but was decided after the passing of the Marine Insurance Act 1906, the case of *Angel* v. *Merchants' Marine Insurance Company* (*sup.*) was overruled. It follows, therefore, that at common law the value of the wreck must be added to the cost of repairs. Sect. 60 of the Marine Insurance Act 1906 is silent on the point, and there would be no inconsistency in applying the common law rule as laid down in *Macbeth* v. *Maritime Insurance Company* (*sup.*) to marine insurance contracts. In that case Lord Collins, referring to the wreck, said that: "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 entirety which is to be formed by the process of reparation?" The prudent uninsured owner would certainly take the value of the wreck into account, and that common law rule is imported into marine insurance contracts by sect. 91 (2) of the Marine Insurance Act 1906.

Maurice Hill, K.C. and *Leck* for the defendant.—The value of the wreck ought not to be taken into account in determining whether a vessel is a constructive total loss. Prior to the Marine Insurance Act 1906, there were two tests as to whether a vessel was a constructive total loss: (1) whether a prudent insured owner would repair her, having regard to all the circumstances; and (2) whether the cost of repairs would exceed her value when repaired. These tests were distinguished by Lord Loreburn, L.C. in *Macbeth* v. *Maritime Insurance Company* (*sup.*), where he says that if it were an open matter there seemed to him ground for arguing that the latter is the sound view. The Court of Appeal in *Angel* v. *Merchants' Marine Insurance* (*sup.*) chose the test as to the cost of repairs exceeding the value of the ship when repaired, and that test is now embodied in sect. 60 of the Marine Insurance Act 1906, and it follows that the value of the wreck ought not to be taken into account. In sect. 60 (1) the word "expenditure" suggests an expenditure of money, and the value of the wreck is not an expenditure. The test laid down in sect. 60 (2) (ii.) is that there is a constructive total loss of the ship where the cost of repairing the damage would exceed her value when repaired. The clause proceeds to state what may be included in the cost of repairing the damage, and the value of the wreck is not specified. The observations of Lord Collins in *Macbeth* v. *Maritime Insurance Company* (*sup.*) proceeded on the reasoning that the test of the prudent uninsured owner and the test of the cost of repairs are really the same, and with this view Lord Loreburn, C. did not agree. As sect. 60 of the Act is clear and unambiguous, the common law as laid down in *Macbeth* v. *Maritime Insurance Company* (*sup.*) does not apply, because sect. 91 (2) provides that the common law rules only apply where they are consistent with the express provisions of the Act. Lord Herschell in *Vagliano* v. *Bank of England* (61 L. T. Rep. 419; (1891) A. C. 107, at pp. 144, 145) stated that in such cases it was necessary to examine the language of a codifying statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law. He then stated that where a statute contained a provision of doubtful intent, resort might be had to the previous state of the law for the purpose of aid in the construction of the code. There is nothing ambiguous

in sect. 60 of the Act of 1906, and therefore as its provisions are inconsistent with *Macbeth* v. *Maritime Insurance Company* (*sup.*), the statutory provisions must prevail, and it follows that the value of the wreck must not be taken into consideration.

Bailhache in reply.

Cur. adv. vult.

BRAY, J.—In this case the plaintiffs claimed under a reinsurance policy dated the 31st July. The original policy was dated the 30th June, and was an insurance on the ship *King Edward* for twelve months. It was an insurance which covered not only total loss, but, under particular circumstances, partial loss also, and it did not contain any clause with reference to the repaired value being taken as the insured value. The plaintiffs paid on that policy as on a total loss, and they sought to recover that amount from the underwriters under the reinsurance policy. The reinsurance policy contained a clause that the repaired value was to be taken as the insured value; the insured value in this case was 34,000 dollars. It was a policy against total loss only, of course either actual or constructive. There was also a clause with reference to salvage. The plaintiffs had to prove, first of all, not only that they paid the shipowner under the original policy, but that they were liable to pay; and, secondly, they had to prove not only that there was a constructive total loss under the first policy, but that there was a constructive total loss under the second policy, which contained the clause that the insured value was to be taken as the repaired value.

The first thing they would have to prove would be that notice of abandonment was given, because it is not suggested that this was an actual total loss; that the notice of abandonment was given by the shipowner to the plaintiffs, the original underwriters. That point, I considered, was not raised by the defendant upon the pleadings as they stood, but I thought that under the circumstances I ought to allow them to amend, of course, allowing the plaintiffs to make any necessary amendment in their reply or in their original statement of claim in consequence of the new defence being raised. I am not quite sure whether I was right in allowing an amendment, and if this case goes to the Court of Appeal I should like them to exercise their judgment and say whether I was right or wrong. However, I have got to treat it as upon the footing that the new notice of abandonment was put in issue. In their statement of claim the plaintiffs alleged that notice of abandonment was given on the 12th March, and there was undoubtedly a notice given on that date, but it was practically conceded by the plaintiffs that that notice was too late, and they sought to rely upon a notice given on the receipt in this country, or soon after a receipt in this country, of a letter dated the 9th Dec. The evidence was not very satisfactory upon that point—first, because nobody could be called who had been to the underwriters with that letter of the 9th Dec. The persons who had given, on behalf of Messrs. Sedgwick and Co., who in that matter were acting under the instructions of the shipowner, the notice were no longer in their service, and their attendance could not be procured. There was a letter dated the 24th Dec. which was relied upon as sufficient evidence that, at all events, some notice was given to the underwriters. There had been an order in this case that the letters should not be merely evidence of themselves, but should be evidence of the facts referred to. The letter was in these words: "Reverting to your letter of the 9th inst., we beg to advise you that we have presented this claim to the leading insurance companies for payment, but they tell us that they have received advices through the Salvage Association that the vessel is ashore in a very comfortable position, and that there will be no difficulty in her getting off in the spring. In these circumstances they decline to pay as for a total loss, and we accordingly await your further advices on the subject." I think I am entitled, therefore, under the order that was made to treat that as evidence that, at all events, some notice was given to the underwriters. There was also some evidence that the practice would be to submit any papers that they got, and, amongst others, the letter of the 9th Dec., and I think I ought to accept it that the substance, either the letter itself or the facts contained in that letter of the 9th Dec. was communicated to the underwriters.

One point that I have to decide—and it is not a simple one—is whether under the Marine Insurance Act, supposing Sedgwick and Co. did, in fact, communicate to the underwriters the substance of what is there stated, that was a good notice of abandonment. Sect. 62 (2) of the Marine Insurance Act provides: "Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer." It need not, therefore, be in writing; it need not be in any specified form; it need not contain any direct statement of abandonment; it is sufficient if it implies it, or if an underwriter receiving it ought to infer that the shipowner has decided to abandon the vessel. A total loss was claimed; that fact alone, I think, is not sufficient; but when I look at the terms of this letter, which I will not read now, and the fact that the underwriters, so far as one can see, never raised the question at any time that no sufficient notice of abandonment had been given, I think, although there is some doubt, I ought to take this letter as sufficient intimation that the assured had decided to abandon the vessel to the underwriters. I must take into consideration not only this letter, but what had gone before, the information which the underwriters had received and what happened afterwards; and, taking all those matters into consideration, I find a sufficient notice of abandonment was given on the 9th Dec. If it was given on the 9th Dec. it was not really contested that that was not in time. Up to that time sufficiently full information had not been received by the assured. He had received that on the 7th Dec., and he wrote on the 9th Dec., or rather his brokers wrote, to the broker in London, and the notice would be given of course not by the receipt of this letter, but by the communication in London after this letter arrived in London. I find that issue, therefore, in favour of the plaintiffs.

There is no doubt that there was a constructive total loss within the original policy; the difficulty is whether there was a constructive total loss

within the reinsurance policy. It is claimed that there was a constructive total loss under both branches of sect. 60 (2) which says this: "In particular there is a constructive total loss (1) where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered." Mr. Bailhache contended that the assured was deprived of the possession, and that it was unlikely that he could recover the ship. That, of course, is a question of fact. I assume that he was deprived of the possession of the ship, it was ashore, and by the 9th Dec. it was quite plain that it could not be removed for a considerable number of months—it could not be removed until the spring. That would not be, perhaps, a serious matter, because the ship was apparently not to be used after the 30th Nov. until the river St. Lawrence reopened on account of the ice; but still I think I must take it that the shipowner was deprived of possession.

Was it unlikely that the shipowner could recover his ship? That was for the plaintiff to prove. In the letter of the 25th Nov. from Fry to Lowrey he says: "If ice forms on the bay before storms seriously increase the injury to vessel, the general opinion is that she will winter safely, and if such proves to be the case, we hope to have her afloat and in the harbour next spring, under a 'No cure no pay' contract." After that date there was a storm, and, in fact, the vessel was not damaged by that storm; and I learn from the letter of the 7th Dec. this: "During the past four days our temperature has been zero to 10 degrees below, or 30 to 40 degrees of frost, so that we conclude she is now firmly and securely frozen in for the winter, in which case gales or seas will not have any effect upon her. On the north shore of our Gulf the ice breaks up much later than along the south shore, so that salvage operations cannot be commenced before about the 1st May next. Meantime we will communicate with salvage contractors, in accordance with your request, and write you on the subject at a later date. The owners will be placed in a very awkward position without a steamer to prosecute their coasting trade and mail service next spring under their contract with our Government. They are much disappointed, as their calculations were she would become a total loss, and with insurance funds purchase another steamer this winter." I have got a little more evidence, but it is impossible for me to find, under the circumstances, that the plaintiff had proved that the shipowner was unlikely to recover his ship. It was not contended that the cost of recovering the ship would exceed her value when recovered, and I shall have to deal with the figures later, but I think it is pretty plain that there would be a slight surplus. The value of the ship, not the repaired value, turned out to be 14,000 dollars, or somewhat more than the actual expense of recovering her. Therefore it seems to me that the plaintiff's claim, so far as it rests on sect. 60, sub-sect. 2 (i.), fails.

Then the next question is, whether there is a constructive total loss under sub-sect. 2 (ii.): "In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired." I shall come to that later.

I now take the figures that I have before me and deal with them. The first salvage is 1830 dollars. That was the attempt that was made to salve her between the date of stranding, the 16th Nov., and the date the 9th Dec.; in fact, it was made very soon after the ship stranded, and it was a failure. It is said that I ought to allow that nevertheless. Mr. Bailhache conceded that if that had been done by the shipowner, he could not have claimed that as part of the repairs, because they were not future salvage operations, but he said it had in fact been done by the underwriters, and therefore I ought to include it. I do not see that. In estimating the cost of repairs, I do not think I have anything to do with the underwriters. It is all upon the assumption as to what a prudent uninsured owner would do, and I have got to see whether on the 9th Dec. the cost of the repairs, as stated in the Act, including those items which are mentioned in the Act, would or would not exceed the value when repaired. I cannot take into consideration anything that was done before, which, as a matter of fact, neither improved the position nor worsened it. Therefore I cannot allow 1830 dollars.

The next is the second salvage operation, which took place at the beginning of May. The Salvage Association, or Messrs. Fry acting for them, tried to make a "No cure no pay" contract. They could not succeed in doing that; I think they did their best, but they made a contract with Messrs. Davie under which they were to pay 2000 dollars in any event, but in case of success they were to pay 40 per cent. of the value when recovered. Those operations were a failure, but the 2000 dollars was paid. It is said that those operations were carelessly performed; that a failure should have been anticipated: and that it was not a reasonable expense. I do not agree with that at all. The ship was in a very difficult position, and you cannot tell at once which is the best way to deal with it. It seems to me that that is a reasonable and proper expense to be allowed, so I allow 2000 dollars. Now there is, practically speaking, no dispute I must allow 9800 dollars. Messrs. Fry made the best contract they could. It was a "No cure no pay" contract, and in case of success they were to pay 70 per cent. of her value when she reached Quebec. Those operations were successful, and they paid or allowed in account the sum of 9800 dollars: that must be allowed. The next is charges on materials and stores landed at Anticosti. Anticosti is the place where the vessel stranded, and it was thought advisable, prudent, and proper to take the removable outfit from the ship and have it properly stored and watched. That seems to me a prudent and necessary course to have taken, and forms part of the cost of the salvage operations in recovering the ship. I think I must allow that, both the 458 dollars and the 109 dollars. The next item is agency cables, &c. First, with regard to cables, the cables were mainly between Messrs. Fry at Quebec and this country. They were communications made between them on behalf of the Salvage Association and the underwriters. I do not think I ought to allow those, because what I have got to consider is what the shipowner would have to expend in order to recover and repair the vessel The shipowner was in Canada himself, and very

little expense of cabling would have been sufficient. Therefore I could only allow a very small portion of that at the most. It is conceded that the commission on advances ought not to be allowed. Then there is a claim for the services of Messrs. Fry amounting to 800 dollars. I must knock off, at all events, part of that, certainly all that took place before the 9th Dec. It seems to me a large sum, and I think if I allow 500 dollars for the work, including any letters or cables of that kind, I am allowing sufficient. Therefore, in respect of that 1288 dollars I allow 500 dollars.

I come now to the repairs to the vessel. They were estimated at 15,700 dollars, and it is not denied that that sum must be allowed, but the plaintiffs are claiming more. They say that those repairs provided only for scarfing the stern-post, and scarfing the stern-post would not be a good job. They further say that the specification did not include any damage which it might be found that the engines or boilers had received, and it was reasonably certain that they would have had some damage from corrosion and other causes, and additional expense would be incurred in consequence of that, and they claim 4300 dollars. I am in a difficulty as to this item, because the evidence is so slender upon it. The ship was eventually repaired, the boilers and machinery were inspected, and there would have been no difficulty in procuring evidence as to what, in fact, had been done and what additional expense had been incurred. The persons who repaired the vessel were Messrs. Davie, and the defendants produced an affidavit by Messrs. Davie which did not refer to this at all. Messrs. Davie must have known, and at first I was inclined to think that that was very strong indeed against the defendants, and almost sufficient to lead me to the inference that very considerable additional expense was incurred; but then it was pointed out to me that the plaintiffs produced an affidavit by Mr. Samson, Lloyd's surveyor, who himself says in his affidavit that he superintended the repairs, and he would know equally. So that the plaintiffs have brought into court, as it were, a witness and have not asked him a single question about that. I offered the parties, if either of them chose, to adjourn the case for further evidence; however, they both elected not to call any further evidence. I am left, therefore, in a very difficult position, and I have to do something which is very like guessing. I must guess as well as I can, always bearing in mind that it is for the plaintiffs to prove their case. I am satisfied — in fact, the evidence was clear upon that point—that mere scarfing, although it would make the ship seaworthy, would not make the ship as good a ship as she was before. I think, when I am dealing with the question of the insured value being taken as the repaired value, the ship must be taken as repaired so as to be practically as good a ship as she was before. It is practically conceded that the scarfing would not be as good; but then what would? It was said that a new stern-post was necessary, but a witness who was called for the plaintiffs and a witness who was called for the defendants admitted that welding would have made a sufficiently good job, and that the mere welding would probably not cost more than the scarfing; but it was said for the plaintiffs by this witness that it was quite plain that they could not do welding except at increased expense, otherwise they would have so provided. I have come to the conclusion that on that point I ought to accept the evidence of the plaintiffs' witness, and that I ought to allow some sum; but what sum? I do not think I ought to allow any large sum; I think if I allow 500 dollars for that, that is quite sufficient.

As regards the machinery, there I am almost in a worse position, and I certainly must not allow the plaintiffs any large sum. I am satisfied that there would have been some additional expenditure, but I do not think I really ought to put it higher than 500 dollars, so that the effect of it is that I allow 1000 dollars in respect of the claim of 4200 dollars. The outfit was estimated at 1500 dollars—that is, the expense of putting the outfit in order. I have got an affidavit by Mr. Fry, without any particulars or any means of testing it, that it would be 1000 dollars. That is obviously very vague, and I find from the correspondence that it seemed to be estimated at the time at about 500 dollars. I do not think I ought to allow more than 500 dollars. Now we come to the survey fees, and the question there is whether I am to allow the three sums or only two sums. Mr. Russell was the surveyor for the owner, Mr. Black was the surveyor for the underwriters, and it is said I ought not to allow two fees. If I am to estimate what the cost of repairing is, I have only to look at the expense which the owner would have incurred. The underwriters might, if they liked, employ a surveyor, but I have not to consider that. What I have to consider is what would it cost an owner to repair, and under the circumstances it seems to me I ought only to allow one surveyor. That will be 250 dollars, or 248 dollars the actual figure. I think I ought to allow the further fees for the repairs, because they clearly would be necessary, 250 dollars more, so I allow in respect of that 498 dollars.

Now, I add up those figures, and, if I recollect right, I find they come to 30,500 dollars. That falls short, of course, of the 34,000 dollars, the insured value, but it is said I ought to add to that the value of the wreck—that is, the value of the wreck on the 9th Dec. That depends on the true construction of the Marine Insurance Act, and I have got to consider two sections, sect. 60, which I will deal with more particularly presently, and sect. 91 (2), which provides: "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance." It was laid down by Lord Herschell, also dealing with a code—the code of the law with reference to bills of exchange—that one ought to look at the Act first, and if you find that there is no ambiguity, that the words are clear, and that they are inconsistent with the common law, then that plain interpretation must be followed. Sect. 60 first of all by sub-sect. 1 says this: "Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred." It seems to me the word "expenditure" is a perfectly plain word, and

I cannot construe it as including the value of the wreck. It is expenditure, no doubt, by the owner, but the value of the wreck is not an expenditure by the owner. It was said that I ought to look at what Lord Collins said in giving judgment in *Macbeth* v. *Maritime Insurance Company* (*sup.*). But Lord Collins was not construing the statute; he was endeavouring to reconcile certain decisions and certain language which had been used by the judges, to make that language consistent with the decision which he was giving. You do not look at the words used by a judge in the same way as you look at the words which are put down after very great consideration in a statute. Further, the words of Lord Collins referred to were mainly restoration and repair—totally different words. None of the other Lords took the same view that Lord Collins did; on the contrary, they seem to have taken the other view, that there were two distinct and separate sets of decisions, one one way, and one the other. Therefore, it seems to me that I must construe this word "expenditure" as being expenditure and nothing else.

But I have also got, undoubtedly, to look at the words in sub-sect. 2 in the second branch of it: "In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired." I cannot come to the conclusion that there is any ambiguity about these words at all. Then: "In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations, and of any future general average contributions to which the ship would be liable if repaired." It seems to me that this section is plain. It is inconsistent with what is now admitted to have been the common law or the law merchant before, because it has now been decided by the House of Lords since the passing of this Act that, with reference to a wreck that had occurred before it came into operation, according to the common law the value of the wreck should be included in the calculation that I am making; but, as I have said, I have come to the conclusion that the words of the statute are inconsistent with that, and, therefore, I have no right to import the common law. It is very unfortunate; it is one of the consequences that sometimes happens as the result of codifying the law, which is a very difficult process. It certainly is unfortunate, because I do not suppose that those who were the authors of this Act thought that they were repealing the common law. The truth is that the decision in the case of *Angel* v. *Merchants' Marine Insurance Company* (*sup.*) had been given in 1903, only three years before this, where the opposite view had been taken, and the result was that in the statute the Legislature took the opposite view, and it may be that it will be necessary in all future cases of insurance for shipowners to stipulate—they can get out of the statute in that way, because it is all subject to any express provisions in the policy—that the value of the wreck shall be included in the valuation, just in the same way that underwriters have insisted upon putting in in many cases that the insured value shall be taken as the repaired value, a very proper provision. If it is found for the interest of shipowners and underwriters generally that an alteration should be made in policies, so as to exclude the effect of this sect. 60, they can do it, and they must do it. I ought to have said that I construed the Act without looking at what had happened before; but if I had looked at what happened before I think I should have found my task still easier, because Lord Loreburn, in *Macbeth* v. *Maritime Insurance Company*, points out this. He says: "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. 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."

Therefore I must decide that the value of the wreck cannot be taken into consideration. But perhaps I ought to express my opinion as to what the value of the wreck was. I do not see how I could put it higher than 3000 dollars. Mr. Fry in his affidavit puts it in November at from 2000 dollars to 3000 dollars. In December, owing to the fact that the ship had sustained no further loss because it became embedded in the ice, it would be worth a little more, and therefore I ought to take the higher value; but I cannot see for myself how I could put a higher value than 3000 dollars. The value which I ought to put upon it, it seems to me, ought to be the break-up value; that is the proper value to put upon it. I do not think I could put it higher than 3000 dollars, although I really have had very little evidence which would enable me to do that, but such evidence as I have would enable me to put it as high. As this matter will probably go to the Court of Appeal, I thought I ought to express my opinion. The result of it is that I find in fact that there was no constructive total loss within the reinsurance policy, and, therefore, the claim must fail. There must be judgment for the defendants, with costs.

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

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Nov. 13, 1911.

(Before Sir S. EVANS, President, and Elder Brethren).

THE MONICA. (a)

Collision — Practice — Lights — Preliminary act — Form of answer—Order XIX., r. 28.

Order XIX., r. 28, of the Rules of the Supreme Court 1883 *directs that in actions for damage by collision between vessels, the plaintiff and defendant are to file with the registrar a document to be called a preliminary act, which, among other information, is to contain the following statements concerning the lights seen on the vessel collided with : " (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." The defendants' preliminary act contained the following statements in answer to (k) : " The masthead, towing, and both side lights of the* Tavistock *" ; and in answer to (l), " None." In fact the master of the defendants' vessel, after seeing all the lights on the plaintiffs' vessel, saw the green light shut in, leaving the red open alone, and then the red was shut in and the green light alone left open.*

Observation by the President : It is desirable that practitioners should state, in answer to par. (l) in the Preliminary Act Forms in Collision Actions, the lights in the sense of the combination of lights seen on the other vessel and the alterations therein.

DAMAGE ACTION.

The plaintiffs were the owners of the dumb barge *C. I. V.*; the defendants were the owners of the steamship *Monica*.

The case made by the plaintiffs was that the *C. I. V.* was with five other barges in tow of the tug *Tavistock* proceeding up the Thames, when she saw, about half a mile off and about one point on the starboard bow of the *Tavistock*, the masthead and green lights of the *Monica*, which was coming down river well over to the north shore. The *Tavistock*, which was under slight starboard helm, sounded two short blasts. The *Monica* replied with two short blasts, and the *Tavistock* kept on, shaping with her craft to pass the *Monica* all clear, starboard side to starboard side. The *Monica* passed the *Tavistock* all clear, but, after doing so, sheered to starboard as if under port helm, causing danger of collision with the craft in tow of the *Tavistock*, and, coming on at high speed and opening her red light to the *C. I. V.*, with her stem and starboard bow struck the starboard bow of the *C. I. V.*, breaking her adrift and doing her such damage that she shortly afterwards sank.

The case made by the defendants was that the *Monica* was proceeding down the river, heading straight down Blackwall Reach, making about nine knots, when those on board her saw, three-quarters of a mile off and about ahead and on the port bow withal, the masthead, towing, and both side lights of the *Tavistock*; that shortly after the lights of the *Tavistock* were sighted the engines of the *Monica* were eased to slow, and shortly afterwards, as the *Tavistock* continued to approach, the whistle of the *Monica* was sounded one short blast and her helm was ported a little, and when the *Tavistock* sounded two short blasts the engines of the *Monica* were stopped and put full speed astern, her whistle being sounded three short blasts and her helm steadied, but the *Tavistock*, acting under a starboard helm, came on at considerable speed across the bow of the *Monica*, and, although she cleared the *Monica*, she caused the *C. I. V.* to strike with her starboard side the stem of the *Monica*.

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

Bateson, K.C. and *D. Stephens* for the defendants.

While the master of the *Monica* was being examined, he was asked whether he had seen any alteration in the lights of the *Tavistock*.

The PRESIDENT.—The preliminary act filed on his behalf says he saw none.

Bateson, K.C.—That is the ordinary form of answer. When all the lights that are carried by a vessel are seen when the vessel is first sighted, no other lights could come into view. The article referred to only applies to different lights being seen, and not to changes in lights already seen. [The PRESIDENT. — The practice is obviously wrong.] It has existed for a considerable time. [The PRESIDENT.—In future I shall expect that if there is any difference in the condition or position of the lights it shall be stated. In the present case it ought to be put in this form: Afterwards the green was shut in, showing the red only; afterwards the red was shut in, showing the green only.]

The PRESIDENT in giving judgment dealt with the facts of the case, and found the *Monica* alone to blame for porting into the barge *C. I. V.*, and then continued: I want to say a word in this case about pars. (*k*) and (*l*) of the preliminary act. After the explanation that was given by counsel for the defendants as to the practice in pleading, I have not drawn any conclusion from the answer which was given to par. (*l*) adverse to the defendants in this particular case. The observation I am going to make is a perfectly general one. Par. (*k*) requires the parties to state " the lights (if any) of the other vessel which were first seen." Par. (*l*) requires a statement as to " whether any lights of the other vessel, other than those first seen, came into view before the collision." The answer of the defendants here to par. (*k*) is that they first saw " the masthead, towing, and both side lights of the *Tavistock* "—that is to say, all the lights—and that is accurate. Then to the question in (*l*), if it can properly be called a question, " Whether any lights of the other vessel, other than those first seen, came into view before the collision," the answer is " None." The evidence was that, having seen all four lights at first, the defendants afterwards saw only the red—that is to say, the green was shut in and the masthead—and a little afterwards they saw only the green, the red having been shut in. In a sense, it is quite right to say that they saw no other light, because they had seen all the possible lights that could be seen first, but I cannot believe, whatever the practice has been, that the intention was to answer it in that way. I do not think the question

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

need be altered at all, in order that the view may be acted upon. My view is that the intention in par. (*l*) was that the combination of lights should be stated. Let me just put a case. Supposing the first lights had been the masthead and green, and that afterwards there had been seen the masthead and red. I do not think it would be right in answer to par. (*l*) to say "red" simply; it ought to be "masthead and red." Illustrating it from the evidence in this case, the defendants ought to have said that, having first seen the masthead and both side lights of the *Tavistock*, they afterwards saw the masthead and red only, and then the masthead and green only; that would have indicated to everybody what the situation was, so far as their observation of the defendants' vessel was.

Therefore, whatever the practice has been, I should like very much if the practitioners hereafter would indicate in par. (*l*) the lights, in the sense of the combination of lights, seen on the other vessel, after the lights which were first seen.

Solicitors for the plaintiffs, *Ballantyne, McNair, and Clifford.*

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

Friday, Feb. 2, 1912.

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

THE FAIRPORT. (*a*)

Salvage — Steam trawlers as salvors — Loss of fishing — Right of salvors to recover loss of profit.

Three steam trawlers while engaged in fishing in the North Sea fell in with a vessel in distress and towed her to a place of safety. In salvage suits brought by the steam trawlers they each made a claim of varying amounts for loss of profit on their fishing voyages which were ended or interrupted by rendering the services.

Held, that they were not entitled to recover a sum representing loss of the prospective profit on the fishing voyage interrupted to render the salvage services.

THE plaintiffs were the owners, masters, and crews of the steam trawlers *Diamond, Oriole*, and *Köln.*

The defendants were the owners of the steamship *Fairport.*

The *Diamond* is an iron screw trawler of Hull of 149 tons gross and 61 tons net register, fitted with compound engines of 250 horse-power indicated, is manned by a crew of nine hands all told, and when she rendered the services was on a fishing voyage in the North Sea. The value of the *Diamond* is 2500*l.*

The *Oriole* is a steel screw trawler of 172 tons gross and 52 tons net register, fitted with triple expansion engines of about 400 horse-power indicated; she is one of the *Gamecock* fleet of steam trawlers, the combined catch of which fleet is daily taken by fish-carriers from the fleet in the North Sea to the market in London. She is manned by a crew of nine hands all told, and when she rendered the services was fishing in the North Sea fully coaled and provisioned for six weeks' fishing. The value of the *Oriole* is 5600*l.*

The *Köln* is a German steel screw steam trawler of 32 tons net register, fitted with compound engines of 225 horse-power indicated, and when she rendered the services was on a fishing voyage in the North Sea. The value of the *Köln* is 3500*l.*

The *Fairport* is a steel screw steamship of 3838 tons gross and 2433 tons net register, is fitted with triple expansion engines of 316 horse-power nominal, is manned by a crew of forty-eight hands all told, and when the services were rendered to her was on a voyage from Hamburg to Newcastle-on-Tyne in water ballast, carrying one passenger. The value of the *Fairport* is 27,000*l.*

The defendants admitted that salvage was due to the plaintiffs. The defendants' case was that on the 31st Oct. 1911 the *Fairport* left Hamburg for Newcastle in water ballast. She encountered very bad weather, and on the 2nd, 3rd, 4th, and 5th Nov. the engines were stopped from time to time to economise coal, and the vessel was allowed to drift. On the 5th Nov. wood was cut up and mixed with the coal, there being 30 to 35 tons of wood and 112 tons of coal on board, but at 6 p.m. the *Fairport* anchored. She hove up her anchor on the 6th Nov. at 4 a.m. The *Diamond* came up about noon on the 6th Nov., the *Oriole* about 1 p.m on the 7th Nov., and the *Köln* about 7.30 p.m. on the same day. The services terminated about 5.30 a.m. on the 11th Nov.

The details of the services sufficiently appear in the judgment.

The *Diamond* claimed 150*l.* for loss of fishing, the *Oriole* claimed 299*l.* 9*s.* 9*d.* for loss of fishing, and the *Köln* 292*l* 8*s.* for loss of fishing.

Bailhache, K.C. and *Dawson Miller* for the *Diamond.*

Batten, K.C. and *J. B. Aspinall* for the *Oriole.*

Bateson, K.C. and *D. Stephens* for the *Köln.*

Laing, K.C. and *Balloch* for the *Fairport.*

BARGRAVE DEANE, J.—This case is one which gives me some trouble with regard to the proper thing to do in awarding salvage and expenses.

The *Fairport* was in water ballast bound from Hamburg to the Tyne. She started from Hamburg with 112 tons of coal on board. The master says that that was amply sufficient, because he had done the voyage in twenty-four hours, and he had sufficient for forty-eight. However, meeting with head-winds, he found himself short of coal, and, the weather continuing bad, he allowed his vessel to drift. With a westerly wind she was driven towards the northern coast of Denmark. It is quite true that, although he had a lee shore, as long as he kept some coal in hand it would have enabled him in the last emergency to make for Frederikshaven, where he could get a supply of coal, or, if the wind shifted to the northward, to turn on his tracks and make for Hamburg, but he was really in a position which was one of some nervousness, and which required great care on his part, and which he naturally thought it would be better to avoid.

The result was that as soon as he sighted a trawler he made signals to her, and the *Diamond* went to him. The *Diamond* is not an old vessel by any means. She was built in 1907, she has

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

engines working up to 250 h.p., and she has a crew of nine hands. The *Diamond* went to the *Fairport*, and got connection with her three times by means of her own wire-warps. These do not seem to have been sufficiently strong, because they parted soon after connection was made. Why the ship's rope, a part of which was put in, was not sent out to the trawler by means of her warps I do not know, but if it had been I think the *Diamond* might have done more good service than she did. The *Diamond* lay by all night in very bad weather, and again the next day, and did really good service, although, unfortunately, until the last day, she was not able to move the vessel towards the Tyne.

The *Oriole* came up next day, and she again was unable to do anything on the first day. Her rope parted, and she had to lie by all night. These two vessels, therefore, lay by on the second night.

On the third day the *Köln* came up, and with the *Köln* and the *Oriole* towing ahead, and the *Diamond* on her starboard bow, the *Fairport* was eventually brought to the Tyne. There the trawlers were cast off, and the vessel went i to the river under her own steam.

The weather was extremely bad on the 7th, and it was bad on the 8th. It began to moderate on the afternoon of the 8th, and gradually moderated until it died away altogether, and then the wind came from the eastward. The bulk of the bad weather was borne by the *Diamond*, next by the *Oriole*, and practically very little of it by the *Köln*. Therefore, in arriving at the awards to be made to these three vessels for their services, apart from the expenses, I am inclined to take what counsel for the defendants suggested as the proper view—namely, to say what would be a fair sum to award for the whole service, and then distribute it as reasonably as one can according to the services, the time occupied, and the work done. I have arrived at the figure of 2300*l.* as the total award. Of that I give 900*l.* to the *Diamond*, 800*l.* to the *Oriole*, which is the most powerful vessel of the three, and 600*l.* to the *Köln*.

Then comes the question of expenses. I at once dismiss the question of the loss of fishing. When seamen render salvage services they abandon their ordinary occupation for the purpose of another occupation, which is salvage, and they cannot be paid for both. I hope it will be a long time before English or German seamen will hesitate to render salvage services to vessels in distress, but they must do it with full knowledge, when they choose to do it, that they have chosen, and they are thereby abandoning their ordinary occupation, and they cannot expect to be paid for both. A salvage award is made in respect of services rendered, and we must take into account the whole story, and not separate it into two or three separate items.

The question of damage and loss directly attributable to the rendering of the services is, however, another matter. This court will always recognise where, in rendering salvage services, damage is occasioned to one of the salving vessels, that that has to be taken into account as actual damage. It is not like loss of fishing, which is prospective damage. In this case these vessels have proved certain damage, and counsel for defendants does not, in fact, dispute the claim put in by the *Diamond* as set out in her statement of claim. The result is that 136*l.* represents the actual damage of the *Diamond*, and this makes her total award 1036*l.* With regard to the *Oriole*, her claim is, first of all, loss of fishing, which I disallow, extra coal—I do not allow that, because it is part of the services rendered—and provisions destroyed. That is another matter. It is loss occasioned to the owners directly by reason of the salvage, and after consulting with the Elder Brethren, they advise me that 15*l.* might reasonably be allowed. The last item is loss of trawl. I have taken the Elder Brethren's view, and, acting upon their advice, I allow the whole of the damage for loss of trawl and gear. Therefore, I allow the *Oriole* 74*l.* for her damage, or 874*l.* in all. Then comes the *Köln*. I disallow the claim for loss of fishing and wages. I allow 222*l.* 10*s.* 6*d.* for repairs; 24*l.* 7*s.* 4*d.* for the cable chain; I do not allow travelling expenses; I allow surveyor's fees and telegrams; I do not allow wear and tear of the engines, because I think there is no evidence to satisfy me there was any wear and tear occasioned by the salvage services; coal I do not allow, except that I am advised by the Elder Brethren that, perhaps, while she was laid up, it might be reasonable to allow a certain amount of coal being used on board, and I allow 10*l.* for that. Then comes the item "expenses, expenses including insurance, equipment." That I do not allow. Then comes the last item, demurrage. It would be difficult to know what would be a fair sum to allow for demurrage while the vessel was under repair. We have to do what is reasonable, and I have allowed 100*l.*, or something under 10*l.* per day. These items which I have allowed make 367*l.* 2*s.* 5*d.* I allow 367*l.*, or 967*l.* in all. The total expenses allowed come to 577*l.*, and, therefore, the total sum awarded will be 2877*l.*

Solicitors for the *Diamond*, *Williamson, Hill, and Co.*, agents for *R.* and *R. F. Kidd*, North Shields.

Solicitors for the *Oriole*, *Stanton* and *Hudson*, agents for *A. M. Jackson* and *Co.*, Hull.

Solicitors for the *Köln*, *Stokes* and *Stokes*, agents for *Bramwell, Bell*, and *Clayton*, Newcastle-on-Tyne.

Solicitors for the *Fairport*, *Botterell* and *Roche*, for *Botterell, Roche*, and *Temperley*, Newcastle-on-Tyne.

Feb. 27 *and* 28, 1912.

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

THE ROSALIA. (*a*)

Collision—Fog—Collision Regulations 1910, *arts.* 15, 16—*Both to blame—Initial wrong—Degree of fault—Apportionment of damage or loss—Maritime Conventions Act* 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1—*Costs.*

In an action for damage by collision, in which both vessels were found to blame for negligent navigation in fog, the vessel which was found guilty of the initial fault was ordered to pay 60 *per cent. of the damage, the other vessel* 40 *per cent., under the provisions of sect.* 1, *sub-sect.* 1, *of the Maritime Conventions Act* 1911.

No order was made as to costs.

[NOTE.—This was the first case to be tried under the Maritime Conventions Act 1911.—ED.]

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

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Woodmere*, her master, and crew; the defendants were the owners of the steamship *Rosalia*.

The case made by the plaintiffs was that shortly before 4.15 a.m. on the 7th Feb. 1912 the *Woodmere*, a steel screw steamship of 682 tons gross and 328 tons register, manned by a crew of thirteen hands all told, was to the northward and westward of the *Newarp* light vessel, in the course of a voyage from North Woolwich to Goole in water ballast. The weather was hazy, of varying density, and the engines of the *Woodmere*, which had been working full speed since passing the *Newarp*, had just been reduced to slow as the weather was coming in thicker ahead. The *Woodmere* was steering a course of N.W. ½ N. magnetic. The tide was ebb, setting to the northward and westward, of about three knots, and the wind was a light breeze from the south-west. The *Woodmere's* masthead, side, and stern lights were duly exhibited and burning brightly, and a good look-out was being kept on board her. In these circumstances the steamship *Spero*, which had overtaken the *Woodmere* and was about a quarter of a mile ahead of her and on the port bow withal, was heard to sound two short blasts, and in reply a vessel, which afterwards proved to be the *Rosalia*, was heard to sound two short blasts on the starboard bow of the *Woodmere*. The helm of the *Woodmere* was accordingly starboarded, and she replied with two short blasts. Shortly afterwards the *Rosalia* again sounded two short blasts and the helm of the *Woodmere* was ordered hard-a-starboard, and two short blasts were again sounded on her whistle and her engines were put full speed ahead. About the same time the masthead light of the *Rosalia* came in sight, about two points on the starboard bow of the *Woodmere*, distant about a quarter of a mile. She again sounded two short blasts, to which the *Woodmere* again replied with two short blasts at the same time keeping her helm hard-a-starboard. The *Rosalia*, however, came on at a great speed, apparently acting under port helm, and her second masthead light and then her red light came in sight, and although she afterwards sounded three short blasts, she continued on at a great speed, heading for the *Woodmere*, and, although the helm of the latter was at the last moment put hard-a-port to ease the force of the blow, the *Rosalia* with her stem struck the starboard side of the *Woodmere* abaft amidships a violent blow, inflicting such damage that the latter sank in ten minutes.

Those on the *Woodmere* charged those on the *Rosalia* with not keeping a good look-out; with sounding misleading whistle signals; with failing to go at a moderate speed; with improperly porting; with failing to ease, stop, or reverse her engines; with neglecting to stop and navigate with caution on hearing a fog signal forward of her beam; and with neglecting to sound her whistle for fog in accordance with the regulations.

The case made by the defendants was that the *Rosalia*, a steel screw steamship of 4308 tons gross and 2673 tons net register, 360ft. in length, manned by a crew of twenty-eight hands, was in the North Sea, in the course of a voyage from Tyne Dock to Genoa, laden with a cargo of coal. The wind was southerly, light, and the tide ebb of the force of about a knot. There was a dense fog, and the *Rosalia*, with engines working dead slow, was steering S.E. by S. magnetic, making about two knots. Her whistle was being duly sounded long blasts for fog, she carried the regulation lights for a steamship under way, including a second masthead light, which were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her. In these circumstances a number of two short-blast signals had been exchanged with a steamer passing on the starboard side bound north, and the *Rosalia* was steadying on her course when two short blasts were heard on the port bow, which signal was sounded by the *Woodmere*. The engines of the *Rosalia* were immediately put full speed astern and her helm was put hard-a-starboard to keep her head straight, and three short blasts were sounded on her whistle. The *Woodmere* replied with another signal of two short blasts, which signal she repeated several times, and the *Rosalia* replied to each signal of the *Woodmere* by sounding three short blasts. The *Rosalia* had nearly, if not quite, lost all headway when the green light of the *Woodmere* came in sight, bearing about three points on the port bow, not a hundred yards off. The *Woodmere* continued to come on across the bow of the *Rosalia*, still sounding two short blasts, and with her starboard side aft struck the stem of the *Rosalia*, doing her considerable damage and so injuring herself that she shortly afterwards sank, all of her crew being taken on board the *Rosalia*.

Those on the *Rosalia* charged those on the *Woodmere* with failing to keep a good look-out; with navigating at too great a rate of speed; with failing to stop and navigate with caution on hearing the whistle of the *Rosalia*; with starboarding; and with failing to sound her whistle in accordance with the regulations for fog.

The following are the collision regulations which the vessels were alleged to have infringed:

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. A steam vessel shall be provided with an efficient whistle or siren, sounded by steam or some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog-horn to be sounded by mechanical means, and also with an efficient bell. . . . 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.

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.

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."

Sect. 1 (1) of the Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 56) was also referred to, and is as follows:

1 (1). Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault: Provided that (*a*) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

Laing, K.C. and *Dawson Miller* for the plaintiffs.—The *Rosalia* was coming down the North Sea, and, when meeting the *Spero* going up the North Sea, sounded a starboard-helm signal to her, but probably did not starboard at all. It was wrong of her to sound any such signal, for it was impossible for her to see the *Spero* in that state of the weather; it was too thick. The *Rosalia* and the *Spero* escaped a collision. The *Woodmere* was following the *Spero* up the North Sea, and had in fact been passed by her. The whistles sounded by the *Rosalia* misled those on the *Woodmere* into starboarding when she could not see the *Rosalia*. The speed of the *Rosalia* was also excessive. She admittedly had a speed of about two and half knots at the moment of collision; if she had been reversing for anything like the four minutes spoken to by her witnesses she must have had a speed of six knots when she began to reverse. The look-out on the *Rosalia* was bad. The *Woodmere* was not to blame.

A. D. Bateson, K.C. and *Lewis Noad*.—The *Woodmere* is solely to blame for her speed and for starboarding in a fog. If the whole blame for the collision is not that of the *Woodmere*, at all events 99 per cent. of it is. On the evidence there can be no doubt the *Woodmere* was going too fast. [BARGRAVE DEANE, J.—How do you excuse yourself for not stopping and blowing the two-blast signal?] There is no hard-and-fast rule that when ships are approaching each other in fog neither should ever take helm action; each case must depend on its own circumstances:

The Vindomara, 63 L. T. Rep. 749; 6 Asp. Mar. Law Cas. 569; (1891) A. C. 1.

The starboard-helm signal was blown to the *Spero*, and the *Spero* was passed and the *Rosalia* was steadying under port helm when the *Woodmere* sounded a two-blast signal. The *Woodmere* was quite wrong to starboard; if she had not done so the vessels would have passed clear.

Laing, K.C. in reply.

BARGRAVE DEANE, J.—This is a case in which I have to refer to three ships. The action is brought by the owners of a smallish steamer, the *Woodmere*, against the owners of the *Rosalia*, a large Italian ship, for damage caused by a collision in the North Sea, between the Newarp and the Would Lightships, on the morning of the 7th Feb. in this year. The result of the collision was that the *Woodmere* was sunk, but her crew were all saved by getting on board the *Rosalia*. In the course of the case I have been forcibly struck by the fact that counsel on both sides have been oppressed by the new Act. This is the first case under the Maritime Conventions Act 1911, and the court has the duty of apportioning the blame and saying what proportion of the damage should be borne by either ship; and whereas in the old days counsel were content to make out that both vessels were to blame, knowing what the result would be, in this case I cannot help thinking that both learned counsel were fighting hard for a proportion. I have under the new Act to say what I think was right.

The two ships were bound one up and the other down the North Sea. The *Woodmere* was upon a course of N.W. ¼ N., and the *Rosalia* on a course of S.E. by S., very nearly opposite courses, and, in my opinion, they were as nearly as possible end-on to each other. I think the *Woodmere* was slightly on the port bow of the *Rosalia*—very slightly. There was another ship also proceeding up—a ship which was a little faster than the *Woodmere*, and which passed her on her port side shortly before the collision—and I think that that vessel was a little on the starboard bow of the *Rosalia*, so that the *Rosalia*, coming down, had two vessels very nearly ahead of her, one a little on the port bow and the other a little on the starboard bow; but the vessel on the starboard bow was the nearer. First of all, what was the weather? The *Rosalia* admits that it was a dense fog. The *Woodmere* says: "It had been a fog, but at the Newarp it cleared up so that we could see two or three miles, and we went on at full speed." The first fact which I find in the case is against the *Woodmere*. I am satisfied from the evidence of the lightship that it was a dense fog, and that that part of the *Woodmere's* case is not proved. She had slowed down for fog just before she got to the Newarp. She admits there was fog to the southward of the Newarp, and there is no doubt there was fog at the time of the collision, and that was only a very short distance from the Newarp, and, in my opinion, there was a fog all the time.

I will deal with the facts as I find them. The *Rosalia*, coming down in a fog, is said to have been blowing her whistle, and blowing it for fog. She heard on her starboard bow another vessel blowing her whistle for fog, and that vessel, after blowing for fog once or twice and being answered by the *Rosalia* once or twice with fog signals, changed her signal into two short blasts. The *Rosalia* responded with two short blasts, and I think on two or three occasions those two short-blast signals were exchanged between the *Rosalia* and the vessel on her starboard bow, the *Spero*. The first thing which I notice in that is this, that the *Rosalia* admits that, hearing in a fog a whistle on her starboard bow forward of her beam, she did not obey the rule and stop her engines. That is the initial fault of the whole case. If the *Rosalia* had stopped her engines and continued blowing a long blast for fog, and then proceeded cautiously, I do not know that I could have blamed her for that; but she did not. She proceeded on, as they say on board her, "slightly giving her a touch of starboard helm," and they eventually passed the *Spero* starboard to starboard, very close—I think something like a ship's length apart. That was a fortunate escape for the *Rosalia* and also for the

Spero, because, although I have not to deal with the *Spero,* there is no doubt that the *Spero* was very badly navigated in foggy weather. That, however, is not the whole of the story, because I have to do with the *Woodmere.* The *Woodmere* heard the *Rosalia* and the *Spero* exchanging two-blast signals. What should the *Woodmere* have done? She should at once have obeyed the rule and stopped her engines. She did not do it. She did not blow a long blast for fog, but repeated the two-blast signals which she heard the other vessels blow. That was utterly wrong according to the rules. She heard two whistles—one she knew was blown by a vessel going the same way as herself, and the other by a vessel coming in the opposite direction—and she had no excuse for not stopping her engines then and there. But I think she was misled. When she heard two vessels ahead of her both blowing the starboard-helm signals, and very nearly ahead of her, she did what perhaps was not unreasonable at the moment—she hard-a-starboarded her helm and put her engines on full speed ahead; but she ought to have stopped, and she is to blame. Both vessels are to blame.

Another matter I have to deal with is the speed of the two vessels. I should think that the *Woodmere* was probably going about nine knots. Her full speed was ten and a half knots, but she probably lost some of the pressure on her boilers and could not attain that, although she was going for some minutes full speed ahead under starboard helm. The *Rosalia,* I am satisfied, was going faster than she admits. I have had the evidence of Mr. Steele on behalf of the *Rosalia,* and he has to admit that, having surveyed the *Rosalia* and seen the damage upon her, and knowing the fact that the other vessel was sunk very shortly after the contact by reason of the damage caused to her, he is forced to the conclusion that there was at least two knots speed on the *Rosalia* at the time of the collision, although she says she was going full speed astern for four minutes, from dead slow, before the collision. Mr. Steele admits that it is impossible to avoid the conclusion that the *Rosalia* was going at least six knots before she reversed her engines. Did she reverse her engines for four minutes? It is true the document say so, but I am forced to the conclusion that I cannot accept the documents and the evidence which has been given. Why? Because I know there was fog further up, by the Haisboro', and the *Rosalia* did not slow down then, but not till a later period, when, according to the pilot and the master, it got so thick that they were obliged to slow.

The fact is that here were three vessels navigating in foggy weather in the North Sea and not obeying the rules. But for the initial fault of the *Rosalia* I do not think there would have been any collision; but. on the other hand, I cannot absolve the *Woodmere* from blame for breaking the rules herself and doing what she ought not to have done. Therefore I must find her also to blame. What am I to do about this new Act of Parliament, the Maritime Conventions Act 1911, which says that "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault." It is very difficult to say exactly what the court is to do in such a case, but there is a proviso that "if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally." This is the first case of the sort, and therefore I have to start the new practice; the Court of Appeal may say, if this case goes to that court, that they "would not have done that; they would have done something else." I have never heard in the common law of the principle which has now come upon us as a sudden blow, but we have got to obey the Act of Parliament, and the way in which I shall deal with this case is this: as the initial fault was in the *Rosalia* I shall order her to pay 60 per cent. and the *Woodmere* the other 40 per cent.

Laing, K.C.—I submit that the costs of the action should be treated in the same way. The *Rosalia* should bear 60 per cent. of them. [BARGRAVE DEANE, J.—That is another point. There is nothing in the Act on the point.] That is so; but my submission is that when one party to the litigation has to pay 60 per cent. and the other 40 per cent., the costs should be paid in the same proportions.

A. D. Bateson, K.C.—If the Act of Parliament had intended to make any alteration in the well-recognised rule as to costs in cases in which both vessels are held to be in fault it would have done so explicitly. There is not a word in the Act as to costs; they are not dealt with at all. The cost of getting the *Woodmere* found to blame to the extent of 40 per cent. is exactly the same as getting her found to blame to the extent of 50 per cent. The costs are a matter of discretion, and there is no ground for departing from the usual rule.

BARGRAVE DEANE, J.—Both vessels are to blame, and nearly equally to blame, although one was guilty of the initial fault. I shall make no order as to the costs in this case.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 12, 13, *and* 15, 1912.

(Before VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L.JJ.)

STEAMSHIP DEN OF AIRLIE COMPANY LIMITED *v.* MITSUI AND CO. LIMITED AND BRITISH OIL AND CAKE MILLS LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Bills of lading—Assignment—Cesser of shipowner's liability—Submission to arbitration —Injunction to restrain arbitration—Arbitration Act 1889 (52 *&* 53 *Vict. c.* 49), *s.* 6.

The plaintiffs, owners of the steamship Den of Mains, *chartered her by charter-party dated the*

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

26th April 1911 to the defendants M. and Co., to load a cargo of beans at Vladivostock, and to proceed to a port in the United Kingdom and there deliver the cargo "agreeably to bills of lading." On the 10th June a cargo of about 6000 tons was loaded, and bills of lading made out to the order of M. and Co. or their assigns were signed by the master and handed to M. and Co.'s representative. M. and Co. had, by a contract dated the 27th April 1911, sold the cargo to the defendants the B. Company on the terms of a "basis delivered" contract, by clause 10 of which the contract was to be void as regarded any portion shipped which might not arrive. On the 12th June the defendants M. and Co., under the contract of the 27th April, declared to the B. Company that the beans had been shipped by steamship Den of Mains. *On arrival of the vessel at Liverpool, the port of discharge, M. and Co. handed to the B. Company the bills of lading indorsed against a payment. When the discharge had been completed it was alleged that there was a shortage of 171 bags, and, the B. Company having paid only in respect of the quantity actually delivered, M. and Co. instructed them to make a corresponding deduction from the freight, but the plaintiffs refused to acknowledge the claim for short delivery. A dispute having thus arisen, M. and Co. gave notice that they demanded an arbitration under a clause in the charter-party which provided for arbitration "by arbitrators, one to be appointed by each of the parties to this agreement, if necessary the arbitrators to appoint a third," and formally required the plaintiffs within seven clear days to appoint their arbitrator.*

The plaintiffs did not appoint an arbitrator, and the defendants after the expiry of the seven days gave notice of the appointment of a gentleman to act as sole arbitrator.

The plaintiffs thereupon took out a summons for further directions, asking (inter alia) *for an injunction to restrain the first defendants from proceeding with the arbitration, alternatively that leave be given to the plaintiffs to revoke the submission to arbitration.*

Held, without deciding the point of law decided by Bray, J., (1) *that there was no jurisdiction in the court to grant the injunction asked for; and* (2) *that in the exercise of its discretion the court ought not to give leave to revoke the submission to arbitration.*

Decision of Bray, J, reported 12 Asp. Mar. Law Cas. 97 (1912); 105 *L. T. Rep.* 823, *affirmed on other grounds.*

APPEAL by the plaintiffs from a decision of Bray, J.

The facts as found by the learned judge are shortly these: The defendants, Mitsui and Co. Limited, on the 26th April 1911 chartered from the plaintiffs the steamship *Den of Mains*, to load a cargo of beans at Vladivostock, and to proceed to a port in the United Kingdom or other ports, and there discharge. The charter-party contained an arbitration clause, which was as follows:

Should any dispute arise under this charter-party, same to be settled in London by arbitrators, one to be appointed by each of the parties to this agreement; if necessary the arbitrators to appoint a third, whose decision to be final and binding upon both parties to the agreement. And it is further agreed the submission hereby made shall be made a rule—if in the United Kingdom or Continent—of His Majesty's High Court of Justice, upon the application of either party.

On the 27th April the first defendants, by a contract of that date, sold 6100 tons of beans, more or less, to the defendants the British Oil and Cake Mills Limited, upon certain terms.

On the 10th June the cargo (about 6100 tons) having been loaded, two bills of lading, comprising the whole cargo, were signed by the master and handed to the first defendants' representative. They were made out to the order of the first defendants, or to their assigns.

On the 12th June the first defendants, under the contract of the 27th April, declared to the second defendants that the beans had been shipped by the steamship *Den of Mains*.

On the arrival of the *Den of Mains* at Liverpool, the port of discharge, the first defendants, under clause 4 of the contract, handed to the second defendants the bills of lading duly indorsed against a payment.

When the discharge had been completed it was alleged that there was a shortage of 171 bags, representing about 14 tons, and a difference in weight of 36 tons. The second defendants only paid in respect of the quantity actually delivered, and the first defendants, in consequence of the shortage, instructed the second defendants to deduct from the freight a sum of 103*l.* 1*s.* 6*d.*, the value of the bags alleged to be short delivered, and this was done.

The plaintiffs refused to acknowledge the first defendants' claim for short delivery, and eventually the first defendants gave notice that they demanded arbitration under the charter-party, and on the 1st Nov. gave a formal notice to Galbraith, Pembroke, and Co., on behalf of the plaintiffs, that they had appointed Mr. Glover their arbitrator, and formally required the plaintiffs within seven clear days to appoint their arbitrator.

The plaintiffs did not appoint an arbitrator, and on the 10th Nov. the first defendants gave notice of the appointment of Mr. Glover as sole arbitrator.

On the 8th Nov. the plaintiffs issued their writ claiming (1) balance of freight 103*l.* 1*s.* 6*d.*; (2) a declaration that the defendants, Mitsui and Co. Limited, having indorsed over to the defendants the British Oil and Cake Mills Limited the bills of lading for 27,132 and 44,280 bags of oil beans under circumstances in which the property in the goods referred to in such bills of lading passed to the indorsees, have no further rights under the contract evidenced in such bill of lading; (3) a declaration that the notice dated the 1st Nov. 1911, purporting to be given by H. D. Blyth and Co., on behalf of the defendants Mitsui and Co. Limited, calling upon the plaintiffs to appoint an arbitrator under the terms of a charter-party of the steamship *Den of Mains*, dated the 26th April 1911, is bad in law and of no effect; (4) an injunction to restrain the defendants Mitsui and Co. Limited from proceeding with the threatened arbitration.

On the 17th Nov. the plaintiffs issued, by special leave, a summons for further directions, asking that the first defendants be restrained until after the hearing of the action from proceeding with the arbitration; alternatively, that leave be given to the plaintiffs to revoke the submission to

arbitration; and, alternatively, that the notice appointing G. as sole arbitrator be set aside, and for the plaintiffs to have seven days in which to appoint their arbitrator.

Meanwhile the second defendants, on the instructions of the first defendants, paid the balance of freight claimed into court.

The points made on behalf of the plaintiffs were three: (1) That the first defendants had no power to appoint Mr. Glover as sole arbitrator; (2) that the notice of the 1st and 10th Nov. were bad as they were not served on the plaintiffs, but only on Galbraith, Pembroke, and Co.; and (3) that the obligation of the plaintiffs under the charter-party to deliver the beans had ceased.

The Arbitration Act 1889 (52 & 53 Vict. c. 49) provides:

Sect. 6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party; then, unless the submission expresses a contrary intention, (a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place; (b) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent. Provided that the court or a judge may set set aside any appointment made in pursuance of this section.

Bray, J. held (1) that there was nothing in the contract or the circumstances of the case to satisfy the court that it was the intention of the shipowners and charterers that the responsibility of the former under the charter-party had ceased; and (2) that the submission to arbitration came within sect. 6 of the Arbitration Act 1898.

The plaintiffs appealed.

The arguments sufficiently appear from the judgments.

Atkin, K.C. and *Keogh* for the appellants.

Leck for the respondents.

The following cases were cited:

Kitts v. *Moore and Co.*, 71 L. T. Rep. 676; (1895) 1 Q. B. 253;

Re Arbitration between Lord Gerard and London and North-Western Railway Company, 72 L. T. Rep. 142; (1895) 1 Q. B. 459;

James v. *James and Bendall*, 61 L. T Rep. 310; 23 Q. B. Div. 12;

Re Intended Arbitration between Smith and Service and J. Nelson and Sons, 63 L. T. Rep. 475; 25 Q. B. Div. 545;

Scott v. *Van Sandau*, 1 Q B. 102, 110;

East and West India Dock Company v. *Kirk and Randall*, 58 L. T. Rep. 158; 12 App. Cas. 738;

North London Railway Company v. *Great Northern Railway Company*, 48 L. T. Rep. 695; 11 Q. B. Div. 30.

VAUGHAN WILLIAMS, L.J.—Bray, J. thought it right to deal with what has just been referred to as the main point. Now, the main point, as it has been called, was a question of the area of the arbitration, the agreement for which was contained in the charter-party, and the particular question was whether it extended to the case where there had been a bill of lading, and there was a claim by the charterers in the circumstances set forth in the judgment of Bray, J., who, sitting as commercial judge, thought it was desirable to deal with this point, and did make it the main point of his decision. But I do not think we are bound to adopt that course, because I think that there are sufficient grounds wholly independent of this question of commercial law for supporting the refusal by Bray, J. to either grant the injunction or make an order for the revocation of the submission to arbitration.

I do not think it is necessary for me to prolong my judgment by making any lengthened statement of the facts as a preliminary part of my judgment. I state generally that there is the action between the Steamship Den of Airlie Company Limited and Mitsui and Co. Limited and the British Oil and Cake Mills Limited, and that the plaintiffs' claim in that action was, first, for "balance of freight, 103*l*. 1*s*. 6*d*."; secondly, "a declaration that the defendants Mitsui and Co. Limited, having indorsed over to the defendants the British Oil and Cake Mills Limited the bills of lading for 27,132 and 44,280 bags of oil beans under circumstances in which the property in the goods referred to in such bills of lading passed to the indorsees, have no further rights under the contract evidenced in such bills of lading"; and, thirdly, "a declaration that the notice dated the 1st day of Nov. 1911, purporting to be given by H. D. Blyth and Co. on behalf of the defendants Mitsui and Co. Limited, calling upon the plaintiffs to appoint an arbitrator under the terms of a charter-party of the steamship *Den of Mains* dated the 26th day of April 1911 is bad in law and of no effect," and, lastly, "an injunction restraining the defendants Mitsui and Co. Limited from proceeding with the said threatened arbitration."

A summons was taken out at chambers applying, as an interlocutory proceeding, for the injunction to restrain these people from going on with the arbitration, and, secondly, for revocation of the submission to arbitration. So far as the injunction is concerned, in our judgment there is no jurisdiction to grant that injunction. That really was decided first in the case of the *North London Railway Company* v. *Great Northern Railway Company* (48 L. T. Rep. 695; 11 Q. B. Div. 30). That was a case which was decided before the passing of the Arbitration Act 1889. It was decided in 1883, and the headnote, which is quite accurate, says: "The Judicature Act 1873, s. 25, sub-s. 8, has given no power to the High Court to issue an injunction in a case in which no court before that Act had power to give any remedy whatever. Therefore the High Court has no jurisdiction to issue an injunction to restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious." That being the headnote, I will now read a short passage from the judgment of Brett, L.J., at p. 35 of 11 Q. B. Div. 30: "The respondents contend that they have a right to maintain that injunction because they say it is clear that the subject-matter of dispute is not one within the arbitration clause in the

agreement, and that therefore the arbitrators have no jurisdiction to proceed so as to bind the respondents, and if the arbitration is allowed to proceed the proceedings will be futile and vexatious, and cause delay." That is very like what is said in the present case. The Lord Justice then continues: "On the other side it is said that if the subject-matter of arbitration is beyond the jurisdiction of the arbitrators, then the respondents may stay away, and then, though it may be true that the arbitration will be futile, it will do no injury to the respondents, and put them to no expense, nor stop them from proceeding in due course with the present action, and if it be vexatious it is not a vexation of which the law can take notice. The question is whether, under those circumstances, the court can issue an injunction. Now, the cases before the Judicature Act would seem to show that no court would have issued an injunction in a case where if the thing went on there would be no legal injury. It is obvious, as it seems to me, that where, as it is here assumed, the whole matter is beyond the jurisdiction of the arbitrators, the fact of the appellants going on with that futile arbitration is no legal injury. Suppose an award was made the respondents could not bring an action on that account against the appellants. It would not be a cause of action known to the law. If they could not bring an action for it after the award they certainly could not bring an action before the award. Therefore it seems to me that before the Judicature Act neither the Court of Chancery nor any common law court would have had any jurisdiction to issue an injunction to enjoin the appellants from proceeding with this futile arbitration, and I doubt whether under the circumstances of this case any court before the Judicature Act would have had any right to put the appellants to an election." Then he says later, upon p. 36: "I personally have a very strong opinion that the Judicature Act has not dealt with jurisdiction at all, but only with procedure; that it has given to the one division the procedure of the other division, or to the two divisions reciprocally the procedure of the other division, and that in some cases it has amended the procedure of both divisions, but that it has not given to any court a jurisdiction which no court had before. Individually I should be inclined to hold that if no court had the power of issuing an injunction before the Judicature Act, no part of the High Court has power to issue such an injunction now," and he says it is not necessary to decide that. Then Cotton, L.J. in his judgment deals with the cases where an injunction in these arbitration cases was sometimes granted by the Court of Chancery; but that was, as he points out, only where there was an equity justifying that interference, and it cannot be suggested in this case that there was any such equity. I ought to refer to the case of *Re Intended Arbitration between Smith and Service and J. Nelson and Sons* (*sup.*). The headnote was as follows: "Where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties and the third by the two so appointed, and one of the parties refuses to appoint an arbitrator, the court has no power, either under or apart from the Arbitration Act 1889, to order him to do so," and in the course of that case judgments were delivered by Lord Esher, M.R., Lindley, L.J., and Bowen, L.J. It will be noticed that the observations of Bowen, L.J. apply not only to the case of an injunction, but also to the question of revocation Lindley, L.J. says, at p. 552: "It has been said that the law has been altered in that respect by the Act of 1889." Really he is dealing there with revocation, and I will not read the passage again. He points out that the law has not been altered. Under those circumstances, in my judgment, the law stands as it did before the Judicature Act and before the Arbitration Act 1889, in such a position that in respect of the injunction there is absolutely no jurisdiction in this court to grant such an injunction.

Having said that I now propose to deal with the question of revocation. With regard to the question of revocation I think it is undoubted, and really it was admitted on both sides, that there is power to revoke; in fact, sect. 1 of the Arbitration Act 1889 by its terms recognises this power. But what is said, and what practically is not denied on either side, is that although the court has power to give leave for the revocation of a submission to arbitration, that is a power which, as was said in *Scott* v. *Van Sandau* (1 Q. B. 102) is to be exercised with great caution. The last words in the case of *Scott* v. *Van Sandau* (*sup.*), at p. 110, are: "We will only observe that the discretion of the court to which this appeal is made ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of strife, should only open the floodgates for multiplied expenses and interminable delays." In that case the ground upon which it was sought to obtain an order for revocation of the submission was the declared intention of the arbitrator to admit inadmissible evidence. When the matter came before the court they were far from saying that there were no grounds on which it might reasonably be argued that the evidence was inadmissible; but although that was so the court refused to make the order or grant the leave for revocation, and they held there was no sufficient ground for giving leave (under stat. 3 & 4 Will. 4, c. 42, s. 39) to revoke the submission, though the objections to evidence might be well founded. I take it that was accepting the proposition of the court at the end of Lord Denman's judgment in that case—namely, that this power of giving leave for revocation is a power which ought to be exercised in a most sparing and cautious manner; and I say further, speaking of *Scott* v. *Van Sandau* (*sup.*) itself, as far as I recollect the judgment, and speaking generally of arbitration, that when you are considering whether you shall make an order for leave to revoke or not, one matter that you ought always to bear in mind is that you should make no order which is likely to lengthen the arbitration proceedings, and, obviously, in a case where a question of construction of the submission to arbitration arises, you will be very likely to lengthen the proceedings enormously if you do not allow first the facts to be found to which the submission to arbitration when ultimately construed, will apply. Under those circumstances I am of opinion in the present case that, although the ground upon which it was sought to say that the submission to arbitration in the charter-party had no application, it is an arguable ground, and more than that, it raised a

question which ultimately, either in this case or in another case, must be decided, yet, *primâ facie* having read the judgment of Bray, J., I feel that there is most cogent ground for saying that the submission to arbitration would apply to such a case as this in which the holder of the bill of lading comes to be concerned.

Under these circumstances, in the exercise of our discretion in this case I think that we ought not to give leave or make an order for the revocation of this submission; and I repeat once more, so that there shall be no mistake, that we also decide that we ought not to grant the injunction that was asked for, for, in our opinion, we have no jurisdiction to grant such an injunction. The result is this appeal is dismissed, and dismissed with costs.

Farwell, L.J.—I am of the same opinion. The appeal is from the refusal of the learned judge to grant an interlocutory injunction, and also from refusing to revoke the submission to arbitration. On the first question of injunction I think we are bound by authority. It is not disputed that there was and is no remedy at common law against a party to arbitration who goes on at his own risk with the arbitration proceedings. As Lord Esher (then Brett, L J.) puts it, at p. 36 of the case of *North London Railway Company* v. *Great Northern Railway Company* (*sup.*), whether before or after the award has been made, no one, he says, has ever heard of an action against a man who procured the arbitrator to make the award because he did it; and, secondly, as he also says, if you could not maintain that action for damages afterwards you could not get an injunction from a common law court before. In the same way there were no means in which equity could have interfered, because the matter was one purely of common law arising under the circumstances of a proceeding in an arbitration when it was doubtful whether there was jurisdiction or not; even although there was no jurisdiction there was no equity which enabled the court to interfere in aid of the common law. Then it was said there was an exception to that in equity, and so there was, because if there was any equity arising out of fraud or mistake, or anything of that sort on which you could impeach or seek to set aside the agreement containing the reference to arbitration, then as incident to that equity the court could restrain interim proceedings on the arbitration clause. That is apparent from *Kitts* v. *Moore and Co.* (*sup.*). There is nothing of that sort here, because there is no ground upon which the agreement can be impeached. It is a perfectly fair and proper agreement, there is no mistake, no fraud, nothing of the sort, and no equity whatever. No bill could possibly have been filed to raise any such question in the old Court of Chancery as is sought to be raised here. That being so, the question of injunction goes. Then it is said that we have jurisdiction under the Arbitration Act to revoke the submission. The words of the Act are general, and I think that it is a question for the judicial discretion of the court in each case whether there should be any such revocation or not, but, as has been pointed out in the case of *Re Intended Arbitration between Smith and Service and J. Nelson and Sons* (*sup.*), what is revoked is not the submission to arbitration, but the authority of the particular arbitrator; and underlying that there always must be something in the nature of a personal disqualification of some sort or other which renders it improper for that particular arbitrator to act. The submission would remain. An action for refusal to carry out an agreement for arbitration will always lie. The submission remains, although the arbitrator who is to act under it may be removed.

In the present case it is said that the arbitrator has no authority on the true construction of this agreement to proceed to make any such award as is asked. On the construction of the document there is no question that the original submission to arbitration does extend to all matters, and what is alleged is that by reason of matters subsequent, documents and dealings between the parties, there is a question whether this submission does or does not apply to the circumstances as they now exist. In my opinion, having regard to the cases referred to by the President, it would be wrong for us to exercise our discretion by cutting short a matter of this sort which is certainly open to serious question, and cutting short the arbitration and saying it shall not go on simply because there may be a question whether, when the person who obtains the award comes to sue upon it, it may be a defence that the matter of the award was outside the arbitrator's jurisdiction.

I think there are three ways in which you can raise a question of this sort. I am not prepared to say in a perfectly plain case it would not be right to revoke the submission if the arbitrator was proceeding to deal with a matter absolutely and clearly outside his jurisdiction altogether. There is always power to state a special case, and there is the power to defend on the ground that the award was made without jurisdiction. In the case of *East and West India Dock Company* v. *Kirk and Randall* (*sup.*) the House of Lords put it to the parties to agree to the statement of a special case, and if they failed to do so the House intimated that the appointment of the arbitrator would be revoked, and the parties agreed to state a case. It only shows that it is the convenience of the parties that the court has regard to in considering what is the best way in which the question could be determined. In my opinion it would be wrong for us here, not knowing the facts which the arbitrator would have to find, to consider whether this ought to be revoked on a question of construction alone, especially when a learned judge like Bray, J. has himself, although I confess I think on the question of the injunction at any rate he had no jurisdiction to do it, expressed his opinion that there is nothing in the contention. It is not necessary for us to review that now. It is sufficient that he has so stated it, and certainly on the first blush of the matter I see no reason to doubt the correctness of that decision. The question really is a very small one of fact, whether there has been short delivery or not. Whether that question is left to this particular arbitrator or not can be determined altogether in one matter in the most expeditious and cheapest manner. I think, therefore, that this appeal should be dismissed.

Kennedy, L.J.—I am of the same opinion, and I have little to add. I have nothing to add upon the question of the injunction which is asked for. I think that is clearly a matter in

which we have no jurisdiction to do that which the appellant asks us to do.

With regard to the other question I think Mr. Leck was right in saying it was a question of discretion. It is also a case in which, as far as I can understand, on the authorities which have been cited to us, or to which we have been referred directly or indirectly, the discretion is one which must be very carefully exercised. It is quite clear to me that the revocation of a submission, whether it was under the old Common Law Procedure Act or under the Arbitration Act, is a revocation of a submission where the reference is made to an arbitrator. It has no application to a general agreement to refer matters in dispute to arbitration. That was very clearly laid down in a case under the Common Law Procedure Act in 1879 by the Court of Appeal in *Piercy* v. *Young* (42 L. T. Rep. 710; 14 Ch. Div. 200). In that case there was, as here, a general agreement to refer any differences or disputes to be settled by an arbitrator to be agreed upon, whose decision was to be final, and in the very opening words of his judgment Jessel, M.R. says: "With respect to the last point, we are all clearly of opinion that a general agreement to refer matters in dispute to arbitration cannot be revoked. The authorities cited have no application. They all relate to cases in which the reference has been actually made to a particular arbitrator."

It is said that that position is the position here, and I agree that since the appointment of an arbitrator there is a position of affairs in which the question of revocation could be considered; but I certainly, speaking for myself, see no sort of ground for discretion in the case that is made, which is not that the submission to refer is itself one which shows that the matter which it is said is going to be dealt with by the arbitrator is outside the submission. Clearly there is no such case. The agreement to refer is as wide as wide can be, but it is said that by reason of some subsequent facts the condition or relation, perhaps, I should call it, of the parties has ceased to be such that that which was a perfectly good agreement of arbitration has no application. No case has been suggested to us or shown to us in which the court has been asked to exercise a discretion to revoke under any such circumstances as those. The nearest that can be put or suggested is a case in which an arbitrator is shown to be going to deal with something which is outside the submission. The difference between that case and this seems to me very strong. Even in that case I understand the courts to have said, and my brothers have already quoted the relevant authorities, that they would be very slow to exercise their discretion and revoke the submission, and very careful in the exercise of its jurisdiction, but here without saying more, because we have not heard Mr. Atkin's argument on the point, nor the argument of his opponent, we have before us a case in which, upon the facts in the considered judgment of Bray, J., he held that this ground was entirely illusory when you come to examine it by the light of facts, and to say the least, therefore, it is a case in which there is no strong probability of the alleged excess beyond the jurisdiction of the submission being likely to take place. And as a member of the court that has to exercise the discretion, I say most certainly there is no ground shown for the exercise of such discretion, and I think this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Lightbound, Owen and Co.*

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

Jan. 27 *and* 29, 1912.

(Before VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L JJ.)

THE UMSINGA. (*a*).

Collision—River Thames—Thames By-laws 1898, *arts.* 4, 14—*Meaning of "master"—Look-out—Whistle—Port of London—Compulsory pilotage—General Pilotage Act* 1825 (6 *Geo.* 4, *c.* 125), *s.* 59.

(1) *A steamship belonging to the port of London while going down the Thames in charge of a duly licensed Trinity House pilot on a voyage from London to East Africa with a cargo and passengers collided with some barges and tugs. The master had been absent from the bridge for some time before the collision, and only returned shortly before the collision. In a damage action brought by the owners of the injured craft it was held that the master was not negligent in not being on the bridge in accordance with art.* 14 *of the Thames Rules, that the pilot was solely in fault, and that, following the case of* The Hankow (40 *L. T. Rep.* 335; 4 *Asp. Mar. Law Cas.* 97 (1879); 4 *P. Div.* 179), *the owners of the steamship were not liable for the damage as the pilot was compulsorily in charge, as the steamship was navigating in the port of London, a place in relation to which particular provision as to the appointment of pilots had been made by charter and by Act of Parliament within the meaning of the statute* (6 *Geo.* 4, *c.* 125, *s.* 59). *On appeal to the Court of Appeal:*

Held, affirming the decision of Sir S. Evans, P. (*reported below and in* (1911) *P.* 234) *that the owners of the steamship were not liable as the pilot was compulsorily in charge, for the steamship was navigating within a port in relation to which particular provision as to the appointment of pilots had been made.*

The Hankow (*ubi sup.*) *approved.* (*b*)

(2) *Observations by the President* (*Sir Samuel Evans*) *in the Admiralty Court as to the effect of rule* 14 *of the Thames Rules and as to the duties of masters of ships in charge of pilots.* (*c*)

DAMAGE ACTION.

Appeal from a decision of Sir S. Evans, President, by which he held that the owners of the *Umsinga* were not liable for the damage caused by a collision which occurred between the

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

(*b*) A note as to the charters of the Trinity House will be found in the report of *The Hankow*, at p. 97 of 4 Asp. Mar. Law Cas. The charters have been printed and published (1730), and there is a copy of the publication in Lincoln's-inn Library. The case of *The Cayo Bonito*, reported in 9 Asp. Mar Law Cas. 445 and in (1903) P. 203, contains much valuable information.

(*c*) In the course of the case in the Admiralty Court *The St. Paul* (1908) P. 320; (1909) P. 43; 11 Asp. Mar. Law Cas 152) was referred to as to the duties of masters and pilots with regard to whistling. The point was left open by the learned President. *The Shakkeborg* (1911) P. 245, and in *Shipping Gazette* April 11, 1911) was also cited, in which case Bargrave Deane, J. decided, upon the advice of the Elder Brethren, that the duty of a look out in the river Thames is to report every material light as soon as it becomes material.

Umsinga and certain barges and tugs owned by the appellants on the ground that at the time of the collision the *Umsinga* was in charge of a compulsory pilot who was alone to blame for the collision.

The appellants, plaintiffs in the court below, were the owners of the tugs *Harlow*, *Grappler*, *Reliance*, and *Growler*, and the barges *Apollo*, *Edwin*, *Turkey*, and *Aqua*.

The respondents, defendants in the court below, were the owners of the steamship *Umsinga*.

The case made by the appellants was, that about 8.35 p.m. on the 8th Oct. 1909 the barges and tugs mentioned above were lying, properly moored, in their barge and tug roads off Charlton, swung head up river. There was a light on the outside tug, and a watch was being kept on the roads.

In these circumstances, the *Umsinga*, instead of keeping clear of the roads as she could and ought to have done while coming down the river, struck the barge *Apollo*, breaking through the barge roads and breaking some of the craft adrift and driving the *Aqua* against the tug *Harlow*, breaking her adrift and damaging all the other craft mentioned above. When first seen by those on the barge roads she was close to and those on the tug roads saw her masthead and side lights one to two cables distant up river.

The appellants charged those on the *Umsinga* with bad look-out and with failing to keep clear of the roads.

The respondents admitted colliding with the craft, but denied that their servants had been guilty of negligence. The case they made was that the *Umsinga*, a steamship of 2958 tons gross and 1869 tons net register, manned by a crew of sixty-eight hands all told, was proceeding down Bugsby's Reach of the river Thames, on a voyage from London to Beira with a general cargo and passengers. The *Umsinga* was in charge of a duly licensed Trinity House pilot, and was making three to four knots an hour. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept on board of her.

In these circumstances as the *Umsinga* was rounding into Woolwich Reach under slight starboard helm and keeping to the southward of mid-channel, the white lights of craft and tugs lying moored at the plaintiffs' barge and tug roads were seen a little on the starboard bow from 300 to 400 yards off. A sailing barge showing a green light was also observed standing to the southward about 400 to 500 yards distant on the port bow, and a tug showing masthead and red lights was observed apparently coming out from the tug roads and bearing a little on the starboard bow. The helm of the *Umsinga* was then ported by the pilot's orders and steaded, and when the tug, having got on to the port bow of the *Umsinga*, began to go astern the helm of the *Umsinga* was again ported as ordered by the pilot.

Shortly afterwards, in order to clear the craft at the barge roads, the helm was by the pilot's orders put hard-a-starboard, but the stem of the *Umsinga* first collided with the craft moored at the barge roads, and directly afterwards with the tugs in the tug roads. Just before the collision the engines of the *Umsinga* were stopped.

The respondents alleged that if and in so far as the collisions and damage were caused by fault on the *Umsinga*, such fault was solely that of the pilot of the *Umsinga* who was compulsorily in charge.

The case was tried on the 27th April 1911, and, so far as the question of compulsory pilotage was concerned, turned upon the effect of the provisions of sect 59 of the General Pilotage Act 1825 (6 Geo. 4, c. 125). (a)

The following Thames rules were referred to:

4. The word master when used in relation to any vessel means any person whether the owner, master, or other person lawfully or wrongfully having or taking the command, charge, or management of the vessel for the time being.

14. The master of every steam vessel navigating the river shall be on one of the paddle boxes or on the bridge of such steam vessel, and shall keep or cause to be kept a proper look-out during the whole of the time it is under way, and shall remove or cause to be removed any person other than the crew, who shall be on the paddle boxes or bridge of such steam vessel.

49. Every steam vessel and steam launch when approaching another vessel so as to involve risk of collision shall slacken her speed, and shall stop and reverse if necessary.

The following cases were also cited:

The Velasquez, 2 Mar. Law Cas. O. S. 544; 16 L. T. Rep. 777; L. Rep. 1 P. C. 494;
The Tactician, 97 L. T. Rep. 621; 10 Asp. Mar. Law Cas. 534; (1907) P. 244;
The St. Paul, 100 L. T. Rep. 184; 11 Asp. Mar. Law Cas. 152; (1909) P. 43.

The appellants during the course of the case on finding that the master of the *Umsinga* had been absent from the bridge for some time before the collision, and had only returned to it just before the collision, alleged that art. 14 of the Thames Rules had been broken.

Judgment was reserved and was delivered on the 3rd May.

The President.—The defendants' steamship, the *Umsinga*, came into collision with certain barges and tugs belonging to the plaintiffs properly moored in barge and tug roads in Bugsby's Reach, on the south side of the Thames, and caused damage.

The *Umsinga*, outward bound, was proceeding down Bugsby's Reach in charge of a pilot duly licensed by Trinity House. He was one of the choice pilots of the defendants' line. The weather was fine. Neither weather, nor wind, nor tide played any material part in the collision.

There were hardly any craft under way in the reach. In fact, only two such craft were proved to be in the reach. One was a sailing barge; she was to the northward of the *Umsinga*, and at one time headed south, showing her green light; but she afterwards put about. The pilot said, and repeated positively, that the sailing barge gave him no trouble, and had nothing to do with the collision. The other was a tug, the *Rotifer*, with which I will deal hereafter. It was said that another craft, a barge under oars, was near at the time. A witness named Davies, who described himself as an "outside witness," gave evidence as to this barge. He never saw the sailing barge above referred to, nor the tug *Rotifer*. No

(a) The section is set out in the judgment of Vaughan Williams, L.J. (*infra*).

witness for the plaintiff saw or made any mention of Davies or his barge. I cannot accept Davies' testimony, and this barge under oars can be dismissed from further consideration.

The tug *Rotifer* had brought up river a dumb barge (the *Rivulet*), lashed to her starboard side. She had intended to make fast and leave this barge on the outside of the coaling station on the south side of the river, where some of the damaged barges were moored. She turned round under a starboard helm, so as to get the barge alongside on the outside of the roads. The watchman of the coaling station, however, directed the *Rotifer* to bring the barge inside the roads. The *Rotifer* thereupon went on a port helm under the stern of the coaling station, and she had got inside the roads before the collision happened.

There was no difficulty in the way of the safe navigation of the *Umsinga*. Nevertheless she headed right into the roads and collided with various barges and tugs which were moored there. This can only be accounted for by negligence, or error, in her management. The pilot said he did not manœuvre her in relation to the sailing barge. I am of opinion, however, upon the verbal evidence and the documents, that he did give an order to port with reference to the green light of that barge. Later, he ported still more, intending to go astern of the *Rotifer*, whose lights he saw. He stated that the *Rotifer* had gone out of the roads, was making way to the northward, and came to bear a little on his port bow; that the tug afterwards went astern, causing him difficulty, and that he therefore starboarded his helm.

Upon the whole of the evidence I cannot accept this story. I have come to the conclusion that the pilot ported too much, starboarded too late, and failed to stop and reverse his engines in proper time. I am clearly of opinion, and in this opinion the Elder Brethren fully concur, that the collision was due to the error or fault of the pilot. The defendants pleaded and contended that the pilot was solely to blame, and that they were relieved from liability by the statute. On the part of the plaintiffs it was contended that the defendants had not shown that the pilot was solely to blame. On the contrary, it was said that the master and officers of the *Umsinga* were negligent, or partly in fault, in that they had not performed their duties, and had not rendered the assistance which they ought to the pilot. Firstly, it was argued that there was a bad look-out on board the *Umsinga*. The chief officer was on the look out on the forecastle head, with the ship's carpenter standing by the windlass. The chief officer was a competent and experienced man. I am satisfied that he kept a good look-out, and made all the necessary reports to the bridge at the proper time. On the bridge were the pilot, the third officer (at the telegraph) and a lascar (at the wheel). The third officer held a first mate's certificate, and it was not suggested that he was not a capable and reliable officer. The orders of the pilot were duly attended to and obeyed. Secondly, it was argued that the sound signals were not given, in accordance with the Thames Rules, when the helm was ordered to be ported twice; and at the last to be starboarded; and that the officers of the vessel were to blame for this. In fact, no order to whistle was given by the pilot. Counsel for the plaintiffs argued, nevertheless, that the ship's officer on the bridge should have blown the whistle signals when the helm orders were given, although the pilot did not direct this to be done. The contention, on the other hand, was that the direction to sound the whistle should come from the pilot, and that he had a discretion as to whether, and when, they should be given. But this point, as counsel for the plaintiffs said, did not arise if the story put forward by the *Umsinga* that the *Rotifer* was making for the north bank, outside the roads, and that she afterwards went astern, was not accepted. I do not accept that story. The point, therefore, does not arise for decision in this case, and need not be further discussed. A similar point appears to have been expressly left open by the Court of Appeal in *The St. Paul*; (11 Asp. Mar. Law Cas. 152; 100 L. T. Rep. 184; (1909) P. 54, 56).

The remaining contention—which was put by counsel for the plaintiffs as part of the alleged bad look-out—was that the master of the *Umsinga* was not on the bridge at the time of the collision and that, therefore, he was in fault. He had left the bridge four or five mintues before the collision. It was not suggested that necessity required him to go. He said he told the pilot that he was going down for a few minutes. The pilot did not remember this; but he did not miss the master. The master was on his way back just about the time the accident happened.

The third officer, who was on the bridge, was a competent officer. He pointed out various matters to the pilot. The pilot did not pretend that he required any further assistance, or that the circumstances called for the attendance on the bridge of the master himself, in addition to the officer and the man at the wheel.

I have said that the navigation of the vessel in the state of the weather, and in the conditions which prevailed in the reach, was singularly free from difficulty; but it was argued on the part of the plaintiffs that rule 14 of the Thames Rules makes it obligatory for the master himself to be on the bridge at all times within the limits to which the rule extends It has never been held, or contended, so far as I am aware, that this rule requires the presence of the master on the bridge at all times and in all circumstances—within the range of the rule—when the vessel is in charge of a compulsory pilot. It is easy to conceive cases in which, even apart from any such rule, a master must be on the bridge before it can be rightly said that all the assistance which the law requires to be given to the pilot by the master and crew is given, and in which his absence might be evidence of negligence or of default. Indeed, in most rivers like the Thames I should consider it very advisable that the master should be on the bridge with the pilot, although the pilot is in charge of the vessel for the time being. But, in my opinion, it cannot be held as a matter of law, or as an inflexible rule of good navigation, that the master must be there, and that his absence amounts to default for which the owners are liable, when he provides a competent officer, or where there are no special circumstances of difficulty, or no special matters within his knowledge of which he ought to be ready to inform the pilot. It is very doubtful whether, when a compulsory pilot is in charge, the pilot is not "the master" within the meaning of rule 14 (*vide* the definition of "master" in rule 4). If by "master" in rule 14 is meant

"the master of the vessel," the rule apparently requires him to remove the pilot himself from the bridge, as he is a person "other than the crew."

It is beside the question to inquire whether the master, if on the bridge, might by suggestion, or advice, or other legitimate intervention, have caused the pilot to avoid the collision. If he is not there, and is not bound by law, or by the rules of good navigation, to be there, the court cannot surmise what he would have done if he was there, in order to fasten liability on the owners for the fault of the compulsory pilot.

In the circumstances of this case, I find that the collision was solely due to the fault of the pilot. I understand that counsel for the plaintiffs wishes to argue that pilotage was not compulsory in this case. If he does, I postpone my formal judgment until that question has been argued and determined.

The point as to whether the pilotage was compulsory was argued on the 17th May, when judgment was reserved.

Judgment was given by the President on the 19th May.

The PRESIDENT.—The collision in this case took place in Bugsby's Reach in the river Thames. Bugsby's Reach is between Lea Ness and Hook Ness. This is the portion of the river which lies, broadly speaking, between the West India Docks at the one end and the Royal Victoria Docks at the other.

I found that the collision was due solely to the fault of the pilot on the *Umsinga*, the defendants' vessel. The defendants say that at the place of collision pilotage was compulsory; the plaintiffs contended that it was not. Sect. 603 of the Merchant Shipping Act 1894 provides that (subject as therein mentioned) the employment of pilots should continue to be compulsory in all districts where it was compulsory immediately before the commencement of the Act, but that all exemptions from that compulsory pilotage should continue to be in force.

Upon the authorities, the question whether the *Umsinga* was at the time and place where the collision occurred exempted from compulsory pilotage depends upon sect. 59 of 6 Geo. 4, c. 125. The *Umsinga* belonged to the port of London. She was outward bound and carried passengers. The collision took place within the port of London. She was, in fact, in charge of a Trinity House licensed pilot at the time.

The question is, did the collision occur in a port or place in relation to which particular provision was made before the statute of 6 Geo. 4, c. 125, either by any Act or Acts of Parliament, or by any charter or charters, for the appointment of pilots. If yea, pilotage was compulsory. If nay, the vessel was within the exemption from compulsory pilotage.

In my opinion this question was decided by the case of *The Hankow* (40 L. T. Rep. 335; 4 P. Div. 197; 4 Asp. Mar. Law Cas. 97). That decision was pronounced in 1879. Fifteen years ago the Merchant Shipping Act 1894 (which no doubt is almost, but not quite, a purely consolidating statute) was passed. Both long before, and ever since, 1879 the practice has been to treat the Thames as a place where pilotage is compulsory. Whether I thought the *Hankow* was rightly decided or not, I should feel bound to follow it in these circumstances, and after this lapse of time. Other cases which were cited and said to be inconsistent with it—namely, *The Killarney* (Lushington, 427) *The Stettin* (Brown and Lushington, 199) and *General Steam Navigation Company* v. *British, &c., Company* (19 L. T. Rep. 357; L. Rep. 3 Ex. 330; 20 L. T. 581; L. Rep. 4 Ex. 238)—were not decisions on the same point. But I wish respectfully to add that in my opinion the decision in *The Hankow* was right, not only on the ground upon which it was rested—namely, that the locus of the collision was in a port or place in relation to which particular provision for the appointment of pilots had been made by charter before the passing of 6 Geo. 4, c. 125, but also on the ground that such a provison had also been made before that time by an Act or Acts of Parliament. The Act then in force was 48 Geo. 3, c. 104. Other Acts to a similar effect had preceded this.

I hold upon the authority of *The Hankow*, and upon the words of sect. 59 of the 1825 Act, that at the place where the collision happened there was no exemption from compulsory pilotage in the case of the *Umsinga*. The defendants are accordingly entitled to judgment, as the compulsory pilot was solely to blame.

On the 7th July 1911 the plaintiffs served a notice of appeal on the defendants appealing against the decision given on the 19th May, and asking for an order that judgment should be entered for the plaintiffs with costs.

The appeal was heard on the 27th and 29th Jan. 1912.

Bateson, K.C. and *Balloch* for the appellants, William Cory and Son Limited.—The question raised in this case is whether the pilot in charge of the *Umsinga* was compulsorily in charge. The *Umsinga* was in her own port proceeding down the Thames with cargo and passengers on board on a voyage to East Africa. The question turns on sect. 603 of the Merchant Shipping Act 1894 which reproduces sect. 503 of the Merchant Shipping Act 1854, and sect. 59 of 6 Geo. 4, c. 125, is the section in which the exemptions from compulsory pilotage are to be found. The judgment in this case which follows *The Hankow* (*ubi sup.*) is wrong. *The Hankow* (*ubi sup.*) was wrongly decided, for though a provision had been made for the appointment of pilots for the river Thames no such provision had been made for the port of London, and the port of London was not a place for which particular provision had been made for the appointment of pilots within the meaning of sect. 59 of 6 Geo. 4, c. 125. To understand the meaning to be attached to that Act it is necessary to see how this matter was dealt with in earlier Acts. The preamble and sects. 1, 8, 9, 11, and 12 of 5 Geo. 2, c. 20 passed in 1732 shows the origin and powers of the Trinity House, but there is no compulsion on any ship to take a pilot under that Act. Then, in 1808, 48 Geo. 3, c. 104 was passed, that Act is the first General Pilotage Act. It deals with the powers of the Trinity House and makes pilotage compulsory. It is in this Act that the exception in question in this case first appears. Sect. 55 imposes penalties on masters of vessels piloted by any other than a licensed pilot, but excepts from the penalty masters of any vessels who shall act as a pilot within the limit of the port or place to which the ship belongs, not being a port or place

in relation to which provisions hath heretofore been made by an Act or Acts of Parliament or by any charter or charters for the appointment of pilots. That Act only remained in force for four years, but in 1812 was replaced by 52 Geo. 3, c. 39, and sect. 59 of that Act reproduces the same section. Then, in 1825, 6 Geo. 4, c. 125 was passed. Sect. 5 of that Act gave the Trinity House power to appoint sub-commissioners, but they are not permitted to do this in ports or places within or for which particular provision shall have been made for the appointment of pilots, and sect. 59 provides that a master . . . of any other ship or vessel whatever, whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament or by any charter or charters for the appointment of pilots, shall and may conduct or pilot his own vessel. The port at which a British ship is registered is deemed to be the port to which she belongs:

> Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 13.

The words particular provision mean provision made by an authority other than the Trinity House. The correctness of the decision in *The Hankow* (*ubi sup.*) has been questioned. See

> Marsden's Collisions at Sea, 6th edit., p. 244, note *z*, and the note to the *Hankow*, in 4 Asp. Mar. Law 97, note *a*.

The charter of James II. only relates to vessels taken into and out of the river, and does not refer to the Port of London. In *The Killarney* (Lush. 427) a particular provision was proved to have existed:

> 52 Geo. 3 c. 39, s. 21.

In *The Stettin* (Br. & L. 199) it was held that no Act of Parliament applied.

Dawson Miller (*Laing*, K.C. with him) for the respondents.—Pilotage is compulsory in this case unless the appellants can bring this vessel within the exception. Such a provision was made by the charter of James II. referred to in *The Hankow* (*ubi sup.*), and apart from the charter 3 Geo. 1, c. 13, also contained particular provisions in relation to this port or place. After the lapse of thirty years the decision in *The Hankow* should not be departed from.

Vaughan Williams, L.J.—This case has been argued at considerable length, but I am far from saying that it does not raise questions of difficulty. I can express the difficulty, I think, best in this way. Sir Samuel Evans, the President, includes among the grounds of his decision the case of *The Hankow* (40 L. T. Rep. 335; 4 Asp. Mar. Law Cas. 97; 4 P. Div. 197). The decision in *The Hankow* is a decision which has been questioned, and, although *The Hankow* was decided in 1879, it would be untrue to say that *The Hankow* has always been accepted as a sound decision under the Acts of Parliament relating to compulsory pilotage, and the authority of Trinity House, and of the corporations, whom I may speak of as the local pilotage authorities. In fact, not only has the case of *The Hankow* not always been accepted as a clear exposition of the law, but the decision in *The Hankow*, and the decisions in the cases which are referred to in the course of a judgment by Dr. Lushington, have been questioned in various cases which have come before us, including, if I recollect rightly, the question raised by Lord Chelmsford in the House of Lords and the question raised in the Exchequer Chamber, in *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company*, which is reported first in 19 L. T. Rep. 357; (1868) L. Rep. 3 Ex. 330—a case in which the decision was not unanimous—and reported also, on appeal, in 20 L. T. Rep. 581; (1869) L. Rep. 4 Ex. 238, where one can fairly say that the decision in the Exchequer Chamber may be read and accepted without in any degree affirming or expressing approval of certain cases which had been cited, and are cited also, I think, in Mr. Marsden's book, as throwing a doubt upon the decision in *The Hankow*. The cases have been referred to, and they are fairly summarised, in the note at p. 244, note (*z*), in Mr. Marsden's book, sixth edition. That note says: Sir R. Phillimore considered that the case was governed by *The Killarney* (Lush. 427), and that *The Stettin* (Br. & Lush. 199) was not to be followed. The question as to the construction of the Act of George IV. was decided in accordance with *The Stettin* (*ubi sup.*), in *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (*ubi sup.*). It seems doubtful whether the decision in *The Hankow*, that the charter of James II. was a particular provision within the meaning of the Act of George IV., is correct."

Having read those authorities, I do not see that they really cast any doubt upon the decision in *The Hankow*, or any doubt upon the efficacy of the charter, as constituting the pilotage authority; but, at the same time, there has been sufficient doubt raised to prevent us in any way dealing with this matter on the basis of saying that we are not going to interfere with the decision of *The Hankow*, since this is a decision which has stood unchallenged for forty years. I do not think one can properly take up that position.

I will now proceed to deal with the judgment of the President of the Admiralty Division in this case. He says: "Upon the authorities, the question whether *The Umsinga* was, at the time and place where the collision occurred, exempted from compulsory pilotage depends upon sect. 59 of 6 Geo. 4, c. 125. *The Umsinga* belonged to the Port of London. She was outward bound, and carried passengers. The collision took place within the Port of London. She was, in fact, in charge of a Trinity House licensed pilot at the time." I would like to say a word about the reference by Sir Samuel Evans to the fact that *The Umsinga* was outward bound, and carried passengers. The importance of that is that there is continuously in these Acts an exemption, in respect of pilotage, which applies to outward-bound ships not carrying passengers. That is why the President here refers to the fact that this particular ship was carrying passengers. His judgment proceeds: "The question is: Did the collision occur in a port or place in relation to which particular provision was made before the statute of 6 Geo. 4, c. 125, either by any Act or Acts of Parliament, or by any charter, or charters, for the appointment of pilots? If yea, pilotage was compulsory; if nay, the vessel was within the exemption from compulsory pilotage." I think the word "exemption" should be read "exception."

I have already said that, in my opinion, both the Act of Parliament and the charter leave the jurisdiction of Trinity House in the Port of London, in respect of compulsory pilotage, unaffected, as it existed before the Act, and nothing has occurred, subject to the exceptions which I have just named, in any way to impair that power vested in the corporation of Trinity House. I hesitate to repeat again the observations which I made just now, in order to ascertain whether I had exactly grasped the steps in the argument—I will say the excellent and clear argument—of counsel for the respondent, in dealing with that which I wish to say, in my opinion, was a question which really, having regard to the authorities and the expressions of many judges in those authorities, was a question of considerable difficulty, and one which really required a decision to solve which view was right.

I think, in those circumstances, I ought to deal with the question. The Act of 1808 (48 Geo. 3, c. 104), was a repealing Act, which repealed the antecedent statutory authorities. That being so, one has to look to see whether the Act of 1808, although it repeals all antecedent authorities, in terms re-enacts antecedent powers given to the Trinity House not by a general reference, but by verbal expression; and, in my opinion, the first result of the words of the Act is such as to leave unimpaired, having regard to the new words of enactment in the statute itself, the power of the corporation of Trinity House, and also, in my opinion, to leave unimpaired their powers under the charter. It is really common ground that, subject to anything else which appears in the Act of Parliament, the result was that the powers of the corporation of Trinity House were preserved. I had better read first the words which appear at the end of the recital, and then the words of sect. 2. After the recital come these enacting words: "That all and every the clauses, provisions, powers, penalties, forfeitures, matters, and things relating as well to pilots appointed by the said corporation of Trinity House, of Deptford Strond, as to pilots of the fellowship of Dover, Deal, and the Isle of Thanet, and to the pilotage by and regulation of all such pilots as aforesaid, and also as to the conduct of all persons in matters of pilotage, within the jurisdiction of the said Corporation of the Trinity House of Deptford Strond, and the Liberty of the Cinque Ports, which are contained in any Act or Acts of Parliament heretofore made, shall be, and the same are hereby repealed, except only so far as such Acts relate to any rates of pilotage due, or to become due, before the commencement of the respective new rates to be established under the provisions of this Act, or to any penalty or forfeiture incurred or to be incurred, or any other Act, matter, or thing done, or to be done, before the establishment of the new rules and regulations which are to be made under the provisions of this Act, or before the commencement of the operations of any of the provisions of this Act, in relation to any such matters as aforesaid." There is nothing in that first section which in any way repeals the powers under the charter. Sect. 2 is as follows: "It shall be lawful for the Master, Wardens, and Assistants of the Guild Fraternity, or Brotherhood of the Most Glorious and Undivided Trinity, and of St. Clement in the Parish of Deptford Strond in the county of Kent (commonly called the Corporation of the Trinity House of Deptford Strond), and they are hereby required to appoint and license under their common seal, fit and competent persons, duly skilled, as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing up and down or upon the rivers of Thames and Medway, and all and every the several channels, creeks, and docks thereof or therein, or leading or adjoining thereto, as well between Orfordness and London Bridge, as from London Bridge to the Downs, and from the Downs westward as far as the Isle of Wight, and in the English Channel from the Isle of Wight up to London Bridge, which vessels shall be conducted and piloted by such pilots so appointed and licensed, and by no other pilots or persons whomsoever, except pilots appointed by" bodies which, without disrespect, I may call the minor Trinity Houses.

I do not think there is any suggestion that those words, if they stood alone, would not cover, among other things, the Port of London, in respect of ships entering or going out.

Then sect. 20 reads thus: "And be it further enacted that it shall be lawful for the said Corporation of Trinity House of Deptford Strond, and they are hereby required to appoint from time to time (as often and for such periods as they in their discretion shall think fit) proper and competent persons at such ports or places in England as they may think requisite (except within the liberty of the Cinque Ports, and all such other ports and places within or for which provision shall have been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots) not to exceed five nor less than three persons at each port or place for which any such appointment shall be made, which persons so to be appointed, shall be called Sub-Commissioners of Pilotage," &c. Now, the argument of counsel for the appellants is that, by reason of the words I have just read, the Port of London itself is excepted from the powers, which I have already read, under sect. 2, given to Trinity House. Apart from certain observations in the cases which have been cited to us, I should have thought that that construction, which would deprive the Trinity House of its jurisdiction in respect of pilotage, particularly in respect of compulsory pilotage, was a very difficult construction to accept. Then we were not invited to deal with this matter merely upon the section of the Act of 1808, but we were invited to deal with it under the provisions of sect. 59 of 6 Geo. 4, c. 125. I have already alluded to the powers which were given under the Act of 1808, and sect. 59 of the Act of 1825 says: "Provided always and be it further enacted that for and notwithstanding anything in this Act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne, inclusive, and the Baltic (all such ships and vessels having British registers, and coming up either by the North Channel, but not otherwise), or of any Irish trader using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the Kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney,

Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of 60 tons, and having a British register, except as hereinafter provided; or of any other ship or vessel whatever, while the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel." It has been suggested that sect. 59 must be read in relation to the section of the earlier Act, in such a way as that the Port of London does not come within the enacting part of the statute, but comes within the exemption part of this section. I think I may say that, even apart from shrinking from a decision which construes a section of an earlier Act of Parliament by the provisions in a later Act of Parliament, I cannot come to the conclusion that the argument of counsel for the appellants is a good one.

Before dealing with any fresh subject in any way, I wish to say that in my own judgment, even if the jurisdiction of the Trinity House were affected by those words in the way which counsel for the appellants has suggested, I think that the words of sect. 2 of the Act of 1808 are so strong that they really are not affected by sect. 59. Dealing with sect. 2 itself, it seems to me it would be very strange to put such a construction upon the exception in that section as to deprive the corporation of the Trinity House of this jurisdiction in the Port of London itself, which, as I have already stated, is not really a new jurisdiction, but an old jurisdiction taken away by the earlier words of the Act, but re-enacted again, and which really contains this very power, with some additional powers under the charter granted in the reign of James II.—as to the existence and extent of which there can be no sort of doubt, a copy of the charter having actually been produced in court before Sir R. Phillimore, in the case of *The Hankow*. The learned president, in his judgment, goes on thus: "In my opinion, this question was decided by the case of *The Hankow* (*ubi sup.*). That decision was pronounced in 1879. Fifteen years afterwards, the Merchant Shipping Act 1894 (which, no doubt, is almost, but not quite, a purely consolidating statute), was passed. Both long before and ever since, 1879, the practice has been to treat the Thames as a port or place where pilotage is compulsory. Whether I thought *The Hankow* was rightly decided or not, I should feel bound to follow it in these circumstances, and after this lapse of time."

I have already said that I am not sure that I should recognise that obligation quite to the extent Sir Samuel Evans has, because of the comments made in high places as to the value of *The Hankow*. The President proceeds: "Other cases which were cited, and said to be inconsistent with it—viz., *The Killarney* (Lush. 427), *The Stettin* (Br. & Lush. 199), and *General Steam Navigation Company* v. *British, &c., Company* (*ubi sup.*)—were not decisions on the same point"—I entirely agree—"But I wish respectfully to add that, in my opinion, the decision in *The Hankow* was right, not only on the ground upon which it was rested—viz., that the locus of the collision was in a port or place, in relation to which particular provision for the appointment of pilots had been made by charter before the passing of the Act of 6 Geo. 4, c. 125—but also on the ground that such a provision had also been made before that time by an Act or Acts of Parliament. The Act then in force was 48 Geo. 3, c. 104. Other Acts to a similar effect had preceded this. I hold upon the authority of *The Hankow*, and upon the words of sect 59 of the 1825 Act, that, at the place where the collision happened, there was no exemption from compulsory pilotage in the case of the *Umsinga*."

I wish most emphatically to say that I agree with Sir Samuel Evans. I should have been content to base my decision upon 48 Geo. 3, c. 104, even though there had been no charter at all; and I wish, also, to say that my construction of 48 Geo. 3, c. 104, has been in no way displaced by sect. 59 of 6 Geo. 4, c. 125, upon which counsel for the appellants laid such stress. I think this appeal must be dismissed.

Farwell, L.J.—I also am of opinion that this appeal fails. We are asked to reverse the decision of the learned President, who has not only followed but expressly agreed with the decision of Sir Robert Phillimore in *The Hankow*—a decision which has been acted upon ever since 1879 without dissent. It differs, no doubt, from the decision in *The Stettin* of Dr. Lushington, but Sir Robert Phillimore explained his reason for not following that decision, and the reason seems to me to be amply sufficient.

This present case, as argued, has turned upon the construction of 6 Geo. 4, c. 125. It appears from the preamble to that Act that for centuries the Trinity House has had jurisdiction over pilots. The Act then proceeds to deal with pilotage, leaving charters untouched, but repealing former Acts, and setting out fresh regulations, leaving to the Trinity House the appointment of pilots in the London district. Then it creates what are now known as, I believe, the Trinity Outports; and sect. 5 empowers the Trinity House to appoint sub-commissioners, who are to make inquiries, and give their certificates as to pilots in the outports—that is to say, places which have no pilotage authority, and where it is deemed expedient should have provision made for future pilotage. By this section of the Act Trinity House is enabled to appoint pilots in the Port of London and various other specified places, and also to appoint pilots in other districts, and the exception upon which reliance is placed is as follows: "That it shall be lawful for the said corporation of Trinity House . . . and they are hereby required to appoint from time to time . . . proper and competent persons, at such ports or places in England as they may think requisite (except within the liberty of the Cinque Ports, and all such other ports and places within or for which particular provision shall have been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots) . . . which persons so to be appointed shall be called sub-commissioners of pilotage," &c.

It is seriously argued that that exception does not apply to London; and, therefore, that this Act of Parliament, first of all, empowered Trinity House to appoint pilots for London, and then went on to treat London as an outport, and authorises them to appoint commissioners, who are to recommend the appointment of pilots for the outports—one of them London. It seems to me that that construction is contrary to the clear intent of the Act of Parliament itself. But the words "any charter or charters" are perfectly clear, and, to my mind, it is a clear case so far as sect. 5 is concerned. I do not think sect. 59 has anything to do with it. It refers back to the same exception, and does not in any way alter or enlarge that exception.

If that be so, the whole of the rest of the argument for the appellants falls to the ground because their argument is that the words of the later Act of George IV. are to be construed in the same way as the Act of 1808. If the words of the 1808 Act do extend to London, then sect. 59 of the later Act does not help. I have already said that, in my opinion, it is clear that sect. 20 of the Act of 1808 (sect. 5 of Act of 1825) does not extend to the Port of London, because it is already specifically dealt with by the Act itself; but in my opinion it is not a proper method of construction to fasten on words in a later Act which bear some resemblance to words in an earlier Act and apply them as if they were a definition clause to be read into the subsequent Act. The word "particular" appears to me to have very great importance, and to show that different considerations apply to the later Act. I entirely agree with what the President has said on this point. In the case before Dr. Lushington—*The Stettin*—the charter of James II. was not referred to, and in the Privy Council it went off on another point, and nothing was said about this particular question. I fail to find anything in the case which throws doubt on the decision in *The Hankow*.

KENNEDY, L.J.—I am of the same opinion. We are asked to reverse the decision of the President of the Admiralty Division upon a question which is no doubt of some importance, but as to which, in the first place, there is a decision now thirty-two years old which has never been, as far as I am aware, questioned in any court of law before. The cases referred to, of *The Stettin* and of the *Steam Navigation Company*, in the Exchequer, were earlier cases, and *The Hankow*, as far as I know, and as far as counsel can tell us, is a case that has never been assailed before in regard to the correctness of its principle. It is true that in the learned work of Mr. Marsden doubt is thrown on the correctness of the principle, but there is nothing to be found in any case which followed *The Hankow* which has cast any sort of doubt upon its correctness.

How, then, does the case stand apart from authorities? We have got in the case of the *Umsinga* a vessel carrying cargo and passengers. She was outward bound, and was no doubt a vessel which was registered in the port of London. Therefore she was a vessel which in terms of the statutes was a vessel belonging to the port or place of London. She pleaded compulsory pilotage, and that plea was upheld. It is said that decision is wrong, and the question of its being right or wrong depends, as argued before us, upon the true construction and meaning of sect. 59 of 6 Geo. 4, c. 125, which I need not read at length because it has been read fully already. The gist of that section, so far as it is material, is this, that in regard to a vessel which is within the limits of the port or place to which she belongs there is an exemption from compulsory pilotage subject to this, that that port or place to which she belongs is not a port or place "in relation to which particular provision has heretofore been made by Act or Acts of Parliament, or by charter or charters, for the appointment of pilots."

It is argued by counsel for the appellants that the *Umsinga* does not fall within that limitation of the exemption, because he says that the Port of London is not a place in relation to which a particular provision has heretofore been made by any Act or Acts of Parliament, or charter or charters, within the meaning of the section.

Certain things have to be admitted. In the first place there is a charter of James II., and it is not contended by counsel for the appellants that that is not a charter which can properly be described as a charter which does contain provisions for the appointment of pilots. But more than that, there is also the Act of 48 Geo. 3, c. 104, which by sect. 2 expressly gave the Trinity House powers to appoint and license under their seal fit and proper persons as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing up and down or upon the rivers of Thames and Medway, &c. That Act was an Act which, by its last section, was expressed to have a duration of only four years, and so when the four years were up, in 1812, came a section, which is practically to the same effect, in the Act of 52 Geo. 3, c. 39, s. 2, which enacts, practically in the same terms, the appointment and licensing of pilots by the Trinity House.

In face of those facts it is said that none the less is this particular Port of London not a place in relation to which particular provisions have heretofore been made by any Act or Acts of Parliament, or by charter or charters. I hope I have done the learned counsel justice. As I understand them they say you must not construe "particular provision" in sect. 59 (6 Geo. 4, c. 125) as it would otherwise be construed, because if you do you thereupon strike out all the places to which the exemption can apply—you must except the Port of London, because if you do not except it, then you show that there is really no place in which a vessel belonging to a port or place will have the benefit of the exemption.

I decline altogether, because a difficulty may arise in finding something to which the section applies, to give the words "particular provision," &c., any other than their natural meaning. I do not myself, however, think that difficulty exists.

Before I point out why I do not, I will just say that the argument for the appellants in saying that the words "particular provision" do not apply, is to say that you are to construe them by the light of sect. 20 of the Act of 48 Geo. 3, c. 104, in which it was enacted that it should be lawful for the corporation of Trinity House to appoint from time to time proper and competent persons at such ports or places in England as they may think requisite, "except within the Liberty of the Cinque Ports, and all such other ports and places within, and for which provision shall have been made by any Act or Acts of Parliament, or by any charter or charters for the appointment

of pilots." I think that the word "provision" in the earlier statute and the words "particular provision" in the later statute were in each case properly used, and that each set of words has its natural and appropriate meaning. I think that by sect. 2 of the Act of 1808, as well as by charter, the Port of London was a place for which provision had been made when that Act of George III. was passed.

There were three classes of places at that time. There were certain places for which there had been an express provision, such as I think was made by charter for the Port of London, and such as had been made by the Cinque Ports. There were also places outside London and the Cinque Ports altogether which had special charters—I do not know whether any have special Acts of Parliament—and there were also places for which no provision had been made, and for the benefit of which, no doubt, this statute was passed. It was felt that there should be pilotage provision made for those places, and pilotage provision taking the form of the licensing of pilots, whose services should be employed by those who travel in or out of those ports by ship. So that the Trinity House was dealt with as a central authority, in whose hands authority might be put to appoint commissioners to appoint pilots in those places for which no provision had been made. Those places did not include the Cinque Ports or those places for which there had been express provision, but for all such other places there was to be a pilotage jurisdiction created for the first time; and then that is, as counsel for the respondent pointed out, supplemented by sect. 55 of the Act of 1808, by which, with regard to the matter we have discussed—namely, the position of the master of a vessel, who is navigating the waters of his own port—protects such a person from being prejudiced by the creation of pilots and compulsory pilotage in a district in which it had not existed before. It was provided that the masters of vessels belonging to those ports thould still be able to navigate in those ports without taking a pilot on board. So, when you come to the statute of 6 Geo. 4, sect. 59, what the Legislature said was this: There shall be an exemption generally or from compulsory pilotage of vessels within the limits of the port to which those vessels belong, but we are not going to interfere with the operation of other Acts of Parliament, or charters, where they have made particular provision, in other words, we are not going by this section of 6 Geo. 4, c. 125, to alter the law whereby under those Acts of Parliament and charters, by particular provision it is at present compulsory to employ a pilot even on a vessel which belongs to that port. Therefore, the Legislature created a large class of outports for which pilots were hereafter to be appointed, but which could not say they had particular provision, but only the general provision of sect. 20 of the Act of 1808.

To my mind it is as clear as I can reasonably expect anything to be that this Act of Parliament was specially drafted to leave a large class of places in which the masters would still enjoy the privilege left them by sect. 55 of the Act of 1808 which by a general provision made them pilotage districts, but still meant to prevent the exemption applying to places in relation to which there had been a particular provision made either by Act of Parliament or by charter. Counsel for the appellants says if London is excepted from the exemption, there is nothing to which the section can apply. I think there is.

For these reasons I think that the learned President was perfectly right, and, if I may, I will add to what my lord has said my concurrence in the view that even without the charter of James II. these two successive Acts of 1808 and 1812 make particular provision for pilotage in the Port of London.

Solicitors: for the appellants, *Keene, Marsland, Bryden* and *Besant*; for the respondents, *Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Jan. 25 *and* 26, 1912.

(Before SCRUTTON, J.)

LANDAUER AND CO. *v.* CRAVEN AND SPEEDING BROTHERS (*a*)

Sale of goods—C.i.f. contract—Bill of lading—Transhipment—Tender of one bill of lading—Right to reject goods.

Where there is a contract of sale on c.i.f. terms, it is, by mercantile usage, unless otherwise agreed, the duty of the seller to provide by a contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, and by an indorsed bill of lading or otherwise to transfer to the buyer the benefit of those rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from port of shipment to port of destination.

In the case of a shipment of goods under a c.i.f. contract from Manila to London viâ Hong-Kong under the bills of lading, one from Manila to Hong-Kong and the other from Hong-Kong to London respectively, where the seller tendered to the buyer the Hong-Kong to London bill of lading:

Held, that this was not a good tender, and the buyer was entitled to reject the goods.

COMMERCIAL COURT.

Special case stated for the opinion of the court.

The facts and arguments are sufficiently stated in the special case and the judgment of Scrutton, J.

AWARD AND SPECIAL CASE.

Whereas by a written and printed contract . . . dated the 5th May 1909 the plaintiffs sold to the defendants 500 bales of Manila hemp . . . at the price of 21*l.* 10s. plus ½ per cent. per ton of eight bales cost freight and usual f.p.a. insurance on the following (amongst other) terms: (*a*) Shipment to be made from a recognised shipping port or ports in the Philippine Islands or from Hong-Kong or Singapore by steamer or steamers direct or indirect to London between the 1st Oct. and the 31st Dec. 1909, both inclusive. (*b*) Declaration was to be made with due dispatch, but not later than sixty days from date of bill of lading. (*c*) Extension of time for shipment was to be allowed to the seller at a reduction of price of 1¼ per cent. up to seven days and 2½ per cent. up to fourteen days. (*d*) Bills of lading were to be made out in sets of not exceeding 250 bales each. (*e*) Payment was to be made

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

by cash within fourteen hours of vessel reporting at Custom House in exchange for shipping documents, but should arrival of vessel be delayed beyond the due date of the draft at three months' sight drawn against the original Manila invoice the seller to have the right to call on the buyer to take up the documents at the maturity of the said draft less usual rebate. (*f*) A provision for arbitration under the Arbitration Act 1889, with restrictions, and (*g*) A supplementary clause providing that the date of the bill of lading attached to the shipper's draft should be conclusive evidence of the date of shipment. . . .

And whereas 100 bales of the said hemp, part of the 500 bales comprised in the said contract, were duly declared in writing by sellers to the buyers per steamship *Oanfa* and were duly tendered and accepted by the buyers and paid for by them on the 18th Feb. 1910 and no question or dispute arose in connection with the said 100 bales. And whereas a dispute arose between the buyers and the sellers whether two parcels of 150 bales and 250 bales of Manila hemp tendered by the sellers to the buyers under the said contract to make up the balance of the said 500 bales were a good tender under the contract. And whereas the buyers appointed Mr. Francis Agar arbitrator in the said dispute and after certain proceedings by originating summons under the Arbitration Act 1889 the sellers appointed Mr. H. W. F. Ide as arbitrator in the said dispute on the terms embodied in the consent order dated the 15th June 1910 made on the said summons that the arbitrators or their umpire should state an award in the form of a special case if required by either party. And whereas the said arbitrators with the consent of the parties appointed me the undersigned Samuel Garrett, of St. Michael's Rectory, Cornhill, London, solicitor, as the umpire in the said reference. And whereas by consent of the parties I sat on the said reference with the arbitrators. And whereas both parties required the award in the said reference to be stated in the form of a special case for the opinion of the court. And whereas the said arbitrators being unable to agree upon an award referred the said dispute to me as umpire by writing under their hands dated the 6th Nov. 1911. Now I the said Samuel Garrett, having take upon myself the burden of the said reference and having considered the evidence adduced by the said parties and the arguments by their respective counsel, do hereby (subject to the opinion of the court on the special case hereinafter stated) award and determine that the said 150 and 250 bales of hemp tendered by the sellers to the buyers as aforesaid under the said contract of the 5th May 1909 were not a good tender and that the buyers were not bound to accept the same and are entitled to recover damages from the sellers for breach of the said contract and that the sellers do bear and pay their own costs of the said reference and do pay to the buyers their costs of the said reference, including the costs of the said originating summons, and do also pay the costs of this award, which I assess at 79*l.* 19*s.* 4*d.*, and that if the buyers shall in the first instance pay the costs of the award the sellers shall forthwith repay to the buyers the amount so paid, but this award is subject to the opinion of the court in the following:—

Case.

1. On or about the 28th Dec. 1909 Warner, Barnes, and Co., of Manila, shipped on board the steamship *Rubi* at Manila under two bills of lading, both dated Manila the 28th Dec. 1909, 150 and 250 bales of Manila hemp . . . for delivery to shipper's order at Hong-Kong. . . . Manila is a recognised shipping port in the Philippine Islands.

2 The said hemp was invoiced by Warner, Barnes, and Co. to Bibby Brothers and Co., London, under two invoices on printed forms, both dated Manila the 28th Dec. 1909, and reading: "Shipped on board the steamship *Rubi*, master, bound for Hong-Kong, for transhipment thence per other steamers to London per account and risk of the concerned and consigned to order." . . . The said hemp at the time of shipment was *bonâ fide* intended by the shippers to be transhipped at Hong-Kong to London, and the shippers caused to be forwarded to Mr. J. C. Moxon, a shipping agent in Hong-Kong, the said Manila bills of lading with the requisite instructions for him to ship the goods forthwith to London. The said J. C. Moxon, however, did not procure ship room for forwarding the said hemp from Hong-Kong to London until the 25th March 1910 as hereinafter mentioned.

3. The buyers contended on the said reference that Warner, Barnes, and Co. and the said J. C. Moxon did not use reasonable endeavours to find ship room for the said hemp from Hong-Kong, and that if reasonable efforts had been used room might have been found at an earlier date than the 25th March 1910. The evidence, however, did not satisfy me that this contention was well-founded, and I find as a fact that there was no want of due diligence on the part of Warner, Barnes, and Co. or the said J. C. Moxon in endeavouring to find room for the forwarding of the said hemp from Hong-Kong to London, and that the delay of nearly three months at Hong-Kong was due to causes beyond the control of Warner, Barnes, and Co. and the said S. C. Moxon.

4. Warner, Barnes, and Co. drew two bills of exchange, dated the 28th Dec. 1909, upon Bibby Brothers and Co. in respect of the said hemp. The said bills of exchange were attached to duplicates of the said Manila bills of lading dated the 28th Dec. 1909 and the policies mentioned in the next clause. . . .

5. The said Warner, Barnes, and Co. on the 28th Dec. 1909 effected insurances on the said hemp on the usual f.p.a. terms "at and from Manila to Hong-Kong per steamship *Rubi* and thence per other steamer to London with leave to call at ports *en route*, including risk of transhipment and of fire while at transhipping port." The two policies by which such insurances were effected were both in the same form. . . .

6. The sellers purchased the said 250 and 150 bales of hemp from Bibby Brothers and Co. on cost freight and insurance terms.

7. On the 3rd Feb. 1910 the sellers declared in writing to the buyers in part and further part fulfilment respectively of the above contract the said 250 and 150 bales of Manila hemp . . . per steamship *Rubi* to Hong-Kong thence per steamer to London. Bill of lading dated the 28th Dec. 1909. . . .

8. On the 25th March 1910 the said 250 and 150 bales were shipped by the said J. C. Moxon on board the steamship *Antilochus* at Hong-Kong for London under two bills of lading for 250 and 150 bales respectively to order, both dated the 25th March 1910. . . .

9. By letter dated the 4th May 1910 the sellers gave notice to the buyers that the said 150 and 250 bales of Manila hemp per steamship *Rubi* and steamer c/o 5.5.09 were arriving per steamship *Antilochus* "due in London on the 12th inst.," and that "as shipper's draft covering these goods will expire to-morrow, we beg to inclose invoice herewith which we trust you will find in order. . . ."

10. On the 7th May 1910 the buyers paid the sellers for the said hemp, but without prejudice to the buyers' rights, and before the arrival of the goods under clause 15 of the said contract, and subsequently claimed arbitration upon the ground that the said goods were not a valid tender against the said contract.

11. The steaming distance from Manila to Hong-Kong is 630 miles or thereabouts, and the goods after arriving in Hong-Kong lay in warehouse there until shipment on board the *Antilochus* on or about the 25th March 1910. The steamship *Antilochus* arrived in London on the 17th May with the said goods on board.

12. The only bills of lading in London on which delivery of the said goods could be taken and on which

delivery was in fact taken were the said two duly indorsed bills of lading for 250 and 150 bales of hemp respectively per steamship *Antilochus*, both dated in Hong-Kong the 25th March 1910, and these were the only bills of lading held by the sellers and the benefit of which they were in a position to transfer to the buyers.

13. It is quite usual for goods shipped from Manila to London to be carried *via* Hong-Kong and to be there transhipped to London. Such goods are usually shipped at Manila under a through bill of lading providing for the carriage on the whole journey from Manila to London *viâ* Hong-Kong. No evidence was given before me of any custom affecting the Manila hemp trade or varying in any way the well-known mercantile usage with regard to contracts of sale of goods on cost, freight, and insurance terms. If and so far as it is a question of fact, I find that on a contract of sale of goods on cost, freight, and insurance terms it is by mercantile usage, unless otherwise agreed, the duty of the seller to provide by a contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, and by an indorsed bill of lading or otherwise to transfer to the buyer the benefit of the rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from port of shipment to port of destination, so that if during any part of that voyage the goods should be lost or damaged by default of the shipowner or of those for whom he is responsible the buyer may have a remedy against the shipowner.

14. The buyers contended that the tender of the said 250 and 150 bales of hemp by the sellers was not a good tender upon the ground that the said goods were not shipped to London direct or indirect between the 1st Oct. and the 31st Dec. 1909, both inclusive, and that, even if they were so shipped, the documents in London which were transferred to the buyers under clause 15 of the contract did not include any bill of lading from Manila, but only bills of lading from Hong-Kong dated the 25th March 1910, and that the documents so transferred were accordingly not the documents to which the buyers were entitled under the contract.

15. The sellers contended that the tender of the said hemp was a good tender under the said contract, and alleged that the said hemp was shipped directly or indirectly from Manila to London between the 1st Oct. and the 31st Dec. 1909 within the meaning of the said contract, and that the buyers were only entitled to a bill of lading entitling them to take delivery in London from the ship, and were not entitled to a bill of lading for the whole voyage from Manila to London.

16. The question for the opinion of the court is whether the tender of the said goods on the 4th May 1910 was a good tender under the said contract. If the court should be of opinion that the tender of the said 250 and 150 bales of hemp was a good tender under the said contract, then my award as above is to be set aside, and in that case I award that the buyers do bear their own costs of the reference and that they also do pay to the sellers their costs of the reference, including the costs of the said originating summons, and do also pay the costs of this award, and that if the sellers shall have previously paid the costs of this award the buyers do forthwith repay to them the amount so paid; but if the court should be of opinion that the said tender was not a good tender, then my award in favour of the buyers will stand, and I respectfully submit that unless the parties should otherwise agree the matter should be remitted to me to ascertain the amount of damages which the buyers are entitled to recover from the sellers.

Dated this 21st day of November 1911.

(Signed) S. GARRETT.

Bailhache, K.C. and *Leck* for the plaintiffs.

Atkin, K.C. and *Chaytor* for the defendants.

SCRUTTON, J.—This is a special case, stated by the umpire, a well-known commercial solicitor, to determine whether a tender of certain hemp on the 4th May 1910 was, as regards the hemp and the documents tendered, a good tender.

The original seller shipped the hemp at Manila, which is a recognised shipping port in the Philippines, to Hong-Kong, per steamship *Rubi*, on the 28th Dec. 1909, under a bill of lading to the shippers' order at Hong-Kong. He sent a copy of such bill of lading forward to London, attached to the seller's draft to the original buyer. He had at the time of shipment no contract for conveyance of the hemp to London, but intended to tranship the goods at Hong-Kong and make such a contract there. But, owing to circumstances beyond his control, he was unable to make such a contract until the 25th March 1910, when the goods were shipped from Hong-Kong by the steamship *Antilochus* under a fresh bill of lading, dated the 25th March 1910, and arrived in London about the 12th May 1910. Meanwhile, the sellers in this case, on the 3rd Feb. 1910, declared the goods per *Rubi* to buyers, referring by date to the Manila bill of lading of the 28th Dec., and on the 4th May the sellers, under clause 15, tendered as shipping documents the Hong-Kong bill of lading of the 25th March, and the policy of insurance covering the goods from Manila to London. The Manila bill of lading was not in London at the time. The buyer subsequently claimed to reject, on the grounds that the goods were not good tender under the contract: (1) because they had not been shipped to London within the contract time, as at the time of the shipment to Hong-Kong there was no contract for carriage to London, but only an intention to make such a contract in the future; (2) because the documents tendered did not include a contract of affreightment covering the goods from Manila to Hong-Kong. The arbitrator found that the bills were not a good tender, without specifically stating his view as to the two contentions put forward, and he states a case on the first question whether the tender of the goods on the 4th May 1910, which was a tender by the documents referred to, was a good one.

Mr. Bailhache, for the sellers, called my attention to a decision of Hamilton, J. in the case of *Cox v. Malcolm and Co.* (unreported), decided in the Commercial Court on the 1st July 1910. This was a special case, relating to hemp, the contract being in the same terms. The goods were shipped within the contract period at Manila, but under a contract to Hong-Kong, and with no contract for carriage to London. They were forwarded to Hong-Kong, and rejected in London on the ground that they had not been shipped to London within the contract period, and that the date of the Hong-Kong bill, which was after the contract period, was conclusive. Hamilton, J. held that there was no necessity in law for the shipment to be under a through bill of lading. He said: "In my opinion the contract does not require in order that a shipment may be made from Manila indirect to London that there shall be a through bill of lading or a bill of lading stating on its face that the shipment to the intermediate port is for the purpose of transhipment by the carrier to a London steamer."

If on this point I had only to deal with law, I should, of course, follow this decision, leaving

it to be examined, if the parties desired, in the Court of Appeal. But I should very respectfully express my doubts of its correctness. Hamilton, J., at p. 220 of his judgment in *Biddell Brothers* v. *Clemens Horst* (103 L. T. Rep. 661; (1911) 1 K. B. 214), states the first two duties of the sellers c.i.f. as follows: "A seller under a contract to sell containing such terms has, firstly, to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract." I should myself add to the first requisite the words, "within the time named in the contract"; and, to the second, that such a contract must be procured on shipment. I should make the last addition for the reason that the seller must, as soon as possible after he has sent the cargo, send forward the documents to the consignee: (see per Lord Esher in *Sanders* v. *Maclean*, 5 Asp. Mar. Law Cas. 160; 49 L. T. Rep. 462; 1 Q. B. Div., at p. 337). If, when he ships goods sold c.i.f. London, but has no contract for carriage to London, but only an intention to make one, he cannot forward this and tender an intention to the buyer. Further, the buyer frequently wants not to take delivery of the goods, but to sell them afloat to other people. And, but for the decision of Hamilton, J., I should have thought that the seller c.i.f. must ship his goods under a contract for conveyance to the port of destination which can be transferred, not under a contract part of the way, and an intention to make another which cannot be transferred, which, as in this case, may not become effective for three months. I should have been disposed to read the words of the contract, "shipment at the port in one or more steamers which are going to London direct or indirect," or, at any rate, "shipment to London—*i.e.*, under a contract to carry to London either direct by the same steamer, or indirect by transhipment to another steamer"; in other words, under a through bill of lading, which both arbitrators find is the usual method of forwarding.

But, while prepared to follow Hamilton, J.'s judgment on this point, as deciding the question of law in this court, I have a finding of the arbitrator on (I was told) evidence given before him, which, in my view, leaves me free to follow my own opinion. The arbitrator finds: "No evidence was given before me of any custom affecting the Manila hemp trade or varying in any way the well-known mercantile usage with regard to contracts of sale of goods on cost, freight, and insurance terms. If and so far as it is a question of fact, I find that on a contract of sale of goods on cost, freight, and insurance terms it is by mercantile usage, unless otherwise agreed, the duty of the seller to provide by a contract of affreightment for the carriage of the goods from the port of shipment to the port of destination." I read this as a finding of fact that, by mercantile custom, a seller c.i.f. must obtain on shipment a through contract of affreightment to the ultimate destination. If so, what would be the law in the absence of mercantile custom does not apply. If, therefore, the decision of the arbitrator proceeded on the ground that there was no contract to carry to London made before the 31st Dec. 1909 in respect of goods shipped at Manila, I hold it is correct.

But the other objection was to the documents tendered, which only included the bill of lading from Hong-Kong, and not the bill of lading from Manila to Hong-Kong. This point might have been raised in *Cox* v. *Malcolm* (unreported), but was not. Hamilton, J. does not deal with it, and, indeed, expressly limits himself to the points raised by the arbitrator. If the arbitrator's decision has proceeded on this ground, I am of opinion it was also correct. The buyer wants the bill of lading for two purposes: (1) to take delivery, for which purpose the Hong-Kong bill will suffice; (2) to claim on the shipowner for any breach of the contract of affreightment. As Lord Blackburn says in *Ireland* v. *Livingston* (1 Asp. Mar. Law Cas. 389 (1872); 27 L. T. Rep. 79; L. Rep. 5 H. L. 395, at p. 407): "Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner." He therefore wants a policy and contract of affreightment, covering the whole adventure. Supposing in this case the transhipment had been at Hamburg, would it have been enough to tender the bill of lading from Hamburg to London? If the transfer of the bill of lading from Manila to Hong-Kong is necessary to enable the buyers to sue the shipowners, it should have been tendered; if, being spent, its indorsement will not have that effect, this is another argument in favour of the tender of one contract of affreightment of the whole voyage. On this point Mr. Bailhache suggested that while it need not be tendered, the buyer might be entitled to claim its transfer afterwards, and he cited a sentence from Kennedy, L.J.'s judgment in *Biddell's* case in the Court of Appeal (12 Asp. Mar. Law Cas. 1; 104 L. T. Rep. 577; (1911) 1 K. B. 834). He said: "How is such a tender to be made under a c.i.f. contract? By tender of the bill of lading, accompanied, in case the goods have been lost in transit, by the policy of insurance." I shall not be supposed to be lacking in appreciation of a judgment which has not been adopted by the House of Lords when I say that I am unable to follow this *obiter dictum*. At the time of tender the goods are generally at sea, and nobody knows whether they are afloat or at the bottom, and, in my view, the buyer is entitled to require the policy in his shipping documents, whether it is known that there has been a loss or not. In my view, therefore, the arbitrator was right on both the grounds argued before him, and his award must stand. The buyers may have the costs of the hearing.

Solicitors for the plaintiffs, *Waltons* and *Co.*

Solicitors for the defendants, *Druces* and *Attlee.*

March 6, 7, *and* 11, 1912.

(Before Scrutton, J.)

Cantiere Meccanico Brindisino *v.* Janson and others.

Cantiere Meccanico Brindisino *v.* Constant. (*a*)

Marine insurance—Policy on floating dock—"Seaworthiness admitted"—Concealment.

The plaintiffs effected an insurance on a floating dock, which was to be towed from Avonmouth to Brindisi, against all the usual risks, and the policy contained a clause "seaworthiness admitted."

Although the plaintiffs believed that the dock was fit for the voyage, it was not in fact seaworthy, as it required special strengthening in order to fit it for the voyage. During the voyage the dock sank and was totally lost. In an action on the policies:

Held, that the underwriters were by reason of the admission of seaworthiness put on inquiry as to its construction, and the plaintiffs were not bound to disclose the want of special strengthening.

Commercial Court.

Actions tried by Scrutton, J. sitting without a jury.

Cantiere Meccanico Brindisino *v.* Janson and others.

In the first case the plaintiffs, who carried on business at Brindisi as shipbuilders and repairers, claimed to recover under certain policies of insurance against certain underwriters and insurance societies in respect of the loss of a floating dock.

The dock, which was constructed of iron, was built in 1896 for the Bristol Corporation, and was originally stationed inside the old dock at Avonmouth. The dock was 365ft. long, 85ft. wide, and 19ft. deep. It was constructed with six pontoons, the depth of each being 8ft., and the height of the side walls above the pontoons 29ft. The side walls were connected to the pontoons by strong angle irons on both sides.

The dock was purchased in 1910 by Mr. Constant, the defendant in the second case, for 5000*l.* for the purposes of resale. The pontoons and walls had to be taken apart to enable the structure to be floated out, each wall being floated out on two pontoons. The dock was then examined and re-erected, 28,000 bolts which had been used for connecting the walls of the pontoons having been renewed, and new joining material being fitted to all watertight joints.

On the 29th Aug. 1911 Mr. Constant sold the dock to the plaintiffs for 19,000*l.*, the price to include cost of towing from Avonmouth to Brindisi, and cost of insurance, fittings, strengthening, and towing gear; 1000*l.* to be paid on the signing of the contract, 15,000*l.* when ready for sea, and the balance was to be placed on deposit and released on the safe arrival of the dock at Brindisi. The vendor agreed to hand over to the buyers, before the voyage commenced, Lloyd's policies of insurance for 16,500*l.*

The plaintiffs said that Mr. Constant employed a firm called Lotinga and Co. to make inquiries as to the cost of insurance for the voyage. Lotinga and Co. employed Tozer and Co., insurance brokers at Lloyd's, to effect the insurances, and Tozer and Co. effected insurances on the dock for 12,000*l.* at 80*s.* per cent., and for 6000*l.* at 100*s.* per cent. For the information of the underwriters, Tozer and Co. made inquiries of Lotinga and Co. as to the dock, and, in particular, if it was new, and, if not, when it was surveyed last. In reply, Lotinga and Co. furnished the following particulars: "Just been newly repaired; pontoons taken abroad and thoroughly repaired and strengthened to make the voyage." This information was passed on to the underwriters by Tozer and Co., who initialled the slips on the 23rd and 24th Aug.

The insurance being a matter of some difficulty to arrange, a report was obtained from a Mr. Watkins, a surveyor, who said that he found every part of the dock in good order, and that in his opinion its condition was practically as new. He stated that he had compared the construction and strength of the dock with that of other floating docks which had been towed to various ports, and found this dock as strong and well fitted as any. He also expressed the opinion that the vessel might be safely towed to a Mediterranean port, provided that suitable arrange ments for towing were made. This report was shown to the underwriters who underwrote the risk.

The insurances were effected as upon a floating dock in tow of two tugs from Avonmouth to Brindisi against all the usual risks, the policies also containing a clause: "Seaworthiness admitted."

On the 13th Sept. the dock left Avonmouth in tow of two tugs, and on the 16th Sept., when about 100 miles west of Ushant, the dock sank in two pieces, the walls and pontoons having parted amidships.

The defendants set up the defence that they had been induced to subscribe the policies by reason of the concealment of a material fact—viz., that the dock was being sent on the voyage without the additional strengthening usual and necessary for the dispatch of a dock on an ocean voyage. Also, that they had been induced to subscribe the policies by a material misstatement of fact at the time when the slips were initialled by the broker through whom the insurance was effected—viz., that the dock had been nearly rebuilt and thoroughly repaired and strengthened for the voyage.

Bailhache, K.C. and *Mackinnon* appeared for the plaintiffs.

Atkin, K.C., *Holman Gregory*, K.C., and *R. A. Wright* for the defendants.

Leslie Scott, K.C. and *Roche* watched the case on behalf of Mr. Constant, the defendant in the second action.

At the conclusion of the evidence and arguments the learned judge intimated that he would not deliver judgment until he had heard the second case.

Cantiere Meccanico Brindisino *v.* Constant.

In the second case the plaintiffs alleged that they agreed to buy from the defendant a pontoon, to be delivered by him at Brindisi, for the price of

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

19,000*l.*, and that it was provided that, if default should be made in the performance of the contract by the defendant, he should repay any sum paid by the plaintiffs. They said they had paid the defendant the sum of 15,950*l.*, and alleged that they were entitled to repayment of that amount as the defendant had failed to deliver the pontoon at Brindisi.

The contract made between the parties provided (*inter alia*) that before the pontoon sailed for Brindisi the defendant should assign and hand over to the plaintiffs Lloyd's policies for 16,500*l.*, duly indorsed over to them, and that they should receive the full benefit thereof. The plaintiffs alleged that it was an implied term of the agreement that the insurance policies should be valid and effective policies upon which, in the event of a total loss, the plaintiffs should be able to recover 16,500*l.* from the underwriters thereon. The defendant on the 13th Sept. 1911 handed to the plaintiffs certain policies of insurance effected at Lloyd's and with insurance companies for 16,500*l.* On the 16th Sept. 1911 the pontoon, while on the voyage to Brindisi, was totally lost by perils of the sea. They said that they put forward claims against the underwriters for 16,500*l.*, and that the underwriters alleged that they were entitled to avoid the policies by reason of some misrepresentation in effecting the policies. The plaintiffs claimed from the defendant payment of the sum of 16,500*l.*, less the amount paid by some of the underwriters, if judgment in the first action against the underwriters was given in favour of the underwriters. Alternatively, they said that the defendant, under the agreement of the 29th Aug., agreed as the plaintiffs' agent to procure insurances for 16,500*l.* on the pontoon, and they alleged that it was the duty of the defendant as such agent to use all reasonable care and skill to procure valid and effective policies on which the plaintiffs should be able to recover in the event of loss. They said that if the allegation of the underwriters were successful the defendant had committed a breach of such duty whereby they had suffered damage by the loss of the insured amounts and the costs they might incur or have to pay to the underwriters, and they claimed a declaration that they were entitled to such damages.

The defendant, by his defence, said he was under no obligation to deliver the pontoon at Brindisi; that it was at the risk of the plaintiffs when lost; and that he was therefore not liable to repay the sums paid to him by the plaintiffs. He also pleaded that the handing over of the policies was an actual fulfilment of the contract and of his obligations thereunder, and he denied that he had been guilty of any misrepresentation or breach. The learned judge found the following facts on the question of concealment: (1) That the dock was not at the time of sailing as fit for the voyage as was usual and proper for such an adventure, or as it could have been made by ordinary available means—in other words, that it was not seaworthy; (2) that the dock had not been strengthened for the voyage in the sense in which the term would be ordinarily understood; (3) that the fact that the dock had not been strengthened for the voyage was clearly material to the question whether, and at what premium, the underwriters would insure—if they had been told it, they would either have refused the insurance or have made further inquiry as to the construction of the dock; (4) that none of the parties knew or believed that the dock was not seaworthy—they all thought the dock was fit for the voyage.

Bailhache, K.C. and *Mackinnon* for the plaintiffs.

Leslie Scott, K.C. and *Roche* for the defendant.

SCRUTTON, J., after stating the facts, proceeded:—On these findings the question arises as to the extent of disclosure necessary by an assured who asked underwriters to insure, "seaworthiness admitted," a subject-matter such as a river steamer or a floating dock, which could never be seaworthy in the ordinary sense of the term, for it was not intended for sea risk, but which could have additional strengthening for a voyage built into it, or added to it.

If the assured knows of any specific defect in the dock he must disclose it in asking for an insurance "seaworthiness admitted"; so also if the assured knew or believed that the dock was not fit to go to sea owing to the absence of some strengthening usually added; or if he had a report or opinion to the effect that the dock was not fit to go to sea he must disclose it, although he might think that the report was erroneous. But suppose none of these facts exist, but the assured and his servants honestly believe the dock is strong enough to go to sea, and tell the underwriters she is a "floating dock," in this case one of some age, must they disclose anything else? If the policy did not admit seaworthiness they need not disclose anything, for the implied warranty excludes the necessity of disclosure of facts which would break it: (Marine Insurance Act, s. 18, sub-s. 3 (*d*). But if the warranty is excluded by the words "seaworthiness admitted," must they give the underwriter, without his asking for it, a full statement of the construction of the structure which they have informed him is a floating dock, or when they tell the underwriter it is a floating dock, and therefore not an ordinary sea-going vessel, and ask him to admit its seaworthiness, do they put him on inquiry as to its construction and the means adopted to send it to sea, with the result that if he does not ask he waives the information? Lord Mansfield in *Carter* v. *Boehm* (3 Burr. 1905, at pp. 1910, 1911) took this view of the insurance of a privateer, so described, which the underwriter must know by its description was engaged on secret enterprises, of which, if he did not ask about them, he waived disclosure. He said: "If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere—he need not be told the secret enterprises they are destined upon; because he knows some expedition must be in view; and from the nature of his contract, without being told, he waives the information." The House of Lords in *Seaton* v. *Burnand* (82 L. T. Rep. 205; (1900) A. C. 135) had a case where the solvency of a surety for a loan was insured, and it was urged by the underwriters that it was material to disclose that the loan was at an interest of over 30 per cent. One of the reasons given by the members of the House was that by Lord Shand. At p. 147 of (1900) A. C. he said: "I must further add that I am of opinion, as Mr. Joseph Walton very

forcibly put it, there was enough to put members of Lloyd's on inquiry. It was for them to inquire if they thought further information was required. The very circumstance that a guarantee of Sir Frederick Seager Hunt's obligation was asked for indicated that at all events security, which was ample and substantial, was required, and that circumstance was sufficient to put them upon inquiry—such inquiry as they made by going to the manager of the bank, from whom they ascertained what Sir Frederick Seager Hunt's circumstances were." Other cases are collected in sect. 618 of the last edition of Arnould's Marine Insurance.

The clause "seaworthiness admitted" is put into these insurances of floating docks and river steamers not ordinarily engaged in sea voyages to avoid the doubtful and difficult inquiry whether sufficient temporary strengthening for an unusual service has been applied to a subject-matter not originally intended for that service; and in my view the proposal of such an insurance to an underwriter, while requiring the disclosures I have already suggested, puts him on inquiry as to the actual construction and strengthening, if any, of the subject-matter if he wants to investigate it. The defence of concealment in my view therefore fails.

As to the second defence. The defendants have not satisfied me that the alleged misrepresentation was made, and as both defences fail there will be judgment for the plaintiffs.

With regard to the second action, if I had set aside the policies in the first action, I should have found that the contract by Constant was to give valid policies; that that contract had been broken; and that Constant would have been liable in damages. As, however, I have not set aside the policies in the first action, it follows that the second action also fails.

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

Solicitors for the defendants, *Parker, Garrett, and Co.; Lowless and Co.*

Wednesday, March 20, 1912.

(Before Scrutton, J.)

Produce Brokers' Company Limited v. Furness, Withy, and Co. Limited. (a)

Bill of lading—Loading charges—London clauses—Discharge of ship at riverside wharf.

By the "London clause" shipowners are entitled to exact certain charges from consignees of cargo in respect of discharge of vessels.

On the construction of a bill of lading:

Held, that these charges could only be exacted by the ship when she discharged her cargo in a dock, and not when she discharged at a riverside wharf.

Action raising a question as to the rights of shipowners under the London clause incorporated in bills of lading.

The plaintiffs were the indorsees and holders of certain bills of lading for rosin and turpentine in barrels on board the defendants' steamship *Malinche* for carriage from Savannah to London.

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

The bills of lading acknowledged that the barrels were received in apparent good order and condition, and were to be delivered at the port of London unto order or to his or their assigns, he or they paying freight in cash for the said goods,

Freight payable on delivery. . . . The goods to be taken from alongside by the consignee immediately after the vessel is ready to discharge, or otherwise they will be landed by the master at the merchant's risk and expense, the collector of the port being hereby authorised to grant a general order to discharge immediately after the entry of the ship. . . . In accepting this bill of lading, the skipper 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.

London clause (A). The shipowners shall, at their option, be entitled to land the goods within mentioned on the quays, or to discharge them into craft hired by them, immediately on arrival and at consignees' risk and expense, the shipowner being entitled to collect the same charges on the goods entered for landing at the docks as on goods entered for delivery to lighters. Consignees desirous of conveying their goods elsewhere shall, on making application to the ship's agents or to the dock company within seventy-two hours after steamer shall have been reported, be entitled to delivery into consignee's lighters at the following rates, to be paid with the freight to the ship's agents against release, or the dock company, if so directed by the ship's agents. . . .

(B) Grain for overside delivery is to be applied for within twenty-four hours of ship's docking, or thereafter immediately it becomes clear. In the absence of sufficient consignees' craft, with responsible persons in charge, to receive as fast as ship can discharge overside into lighters during dock working hours, the master or agent may land or discharge into lighters at the risk and expense of the consignee. The shipowner may land or discharge continuously day and (or) night, any grain landed or discharged for ship's convenience during usual dock hours, consignees' craft being duly in attendance, and any grain that may be landed or discharged before or after usual dock hours (whether craft are then in attendance or not) is to be given up free to consignees' craft applying for same within seventy-two hours from its landing or discharge, otherwise it will be subject to the usual dock charges. . . .

(C) Hay, flour, illuminating and lubricating oil.—Consignees to have craft in attendance immediately on ship's docking to take delivery from ship or quay, at shipowner's option, working continuously day and (or) night, paying in any case 1s. 3*d*. per ton weight, or otherwise the goods will be put into captain's entry craft at consignees' risk and expense.

These London clauses (A), (B), and (C) are to form part of this bill of lading, and any words at variance with them are hereby cancelled. The shipowners shall have the same lien, rights, and remedies on goods or grain referred to in the above clauses, or under any other clauses of the bills of lading, as they have by law in respect of freight.

The exceptions and conditions enumerated in this bill of lading shall apply during the voyage, and while on the quays or sheds of the dock, for any purpose whatever, and until the goods and (or) grain are actually delivered to the consignees or their agents.

Upon the arrival of the vessel in London she proceeded to Mark Brown's Wharf, a riverside wharf, and there discharged the turpentine into the plaintiffs' craft, and the rosin partly into the plaintiffs' craft and partly on the wharf. The bill of lading freight was paid by the plaintiffs, and they also had to deposit in court a sum of 36*l*. 7*s*. 6*d*. in respect of a claim put forward by

the defendants for charges under the London clauses in the bill of lading, and in respect of which claim the defendants exercised a lien on a portion of the plaintiffs' rosin for the 36*l.* 7*s.* 6*d.*

The plaintiffs pleaded that the London clauses had no application when the cargo was discharged in the river and not in the dock, and they claimed payment out of court of 36*l.* 7*s.* 6*d.*; a declaration that the defendants were not entitled to impose the charges upon them or to exercise any lien upon their goods in respect thereof; and damages for the wrongful detention of the rosin.

By their defence the defendants said that owing to congestion at the Surrey Commercial and other docks, in order to save expense and delay to the consignees, they berthed the vessel on her arrival in London at Mark Brown's Wharf, where the operation of landing on the quay, sorting, and delivery from the quay or overside into lighters would be, and was in fact, quickly carried out. They pleaded that in the circumstances the charges claimed were properly made and enforced under the London clauses in the bills of lading; or, in the alternative, that the expenses incurred in discharging at the wharf instead of at a quay in the dock were reasonably incurred on behalf of the consignees, and that the sum of 36*l.* 7*s.* 6*d.* was the contribution thereto properly due from the plaintiffs.

Adair Roche and *Cuthbertson* for the plaintiffs.

Dunlop for the defendants.

Scrutton, J.—In this case, which is a test action, the Produce Brokers' Company Limited sue Messrs. Furness, Withy, and Co. Limited, the well-known shipowners, and the subject-matter of the action is to ascertain whether the shipowners were entitled, in the case of a ship called the *Malinche*, of the Furness Line, coming from the Savannah, and discharging at Mark Brown's Wharf above the Tower Bridge, to make certain charges under clauses known as the London clauses.

Somewhere about the end of the eighteenth century there were no docks in London, and all ships, which were all sailing ships of course, used to discharge in the river. Between 1790 and 1810 several Acts were passed under which docks were constructed, and it was a matter of great controversy in connection with each Act whether the lightermen who brought their barges alongside ships in the river and the wharves to which the goods came from ships in the river were to be interfered with as a matter of trade by the creation of new docks, and the lightermen and the wharves were protected by what is called the free-water clause in the Dock Acts, under which lighters had a right of entry to the docks to take goods overside whenever the consignee wanted it. Ships were then sailing ships, and they were very leisurely, making one or two voyages a year, and it did not matter very much how long a barge waited alongside a sailing ship to take discharge; and also discharging was claimed by the dock companies as their sole right, and the dock companies, if they were in difficulties as to sorting, used to discharge on their own quay without making any particular claim on anybody When steamers came in, and more capital was invested in each steamer, and time became of more importance, because each steamer could then make more voyages in a year, for some time the question did not arise acutely as to this sorting on the quay, because the dock was doing the whole work, and it did not become material to ascertain who the dock was doing it for.

But after the great dock labourers' strike—I think the date was 1886—the docks suddenly refused to discharge ships except on their own terms. The shipowner then had to face the problem of discharging his own ship himself in the dock, and he found that he could not discharge his ship quickly by sorting on his own ship, and he wanted to use the dock quay, but the dock said that he could not use it unless certain charges were paid, and there was for some ten years a very prolonged fight between the dock and the shipowners. It came before the courts in 1892 in a number of other cases, in most of which I was concerned for the shipowners. The result was that the shipowner had to pay the docks for using their quay for sorting. It was for his convenience to sort quickly on the quay rather than on the deck of his ship, and the docks made him pay if he wanted to use the quay for sorting overside goods as to which otherwise the docks would not have had any right to make any charge.

Not unnaturally the shipowner, having to pay these charges, cast about to see if he could find somebody else to pay them, and he invented the London clause, which was done for the purpose of putting some of the charges which he had to pay the docks for sorting on to consignees taking their cargo overside in craft, who, said the shipowner, benefited as much as he did by the increased quickness in discharge, saving demurrage on lighters, and getting their goods quicker. So various forms of the London clause were invented, all of which, as far as I know, had reference, and had reference only, to discharge in docks, because it was only at docks that the question arose.

The question in this case and on this bill of lading comes to this—and what I say only applies to this bill of lading and to other cases similar to it — supposing that the steamer does not go into dock, but discharges at the wharf in the river, can it still collect, under the London clause, the charges which it could collect from the consignee who wanted his goods overside if the discharge was in a dock where the question originally arose? That, in my view, must turn on the terms of the clause used, which must be read against the shipowner who is seeking to claim them. These goods are turpentine and rosin, and there is an agreement of the parties that they have, when the ship has been in the dock, treated turpentine and rosin as coming under clause (*c*), I suppose under the head of illuminating and lubricating oil. Clause (*c*) is: "Consignees to have craft in attendance immediately on ship's docking to take delivery from ship or quay, at a shipowner's option, working continuously day and (or) night, paying in any case 1*s.* 3*d.* per ton weight, or otherwise the goods will be put into captain's entry craft at consignees' risk and expense." Clause (*c*) is the third of three London clauses, which, without reading through it carefully, appear to me on reading them, from my knowledge of the history of the matter, to have been drafted entirely with reference to docks. I am told in this case in evidence that this is the

first time that one of the Furness Line ships has discharged at a wharf in the river. In my view, therefore, having regard to the language used, which throughout was language speaking of docks —"usual dock hours," "dock working hours," "land at the docks," "apply to the dock company"—this clause as at present drafted only entitles the shipowner to make these charges when the ship discharges in a dock. On the reason of the thing there is no particular reason why he should not have it if the ship discharges at a wharf, but he has not said so, in my view; and if he wants to get these clauses when a vessel goes to a wharf he must say so in clear terms, because he is putting a charge on the consignee. The result is that, in my opinion, the plaintiffs' claim succeeds. There must be judgment for the amount claimed, and 3*l.* 10*s.*, the agreed sum for damage, with costs.

Solicitors for the plaintiffs, *Waltons* and *Co.*

Solicitors for the defendants, *Downing, Handcock, Middleton*, and *Lewis.*

March 29, *April* 1 *and* 3, 1912.

(Before Scrutton, J.).

Martineaus Limited v. Royal Mail Steam Packet Company Limited. (a)

Bill of lading—"Shipped in apparent good order and condition"—Incorrect statement—Liability of shipowner—Estoppel.

The master of a ship signed bills of lading by which he acknowledged to have received a cargo of sugar in "apparent good order and condition."

In an action by the indorsees of the bills of lading against the shipowners in respect of damage to the sugar:

Held, that, as the bill of lading contained a statement that the goods when shipped were in "apparent good order and condition," they were estopped from saying that the goods when shipped were not in apparent good order and condition.

Compania Naviera Vasconzada v. Churchill and Sim (10 *Asp. Mar. Law Cas.* 177; 94 *L. T. Rep.* 59; (1906) 1 *K. B.* 237) *followed.*

Commercial Court.

Action tried by Scrutton, J. sitting without a jury.

The plaintiffs were indorsees of two bills of lading, dated the 24th and 25th Aug. 1911, under which 2160 bags of sugar were shipped on board the defendants' steamship *Catalina* at Puerto, Mexico, for carriage to London.

By their points of claim the plaintiffs pleaded that by the bills of lading the defendants acknowledged to have received the goods at Puerto in apparent good order and condition to be conveyed to and delivered in London, and they thereupon became bound to deliver the goods in the like good order and condition. They alleged that the defendants failed to deliver the goods in the like good order and condition, but delivered the entire shipment damaged and deteriorated by sea water; and they claimed 189*l.* 16*s.* 10*d.* as difference between the weight invoiced and weight received, and 628*l.* 11*s.* 8*d.* in respect of depreciation, making a total of 818*l.* 8*s.* 6*d.*

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

By their points of defence the defendants alleged that the contents of the bags were moist and liable from their inherent nature or vice to leak, melt, evaporate, or lose weight during the voyage; the bags were also leaky and were marked with a red stripe causing the sugar to be discoloured by red stains, and that if the sugar or any part thereof was delivered in a damaged condition, such damage arose from one or other of these causes. They further stated that they would, if necessary, rely upon the following terms and conditions in the bills of lading:

3. The company will not be responsible . . . for any act, neglect, or default whatsoever of the pilots, masters, engineers, mariners, stevedores, or other servants or agents, or other persons for whose conduct the company would otherwise be liable whether in relation to the navigation, management, or stowage of any carrying vessel or otherwise, nor for unseaworthiness of the ship (provided all reasonable means have been taken by the shipowners or their agents to provide against such unseaworthiness), nor for any consequences arising from any of the foregoing exceptions. . . .

8. Nor for any leakage, breakage (however caused), loss, or damage to packages or their contents through badness or insufficiency of package or packing, effects of climate, sweating, heat of holds, contact with or smell or evaporation from other goods, or decay, nor for anything that may occur after the packages have come within the control of any public authorities, dock, railway, or other carrier, or have reached a custom house.

15. The weight, contents, marks, value, and numbering of the packages are unknown to the company, who are not bound by the description in the margin.

On the day before the trial the plaintiffs gave notice of their intention to rely upon a plea that, even if the goods were not shipped in apparent good order and condition, the statement in the bills of lading that the goods were so shipped was made with the knowledge and intention that it should be acted upon by any buyers into whose hands the bills of lading might come, and they said they had acted on the statement in the bills of lading as to the condition of the goods to their detriment, and that therefore the defendants were estopped from saying that the goods when shipped were not in apparent good order and condition. In support of this plea they relied on the judgment of Channell, J. in *Compania Naviera Vasconzada* v. *Churchill and Sim* (*sup*).

At the time of shipment the mate made the following note upon the receipt which he gave for the goods: "Very wet and stained by contents."

The plaintiffs admitted that no part of the damage was occasioned by water getting into the ship during the voyage, and the defendants admitted that it was not caused after the goods left the ship.

The remaining facts and arguments are sufficiently stated in the written judgment of Scrutton, J.

Bailhache, K.C. and *Leck* (*Raeburn* with them) for the plaintiffs.

Holman Gregory, K.C. and *Dunlop* for the defendants.

Scrutton, J.—In this case the plaintiffs, Messrs. Martineaus Limited, who are well-known importers of sugar, alleged that the defendants, the Royal Mail Steam Packet Company, had received for carriage at Puerto, Mexico, in

apparent good order and condition, 2160 bags of sugar, but had delivered them in London badly damaged and deteriorated by sea water, and they claimed damages. The defendants pleaded that the sugar was damaged by its own inherent moisture. On the eve of the trial the plaintiffs admitted that no part of the damage was occasioned by sea water getting into the ship during the voyage, and the defendants admitted that it was not caused after the goods left the ship; but the plaintiffs gave notice that they would rely on the decision of Channell, J. in *Compania Naviera Vasconzada* v. *Churchill and Sim* (*sup.*).

In that case a shipowner, whose master had untruly stated that timber was shipped in good order and condition, whereas in fact it was shipped damaged by oil, was held liable in damages to an indorsee of the bill of lading, who paid for the timber on the faith of the admission of shipment in good order and condition.

I find the facts to be as follows:

Certain sugar was brought in lighters alongside the steamer in a river in Mexico close to the sea. The bags were then in such a state that the mate recorded at the time, "Very wet and stained by contents." When the vessel arrived in London it was found that the bags were much stained and the contents damaged partly by moisture and partly by the red paint on the bags, which had by reason of the moisture stained the sugar. One of the controversies at the trial was whether this state of the sugar was due to its own inherent moisture oozing out as molasses, staining the bags through which it percolated and damaging the bags and sugar below it; or to salt and (or) fresh water getting on the bags from some external source before shipment. I heard experts and other witnesses on each side, and having carefully considered their evidence and the documents I find that the sugar had been externally damaged before shipment by water both fresh and salt probably coming from some leakage in the lighters and from rain; and that the sugar itself was a dry (as opposed to a wet) sugar, with no molasses in it or appreciable drainage from it. I find, therefore, that the mate's note recorded the fact that the bags had been wetted by water and that the wetted sugar draining through the bags had stained them.

Mr. Gregory, for the defendants, argued that as the bill of lading contained the words "contents unknown," the master might accurately sign the bill, "Sacks of sugar shipped in apparent good order and condition," for the contents might be wet sugar, the drainage from which would wet and stain the bags, which would yet be in apparent good order and condition as bags of wet sugar. The master and mate in the box gave this explanation of the note in the receipt and the failure to make a note on the bill of lading. But in my view the mate did not mean only this when he made the note. I think the explanation of the captain's conduct is to be found in his owner's letter of the 10th Nov. 1911: "If all these notations were to appear in B/L there would be, as there has been in the past, a great outcry about unnecessary clauses of bills of lading." And I suspect that some instructions to this effect, possibly misunderstood by the captain in this case, have not been modified since the decision of Channell, J. drew attention to the importance of an accurate statement of condition on shipment. If the mate's and master's view was the one they took at the time, it yet resulted in a misstatement of fact, for the bags were not in apparent good order and condition. And in my view if masters made such statements of fact, they must not guess at the nature of the contents and their effects, but must ask, before drawing inferences from the assumed nature of the contents and making statements of fact based thereon.

The plaintiffs therefore received in London an apparently clean bill of lading, containing an untrue statement of fact.

I am relieved from considering many of the difficult questions which arise as to the position of an indorsee who took such a bill in relation to the shipowner, by their discussion and decision in the judgment of Channell, J., by which I am bound.

But Mr. Gregory endeavoured to distinguish this case from the previous one by pointing out there the indorsee paid the whole price against the bill of lading in ignorance of the damage, while here, though he was bound by contract to pay cash against documents on arrival of the vessel, by arrangement with the sellers he only paid 600*l.* against documents; then made a series of payments against goods delivered, and had at the trial not yet paid a final balance of 115*l.*, or more. But in my view he had acted on the documents to his prejudice; he had accepted the bill of lading, and begun to pay for it, and if he was to resist further payment he must prove that the damage happened before shipment, contrary to the statement in the bill of lading. If the bill of lading had contained the mate's statement, he would have been warned and could have resisted payment. This, within Channell, J.'s decision is sufficient, in my opinion, to raise the estoppel which prevents the ship from proving, in accordance with the fact, that the goods were in bad condition externally when shipped and obliges them to admit that the bags were apparently in good external condition, which is inconsistent with their then being wet from external causes and stained by sugar melting owing to the wet. If so, goods shipped apparently in good order and condition were delivered damaged by an external cause, and the shipowner cannot prove that an excepted peril caused the damage.

The shipowners could, in *Churchill's* case, have proved that no oil got at the timber during the voyage, and here there is an admission that no water got at the sugar during the voyage; but under *Churchill's* case the defendants were prevented from using the proof or admission because it was inconsistent with their own statement to the contrary, on which the indorsees had acted to their detriment.

Under Channell, J.'s decision the plaintiffs are entitled to the difference between the value of sound sugar and the sugar as delivered, which I assess at 628*l.* 11*s.* 8*d.* They are also entitled as holders of the bills of lading to the value of three bags short delivered, 5*l.* 16*s.* 1*d.* But they further claimed 184*l.* 0*s.* 9*d.* difference between the invoice weight of the sugar and the weight delivered. They had, however, only to pay for "delivered weight," and there was no evidence before me of the weight actually shipped. On this ground I dismiss this part of the claim.

I have considered whether I should deal with the plaintiffs' costs in view of the fact that their points of claim did not expressly raise the question of estoppel under *Churchill's* case, and that they only gave express notice in writing of this line of claim the day before the trial. I have come to the conclusion that no harm has thereby been done to the defendants, who, anyhow, would have resisted the claim, and that justice will be done by refusing the plaintiffs any costs of the amendment, or of the extra discovery rendered necessary by it. I therefore give judgment for the plaintiffs for 634*l.* 7*s.* 9*d.* with costs.

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

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 5 *and* 19, 1912.

(Before BARGRAVE DEANE, J.)

THE RIGEL. (a)

Collision — Personal injury—Shock to seaman —British ship—Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58), *ss.* 6, 7*—Claim by seaman against employer—Claim by employer against wrongdoer—Action* in rem*—Damage done by any ship—Admiralty Court Act* 1861 (24 *Vict.* c. 10), *s.* 7*—Remoteness of damage.*

A lightship owned by the Commissioners of Irish Lights was run into and damaged by a German sailing ship which was in tow of a tug. The sailing ship was arrested in England in an action in rem *instituted by the owners of the lightship to recover the damage they had sustained, and an undertaking was given in the action to appear and put in bail to answer the claim. After the writ was issued and the undertaking was given, one of the crew on the lightship made a claim under the Workmen's Compensation Act* 1906 *against her owners for compensation for injury caused by shock by fright before the collision actually took place, and an award was made in his favour in proceedings before an Irish County Court judge. The owners of the German ship were not represented at the County Court and were not parties. The owners of the lightship claimed an indemnity for any sum paid or payable to the workman in respect of his injury, and sought to recover the sum so paid from the owners of the German sailing ship. On the claim coming before the registrar he dismissed it. The owners of the lightship appealed from his decision. On appeal :*

Held, affirming the decision of the registrar, that even assuming that the seaman had in fact sustained the shock alleged and was entitled to recover compensation under the Act from the commissioners, and though the ship was for the purposes of the Act to be considered a British ship, the owners of the German sailing ship were not bound by the decision in the arbitration.

Held, further, that the damage was not " done by any ship " within the meaning of sect. 7 *of the Admiralty Court Act* 1861, *and that the claim was too remote.*

PETITION in objection to the report of the registrar dismissing a claim made by the Irish Lights Commissioners against the owners of the German sailing ship *Rigel.* The claim disallowed by the registrar was a claim for an indemnity in respect of sums paid to one of the crew of the lightship under the Workmen's Compensation Act 1906 which the commissioners sought to recover in an action *in rem* as damages caused by a collision which occurred between the two vessels.

On the 5th Aug. 1910 James Keating was serving on the lightship *Petrel* as a seaman, and was acting as cook and gunner. About 7.10 a.m. on the 5th Aug. he was on watch, when the *Petrel* was struck a glancing blow by the sailing ship *Rigel,* which was in tow of a tug. Keating was not knocked down, but he alleged he was very much frightened and suffered from shock and could not sleep. On the 29th Aug. Keating left the lightship, his employment, which was of a temporary character, having come to an end. During his employment on the lightship he made no complaint to the master or mate, but he went to see a doctor the day after he left the lightship and complained of sleeplessness and shock.

On the 9th Aug. the commissioners issued a writ *in rem* against the *Rigel,* claiming the sum of 1000*l.* against the *Rigel* for damage by collision.

On the 15th Oct. a solicitor acting on behalf of James Keating wrote to the commissioners alleging that his client had sustained injury from an accident which had happened to him while in their employ.

On the 20th Oct. the commissioners replied to that letter stating that it was the first they had heard of the accident.

On the 31st Oct. the solicitors acting on behalf of the *Rigel* admitted liability " for the damages, the subject-matter of the action, and pray a reference to the registrar and merchants to assess the amount thereof."

On the 8th and 11th Nov. the commissioners received letters from the mate and master of the *Petrel* stating that Keating had discharged his duties up to the 29th Aug., when he left the ship. The mate stated that after he had been put ashore he asked for a letter to the Irish Lights doctor, but that this was refused him as he had left the service.

On the 17th Nov. the commissioners forwarded their claim in the damage action to the solicitors for the *Rigel.* The claim contained twenty items, amounting to 365*l.* 19*s.* 5*d.*, and ended as follows :

> The plaintiffs also claim an indemnity against the defendants for any sum for which they may be liable in respect of injury alleged to have been sustained by one James Keating, a seaman employed on board the lightship *Petrel* at the time of the collision the subject of this action by reason of the said collision.

On the 23rd Jan. 1911 a further letter was received by the commissioners from the solicitor acting for Keating stating that he was prepared to settle his claim for 250*l.*

On the 25th March 1911 the plaintiffs filed their claim in the Admiralty registry, and when

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

the reference came on on the 29th March 1911 the first twenty items were either agreed or admitted and the reference was adjourned as no formal claim had been put forward by Keating against the commissioners.

On the 31st March Keating started proceedings under the Workmen's Compensation Act 1906 to recover compensation from the commissioners, alleging that he was totally incapacitated by shock and claiming half-pay during his incapacity.

On the 6th April the solicitors acting for the commissioners wrote to the solicitors for the defendants giving them notice that a claim had been made, asking them if they would take over the defence of the claim, and saying that, if they would not defend, the commissioners would do so and claim anything they had to pay from the owners of the *Rigel*.

On the 10th April the solicitors for the owners of the *Rigel* replied that if the commissioners sought an indemnity they must proceed strictly in accordance with the Act, and stated that Keating had no claim as he had not received any injury; he was not a workman or a seaman, and that no such claim as that suggested could be made in the action against the *Rigel*.

On the 11th April the solicitors for the commissioners acknowledged the letter and stated that the three points mentioned would be put forward at the arbitration, but they did not know how the court could issue a notice of indemnity to third parties resident in Germany.

The arbitration took place before Judge Orr, of the County Down County Court, and, as the medical evidence was conflicting, he referred the case to the medical referee of the district, who reported that Keating was suffering from shock, and that he thought he ought to be able to resume work as a seaman in about two months.

On the 16th June the County Court judge made an award in Keating's favour, awarding him 12*s*. 3*d*. a week from the 31st Aug. 1910.

On the 31st Oct. the adjourned reference was held, and on the 6th Nov. the registrar made his report dismissing the claim of the Irish Lights Commissioners.

The material parts of the eivdence given before the registrar on the hearing of the reference appears in the report, which is as follows:

Whereas the defendants have admitted their liability for the damages occasioned to the plaintiffs by reason of the collision in question in this action, subject, however, to a reference to the registrar assisted by merchants to assess the amount thereof. Now I do hereby report that the said claim was agreed between the parties with the exception of item No. 21, a claim for an indemnity for personal injury which came before me on the 29th March and the 31st Oct. 1911. The plaintiffs in this action were the Commissioners of Irish Lights, the owners of the lightship *Petrel*. On the 5th Aug. 1910 the *Petrel* was stationed on what is known as the South Rock Station. She was in her proper charted position in latitude 54·24 N and longitude 5·21 W, being then about two miles from the South Rock disused lighthouse tower off the coast of the county of Down. Shortly before 8 a.m. on the 5th Aug. the defendants' ship *Rigel* came into collision with the lightship, inflicting damage to her. On the 9th Aug. 1910 the plaintiffs issued a writ in an action *in rem*. The endorsement of this writ was "the plaintiffs as owners of the lightship *Petrel* claim the sum of 1000*l*. against the ship *Rigel* for damage by collision which took place on the 31st Oct 1910." The defendants' solicitors admitted liability in the following terms: "We hereby admit their liability for the damages, the subject matter of this action." On the 25th March 1911, the plaintiffs filed their claim in the reference. The several items of this claim were subsequently admitted or agreed, except item twenty one, which was as follows: "the plaintiffs also claim an indemnity against the defendants for any sum for which they may be liable in respect of injury alleged to have been sustained by one James Keating a seaman employed on board the lightship *Petrel* at the time of the collision, the subject of this action by reason of the said collision." On the 29th March, the day appointed for the reference, it was agreed by counsel for the plaintiffs and the solicitor for the defendants, that the reference should be adjourned until the damages, if any, the subject of item 21, had been assessed. The adjourned reference was held on the 31st Oct. when the plaintiffs were represented by Mr. Balloch and the defendants by Mr. Dunlop, who contended that the plaintiffs could not recover any sum in respect of the compensation paid by them to Keating under the Workmen's Compensation Act 1906. The circumstances under which the claim arose are stated in Keating's affidavit. "On the 5th Aug. I was keeping watch from 4 till 8 a m. At that time a very heavy fog prevailed and I was engaged in firing the lightship's fog signal. Shortly before 8 a.m. a tug boat appeared out of the fog on our starboard beam about half a cable's length away, almost immediately afterwards I saw a large ship coming down on us about one point on our port bow and a quarter of a cable's length away. The said ship, which I afterwards ascertained to be the *Rigel*, struck the lightship's stem, and subsequently struck a glancing blow on her starboard bow. When I saw the *Rigel* approaching, I was very much frightened, as I thought the lightship was about to be sunk by the collision, and I suffered a severe shock and fright by reason thereof." And in his evidence before the County Court judge, Keating said: "The vessel was a large sailing vessel, she was coming on to our port bow to sink us. I said: 'All hands on deck,' and fired the gun. She struck us right on the stem with her starboard bow. We turned and struck him with our starboard bow to his starboard bow, and rasped along to his stern. The sailing vessel was in ballast and much higher than the lightship, I was not knocked down, but I was very much frightened. I suffered from shock, and could not sleep at night. I told the mate and all the others, they laughed and put me off." Numerous objections were raised to this head of the claim, to all of which it is not necessary to refer. The conclusion to which I have come to is that the defendants are not liable in this action. The claim is for damage by collision. Counsel for the plaintiffs argued that the real ground of action was negligent navigation, of which the contact of the two ships was a result. This is, in a sense, true, but the negligent navigation does not give the plaintiffs any ground of action until and unless they or their property are injured. It is not proved that the actual collision caused the nervous shock to Keating—rather it was the approach of the *Rigel*, but in either event the claim is, I think, too remote. It is, I think, clearly now the law that a person may recover from another person guilty of negligence damages resulting from a nervous shock unaccompanied by any actual impact: (*Dulieu* v. *White* (1901) 2 K. B. 669). But this general proposition has a qualification which is stated in the above case. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C. or towards the property of B. or C. The fear which Keating had in the first place was injury to the lightship by the *Rigel*; as soon as the collision took place, it was nothing more than a grazing

blow which could not injure Keating. It is impossible to say that as a seaman there was a reasonable fear of personal injury such as existed in the mind of the plaintiff in *Dulieu* v. *White*. Keating has, however, recovered compensation under the Workmen's Compensation Act 1906 for injury in the course of his employment. But this fact does not thereby enable the plaintiffs to recover damages from the defendants in this action, since the obtaining of the compensation results solely from the provisions of a special statute, and the case of *The Circe* (10 Asp. Mar. Law Cas. 149; (1906) P. 1, at p. 13) would apply. It was argued on behalf of the plaintiff that *The Annie* (1909) P. 176) (*infra*) governed the case. But from the statement of counsel it appears that *The Annie* was a case under sect. 6 of the Workmen's Compensation Act 1906, and it is admitted in the present case that the formalities necessary to make that section applicable have not been complied with. There is also a further point which is adverse to the plaintiffs. The plaintiffs' action is for damage done by a ship (Admiralty Court Act 1861, s. 7), that is by a ship as the noxious instrument, see *The Vera Cruz* (L. Rep. 9 P. Div. 96) (*infra*). Under the circumstances already stated, I am of opinion that this claim is not one in respect of damage done by a ship; it is one which must be distinguished from an action by Keating himself against the owners of the *Rigel* for negligent navigation, whereby he suffered a nervous shock causing physical injury. Stating the result of the previous opinions shortly, the conclusion is that in order to enable the owners of a ship who have paid compensation under the Workmen's Compensation Act 1906 to recover against the owners of the wrong-doing ship, if they can recover at all, except under the provisions of sect. 6, the claim must either be one for damage done by the wrong-doing ship, and not excluded by the rules as to remoteness of damage irrespective of the fact of a payment under the statute, or it must be a proper claim for indemnity under the statute as in *The Annie*, in which case also it might perhaps be said that there was actual damage by the ship. The present case does not fall under either of these heads, and therefore this particular claim must be disallowed. I have referred above to the case of the *Circe*. After a careful perusal of Lord Gorell's judgment, I think it is an authority that a payment under the Workmen's Compensation Act cannot be recovered as part of the damages suffered by the owners of an innocent ship against the owners of a wrong-doing ship. Since the decision in *The Dupleix* (*Shipping Gazette*, the 29th July; 12 Asp. Mar. Law Cas. 122; (1911) and (1912) P. 8; 106 L. T. Rep. 347) it appears to me immaterial whether the action in which the claim is made be one *in rem* or *in personam*, and, if there is a conflict between the *Circe* and the *Annie*, I must follow the reasoned judgment of Lord Gorell in the former case. Apart, therefore, from the opinions I have already expressed, the view I take of the *Circe* would be sufficient to exclude this claim. Having regard to the above opinion, it is unnecessary for me to give a decision on the various other points which were argued before me, some of which may also well form a bar to this claim. I was asked to assess the damages irrespective of any decision to which I might come on the point of law. As, however, the claim is not even yet accurately formulated, it is undesirable that I should do so at this period, as the claim, if it should in future be desirable to assess it, can be more accurately and without expense assessed at a later date. Having regard to the above decision the defendants are entitled to the costs of the reference since the date of payment to the plaintiffs of the undisputed items of the claim.

On the 13th Nov. the plaintiffs' solicitors gave notice that the plaintiffs objected to the report.

On the 25th Nov. the plaintiffs presented a petition in objection to the report submitting that the report was wrong and ought to be rejected because Keating was entitled to recover compensation from the plaintiffs; because the plaintiffs had been duly compelled to pay compensation to Keating under the Workmen's Compensation Act 1906; because the plaintiffs were entitled to recover damages in the action in respect of compensation payable by them to Keating, the injuries to Keating in respect of which such compensation had been ordered to be paid having been caused by the wrongful acts of the defendants; and because the conclusions of the registrar were wrong in fact and in law.

On the 8th Dec. the defendants delivered an answer to the petition submitting that the report was right, because compensation paid or payable under the Workmen's Compensation Act 1906 was not recoverable as damages in this action; because Keating was not entitled to recover compensation from the plaintiffs; because the award under which the plaintiffs were compelled to pay compensation to Keating was not binding on the defendants, because no personal injury by accident was caused to Keating, or, if caused, was not caused under circumstances creating a legal liability in the defendants to pay damages to Keating, because the registrar had no jurisdiction to grant the relief claimed, and because his conclusions were right in fact and in law.

On the 5th Feb. 1912 the petition came before the court for argument.

Bateson, K.C. and *Balloch* for the plaintiffs, the Commissioners of Irish Lights.—This case is covered by authority; it is clear that this sum is recoverable:

> *The Annie*, 100 L. T. Rep. 415; 11 Asp. Mar. Law Cas. 213; (1909) P. 176.

That action was an action *in personam*; this is an action *in rem*, but as the defendants have entered an appearance in the action, there is no difference between the cases:

> *The Gemma*, 81 L. T. Rep. 379; 8 Asp. Mar. Law Cas. 585; (1899) P. 285;
> *The Dictator*, 67 L. T. Rep. 563; 7 Asp. Mar. Law Cas. 251; (1892) P 304;
> *The Dupleix*, 106 L. T. Rep. 347; (1912) P. 8.

The lightship was struck by the *Rigel* and received damage. The defendants appeared unconditionally and admitted they were liable to pay damages whether they were direct or consequential. It is unnecessary that the damage should be caused by an actual striking of the thing injured:

> *The Port Victoria*, 86 L. T. Rep. 804; 9 Asp. Mar. Law Cas. 314; (1902) P 25.

[BARGRAVE DEANE, J.—The question here is does it reasonably flow from what happened?] The shock is the natural and probable consequence of the careless navigation, and the damage is recoverable:

> *Dulieu* v. *White*, 85 L. T. Rep. 126; (1901) 2 K. B. 669.

The Circe (93 L. T. Rep. 640; 10 Asp. Mar. Law Cas. 149; (1906) P. 1) was decided before the Workmen's Compensation Act 1906 was passed, and seamen were not within the Act then. The claim in the *Annie* (*ubi sup.*) was not a claim for an indemnity under sect. 6 of the Act; it was an action for damages. The owners of the *Petrel*

are entitled to recover any sums paid as a consequence of the collision:

> *The Frankland*, 84 L. T. Rep. 395; 9 Asp. Mar. Law Cas. 196; (1901) P. 161.

Instances of such payments are the cost of raising a wreck caused by collision, and salvage necessitated by collision, which are always recovered as damages in collision cases.

Laing, K.C. and *Dunlop* for the defendants, the owners of the *Rigel*.—The defendants are not bound by the arbitration proceedings. In order to bind the defendants notices should have been given under rules 19-24 of the Workmen's Compensation Act Rules, and they were not given. To succeed in this action the plaintiffs must show that this man had a good claim against them and that the money paid to satisfy it is damage done by a ship. This man is not within the Act, for he is not a seaman on a British ship, for the ship is not registered and is not recognised as a British ship:

> Merchant Shipping Act 1894, s. 2 (2).

And is entitled to none of the benefits enjoyed by British ships:

> Merchant Shipping Act 1894, s. 72.

The seaman did not give the notices necessary under the Act:

> Workmen's Compensation Act 1906, s. 7 (1) (*a*).

And the incapacity did not commence on board, so notice is necessary. The admission of liability made by the defendants did not include this claim, for when the admission was made no one knew of this claim:

> *The General Havelock*, (1906) P. 4.

The Port Victoria (*ubi sup.*) was an action for damage received by a ship and was brought under the Admiralty Court Act of 1840. This is an action for damage done by a ship and is brought under the Admiralty Court Act of 1861. In fact the damage sued for was not done by a ship, it was done before the collision took place at all and had nothing to say to the collision:

> *The Theta*, 71 L. T. Rep. 25; 7 Asp. Mar. Law Cas. 480; (1894) P. 280;
> *The Vera Cruz*, 52 L. T. Rep. 474; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. 59.

[BARGRAVE DEANE, J.—It is said that after appearance the action *in rem* becomes an action *in personam.*] The fallacy in that statement is that though the judgment obtained in an action *in rem* is also obtained against the person of the owner and may be enforced against other property of his, appearance gives no greater right against the bail than there was against the *res*. *The Annie* (*ubi sup.*) was a common law action for negligence and was not an action *in rem* brought under the Admiralty Court Act 1861, and the compensation was in such an action clearly recoverable. In *The Circe* (*ubi sup.*) Lord Gorell clearly thought that such a case as this would not be a case of damage done by a ship. This sum cannot be recovered unless the plaintiffs bring themselves within the words of the statute. The collision between the ships was not the proximate cause of the damage:

> *Cory and Son* v. *France Fenwick*, 103 L. T. Rep. 649; (1911) 1 K. B. 114.

Bateson, K.C. in reply.—Damage done by a ship includes any sort of damage done by it:

> *The Zeta*, 69 L. T. Rep. 630; 7 Asp. Mar. Law Cas. 369; (1893) A. C. 468, at p. 478;
> *The Sylph*, 17 L. T. Rep. 519; L. Rep. 2 A. & E. 24;
> *The Guldfaxe*, 19 L. T. Rep. 748; L. Rep. 2 A. & E. 325.

Judgment was reserved and was delivered on the 19th Feb.

BARGRAVE DEANE, J.—This is an appeal from a report of the registrar on a reference, in which he refused to allow a claim by the Commissioners of Irish Lights, as owners of the lightship *Petrel*, to include as damages occasioned by a collision between the *Petrel* and the defendants' vessel *Rigel* an award made by the judge of the Newtownwards County Court, County Down, in Ireland, in favour of one James Keating, under the provisions of the Workmen's Compensation Act 1906.

On the 5th Aug. 1910 the *Petrel* was stationed on what is known as the South Rock Station, off the coast of Ireland. On the morning of that day the defendants' vessel *Rigel* collided with the *Petrel*, causing some slight damage to her. It was a dense fog at the time, and James Keating, who was a member of the crew of the *Petrel*, serving as cook and gun firer, was on watch. Keating saw the *Rigel* approaching—looming through the fog. Keating was not knocked down or physically injured by the collision, but alleged that he was very much frightened when he saw the *Rigel* "coming on our port bow to sink us." The County Court judge held that this fright so occasioned had caused a nervous breakdown, accepting the evidence of a medical witness, Dr. Tate, that he was temporarily quite incapacitated from his ordinary work as a seaman, and awarded him a weekly payment of 12*s*. 3*d*., being the half of his weekly wages while in the commissioners' employment, to commence from the 31st Aug. 1910.

Keating had been engaged to serve on the *Petrel* from the 1st Aug. to the 29th Aug. in place of another man temporarily absent, and he served to the end of his engagement, the 29th Aug.. when in due course he was put ashore. The captain of the *Petrel* deposed that no complaint was made to him of any shock or injury by Keating, and the solicitor of the commissioners had no information till he received a letter from Keating's solicitor on the 18th Oct. The mate of the *Petrel* deposed that he had no complaint made to him by Keating at any time, and that if he had it was his duty to, and he would have, put it in the log. There is no such entry proved.

It is very difficult to believe that an experienced seaman, such as Keating was, could have been so seriously affected "by fright," or that he could have been so frightened, as to sustain a shock such as he described, and yet to go on performing his duties on board from the 5th Aug. to the 29th Aug. without any complaint. I am not bound by the finding of the County Court judge, and I have very grave doubts. I certainly should not, on the evidence, have felt that Keating had proved his case. But, assuming for the sake of argument that the judgment is right, and the commissioners have to pay, can they recover the amount over from the owners of the *Rigel?* The registrar

has reported that they cannot. Many reasons were given to me in support of the registrar's decision. Sect. 7 of the Admiralty Court Act 1861 gives jurisdiction to the High Court of Admiralty "for damage done by any ship." In this case was damage done to Keating by the ship *Rigel?* His own story is that he was frightened not by the collision, but before the collision took place, when he saw the *Rigel* looming out of the fog. Supposing that the *Rigel* had passed by, just avoiding a collision. Keating, according to his own account, would have had his fright all the same, but could it be then said to be damage caused by a ship? I do not think so, and in Keating's case as put it was his own nervousness which caused his fright, and, in my opinion, as a seaman, it is hardly credible that what he saw could have created such a fright in him as he describes. I am of opinion that his claim is too remote as against the owners of the *Rigel*.

I have not forgotten to notice the case of *Dulieu* v. *White* (1901) 2 K. B. 669), but I agree with the words of the registrar in his report. It is impossible to say that, as a seaman, there was a reasonable fear of personal injury, such as existed in the mind of the plaintiff in *Dulieu* v. *White*.

But the further difficulty in the commissioners' way in seeking to recover from the owners of the *Rigel* the amount due to Keating under the County Court award is a statutory one. Keating gave notice of his intention to proceed in the County Court to get an award against the commissioners, as his employers, under the Act, on the 4th and 8th Nov. 1910 and the 23rd Jan. 1911 and on the 6th April 1911, the commissioners' solicitors wrote to the *Rigel's* solicitors a letter containing the first intimation of Keating's claim. The answer was on the 10th April, repudiating any liability, and adding: "If your clients seek an indemnity from our clients they must proceed strictly in accordance with the Acts and rules governing such a case." Then followed the letter of the 10th April from the commissioners' solicitors, but no notice was given by the commissioners' solicitors to the *Rigel's* solicitors pursuant to pars. 19-24 of the rules under the Act (form 23), and the owners of the *Rigel* were therefore, not represented at the County Court were not parties, and are not bound by the decision. It was also admitted in argument that the admission of liability in the Admiralty action *in rem* was given before this question was put before the owners of the *Rigel*.

One point raised by counsel for the defendants was that the *Petrel* was not a registered British ship under sub-sect. 1 of sect. 2 of the Merchant Shipping Act, and therefore not a British ship, under sub-sect. 2. It is agreed that she was not registered, although the County Court judge was informed (wrongly) that she was; but was she a British ship? I think this question is not material, because in my opinion sect. 2 (1) (2) of the Merchant Shipping Act 1894 only apply to the provisions of that Act, and that for determining whether the *Petrel* was or was not a British ship or vessel we must look to the wording of sect. 7 of the Workmen's Compensation Act 1906: "Any British ship or vessel of which the owner, or, if more than one, the managing owner resides or has his principal place of business in the United Kingdom." Counsel for the defendants further urged that Keating could not recover from the commissioners because he had failed to follow the provisions of sub sect. (*a*) of sect. 7 of the Workmen's Compensation Act 1906. I do not think the words "may give notice" are to be read "shall give notice" to the master; but, as I have already said, the fact that the man did not give any notice to his master, although he remained at his duties on board more than three weeks after his supposed shock, is a fact in the case of great weight. I therefore confirm the registrar's report.

Solicitors for the plaintiffs, *Williamson, Hill, and Co.*, for *Ingledew, Sons,* and *Phillips*, Swansea.

Solicitors for the defendants, *Stokes* and *Stokes*.

Feb. 28, 29, *and March* 1, 1912.

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

THE BROMSGROVE. (*a*)

Collision—Steamship aground in the Thames—Signals—Thames Rules 30, 40, *and* 52.

A vessel proceeding up the Thames grounded. She sounded four short blasts on her whistle to signify that she was not under command, but, before she could put up the lights required by art. 30 *of the Thames Rules, she was run into by a steamship which had been coming up the river about a quarter of a mile astern of her. In a damage action:*

Held, that the steamship which got aground was not to blame for not putting up the lights required by art. 30, *as that rule was not applicable, and, even assuming that she was, there was not sufficient time in which to put them up before the collision, and she had sounded a four-blast signal signifying that she was not under command.*

Held, further, that the overtaking ship was alone to blame for not keeping out of the way and for bad look-out.

Observations on the want of a signal to be made by vessels temporarily aground in the Thames.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Holywood*; the defendants and counter-claimants were the owners of the steamship *Bromsgrove*.

The case made by the plaintiffs was that shortly before 8.17 p.m. on the 5th Nov. 1911 the *Holywood*, a screw steamship of 1546 tons gross and 965 tons net register, manned by a crew of eighteen hands all told, was, whilst on a voyage from Hull to London with a cargo of coal, in Erith Rands, River Thames, in charge of a Trinity House pilot. The wind was a gale from the west, the weather was fine and clear moonlight, and the tide first of the flood, of little force. The *Holywood* was proceeding straight up the Rands, a little to the north of mid-channel, shaping to pass to the northward of the dredger which was at work in the upper part of the reach and to the northward of mid-channel, and was making about nine and a half to ten knots through the water. Her regulation double mast-

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

head, side, and stern lights were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

In these circumstances those on the *Holywood* observed the stern light of the *Armadale* clear to the northward of the dredger and just touching on the port bow of the *Holywood*, and very shortly afterwards the stern light of the *Bromsgrove* a little to the northward of the light of the *Armadale* and about ahead of the *Holywood*, and distant from half to three-quarters of a mile. Shortly afterwards, when the *Holywood* was about a quarter of a mile below the dredger, and when it was found that she was overhauling the two steamers which were showing their stern lights, her engines were stopped. Shortly afterwards the *Bromsgrove* was seen to be angling to the southward, as if intending to cross over to the south side of the river. The *Holywood* kept on with engines stopped, intending to pass under her stern, until it was seen that the *Bromsgrove* was not drawing across the river, but was stationary, the *Armadale* being also stationary and further to the southward than the *Bromsgrove*, when the engines of the *Holywood* were set on full speed ahead and her helm put hard-a-port to give her steerage way so as to try to run her aground as the best chance of avoiding collision with the *Bromsgrove*, having regard to the position of the *Armadale*. Shortly afterwards, as soon as the *Holywood* began to answer her port helm, her engines were stopped and reversed full speed astern and three short blasts were sounded on her steam whistle, but with her stem and port bow the *Holywood* struck the starboard side of the stern of the *Bromsgrove*, receiving considerable damage.

Those on the *Holywood* charged those on the *Bromsgrove* with keeping a bad look-out; with failing to exhibit anchor lights; with exhibiting a misleading light; and with failing to sound warning signals.

The case made by the defendants and counter-claimants was that shortly before 8.5 p.m. on the 5th Nov. 1911 the *Bromsgrove*, a steel screw steamship of 1445 tons gross and 833 tons net register, manned by a crew of seventeen hands all told, was proceeding up Erith Rands, River Thames, while on a voyage from Port Talbot to the Atlas Derrick, Bugsby Reach, with a cargo of coal. The tide was flood of the force of two to three knots. The *Bromsgrove*, in charge of a duly licensed Trinity House pilot, was following the line of the channel, keeping a little to the north of mid-channel, and was making about eight and a half knots. She carried the regulation masthead, side, and stern lights, which were all electric, and they were being duly exhibited and were showing brightly, and a good look-out was being kept on board of her.

In these circumstances the *Bromsgrove*, whose engines had been eased to slow and her helm ported a little in order to pass to the northward of the *Armadale*, which she had overtaken and which appeared to be aground, was also found to be touching the ground and then came to a stop on the starboard quarter of the *Armadale*. At this time the *Holywood*, which had previously been noticed following the *Bromsgrove*, was astern from a quarter to half a mile. As soon as the *Bromsgrove* grounded, her whistle was sounded four short blasts in rapid succession, which signal was repeated at very short intervals several times, but, notwithstanding the warning thereby given, the *Holywood* came on at great speed and with her stem struck the stern of the *Bromsgrove*, whose engines had been stopped as soon as she was found to be fast on the ground, such a heavy blow that her starboard quarter was completely demolished.

Those in charge of the *Bromsgrove* charged those on the *Holywood* with bad look-out; with neglecting to keep clear; and with neglecting to ease, stop, or reverse their engines.

The following Thames Rules were referred to:

30. With the exceptions hereinafter named, a vessel under 150ft. in length when at anchor or moored shall carry forward where it can best be seen, but at a height not exceeding 20ft. above the hull, a white light (hereinafter called the riding light) in a lantern so constructed as to show a clear uniform and unbroken light visible all round the horizon at a distance of at least one mile. A vessel of 150ft. or upwards in length when at anchor shall carry in the forward part of the vessel at a height of not less than 20ft. and not exceeding 40ft. above the hull one such light, and at or near the stern of the vessel and at such a height that it shall be not less than 15ft. lower than the forward light another such light. . . . A vessel of 150ft. or upwards aground in or near a fairway shall carry the above light or lights.

40. When a steam vessel in circumstances other than those mentioned in by-law 36 is turning round, or for any reason is not under command and cannot get out of the way of an approaching vessel, or when it is unsafe or impracticable for a steam vessel to keep out of the way of a sailing vessel, she shall signify the same by four blasts of the steam whistle in rapid succession, each blast to be of about one second's duration.

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 vessel shall keep her course. Every vessel coming up with another vessel from any direction more than two points abaft her beam, *i.e.*, in such a position with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side lights, shall be deemed to be an overtaking vessel, and no subsequent alteration of the bearing between the two vessels shall relieve the overtaking vessel of the duty of keeping clear of the overtaken vessel until she is finally past and clear. As by day the overtaking vessel cannot always know with certainty whether she is forward or abaft this direction, she shall if in doubt assume she is an overtaking vessel and keep out of the way.

Laing, K.C. and *R. H. Balloch* for the plaintiffs.

Batten, K.C. and *D. Stephens* for the defendants.

BARGRAVE DEANE, J.—This is a curious sort of case. At first sight art. 52 seems to be the one to apply. It is the overtaking rule, which says: "Every vessel overtaking another vessel shall keep out of the way of the overtaken vessel, which latter vessel shall keep her course." It does not say speed, but I take it to mean speed. Therefore, *primâ facie*, the *Holywood* had to keep out of the way of the other vessel.

Then the other vessel by accident got aground, and was unable to keep her course and speed, and therefore one has to look to see how the other vessel when she got aground was to give notice

to the vessel coming up astern of her that she was aground.

I do not think, myself, that this is provided for in the rules. I do not think there is provision made in the rules, and I think there ought to be provision made, for often it happens in the Thames that a vessel goes aground when there is very little water in the river, and she requires to indicate that she has temporarily gone aground. Very often she has not time to change her lights, and I think it would be advisable if the rules stated that she should give some particular signal to indicate that which has happened. Whether it might be by continuing to blow the whistle until the lights were got up or the vessel was got off I do not pretend to dictate, but that there should be some rule I am clear.

The *Bromsgrove*, when she found herself aground, blew four blasts, according to her story, and continued to blow them. That is supposed to be under by-law 40, which says: "When a steam vessel, in circumstances other than those mentioned in by-law 36, is turning round or for any reason is not under command and cannot get out of the way of the approaching vessel . . . she shall signify the same by four blasts." Well, she was not turning round. She could not get out of the way of the approaching vessel, but as I say that is not what the rule, I think, had in mind. The rule had in mind, I think, a steamer whose gear is out of order, or whose engines are broken down, or something of the sort, and not a steamer which has temporarily run aground.

Art. 30 certainly does not apply, because I think it is meant to apply to vessels anchored or on the ground permanently near the fairway. That is not at all the same thing as this, where a vessel, owing to the lowness of the tides, had temporarily got herself on a bank. Did the *Bromsgrove* blow four blasts? That is a question of fact which I have to decide. Now counsel for the plaintiffs called my attention to the fact that none of the witnesses called for the *Holywood* say the *Bromsgrove* sounded four blasts. I think, however, this case is a very good example of the difference between affirmative and negative evidence, and the conclusion I have come to is that the evidence of those who say "I did not hear" is not of very much value in this particular case. Did this vessel blow four blasts? It is sworn to by the master, the pilot, the chief officer, the second officer, the man at the wheel, the pilot on the *Armadale*—who swears positively to it—the pilot's brother, and the man from the *Axwell*, who speaks to hearing four blasts from the *Bromsgrove*. That they were not heard by the plaintiffs' witnesses may be, but that is not the point. The point is did she blow them, and give the only notice open to her under the rules—namely, blow four blasts to indicate that she was not under command. I think she did. If she did you cannot impute blame to her, and if she did all that it was possible to do then the other vessel had to keep out of her way and did not do it.

I cannot help coming to the conclusion that the chief officer on the look-out on the *Holywood* was inattentive to his duties; that the people on the bridge trusted to him and he failed them, and their attention was not directed to the whistles and they did not hear them, and they got too close before they realised the *Bromsgrove* was there, and then had not time to keep clear of her. That is the conclusion I have come to, and it is one in which I am supported by the Elder Brethren, on whose advice I rely.

The Elder Brethren strongly urge upon me the importance of having some new rule—and I believe new rules are being prepared—in accordance with which a vessel which gets temporarily aground in the Thames—or in any other river where these shallows exist—shall indicate her position, and it seems to me that if she keeps blowing her whistle until she gets her lights up or gets off the ground, that might be sufficient. I ought to add a word on the question of putting up the anchor lights. You cannot put up lights in a moment. I do not know that vessels are bound to carry their lights ready lighted on deck in case of such an accident as this. It might be advisable to do so, but you have got to consider what distance these vessels were apart when first it came to their notice that the *Bromsgrove* was ashore. The other vessel was only something like a quarter to half a mile astern. That is not three minutes. In my opinion there was no time between the *Bromsgrove* getting aground and the other vessel running into her for the lights to be got out, lighted and put up to indicate that she was, under art. 30, aground near the fairway. I do not think, myself, that any blame can be attributed to the *Bromsgrove* on that account, and in my opinion the whole blame for the collision must be attributed to the *Holywood*. I do not think in this case there was time to put up the lights, but I do not think their absence affected the collision.

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

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

April 18 *and* 19, 1912.

(Before Sir S. Evans, President, and Elder Brethren.)

The Elysia. (*a*)

Collision—Lights—Tug lying by a ship and in attendance on her—Look-out—Sound signals—Compulsory pilot—Proper assistance from crew.

A tug in attendance on, but not fast to, a vessel at anchor with anchor lights, in the Mersey was stemming the tide, and carrying the usual under-way lights. Her green light was open to an upcoming steamship in charge of a compulsory pilot in such a position that the pilot navigated the upcoming ship towards the vessel at anchor and her tug under the impression that he was approaching one vessel under way showing her green light. A collision and damage resulted.

In a damage action brought by the owners of the ship at anchor, the defendants pleaded compulsory pilotage:

Held, that the tug was properly exhibiting her green light as she was under way, and that the defendants could not properly complain of having been misled by the green light; that the collision was brought about by the negligence

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

of the pilot, but that the plea of compulsory pilotage failed upon the grounds : (1) *That the master of the defendants' ship in fact appreciated the true position of things in time to warn the pilot that he was under a misapprehension and failed to do so as was his duty in accordance with the decision in* The Tactician (10 *Asp. Mar. Law Cas.* 534; 97 *L. T. Rep.* 621; (1907) *P.* 244). (2) *That the master of the defendants' ship knew what the pilot was doing and failed to call his attention to the fact that no sound signals had been given as was his duty.* (*a*)

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Explorer*; the defendants and counter-claimants were the owners of the steamship *Elysia*.

The case made by the plaintiffs was that the *Explorer*, a steel screw steamship of 4871 tons net register, manned by a crew of eighty-three hands all told, was, while on a voyage from Calcutta to Liverpool lying at anchor in the Sloyne, River Mersey, heading north, about two lengths from the Cunard buoy in a position selected by the pilot who was compulsorily in charge. The wind was S.S.E. a moderate breeze, the weather was fine and clear, and the tide was half flood of a force of about two to three knots. The *Explorer's* anchor lights were being duly exhibited and were burning brightly, and a good look-out was being kept on board.

In these circumstances those on board the *Explorer* saw the masthead and side lights of the *Elysia* coming up the river, nearly end-on, about two miles off, in charge of the steam tug *Toxteth.*

When the *Elysia* had approached to within about half a mile, her green light opened a little on the port bow of the *Explorer.* Then her red light opened, and with the tug ahead she continued to come ahead showing her red light as if intending to pass on the port side of the *Explorer*, but when the *Elysia* was half a length to a length distant she suddenly swerved to port as if acting under a starboard helm, showing her green light and shutting out her red light, and, coming on, with her stem struck the port bow of the *Explorer* a heavy blow, causing damage.

Those on the *Explorer* charged those on the *Elysia* with keeping a bad look-out and with failing to drop her anchor in due time or to take any measures to keep clear, and they charged those on the *Elysia* and her tug with starboarding and with failing to slacken their speed or stop or reverse.

The case made by the defendants and counter-claimants was that shortly before 6.28 a.m. the *Elysia*, a steamship of 6368 tons gross and 3994 tons net register, 440ft. in length, whilst on a voyage from Bombay to Liverpool with a cargo and passengers, and manned by a crew of 120 hands was in the River Mersey. The weather was dark but clear, and the wind a moderate southerly breeze. The *Elysia*, in charge of a duly licensed pilot, was proceeding straight up the river on the west side of the channel, with a tug fast ahead, and was making about two knots through the water. The regulation lights for a steamship under way were being duly exhibited on the *Elysia* and her tug, and they were burning brightly, and a good look-out was being kept. In these circumstances white and green lights, which were taken to be the lights of a steamship underway were seen about a mile off, and bearing slightly on the starboard bow. The green light was in fact the light of a tug fast to or attached along the starboard side of the *Explorer.* After the white and green lights were seen the helm was starboarded, and shortly afterwards the engines, which had previously been stopped, were put half speed ahead. When it was seen that the *Explorer* was at anchor the helm was put hard-a-port, the following orders were given to the engines in succession: "Full astern," "full ahead," and then "full astern," the starboard anchor was let go, and the tug towed off the starboard bow. Notwithstanding these measures the port bow of the *Elysia* struck the port bow of the *Explorer.*

Those on the *Elysia* charged those on the *Explorer* and those on the tug in attendance on her with keeping a bad look-out, with wrongly exhibiting, or allowing to be exhibited on the tug, a green light in such a position as to be mistaken for the starboard side light of the *Explorer*, with not exhibiting anchor lights on the tug, with not exhibiting towing lights on the tug if she was towing or attached to the *Explorer*; if the tug was not fast to the *Explorer* they charged those on board her with a breach of the end on rule, with not keeping to the starboard hand side of the channel. Alternatively they alleged that if there was any negligence on the part of those on the *Elysia* it was the negligence of her pilot who was compulsorily in charge.

The plaintiffs in their reply and defence to the counter-claim set up the defence of compulsory pilotage.

The other facts appear in the judgment.

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

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.

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 not less than 14ft. above the hull.

11. . . . A vessel of 150ft. or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20ft., and not exceeding 40ft., above the hull, one such light, and at or near the stern of the vessel and at such a height that it shall not be less than 15ft. lower than the forward light, another such light.

18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each

(*a*) This case seems to decide the point left open by Lord Alverstone, L.C.J. in *The St. Paul* (11 Asp. Mar. Law Cas. 169; 100 L. T. Rep. 184; (1909) P. 43) as to whether it is the duty of a master to call the attention of a compulsory pilot to the fact that sound signals ought to be given. It does not, however, decide the other point left open in that case as to whether the responsibility for giving sound signals rests with a master or a pilot.—ED.

shall alter her course to starboard, so that each may pass on the port side of the other.

25. In narrow channels every steam vessel shall when it is safe and practicable keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

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 following Mersey rules were also referred to:—

1. Every vessel, of whatever description, used in navigation, when in any part of the river Mersey, or in the sea channels or approaches thereto as above defined, shall, on and after the 17th day of September 1900, observe and obey the "regulations for preventing collisions at sea" made in pursuance of the Merchant Shipping Act 1894, hereinafter called "the general regulations" which may from time to time be in force, with the exceptions and additions mentioned in the following rules.

4. (*a*) A steam vessel when towing another vessel or vessels or when attached for the purpose of towing or manœuvring such vessel or vessels, shall carry the compulsory lights prescribed by article 3 of the general regulations, and such steam vessel when towing or attached as aforesaid to a vessel 450 feet or upwards in length shall carry the additional bright white light prescribed by the said article 3.

6. In lieu of article 11 of the general regulations, a vessel when at anchor, except when lying at any stage, shall carry in the forward part of the vessel, at a height of not less than 20, and not exceeding 40 feet 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 a mile, and at or near the stern of the vessel and at such a height that it shall not be less than 15 feet lower than the forward light, another such light.

11. Every steam vessel under way 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.

Laing, K.C. and *Kennedy* for the plaintiffs—Whether the *Explorer* is to blame depends on whether her tug was made fast to her and on the construction to be placed on 4 (*a*) of the Mersey rules. [*Batten*, K.C.—My point is that the tug should have had anchor lights up.] On the evidence the tug was not in fact fast to the *Explorer*. The tug was dodging round the ship waiting to be made fast and she was not at anchor. It is said that the tug was carrying wrong lights. The contention is based on *The Romance* (83 L. T. Rep. 488; 9 Asp. Mar. Law Cas. 149; (1901), *P.* 15). The lights exhibited by the tug were correct, for she was not at anchor, or made fast to the shore or aground, and therefore she was under way. It was further contended that those on the *Explorer* had a duty to see that the tug had proper lights up:

The Devonian, 84 L. T. Rep. 675; 9 Asp. Mar. Law Cas. 179; (1901) P. 221.

But in that case the tug was actually fast to the *Devonian*; in this case the tug was not fast. The fault on the *Elysia* was not that of the pilot alone, either the *Explorer* was not reported soon enough, in which case there was a bad look out, or if she was reported in proper time, the master should have seen that the pilot heard and acted on the report and told him that he was going wrong:

The Tactician, 97 L. T. Rep. 621; 10 Asp. Mar. Law. Cas. 534; (1907) P. 244.

The vessel was not reported till very late, and those on the bridge never mentioned her to the pilot until a minute before the collision, though they had seen her for about twelve minutes.

Batten, K.C. and *Dunlop* for the defendants.—Those on the *Elysia* were misled by the green light of the tug; they thought it belonged to the *Explorer*, and that that vessel was under way. The practice is that tugs attending on steamships at anchor should exhibit anchor lights. The tug was exhibiting wrong lights. The tug in this case, though made fast to the big ship, was not towing her, so the facts here differ from those in *The Romance* (*ubi sup.*). If the anchor of the big ship supports the weight of the tug, the tug is at anchor and should exhibit anchor lights. *The Devonian* (*ubi sup.*) shows that the master and pilot are responsible for the lights of the tug. The tug here was in fact fast to the ship.

Laing, K.C. in reply.

The PRESIDENT.—It is not necessary for me to recapitulate the facts of this case. It is enough for me merely to state the conclusions of fact at which the court has arrived.

The collision took place, as we know, between the *Elysia*, a vessel under way, travelling at about five knots over the ground and two knots through the water, and the *Explorer*, a vessel which was in fact at anchor. *Primâ facie*, therefore, an explanation must be given by the defendants for the collision which took place. The explanation which they offer is this: We were misled by a green light which was allowed to remain, improperly allowed to remain, on the tug which was in some way in attendance upon the *Explorer*. Having regard to the argument of counsel for the defendants, I must at once consider whether or not it has been shown in this case that the tug was made fast to the *Explorer*. The only witness produced for the defendants to establish that fact was the master of the tug *Nelson*. He had every opportunity of seeing the rope which he says he saw at one time, after the crash of the collision, with the tug away from the starboard side of the *Explorer*. He was expecting a collision to take place between these two big vessels, and I doubt very much whether he was observing or could see whether the tug was made fast to the *Explorer*, or whether he was paying attention to anything but the collision which was impending, and which actually took place between the two vessels. On the other hand, there is the evidence of the chief officer of the *Explorer*, there is the evidence of the

master of the tug *Westcock*, and the evidence of the man who was called the mate. Their evidence stands in this way. The tug would hardly make fast without instructions from the chief officer on the bridge of the *Explorer*. The chief officer says not only that the tug was not in fact made fast, but that he gave no instructions for making fast. In the same way the master of the *Westcock* says that in fact there was no rope between the tug and the *Explorer*; and that statement is also made by the mate, at any rate up to a time within two minutes of the collision, when he went below. They further say this, that "before we would make fast instructions would have been given by me, the master of the *Westcock*, to the mate to make fast the rope." The master of the tug says "I gave no instructions to the mate." The mate says: "I received no instructions from the master." Putting this evidence on the one side, and comparing it with the evidence on the other, I am bound to come to the conclusion, and I do without hesitation come to the conclusion, that for some reason or other the tug had not been actually made fast on this occasion. Then counsel for the defendants went further, and argued that, even if the tug was merely in attendance, being there at the request of the master of the *Explorer*, she ought not to have had the green light burning at all. Well, no case has gone as far as that, and I do not think that the argument is a sound one. She, in fact, was steaming two knots in order to stem the tide, and I have come to the conclusion, and I am advised by those who assist me, that if she were not carrying her under-way lights in those circumstances she would be carrying improper lights.

So far as the pilot of the *Elysia* is concerned, I think the navigation of the *Elysia* was faulty, and that blame for the collision rests with the pilot of the *Elysia*; but another question, and a more difficult one to determine in this case, is whether or not the collision is solely attributable to the fault or negligence of the pilot, or whether it was contributed to by negligence on the part of somebody on the *Elysia* whose assistance ought to have been given to the pilot. The case which has gone furthest in the direction of doing away with the defence of compulsory pilotage is the case of *The Tactician* (97 L. T. Rep. 621; 10 Asp. Mar. Law Cas. 534; (1907) P. 244), and in that case it was laid down by the Court of Appeal, in the judgments of Lord Alverstone, that side by side with the principle that the navigation must be intrusted, without any undue interference, to the pilot alone, there is another principle—namely, "that the pilot is entitled to the fullest assistance of a competent master and crew, of a competent look-out, and a well-found ship"; and Fletcher Moulton in his judgment says that "just as the pilot is entitled to the assistance of the master and crew of the ship in obtaining information as to the surrounding circumstances, so in the present case he was entitled to the assistance of the master in calling his attention to the fact that the inferences he was drawing from the surrounding circumstances were such as a competent mariner ought not to draw."

In this case, the question being whether the pilot was given the assistance of a proper look-out, we must consider what the look-out was. It consisted, as counsel for the defendants admitted in terms, of the chief officer on the forecastle head, of the man in the crow's-nest and of the master on the bridge. The master on the bridge formed part of the look-out on the vessel, and therefore the pilot was entitled to the assistance not only of the chief officer on the forecastle head and of the man in the crow's-nest, but also the assistance of the master, forming part of the system of look-out. With regard to the forecastle head, I do not think the plaintiffs have shown that there was any negligence on the part of the man on the look-out on the forecastle head. I have come to the conclusion that I cannot disbelieve him when he says that at a considerable distance away—about a mile—he saw the vessel and reported her upon three occasions. One thing, though, is quite certain, and that is that the man on the forecastle head did not appreciate the fact that the light of the vessel which he saw, and which he called, "the vessel ahead," was the light of a vessel at anchor. He apparently thought, as did the others—by reason, so he explained, of the presence of the green light of the tug—that those lights belonged to one ship, and that that ship was in some way under way. What was his position in the circumstances? A man on the look-out on the forecastle head is not in as good a position to judge as a man on the bridge, with reference to the lights which he sees, as to whether they change their bearing to other lights or to his vessel; but whether he was or not, I think he did perform his duty by reporting the lights of a vessel ahead—that it was not his duty to go arguing with the people on the bridge, the pilot or the master, as to whether the lights which he reports are the lights of a stationary vessel at anchor or of a vessel under way. He shouted out, "Lights of a vessel ahead?" and I think he performed all that could reasonably be expected of him. On the bridge was a look-out consisting of the two eyes of the captain himself, and he ought to be a competent mariner. I daresay he is, and it was much easier for him, if he had been careful in his examination of the lights, to see whether that white light was the light of a vessel at anchor. Could a competent mariner have seen it earlier than the captain did? Unquestionably he could, because we have had the evidence, called by the defendants themselves, of the master of the tug *Nelson*, who says he appreciated, when he was a quarter of a mile distant, that the light of the *Explorer* was the light of a vessel at anchor. He mentioned the Wallasey Stage as his position when he appreciated that fact, and that is much nearer a mile away than a quarter of a mile; but it is enough for me to say, for the purpose of my judgment, that he did appreciate at least a quarter of a mile away, and probably at a much further distance away, that the light was the light of a vessel at anchor. If he did, the master could, and if the master could, he ought to have appreciated the same thing. He did not. Therefore I think that the look-out of the master was not as careful as it could and ought to have been. He could have, and ought to have, appreciated much earlier than he did that the light was the light of a vessel at anchor. He did, according to his own evidence, appreciate two minutes before the collision took place that that was the fact. The distance between the two vessels at that time was about a thousand feet. During the whole of this time the master knew that the

pilot was navigating towards the other vesels under the impression that she was under way, whereas in fact she was at anchor. If he ought to have appreciated the fact, as I think he ought to have, and if he had done what he ought to have done in that respect, he would have known that the pilot was navigating under a misapprehension; and in these circumstances, according to the decision in *The Tactician* (*ubi sup.*) it was his duty to have told the pilot, "You are going, apparently, towards that vessel as if she was a vessel under way. I can see she is a vessel riding at anchor," and he did not do so. If he had done so, even two minutes before the collision, I do not doubt something might have been done to alter a state of things which produced the collision, and that indeed the collision might have been avoided.

I know how difficult it is for a master to appreciate exactly, in the present state of the law, when he ought to, I will not say interfere, but say anything to the pilot which would seem to show he was interfering with the navigation by the pilot, or throwing any doubt upon the propriety of it. I appreciate to the full that it is a very dangerous thing to divide responsibility, but in this case, where the master was in doubt, and where, if he had kept a careful look-out, he would have appreciated what the tug appreciated, he ought to have told the pilot that he was under a misapprehension. I think it shows that the master himself in this case was to a certain extent responsible for the accident, and therefore the collision was not solely the fault of the pilot.

There is one other matter I ought to mention with reference to the master. I think in the case of *The St. Paul* (100 L. T. Rep. 184; 11 Asp. Mar. Law Cas. 169; (1909) P. 43.) the point was left open as to whether the duty of giving sound signals rested with the master as well as with the pilot; but there was a very strong indication of opinion by Lord Alverstone in that case that whosoever duty it was to order sound signals to be given, it probably is the duty of the master to call attention of the pilot to the fact that sound signals have not been given if in fact they ought to have been given. What was done in this case? There was a movement of the helm ordered upon three different occasions, according to the story of the defendants themselves—"starboard," some distance off; "starboard" again; and again "hard-a-starboard." It may be it is not often that sound signals are given to a vessel which is at anchor, but the pilot who was navigating the *Elysia* in this case thought he was approaching a vessel under way, and certainly these signals ought to have been given. The master himself knew what the pilot was doing, and, notwithstanding these three different orders to the helm, he did not call the attention of the pilot to the fact that he had not ordered any sound signals to be given. If sound signals had been given, what would have happened? No answer would have been given, clearly, from the *Explorer* of any movement of the helm on her part; but some kind of signal could be given, and in all probability would have been given, to the approaching vessel that the *Explorer* was not in a position to alter her course at all. In that way it would have been brought to the notice of those on the *Elysia*—and very likely have been brought to their notice in time—that this vessel was at anchor. Then this collision might have been avoided at the last. That is my decision.

I am clearly of opinion that the *Elysia* is to blame, by reason of the negligence of the pilot, for the collision, and for the reason I have given I have come to the conclusion that the collision would have been avoided if the proper assistance had been given by the master to the pilot in the direction which I have already indicated.

Therefore in this case the defence of compulsory pilotage fails, and the plaintiffs are entitled to recover judgment against the defendants. The defendants' counter-claim is dismissed.

Solicitors for the plaintiffs, *Simpson, North, Harley* and *Co.*, Liverpool.

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

May 15, 16, *and* 17, 1912.

(Before Sir S. T. EVANS, President, and Elder Brethren.)

THE SARGASSO. (*a*)

Collision—Fog—Tug attached to a steamship but not towing—Sound signals in fog for steamship and for tug—Collision Regulations, art. 15 (*a*) *and* (*e*)*—Division of loss—Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1.

Where a tug was during fog accompanying a vessel in from sea to the Tyne, and was made fast alongside her but was not towing her, it was held in the circumstances: (1) *That the tug was not bound to comply with sub-sect.* (*e*) *of art.* 15 *of the Sea Rules as she was not towing.* (2) *That she was not bound to comply with sub-sect.* (*a*) *of the same article as safe navigation demanded that she should not sound any signals as if she were a separate vessel having way upon her.*

In this case both the plaintiffs' and defendants' vessels were found to blame for excessive speed. The defendants' vessel was found to blame in addition for bad look-out and for not stopping. The court, in applying sect. 1 *of the Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *apportioned two-thirds of the blame to the defendants' vessel and one-third to the plaintiffs', and gave no costs on either side.*

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Mary Ada Short*; the defendants and counter claimants were the owners of the steamship *Sargasso.*

The case made by the plaintiffs was that about 4.35 p.m. on the 18th April 1912 the *Mary Ada Short*, a screw steamship of 3605 tons gross and 2335 tons net register, manned by a crew of thirty hands, all told, was, whilst on a voyage from Brake, on the River Weser, in water ballast, quarter to half a mile to the eastward, and a little to the southward of the entrance to the River Tyne, in charge of a duly licensed Tyne pilot. The wind was south east, light, the weather was very foggy, and the tide was flood setting to the south south-west of the force of about a knot. The *Mary Ada Short* was proceeding slow ahead and stopping at intervals, and was making about three and half knots through the water, heading

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

N. by W. ½ W. magnetic. Her steam whistle was being sounded, a long blast at intervals of about a minute, and a good look-out was being kept on board her.

In these circumstances, those on the *Mary Ada Short* heard the sounds of whistles of steamers on the port bow. The engines of the *Mary Ada Short* were immediately stopped, and a long blast was sounded on her whistle, and she was kept on the same heading. About a minute later a long blast from the whistle of the *Sargasso* was heard nearer to the *Mary Ada Short*, and finer on the port bow. The whistle of the *Mary Ada Short* was immediately sounded one long blast in reply, and the steam tug *Triton*, which had a rope fast from the starboard bow of the *Mary Ada Short*, but was not towing, was directed to come on the port bow with a view of keeping the *Mary Ada Short*, which had a right-handed propeller straight. The *Triton* sounded one long blast on her syren, the engines of the *Mary Ada Short* were at the same time put full speed astern, and three short blasts sounded on her steam whistle. Shortly afterwards the *Sargasso* came into sight, distant about 100 yards, bearing about two points on the port bow, heading for the port bow of the *Mary Ada Short*. The *Sargasso* sounded two short blasts on her steam whistle, and appeared to be acting under a starboard helm. The *Triton*, which was then on the port bow of the *Mary Ada Short*, slipped the rope by which she was fast to the *Mary Ada Short*, hard-a-starboarded her helm, and set her engines ahead, and gave two short blasts in reply, and three short blasts were again sounded on the steam whistle of the *Mary Ada Short*, her engines were kept working full-speed astern, and her helm was kept steady, but the *Sargasso* coming on at a considerable speed, and apparently attempting to cross the bows of the *Mary Ada Short*, with her starboard side about amidships, struck the stem of the *Mary Ada Short*, doing her considerable damage.

Those on the *Mary Ada Short* charged those on the *Sargasso* with not keeping a good look-out, with proceeding at an excessive speed, with failing to stop their engines and navigate with caution on hearing a fog signal forward of their beam, with failing to slacken their speed or stop or reverse, and with attempting to cross ahead of the *Mary Ada Short*.

The case made by the defendants and counter-claimants was that shortly before 4.35 p.m. the *Sargasso*, a screw steamship of 1508 tons gross and 884 tons net register, manned by a crew of twenty-one hands, whilst proceeding on a voyage from Howdon Dock, on the River Tyne, to Carthagena with a cargo of coals, was outside the entrance to the River Tyne about a quarter of a mile nearly due east from the end of the south pier. The wind was easterly—a light breeze—and there was a thick fog and the tide was about half an hour after high water, with very little if any force. The *Sargasso* was heading due east, and, with the engines working at slow, was making about two and a half to three knots, the regulation long blast for fog was being sounded on the whistle at intervals of about one minute, and a good look-out was being kept on board her.

In these circumstances those on the *Sargasso* heard a long blast from the *Triton's* syren and one from the *Mary Ada Short's* whistle bearing on the starboard bow, and immediately replied with a long blast and stopped the *Sargasso's* engines. In a short time the *Triton* and the *Mary Ada Short* each blew two short blasts, and about the same moment came into view, distant about 100 yards, and bearing between two and three points on the starboard bow. The *Sargasso* immediately replied with two short blasts and put her helm hard-a-starboard, and her engines were put slow ahead to give her steerage way, but, before her speed could be increased, the *Triton* replied with two short blasts and the *Mary Ada Short* with three. The *Sargasso* immediately replied with three short blasts, and her engines were put full speed astern and her helm amidships. The tow rope between the *Triton* and the *Mary Ada Short* parted, and the *Triton* cleared the *Sargasso*, but the *Mary Ada Short* came on at a considerable speed, and with her stem struck the *Sargasso* on the starboard side abreast of No. 2 hatch with considerable force, cutting into her and doing her so much damage that the *Sargasso* rapidly sank and one of her crew was drowned.

Those on the *Sargasso* charged those on the *Mary Ada Short* with not keeping a good look-out, with proceeding at an excessive speed, with failing to stop their engines and navigate with caution on hearing a fog signal forward of their beam, with failing to slacken their speed or stop or reverse, with improperly approaching and entering the Tyne on the south side of mid-channel, and with failing to sound their whistles for fog in accordance with the sea regulations.

The following collision regulations were referred to:

15. All signals prescribed by this article for vessels under way shall be given: 1. By "steam vessels-" on the whistle or siren. 2. By "sailing vessels and vessels towed" on the fog horn. The words "prolonged blast" used in this article shall mean a blast of from four to six seconds duration. A steam vessel shall be provided with an efficient whistle or siren, sounded by steam or some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn, to be sounded by mechanical means and also with an efficient bell. . . . 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. . . . (*c*) A sailing vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession. . . . (*e*) A vessel when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these rules shall, instead of the signals prescribed in sub-divisions (*a*) and (*c*) of this article, at intervals of not more than two minutes, sound three blasts in succession—viz.: one prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

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 seamen, or by the special circumstances of the case.

The following local (Tyne) rule was also referred to :

20. Every steam or other vessel (whether towing any other vessel or not, or being towed) shall, unless prevented by stress of weather, be brought into the port to the north of mid-channel, and be taken out of the port to the south of mid-channel.

The following section of the Maritime Conventions Act (1 & 2 Geo. 5, c. 57) 1911 was cited during the course of the arguments.

Sect. 1 (1). Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault. . . .

Batten, K.C. and *R. H. Balloch* for the plaintiffs.

Bateson, K.C. and *A. E. Nelson* for the defendants and counter-claimants.

The case of *The Devonian* (84 L. T. Rep. 675: 9 Asp. Mar. Law Cas. 179; (1901) P. 221), was referred to as showing when a steam tug might be said to be towing a vessel.

The PRESIDENT.—The collision in this case took place on the 18th April of this year between two vessels, one the *Mary Ada Short*, proceeding on her way towards the entrance into the Tyne, and the *Sargasso* steamship, proceeding out from the Tyne on a voyage to Carthagena.

The place of collision is approximately—I will not say exactly—fixed in this case by the wreck which is now visible of the *Sargasso*, the distance away from the South Pier Head being 630 yards. I believe that the vessel was pushed by the *Mary Ada Short* going full speed on her engines, and, acting very wisely in the circumstances after the actual collision, she did that in order to keep her bows in the wound, whereby to prolong the very short period during which the vessel remained afloat, so that the lives might be saved, and fortunately all the lives were saved except that of one man, who apparently in some way was overlooked.

A good deal of evidence has been gone into as to the courses of the two vessels, and as to the angle of the blow. This court seldom gets much assistance from the consideration of the angle of the blow because very often very experienced men on the one side say the angle was a small one, and very experienced men on the other side persuade themselves that in that particular case the angle was a broader one. There is, however, in this case one matter not in dispute, and that is that the *Mary Ada Short* entered the hull of the other vessel to the extent of about 7ft. 10in. on one side of the *Mary Ada Short's* bows and 5ft. 3in. on the other.

The *Mary Ada Short* was a light vessel, she was the larger vessel, and was riding light, the other was the smaller vessel, but was fully laden with coal on her outward journey. I have come to the conclusion that it is more important in this case to consider carefully the speeds of the two vessels, and the look-out of the two vessels, than the courses or the angle of the blow.

The defendants are attacked by the plaintiffs, first of all, for a deficient look-out, and in the next place for excessive speed. These really are the two material allegations which are made by the plaintiffs against the defendants. The defendants, on the other hand, retort against the plaintiffs, and counterclaim against the plaintiffs on the ground that the speed of the plaintiffs' vessel was excessive, and on the ground that the signals given by the plaintiffs, and by the tug in attendance on the plaintiffs' vessel, were not the appropriate signals. So far as the defendants' conduct is concerned, I have come to the conclusion that their look-out was a bad look-out—whatever the reason for that may have been—in the result there was not the careful look-out there ought to have been on that vessel, either by the look-out man, the mate, a young man of twenty-three on the forecastle head, or by the captain who remained on the bridge after the pilot left.

I accept the account which is given of the various signals by the witnesses for the *Mary Ada Short*, and I was impressed by the character of the evidence given as to the conduct of the vessel in the fog, particularly by the account given by the master of the tug. It appears that she passed two steamers before anything was known or heard from the *Sargasso*. Various whistles were given by these two steamers—about three each, I think —fog whistles, and when those whistles were heard the *Mary Ada Short* stopped her engines. The first steamer was seen, and thereafter she proceeded on her way; the second steamer was heard, she was not seen, but when her signals were heard I think the *Mary Ada Short* again stopped her engines, and kept them stopped until she was satisfied that the sound signals of the second steamer were abaft the *Mary Ada Short's* beam. That shows, if it is an accurate story—and I am accepting it—that the navigation of this vessel—apart from the question of speed—when she heard those sound signals was careful navigation, and it shows not merely that those on the look-out were attending to the signals which could be heard, but it shows also they were taking the appropriate steps when those signals were heard.

So far as the *Sargasso* is concerned, two long blasts were heard about the same time, proceeding from about the same direction, and they were regarded as two different blasts, one blast coming from one steamer and another blast from another steamer. There is some doubt about it in the minds of some of these people, but I think almost every one of them said there was some difference in the sound, and the probability is one long blast of those two which were first described came from the *Sargasso*, and the other it is said now was a blast of another steamship now known to have been in the neighbourhood. These were reported and answered with a long blast from the *Mary Ada Short*, then there was another report and there was an answer given by the *Mary Ada Short* of a long blast, then the tug was ordered round from the starboard bow to the port bow, with the accompanying hail from the bridge to get on to that side, so as to hold the head of the

vessel straight, as her engines would be put astern. The tug thereupon blew a signal—the first signal which the tug gave, and the signal was a long blast. I think it was not unreasonable for the tug to give that blast in the circumstances. I do not know that there was any obligation on her; whether that be so or not, this signal was properly given, she was moving then, so to speak, independent of the *Mary Ada Short*, and it was an indication to anybody that some steamer possessing a siren was in the locality, and was giving a signal for fog. Immediately that was done the three short blasts were given on the *Mary Ada Short*. I have said the very object of sending the tug from the starboard side to the port side was that she should prevent the vessel canting her head when going astern, and I believe in the circumstances that those three whistles were given.

Now comes the question which it is important to determine here. At this stage, according to the evidence of the *Mary Ada Short*, the vessels came into view, and after the vessels came into view the account given by the plaintiffs' witnesses is that the *Sargasso* gave two short blasts—that is, a starboard helm signal—and it is admitted by the *Sargasso* that she did give a starboard helm signal at some time, and that she did order and put the helm to starboard: but did the *Sargasso* give the starboard helm signal first before the two short blasts were given from the tug? The evidence from the defendants is that it was the tug which first gave the two short blasts, and that it was in answer to the starboard helm signal from the tug that the *Sargasso* gave her starboard helm signal. I have come to the conclusion that that account is not an accurate account, and that the first starboard helm signal was given by the *Sargasso*, and it was then that the tug, having slipped her rope, gave her two blasts. The other signal—the only signal left—was the three short blasts again given on the whistle of the *Mary Ada Short*. It is said that that signal was not the appropriate signal for two reasons. Counsel for the defendants say, first of all, that the tug is towing this vessel, and that although the vessel need not have given any signals at all for a vessel in tow during a fog, yet if she gave signals as she did, she gave wrong signals, and the only signal she ought to have given was a signal of a prolonged blast followed by two short blasts, being three blasts in succession, under the sub-head (*e*) of art. 15 of the Regulations for Preventing Collisions at Sea. They also say that that article applies to the tug, and that the tug is in fault for not blowing any signal at all appropriate in these circumstances, and that the plaintiffs are responsible for that omission on the part of the tug.

The articles with reference to the signals to be given in time of fog are difficult to follow, and I can quite conceive the signals themselves may be misleading, because one particular signal is a signal for three different situations — three different manœuvres. But for the purpose of this case I hold in fact that the tug was not towing the vessel. It may be a question of mixed law and fact; if so, I hold in law and I hold in fact that the tug was not towing—that the vessel was not being towed. The tug had gone out to sea in order to deliver some message to this vessel, and she accompanied the vessel on her way back, intending to be her tug when it was necessary to tow the vessel along. In the circumstances a rope was passed from the vessel to the tug, the scope of which was about fifteen fathoms, and I find in fact that there was no towing at all by means of that rope during any times material in this case, and that the point of time had not arrived when it had been intended that these vessels should become a tug and tow. That being so, I do not think that the sub-head (*e*) of the article is applicable. It is said that if that be so, then the tug was a steam vessel having way on her, and ought herself to give the appropriate signals, which in this case, of course, would be one long blast on her siren. I doubt very much whether in the circumstances of this case this tug is to be regarded as a separate vessel requiring separate signals; but whether that be so or not, I am clearly of opinion, and I have taken careful advice from the Elder Brethren who are assisting me in this case, that from the point of view of navigation—safe navigation—warning to others, it would be less confusing for the vessel to give the signals she did, unaccompanied by any signals by the tug, than for the tug to have sounded any signals as if she was a separate vessel, having way upon her. In any event, I have come to the conclusion that that omission on the part of the tug—if it be an omission—did not in any way contribute to the collision in this case.

The next thing to consider is how these signals, which I have found were given in this way from the *Mary Ada Short*, were observed or heard by the *Sargasso*, and how such signals as were observed on the *Sargasso* from the *Mary Ada Short* were acted upon? I have said I have come to the conclusion that the look-out on the *Sargasso* was bad. The sounds which ought to have been heard were not heard, and many other blasts from the *Mary Ada Short* ought, in the circumstances, to have been heard both on the forecastle and on the bridge. Some sounds of craft in this fog were heard, as is admitted, without any action at all being taken by the *Sargasso*. One or two, if not more, vessels' signals were reported and heard, but there was no order to stop the *Sargasso*. That is a breach of the rule, and if the *Sargasso* had heard, as she ought to have heard, the signals given from the *Mary Ada Short*, she would have stopped before she did. Only two reports were given from the forecastle head, one was a steamer's whistles on the starboard bow, and the other, I think, was given very shortly afterwards, "There is the vessel." Those are the only reports given from the forecastle head. The look-out did not therefore report the sounds which he did hear. He ought to have heard more. The account now given by those on the *Sargasso* of the signals is entirely inconsistent with the account given by the master in his deposition before the Receiver of Wrecks.

Now comes the question whether the speeds of the vessels were excessive. I have come to the conclusion with regard to both that the speed was excessive. With regard to the defendant vessel, the *Sargasso*, their pleaded speed is two and a half to three knots at the time when the other vessel was first heard. Comparing that with the times given and distances run from the pier head, which is a fixed point, and the place

about 630 yards. away, which is also a fixed point, I have come to the conclusion that the speed of this vessel was certainly over four knots. After she stopped, that speed, of course, became lessened, but the speed does not go from the vessel all at once. With regard to the *Mary Ada Short*, her speed spoken to by her captain was a speed of three knots; that is probably a smaller speed than she had a good deal, and in this regard, apart from the angle of the blow, I have come to the conclusion from the nature of the wound that the speed at which this vessel was going was a good deal more than she says she had. If vessels could only see each other at a distance of 100yds. and if they had to be under way at all, they ought to proceed as slowly as they possibly can. It is impossible to say what the speed ought to be in figures in every case, but it is obvious if the vessel was proceeding at a speed which would not allow her to pull up in something like her own length in the circumstances of this particular afternoon, and if a vessel could proceed and have steerage way at a smaller speed than she was going, she ought to have gone at that speed, and in so far as that speed is exceeded it is excessive.

I think in this case I ought to distribute the fault between the vessels in different degrees—to proportion the degree which each vessel was in fault, and having come to the conclusion there was fault by reason of excessive speed on one vessel, and having come to the conclusion that the conduct of the other vessel was a good deal worse, including excessive speed, I have come to the conclusion that the liability to make good the damage or loss in this case shall be in proportion to the degree in which each vessel was at fault, and I find that the *Sargasso*—if the fault was as to three-thirds—must bear two-thirds of the blame, and that the other third of the blame attaches to the *Mary Ada Short*. That means, I suppose, that the degree which each vessel was in fault was that the *Sargasso* was twice as much at fault as the *Mary Ada Short*.

In respect of costs I make no order, so that each party will bear their own costs.

Solicitor for the plaintiffs, *Charles E. Harvey*.
Solicitors for the defendants, *Lowless* and *Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

April 23, 24, *and May* 17, 1912.

(Present: The Right Hons. Lords MACNAGHTEN ATKINSON, SHAW, and MERSEY.)

SASSOON AND CO. v. WESTERN ASSURANCE COMPANY. (*a*)

ON APPEAL FROM THE SUPREME COURT OF CHINA.

Marine insurance—Perils of seas—Goods stored in hulk—Damage by leakage.

Goods belonging to the appellants were stored in a hulk moored in a tidal river, in smooth water, and were insured (inter alia) *against perils of the seas.*

In consequence of natural decay, which could not be detected by ordinary examination, the hulk became leaky, and the goods were injured by water which found its way through the decayed woodwork of the bottom of the hulk.

Held, that though the damage was due to sea water it was not due to sea perils, which were the perils insured against.

Judgment of the court below affirmed.

APPEAL from a judgment of His Britannic Majesty's Supreme Court for China, dated the 28th Jan. 1911, in an action in which the appellants were plaintiffs and the respondents were defendants. The learned judge gave judgment for the respondents with costs.

The claim of the appellants was for a loss under a contract of marine insurance issued by the respondents. There was no dispute as to the facts, and the only question was whether the damage sustained by the goods of the appellants which were insured was a loss caused by a peril insured against.

The appellants were insured by a risk note dated the 6th July 1908, and issued by the agents of the respondents for 200,000 taels on opium per the *Corea* from noon of the 6th July to noon of the 6th Aug. 1908, with average as customary. The risk note referred to and incorporated the respondents' form of insurance policy, which was (*inter alia*) against perils of the sea.

The *Corea* mentioned in the insurance was a hulk owned by the appellants in which as a bonded warehouse they stored their opium. She had been moored as a fixture for many years in the river Huang-Pu, off the Canton Road jetty at Shanghai. She was there in smooth water and did not move.

On the 20th July 1908 the *Corea* was found to be leaking. A considerable quantity of water from the river found its way into her, and the appellants' insured opium was damaged by this water to such an extent that if such damage constituted a loss under the respondents' contract of insurance they would be liable to pay to the appellants the amount claimed in the action—namely, taels 7418.05.

The leaking of the *Corea* and the consequent incursion of water from the river arose in the following way. The *Corea* was built of wood, and her sides and bottom were sheathed with copper. Though the appellants caused her condition to be examined from time to time it was impossible by such examination to ascertain the condition of the woodwork inside the copper sheathing. Owing to the great age of the *Corea*, and from natural causes, the woodwork under the sheathing had become so perished or decayed (in particular the wooden trenails which fastened her timbers together) that ultimately about the 20th July 1908 the decayed woodwork could no longer keep out the water which percolated through the joints of the sheathing or otherwise, and the water so found its way into the interior of the hulk.

In these circumstances the appellants claimed on the insurance contract for the damage to the opium by water as for a loss caused by perils insured against. The respondents contended that the damage was not a loss caused by "perils of the seas."

De Sausmarez, C.J. decided in favour of the respondents, and held that the damage to the opium was not a loss caused by any peril insured against.

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

Leave to appeal to His Majesty in Council was given to the appellants on the 20th Feb. 1911 upon terms.

Atkin, K.C., *Bailhache*, K.C., and *Raeburn*, for the appellants, contended that in the case of a time policy, such as this was, there is no implied warranty of seaworthiness, and the insurance was not upon the hulk, but on the goods stored in it. The incursion of the salt water which damaged the goods is *primâ facie* a "peril of the sea." If goods at sea in an unseaworthy ship are injured by sea water they are injured by a peril of the sea, and in a time policy unseaworthiness does not avoid the policy. "Peril of the sea" has not the same meaning in a policy on goods as it has in a policy on the ship. The natural decay of the hulk was a peril within the contemplation of both parties. They referred to

Thompson v. *Hopper*, 28 L. T. Rep. O. S. 172; 6 E. & B. 172;
Fawcus v. *Sarsfield*, 25 L. J. 249, Q. B.; 6 E. & B. 192;
Dudgeon v. *Pembroke*, 3 Asp Mar. Law Cas. 393 (1877); 36 L. T. Rep. 382; 2 App. Cas. 284;
Blackburn v. *Liverpool Steam Navigation Company*, 9 Asp. Mar. Law Cas. 263 (1901); 85 L. T. Rep. 783; (1902) 1 K. B. 290.

Sir *R. Finlay*, K.C. and *Mackinnon*, for the respondents, maintained that the loss was not by a peril of the sea. The appellants are seeking to make the policy apply to a loss by the natural decay of the hulk, and the judgment of the court below was right. They referred to

Merchants Trading Company v. *Universal Marine Insurance Company*, 2 Asp. Mar. Law Cas. 431n. (1870);
Dudgeon v. *Pembroke* (*sup.*);
Magnus v. *Buttemer*, 21 L. J. 119, C. P.; 11 C. B. 876;
Paterson v. *Harris*, 5 L. T. Rep. 53; 1 B & S. 336;
Hamilton v. *Pandorf*, 6 Asp. Mar. Law Cas. 212 (1887); 57 L. T. Rep. 726; 12 App. Cas. 518;
Wilson v. *Owners of Cargo of Xantho*, 6 Asp. Mar. Law Cas. 207 (1887); 57 L. T. Rep. 701; 12 App. Cas. 503.

Bailhache, K.C. was heard in reply.

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

May 17.—Their Lordships' judgment was delivered by

Lord MERSEY.—This is an appeal from a judgment of His Majesty's Supreme Court for Shanghai, dated the 28th Jan. 1911, dismissing the plaintiffs' claim.

The facts of the case are as follows: The plaintiffs were the owners of a wooden hulk moored in the river Huang-Pu, which they used as a store. In this hulk they placed some opium on which they effected an insurance with the defendants against marine risks. The policy was a time policy running from the 6th July to the 6th Aug. 1908. On the 20th July the hulk sprang a leak, and the opium was damaged by the percolating water. The leak was wholly due to the rotten condition of the hulk. The condition of the hulk was unknown to the plaintiffs, the weak place being covered up by some copper sheathing. In these circumstances the plaintiffs brought their action. The defendants by their plea denied that the damage to the opium was by the perils insured against. This denial raised the only question in the case.

The risks covered by the policy were the risks usually described in such a contract—namely, "perils of the sea and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . goods." It was not contended on the plaintiffs' behalf (nor could it have been) that these words covered any risk except the risk of damage by perils of the seas; but it was said that the loss was due to such a peril. The learned judge held that the damage was not due to a sea peril at all, but was solely due to the weakness of the hulk, and he thereupon dismissed the action. Their Lordships are of opinion that the learned judge was right. There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss. There is ample authority for so holding, but it is sufficient to cite the judgment of Lord Herschell in *The Xantho* (*sup.*), where he says: "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear."

An attempt was made during the argument to attribute a different meaning to the expression "perils of the sea" when used in a policy on goods from that which it bears when used in a policy on ship; but no authority was cited for the distinction, nor would it be right in principle to make any such distinction. In the case above cited an attempt was made to draw a distinction between the meaning to be given to the words when used in a bill of lading and in a policy of insurance, but Lord Herschell said, "It would, in my opinion, be very objectionable unless well settled authority compelled it to give a different meaning to the same words occurring in two maritime instruments."

In this case the damage, though doubtless proximately due to sea water, was not in any sense due to sea peril. It does not therefore fall within the policy.

Their Lordships are of opinion that the appeal should be dismissed, and they will advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors: for the appellants, *William A. Crump and Son*; for the respondents, *Thomas Cooper and Co.*

April 23 *and July* 3, 1912.

(Present: The Right Hons. Lord Macnaghten, Atkinson, Shaw, and Mersey.)

White *v.* Williams. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Charter-party—"Consignees to effect discharge of cargo steamer paying 1s. *per ton"—Sale of cargo by consignee—"Cost of stevedoring to be paid by" purchaser—Right to sum payable by steamer.*

The appellant had chartered a steamer to load a cargo of coal for Sydney. The charter-party contained the following clause: "Consignees to effect the discharge of the cargo, strike or no strike, steamer paying 1s. *per ton of* 20cwt." *Before the ship arrived the appellant sold the cargo to the Government of New South Wales on the terms* (inter alia) *"The Government to guarantee to discharge the vessel at not less than* 500 *tons per day, strike or no strike. The cost of stevedoring to be paid by the Government."*

Held, that the Government were entitled to retain the 1s. *per ton payable as against the appellant.*

Judgment of the court below affirmed.

Appeal from an order and judgment of the Supreme Court of New South Wales dated the 1st March 1911.

The action was brought by the appellant as plaintiff against the respondent, who was appointed nominal defendant on behalf of the Government of New South Wales under the Claims against the Government and Crown Suits Act of 1897.

The writ of summons was issued on the 10th Oct. 1910, and by an order of Pring, J., dated the 21st Nov. 1910, it was by consent ordered that the action should be entered in the list of commercial cases, and that pleadings should be dispensed with.

The action was tried before Pring, J. on the 15th Dec. 1910, and the facts proved or admitted were as follows: In Dec. 1909 the appellant was acting as agent for Andrew Weir and Co. in connection with the sale of coal to the Government. By letter dated the 16th Dec. 1909 the appellant offered to supply to the Government (*inter alia*) the following shipments of coal—viz., from Japan a cargo of coal about 6000 tons to be dispatched per steamship *Strathfillan*, price 28s. 9*d*. per ton c.i.f., Sydney Harbour, and about 4700 tons of Indian coal to be shipped per steamship *Evandale*, price 31s. 6*d*. per ton c.i.f. Sydney. "The Government to guarantee to discharge the several vessels at not less than 500 tons per day, strike or no strike. The cost of stevedoring to be paid by the Government, and vessels to have free wharfage." This offer was accepted by the Government by a letter from the Colonial Treasurer also dated the 16th Dec. 1910. Prior to the making of this contract Andrew Weir and Co. had chartered the *Strathfillan* by charter-party dated the 14th Dec. 1910 to load a cargo of coal at Moji for Sydney, and the charter-party after providing for discharge at the rate of 500 tons per day, strikes not excepted, contained the following words: "Consignees to effect the discharge of the cargo, strike or no strike, steamer paying 1s. per ton of 20cwt."

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

Prior to the making of the aforesaid contract Andrew Weir and Co. had also chartered the *Evandale* by charter-party dated the 15th Dec. 1909 to load a cargo of coal at Calcutta for Adelaide, Melbourne, or Sydney at charterers' option, and the charter-party which did not contain any provision as to the rate of discharge provided as follows: "Consignees to effect discharge of steamer irrespective of strike or labour trouble steamer paying 1s. per ton towards cost of the same." The coals shipped by the *Strathfillan* and the *Evandale* were supplied to the Government, and received by them under the said contract of the 16th Dec. 1909. The freight of the *Strathfillan* was paid by the appellant, and the freight of the *Evandale* was prepaid by or for Andrew Weir and Co. at Calcutta. The Government, when paying the appellant demurrage incurred on the *Strathfillan*, claimed a right to deduct, and deducted a sum in respect of the 1s. per ton payable by the steamer under the charter-party. The Government also received from the agents of the *Evandale* 1s. per ton under the charter-party of that steamship, and refused to pay the same to the appellant.

Pring, J. on the 15th Dec. 1910 gave his verdict and decision in favour of the defendant, for whom judgment was entered accordingly.

Pursuant to notice of motion dated the 21st Dec. 1910 the appellant moved the Supreme Court of New South Wales to grant a new trial, or to enter a verdict for the appellant. The motion was heard on the 1st March 1911 by the Supreme Court, consisting of Cullen, C.J. and Cohen and Gordon, JJ. when the court dismissed the motion with costs.

Bailhache, K.C. and *D. C. Leck*, for the appellant, argued that the contract between the parties was contained in the letters of the 16th Dec., and the charter-party cannot vary the terms of that contract by imposing either more or less onerous conditions. The Government agreed to pay the whole cost of discharging the cargoes, and the appellant is entitled, under the charter-party, to make this profit out of the transaction. They referred to

Houlder Brothers and Co. v. *Commissioner of Public Works*, 11 Asp. Mar. Law Cas. 61; 98 L. T. Rep. 684; (1908) A. C. 276.

Sir *R. Finlay*, K.C. and *Austen-Cartmell*, for the respondent, maintained that upon the true construction of the contract the Government were entitled to retain these sums as against the appellant The Government had undertaken to relieve the appellant and his principals from liability in regard to the discharge of these ships, and were entitled to receive all contributions which were payable by third persons towards the cost of such discharge.

Bailhache, K.C. was heard in reply.

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

July 3. — Their Lordships' judgment was delivered by

Lord Mersey.—This is an appeal from an order and judgment of the Supreme Court of New South Wales dated the 1st March 1911.

The question in the case turns entirely on the meaning to be given to the words "cost of stevedoring" as used in a contract for the sale by

the plaintiff to the defendant (representing the Government) of two cargoes of coal on c.i.f. terms.

The contract is contained in two letters of the 16th Dec. 1909. The first of these letters is in the following terms: "I have the honour to offer to supply to your Government . . . from Japan a cargo of . . . lump coal, about 6000 tons . . . to be dispatched per steamship *Strathfillan* . . . price 28*s.* 9*d.* per ton c.i.f. Sydney Harbour (and) about 4700 tons of Indian coal . . . to be shipped per steamship *Evandale* . . . at Calcutta . . . price 31*s.* 6*d.* per ton c.i.f. Sydney. The Government to guarantee to discharge the several vessels at not less than 500 tons per day, strike or no strike. The cost of stevedoring to be paid by the Government and vessels to have free wharfage." The second letter, which was from the Government to the plaintiff, contained an acceptance of this offer.

Before entering into this contract the plaintiff had chartered the two vessels the *Strathfillan* and the *Evandale* by charter-parties dated the 14th and 15th Dec. 1909. These charter-parties contained clauses relating to the discharge of the coal to be carried. The clause in the *Strathfillan's* charter-party was as follows: "Consignees to effect the discharge of the cargo, strike or no strike, steamer paying 1*s.* a ton . . . and providing only steam, steam winches, winchmen, gins, and falls." And the clause in the *Evandale's* charter-party as follows: "The cargo to be taken from the steamer's tackles at the risk and expense of the charterers and consignees, who will bear all risk and expense of lighterage, if any, at port of discharge. . . . Consignees to effect discharge of steamer irrespective of strike or labour trouble, steamer paying 1*s.* per ton towards cost of same.

The wording of these two clauses differs slightly, but they both mean the same thing. The ship is to provide the discharging appliances and the steam power required for working them; but all the other labour in the hold (which but for the clause would fall to the ship to provide) is to be found by those who receive the cargo, the ship paying 1*s.* per ton towards the cost. It appears that these or similar clauses are printed as part of the common form of charter-party in use in the coal trade, a blank being left for the sum to be contributed by the ship, which may vary according to circumstances.

The cargoes arrived and delivery of them was taken by the Government, who did all that part of the work of discharging which is customarily done by the ship except in so far as that work consisted of providing gear and keeping up steam for winches. The Government paid the c.i.f. price to the plaintiff, but claimed a right to have credit for the 1*s.* a ton. The question is, are they entitled to it? The learned judge who tried the case held that they were and the Court of Appeal affirmed the judge's decision.

It is said by the appellant that the Government were no parties to the charter-party contracts and cannot therefore claim any benefit under them, and this no doubt is true. But it is upon the construction to be put on the contract of the 16th Dec. for the sale of the coal that the respondent relies. What is the "cost of stevedoring" which the Government are to pay? It is certainly not all the money which would have to be disbursed if the ship did not contribute, for if it were the Government would have to pay for the use of the discharging appliances and for the supply of steam for working them. These are as much part of the cost of stevedoring as the wages of the men who work in the hold. But the plaintiff makes no claim to be paid either for the use of the appliances or for the steam. And why not? It is because when making the c.i.f. contract both parties knew that the ship was to contribute to the stevedoring by providing these things, and they contracted on that footing. They would also know of the practice or custom evidenced by the common form of charter-party that the ship would contribute towards the cost of wages, and they contracted on that footing also. Thus, when in the contract it is stipulated that the Government is to pay the "cost of stevedoring" the expression must, in their Lordships' opinion, be read as meaning so far as such cost is not provided by the ship in the way of tackle or steam or in money. The Chief Justice in delivering the judgment of the Supreme Court says: "The possibility, however, of some part of the cost of discharging being paid by the shipowners must have been present to both parties, and although there was then no certainty about it, they would have that possibility in contemplation when bargaining about the cost of discharge."

This finding of fact by the Supreme Court is probably in accordance with the understanding on which business men contract in the trade. It appears clear from the terms of the two charter-parties that both the plaintiff and the shipowners contemplated that the shilling a ton should be paid to those who undertook the work of discharge; and if the shipowners had paid the money to the respondent they could as against the plaintiff have justified the payment as being exactly in accordance with the charter-party contracts. As between plaintiff and shipowner it was never contemplated that the plaintiff, who did no part of the discharging, should receive and retain the ship's contribution towards the cost of it; and though it is true that the charter-parties create no privity as between plantiff and the defendant, their terms which are in common use in the trade serve to throw light upon the meaning to be put on the words "cost of stevedoring" as used in the contract of sale.

The question is more one of fact than of law and their Lordships do not think it right to interfere with the finding of the courts below. They will therefore advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

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

Solicitors for the respondent, *Light* and *Fulton*.

HOUSE OF LORDS.

June 17, 18, 20, *and July* 19, 1912.

(Before the LORD CHANCELLOR (Viscount Haldane), the Earl of HALSBURY, Lords ASHBOURNE, MACNAGHTEN, and ATKINSON.)

OWNERS OF STEAMSHIP DEVONSHIRE *v.* OWNERS OF BARGE LESLIE AND OTHERS; THE DEVONSHIRE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Tug and tow — Admiralty rule as to division of loss.

A barge in tow of a tug which had control of the navigation collided with a steamship. The tug and the steamship were both found to blame in the Admiralty Court. The barge was freed from blame.

Held, that, as the barge in tow was completely under the control of the tug and did not stand to the latter in the relation of master and servant, the barge was to be considered as an innocent ship in no sense identified with the delinquent tug, and that there was no rule in force in the Court of Admiralty before the passing of the Judicature Act 1873 which would prevent the owner of the innocent barge from recovering the whole of the damage which he had sustained from either wrongdoer.

Judgment of the Court of Appeal (reported 12 Asp. Mar. Law Cas. 137; 106 *L. T. Rep.* 241; (1912) *P.* 21), *affirming the judgment of the President, Sir Samuel Evans, set out in the report of the case in the Court of Appeal, affirmed.*

The appeal dismissed with costs.

APPEAL from a decision of the Court of Appeal (Fletcher Moulton and Buckley, L.JJ., with nautical assessors), Vaughan Williams, L.J. dissenting, who had affirmed a judgment of Sir S. Evans, President of the Admiralty Division.

The case is reported 12 Asp. Mar. Law Cas. 137; 106 L. T. Rep. 241; (1912) P. 21.

On the 4th Feb. 1911 the barge *Leslie*, of which the respondents were owners, was in the river Mersey, in tow of a tug which had the control and management of the navigation. She came into collision with the steamship *Devonshire*, and was so injured that she sank, and was totally lost. The owners, master, and crew brought an action in the Admiralty Division to recover their loss, and the learned President found that both the *Devonshire* and the tug, which was in charge of the barge, were to blame for the collision.

The plaintiffs then contended that they were entitled to recover their whole loss from the owners of the *Devonshire* as they had been injured by the joint negligence of the *Devonshire* and the tug. The defendants contended that the *Devonshire* was only liable for half the loss, alleging that the Admiralty rule as to division of loss applied.

The President held that the plaintiffs were entitled to recover their whole loss, and gave judgment accordingly, and his judgment was affirmed on appeal as above mentioned.

The owners of the *Devonshire* appealed.

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

Leslie Scott, K.C. and *Dawson Miller* for the appellants contended that by the rule of the Admiralty Court where both ships are to blame the damage is divided. This rule was in force at the time of the passing of the Judicature Act 1873, and by sect. 25, sub-sect. 9, of that Act it must prevail over the common law rule in cases to which it is applicable. It has been extended to the case of innocent cargo owners, and to cases of compulsory pilotage, and was recognised by the House of Lords in *Hay* v. *Le Neve* (2 Shaw's Sc. App. 395). All vessels are under a statutory liability to obey the rules for preventing collisions, and it is no defence to say that a tow had engaged a competent tug to control the navigation. See

> *Hardaker* v. *Idle District Council*, 74 L. Rep. 69; (1896) 1 Q. B. 335.

The Admiralty rule is not superseded by the Judicature Act. The scheme of that Act is not to abolish the Admiralty law except where it is expressly retained, but to retain it except where it is expressly abolished. Sect. 16 gives to the High Court the former jurisdiction of the Admiralty Court, and is the governing section. As to a collision at common law, see

> *Tuff* v. *Warman*, 2 C. B. N. S. 749; 5 C. B. N. S. 573.

The contention of the respondents is that except in the case of cases which fall under sect. 25, sub-s. 9, which this case does not, the common law rule, and not the Admiralty rule is to prevail. But see the rule laid down in *The Milan* (Lush. 388), which was recognised in *Owners of Cargo in Steamship Tongariro* v. *Astral Shipping Company*; *The Drumlanrig* (11 Asp. Mar. Law Cas. 451, 520; 103 L. T. Rep. 773; (1911) A. C. 16). See also *The Hector* (5 Asp. Mar. Law Cas. 101 (1883); 48 L. T. Rep. 890; 8 P. Div. 218), which was a case of compulsory pilotage. *The Bernina* (5 Asp. Mar. Law Cas. 577 (1886); 6 Asp. Mar. Law Cas. 75, 257 (1888); 58 L. T. Rep. 423; 13 App. Cas. 1), *Boucher* v. *Clyde Shipping Company* (1904, 2 Ir. 129), and *The Vera Cruz* (5 Asp. Mar. Law Cas. 386 (1887); 52 L. T. Rep. 474; 10 App. Cas. 59) were cases under Lord Campbell's Act, not under the original Admiralty jurisdiction, and therefore the rule did not apply. It applies in all proceedings *in rem*. The authorities show that before the Judicature Act whenever the Admiralty Court found that both vessels were in fault, the damages were divided. As to the history of the rule see the preface to Abbott on Shipping, and Marsden on Collisions at Sea, 5th edit., pp. 132-144. The cases are all explicable on the view of the Admiralty law that each ship is liable to the extent to which it is in fault. No other principle is to be found. Before the Judicature Acts there was a body of Admiralty law distinct from common law, and the burden is on the respondents to show that this law has been superseded. *The Lemington* (2 Asp. Mar. Law Cas. 475 (1874); 32 L. T. Rep. 69) shows the existence of the Admiralty law after the passing of the Judicature Acts, and Admiralty law is to a large extent international law. Where a collision occurs between a tow and a third vessel through the faulty course of the tug, and the negligence of the third vessel, for the purposes of the collision rules the navigation of the tow may be in fault so as to bring the case within sect. 25,

sub-sect. 9, of the Judicature Act 1873. It is analogous to the case of a ship in charge of a compulsory pilot, which has been held to be within the rule. The tug and tow broke the crossing rule in this case, and it is no defence for the owner of the tow to say that he had delegated the navigation to an independent contractor. See

Hardaker v. *Idle District Council (ubi sup.)*.

Down to the case of *The Stormcock* (5 Asp. Mar. Law Cas. 470 (1885); 53 L. T. Rep. 53), the view that the tug and tow were one vessel was not questioned. See

The American and The Syria, 2 Asp. Mar. Law Cas. 350 (1874); 31 L. T. Rep. 42; L. Rep. 6 P. C. 127.

The point was discussed in *The Quickstep* (6 Asp. Mar. Law Cas. 603 (1890); 63 L. T. Rep. 713; 15 P. Div. 196), but that case turned on the local regulations in the river Tees. In *Owners of the Comet* v. *Owners of Hopper Barge W. H. No.* 1 (11 Asp. Mar. Law Cas. 497 (1910); 103 L. T. Rep. 677; (1911) A. C. 30) the point was left open. The tow may be free from liability as defendant, and yet only able to recover half damages as plaintiff. See also

The Niobe, 6 Asp. Mar. Law Cas. 300 (1888); 65 L. T. Rep. 502; (1891) A. C. 401.

Bailhache, K.C. and *D. Stephens* for the respondents maintained that the appellants could only succeed by establishing the identity of the tug and the tow, or if they could make out that, by the Admiralty rule, each of two tort-feasors was only liable for half the damage, and there is no authority in their favour on either point. Sect. 25, sub-sect. 9, of the Act of 1873 only applies to the case of a collision in which both ships are to blame, for the Court of Admiralty did not apply the common law doctrine of "contributory negligence." The position of the innocent cargo owner was in dispute till the decision in the *Drumlanrig* (*ubi sup.*). If the tug and tow can be considered as identical, the appellants are entitled to succeed, but they are not necessarily so. It is a question of fact in each case. See

The America and Syria (*ubi sup.*);
The Quickstep (*ubi sup.*);
The Niobe (*ubi sup.*).

Therefore the discussion is narrowed down to the question whether the Admiralty rule as to cases of collision where both ships are to blame applies to this case. The *Lemington* (*ubi sup.*) is only explicable on the ground that the charterers were held to be the agents of the owners. See also

Morgan v. *Castlegate Steamship Company*, 7 Asp. Mar. Law Cas. 284 (1892); 68 L. T. Rep. 99; (1893) A. C. 38;
The Utopia, 7 Asp. Mar. Law Cas. 408 (1893); 70 L. T. Rep. 47; (1893) A. C. 492.

The supposed Admiralty rule is to be found in *Hay* v. *Le Neve* (*ubi sup.*), but it was not really discussed there, and if it had been a settled practice, Dr. Lushington would not have thought it necessary to examine the authorities at such length in *The Milan* (*ubi sup.*). The foundation of the rule is the identification of the cargo with the ship, and it had its origin in the time when, as a rule, the merchant owned both ship and cargo. The argument does not go so far as to ask the House to overrule *The Milan*. See

The Thomas Joliffe, 6 Asp. Mar. Law Cas. 605 (1890); 63 L. T. Rep. 712; (1891) P. 7;
The Englishman and The Australian, 7 Asp. Mar. Law Cas. 605 (1894); 70 L. T. Rep. 846; (1894) P. 239;
The Frankland, 9 Asp. Mar. Law Cas. 196; 84 L. T. Rep. 395; (1901) P. 161;
The Harvest Home, 10 Asp. Mar. Law Cas. 118; 93 L. T. Rep. 395; (1904) P. 409.

The common law rule and the Admiralty rule are the same in every case except that of contributory negligence. The appellants allege that the cases of the innocent cargo owner and compulsory pilotage are examples of the rule, but they are rather exceptions from the true rule. The rule should not be extended to the case of an innocent tow.

Leslie Scott, K.C. in reply.—The rule is that the defendant does not pay more than half the loss when he has only caused half the damage, which explains all the cases. It has been extended in America, but in *The Thomas Joliffe* (*ubi sup.*), Butt, J. refused to follow the American decisions. The cases which establish the rule are *The Milan* (*ubi sup*) and *The Hector* (*ubi sup.*). See also *Palmer* v. *Wick Steamship Company* (71 L. T. Rep, 163; (1894) A. C. 318), per Lord Herschell, L.C., as to contribution between joint tort-feasors. If the cases are explicable on a principle which is just, and consonant with public policy, such principle should be followed. All the cases cited for the respondents are founded on *The Thomas Joliffe*, which was wrongly decided. The case of a tug and tow is analogous to the cases of compulsory pilotage and the innocent cargo owner to which the rule has been held to apply. The case of two ships not tug and tow jointly causing injury must be very rare.

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

July 19.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Viscount Haldane).—My Lords: [His Lordship went through the facts of the case as set out above, and continued:]

The defendants have appealed to this House. They accept the decision on the facts of the judge of first instance, and their appeal is confined to the question of law, whether, under the circumstances, they ought to have been condemned in the whole of the damages or merely in half.

Shortly stated, their case is that the tug as well as the *Devonshire* having been found to be in fault, the Admiralty rule as to division of loss applies, and the *Devonshire*, as one only of two delinquents, was liable for merely a moiety of the damage. They contend further that the owners of the tow having committed its navigation to the tug, cannot be treated as though the tow was in the position of a wholly innocent ship, and, at all events, cannot be in a better position than the owner of cargo on board a ship which is partly to blame, such owner being, they say, precluded from recovering more than half the damage to his cargo from the owners of the other delinquent ship. The questions thus raised involve to some extent consideration of the principles which govern the relations of the Admiralty Court jurisdiction to that of the

common law, for by the common law, if the respondents were entitled to succeed, they would plainly be entitled to recover the whole of the damage, and this right can be cut down only by showing that there exists an Admiralty rule which displaces it.

It is not necessary for the purposes of this appeal to investigate in detail the origin of the jurisdiction of the Admiralty Court. It is sufficient to say that this jurisdiction had its origin mainly in the authority of the Lord High Admiral of England, the *custos maris*, who exercised the jurisdiction of the Crown in respect of the command and charge of the sea. The Admiralty judge of later years was in theory his deputy. By degrees the Court of the Lord High Admiral acquired an extensive jurisdiction in civil suits relating to the sea and the estuaries of rivers, and a body of maritime law grew up founded on the unwritten usages of seafaring men and on the traditions of other countries, such as the so-called law of Rhodes and the customs of Oleron. It was inevitable that sharp conflict should arise between this jurisdiction and that of the courts of common law, and accordingly, from the period of Richard II. downwards, statutes were from time to time passed which endeavoured to limit the title of the Court of Admiralty to take cognisance of rights relating to maritime matters, but arising out of transactions on land. The popularity of the Court of Admiralty appears to have rested in a considerable measure on its freedom from certain technical rules of procedure which were applied inexorably by the court of common law, and on its power of proceeding *in rem*.

This power was so different from the procedure of the common law courts that the latter did not attempt prohibition against its exercise, and in consequence the system of initial arrest of the ship and cargo in order to found jurisdiction gradually developed into an extensive practice. Some account of its growth is to be found in the judgments in this House in *Mersey Docks and Harbour Board* v. *Turner* (7 Asp. Mar. Law Cas. 369 (1893); 69 L. T. Rep. 630; (1893) A. C. 468). When the Judicature Act of 1873 was passed the Admiralty Court had thus come to possess a well-defined and large jurisdiction, which had frequently been recognised by statute, and a body of law which it alone administered. By sect. 16 of the Act of 1873 the jurisdiction of the High Court of Admiralty was transferred to the new High Court of Justice, and the effect of sect. 24 (6) was to bind this court to give effect to all rights and duties existing by custom, as did those under Admiralty law. Sect. 25 (9) which is an important section for the purposes of this appeal, however, enacted that in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to be 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.

At common law, unless the tow in the present case is to be regarded as having been so identified with the tug as to have been guilty with her of faulty navigation, there is no doubt that the owners of the tow, as being an innocent vessel, would be entitled to recover the whole of the damage from the appellants.

The first question which arises is, therefore, whether the tow is to be regarded as thus being in fault like the tug. Then there is the further question whether, if the tow is not in fault, an Admiralty rule precludes her from recovering more than half her damage from the *Devonshire* by reason of the latter having been only one of two guilty ships, the tug having been the other. It seems clear that by Admiralty law the whole of that damage to an innocent ship by collision could be recovered if the party defendant was exclusively to blame, and that whether his proceedings were *in rem* or *in personam*. If, however, the owner of one ship brought an action against the owner of another for damage by collision, and both the plaintiff and defendant ships were found to blame, the party proceeding recovered only a moiety of the damage. Perhaps the best exposition of the principles on which these rules rest was given by Lord Stowell in the case of *The Woodropp Sims* (2 Dods. 83), which was approved in this House in *Hay* v. *Le Neve*, decided in 1824, and reported in 2 Shaw, Scotch App. 395.

In *The Milan* (Lush. 388) Dr. Lushington did not extend the fourth of Lord Stowell's principles to the case of an innocent cargo owner whose cargo was on board one of two ships in fault, and decided that the cargo owner could only recover half his damage against the particular ship sued. He came to this conclusion, however, not on the ground that the owner of the cargo was constructively to blame, as had been contended in reliance on the common law case of *Thorogood* v. *Bryan* (8 C. B. 115), but because he held that the Admiralty rule limited the liability to half of the damage in the case of each of two ships both to blame, and that the cargo owner was not entitled to affix to the ship which he had selected as defendant more than half the blame and damage. In so far at least as he refused to follow *Thorogood* v. *Bryan*, his decision was approved by this House in the case of *The Bernina* (6 Asp. Mar. Law Cas. 257 (1888); 58 L. T. Rep. 423; 13 App. Cas. 1).

I have now to consider whether the principle thus applied to cargo on board one of two ships both to blame applies also to a tow under the control of a tug which is equally to blame with a defendant third ship. In the case of *The Quickstep* (6 Asp. Mar. Law Cas. 603 (1890); 63 L. T. Rep. 713; 15 P. Div. 196), Butt, J., in delivering the judgment of Sir James Hannen and himself, laid down that where a tug and its tow come into collision with an innocent ship the question whether the owners of the latter can recover damages against the owners of the tow depends on whether the relation of master and servant obtains between the owners of the tow and those on the tug. Unless this relation is established, he said that there was no liability on the part of the tow.

I think that, as the doctrine of identification as enunciated in *Thorogood* v. *Bryan* has now been swept away, the principle so laid down was right and that it is a simple application of the rule established in the well-known case of *Quarman* v. *Burnett* (6 M. & W. 499). No relation such as that of master and servant was established in the present case, and the tow was therefore an innocent ship, and its owners are at common law entitled to recover the whole of their damage from the owners of the *Devonshire*. This disposes of

one of the appellants' contentions, and on principle I think that it also disposes of the contention that blame for breach of sailing regulations can be affixed to the tow: (*Morgan* v. *Castle Gate Steamship Company*, 7 Asp. Mar. Law Cas. 284 (1892); 68 L. T. Rep. 99; (1893) A. C. 38, per Lord Watson; and *The W. H. No.* 1 and *The Knight Errant*, 11 Asp. Mar. Law Cas. 497 (1910); 102 L. T. Rep. 643; (1910) P. 199; 103 L. T. Rep. 677; (1911) A.C. 30).

The second point made by the appellants is that the analogy of the decision in *The Milan*, as to the right of the owners of cargo on board one of two ships to blame being limited to one half the damage as against the other ship, applies to the case of the *Leslie*.

The first question which arises on this point is whether there was a rule in force in the Court of Admiralty which limited the right of an innocent tow to recover in such a case as the present. I have examined the authorities such as they are, and I do not think that they establish any general rule which covers the case. *The Milan* is the authority which comes nearest to suggesting what the appellants contend for. But when the judgment of Dr. Lushington is examined I think that it appears that while he rejected the case for identification so far as based upon the common law principle said to be laid down in *Thorogood* v. *Bryan* with reference to a passenger in an omnibus, he still may be taken to have considered that the fact of the cargo having been on board one of the ships to blame was a circumstance material to be taken into account in deciding whether the cargo owner could so dissociate his cargo from the ship as to be outside the Admiralty rule.

The language of his judgment appears to me to be open to the criticism that he does not make it plain whether he was influenced by a view, which would account for his conclusion if he held it, or whether he meant to lay down the much broader principle now contended for, to be applied in all cases where an innocent third party sued one of two delinquent ships. If the former, then the decision in *The Milan* is an authority for the application of the rule to the case of cargo on board one of two delinquent ships, an application which was approved by this House in *The Drumlanrig* (11 Asp. Mar. Law. Cas. 451, 520 (1910); 103 L. T. Rep. 773; (1911) A. C. 16), but for nothing further. If he meant to lay down the more general proposition it is sufficient to say that it was unnecessary for a decision concerned merely with cargo forming one *res* with the ship, though differently owned, and that the general proposition is, to say the least, by no means clearly borne out by either the older or the subsequent authorities.

Where, as in the present case, the tow was completely under the control of the tug, and did not stand to the latter in the relation of master and servant, I think that the tow is to be considered as an innocent ship in no sense identified with the delinquent tug, and I see no reason for extending to a tow so situated the analogy of cargo on board a ship to blame. I agree with the reasoning on this point in the judgments of Fletcher Moulton and Buckley, L.JJ.

I have come to the conclusion that the appellants have failed to show that there was a rule in force in the Court of Admiralty that the owners of an innocent ship could not recover the whole of the damage which she had sustained against one or two ships both to blame for a collision with her. Apart from sect. 25 (9) of the Judicature Act 1873, I am, therefore, of opinion that the respondents are entitled to succeed. This renders it unnecessary to decide the point whether when the conclusion has once been reached that the tow was innocent, the section in question entitles them to succeed on another ground. This is not a case in which the ships of the appellants and respondents have both been found to be in fault, and, if not, the section does not apply to the case.

It has been argued that the words mean to go further, and to exclude any other case than that of ships both to blame, and that the Legislature intended to provide that as between ships both to blame, and in such cases only the Admiralty rule should prevail if these were at variance, and it is said that this may well have been because those who framed the statute considered that it was only in such instances that there was substantial variance in the rules as to liability for collision. On this question I think it best to express no opinion in the present case. I have arrived at the result which I have indicated independently of any conclusion about it. I move your Lordships to dismiss the appeal with costs.

The Earl of Halsbury, Lords Ashbourne, Macnaghten, and Atkinson concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Pritchard* and *Sons*, for *Collins*, *Robinson*, *Driffields*, and *Kusel*, Liverpool.

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

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, May 20, 1912.

(Before Hamilton, J.)

Smeed, Dean, and Co. Limited v. Port of London Authority. (a)

Port of London—"Barge"—Sailing barge—By-laws—Registration — Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60)—*Port of London Act* 1908 (8 *Edw.* 7, *c.* 68), *s.* 11 (2) (*f*).

A sailing barge is a "barge" within the meaning of the Port of London Act 1908, *s.* 11 (2) (*f*), *and therefore liable to registration under by-law No.* 4 *of the Port of London* (*Registration of River Craft*) *By-laws* 1910.

Commercial Court.

Action tried by Hamilton, J., sitting without a jury.

The plaintiffs claimed to recover the sum of 1*l.* 0*s.* 9*d.* as money received by the defendants to the plaintiffs' use, as money paid under duress, and also for a declaration as to the true intent

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

and meaning of by-law No. 4 of the Port of London (Registration of River Craft) By-laws 1910.

Bailhache, K.C. and *Cranstoun* appeared for the plaintiffs.

George Wallace, K.C. and *C. B. Marriott* appeared for the defendants.

The facts and arguments are sufficiently stated in the judgment.

Hamilton, J.—This action is brought to recover 1*l.* 0*s.* 9*d.* as money received by the defendants to the plaintiffs' use, money paid under duress, and also for a declaration as to the true intent and meaning of by-law No. 4 of the Port of London (Registration of River Craft) By-laws 1910, and a declaration that if its meaning is such as to justify the charge in question, then the bye-law is itself *ultra vires.* The by-law in question is: "Every person shall on applying to the port authority for the registration or for the renewal of the registration of a steam tug, lighter, or barge, other than a steam barge or canal barge or canal boat registered by the port authority as such, respectively pay to the port authority the sum specified in this by-law," and then the mode of calculating the sum payable is added, which results in the sum 1*l.* 0*s.* 9*d.* for this particular barge. No question is raised as to the amount that was imposed. What enables the Port of London Authority to constrain persons to apply to the port authority for the registration of a steam tug, lighter, or barge is the combined effect of the Port of London Act 1908, s. 11, sub-s. 2, par. (*f*), and of sect. 7 of the Thames Watermen's and Lightermen's Act 1893, which gave the late Thames Watermen's Company certain powers which by sub-sect. 1 of sect. 11 of the Act of 1908 have now been transferred to the Port of London Authority with respect to, among other things, the registration and licensing of craft and boats.

The plaintiffs' vessel was called the *George.* She is a "ship" within the definition of a vessel in the Merchant Shipping Act, because she is propelled otherwise than by oars—namely, by sails. She is accordingly registered at the port of Rochester under the Merchant Shipping Act, and under her registry she has a registered tonnage of 41·45 tons. She has, however, a much more important capacity than that registered tonnage might imply; she carries as much as 110 tons dead weight, and she makes voyages regularly from the river Swale into London and back. She occasionally goes along the East Coast as far as Harwich, or further; she has been up the Thames as far as Walton on-Thames. She has the characteristics which in the evidence of the experienced harbourmaster for the lower district of the Port of London, Captain Kershaw, are important as determining how she should be named. She is nearly square in section; she has wing boards; she has the typical rig of a Thames sailing barge; she has a rudder outside the lines of the hull. She is regularly loaded down to a very small freeboard, and has her cargo in her central compartment battened down and tarpaulined down, and no doubt she relies for her stability of flotation on the inclosed spaces in the bow and stern. I think there is no doubt that the term by which seamen and waterside characters would describe her is the term by which she has been described throughout these proceedings—that is to say, as a "sailing barge." She is so described in the pleadings, and although she might be laxly described as a ship, and might be described as a sailing vessel of some particular rig, "sailing barge" is her most appropriate description. The plaintiffs, however, contend they are not compellable to register her, and by navigating within the limits of the Port of London Authority they commit no breach of statute or of by-law, although they have not registered her, and they rely upon the character of the vessel as well as the trade, and the somewhat lengthy voyages that she embarks upon.

I think that the first question to be considered is: What is the power of the Port of London Authority? The matter is necessarily an intricate one because the Port of London Authority was a successor, with certain amendments and variations, to the powers of the Watermen's and Lightermen's Company, which company in its turn was regulated by at least two Acts of the reign of Queen Victoria, and whose proceedings have also been the subject of various legal decisions.

The Port of London Authority say that among other powers and duties of the Watermen's Company with regard to the registration and licensing of craft and boats transferred to them, there were transferred to them the powers under the provisions of the Act of 1893 as amended by sect. 11, sub-sect. 2, par. (*f*) of the Act of 1908: "The provisions of the 1893 Act as amended by this Act so far as they relate to craft shall extend to all lighters, barges, and other like craft for carrying goods . . . navigating either wholly or partially within the limits of that Act as so amended." It is admitted that the *George* comes to London too regularly and too much as a matter of course to be within the words "navigating exceptionally or occasionally only within those limits." Therefore, no question now arises on that phrase. The case for the defendants is, that sect. 7 of the Act of 1893, so far as it relates to craft, extends to all lighters, barges, and other like craft for carrying goods, and steam tugs navigating either wholly or partly within the limits of that Act as so amended. There is no doubt that partly, at any rate, and constantly the *George* navigates within the limits of the Act of 1893 as subsequently amended, which however, does not cover the river Swale, which is the regular *terminus a quo* of the *George's* voyages. She navigates, therefore, partly within the limits of the Act. She is engaged in carrying goods. Is she within the words "all lighters, barges, and other like craft for carrying goods"? If so, the provisions of sect. 7 of the Act of 1893, so far as they relate to craft, extend to her.

The provisions of sect. 7 of the Act of 1893 are that "no craft shall be worked or navigated within the limits of this Act, unless: (1) A certificate relating to such craft shall have been issued in pursuance of this Act, and shall for the time being be in force. The circumstance that the *George* is registered under the Merchant Shipping Act is by no means conclusive, because it is clear that registration under the Merchant Shipping Act is not necessarily exclusive of registration under the Port of London Authority Act, and the reference in sect. 11, sub-sect. 2 (*f*), to the river steamboat negatives such a conclusion.

Primâ facie as this sailing barge is a barge, it is within the words "all barges," and "all" cannot be limited, I think, to an enumerative use of the word "all," but it is wide enough also to cover all descriptions of barges, all manner of barges. If the clause only meant all barges, enumerating them or without enumerating, it would be enough to say it extended to "lighters, barges, and other like craft," and I think, therefore, on the plain construction of these words, all barges must include this sailing barge, and she is a barge none the less because she sails, though in fact she can bring her masts down parallel with the deck and then be propelled like any other barge, by tug, by poling, by warping, by sweeps.

The plaintiffs, however, answer this by saying that not only are there a number of considerations which show that this construction is very inconvenient, but that there are some which show that it cannot have been intended. For example, it is pointed out that under the Thames Conservancy by-laws, which, of course, within the Thames Conservancy limits the *George* must conform to, "lighter" and "sailing barge" are used antithetically, and the lights and signals required on a lighter are different from those required from a vessel under sail. There is no doubt that is true. I do not, however, think that that carries the matter much further, because I think the words "all barges and other like craft" are so explicit that I should need more than the mere use of other terms in other Acts or by-laws having statutory authority to enable me to depart from the meaning of these explicit words. The same observation, I think, applies to the very just comments that were made that there is danger, if there be two registers, of discussion and doubts, at any rate, as to whether a person on board such a craft as this is a seaman, and whether or not he is entitled to the benefit of the Employers' Liability Act, whether the *George* herself is a ship and entitled or not to limitation of liability, and whether or not the *George* is amenable to Admiralty jurisdiction, or is a ship and subject to it.

I have not been satisfied that in any of those connections any contention could be raised that would not be readily disposed of upon the principles to which Mr. Cranstoun drew my attention in connection with the case he cited. Conversely, I do not derive, unfortunately for myself, any guidance from the decision in *Burham Brick, Lime, and Cement Company Limited* v. *London and India Docks Joint Committee* (unreported) in 1899, because there, though no doubt it was assumed that a sailing barge was a "lighter, barge, or other like craft" for the purpose of being entitled to free entrance into the London and India Docks, that appears to have been rather a matter of assumption than argument, and the decision turned on other grounds for disputing her exemption. I understand that in practice from 1894 till 1910, though great numbers of sailing barges were regularly registered, as they were all barges navigating wholly within the limits of the Watermen's Company's Act, they may have been registered upon an entirely different ground from the one that I have to consider, which turns upon the difference between a "barge" and a "sailing barge." The more formidable considerations turn upon what is to be done to a vessel, which being *ex hypothesi* a barge carries her full burthen of tonnage in goods, and does not carry a licensed lighterman in charge when within the limits of the Port Authority. I am satisfied, however, that as regards the carrying of any particular deadweight, the matter is not affected by the necessary provision in the certificate issued by the Port of London Authority of a blank in which to fill up the weight-carrying capacity or burthen tonnage of the vessel, or the filling of it up in blank. Sect. 19 of the Act of 1893 is the penalty section for working or navigating in contravention of the provisions of sect. 7 of the Act, and I think "in contravention of the provisions of sect. 7 of the Act" only means without having taken out and kept out a certificate in pursuance of this Act, and without having affixed to the vessel the particulars that that section requires, and whatever may have been the object with which the burthen tonnage is provided for in sects. 5 and 6, and the calculation of it provided for in sched. 3, I do not think that sect. 19 constitutes a penalty section that navigating with a load on board which though safe enough is in excess of the burthen tonnage of the certificate. It is very likely the case that those sections are introduced in order that there may be a mode provided for calculating and recording each craft's burthen tonnage, which in its turn, under by-law 27 of the Thames Conservancy by-laws or the preceding bye-laws to the same effect, would regulate the number of lightermen which the given craft must carry. But under the Watermen's Company Act 1859, in a section repealed by the Act of 1893, s. 53: "The owner for the time being of any lighter, or lighters, barge, or barges, or other boat or craft used, or to be used, within the limits of this Act, for the carrying of goods, wares, or merchandise, without passengers, from or to any place, ships, or other vessels, shall cause his name and place of abode to be registered." And there are further provisions in subsequent sections with regard to registering. Then under sect. 54: "If any person not being licensed"—I am reading it now as subsequently amended—"in pursuance of this Act (except as hereinafter mentioned), shall at any time act as a waterman or lighterman, or ply, or work, or navigate any wherry, passenger boat, lighter, vessel, or other craft, upon the said river, from or to any place or places, or ship or vessel, within the limits of this Act, for hire or gain (except as hereinafter is mentioned) every such person shall forfeit and pay, for every such offence, any sum not exceeding forty shillings." And by sect. 66: "No barge, lighter, boat, or other like craft, for the carrying of goods, wares, or merchandise, shall be worked or navigated within the limits of this Act, unless there be in charge of such craft a lighterman licensed in manner hereinbefore mentioned; or an apprentice qualified as hereinbefore mentioned; and if any such craft be navigated in contravention of this section, the owner thereof shall, in respect of such offence, incur a penalty not exceeding five pounds." Then, when one looks to see what kind of person "a lighterman licensed in manner hereinbefore mentioned" must be, sects. 56 and 57 show that "No person shall be deemed qualified for a lighterman's licence, unless he is of the age of nineteen or upwards, is of good character, and has served an apprenticeship of five years at the

least, to some person authorised by this Act to take apprentices, for the purpose of having them instructed as lightermen, and has, for a period of two years at the least immediately preceding his application, been continuously engaged in working a barge, lighter, or other like craft, within or through the limits of this Act"; and similar provisions with regard to an applicant for a waterman's licence. It is said if the *George*, being a sailing barge, is yet a barge within sect. 11 (2) (*f*) of the Act of 1908, she must also be a barge within sect. 66 of the Act of 1859. The result of that might be that when the vessel reached the limits of the Port Authority, though still under sail, and still requiring even more careful navigation than before, as the waters were getting closer, the sailing master who understands how to sail her is to stand by her and the licensed waterman is to take charge of her, though there is no guarantee and no great probability of his knowing anything whatever about sailing, and although the most that can be learned about him under that Act is that he will have been five years apprenticed to some lighterman under the Act, that he will spend two years before getting his licence within the limits of the Act, or mostly within the limits of the Act, and that in addition he will be more than nineteen, and, for whatever it may be worth, of good character.

This, I think, is a formidable point. The answer given is that those sections have no application to a sailing barge, but are limited to that to which they were always limited—lighters applying wholly within the limits of the Act. The words vary a little in the different sections, because whilst sect. 66 says "worked or navigated within the limits of this Act," the other penalty section—that is to say, the penalty section on the navigator, says: "Work, or navigate any wherry, passenger boat, lighter, vessel, or other craft, upon the said river from or to any place or places, or ship or vessel within the limits of the Act." And sect. 56, which qualifies the lighterman, speaks of his having been continuously engaged in working the lighter within or through the limits of the Act. The natural meaning of that, I think, may be assisted in considering that the Act of 1859, and still more the Act of 1893, were continuing but controlling the privileges of the master, wardens, and commonalty of watermen and lightermen of the River Thames as they had come down at any rate since 7 & 8 Geo. 4, and they had therefore two objects in view: one to impose proper regulations upon the privileged navigators, the other to secure their privileges to those navigators. Hence, I think, on reading the section in question, it is reasonable to suppose that no more was intended than to deal with such barges and other craft as navigated wholly within the limits of the Act—that is to say, wholly within the area of privilege, and which, being bound to carry licensed lightermen, were the subject of the lightermen's privilege; whereas the same reason does not apply to the interpretation of sect. 11 (2) (*f*) of the Act of 1908, which gives to the Port of London Authority the independent and extended right of issuing certificates and controlling the registration of craft, and which is extended, it is true in terms, by the addition of two other classes of vessels, but, I think, also extended in substance by the use of the word "all" which is prefixed to "lighters, barges, and other like craft." No craft was to be worked without a certificate, "no craft," meaning thereby any lighter, barge, or other like craft for carrying goods within the limits of this Act. That now is phrased "the provisions so far as they relate to craft shall extend to all lighters, barges, and other like craft for carrying goods and steam tugs," and I do not think, having regard to the much wider function the Port of London Authority has than the Lightermen's Company had, and to the fact that the powers of the Watermen's Company are transferred to the Port of London Authority primarily for disciplinary and regulating purposes, the difficulty is insuperable of treating "barge, lighter, boat, or other like craft" in sect. 66 of the Act of 1859 as more limited than "all lighters, barges, and other like craft" in sect. 11 (2) of the Act of 1908. In sect. 66 the words are slightly different, because it is no barge or other lighter, and the inclusion of the word "boat" so far as it goes seems to me to be restrictive of the sizes and seagoing importance of the different craft, and to indicate a dividing line which would exclude the *George*. It is, however, forcibly pointed out that the Legislature seems to have thought either that "within the limits of this Act" in sect. 66 meant wholly or partly, but at any rate they might be so understood, though erroneously, because in sect. 311 of the Thames Conservancy Act 1894 Parliament has apparently enacted that "nothing in sect. 66 of the Watermen's Company Act shall apply to lighters passing entirely through the limits of that Act," and sect. 11, sub-sect. 2 (*d*), of the 1908 Act says that to the words of sect. 311 of the Act of 1894 there shall be added the words "or to any lighters on a voyage commencing or ending at any place eastward or westward of the limits of that Act, whether or not goods are in the course of the voyage taken in or discharged at any place within those limits." It is urged that those provisions were entirely unnecessary if the words "within the limits of this Act" in sect. 66 of the Act of 1859 meant "wholly within the limits of the Act." It may well have been thought necessary to include those provisions, not because there was a doubt as to the meaning of sect. 66, but in order that those who wished to be protected from the necessity of employing London lightermen might have the provision clearly stated on the face of the enactment.

I have come to the conclusion that the construction of sect. 66 as not applicable to this sailing barge is not unsound, in spite of what is pointed out with regard to the Thames Conservancy Act, s. 311, and the Act of 1908, s. 11 (2) (*d*), but, even if it is not sound, I think that the words of the Act of 1908, s. 11 (2) (*f*), are too explicit to warrant me in restricting their scope and in saying that although the provisions as to registration extend to "all barges," still they do not extend to this barge merely because the consequence might follow that at a certain point of her voyage within the area ordinarily navigated by barges she might have to be placed in charge of a qualified licensed lighterman instead of being left in charge of her master. I know not in how many cases qualified licensed lightermen are able to sail barges. I daresay in many, and probably very many, and I do not think, in fact as I have no evidence to guide me on the subject, I can say

that the consequence would be so formidable if the charge of this sailing barge had to be made over to a licensed lighterman on entering the limits of the Act, as to warrant me in excluding this sailing barge, which is a specimen of the class "barges," from a provision which in terms covers all barges sailing or not sailing. Accordingly my judgment must be for the defendants with costs.

Solicitors for the plaintiffs, *R. S. Jackson, Bowles*, and *Jackson*.

Solicitor for the defendants, *Ernest Glenshaw*.

HOUSE OF LORDS.

Feb. 5, 8, *May* 10, *and July* 26, 1912.

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

KISH AND ANOTHER v. TAYLOR, SONS, AND CO. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Bill of lading—Failure to load complete cargo—Unseaworthiness—Deviation to port of refuge—Dead freight—Lien—Unliquidated damages.

By the terms of a charter-party the shipowners had a lien on the cargo for dead freight, and by the bills of lading the cargo was to be delivered to the shippers' order, or to their assigns, "all other conditions as per charter-party."

The charterers failed to load a complete cargo, and the owners loaded other cargo, at a lower rate than the chartered freight, in order to minimise the loss. An excessive quantity of deck cargo was loaded so as to make the ship in fact unseaworthy at the time of sailing, and she was in consequence compelled to put into a port of refuge for repairs, after which she completed her voyage.

In a claim by the owners 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:

Held, that the right to compensation having accrued before the ship sailed, and the deviation to a port of refuge for repairs being justifiable under the circumstances, the contract of affreightment was not put an end to by the unseaworthiness or the deviation, and the owners retained their rights under it, and that a claim for dead freight included a claim for unliquidated damages.

Judgment of the Court of Appeal reversed.

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 544 (1910); 103 L. T. Rep. 785; (1911) 1 K. B 625, who had reversed a judgment of Walton, J., sitting in the Commercial Court without a jury, reported 11 Asp. Mar. Law Cas. 421; 102 L. T. Rep. 910; (1910) 2 K. B. 309, in favour of the appellants, the plaintiffs below.

The action was brought by the plaintiffs, the owners of the steamship *Wearside*, against the defendants, who were holders of a bill of lading dated 23rd June 1908, claiming a declaration that they were entitled to a lien upon the cargo under the bill of lading, and a charter-party dated 18th Dec. 1907 for dead freight.

The facts appear fully in the reports in the courts below, and in the judgment of Lord Atkinson.

Bailhache, K.C., *Adair Roche*, and *Spratt* appeared for the appellants, and argued that the only point decided in the Court of Appeal was the question of deviation. In this case the deviation was justifiable, and did not destroy the right to a lien for dead freight which had accrued under the charter-party before the deviation took place at all. It is said that the deviation was not justifiable because it was due to the unseaworthiness of the vessel, and that the owners are seeking to take advantage of their own wrong. But it was necessary to take steps to protect lives and property which were in danger, no matter how caused, and the master was performing a paramount duty in deviating, and was not taking advantage of his own wrong, as alleged. Even if unjustifiable a deviation does not avoid a charter-party *ab initio*, but only from the point of departure, and cannot take away a lien which had already accrued. There is not much authority as to the effect of a deviation caused by unseaworthiness, but there is an unbroken series of authorities that the unseaworthiness must be the cause of the damage complained of. The Court of Appeal relied on *Strang, Steel, and Co.* v. *Scott and Co.* (6 Asp. Mar. Law Cas. 419 (1889); 61 L. T. Rep. 597; 14 App. Cas. 601), but they misunderstood the effect of that decision, which is not really in point here at all. See *Guibert* v. *Readshaw, The Nancy*, a case decided by Lord Mansfield in 1781, and reported only in 2 Park on Insurance (8th edit.), p. 637. The dictum of Lord Eldon in *Woolf* v. *Claggett* (3 Esp. 257) is the only direct authority against the appellants' contention on this point. See also

Weir v. *Aberdeen*, 3 B. & Ald. 320;
Forshaw v. *Chabert*, 3 Brod. & Bing. 158;
Quebec Marine Insurance Company v. *Commercial Bank of Canada*, 22 L. T. Rep. 559; L. Rep. 3 P. C. 234.

The Marine Insurance Act 1906 (6 Edw. 7, c. 41), by sect. 46 enacts that the insurer is discharged "as from the time of deviation," and by sect. 49 deviation is excused where it is "reasonably necessary for the safety of the ship." In any case it cannot relate back so as to destroy rights which had already come into existence under the charter-party. The Court of Appeal held that this was decided by the cases of *Balian and Son* v. *Joly, Victoria, and Co.* (6 Times L. Rep. 345) and *Joseph Thorley Limited* v. *Orchis Steamship Company* (10 Asp. Mar. Law Cas. 431; 96 L. T. Rep. 488; (1907) 1 K. B. 660), and *International Guano Company* v. *Macandrew* (11 Asp. Mar. Law Cas. 271; 100 L. T. Rep. 850; (1909) 2 K. B. 360), but it only gives a right of action, and does not destroy the contract of affreightment *ab initio*. The precise point was decided in *The Europa* (11 Asp. Mar. Law Cas. 19; 98 L. T. Rep. 246; (1908) P. 84). See also

Schloss v. *Heriot*, 8 L. T. Rep. 246; 14 C. B. N. S. 59;

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

Baumvoll Manufactur v. *Gilchrest*, 66 L. T. Rep. 66; (1892) 1 Q. B. 253; affirmed in the House of Lords, 68 L. T. Rep. 1; (1893) A. C. 8;
Kopitoff v. *Wilson*, 3 Asp. Mar. Law Cas. 163 (1876); 34 L. T. Rep. 677; 1 Q. B. Div. 377;
Steel v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516 (1877); 33 L. T. Rep. 333; 3 App. Cas. 72;

The Court of Appeal did not touch the question whether a lien for dead freight applies to a claim for unliquidated damages. Contradictory opinions were expressed by 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), and the Court of Exchequer Chamber in *Gray* v. *Carr* (1 Asp. Mar. Law Cas. 115 (1871); 25 L. T. Rep. 215; L. Rep. 6 Q. B. 522), which were heard about the same time, but the former decision is to be preferred.

Atkin, K.C. and *Holman Gregory*, K.C. for the respondents contended that the obligation of the bill of lading holder was to pay the bill of lading freight, and the obligation of the shipowner was to deliver the goods on such payment. The bill of lading does not incorporate the provisions of the charter-party as to dead freight. In this case the deviation displaced the contract of affreightment. It is displaced if it can be shown that the ship deviated from the contract voyage, and did not perform the contract. The only point is whether the deviation was justifiable, and the onus of proving that it was is on the owner. It is not a sufficient justification that the necessity arose from unseaworthiness caused by the default of the owner. But for his default the necessity would not have existed, and he is seeking to take advantage of his own wrong. It is analogous to a case of general average. See

Strang, Steel, and Co. v. *Scott and Co.* (*ubi sup.*).

The appellants must contend that though the deviation would not be justifiable in a case of general average, it is justifiable for charter-party purposes, which cannot be a sound construction. [The Earl of Halsbury referred to the judgment of Willes, J. in *Dakin* v. *Oxley* (10 L. T. Rep. 268; 15 C. B. N. S. 646).] See

Kettell v. *Wiggin*, 13 Massachusetts Rep. 68;
Woolf v. *Claggett*, 3 Esp. 257.

As to the contention that the deviation only avoids the contract from the date of the deviation, and does not affect rights which have accrued earlier, the analogy from insurance is fallacious. The lien can only be exercised if the ship is brought to the port of destination on the contract voyage. If the contract is not performed the shipowner is not entitled to freight at all, and therefore cannot rely on any lien. See

Balian and Son v. *Joly, Victoria, and Co.* (*ubi sup.*);
Joseph Thorley Limited v. *Orchis Steamship Company* (*ubi sup.*).

The right had not accrued before the deviation, and was lost when the contract was displaced by the unjustifiable deviation. The warranty of seaworthiness is the same in a contract of affreightment and in a contract of insurance. See

Lyon v. *Mells*, 5 East, 428, per Lord Ellenborough, C.J.

It is the foundation of both contracts. The appellants' contention that it is not a condition precedent going to the validity of the contract, but is only a collateral term for the breach of which damages are the only remedy, is not sound. See

Stanton v. *Richardson*, 30 L. T. Rep 643; L. Rep. 9, C. P. 390; affirmed in the House of Lords, 33 L. T. Rep. 193;

Schloss v. *Heriot* (*ubi sup.*) cited by the appellants is distinguishable. It was a case of general average not of affreightment. Further this is not a claim for dead freight at all. The whole contract has been repudiated by the charterer, and the only right of the owner is to sue him for the breach. Dead freight was never meant to cover a case of this kind. It does not include unliquidated damages for breach of contract. See *Gray* v. *Carr* (*ubi sup.*) in which *McLean* v. *Fleming* (*ubi sup.*) was distinguished. The holder of the bill of lading is only liable to pay the bill of lading freight. Any difference between that and the chartered freight should have been settled at the port of loading. See

Gardner v. *Trechmann*, 5 Asp. Mar. Law Cas. 558 (1884); 53 L. T. Rep. 518; 15 Q. B. Div. 154.

If a complete cargo had been loaded the appellants could not have recovered from the respondents the difference between the charter-party freight and the bill of lading freight, but because a complete cargo was not loaded they contend that they can recover. The learned judge at the trial did not arrive at the amount which he found to be due from the respondents on correct principles. [The Lord Chancellor.—That question must be decided by the Court of Appeal.]

Bailhache, K.C. was heard in reply.

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

May 10.—Their Lordships gave judgment as follows:—

Lord Atkinson.—My Lords: In this case the appellants, the owners of the ship *Wearside*, claim a lien upon the goods of the defendants, the indorsees of a bill of lading, dated the 23rd Jan. 1908, which purported to incorporate all the conditions, provisos, and exceptions contained in a certain charter-party, dated the 18th Dec. 1907, made between these owners and the Mississippi Transportation Company of Gulfort, Mississippi.

By this charter-party the *Wearside* was bound to proceed to Mobile, and there or at Pensacola load a full and complete cargo of timber of the kind described, and being so loaded to proceed to a port on the Continent between Bordeaux and Hamburg (Rouen excluded), and, at charterer's option, to discharge at two ports on the continent and one port in the United Kingdom. The port of Liverpool was ultimately selected as the port of discharge in the United Kingdom. The charter-party contained the following clauses, amongst others: (1) A clause authorising the *Wearside* to deviate for the purpose of saving life and property; (2) a clause to the effect that the master or owners of the ship were to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and (3) a clause that any difference between charter-party and bills of lading freight was to be settled at the port of loading before the vessel sailed; if in favour of vessel, to be paid in cash at current

rates of exchange less insurance; if in the charterer's favour, by captain's bills payable ten days after arrival at port of discharge.

The vessel duly arrived at Mobile, and subsequently went to Pensacola to load. The charterers were admittedly under this charter-party absolutely bound to furnish a full cargo. They failed to do this. They only shipped 801¼ standards, all of which were properly stowed in the hold of the vessel. Fully loaded she would have carried 1390½ standards; the cargo shipped was therefore short by 589¼ standards. Now it is not suggested that at the time when the charterers thus broke their contract the vessel was not perfectly seaworthy, was not fit in every way to receive her full cargo, or that her owners had, up to that time, failed in any respect to carry out, or were not ready and willing to carry out their contract fully. There was, therefore, nothing to justify or excuse this breach of contract by the charterers, and the right to recover damages for the breach had accordingly accrued to the owners. These damages are what is styled dead freight. In Carver on Carriage, par. 666, dead freight is defined to be the compensation payable to the shipowner when the charterer has failed to ship a full cargo. Freight is the recompense which the shipowner is to receive for carrying the cargo to its port of discharge. The two things are wholly dissimilar in their nature, though, of course, the freight which the shipowner would have earned if the charterers had fulfilled his contract will in most cases be a fair measure of the damages which he is entitled to recover, and it is in my view clear, from the decision of your Lordships' House in *McClean* v. *Fleming* (*sup.*), that an agreed lien does not cover such damages though they be unliquidated.

Walton, J. states in his judgment that it was not disputed before him that the words occurring in the bill of lading—"all other conditions as per charter"—import into that document the provision of the charter-party giving to the owners of the vessel an absolute lien on the cargo for dead freight amongst other things. Indeed, in the face of the authorities this could not be disputed successfully. They are, I think, clear upon the point. So that before the vessel had loaded more than the 801 standards the right to recover this compensation had accrued to the owners, and they had become entitled to a lien on the cargo in respect of it. The master of the vessel, after the default of the charterers, and in their relief, obtained additional cargo from other sources. Unfortunately, he overloaded his ship with deck cargo to such an extent as to make her unseaworthy. She proceeded to sea, encountered bad weather, and, by reason of her overloaded condition, her master was obliged, in order to save his vessel and the lives of his crew, to take refuge in the port of Halifax. Some of the deck cargo was carried overboard, other portions were jettisoned, other portionsdamaged, and the vessel herself was so much damaged that it was absolutely necessary to have some repairs done upon her and to have a portion of her cargo restowed. The owners have paid for these repairs, and have compensated the owners of the lost, jettisoned, and damaged cargo for the loss which they have sustained, and do not claim from anyone concerned any contribution on foot of the expenditure thus resulting from their improper act in overloading their ship. They do not seek in any way to take, in this respect, any advantage of their own wrong, in the proper sense of that expression.

The *Wearside* duly arrived at Liverpool. The respondents' portion of the cargo was uninjured, and the ship was ready to deliver it. The respondents, however, dispute the existence of the shipowners' lien for dead freight to any amount, mainly on two distinct grounds. First they contend that as every shipowner is held to warrant the seaworthiness of his ship, the breach of that warranty puts an end to the contract of affreightment contained in the bill of lading, which becomes, they say, void *ab initio*, and consequently that though the goods *in specie* have been duly carried to their destination undamaged, the indorsees of the bill of lading are only obliged to pay the shipowners for their services such sum as they may be entitled to as common carriers by sea instead of the remuneration stipulated for in the bill of lading.

Second, they contend that the deviation to the port of Halifax was unjustifiable in this respect, that however necessary it may have been in order to save the ship and cargo and the lives of the crew owing to the perilous condition to which the vessel was in fact reduced, yet, as that condition was in part due to the act of the master in overloading her with deck cargo to such an extent as to make her unseaworthy, the deviation must be treated as a deviation made without any necessity whatever, a gratuitous alteration of the voyage rendering the contract of affreightment contained in the bill of lading void *ab initio*. Of the several points raised by the respondents in the Court of Appeal this latter was the only one decided. The Lords Justices held that the respondents' contention was right, that the deviation constituted a new voyage different from that with which the bill of lading and charter-party were conversant, and that the former of these documents, if not both, were therefore void *ab initio*.

Mr. Atkin, on behalf of the respondents, was driven to admit that if his contention on the first point were sound, it would be competent for every indorsee of a bill of lading, whose goods had, in fact, been carried safely and with due expedition to the appointed port of discharge, to contend that, by reason of some of those comparatively trifling omissions on the part of the master, which have been held to render a vessel unseaworthy—such as sailing without two anchors, sailing without an adequate supply of medicines and medical appliances for the crew—he was released from all the obligations imposed upon him by the bill of lading, the argument being that the provision of a seaworthy ship was a condition precedent, and, not having been performed, the contract of affreightment was entirely displaced. No authorities were cited in support of this proposition. I think that it is in conflict with the principles of English law.

In *Dakin* v. *Oxley* (*sup.*) Willes, J. deals exhaustively with the question whether, under the laws of different continental and other foreign countries, the indorsee of a bill of lading is relieved from his contract where the cargo arrives at the port of lading in specie, though damaged through the negligent navigation of the ship by her master and crew; and as to the law of

England on this point he speaks thus: "The test to the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed, and, according to English law, freight is earned by the carriage and arrival of the goods, though they be in a damaged condition when they arrive. Freight must be paid even where the damage is culpable, and the parties must be left to their cross-action."

The case of *The Europa* (*sup.*) is, I think, an authority against the respondents' contention. There the action was brought by the shipowner against the charterer in respect of goods damaged by one of the perils of the sea excepted by the charter-party, not by the unseaworthiness of the ship, which was admitted. It was held by Bucknill and Bargrave Deane, JJ., on a line of reasoning which appears to me convincing, that the charter-party, notwithstanding this unseaworthiness, was not displaced; that, on the contrary, the clause excepting perils of the sea was alive and operative; and that the shipowner, despite his breach of warranty, was protected under it from liability for the injury done to the goods.

Neither in *Steel* v. *State Line Steamship Company* (*sup.*) nor in *Gilroy, Son and Co.* v. *Price and Co.* (7 Asp. Mar. Law Cas. 314; 68 L. T. Rep. 302; (1893) A. C. 56) was it suggested that the breach of warranty of seaworthiness put an end to the contract of affreightment, and relegated the shipowner to his rights as a common carrier by sea. On the contrary, the observations of Lord Blackburn, in the former case, seem to indicate that the indorsee of the bill of lading might be disentitled to recover, despite the fact of unseaworthiness, unless that unseaworthiness caused the damage. He is reported to have used these words: "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 was 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"; and further on he says, "I have no doubt what the result will be; it will be a question whether, taking the whole circumstances together, this ship was reasonably fit when she sailed to encounter the perils, and whether the damage that happened was a consequence of her being unfit, if she was unfit," which appears to me to imply that if the damage was not a consequence of this unfitness, the shipowner's liability must be determined by the provision of his contract of affreightment so far as it dealt with that liability.

In *Baumvoll Manufactur von Scheibler* v. *Gilchrest and Co.* (*sup.*), Lord Esher, M.R. is reported to have used these words: "The first cause of action which they allege is for breach of the bills of lading, and, secondly, they allege negligence in sending the ship to sea from New Orleans is an unseaworthy condition. It is not a sufficient breach of a bill of lading that a ship went to sea in an unseaworthy condition, but it must always be shown that the unseaworthiness was the cause of the loss." The fact that a ship is not in a fit condition to receive her cargo, or is from any cause unseaworthy when about to start on her voyage, will justify the charterer or holder of the bill of lading in repudiating his contract and refusing to be bound by it, and, of course, the parties can, by mutual consent, rescind their contract of affreightment, but repudiation or recission are questions of fact. They have not been found upon by the judge at the trial in this case. It lay upon the respondents to procure findings upon them, if they wished to escape on these grounds from the obligations of their contract.

Having regard, therefore, to the authorities which I have cited, and to the absence of all authority to support the respondents' contention on their first point, it is, I think, unsound and unsustainable according to the law of this country.

On the second point it is not disputed that it is *primâ facie* not only the right but the duty of the master of a ship to deviate from the course of his voyage and seek a harbour or place of safety, if that course be reasonably necessary in order to save his ship and the lives of his crew from the perils which beset them. Neither is it disputed by the appellants that they are answerable in damages to every person who sustains loss or injury by reason of the breach of their warranty of the seaworthiness of their ship, and they further admit that they cannot require the owners of the cargo or any portion of it to recoup them to any extent for any loss which they may have sustained or expense to which they may have been put as a result of this breach of warranty, or of any course which they may have had to take in consequence of it. The appellants further admit that voluntary or unwarranted deviation may render the contract of affreightment void *ab initio*, as was decided by the Court of Appeal in *Joseph Thorley Limited* v. *Orchis Steamship Company* (*sup.*). What they contend is, in effect, this, that justifiable deviation does not avoid the contract; that, to use the language of Lord Watson in a case presently to be referred to, "it is the presence of the peril and not its causes" which justify it, and that it is, therefore, immaterial whether the unseaworthiness of the ship or her negligent navigation contributed directly to the peril or not. Judged by that test it is not disputed that the deviation in the present case was justifiable, and if so, that the contract of affreightment was not void *ab initio*, so that the question for decision resolves itself into this: Is it the presence of the peril and not its cause which determines the character of the deviation, or must the master of every ship be left in this dilemma, that whenever, by his own culpable act, or a breach of contract by his owner, he finds his ship in a perilous position, he must continue on his voyage at all hazards, or only seek safety under the penalty of forfeiting the contract of affreightment? Nothing could, it would appear to me, tend more to increase the dangers to which life and property are exposed at sea than to hold that the law of England obliged the master of a merchant ship to choose between such alternatives.

The Court of Appeal appears to have considered that they found in Lord Watson's judgment in *Strang, Steel, and Co.* v. *Scott and Co.* (*sup.*), a principle which was applicable to the present case. They did not refer to any other authority in support of their decision on this point. With the utmost respect I am quite unable to concur with them. In that case,

through the negligence of the master, the ship was driven ashore and part of her cargo was jettisoned.

The question with which Lord Watson was dealing in the passage cited from his judgment by Fletcher Moulton, L.J., was what he styled the first question raised in the case—namely, "Whether innocent owners of cargo, sacrificed for the common good, are disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault?" He says: "Each owner of jettisoned cargo becomes a creditor of the ship and cargo saved, and has a direct claim against each of the owners of the ship and cargo for a *pro ratâ* contribution towards his indemnity, which he can enforce by direct action." Further on he says: "The Rhodian law, which in that respect is the law of England, bases the right to contribution, not upon the causes of the danger to the ship and cargo, but upon its actual presence." And before the passage last cited, he says: "The principle upon which contribution becomes due does not appear to differ from that upon which the claim for salvage services are founded. But, in any aspect of it, the rule has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all, and these rights and obligations are mutually perfected, wherever the goods of some of those shippers have been advisedly sacrificed and the property of the others has been thereby preserved. There are, however, two well-established exceptions to the rule of contribution for general average which it is necessary to notice."

He then proceeds to deal with the first exception in the passage cited. Lower down he deals with the second exception, deck cargo; he says: "But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim against the master and owners who received his goods for carriage upon deck." And after stating that such exceptions as are recognised in *Schloss* v. *Heriot* (*sup.*) are in truth limitations of the rule introduced from equitable considerations in the case of actual wrongdoers, he states the conclusion of the Judicial Committee thus: "The owners of the goods thrown overboard, having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves."

To permit a wrongdoer to recover contribution in such a case would indeed be to permit him to take advantage of his own wrong, for his wrongdoing necessitated the sacrifice out of which his claim for contribution would spring. The present case is wholly different. Here the claim of the appellants arose before they were in default at all. It does not spring from their default; it is entirely independent of their default. It springs, on the contrary, from the respondents' fault, and the contract of the respondents provides a specific and particular method, a lien, by which it may be enforced. It is, in truth, the respondents, not the appellants, who seek to take advantage of the appellants' wrong, in order to deprive the appellants of a right which the respondents' wrong gave them. This distinction between the case of *Strang Steel and Co.* v. *Scott and Co.* and the present case is, to my mind, crucial, and prevents the decision in that case from being any help whatever to the proper decision of the present.

On the whole, therefore, I am of opinion that a master, whose ship is, from whatever cause, in a perilous position does right in making such a deviation from his voyage as is necessary to save his ship and the lives of his crew, and that while the right to recover damages for all breaches of contract, and all wrongful acts committed either by himself or by the owners of his ship, is preserved to those who are thereby wronged or injured, the contract of affreightment is not put an end to by such a deviation nor are the rights of the owners under it lost.

Speaking for myself, I may say that I think that it would not be consistent with any principle of justice that these rights should be lost. The fact that by a policy of insurance the insurer merely indemnifies the insured against loss from certain risks, and it is therefore his right not to have these risks increased, differentiates, I think, altogether the case of an insurer from the case of an indorsee of a bill of lading whose goods have been brought safely and undamaged to the port of discharge. The respondents' contention on the second point is to my mind, therefore, as unsustainable as that on the first.

The respondents' contention on their third point amounts, as I understand it, to this. The freight mentioned in the bill of lading is, they say, 26*s.* per load of 50 cubic feet. *Gardner* v. *Trechmann* (*sup.*) decides that where the freight mentioned in the charter-party is more than that mentioned in the bill of lading, the indorsee of the latter, claiming as such, is, in the absence of special agreement to the contrary, only bound to pay the lesser freight. Here there is a special agreement in the last clause of the charter-party, providing that any difference between the two should be settled at the port of lading before the vessel sails. Therefore, as dead freight is still freight it should either not be paid at all, as it is not included in the freight mentioned in the bill of lading, or if payable at all it should under the last clause of the charter-party have been settled and paid at the period of loading before the vessel sailed at all. The answer to this ingenious but very fallacious argument is, that dead freight is not freight at all properly so called, but is in reality damages for breach of contract, for convenience nick-named dead freight, and that neither the last clause in the charter-party nor the case of *Gardner* v. *Trechmann* has any application whatever to it.

On the whole, therefore, I am of opinion that on the three points argued before your Lordships the respondents fail, and that the appeal ought to be allowed with costs, and further that the case should be remitted to the Court of Appeal to deal with the award of damages by Walton, J. against which both parties have appealed.

The Earl of HALSBURY concurred.

Lord MACNAGHTEN.—My Lords: I have had the advantage of reading the judgment of Lord Atkinson and I agree.

The LORD CHANCELLOR (Earl Loreburn).—My Lords: I also agree. I think the best course

would be for the parties to frame an order in accordance with the opinions expressed by Lord Atkinson.

July 26.—The parties submitted to the House the terms of the order.

Judgment appealed from reversed. Case remitted to the Court of Appeal. Respondents to pay to the appellants their costs of this Appeal. Costs in the Court of Appeal to depend on the final issue.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, June 24, 1912.

(Before FLETCHER MOULTON and BUCKLEY, L.JJ.)

THE PACUARE. (*a*)

Collision—Admission of liability subject to a reference — Discovery — Inspection—Order XXXI., r. 18.

A collision occurred between a steamship and a lightship in Liverpool Bay. The owner, master, and crew of the lightship started an action in rem *to recover the damage they had sustained. The owners of the steamship admitted liability subject to a reference. The plaintiffs then delivered particulars of their claim and* inter alia *claimed a sum of* 7047*l. as the value of the lightship. The defendants made an application to the registrar for an order that they were entitled to inspect the plaintiffs' books in order to see upon what basis the plaintiffs arrived at the value set upon their lightship at the time of the collision. The registrar refused to make the order, and on appeal to the judge he confirmed the order of the registrar. The defendants appealed to the Court of Appeal.*

It was admitted that the books would have to be produced at the reference.

Held, reversing the decision of the judge and the registrar, that the defendants were entitled to an order for the inspection of the books before the reference.

DAMAGE ACTION.

Appeal from a decision of Bargrave Deane, J. affirming a decision of the district registrar at Liverpool, who refused to order the plaintiffs to give inspection of certain books which contained statements as to the value and depreciation of their vessel.

On the 22nd Aug. 1911 a collision took place between the lightship *Alarm* and the steamship *Pacuare* in Liverpool Bay.

On the 23rd Aug. the owners of the *Alarm* and her master and crew, suing for their effects, issued a writ *in rem* against the *Pacuare* to recover the damages they had sustained.

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

On the 29th Aug. the owners of the *Pacuare* admitted liability for the collision subject to a reference to the registrar to assess the amount of the damage.

The plaintiffs filed their claim, and among the items included in it was one for 7047*l.*, the value of the *Alarm*.

On the 21st May 1912 the defendants applied to the district registrar for an order that the plaintiffs, the Mersey Dock and Harbour Board, should give the defendants inspection of their books showing the value of the *Alarm* at the time of the collision.

The district registrar refused to make the order.

The defendants appealed to the judge in chambers, who affirmed the order of the district registrar, saying that as the defendants could have the books produced at the reference there was no point in getting inspection before the hearing.

The defendants appealed to the Court of Appeal.

Order XXXI., r. 18 (i.), is as follows:

If the party served with notice under rule 17 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the court or judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit: Provided that the order shall not be made when and so far as the court or a judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

Keogh for the appellants, the owners of the *Pacuare*.—The plaintiffs are not claiming the market value of the lightship, for of course there is no market value; they are claiming the value of the vessel to themselves as a lighting authority. The defendants think that if they inspect the plaintiffs' books they will find that the *Alarm* was an obsolete vessel at the time of the accident, and that the value put on her is an extravagant one. The books are certain to show the value to which the plaintiffs had written the vessel down and the rate of depreciation. The learned judge in chambers thought that if those facts were known at the reference it would suffice; the defendants want to know them at once.

H. M. Robertson for the Mersey Dock and Harbour Board, the plaintiffs. — The order appealed from is right, and is consistent with the practice in the Admiralty Court, which is not to produce books until the hearing of the reference. The books will not be of much assistance to the registrar. [FLETCHER MOULTON, L.J.—I am not sure of that, though they may not be binding on him.] He cannot be bound by them, and what evidence of real value is the fact that the Board may have written down the value of the property very considerably. The *Alarm* since she was built in 1885 has been used for many different purposes, and the depreciation allowed is properly different in each case. [FLETCHER MOULTON, L.J.—Then surely the fullest information should be given.] So it will be on the reference, but it cannot help the defendants to have it before then, and no adequate reason has been given for departing from the usual practice in these cases.

FLETCHER MOULTON, L.J.—This is a plain case. The plaintiffs are the owners of the light-

ship *Alarm*, which was run down by the defendant's steamship. The defendants admit liability, and one of the questions on the reference is the value of the lightship. The plaintiffs have got books which contain the whole history of this vessel, its original cost, the work done on it, the depreciation which has been written off, and, in fact, they record all the relevant facts which must ultimately guide the tribunal in deciding on what the value of the lightship is. It is admitted that the books must be produced on the hearing of the reference. Why should they not be produced beforehand, to enable the defendants to be in possession of those facts before the hearing of the reference? I cannot see why they should not. I am not satisfied that any such practice as is alleged to exist does exist or is right and I think it would help to dispose of the case if the books were produced, and the order will be that the books are to be produced forthwith. The appeal will be allowed with costs here and below.

Buckley, L.J.—I agree.

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

Solicitors for the respondents, *Rawle* and *Co.*, for *W. C. Thorne*, Liverpool.

April 17, 18, *and May* 18, 1912.

(Before Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.)

Reliance Marine Insurance Company *v.* Duder. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Reinsurance — Risk—Intention of assured—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 26, *sub-s.* 3.

The plaintiffs issued two policies for the insurance of a vessel for a voyage from "Newcastle, N.S.W., to port or ports, place or places, in any order or rotation, on the West Coast of South America." The vessel was valued in these policies at 12,000*l., and the risk was to continue until thirty days after arrival at final port of discharge or until sailing on next voyage, whichever might first happen. The vessel was also insured by a policy issued by the plaintiffs 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 the United Kingdom, or Continent, or the United States. The vessel was valued in this policy at* 10,000*l., and the risk was to commence from the expiration of the previous policy. The plaintiffs reinsured the vessel with the defendant for a voyage "at and from Valparaiso and (or) port or ports, and (or) place or places, on the West Coast of South America" to the United Kingdom, Continent of Europe, or the United States. The valuation of the vessel was the same as in the two original policies. The plaintiffs gave instructions to their brokers to effect this reinsurance for a voyage "At and from Valparaiso and (or) W. C. S. A. or h/c to U. K. and (or) Cont., or to U. S. A. or h/c . . . (wd. nitrate or h/c). Valuation clause. Hull, &c., vd.* 10,000*l. or v.o.p."*

The vessel was chartered to load a cargo of coal at Newcastle, N.S.W., and under the charterparty the charterers directed her to discharge the cargo at Valparaiso, and bills of lading were accordingly issued making it deliverable at that port. The vessel was then under a second charter party to proceed to Tocopilla to load a nitrate cargo for a European port, and when she reached Valparaiso it was agreed between the owners and charterers under the first charterparty that, instead of delivering the whole of the cargo of coal at Valparaiso, she should proceed with 800 *or* 900 *tons of coal still on board and deliver same to charterers at Tocopilla. By this arrangement it was unnecessary for the captain to take ballast on board for the voyage from Valparaiso to Tocopilla, and on this voyage the vessel stranded and became a total loss. The plaintiffs paid the owners of the ship for a loss under the first two policies, and then brought an action against the defendant on the policy of reinsurance.*

The defendant contended that the plaintiffs did not intend to cover by the reinsurance any risk except the risk under the third policy, and intended to exclude their liability under the two earlier policies.

Held, that this contention failed both upon the facts and the law; that the terms of the written contract being what they were, the evidence as to intention adduced by the defendant was not legally admissible; and held also, Buckley, L.J. (dubitante), *that the defendant was liable as there was no evidence to show that the plaintiffs intended to cover only their risk under the third policy.*

Decision of Bray, J. (12 *Asp. Mar. Law Cas.* 95; 105 *L. T. Rep.* 820) *affirmed, and sect.* 26, *sub-sect.* 3, *of the Marine Insurance Act* 1906 *considered.*

The plaintiffs' claim was to recover, at a trial before Bray, J. sitting without a jury in the Commercial Court, for a loss under a policy of reinsurance upon the vessel *Kynance*.

By their points of claim the plaintiffs pleaded that they caused themselves to be insured by a policy dated the 9th Aug. 1910, which was expressed to be a policy of reinsurance of 500*l.* upon the vessel *Kynance*, valued as in original policy against the risk of total or constructive total loss only, subject to the same terms, clauses, and conditions as the original policy or policies, and to pay as may be paid thereon. The voyage insured was "at and from Valparaiso and (or) any port or ports, place or places, on the West Coast of South America" to the United Kingdom, Continent of Europe, or the United States. They alleged that on the 29th July 1910 the *Kynance*, while on the insured voyage from Valparaiso to Tocopilla, whence she was to sail to the United Kingdom, was totally lost by perils insured against—viz., perils of the sea.

They also alleged that at the time of the loss they were fully interested in the policy of the 9th Aug. 1910 in that they had executed and delivered to the owners of the *Kynance* two policies of insurance on the vessel, dated the 6th and the 11th May 1910 respectively, each for 500*l.* Each of these policies insured the vessel

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

from "Newcastle, N.S.W., to port or ports, place or places, in any order or rotation on the West Coast of South America." The vessel was valued at 12,000*l.* and the risk was to continue until thirty days after arrival at final port of discharge or until sailing on next voyage, whichever might first occur.

The defendant by his defence pleaded that the *Kynance* was also insured by the plaintiffs under another policy for 1000*l.*, dated the 4th Aug. 1910, for her homeward voyage, which was described as "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 the United Kingdom, or Continent, or the United States. The vessel was valued at 10,000*l.*, and the risk was to continue until thirty days after arrival, however employed, or until sailing on next voyage, whichever might first occur.

The policy contained the following provision:

In the event of total and (or) constructive total loss of the vessel, underwriters' subscriptions to be limited to 50 per cent. of their lines. Warranted nitrate or held covered at a premium to be arranged.

The policy also contained a proviso:

Risk to commence from expiration of previous policy.

The defendant also alleged that the risk intended to be reinsured by his policy was the risk under the plaintiffs' policy of the 4th Aug. 1910, and he said there had been no loss under that policy, and that the risk never attached, the *Kynance* having been lost before the expiration of the previous policy, and also that there had been a breach of the warranty: "Warranted nitrate."

The plaintiffs had given written instructions to their brokers, dated the 14th July 1910, to effect the reinsurance with the defendant. These instructions were for a reinsurance on a voyage

At and from Valparaiso and (or) W. C. S. A. or h/c to U. K. and (or) Cont. or to U. S. A. or h/c. Leave to call, &c., against the risk of T. and (or) C. T. Loss only (wd. nitrate or h/c). Valuation clause. Hull, &c., vd. £10,000 or v.o.p.

The facts with regard to the voyage were as stated in the report of the *Sailing Ship Kynance Company Limited* v. *Young* (11 Asp. Mar. Law Cas. 596 (1911); 104 L. T. Rep. 397), as follows:

By 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.

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. Frederick 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.

In an action upon a policy of insurance similar to the policies of the 6th and the 11th May, Scrutton, J. held that the owners of the *Kynance* and the charterers were entitled to vary the mode of performing the charter-party by discharging the coal at two ports of the West Coast of South America instead of at one, and that the policy covered such an adventure, and therefore the owners were entitled to recover under the policy.

It was decided by Bray, J. that the defendant was liable as there was no evidence of an intention on the part of the plaintiffs to cover only their liability under the third policy.

From that decision the defendant now appealed.

Atkin, K.C. and *Leck*, for the appellant, referred to

Sailing Ship Kynance Company Limited v. *Young*, 11 Asp. Mar. Law Cas. 596 (1911); 104 L. T. Rep. 397;

Allison v. *Bristol Marine Insurance Company*, 3 Asp. Mar. Law Cas. 178 (1876); 34 L. T. Rep. 809; 1 App. Cas. 209;

Lower Rhine and Wurtemburg Insurance Association v. *Sedgwick*, 8 Asp. Mar. Law Cas. 380; 78 L. T. Rep. 496; (1898) 1 Q. B. 789; on appeal, 8 Asp. Mar. Law Cas. 466; 80 L. T. Rep. 6; (1899) 1 Q. B. 179, at p. 190;

Scott v. *Globe Marine Insurance Company*, 1 Com. Cas. 370;

Marine Insurance Act 1906, s. 26 (3).

Bailhache and *Mackinnon*, for the respondents, referred to

Irving v. *Richardson*, 2 B. & Adol. 193;
Stephens v. *Australasian Insurance Company*, 1 Asp. Mar. Law Cas. 458; 27 L. T. Rep. 585; L. Rep. 8 C. P. 18;
Denoon v. *Home and Colonial Assurance Company*, 1 Asp. Mar. Law Cas. 309; 26 L. T. Rep. 628; L. Rep. 7 C. P. 341;
Marine Insurance Act 1906, s. 5.

[BUCKLEY, L.J. referred to Marine Insurance Act 1906, s. 9. KENNEDY, L.J. referred to *Royal Exchange Assurance Company* v. *M'Swiney*, 14 Q. B. 634, 646.]

Leck replied.

Cur. adv. vult.

May 18.—The following written judgments were delivered :—

KENNEDY, L.J.—The material facts of this case may be shortly stated. They appear more fully in the report in 12 Asp. Mar. Law Cas. 95 (1911) and 105 L. T. Rep. 820.

Before the 9th Aug. 1910 the plaintiffs had executed three policies of marine insurance on the vessel *Kynance*, dated respectively the 6th May, the 11th May, and the 4th Aug. 1910. Of those three policies, the first two for 500*l*. each covered the vessel from Newcastle, N.S.W., to port or ports, place or places, in any order or rotation on the West Coast of South America. The vessel was valued at 12,000*l*., and the risk was to continue until thirty days after arrival at final port of discharge or until sailing on next voyage, whichever might first occur. One of these two policies stated, "cargo to be screened coal or held covered." The third policy, dated the 4th Aug., covered the *Kynance* "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 the United Kingdom or Continent or the United States." The vessel was valued at 10,000*l*. This policy also contained two provisions: First, "In the event of total and (or) constructive total loss of the vessel, underwriters' subscriptions to be limited to 50 per cent. of their lines. Warranted nitrate or held covered at a premium to be arranged"; and secondly, "Risk to commence from expiration of previous policy."

The charter-party under which the *Kynance* made her voyage with a coal cargo from Newcastle, N.S.W., to the West Coast provided that she should discharge at Valparaiso, or, if ordered by the charterers' agents, after her arrival there, should discharge at any safe port on the West Coast not north of Pisagua; and in fact, by arrangement made between the charterers and the owners of the *Kynance*, she did not discharge all her coal cargo at Valparaiso, but proceeded with 800 tons on board towards Tocopilla, a West Coast port not north of Pisagua. Between Valparaiso and Tocopilla she was stranded and became a total loss. It was held by Scrutton, J. —as is stated by my brother Bray in the judgment now under appeal—that the present plaintiffs became liable to pay in respect of this loss under the original policies of the 6th and the 11th May. The policy of the 4th Aug. was not available to the owners of the *Kynance*, because, as I have already stated, it was an express condition of that policy that the risk under it should commence only when the previous policies had expired.

The question to be decided in the present action arises in respect of a reinsurance policy which was effected with the defendant, an underwriter of the plaintiffs, on the 9th Aug. 1910, and, therefore, after they had executed all the three policies of the 6th and the 11th May and the 4th Aug., and during the subsistence of those original policies. The plaintiffs sued the defendant in the present action upon this reinsurance policy in order to recoup themselves for the amount of the total loss which they have been held liable to pay and have paid to the owners of the *Kynance* under the original policies of the 6th and the 11th May. The terms of the reinsurance policy are these: It is a policy upon the *Kynance* at and from Valparaiso and (or) any port or ports on the West Coast of South America to any port or ports, place or places, in the United Kingdom and (or) on the continent of Europe between and including Bordeaux and Hamburg or held covered or in the United States of America or held covered as original, &c., &c. "Hull valued as in original policy. Against the risks of total loss and (or) constructive total loss of the vessel only. Valuation clauses as attached. No salvage charges and no sue and labour clause." And in the margin: "Being a reinsurance applying to Reliance Company subject to the same terms, clauses, and conditions as the original policy or policies and to pay as may be paid thereon."

It was not argued at the trial, as Bray, J. states in his judgment, and I did not understand the defendant's counsel to argue before us, that the loss in respect of which the plaintiffs have paid under the policies of the 6th and the 11th May did not fall within the words of the reinsurance policy. And I agree with the learned judge in thinking that they could not successfully have so argued. The language of this reinsurance policy is both sufficient and apt to constitute a contract between the plaintiffs, the Reliance Company, and the defendant, whereunder the plaintiffs, having paid in respect of the total loss of the *Kynance* upon the two original policies of the 6th and the 11th May, became thereupon entitled to be indemnified by the defendant in respect of the said payments. In other words, the policy of reinsurance, according to the natural meaning of its terms, covers the plaintiffs' risk of having to pay for the loss of the *Kynance*, as and when that loss in fact occurred, under any original policy or policies, or, at all events, any original policy or policies existing at the time of the reinsurance (see *Lower Rhine and Wurtemburg Insurance Association* v. *Sedgwick*, *sup.*) under which that risk was insured by the plaintiffs, and each of the policies of the 6th and the 11th May was an original policy.

It is, of course, immaterial in regard to the liability of the defendant as a reinsurer to indemnify the plaintiffs in respect of a loss to which both the original policies of the 6th and 11th May and the reinsurance policy extend that the reinsurance policy would also have protected the original insurer in respect of a loss of the *Kynance* at a further stage, *i.e.*, on the intended homeward voyage, in regard to which the plaintiffs could have been liable to her owners only under the third policy—the policy of

the 4th Aug. The applicability of a reinsurance policy depends upon the period of risk which it covers being coterminous with the risk in the original policy. So far, there is not, I think, any difference between the parties. But the defendant, whilst admitting that the plaintiffs both at the time of the reinsurance and at the time of the loss of the *Kynance* had an insurable interest arising from their liability to the owners of the *Kynance* under the original policies of the 6th and the 11th May, and not disputing that that risk is a risk which apparently comes within the terms of the reinsurance policy, and that the plaintiffs have in fact been held legally liable to pay under those original policies, resists the plaintiffs' claim, because, as he contends, and as he contended before Bray, J., the general words must be limited by the intention of the assured, and he can show that the plaintiffs did not intend to cover by the reinsurance any risk except the risk under the third policy—the policy of the 4th Aug.—and it is not upon that policy, but only upon the two earlier policies of the 6th and 11th May that the plaintiffs have been held liable to pay for the loss of the *Kynance*. He has taken upon himself the burden of proving not merely that the plaintiffs in reinsuring intended to cover their risk on the third policy, but intended to exclude their liability under the two earlier subsisting policies.

I am of opinion that this contention of the defendant fails both upon the facts and in point of law. Such an intention as the defendant imputes to the plaintiffs is, to say the least, improbable. It is difficult to imagine why the plaintiffs, as business men, having risks subsisting under all the three policies of insurance, should, when subsequently taking out through their brokers a policy of reinsurance in terms sufficient and apt to cover their risk on the *Kynance* during her stay on the West Coast under all the three policies as well as during her intended further voyage homeward under the third policy, have intended to limit the protection of reinsurance to the risk under the third policy and to exclude the risks under other two. It is, however, unnecessary to dwell upon this antecedent improbability. The defendant at the trial endeavoured to make out his case by an inference of intention which he invited the learned judge to draw from certain entries in the plaintiff's books, from written communications passing between the plaintiffs and their insurance brokers and between those brokers and their London agents, and also by oral evidence of a sort of constructive notice of the alleged intention given in conversation between those agents and the defendant. The learned judge who had this written and oral evidence before him has held that upon the facts the defendant wholly failed to prove his case.

In the course of a considered judgment, after carefully reviewing the evidence, Bray, J. stated (at p. 97 of 12 Asp. Mar. Law Cas. 95; and at p. 822 of 105 L. T. Rep.) his conclusion in the following terms: "I am unable to find that the intention of the plaintiffs was to cover only their liability under the third policy. It might be true to say that they expected the liability to arise under the third policy, but I find it is not true that their intention was to cover that liability only." As I see no reason for differing from my brother Bray, in regard to this finding, in fact it is not necessary for my judgment on this appeal to consider the law. But as it was much discussed in the course of the argument in this court, I think that I ought shortly to give reasons for my view that the basis of the defendant's contention is unsound and the terms of the written contract between the parties being what they are, that the evidence adduced by the defendant was not legally admissible.

It is, I conceive, a fundamental principle of our law, that, where you have a contract which has a plain natural meaning, and which is not impeached upon the ground of common mistake or upon the ground of fraud or misrepresentation, it is not permissible to alter its effect according to the intention of one of the two contracting parties or to adduce evidence in order to show such an intention. If A. and B. enter into a written contract it is immaterial to consider what either of them intended to effect. The only question is what have they said by their contract. But it is just the opposite of this which the defendant, in resisting the plaintiff's claim, has tried to do. We have here a reinsurance policy covering the insurer's risk under "original policies" ("subject to the same terms, clauses, and conditions as the original policy or policies, and to pay as may be paid thereon") insuring the Kynance at the time and the place of her loss; and the defendant the insurer, has attempted to narrow the natural and *primâ facie* meaning of the contract contained in the reinsurance policy to one out of three of the original policies which existed at the time of the reinsurance, and to each of which the contract of reinsurance is, in regard to the safety of the Kynance when on the West Coast, equally applicable, by proof of an intention on the part of the plaintiffs uncommunicated to the reinsurer to protect themselves only in respect of that single policy.

Such a proceeding appears to me unjustifiable in point of law. Willes, J. in *Denoon* v. *Home and Colonial Assurance Company* (*sup.*), referring to the "intention" of the assured as to insuring the freight and merchandise only, says "which intention, however, not being communicated to the underwriters, could not of itself have altered the construction of the policy, whatever effect it may have had to show a mistake on both sides as to the subject-matter of the valuation, and so to open the policy." When the assured in an original policy or in a reinsurance policy has proved his interest at the time of the loss, the only other questions in the absence of some special provisions in the policy, relevant to the question of the insurer's liability are "Was the subject matter not a subject matter covered by the terms of the contract appearing in the policy? Was the risk occasioning the loss of that subject matter a risk included in the terms of the contract appearing in the policy?

But then, says the defendant "I rely upon sect. 26 (3) of the Marine Insurance Act 1906." That enactment runs thus: "Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered." I hope that I shall not be judged lacking in due respect either to their Legislature or to the eminent judicial authority whose language—that of Lord Esher (then Mr. Justice Brett) in *Allison* v. *Bristol Marine Insurance Company Limited* (*sup.*) has been in this sub-section imported into the

statute, if I venture to say that I think as I understand Scrutton, J. to think (see *Sailing Ship Kynance Company Limited* v. *Young, sup.*) in agreement with the learned editors of the last edition of Arnold on Marine Insurance (vol. 1, pp. 327, 328) that this sub-section might have been less obscurely worded. Possibly as those learned editors suggest, a question may some day arise under it in regard to opening a valued policy in cases where the designation of the subject-matter in the policy is larger than the insurable interest of the assured, as the valuation was opened by Lord Ellenborough in *Forbes* v. *Aspinall* (13 East. 323) and by Willes, J. in *Denoon* v. *Home and Colonial Assurance Company* (*ubi sup.*). But, be this as it may, I do not think that this subsection can rightly be interpreted to mean that an insurer is thereby entitled to exclude the assured from the receipt of the insurance of any of the risks which are within the terms expressed in the written policy, and which have been presumably considered by the insurer in fixing his premium, by showing that, at the time when the insurance was effected, the assured "intended" in his own mind to cover only some of them. On the contrary, I think that, if this sub section is read as it ought to be in connection with the rest of sect. 26, the purpose of which, as appears by the marginal note, is to deal with "Designation of subject-matter," the principal object of the sub-section is to prevent an assured who at the time of a loss within the policy has only a limited interest in the subject-matter which is designated in the policy in general terms—such, for instance, as "cargo" or "freight"—from being prejudiced by such generality of designation, provided that the designation is not inappropriate, as, for instance, "rice" would be intended to cover an interest in profits which might arise collaterally from a contract relating to the rice: (see per Blackburn, J. in *Anderson* v. *Morice* (3 Asp. Mar. Law Cas. 290; 32 L. T. Rep. 355; L. Rep. 10 C. P. 609, at p. 621) and *Royal Exchange Assurance Company* v. *M'Swiney* (14 Q. B. 634).

Having regard to the words "interest intended by the assured to be covered," I think that those who introduced the sub-section into the Act may also have had in view the one class of case in relation to marine insurance in which the "intention" of one of the two parties to the contract —*i.e.*, the assured, is properly (I say "properly" because it is required by the very terms of the contract) a matter of inquiry in regard to rights under the contract. According to the common form of policy (which appears in the reinsurance policy that we are considering in this case) the insurance is effected by the insurance brokers, "as well in their own names as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." The persons for whose benefit the policy was intended to enure have therefore to be ascertained. It is expressly provided by sect. 14 of this Act that persons—such, for instance, as mortgagee or consignee, having only themselves a limited interest—may insure for and on behalf of other persons interested as well as for their own benefit, and may recover accordingly upon the policy; although, of course, as laid down by Bowen, L.J. in *Castellain* v. *Preston* (49 L. T. Rep. 29; 11 Q. B. Div. 380, at pp. 388, 399) the plaintiff in such a case can keep for himself only so much of the amount recovered from the insurer as will be due in respect of his own limited interest.

Even in such circumstances the claim to inquire into the intention of those who contract with the underwriters—not appearing in the policy and not communicated to him—has been criticised in a recent insurance case in the House of Lords. In *Boston Fruit Company* v. *British and Foreign Marine Insurance Company* (10 Asp. Mar. Law Cas. 260; 94 L. T. Rep. 806; (1906) A. C. 336, at p. 343) Lord Atkinson made the following remarks: "The underwriter, it would seem, was held to have insured those whom the person who dealt with him intended should be insured, though that intention was never communicated to him. I doubt very much whether that doctrine can long survive the decision of your Lordships' House in *Keighley, Maxsted, and Co.* v. *Durant* (7 Asp. Mar. Law Cas. 418; 84 L. T. Rep. 777; (1901) A. C. 240), or whether the rule of construction thus adopted in the case of marine policies from earlier times is not inconsistent with the root principle which lies at the foundation of the contract—namely, that there must always be the consent *ad idem* of the two contracting minds to make a valid contract." I do not think that sect. 26, sub-sect. 3, assists the defendant in the present case.

The defendant appeared to some extent to seek to support his argument by a reference to the decision of the Court of Appeal in the case of *Lower Rhine and Wurtemburg Insurance Association* v. *Sedgwick* (*ubi sup.*). I do not think that that case has really any bearing upon the question which we have to consider. So far as it goes, it is, when the grounds of the decision of the Court of Appeal are appreciated, rather adverse to the present defendant. The court held, in the words of A. L. Smith, L.J., that "*primâ facie* a person who affects a reinsurance, reinsures the liability he is under at the time when he effects the reinsurance and not a liability he is not then under, and may never thereafter come under;" and that the words after "rubber clause" in that policy of reinsurance "original policy or policies" ought accordingly to be interpreted as referring to the two original policies which were in existence at the time of the reinsurance. The policy to which the defendant in that case was seeking to apply the reinsurance policy, was policy which had been effected upon the expiration of the two original policies which had existed at the time of the reinsurance, and after the reinsurance policy had been effected. The Lord Justice proceeded to point out that he was not deciding that under no circumstances could a policy afterwards effected be covered by a reinsurance policy, but that in face of the fact that there was at the time of the reinsurance two of the original policies to which it did apply and to which *primâ facie* it must be held to apply, the words of the "rubber claim" were not sufficient to embrace a policy effected afterwards, which in material terms differed from the two original policies. The reasoning of Rigby and Collins, L.JJ. was substantially the same as that of A. L. Smith, L.J., which I have cited.

There is, as I have said, nothing in all this which assists the present defendant. The question of "intention" *dehors* the contract itself and existing only in the mind of the person who

effected the reinsurance policy, had not to be, and was not considered at all. The Court of Appeal decided as it did, reversing the judgment which I had given in favour of the defendant, upon the ground (1) that it was the duty of the court, as a matter of construction, to treat the reinsurance policy as *primâ facie* applying, under the phrase "original policies" and the two policies already existent: (2) that in a case at any rate where such original policies existed at the time a subsequent policy in materially different terms ought not to be treated as covered by the reinsurance policy.

COZENS-HARDY, L J. expressed his concurrence in the foregoing judgment.

BUCKLEY, L.J.—I have had the advantage of reading and considering the judgment which Kennedy, L.J. has delivered. I do not differ from it, but I still doubt.

Whether the risk is a risk which comes within the words of the reinsurance policy upon its true construction is, I think, the question to be decided. As matter of construction of the words "original policy or policies" in the reinsurance policy, the question is whether all or some and which of the three insurance policies is described by those words. Looking at the valuation given and the voyage described in the policy of the 4th Aug. as contrasted with those given and described in the policies of May, and looking at the voyage described in the reinsurance policy of the 9th Aug., it is, I think, a question of construction whether the policy of the 4th Aug. to the exclusion of those of May is not that which the reinsurance policy calls the "original policy or policies."

To answer this question of construction no resort need be or ought to be had to intention. The documents alone and a proper regard to the surrounding circumstances are the only materials for the decision. I had elaborated this more fully in the judgment which I had written, but I think it unnecessary to deliver it.

Appeal dismissed.

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

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, May 14, 1912.

(Before HAMILTON, J.)

SOCIETA ANONIMA UNGHERESE DI ARMAMENTI MARITTIMO *v.* HAMBURG SOUTH AMERICAN STEAMSHIP COMPANY. (*a*)

Charter-party—Charterer to pay all "dues"—Ship to pay all "port charges"—Custom of port of Santos.

A charter-party contained the following clause: "The charterer paying all dues and duties on the cargo, and the steamer all port charges, pilotages, &c., as customary," and also provided that on arrival at Santos the steamer should discharge on the quay.

At Santos a dock company has authority to enforce a tariff, being entitled (inter alia) *to make a charge "for the use of the quay for loading and discharging goods and any merchandise. . . ."*

The plaintiffs' vessel having been discharged on to the quay, the charterers' agents at the port of Santos charged against the ship in accounts rendered the particular charge for cargo so delivered.

In an action by the shipowners to recover the amount deducted:

Held, following the decision of Walton, J. in Field Line (Cardiff) *v.* San Paulo Gas Company *(unreported, but delivered on the 14th April* 1908), *that the charge was not a "due" on the cargo, but a port charge falling on the steamer.*

COMMERCIAL COURT.

Action tried by Hamilton, J., sitting without a jury.

The plaintiffs' claim was for balance of freight due under a charter-party.

The facts and arguments are sufficiently stated in the judgment.

Bailhache, K.C. and *Roche* appeared for the plaintiffs.

Gregory, K.C. and *Chaytor* for the defendants.

HAMILTON, J.—This is a shipowner's action for balance of freight due under a charter-party dated the 4th Oct. 1910. It is brought against the charterers, but as by the terms of the charter the steamer was to be consigned to the charterers' correspondents in the respective ports, the capacity in which the charterers are defending the action is really that of ship's agents at one of the ports of discharge, who by themselves or their sub-agents have made a disbursement on behalf of the ship which they were compellable to make, and who have sought to reimburse themselves, as *primâ facie* they were entitled to do, by setting it off against the charter-party freight and deducting it. The result is, therefore, that the shipowners, although suing for a balance of a lump sum freight, are in substance engaged in showing that a sum, which their agents paid at a foreign port to discharge a liability which fell in the first instance upon their ship, is one which the defendants have themselves contracted to bear, and are not entitled to set off and deduct in dealing with the freight. The dispute turns upon what occurred in connection with this voyage at the port of Santos, in Brazil. There is there a dock company which is authorised to enforce a tariff of charges, published in Portuguese, of which I have a translation which is substantially accepted. That tariff is divided into four heads: A, B, C, and D. C is a tariff of charges which the dock company makes under contract for non-obligatory services rendered to cargo, and D is a similar tariff for services which are non-obligatory rendered under contract to ships not included in the contracts of the docks company. The remaining two charges appear to be the regular dock company's charges, independent of contracts to render specific services in particular cases. A begins "Quay dues payable by ships and included in their price of affreightment," and is then divided into two heads. B is headed: "Dues for services rendered to goods and paid directly by them," and is divided into two heads, and they are "supervision dues" and "warehousing dues."

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

The two heads under A are "landing dues," which vary in amount according as the vessel is a steamer or a sailer, and are calculated by a combination of the linear meter of quay occupied by the steamer and time, and the other is the charge in question, and the translation of the charge in the tariff is this: "For the use of the quay for loading and discharging goods and any merchandise, and for the dredging and clearing away of obstructions from the port per kilogram."

The result, therefore, is that the ship's agents, the charterers' correspondents in the port, charged against the ship in accounts which are rendered in the first instance to the captain this particular charge upon the weight of the cargo which was delivered on to the quay. The charter is expressed in English, although it is in fact made between the Societa Anonima Ungherese di Armamenti Marittimo "Oriente" and Hamburger Sud Amerikanische Dampfschiffahrts Gesellschaft. It comes from Hamburg, and has been adopted by the English firm. It provides that the ship shall load a general cargo at Antwerp and proceed outwards to Rio de Janeiro and Santos, there being no provision as to the quantity of cargo for each port that she is to take, and on the right and true delivery to pay the lump sum freight of 6412*l.*, part prepaid on sailing and part on delivery. At Santos she is to discharge on the quay by the express terms of charter, and then in the printed form, which as far as print goes is applicable to any ports in the world, there is this provision: "The charterer paying all dues and duties on the cargo, and the steamer all port charges, pilotages, &c., as customary."

It is not contended on either side that there is any kind of impost levied at Santos which would not be either dues and duties on the cargo or port charges, pilotages, &c., as customary, and there at least those two classifications are exhausted; but the ship, in order to establish an answer to the charterers' claim to indemnity against disbursements on ship's account, has to establish not merely that those are not port charges, pilotages, &c., as customary, which she has expressly contracted to pay, but also that they are dues and duties on cargo, because those and those alone are what the charterer has expressly contracted to pay. It is proved in the case, by the uncontradicted evidence of Mr. Luigi Nicolich, that there are no such dues as these at Rio de Janeiro, and it is amply proved that such dues as these have been well known and regular dues at Santos for a great many years. Under the terms of the tariff, the ship has to pay the dues in question in the first instance, but that is by no means conclusive, because it only refers to the party from whom the dues are to be collected, without defining in itself whether the dues are dues on the cargo or a port charge as customary. It is plain that the scheme of the tariff is to contrast B, which are dues for services not merely paid for directly by the goods, but rendered to the goods, with A, which are quay dues not only payable by ships, but included in their prices of affreightment. What the concern of the docks company of Santos may be with the ship's freight is not apparent—legally none—but those words can hardly have been used, except with some idea of indicating that those are dues not merely payable by ships, but are in a special degree a burden upon the ships, and therefore can be contrasted with services rendered to goods. In this particular case the ship's contract bound her to discharge on the quay, and she therefore was not merely in the position of calling upon the consignee to receive his goods at the ship's rail in an accustomed place of discharge, but the ship was bound to place the goods on the quay, and the quay is there a contrivance for discharge, and not for custody. Hence, therefore, to this particular obligation of the ship landing dues on to a quay and discharging dues for the use of the quay for discharging are particularly appropriate; and another portion of the words, which describes what this particular charge is for, are still more words indicative of a charge for appliances which enable a ship to perform her contract of carriage. They provide that this charge is not only for the use of the quay in discharging, but for the dredging and clearing away of obstructions from the port. If there had been a separate charge for dredging and clearing away obstructions from the port, I think that "port charge" would have been a very convenient term to apply to it. It is pointed out to me very forcibly upon the charter, first of all, that under this charter it is entirely in the charterer's opinion whether he will send most of his cargo to Santos and a little part to Rio, or *vice versâ*, although at Rio he has to take cargo free from alongside, while at Santos the ship has to place it on the quay. Further, that he has the option of underletting the whole or any part of the steamer, and yet the lump sum freight on the ship is the same, and hence if the ship has to pay any more in the course of the process of discharge at Santos than at Rio, where there are no such charges, the result is to give an option to the charterer, which might be in fact determined by a sub-charterer, and which will within very wide limits affect the freight which the shipowner is to get. It is further pointed out that unless these particular dues at Santos are those from which the shipowner was protecting himself when in this contract he stipulated that the charterer should pay all dues on cargo, there appear to be no dues to which those words would be applicable, and from which he would be protecting himself, and therefore, in order that some effect may be given to the express terms between the parties in this case, that I ought to apply the words "all dues on the cargo" to these dues; otherwise the clause in the charter would be of none effect. The force of that argument is very considerably lessened by the circumstance that the charter is in a printed form equally applicable, as filled up, at the will of the parties, to one port of discharge or to many, to a lump sum freight or to a tonnage freight, and that there would be no difficulty in inserting a clause apportioning the total cargo between the two ports, if any importance is attached to the point. First of all, as a question of construction, I have come to the conclusion that these particular charges are not dues on the cargo. Secondly, I have come to the conclusion that they are port charges, and port charges on the steamer. I do not attach any importance to the mere circumstance that the money is collected from the ship, but I think that circumstance, in conjunction with the rest of the words of the tariff, is of importance as showing that it is part of the paragraph which is not providing for dues on cargo, but which is providing for sums to be paid by the ship in return for the provision

of these appliances and structures, without which she cannot perform her contract. I do not think it is practicable to dissect this particular charge into a part connected with the port, namely, dredging, and a part connected with the cargo, namely, discharging; nor do I think it is practicable to give so much importance to the circumstance that discharge is commonly the joint operation of ship and consignee as to warrant me in saying that this combined charge must be deemed to be a charge in respect of cargo, although half of it is for dredging, and half of the remainder at the least must be for the ship's part of the discharge. The expression used has been that these are dues payable in respect of cargo, but the expression in the charter is dues "on" the cargo, and the mere fact that they are incurred in respect of the cargo partly by reason of the ship discharging her cargo in pursuance of her contract on to the quay, and partly by reason of the measure being the number of kilograms of cargo that get to the quay, is not sufficient, I think, to enable me to say that this is a charge within the words "dues on the cargo" in the charter-party. There was a decision a few years ago of the late Walton, J., in the case of *Field Line (Cardiff) Limited* v. *San Paulo Gas Company*, delivered on the 14th April 1908. I have not the facts or the argument, but I have a shorthand note of the judgment, which I think is quite sufficient for the purpose, and I have had handed to me a copy of the charter. The learned judge there was dealing with this same port, this same charge, this same tariff, and on a charter which, although it differed from the present one, was very similar to it. The words in the charter there were: "The freight is in full of trimming and of all port charges, pilotage, and consulages on the vessel. All wharfage dues on the cargo to be paid by the charterers."

Technically, Walton, J.'s judgment does not bind me here, because I am construing a charter in slightly different language, but at the same time, the reasons that he gives are equally applicable to the present case, and I need hardly say that I should differ from any conclusion of his only if I were satisfied first of all that the authority of his judgment was distinguishable, and, secondly, that the convincing character of his reasoning was inapplicable to the present case by reason of some difference in the language of the charter or in the facts. The facts seem to me to be indistingushable. Now in his judgment he analysed the tariff itself, and he stated that the question he had to decide was whether this—that is, this very charge—was a port charge which was payable by the ship, or whether it was a wharfage charge due on the cargo, in which case it was payable by the cargo. He cites the words of the charter, and he then proceeds to examine the nature of the charge, and expresses the opinion that it is really a charge which is for the provision of quays on which the ship can unload her cargo, and is not intended to be a rate for the use of the quays by the cargo. He says: "I do not think it is a rate, although it may be payable by the ship, imposed really upon the cargo for the use of the quays or wharves, or anything of that kind. I think it is what it says—it is a rate on vessels, or a charge on vessels, in respect of the expense to which the docks company has been put for the utilisation of the quays. I do not think that means merely for the use of the quays; I think it means rather for making the quays useful for the purpose, so that they may be fit for the purpose of loading and unloading, and further in respect of the dredging and clearing of the port from obstruction. That is so that ships may be enabled to get to the quays. That seems to me to be intended by the tariff, and it seems to me in fact to be a rate payable by vessels, imposed on vessels, and in the nature of a port or harbour rate, or port or harbour due. That, I think, practically disposes of the case."

And he thereupon proceeds to say that it is not in the words of the charter-party a wharfage due on the cargo, but is a due payable by the ship. These considerations, which appear to me to be of high authority, lead to the conclusion which I have already indicated on the tariff, that I should treat this particular charge as not being a due on the cargo. It is quite true that in the contract before Walton, J. dues on the cargo were qualified and limited; the words were, "all wharfage dues on the cargo," and it is truly said that there might be here dues on the cargo consisting of this very charge which were not wharfage dues on the cargo because they were not in respect of any wharfage. I am unable to accede to that contention, because, having regard to the fact that the due is the same, and that Walton, J. laid no particular stress on the word "wharfage," and that this clause is framed to cover everything under two mutually exclusive categories—"dues on cargo" and "port charges, pilotages, &c., as customary"—this is so clearly a port charge that I do not think it is practicable to distinguish this case from the case before Walton, J. It was pleaded in this case that there was a custom at the port of Santos by which, independently of the charter-party, this sum was payable by the ship, and not by the charterer. I have heard witnesses of experience and competence, who, of course, have given me their experience, but I think that their evidence does not amount to proof of the custom which was pleaded, nor is it now so relied upon. It is really evidence of very experienced gentlemen as to what they have found in practice is done as between shipowner and charterer. Had there been any dispute here as to what is the customary port charge, their evidence would have been of value on that point also, but there is no dispute that this is a customary charge; in fact, it is an obligatory charge under the tariff, and there is no dispute here as to whether the particular thing is or is not a port charge, except such dispute as turns upon the contention that this is not a port charge because it is a due on cargo; and therefore no evidence to denominate the particular port charges at Santos is here required. I regard the evidence simply as showing that in the course of commerce for a good many years past there has been, I think, an invariable, and certainly a very general, practice, by which this due is paid and is borne by the ship. In every case, or in practically every case, the matter is regulated by the charter. This particular dispute, as I understand it, has not arisen, or I have not heard that it has arisen, since the decision of Walton, J., and the consequence is that in one form of words or another mercantile men are in the habit in voyages to Santos of contracting that this particular due

shall be borne by the ship. A new form of charter is on the point of coming out—whether it will be adopted or not I am sure I do not know—which will reverse the incidence of this charge, and therefore I have no doubt that soon there will be other cases which will have to be decided. But at present that is the firm view taken by gentlemen well conversant with the trade of the effect of the contracts which, in one form of words or another, they have adopted. The judgment in this case is for the defendants.

Solicitor for the plaintiffs, *W. G. Glover*.

Solicitors for the defendants, *Rehder and Higgs*.

Thursday, July 4, 1912.

(Before Hamilton, J.)

Coker *v.* Bolton. (*a*)

Marine insurance—Constructive total loss—Freight policy—Institute time clauses—Construction.

The plaintiffs, the assured, were insured with the defendants under a time policy on freight per the steamship Ivy, *valued at* 950*l.*, *"chartered or unchartered, on board or not on board, and (or) bunker out and freight only home." There were three separate printed sets of clauses attached, the principal one being the "Institute Time Clauses—Freight* 1910,*" of which No.* 5 *was as follows: "In the event of total loss, whether absolute or constructive, of the steamer, the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded, or in ballast, chartered or unchartered." During the course of the voyage the vessel became a constructive total loss, but was subsequently towed to a port where she discharged her cargo, and the plaintiff received payment of freight.*

In an action to recover the full amount of the policy:

Held, that the underwriters were entitled to credit for the amount of the freight received by the assured.

Commercial Court.

Action tried by Hamilton, J., sitting without a jury.

The plaintiff claimed on behalf of himself and all other the owners of the steamship *Ivy* for a loss under a policy on the vessel.

An order was made for an early trial of the action without pleadings or discovery on an agreed statement of facts as follows:—

1. The defendants admit that the plaintiffs were at all material times the owners of the steamship *Ivy*, and that they had an insurable interest in the subject-matter of the policy sued upon to the full amount mentioned in such policy.

2. The defendants admit that they underwrote the policy of insurance. . . .

3. During the currency of the policy . . . —namely, on the 2nd Dec.—the steamship *Ivy* stranded in the river Mersey while on a voyage from the Baltic to Manchester with a cargo of grain, and as the result of such stranding became a constructive total loss.

4. At the time of the stranding of the *Ivy* the hull of the steamship was insured for 5150*l.* on a valuation of 9000*l.*, the plaintiffs being uninsured for 3850*l.* . . .

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at Law.

5. On the 2nd Dec. the Liverpool Salvage Association, on the suggestion of the underwriters of the hull policy . . . and by arrangement with the plaintiffs, but without prejudice—that is, without accepting the abandonment of the *Ivy* of which notice had been given—took charge of the steamship *Ivy* and towed her to Manchester and discharged her cargo there. Subsequently the hull underwriters settled with the plaintiffs on basis of settlement at 6250*l.* with interest at 5 per cent. (on the sums payable) for twelve months, plaintiffs to keep proceeds of sale of wreck.

6. The sum of 630*l.* 12*s.* became payable and was paid for freight on the cargo by the consignees to the plaintiffs.

7. The expenses incurred in taking the said vessel to Manchester after she had been floated were borne by the underwriters on the hull policy. Any question of figures can be adjusted hereafter.

8 On the 8th Dec. 1910 the plaintiffs gave notice of abandonment to the defendants which was not accepted, but the plaintiffs were placed by the defendants in the same position as if writs had been issued.

9. The defendants admit that the sum of 450*l.* 15*s* 6*d.* is due to the plaintiffs under the terms of the policy, being the insured amount, 950*l.*, less nineteen-twenty-fourths of the 630*l.* 12*s.* freight received by the plaintiffs as aforesaid.

The policy in question was dated the 25th Nov. 1910, was valued at 950*l.*, and covered freight on the *Ivy*, "chartered or as if chartered, on board or not on board, and (or) bunker coals out and freight only home."

The following clause was attached to the policy:

In the event of total loss, whether absolute or constructive, of the steamer, the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded, or in ballast, chartered or unchartered.

Leslie Scott, K.C. and *J. W. Scott* for the plaintiff.

Baillhache, K.C. and *Leck* for the defendants.

Hamilton, J.—The question which the parties desire to have decided in this action is really a question of the construction of No. 5 "Institute Time Clauses—Freight 1910," applicable to the freight policy to which they are attached.

The plaintiffs, the assured, were insured with the defendants under a time policy on freight by the steamship *Ivy* belonging to them, valued at 950*l.*, "chartered or unchartered, on board or not on board, and (or) bunker coals out and freight only home." There were three separate printed sets of clauses attached, the principal one being the "Institute Time Clauses—Freight 1910." There are thirteen of these. No. 5 is as follows: "In the event of total loss, whether absolute or constructive, of the steamer, the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded, or in ballast, chartered or unchartered." The agreed facts conclude that she stranded in the Mersey on a voyage from the Baltic to Manchester with a cargo of grain, that as the result of such stranding she became a constructive total loss, that by arrangement with the plaintiffs, but without prejudice to their rights, the hull underwriters suggested that

the Liverpool Salvage Association should deal with the casualty, that thereupon the vessel was towed by the Salvage Association to Manchester, that she discharged her cargo there, and that 630*l.* 12*s.* became payable and was paid for freight on the said cargo, and it is common ground that that money came to, and has been retained by, the plaintiffs; and the defendants, admitting that the sum of 450*l.* 15*s.* 6*d.* is due to the plaintiffs under the freight policy, say that that is arrived at by deducting from the insured amount the proportion of the freight received by the plaintiffs as aforesaid. The plaintiffs' claim for the whole amount irrespective of any deduction for this freight received amounts to this, that no matter what was paid by the cargo owners on delivery of the cargo, and no matter what was received by the plaintiff in consequence, be it 100 per cent. or less than the amount of the freight insured, they are entitled by virtue of clause 5 in the event which has happened to recover in full upon the freight policy. The effect of that would be to treat it as a separate and independent insurance which gives to the plaintiff, apart from any actual loss of freight, or any actual pecuniary loss at all, the right to receive the same in the event of the total loss of the steamer. I do not understand that it is argued that that could be the effect interest or no interest, though I think that must follow from the argument, because this clause, looked at by itself, contains no reference to interest. It is argued that the true effect of the express words "in full" is the same as though it were "without the benefit of salvage." In fact, it is only one of many attached clauses ancillary, therefore, to the insurance in the body of the policy, and its function is only to elaborate, and it may be extend, the insurance which is subject to the usual insurance law, and expressed in the old Lloyd's form; and it is clearly contrary to the structure of this, and every similar insurance, to treat clause 5 as though it were the expression of an independent insurance altogether. It is clearly to my mind contrary to the intention of the parties, and contrary to anything under the well-known rules of insurance law, to say that this is a wagering policy imported into the transaction as a separate contract by clause 5 of these clauses; and I am satisfied that I ought not to regard it in that light if by any possibility it can be avoided; and if it is to be regarded in that light I am not sure that I have any power in view of the Stamp Act to enforce it.

The argument by which it is supported, if I rightly appreciate it, is very refined, and is drawn from certain well-known rules which have been laid down in regard to the respective rights of hull underwriters and freight underwriters when cargo is delivered and freight is earned, although the carrying ship has become a constructive total loss, and notice of abandonment has been given. In fact, in this case the plaintiffs had a hull insurance, but it was a hull insurance to which there was also attached "Institute Time Clauses —Hull 1910," which provide that "in the event of total or constructive total loss no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not." Had there been no hull insurance at all the position of the plaintiffs would have been that with a crippled ship they would have had the good fortune to earn freight. I do not think it matters, but I am not informed either as to the total amount of the freight that was in process of being earned, or whether it was being earned under bills of lading or under charter-party, or how; but if the plaintiffs had been insured under a Lloyd's policy without the clause that I have read, the result would have been that the vessel having sustained this casualty, and being a constructive total loss, and the plaintiffs having given notice of abandonment, the underwriters would have been entitled to claim as incident to the ship the sum received upon the delivery of the cargo to the cargo owners; and, therefore, it is said that I must regard the event in clause 5 as having happened in the ordinary sense of the term, the vessel being a constructive total loss. I must then remember that under those circumstances by general law this money would belong to the underwriters, and although it might be received by the hand of the shipowner would be received by him in trust for the hull underwriters only. Consequently, it is said that what he receives, not for himself, but only as trustee for third parties, cannot be claimed as salvage by freight underwriters, nor can they claim as against him a benefit which, in fact, he cannot give them, because he has only received the money in trust. Alternatively, as I understand, it is said the true view of the transaction that happened is that the hull underwriters have by the terms of the hull policy released their right to have the benefit of this sum, and are, therefore, I suppose, *cestuis que trust* who have released to the trustee their interest in the subject-matter. If so, that is *res inter alios acta*, the benefit of which the freight underwriters cannot claim; that is a transaction to which they are strangers, not incident to the ownership of the ship. It is also put, if I follow it, thus: that the right to retain the money as between the shipowner and the hull underwriter arises not as part of the contract of affreightment, and the money he has received is not really the fruit of performance of the contract of affreightment, and, consequently, it is not freight which she, the vessel, earned within sect. 63, sub-sect. 2, of the Marine Insurance Act 1906, but is either the proceeds of some bargain which, as a matter of business, it was convenient for the hull underwriters to make with the shipowner, or is remuneration received by the shipowner by way of *quantum meruit* for the service that was rendered by the ship in being the vehicle in which the cargo owner's property was conveyed from some sandbank in the Mersey to Manchester in tow of a tug.

If I fail to represent the argument more accurately, it certainly is not the fault of anyone but myself; but I think the considerations which I have listened to hardly agree with the facts of the case. Sect. 63, sub-sects. 1 and 2, of the Marine Insurance Act 1906, a codifying Act, provide what is to happen where there is a valid abandonment in the one case, or upon the abandonment of a ship in the other. Nothing prevents the parties interested in that abandonment from agreeing between themselves that the statutory rule shall not apply, and the effect of the Institute time clause in the hull policy is to oust that effect, and to agree that no claim is to be made by the underwriters for freight whether notice of abandonment has been given or not. If, therefore, they are to make no claim, they have no right, and they acquire

no right, and need not to release any right, and for this purpose, that is to say, for the purpose of seeing what the truth of the fact is with regard to the shipowner's receipt of this money, one can look at his contract with third parties. The effect of the contract with the hull underwriters is that he never ceded his right to the freight, he never ceded his right to carry on if he could and to claim from the cargo owners, and he succeeded, although with a battered ship, in earning freight, and has had full benefit of it. In the same way it appears to me that there is no new transaction, by way of argument, with strangers, out of which this money arose, but that, in fact, in the words of the Act, it was freight earned by her subsequent to the casualty causing the loss. But by the agreement which he had made the shipowner continued to be entitled to freight so earned by her, and that being so he has earned some of his freight, and the freight underwriters are entitled to claim to that extent; and although there may have been *primâ facie* a total loss of the freight when the ship stranded and became a constructive total loss, there has been salvage, the benefit of which they are entitled to.

The only difficulty I have in the case is the one of bestowing upon clause 5 the construction that the plaintiff contends for. Mr. Leslie Scott said: What effect is given to the words "in full" in this clause, if the meaning of it is that there is no recovery in full, but only a recovery of part, that is to say, a recovery in full less the share of the salvage? I think the meaning of the words "in full" can only be ascertained by continuing the sentence to the end. It is to be paid in full whether the steamer be fully or only partly loaded, or in ballast, that is to say, not yet loaded at all, and whether she be chartered or unchartered. Those circumstances are not to prevent payment in full. If the risk on freight is attached, if the conditions necessary to have freight at risk have arisen, then if that freight, or that chance of earning freight, be lost, it is to be paid for in full, and not to be reduced to any extent by pointing out that the cargo is not still on board, or that all the cargo was engaged but not loaded, or circumstances of that kind; and the other words of the clause, I think, are clearly intended to deal with the rule that has long been felt to be a difficulty with regard to the right to freight earned after a constructive total loss. Even Blackburn, J., in expounding the rule, dwelt rather upon its intrinsic injustice than on its established legality. And underwriters as well as assured have felt that it is, if I may say so, paradoxical, and have repeatedly endeavoured to deal with it. One instance in which it has been endeavoured to be dealt with is the case of *United Kingdom Mutual Steamship Assurance Association Limited* v. *Boulton* (3 Com. Cas. 330), where the rule, also not without some difficulty of construction, was construed by Bigham, J., as he then was, as being intended to secure that where freight was lost to the shipowner at common law not by perils of the sea, but by the operation of the notice of abandonment in transferring to the underwriters of the ship the freight which was eventually earned, the assured should, nevertheless, recover for that as a loss as though it had been lost entirely from perils of the sea. The same is the object here. Whether the language is felicitous or not is immaterial. I think it is quite sufficiently clear for the purpose. "In the event of the total loss, whether absolute or constructive, of the steamer"—that directs attention to the question that had arisen, as to whether the freight is lost or whether some of the freight is earned, and earned for the hull underwriters, though not lost as a loss on the freight policy—"the amount underwritten by this policy shall be paid," that is to say, the underwriters on this policy shall be liable for the freight so lost, and paid in full, whether the cargo be actually fully on board or partly on board.

I think, therefore, that the plaintiff's construction of the clause fails, and his contention in the case fails. I think the clause sufficiently bears out the contention of the defendants, and unless there is some question of figures which still requires to be adjusted, the amount which the defendants admit to be their liability is right.

Solicitors for the plaintiff, *Lightbound, Owen, and Co.*

Solicitors for the defendant, *Pritchard and Sons.*

Wednesday, July 3, 1912.

(Before HAMILTON, J.)

VIRGINIA CAROLINA CHEMICAL COMPANY v. NORFOLK AND NORTH AMERICAN SHIPPING COMPANY. (a)

Bill of lading—Defect in tap—Loss by fire—Unseaworthiness.

A bill of lading provided that the owners of the vessel were not to be liable "for fire on board" or owing to "unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." The ship took fire in consequence of some oil from a leaky tap coming into contact with a light, the tap being in that condition at the commencement of the voyage.

Held, that as there was no defect existing in the tap which could not be ordinarily remedied in the course of the voyage, the condition of the tap did not in any way constitute initial unseaworthiness.

COMMERCIAL COURT.

Action tried by Hamilton, J. sitting without a jury.

The action was brought in respect of the non-delivery of some 9000 bags of sulphate of ammonia shipped on board the steamship *West Point* from Glasgow to Charleston, and lost owing to the destruction of the vessel by fire while at sea. The action originally came before Bray, J. for decision on certain points of law. The judgment of Bray, J. was affirmed by the Court of Appeal (see 12 Asp. Mar. Law Cas. 82 (1911); 105 L. T. Rep. 810), but on appeal to the House of Lords that tribunal declined to give a decision until there had been findings of fact, and the action was accordingly removed to the King's Bench Division.

The facts and arguments are sufficiently stated in the judgment of Hamilton, J.

Atkin, K.C., *Maurice Hill*, K.C. and *R. A. Wright* for the plaintiffs.

Bailhache, K.C. and *Dawson Miller* for the defendants.

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

HAMILTON, J.—On the 18th Aug. 1910 the *West Point*, the property of the defendants, sailed from Glasgow for Charleston, with a cargo of the plaintiffs' on board. Some time in the morning of the 27th Aug., about 6 30 in the morning, when it was daylight on deck at any rate, if not down in the engine-room, a fire broke out in the engine-room, two persons only being there—the second engineer, Westlake, and Vedoe, the greaser. The fire drove everybody out of the engine-room, and, after raging there for some considerable time, spread to the cargo and the rest of the vessel, with the result that it became necessary to abandon the ship to save the lives of those on board her. They took to the boats, after scuttling the vessel to prevent her from being a danger to navigation, and she went to the bottom.

In this action, which is an action for the loss of the plaintiffs' cargo, the question is first, how this happened; and, secondly, when the cause has been ascertained, whether that amounts to unseaworthiness of the vessel for the carriage of the cargo at the time when she loaded the cargo and sailed from Glasgow; and there is also the question whether, if she was unseaworthy, all reasonable means had been taken to provide against such unseaworthiness. That the cargo was burnt because of the fire in the engine-room is clear; that the fire in the engine-room broke out because a store of paraffin kept in the engine-room escaped so as to come in contact with some naked light and started a conflagration is also clear. All the rest is obscure, and, up to a certain point, rather difficult to settle.

The paraffin was carried in the cavity of the low-pressure column. I am satisfied that that mode of carrying the paraffin was not unreasonable or unsafe in itself, or such as could make the vessel unseaworthy. I am satisfied that the same is true of the presence of the paraffin in the engine-room at all, and this particular part of the engine-room was as well ventilated and as cool as any part. [His Lordship, having considered the evidence, continued:] I have come to the conclusion, therefore, that there was no crack or flaw. [His Lordship having dealt with the cock, continued :] I have come to the conclusion that there is nothing inconsistent with the evidence that I have and can accept, and with the condition of the cock, in the supposition that a sudden and excessive use of force by Westlake, the second engineer, in screwing up the tap might fracture it in the way described, and thus cause the escape of the oil. If that is so, the conclusion to be drawn would be that prior to the sailing of the vessel the tap was in good order, and not open to criticism; and that the accident was caused, and entirely caused, by two acts of negligence on the part of Westlake; one, working in proximity to a possible escape of paraffin with a naked lamp, instead of keeping his daylight job for daylight; and another, nipping up the tap with excessive force, so that he broke what should have been handled more judiciously, and then would not have broken. [His Lordship, having dealt further with the evidence, continued:] An argument was advanced with much skill by Mr. Atkin to the effect that a leakage of the tap, if it was leaking at that joint, though not from any crack and not accompanied by an unprecedented kind of repair to the nipple, was such that the vessel was unseaworthy to go to sea unless it was cured before she sailed. It was not contended, of course, that seaworthiness has to be maintained at the cost of always introducing the latest or the best appliances. It was pointed out that negligence will occur and negligence must be provided for, and that you cannot assume perpetual carefulness in your engine-room, and therefore must have appliances capable of carrying the cargo in safety, even although there be some negligence. I accept that, of course. On the other hand, one must remember that it cannot be expected of a shipowner that he should make his appliances what is called in the United States "fool proof." There must be some limit within which human beings who get wages may be deemed to be capable of doing their duty and willing to do it, and reliance must be placed upon that. Can this defective tap, assuming that there was some little occasional oozing at the joint on the boss, which is all that I think there can have been, and assuming that there may have been an occasional dripping at the bottom of the plug which could have been cured in a moment, be described as constituting a structural defect existing in the vessel at the time of sailing? It appears to me to be impossible. I accept the evidence, of course, that if it had been noticed that there was such a leak, the proper thing would have been to have it attended to at once. The sooner these things are done the better. No leak should be tolerated in any engine room at all; but upon this point I was struck with, and think I ought to accept, the evidence of Mr. Swainston, who is practically experienced as well as experienced as an engineer, who has had experience in the engine-room and in supervising the conduct of engine-rooms, who says to me: "I would, of course, do it at once, and as a superintendent I would order it to be done at once if I saw it; but I should not stop the ship for it, and if I was a second engineer I should, as a matter of course, deal with it without difficulty as soon as she had proceeded." I think that there was no defect existing in the tap at all that could be called more than such a matter as is, and ought to be, ordinarily remedied in the course of the voyage. I think, therefore, that she sailed with a good tap in her, a tap in a reasonable condition, which might be properly left to that which it must receive—the daily attention of the engine-room staff, and a tap which did not in any way constitute initial unseaworthiness. The evidence, as I find it, seems to me not to indicate in any way any fault or privity of the owner.

There only remains one thing to be said. It does not appear to me quite clear what my position and functions are on this occasion. The case has been, by the consent of the parties and with the approval thereto of the House of Lords, remitted to me for trial here out of the usual course. No order was drawn up. The only thing is to ascertain what their Lordships' pleasure really is, and that can be done by the simplest application. If their intention was that the case should be remitted to me for trial, then my judgment is for the defendants with costs. If their intention was that the case should be remitted to me for inquiry and report, then I find the facts, after hearing the evidence, as I have endeavoured to explain them in this judgment.

In neither case is it necessary for me to express any opinion at all upon the questions which, having been pronounced upon by my brother Bray and the Court of Appeal, were taken by way of appeal to the House of Lords, when the step was taken which has resulted in the case being sent down again.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, March 26, 1912.

(Before BARGRAVE DEANE, J. and ELDER BRETHREN).

THE TONGARIRO. (a)

Collision — Compulsory pilotage — Exemption — Ships navigating in ballast—Bunkers in excess of immediate requirements—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 581, 583, 745—*Order in Council the* 25*th July* 1861.

A steamship left Newcastle-on-Tyne for London, on a voyage to Port Chalmers, New Zealand, viâ London, with no cargo, but having on board 3040 *tons of coal, of which* 1095 *tons were carried in her bunkers and the rest in No.* 3 *hold and No.* 3 *between deck; she also had on board* 710 *tons of water ballast. The steamship had a water ballast capacity of* 1538 *tons and the water ballast and coal on board was more than was necessary to make the vessel seaworthy. When coming up the Thames in charge of a pilot she ran into and damaged a pier. In an action brought by the pier owners against the shipowners to recover damages for the injury done to the pier, the shipowners pleaded that the steamship was in charge of a compulsory pilot, and that the damage was caused by his negligence. An order was made that the point whether the steamship was under compulsory pilotage should be tried first. On the hearing:*

Held, that the steamship was navigating in ballast from a port or place in the United Kingdom to another port or place in the United Kingdom within the meaning of the Trinity House by-law authorised by the Order in Council of the 25*th July* 1861, *and was therefore exempt from compulsory pilotage.*

DAMAGE ACTION.

Trial of a point of law as to whether a vessel was in ballast within the meaning of the Trinity House by-law confirmed by Order in Council of the 25th July 1861 and so exempt from compulsory pilotage.

The case made by the plaintiffs on the pleadings was that they were the owners and occupiers of a pier and jetty connecting it with the land at Purfleet on the north side of Long Reach of the river Thames which was used for the purposes of loading and discharging petroleum.

At about 12.10 a.m. on the 7th Oct. 1911, the wind being light and variable the tide last of the flood of about one knot and the weather foggy, the defendants' twin screw steamship *Tongariro* of 8073 tons gross register when coming up Long Reach was so negligently and improperly navigated that, although the pier and jetty were duly lighted by two red lights placed vertically at each end of the pier or jetty which were burning brightly, the *Tongariro* ran into the jetty and forced her way through the same and did so much damage that the pier and jetty became wholly useless to the plaintiffs.

The charges made against those on the *Tongariro* were that they did not keep a good look-out, that they did not keep clear of the jetty, that they were proceeding at an excessive speed and that the engines of the *Tongariro* were not eased, stopped, or reversed.

The case made by the defendants was that shortly after midnight on the 7th Oct. 1911 the *Tongariro*, a steel twin screw steamship of 7600 tons gross, and 4917 tons net register, whilst bound from Newcastle to New Zealand *viâ* London, and proceeding up the River Thames in charge of a duly licensed pilot, was enveloped in a sudden very dense bank of fog, and although the engines which previously had been slowed were put full speed astern, and the helm which had been ported for the lights of craft believed to be barges was put hard-a-starboard, the *Tongariro* struck the plaintiff's pier, and that they were not guilty of any negligence.

Alternatively they alleged that if there was any negligence in the navigation of the *Tongariro*, which they denied, it was solely that of the compulsory pilot in charge of the *Tongariro*.

After the close of the pleadings it was agreed that the question as to whether the *Tongariro* was or was not exempt from compulsory pilotage should be decided before the question of negligence was decided.

During the hearing of the point of law, the following sections of the Merchant Shipping Act 1894 were referred to:

Sect. 581. Every pilotage authority may, by by-law made under this part of this Act, exempt the masters of any ships or of any classes of ships from being compelled to employ qualified pilots, and annex any terms and conditions to those exemptions, and revise or extend any such exemptions or any exemptions existing by virtue of any Act of Parliament, law, charter, or usage, upon such terms and conditions and in such manner as may appear desirable to the authority.

Sect. 583 (1) A by-law under this part of this Act shall not take effect until it is submitted to Her Majesty in Council, and confirmed by Order in Council.

(2) Any by-law proposed to be made under this part of this Act shall, before it is submitted for confirmation, be published in such manner as the Board of Trade direct.

Sect. 745 (1). The Acts mentioned in the twenty-second schedule to this Act are hereby repealed to the extent specified in the third column of that schedule. Provided that (*a*) any Order in Council, licence, certificate, by-law, rule, or regulation, made or granted under any enactment hereby repealed shall continue in force as if it had been made or granted under this Act.

The following Orders in Council were also referred to.

Order in Council the 21st Nov. 1855:

Whereas the Trinity House, being a pilotage authority, hath submitted, for the consent of Her Majesty in Council, the following by-law, *videlicet* That all ships which shall arrive from foreign parts at ports or places in the United Kingdom, within

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

the pilotage jurisdiction of the Trinity House, shall when navigating from thence in ballast to a port or place in the United Kingdom, for the purpose of taking on board cargo for delivery at some other port or place in the United Kingdom, be exempt from compulsory pilotage while navigating within the limits of such pilotage jurisdiction, subject, nevertheless, to the terms and conditions following, that is to say, first that the owner or master of the ship claiming exemption from such compulsory pilotage shall provide himself with a certificate of such exemption for the particular voyage therein specified; such certificate to be signed by the secretary or other proper officer of the Trinity House, and to be delivered to the owner or master of such ship, upon his making a declaration, setting forth that the said ship last arrived from foreign ports, and is about to navigate in ballast to some port or place in the United Kingdom, for the purpose of taking on cargo, for delivery at another port or place, also in the United Kingdom, and such ports or places being named in such declaration. And further that the master of such ship shall produce the said certificate, to any duly licensed Trinity House pilot, who shall offer his services to pilot such ship on such voyage; and such master shall on every such occasion, make an entry in the ship's log, of the offer by a Trinity House pilot, of the certificate of exemption having been produced to the said pilot, and of his services having been declined. Second, that in every case in which a certificate of exemption shall have been obtained by misrepresentation, the person on whose application such certificate shall have been granted, shall forfeit double the amount of the pilotage to which the ship so exempted would, but for such certificate, have been liable, to be recovered in like manner as penalties are recoverable under the said Act; and third that in every case in which a ship, for which a certificate of exemption has been granted, shall proceed oversea, either before or after arriving at the port or place specified in such certificate, without navigating with cargo to some other port or place in the United Kingdom, the pilotage to which such ship would have been liable, had a pilot been employed, shall be paid to the pilotage authority or sub-commissioners of the district, and be applied to the purposes of the pilotage fund. Now, therefore Her Majesty . . . is pleased . . . to declare her consent to the same, and the said by-law is hereby approved accordingly.

Order in Council the 25th July 1861:

Whereas the Trinity House at Deptford Strond, being a pilotage authority, have submitted for the consent of Her Majesty in council, the following by-law, viz:—that all ships navigating in ballast from any port or place in the United Kingdom, to any other port or place in the United Kingdom, shall, when not carrying passengers, be exempt from compulsory pilotage within the pilotage jurisdiction of the said Trinity House. Now, therefore, Her Majesty . . . is pleased . . . to declare her consent to the same, and the said by-law is hereby approved accordingly.

Evidence was given and it was proved that the *Tongariro* was registered at Plymouth, and that at the time of the accident she was in fact in charge of a duly-licensed pilot. She had gone to Newcastle-on-Tyne from London in water ballast with 195 tons of coal on board. When she left Newcastle she was bound for Port Chalmers, New Zealand, *viâ* London; she cleared out from Newcastle for London in ballast, paying no cargo dues to the Tyne commissioners. Her crew were engaged on ships' articles which described the voyage as being a coasting one from London to Newcastle and back to London. On her voyage to London she had 3040 tons of coal on board, 1095 tons in her bunkers, and the rest in No. 3 hold and No. 3 between decks, and she also had 710 tons of water ballast. She could carry about 10,000 tons of cargo. The total capacity of her water-ballast tanks was 1538 tons, and she was stable with water-ballast only. The coal was all intended for consumption on the voyage out to New Zealand; she usually bunkered in London, but she bunkered in Newcastle on this occasion to save the cost of the freight on the coal. The coal in London would have cost about six shillings a ton more.

Laing, K.C. and *Dunlop* for the defendants, the owners of the *Tongariro*.—This vessel is not exempt from compulsory pilotage. Pilotage is compulsory in the Thames unless the vessel is an exempt vessel. The only possible way she can be exempt is if she can be brought within the words of the Order in Council of the 25th July 1861, for it is clear she is not within the exemption created by the Order in Council of the 21st Nov. 1855. It is true this steamship was navigating from a port in the United Kingdom to a port in the United Kingdom, and she was not carrying passengers, but she was not in ballast within the meaning of the Order in Council. Those words only cover vessels of light draft earning no freight. Under the Customs Consolidation Act 1876, s. 6, for customs purposes ships are cleared as in ballast if they leave the United Kingdom not having goods on board except stores borne on the victualling bill, but this is no guide. Again, the second schedule of the Merchant Shipping (Mercantile Marine Fund) Act 1898 appears to make the earning of freight the test as to whether or not a vessel is in ballast for the purpose of escaping the payment of light dues, in this case by carrying the coal she in effect earned a freight, for her owners got the coal at a cheaper rate by buying it in Newcastle than they could have done in London; and the vessel ought to be credited with the difference as freight for the carriage of the coal. No vessel can be said to be in ballast when she is loaded to the extent this one was.

Bateson, K.C. and *Roche* for the plaintiffs, the owners of the pier.—This vessel was exempt from compulsory pilotage. It is admitted that she is not within the exemption created by the Order in Council of the 21st Nov. 1855, but she is clearly within that of July 1861. These bunker coals were ballast. Suppose a sailing vessel were to carry more than one suit of sails, is the spare suit cargo, and would she cease to be in ballast and have to take a pilot? The argument for the defendants amounts to this, that if there is a ton more ballast on board than is necessary to make the ship seaworthy, the ship ceases to be in ballast, and the excess ballast is supposed to become cargo. Further, it is arguable that she was a vessel employed in the coasting trade of the United Kingdom, and so within the exemption created by sect. 625 (1) or (3) of the Merchant Shipping Act 1894, for the facts in this case differ from those in *The Winestead* (72 L. T. Rep 91; 7 Asp. Mar. Law Cas. 547; (1895) P. 170) and *The Glanystwyth* (80 L. T. Rep. 204; 8 Asp. Mar. Law Cas. 513; (1899) P. 118).

Laing, K.C. in reply.—This vessel was not in fact engaged in the coasting trade, and so is not within the exemption created by sect. 645 (1) of the Merchant Shipping Act 1894, and the cases cited clearly show that she is not within that created by sect. 645 (3) of the Act.

BARGRAVE DEANE, J.—This is a very short point, but it is an important one. It is whether a steamer, in other respects within the Order in Council of 25th July 1861, can be said to be in ballast when she is carrying more coal than is necessary to take her from one port to the other. That is what it really comes to.

I am of opinion that this vessel was in ballast within the meaning of the Order in Council and of the by-law passed by the Trinity House and recognised by that Order in Council. The by-law is as follows: "That all ships navigating in ballast from any port or place in the United Kingdom to any other port or place in the United Kingdom shall, when not carrying passengers, be exempt from compulsory pilotage within the pilotage jurisdiction of the said Trinity House." First of all, if her two bunkers had been full and her tanks had been full she would have had about 2600 tons on board; she only had 1100 tons in excess of that. She was, as a matter of fact, only down to three-eighths of her dead-weight capacity—3750 as against 10,000. She had nothing on board which was earning freight. She was on a voyage to Port Chalmers *viâ* London, which would require her to be cleared in London, which would again be a protection against any possibility of fraud upon the Government.

The statute itself has no definition of what is "in ballast," and all counsel for the *Tongarir o* have been able to do is to quote to me two statutes upon other subjects in which there are definitions of "in ballast" which are contradictory of each other; and therefore it is clear that "in ballast" must have a different meaning according to the different circumstances to which it is sought to apply it.

Then I come to another point which seems to me conclusive. In what category would you class bunker coals on board a ship? Surely they are stores. If they are stores, then you have got the definite word "stores" in the language of these provisions in the clearance papers. The clearance says this: "That she has not on board, nor will she take on board at this port, any goods, wares, or merchandise whatever, except such stores as are necessary for the use of the said ship during the said voyage"—the said voyage being described as to Port Chalmers. Now, she did not take on board more stores than were necessary for her purpose on that voyage, because we have it in evidence from the gentleman called—Mr. Haycroft—that she would have required more than the 3040 tons on board to take her all the way to Port Chalmers, and that she would have to take on some hundreds of tons of coal at Teneriffe. I am of opinion that these coals taken on board at this time were stores within the meaning of the clearance; that they were not merchandise in the sense that they were earning freight; that they were nothing which would bring this vessel within the provisions of any regulation which would recognise that she was carrying them as cargo.

Vessels are either in ballast or laden, and if you had seen this vessel in the Thames, only down to three-eighths of her loading draught, you would have said at once she was in ballast. That, however, is not conclusive. It is only in point to the extent that she was light. The whole point is that when a vessel has got nothing on board except these matters which are necessary for her purposes as a travelling vessel, can she be said to be otherwise than in ballast?

There is one other matter which I want to mention. A steamer requires coal for her propulsion at present—she may require oil later on—but a sailing vessel requires canvas. Now, if a sailing vessel has two or three duplicate sets of sails beyond any amount of not-made-up canvas on board, is that to be said to be other than stores? They are just as much stores in the one case as in the other, and in my opinion from whatever point of view you look at this case it cannot be said that this steamer was carrying cargo. If she was not carrying cargo she was in ballast. You cannot say a vessel shall only have so much ballast. There is no regulation prescribing, according to tonnage, how much ballast she shall have. She may be ballasted right down, I suppose, if she thinks right. In my opinion in this case the extra coal she was carrying, which was to be used entirely by herself and in her own furnaces, was nothing more or less than ballast, therefore the pilot was not necessary, and the vessel was exempt. There will be judgment for the plaintiffs on this issue, with costs.

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

Solicitors for the defendants, *Cattarns* and *Cattarns.*

June 24 *and* 25, 1912.

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

THE BITINIA. (*a*)

Collision—Vessel aground in Thames at night—Lights — Validity of rule 30 *of the Thames Rules—Collision Regulations, art.* 11.

A vessel upwards of 150*ft. in length aground in the Thames was exhibiting two white lights, one forward and one aft, in order to comply with rule* 30 *of the Thames By-laws for vessels "of* 150*ft. or upwards aground in or near a fairway."*

It was contended in a damage action that she should have exhibited the two white lights and the two red lights prescribed by art. 11 *of the Sea Rules for vessels "aground in or near a fairway," as rule* 30 *of the Thames Rules was ambiguous, and that therefore art.* 11 *of the Sea Rules was the article to be obeyed.*

Held, that there is no ambiguity in rule 30 *of the Thames By-laws so far as concerns "vessels of* 150*ft. or upwards"; that it was a rule duly made by a local authority as contemplated by art.* 30 *of the Sea Rules, and as such was the rule which applied to vessels "*150*ft. in length or upwards aground in or near a fairway" in the Thames.* (*b*)

The Carlotta (8 *Asp. Mar. Law Cas.* 544; (1899) *P.* 223; 80 *L. T. Rep.* 664) *referred to.*

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

(*b*) This decision does not seem to cover the case of a vessel which may be less than 150ft. in length aground in the Thames Query as to the lights such a vessel ought to carry. It may be that provision will be made to cover this point in the revised Thames Rules which it is understood will shortly come into operation.—ED.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Otaki*; the defendants and counter-claimants were the owners of the steamship *Bitinia*.

The case made by the plaintiffs was that shortly before 10.35 p.m. on the 11th Nov. 1911 the *Otaki*, a steel, twin-screw steamship of 4611 tons net register was, whilst in the course of a voyage from London to New Zealand, laden with a general cargo, manned by a crew of sixty-six hands, all told, and in charge of a duly licensed Trinity House pilot, lying aground in Sea Reach, River Thames, a little above the Chapman Light. The wind was southerly, a fresh breeze, it was raining heavily, and the tide was low water. The *Otaki* was aground on the north bank of the river, heading about east south-east. The regulation white lights, forward and aft, were duly exhibited and burnt brightly, and a proper watch was being kept.

In these circumstances those on the *Otaki* observed, at a distance of one to two miles, and bearing about ahead, the masthead and green lights of the steamship *Bitinia* coming up river. The *Bitinia* was watched, and as she came nearer was heard to blow a port-helm signal, apparently for some other vessel. When a short distance away from the *Otaki* she appeared to port her helm, and showed her red light and subsequently seemed to starboard her helm. Nothing was or could be done on the *Otaki* to avoid a collision, and the *Bitinia*, coming on at a high rate of speed, with her port anchor and port bow struck the port side of the *Otaki* just before the main rigging, doing heavy damage.

Those on the *Otaki* charged those on the *Bitinia* with not keeping a good look-out, with failing to keep clear of the *Otaki*, and with failing to slacken speed, or stop or reverse in due time or at all.

The case made by the defendants and counter-claimants was that shortly before 10 30 p.m. on the 11th Nov. 1911 the *Bitinia*, a screw steamship of 3125 tons gross and 1968 tons net register, whilst on a voyage from Alexandria to London with general cargo, passengers, and a crew of twenty-six hands all told, was in Sea Reach, River Thames. The weather was thick with rain, and the wind a strong south-easterly breeze, with squalls, and the tide low water slack. The *Bitinia*, in charge of a duly qualified pilot, was proceeding up the river to the northward of mid-channel, making about three knots. 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 of her.

In these circumstances the blur of what afterwards proved to be the two white riding lights of the *Otaki* was seen behind the lights of a steamship a quarter to half a mile distant and about one to one and a half points on the starboard bow. The *Bitinia* sounded one short blast, ported her helm, and after passing the last mentioned steamship portside to portside the helm was ported and hard-a-ported for the *Otaki*, but the *Bitinia* owing to the shoal water fell off against her helm, and although the engines were put full speed astern the *Bitinia* with her port bow struck the *Otaki* a sliding blow on the port side. It was then found that the *Otaki* was aground.

Those on the *Bitinia* charged those on the *Otaki* with not exhibiting the two red lights which betoken a vessel aground in or near a fairway, and with not ringing her bell as required by the Thames rules when a vessel is in the fairway and not under way. They further alleged that if there was any negligence in the navigation of the *Bitinia* it was that of the pilot who was in charge by compulsion of law.

The following collision regulations were referred to:

Art 11 . . . A vessel aground in or near a fairway shall carry the above light or lights (that is a white light or lights depending on whether the vessel is anchor over or under 150ft. long) and the two red lights prescribed by art. 4 (*a*).

Art. 4 (*a*) is as follows:

4 (*a*). A vessel which from any accident is not under command shall carry at the same height as the white light mentioned in art. 2 (*a*) where they can best be seen, and, if a steam vessel, in lieu of that light, two red lights, in a vertical line one over the other, not less than 6ft. apart, and of such a character as to be visible all round the horizon at a distance of at least two miles; and shall by day carry in a vertical line one over the other, not less than 6ft. apart, where they can best be seen, two black balls or shapes each 2ft. in diameter.

The following Thames rules were referred to:

Preliminary.—In obeying and construing the following by-laws relating to lights and signals and steering and sailing due regard shall be had to all dangers of navigation and of collision, and to any special circumstances which may render a departure from them necessary in order to avoid immediate danger. Nothing in the following by-laws shall exonerate any vessel or the owner, master, or crew thereof from the consequences of any neglect to carry lights or signals or to keep a proper look-out, or of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. The by-laws as to 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 lights prescribed by the by-laws shall be exhibited.

30. With the exceptions hereinafter named a vessel under 150ft. in length when at anchor or moored shall carry forward, where it can best be seen, but at a height not exceeding 20ft. above the hull, a white light (hereinafter called the riding light) in a lamp so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile. A vessel of 150ft. or upwards in length when at anchor shall carry in the forward part of the vessel at a height of not less than 20 and not exceeding 40ft. above the hull, one such light, and at or near the stern of the vessel and at such a height that it shall not be less than 15ft. lower than the forward light, another such light. The exceptions are as follows: (*a*) Where masted vessels are lying in tiers the outermost off shore masted vessels only of each tier shall carry the riding light; (*b*) Lighters lying at the usual barge moorings in the river above Gravesend are not required to exhibit the riding light; (*c*) every steam vessel, sailing vessel, or lighter moored permanently head and stern in the river shall in addition to or in lieu of the riding light exhibit such light or lights as the conservators shall from time to time order or direct. The length of a vessel shall be deemed to be the length appearing in her certificate of registry. A vessel of 150ft. or upwards aground, in or near a fairway shall carry the above light or lights.

38. All steam and sailing vessels when in the fairway of the river and not under way shall at intervals of about one minute ring the bell rapidly for about five seconds.

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.

Batten, K.C. and *Raeburn* for the plaintiffs.—It is the practice in the Thames to exhibit the two white lights mentioned in rule 30 of the Thames rules in circumstances such as these. The *Otaki* is not within any of the exceptions mentioned in that rule. Even if the lights exhibited were wrong the defendants must show that they were misled by them. The sea rules do not apply in this case:

The Carlotta, 80 L. T. Rep. 664; 8 Asp. Mar. Law Cas. 544 (1899) P. 223.

The real cause of the collision was that the pilot received no assistance from the crew.

Bateson, K.C. and *C. R. Dunlop* for the defendants.—The look-out on the *Bitinia* was at his post and reports were made by him. The collision was not caused by want of look-out. The collision was caused by the pilot porting and going to the north of the small vessel he met, just before he got up to the *Otaki*, and by attempting to go north of the *Otaki*. The *Otaki* should not have exhibited anchor lights for she was not at anchor:

The Thames Preliminary Rule.

When rule 30 says a vessel of 150ft. aground shall carry the above light or lights, it cannot mean that she is to carry anchor lights. There must be some omission in the rule, and it is ambiguous. *The Carlotta* (*ubi sup.*) shows that the Sea Rules apply in the Thames unless there is some local rule which supersedes the sea rule. The local rule here is ambiguous and the *Otaki* should have been exhibiting the two white lights and the two red lights required by art. 11 of the Sea Rules. Rule 30 of the Thames Rules is void for ambiguity.

Batten, K.C. in reply.—There is no ambiguity in rule 30. That rule supersedes art. 11 of the Sea Rules.

BARGRAVE DEANE, J.—This action is brought by the owners of the *Otaki* to recover the amount of the damage sustained by reason of a collision between their vessel and the *Bitinia*, owned by the defendants and counter-claimants. The collision happened about 10.30 p.m. on the 11th Nov. in last year, and it took place about three-quarters of a mile above the Chapman Light, on the north side of the river Thames. The *Otaki*, a big steamer drawing 29ft. of water, found that the tide was too low to let her get safely down over the shoal at the mouth of the river, and so, when she got near the Chapman Light, she turned, and in turning got ashore on the north bank; and there she lay with her head to the southward and eastward. I think that was about 7 30 o'clock. The *Bitinia* was a vessel of some size, over 3000 tons, and she was coming up the river on the north side, in charge of a Trinity House pilot. It appears that he found himself too close to the Chapman Light. He set a course from the Chapman Light of W. by N. which, as I have laid it off, would take him pretty nearly straight to where the bow of the *Otaki* was lying out in the river. As they proceeded on the weather apparently became squally, with a rain storm, and the pilot thought they had better anchor, and the chief officer was sent forward with the boatswain to see that the anchor was clear, ready to let go. Before the chief officer went forward the look-out man reported green and white lights on the starboard bow, and the pilot of the *Bitinia*, who already knew that he was too far to the northward, ported his helm in order to pass that vessel, which was on his starboard bow, showing a green light, port to port, which would take him still more into the northward, away from that centre of the river which was the best place to be in at low water. That was his initial fault. Instead of porting, in my opinion, he ought to have starboarded. But, assuming that he did not starboard, but ported, he knew perfectly well that he was going into the northward. Then he saw, and I am satisfied they were reported, the white lights of the *Otaki*, which was lying on the north side of the river; and he ported still more, with the result that his vessel got on the ground, refused to answer her helm, and ran into the port quarter of the *Otaki*, doing damage. That is the story, and a worse story for a pilot I do not think I have ever heard.

The only question I have to ask myself with regard to the *Bitinia* is, Was the pilot properly supported by the crew? The Elder Brethren and I have discussed with some care the question whether a proper look-out was being kept, and the conclusion I have come to upon the evidence is that a proper look-out was kept on board the *Bitinia*, and that it was solely the fault of the pilot of the *Bitinia* that this collision took place. That, however, does not conclude the case, because counsel for the defendants, on behalf of their clients, have raised another point. They say that the *Otaki* was not properly lighted, and that she did not do what was necessary in the circumstances, she being aground, to give notice to any vessel coming up that she was in that position. In the defence they plead art. 11 of the general Regulations for Preventing Collisions at Sea and also art. 38 of the by-laws of the river Thames These by-laws they say are *ultra vires*. They make use of the Thames by-laws for their own case, but so far as the other side is concerned they say the by-laws are *ultra vires*. Now, what is it that, according to the by-laws, the *Otaki* ought to have done, because for the purpose of to-day I hold that the by-laws are not *ultra vires*, but are binding and have been acted upon for many years? Sect. 191 of the Thames Conservancy Act 1894 provides that: "The Conservators may from time to time make such by-laws as to them seem meet for all or any of the purposes for which by this Act they are authorised to make by-laws, and for all or any of the following purposes—namely," for the regulation, management, and improvement of the Thames and of the navigation thereof, and "for compelling vessels on the Thames to exhibit lights." If that is the case I should say that the by-law is a perfectly good one which regulates the lights which vessels should show at various times and in various circumstances between sunset and sunrise on the river Thames. Accordingly the conservators have made by-laws. If these by-laws are *ultra vires*, some other court must decide that point, as, so far as I am concerned, I am of opinion that they are good by-laws.

The by-law in question is No. 30, which provides for lights to be carried by vessels when

at anchor or moored. It says: "With the exceptions hereinafter named a vessel under 150ft. in length when at anchor or moored shall carry forward . . . a white light (hereinafter called the riding light) . . . A vessel of 150ft. or upwards in length when at anchor"—it does not say when moored—"shall carry in the forward part of the vessel at a height of not less than 20ft. and not exceeding 40ft. above the hull one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than 15ft. lower than the forward light another such light." In other words, a vessel under 150ft. shall carry one light, and a vessel of over 150ft. two lights. Then there follow the exceptions: (*a*) "Where masted vessels are lying in tiers the outermost off-shore masted vessel only of each tier shall carry the riding light." I should say that applies to vessels under 150ft. Then (*b*) "Lighters lying at the usual barge moorings in the river above Gravesend are not required to exhibit the riding light; (*c*) every steam vessel, sailing vessel, or lighter moored permanently head and stern in the river shall, in addition to or in lieu of the riding light exhibit such light or lights as the conservators shall from time to time order or direct." This exception is not a matter of 150ft., above or under. It says: "Every steam vessel," &c. That is an absolutely different class of regulation. It relates to a vessel which is permanently moored in some particular part of the river. She is to carry in addition to or in lieu of the riding light any such light or lights as the conservators may in their discretion order or direct. Up to the present they do not seem to have thought it right to add any other lights, but they do reserve to themselves the right to add to the riding light any such lights as they may think necessary for vessels permanently moored in the river. Then it goes on to this paragraph in the same rule, which is in dispute: "A vessel of 150ft. or upwards aground in or near a fairway shall carry the above light or lights." The difficulty about that is that the rule only mentions vessels of over 150ft. or upwards in respect of which, by the earlier part of the by-law in question, two lights must be carried, and therefore the word "light" is ambiguous, but with regard to a vessel of over 150ft. carrying two lights there is no ambiguity. It seems to me plain that, whether anchored or whether aground, she is to carry those two lights at particular heights above the deck and at particular distances fore and aft, to indicate that she is there, fixed and immovable.

Counsel for the defendants say that, having regard to that particular paragraph, the rule is ambiguous and void for ambiguity; so that it is to be treated as a nullity, and therefore you are entitled to introduce the sea rule, which otherwise would not apply. They say that by the sea rule, which applies where there is no valid local rule, you must carry two red lights, and that as the *Otaki* was carrying two white lights when she was aground she is to blame also. I do not agree with them. The case of the *Carlotta* (*ubi sup.*) has been cited, and in that particular decision, which was not quite like this, because it was broad daylight and there was no question of lights, Gorell Barnes, J. pointed out distinctly that the Regulations for Preventing Collisions at Sea "commence with a preliminary statement that: 'These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by seagoing vessels.' It is also provided by art. 30 of those Regulations that 'nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters.'" If that is the case, that is a precise provision in the sea rules that they shall not apply to the river Thames if there is a rule made by the proper authority exercising jurisdiction over the river Thames, providing for the particular matter in question. In my opinion, as I have said before, art. 30 of the Thames Rules does purport to provide for the case, and that being so, you must not bring in the sea rule, which is a different rule, and would mean this, that a vessel by the Thames rule would require two white lights and by the sea rule would require two white lights and two red lights. That would be a conflict of authority and practice which would cause confusion. In my opinion the contention of counsel for the defendants on the question of the articles and the lights which the *Otaki* should have been carrying cannot prevail. I think the collision was caused solely by the bad navigation of the pilot, who was compulsorily in charge of the *Bitinia*, and both claim and counter-claim will be dismissed, with costs.

Solicitors for the plaintiffs, *Cattarns* and *Cattarns*.

Solicitors for the defendants, *Stokes* and *Stokes*.

July 29 *and* 31, 1912.

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

THE ENTERPRISE. (*a*)

Collision — Breach of collision regulation — Presumption of fault—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 419 (4)—*Collision happening before the passing of the Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57)—*Proceedings taken after the passing of that Act—Application of that Act—Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *ss.* 4 (1), 9 (2).

A steamship dredging up the river Ouse was run into by two lighters proceeding up the river in tow of a tug. The collision happened before the passing of the Maritime Conventions Act 1911, *but proceedings were instituted after, by the owners of the steamship against the owners of the tug to recover the damage. The defendants contended that, even if they were to blame, as the steamship had broken art.* 28 *of the collision regulations by failing to sound whistle signals when she ported and went astern she was also to be deemed to be in fault.*

Held, that as sect. 419 (4) *of the Merchant Shipping Act* 1894 *was repealed by sect.* 4 (1) *of the Maritime Conventions Act* 1911 *and as no proceedings had been taken in respect of the collision before the passing of the Maritime Conventions Act* 1911, *sect.* 9 (2) *and* (3) *of that Act applied, and as the breach of the collision regulations did not in fact contribute to the collision, the steamship was not to blame.*

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

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Gripfast*; the defendants were the owners of the steam tug *Enterprise*.

The case made by the plaintiffs was that shortly before 7.35 a.m. on the 23rd Nov. 1911, the *Gripfast*, a screw steamship of 1109 tons gross and 645 tons net register, 225ft. in length, manned by a crew of sixteen hands all told, was, whilst on a voyage from Poole to Goole in ballast, in Goole Reach, river Ouse, in charge of a duly licensed Ouse pilot. The wind was south-easterly, a fresh breeze, the weather was fine and clear, and the tide flood of a force of about two and a half to three knots. The steamship *Brenda* was aground on Goole Ness on the east side of the river, and was athwart the river head to the shore. The *Gripfast*, which had turned round head to tide below the *Brenda*, and had dredged up past her, was about four ships' lengths above the *Brenda*, and was dropping slowly up in about mid channel with her starboard anchor down, with about twelve fathoms of chain paid out. Her regulation lights for a steamship under way were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

In these circumstances those on the *Gripfast* saw the steam tug *Enterprise* with four barges in tow in two lines, of which the *Dora* was the leading barge, and the *Speculator*, the second barge on the port hand coming up below the *Brenda* bearing on the port bow of the *Gripfast*, and distant about four or five ships' lengths. The *Enterprise* passed round the stern of the *Brenda*, apparently shaping to pass along the port side of the *Gripfast*. The helm of the *Gripfast* was ported to give her as much room as possible, but the lighters in tow of the *Enterprise*, having apparently got caught in the eddy under the *Brenda's* stern, were observed to sheer, and the *Dora* and afterwards the *Speculator* with their port bows struck the port side of the *Gripfast* about amidships doing her considerable damage, and although the port anchor of the *Gripfast* was let go, she fell against the steamship *Aire* receiving further damage. Just before the collision with the *Dora* the engines of the *Gripfast* were given a touch astern to ease the blow.

Those on the *Gripfast* charged those on the *Enterprise* with not keeping a good look-out, with navigating at an excessive speed, with failing to slacken her speed or stop or reverse, with failing to keep to her starboard side of the channel, with failing to pass the *Gripfast* port to port, and with failing to turn round head on tide.

The case made by the defendants was that shortly after 7.30 a.m. on the 23rd Nov. the *Enterprise*, a steam tug of 70 tons gross register 75ft. in length, manned by a crew of four hands all told, was whilst on a voyage from Hull to York with four laden barges in tow in Goole Reach, river Ouse. The wind was a light air from the north-west, the weather was fine and clear and the tide very strong flood four to five knots in force. The *Enterprise* was on an up-river course making about two knots through the water. It was daylight and a good look-out was being kept on board her.

In these circumstances those on board the *Enterprise* observed the *Gripfast* about three-quarters of a mile away lying to the tide apparently stationary, and at anchor on the port bow and on the west side of the river. No lights were noticed on her, it being daylight. As the *Enterprise* proceeded on with her four laden barges in tow, she gave one short blast to indicate that she was going to pass the *Gripfast* under port helm. No reply was heard. As the *Enterprise* approached the *Gripfast*, the latter was seen to be working her engines astern. A second short blast was blown. No reply was heard. The *Gripfast* apparently increased her speed astern, and instead of remaining fore and aft the river as she could and ought to have done, swung across the river narrowing the passage between the *Brenda* (a vessel ashore on the Goole Ness) and herself. The helm of the *Enterprise* was at once ported and hard-a-ported, but, although she succeeded in clearing the *Gripfast*, first the *Dora*, the leading lighter in her port tier, and then the *Speculator*, which was behind the *Dora*, were carried down on to the *Gripfast* by the tide or by the wash from the propeller of the *Brenda*, which vessel was working her engines astern, the port bows of the barges colliding with the port side of the *Gripfast* about amidships.

Those on the *Enterprise* charged those on the *Gripfast* with not keeping a good look-out, with not keeping her fore and aft of the river and allowing her to impede the traffic, with neglecting to keep to the western side of the river, with improperly going astern, with neglecting to keep clear of the lighters, with neglecting to navigate with care and with failing to signify their course by whistle signal.

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

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 following Ouse (Lower) Rules 1910 were also referred to:

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.

9. A vessel when at anchor except when lying alongside any quay, jetty, wharf, or landing place shall, between sunrise and sunset, carry in the forward part of the vessel at a height of not less than twenty and not exceeding forty feet above the hull a black ball not less than fifteen inches in diameter, provided that in the case of a vessel within Article 7 of the General Regulations such black ball may be carried at a height above the gunwale not less than nine feet.

14. When a steam vessel is commencing to turn round or for any other 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 blast signals prescribed by article 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.

18. No vessel, unless compelled by stress of weather, fog, or other emergency, shall anchor in the fairway of the river in such a position as unnecessarily to obstruct, impede, or interfere with passing vessels. A vessel, which by stress of weather, fog, or other emergency, may be compelled to anchor in any such prohibited position shall, with the least possible delay, remove therefrom.

20. No vessel shall be allowed to drift otherwise than under control, or to drift athwart or abreast.

21. 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 of, 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 sections of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), and the Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57) were referred to.

The Merchant Shipping Act 1894, s. 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 regulations necessary.

The Maritime Conventions Act 1911:

Sect. 4 (1). Sub-sect. (4) of section four hundred and nineteen of the Merchant Shipping Act 1894 (which provides that a ship shall be deemed in fault in case of a collision where any of the collision regulations have been infringed by that ship), is hereby repealed.

Sect. 9 (2). This Act shall not apply in any case in which proceedings have been taken before the passing thereof, and all such cases shall be determined as though this Act had not been passed. (3) The provisions of this Act shall be applied in all cases heard and determined in any court having jurisdiction to deal with the case, and in whatever waters the damage or loss in question was caused, or the salvage services in question were rendered, and sub-section 9 of section 25 of the Supreme Court of Judicature Act 1873 shall cease to have effect.

Laing, K.C. and *R. H. Balloch* for the plaintiffs.—The evidence of the defendants' witnesses ought not to be accepted. It is impossible that this tug-master thought that the *Gripfast* and these other vessels were all at anchor. It is clear that the *Enterprise* is to blame for excessive speed. The *Gripfast* did nothing which contributed to or caused the collision.

Bateson, K.C. and *J. B. Aspinall* for the defendants.—Even if the story told by those on the *Enterprise* is not accepted the *Gripfast* must be held to blame, for she did not sound whistle signals when she ported and went astern. The case has been argued on behalf of the plaintiffs as if the Maritime Conventions Act 1911 applied. The collision in this case happened on the 23rd Nov. 1911, and the Act did not come into force until the 16th Dec. 1911, and therefore if the *Gripfast* broke any of the collision regulations she is deemed to be in fault under sect. 419 (4) of the Merchant Shipping Act 1894 unless the plaintiffs show that the breach of the regulation could not by any possibility have contributed to the collision, and that they have not done.

Laing, K.C. in reply.—The fact that the whistle of the *Gripfast* was not blown had no bearing on the collision. The Maritime Conventions Act 1911 does apply to this case. Sect. 419 (4) of the Merchant Shipping Act 1894 is a direction to the court that when it is proved to the court before whom the case is tried that any of the collision regulations have been infringed the court shall deem that vessel to be in fault, but on the 16th Dec. 1911 sect. 4 (1) of the Maritime Conventions Act 1911 repealed sect. 419 (4) of the Merchant Shipping Act 1894, and the result is that in cases tried after the 16th Dec. 1911 there is no section of the Merchant Shipping Act in existence which says that a vessel is to be deemed to be in fault for a breach of the collision regulations, and the court before whom the case is tried has to consider whether the breach of the regulations in fact caused the collision or contributed to it. Sect. 9 (2) of the Maritime Convention Act 1911 enacts that the Act is not to apply to any case in which proceedings have been taken before the passing of it which shows that it is to apply to any case in which proceedings are taken after the passing of it. The writ in this action was issued on the 24th Jan. 1912, that is the date on which the proceedings were taken, and the Act therefore applies to this case.

BARGRAVE DEANE, J.—This case depends largely on a question of fact, and I believe the evidence of the plaintiffs. I find this is the true state of things.

The *Gripfast* was making for Goole Dock, and when she got to Goole Reach, somewhere opposite the green light which we hear so much of in these cases, it is perfectly manifest that she adopted the ordinary rule of navigation in that part

of the river. She turned under port helm, dropped her anchor, and dredged up with her anchor under her foot, making up to that portion of the river above Goole Dock. In that position there was on her port side as she dredged up the *Brenda*, a vessel which was ashore on the east side pretty well at right angles to the river, with her stern sticking out into the river. The *Gripfast*, dredging up, saw coming up the river on her port bow this tug with four lighters in tow, and it is important to remember it is the fact in this case that the four lighters were two abreast. There was a scope of about 15 fathoms of line out from the stern of the tug to the leading lighters, and of 10 fathoms between the leading lighters and the after lighters. Therefore the total length of the tug and tows was over 380ft. That is important to remember. It is not like the river Thames, where you have short tow ropes. These long tow ropes of course rendered the navigation of the lighters more difficult. It is agreed that they each had a rudder, and I suppose they had rudders of some size, because it is no use having a rudder on lighters of this description unless it is a broad one. This tug, coming up, blew a port-helm signal. It does not appear quite where she blew that signal, and it does not matter much. She blew it to denote that she was porting her helm, which would head her in towards the *Brenda*. Any ordinary man who knew that water or any water with a tideway would know that there must be a set of the tide off the starboard quarter of the *Brenda* as she lay ashore, setting out towards mid-channel. The *Gripfast* continued to dredge up, I find as a fact, until she got four or five lengths up river from the stern of the *Brenda*. I do not believe the story of the tug-master that the collision took place off the *Brenda*—it is in conflict with all the other evidence in this case—but I believe it took place, as I have said, four or five lengths up river—150yds. above the *Brenda*. The *Gripfast* continued to dredge, and the tug, going at full speed past the *Brenda*, felt the set of the tide, but she managed to avoid the effect of the set. She had this motive power of her own, which enabled her to do that, but the two sets of lighters, with the long scope of rope, would feel this set and would be shot across towards the middle of the river. That is what happened. They were shot across towards the *Gripfast*, and the tug, continuing at full speed, would take them still further on and cause the collision just about where the plaintiffs' witnesses say it occurred.

In my opinion the tug-master was in a hurry, and he seemed to think everybody ought to give way to him, and that he would make a push for it. He took the risk. He ought to have known the danger of the risk he was taking. Whether he shut his eyes to it I do not know, but he took the risk, with the result that the accident happened in the way I have described.

I am advised by the Elder Brethren that, although possibly he could not have stopped his engines altogether for any length of time, he might have eased down and kept a slight strain on the tow rope, which would have lost him a minute and a half to two minutes perhaps; and if so he might have succeeded in getting through. The facts are against him. By keeping his engines going full speed ahead he got his vessel into the particular place at the particular time. If he had been a minute later, he would not perhaps have been taking his lighters into collision. It was due entirely to the stubborn determination of the tug-master to try to force his way through a difficult place without taking into account all the dangers, and running the risk which I have mentioned.

The defendants said that the *Gripfast* ought to have given notice that she was going astern, and ought to have given notice that she had ported her helm at a particular time. I do not think that is upheld by the evidence. I think the porting of the helm and the putting of the engines astern were done at the very last moment, when the collision was inevitable, and that there was nothing done on the part of the *Gripfast* which could in fact have caused this collision or contributed to it. I am afraid that under the old state of the law I should have had to say that, as the master of the *Gripfast* ported and reversed without sounding the proper whistle signals, he was to blame for not blowing his whistle; but the Court of Appeal have been, I think, rather too strict in the line which they have taken, and the Legislature seems to have thought they had been too strict. They have taken away that arbitrary rule which has been in existence, and have left the court to follow what I think is the proper rule, and to say, "Did this want of obedience to the regulations in any way contribute to the collision?" In my opinion, and the Elder Brethren so advise me, the porting and reversing could not have contributed to the collision. It was broad daylight, and everything was open to the eyes of the tug-master. He saw and knew exactly what was going on, and he has come here and deliberately told us what was untrue, about the *Gripfast* being right athwart the river and going astern and getting into his way. If his story was true he might be right, but I do not believe it, and I think he and the witness from the quay have deliberately tried to mislead the court. Therefore I am of opinion that the failure of the *Gripfast* to blow "port helm" and "going astern" signals had nothing whatever to do with the collision, which was inevitable from the time the tug-master determined to force his way through between the *Gripfast* and the *Brenda*.

I must say a word about the Maritime Conventions Act. I can only read that Act literally. I do not import words into it, or say that the plain language of the Act means anything other than it says. Sect. 9, sub-sect. 2, is as follows: "This Act shall not apply in any case in which proceedings have been taken before the passing thereof, and all such cases shall be determined as though this Act had not been passed." It is perfectly plain language. It does not say "the Act shall not apply to any case in which the collision occurred before the passing of the Act," but "it shall not apply to any case in which proceedings have been taken." Counsel for the defendants asked me to read it as though it said "in which the collision happened before the passing of the Act." Why the Legislature dealt with it in that way it is not for me to say, but the words are so plain that there cannot be any doubt about it. Sub-sect. 3 says: "The provisions of this Act shall be applied in all cases heard and determined in any court having jurisdiction to deal with the case."

Therefore I am clearly of opinion that the Legislature have clearly said that the application of the Act is determined by the date of the proceedings and not by the actual date of the accident. That being so, I feel perfectly justified in coming to the conclusion I have done, although under the old practice, as laid down by the Court of Appeal, if the whistle was not blown, the Court of Appeal would have held that that was in itself sufficient to make the vessel to blame under sect. 419 of the Merchant Shipping Act. Under the Maritime Conventions Act the court is clearly authorised by sect. 4, sub-sect. 1, to see whether the breach of the regulation did or did not contribute to the collision. It means that the old statutory provision that the mere fact of a breach of the regulations, whether it did or did not in fact contribute to the collision, is not to be sufficient to render a vessel responsible for the collision as one of two wrongdoers is repealed, and the court is left to exercise its own judgment and discretion in the case before it. I am of opinion that the *Gripfast*, in this case, is not in any way to blame for this collision. The whole fault of the collision was due to the tug-master, and the *Enterprise* is alone to blame for the collision.

Solicitors for the plaintiffs, *Botterell* and *Roche*, agents for *Botterell, Roche*, and *Temperley*, Newcastle-on-Tyne.

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

Wednesday, July 31, 1912.

(Before BARGRAVE DEANE, J.)

THE CALIPH. (a)

Collision—Loss of life—Action in rem *to recover damages for loss of life—Action brought more than twelve months after the death of the deceased —Fatal Accidents Act* 1846 (9. *&* 10 *Vict. c.* 93), *ss.* 1, 3—*Maritime Conventions Act* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *ss.* 5, 8.

A steam trawler collided with a ketch. The ketch was lost, and in consequence of the collision her crew, one of whom was her owner, were drowned. After the passing of the Maritime Conventions Act 1911, *and more than a year after the collision, the widow of the owner instituted proceedings* in rem *to recover damages for the loss of the ketch, and damages on behalf of herself and her four children under the Fatal Accidents Act for the loss of life of her husband. The defendants admitted liability for the loss of the ketch, but alleged that the action to enforce the right given by the Fatal Accidents Act should have been brought within twelve months after the death of the deceased, and that, as that had not been done, the plaintiff had lost her right to recover anything in respect of the loss of her husband.*

Held, that as sect. 5 *of the Maritime Conventions Act* 1911 *provided that damages for loss of life were included in the damage recoverable in the Admiralty Court and enacted that such damages should be recoverable in an action* in rem, *and that as sect.* 8 *of the Act provided that an action* in rem *might be brought to recover damages for loss of life within two years from the date when the damage, loss, or injury was caused, it extended the time under sect.* 3 *of Lord Campbell's Act from one year to two years, and that the widow was entitled to recover.*

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

DAMAGE ACTION.

The plaintiff was the widow of Joseph Williams, the owner of the ketch *Glyndwr*; the defendants were the owners of the steam trawler *Caliph*.

The action was brought by the plaintiff as administratrix of the estate of her husband to recover the damage sustained by the loss of the ketch and to recover damages for herself and her four children for the loss of her husband, Joseph Williams, who met his death by drowning as a consequence of the collision.

The case made by the plaintiff was that on the afternoon of the 16th Dec. 1910 the *Glyndwr*, a ketch of 26 tons register, manned by Joseph Williams and another hand, was lying properly and safely at anchor in Dale Roads, Milford Haven. The wind was westerly, blowing very strong; the weather was squally and the tide was flood, and a proper anchor watch was being kept.

In these circumstances the *Glyndwr* was fouled by the *Caliph*, which drifted down upon her and broke her adrift, with the result that she drifted helplessly across the roads and was totally lost on the rocks near the Castle Head, both members of her crew being drowned. After breaking the *Glyndwr* adrift, those on the *Caliph* made no efforts, as they should and could have done, to save either the ketch or the lives of those on board of her, but steamed away without attempting to render assistance.

The plaintiff charged those on the *Caliph* with not keeping a good look-out, with giving the *Glyndwr* a foul berth, with failing to keep clear of her, with being improperly and insecurely moored, and with neglecting to render assistance to the *Glyndwr* or her crew in breach of the duty imposed on them by sect. 422, sub-sect. 1 (*a*), of the Merchant Shipping Act 1894 and sect. 6 (1) of the Maritime Conventions Act 1911.

The defendants admitted liability for the value of the *Glyndwr* and claimed a reference to the registrar and merchants to assess the amount of damages for that, and as to the claim for damages under the Fatal Accidents Act they alleged that by sect. 3 of that Act every action to recover damages for loss of life had to be commenced within twelve calendar months after the death of the deceased person, and that the plaintiff had failed to do that.

The plaintiff relied on the following collision regulation:

> 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 statutes were cited:—

The Fatal Accidents Act 1846 (9 & 10 Vict. c. 93):

> Sect. 1. Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not

ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sect. 3. Provided always that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

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

Sect. 7. The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

The Merchant Shipping Act 1894:

Sect. 422 (1) (*a*). In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any), (*a*) to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable and may be necessary to save them from any danger caused by the collision, and to stay by the other vessel until he has ascertained that she has no need of further assistance.

The Maritime Conventions Act 1911:

Sect. 5. Any enactment which confers on any court Admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*.

Sect. 6 (1). The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, her crew, and passengers (if any), render assistance to every person, even if such person be a subject of a foreign State at war with His Majesty, who is found at sea in danger of being lost, and, if he fails to do so, he shall be guilty of a misdemeanour.

Sect. 8. No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment: Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

Laing, K.C. and *Raeburn* for the plaintiff.—The collision took place on the 16th Dec. 1910, and the plaintiff's husband was drowned on that day. The writ in this action was issued on the 6th May 1912, and an appearance was entered on the 25th May. The right to damages was given to the widow in 1846 by sect. 1 of the Fatal Accidents Act, and sect. 3 of that Act provided that the action to enforce that right, which was a right against a person, should be commenced within twelve calendar months after the death. In 1861 sect. 7 of the Admiralty Court Act gave the Admiralty Court jurisdiction to try any claim for damage done by any ship, and by sect. 35 that jurisdiction could be exercised *in rem* or *in personam*, but it was decided in *The Vera Cruz* (52 L. T. Rep. 474; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. 59) that there was no right *in rem* for damages recoverable under the Fatal Accidents Act as they were not damages done by a ship. On the 16th Dec. 1911 the Maritime Conventions Act came into force, and sect. 5 of that Act provides that any enactment which confers on any court Admiralty jurisdiction in respect of damage shall have effect as though such damage included damages for loss of life, and that accordingly proceedings may be taken *in rem* or *in personam*. That section clearly sweeps away the decision in *The Vera Cruz* (*ubi sup.*). Sect. 8 of the Maritime Conventions Act provides that no action shall be maintainable in respect of damage or loss to another vessel or in respect of damages for loss of life or personal injuries suffered by any person unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused. The loss in this case was caused on the 16th Dec. 1910 and proceedings were commenced on the 6th May 1912—that is, well within the two years. The right to recover these damages may be put on two grounds—first, that the time limit in sect. 3 of the Fatal Accidents Act has been enlarged by sect. 8 of the Maritime Conventions Act, just as it was curtailed in certain cases by the Public Authorities Protection Act 1891 (*Markey* v. *Tolworth*, 83 L. T. Rep 28; (1900) 2 Q. B. 454); or, secondly, that the Fatal Accidents Act gave a right which was enforceable for a year against a person and the Maritime Conventions Act 1911 provided that that right may be enforced by a new remedy—namely, an action *in rem*, which is something quite distinct from an action *in personam* (*The Burns*, 96 L. T. Rep. 684; 10 Asp. Mar. Law Cas. 424; (1907) P. 137) and which may be brought within two years of the loss. On either ground the widow has this right *in rem* up to the 16th Dec. 1912.

Bateson, K.C. and *Noad* for the defendants.—The widow can only bring an action under the Fatal Accidents Act within a year of the loss. There is no doubt that sect. 5 of the Maritime Conventions Act 1911 refers to actions under the Fatal Accidents Act, and they may now take the form of an action *in rem*, but sect. 3 of that Act is not repealed, and the action *in rem* must be brought within twelve calendar months of the death. Sect. 8 of the Maritime Conventions Act, which deals with limitations of actions, refers to actions in respect of any damage or loss to another vessel or to actions in respect of damages for loss of life or personal injuries, and says they shall not be maintainable unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused, but the two years only applies to actions for damage or loss to other ships or to actions for personal injuries,

but no reference is made to actions for damage for loss of life. This is not damage done by a ship within the meaning of sect. 7 of the Admiralty Court Act 1861:

The Rigel, 106 L. T. Rep. 648; (1912) P. 99.

Statutes are to be construed as only applying to cases and facts which come into existence after the statutes are passed unless a retrospective effect is clearly intended:

Maxwell on Statutes, 4th edit., 321.

BARGRAVE DEANE, J.—This is an action in which a vessel at anchor was driven down upon by another which broke her adrift. It was blowing hard at the time, and the vessel drove ashore and both hands on board were drowned.

It is admitted that this accident occurred through the negligence of those on board the *Caliph*. This widow would have had no right of action for the loss of the life of her husband but for Lord Campbell's Act of 1846 (9 & 10 Vict. c. 93). By sect. 3 of that Act she is entitled to bring an action for damages for the loss of the life of her husband, but she must bring it within twelve months after the death of her husband. So the law stood, and, but for the Maritime Conventions Act, so the law would still stand; but sect. 8 of the Maritime Conventions Act, according to the contention of the plaintiff, extended the time to two years.

The section says this: [His Lordship referred to the section, and continued:] Therefore, in respect of the matters mentioned in the earlier part of the section, any action must be commenced within two years. The words are "damage, or loss, or injury." The first is damage or loss to another vessel, the second damages for loss of life or personal injury, and then there comes salvage. Therefore you have got exactly the same language used, except the words "loss of life," which is not mentioned in the later part of the section. But it is part of the very same section, and it says that the action shall not be maintainable unless brought within two years.

The section goes on to say that "an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment"—which would be a considerable time after the original loss.

As I read this section, it extends the time in which alone an action could be brought by a widow for damages for the loss of the life of her husband from one year to two years. Counsel for the defendants say: "Under Lord Campbell's Act, this man having been drowned on the 16th Dec. 1910, the widow ceased to have any right of action after the 15th Dec. 1911, and the Maritime Conventions Act only receiving the Royal Assent on the 16th Dec. 1911—the next day—she cannot in this way revive an action which is already dead" In the case of *The Enterprise* (*ante*, p. 240) I tried to point out that the Legislature in passing the Maritime Conventions Act was dealing, in regard to the application of the Act, not with the date of the cause of action, but with the date at which proceedings were commenced; and this statute says the action shall be brought within two years from the date of the right of action, whereas Lord Campbell's Act says one year. I have no doubt myself, although it may be badly worded, as, unfortunately, many Acts of Parliament in recent years have been, that what the Legislature meant by this section was that an action for damages for loss of life should not be maintainable unless brought within two years after the date when the damage or loss was caused.

Therefore I am of opinion that, under the Maritime Conventions Act, the time under Lord Campbell's Act limiting the right of action to one year after the date of death is extended to two years. I think that is the short point which I have to decide, and I decide that the plaintiff is entitled to recover under sect. 8 of the Maritime Conventions Act 1911, which extends the time under sect. 3 of Lord Campbell's Act.

Solicitor for the plaintiff, *W. W. Stocken*.

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

Supreme Court of Judicature.

COURT OF APPEAL.

July 16, 17, 19, 20, *and* 24, 1912.

(Before VAUGHAN WILLIAMS, FLETCHER MOULTON, and BUCKLEY, L.JJ.)

CANTIERE MECCANICO BRINDISINO *v.* JANSON AND OTHERS.

CANTIERE MECCANICO BRINDISINO *v.* CONSTANT. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Policy on floating dock—"Seaworthiness admitted"—Concealment—Waiver—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 17, 18, 20.

The plaintiffs effected an insurance on a floating dock, which was to be towed from Avonmouth to Brindisi, against all the usual risks, and the policy contained a clause "seaworthiness admitted."

Although the plaintiffs believed that the dock was fit for the voyage, it was not in fact seaworthy, as it required special strengthening in order to fit it for the voyage. During the voyage the dock sank and was totally lost. In an action on the policies:

Held, that the underwriters, who were aware that the subject-matter of the insurance was a dock and not an ordinary sea-going vessel, were by reason of the admission of seaworthiness put upon inquiry as to the dock's construction, and the plaintiffs were not bound to disclose the want of special strengthening.

Decision of Scrutton, J. (12 *Asp. Mar. Law Cas.* 186; 106 *L. T. Rep.* 678; (1912) 2 *K. B.* 112) *affirmed.*

APPEAL from a decision of Scrutton, J. sitting without a jury in the Commercial Court.

The plaintiffs, who carried on business at Brindisi as shipbuilders and repairers, claimed to

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

recover under certain policies of insurance against certain underwriters and insurance societies in respect of the loss of a floating dock.

The dock, which was constructed of iron, was built in 1893 for the Bristol Corporation, and was originally stationed inside the old dock at Avonmouth. The dock was 365ft. long, 85ft. wide, and 19ft. deep. It was constructed with six pontoons, the depth of each being 8ft, and the height of the side walls above the pontoons 29ft. The side walls were connected to the pontoons by strong angle irons on both sides.

The dock was purchased in 1910 by Mr. Constant, the defendant in the second action brought by the same plaintiffs for 5000*l.* for the purposes of resale. The pontoons and walls had to be taken apart to enable the structure to be floated out, each wall being floated out on two pontoons. The dock was then examined and re-erected, 20,000 bolts which had been used for connecting the walls of the pontoons having been renewed, and new joining material being fitted to all water-tight joints.

On the 29th Aug. 1911 Mr. Constant sold the dock to the plaintiffs for 19,000*l.*, the price to include cost of towing from Avonmouth to Brindisi, and cost of insurance, fittings, strengthening, and towing gear; 1000*l.* to be paid on the signing of the contract, 15,000*l.* when ready for sea, and the balance was to be placed on deposit and released on the safe arrival of the dock at Brindisi. The vendor agreed to hand over to the buyers, before the voyage commenced, Lloyd's policies of insurance for 16,500*l.*

The plaintiffs said that Mr. Constant employed a firm called Lotinga and Co. to make inquiries as to the cost of insurance for the voyage. Lotinga and Co. employed Tozer and Co., insurance brokers at Lloyd's, to effect the insurance, and Tozer and Co. effected insurances on the dock for 12,000*l.* at 80*s.* per cent., and for 6000*l.* at 100*s.* per cent. For the information of the underwriters, Tozer and Co. made inquiries of Lotinga and Co. as to the dock, and, in particular, if it was new, and, if not, when it was surveyed last. In reply, Lotinga and Co. furnished the following particulars: "Just been newly repaired; pontoons taken abroad and thoroughly repaired and strengthened to make the voyage." This information (the defendans alleged) was passed on in some form or other to the underwriters by Mr. Bullock, of Tozer and Co., and the underwriters initialled the slips on the 23rd and 24th Aug.

The insurance being a matter of some difficulty to arrange, a report was obtained from a Mr. Watkins, a surveyor, who said that he found every part of the dock in good order, and that in his opinion its condition was practically as new. He stated that he had compared the construction and strength of the dock with that of other floating docks which had been towed to various ports, and found this dock as strong and well fitted as any. He also expressed the opinion that the vessel might be safely towed to a Mediteranean port, provided that suitable arrangements for towing were made. This report was shown to several of the underwriters who undertook the risk.

The insurances were effected as upon a floating dock in tow of two tugs from Avonmouth to Brindisi against all the usual risks, the policies also containing a clause: "Seaworthiness admitted."

On the 13th Sept. the dock left Avonmouth in tow of two tugs, and on the 16th Sept., when about 100 miles west of Ushant, the dock sank in two pieces, the walls and pontoons having parted amidships.

The defendants set up the defence that they had been induced to subscribe the policies by reason of the concealment of a material fact—viz., that the dock was being sent on the voyage without the additional strengthening usual and necessary for the dispatch of a dock on an ocean voyage. Also that they had been induced to subscribe the policies by a material misstatement of fact at the time when the slips were initialled by the broker through whom the insurance was effected—viz, that the dock had been nearly rebuilt and thoroughly repaired and strengthened for the voyage. They contended at the trial that the fact that the dock had not been specially strengthened for the voyage ought to have been disclosed (Marine Insurance Act 1906, s. 18), for it was a material circumstance affecting the risk and known to the assured, and one which, if disclosed, would have caused the underwriters to refuse the risk.

After hearing the evidence, Scrutton, J. found the following facts on the question of concealment: (1) That the dock was not at the time of sailing as fit for the voyage as was usual and proper for such an adventure, or as it could have been made by ordinary available means—in other words that it was not seaworthy; (2) that the dock had not been strengthened for the voyage in the sense in which the term would be ordinarily understood; (3) that the fact that the dock had not been strengthened for the voyage was clearly material to the question whether, and at what premium, the underwriters would insure—if they had been told of it they would either have refused the insurance or have made further inquiry as to the construction of the dock; (4) that none of the parties knew or believed that the dock was not seaworthy—they all thought the dock was fit for the voyage. As to the defence of misrepresentation, Scrutton, J. was not satisfied that the alleged misrepresentation had been made. He held that the underwriters were by reason of the admission of seaworthiness put on inquiry as to the construction of the dock, and that the plaintiffs were not bound to disclose the want of special strengthening, and he gave judgment for the plaintiffs.

The defendants appealed.

Atkin, K.C., *Holman Gregory*, K.C., and *R. A. Wright* for the appellants.

Bailhache, K.C. and *F. D. Mackinnon* for the respondents.

The nature of the arguments appears sufficiently from the judgments.

Leslie Scott, K.C. and *Roche* attended the proceedings in the interests of Mr. Constant, the respondent in the second appeal (which was dismissed without any further argument as a necessary consequence of the dismissal of the first appeal).

Cur. adv. vult.

VAUGHAN WILLIAMS, L.J. read the following judgment:—This is an action on a policy of marine insurance upon a floating dock in tow of

two tugs from Avonmouth to Brindisi. Such policy insured the dock against all usual perils. The claim was for total loss. By the policy the seaworthiness of the dock was admitted. The underwriters respectively plead that they are not bound by reason of the concealment of a material fact—namely, that the dock was being sent on the voyage without the additional strengthening usual and necessary for the dispatch of a dock on an ocean voyage; and, further, or in the alternative, they plead that the defendants were severally induced to subscribe the respective policies by a material misstatement of fact made to them orally, at the respective times when, as appears from the slips to which the defendants will refer, they severally initialled such slips, by Samuel Walker Bullock, of Tozer, Hemsley, and Fisher, the broker through whom the insurance was effected—namely, the statement that the dock had been nearly rebuilt and thoroughly repaired and strengthened to make the voyage. In fact the dock had not been nearly rebuilt or thoroughly or at all repaired or strengthened to make the voyage.

The defendants delivered particulars of the additional strengthening rendered necessary by the fact that the stresses to which a floating dock is exposed while being towed on an ocean voyage are different from the stresses involved in the operation of lifting vessels, for which purpose the dock is constructed. Such strengthening is needed to bind together the pontoons of the dock so as to give longitudinal strength to the dock. It is effected, as a general rule, by giving greater strength to the side walls of the dock by adding increased thickness to the plating of the lower deck connecting the side walls, and also to the steel plating of the lower deck connecting the pontoons with plates or angles or otherwise.

Such strengthening in the case of the dock referred to in the points of claim was said to be necessary by reason (1) that the dock was built of iron; (2) it had never been adapted for towage in the open sea; (3) it had been almost completely disused and unattended to since 1908; (4) the plates connecting the pontoons were only seven-sixteenths of an inch thick; (5) the side walls were in no place more than 29ft. high; (6) the side walls were not of uniform height; (7) the diagonalisation in the way of the low portions was not strong enough for the force which would come upon it; (8) the bridges connecting the side walls were weakened by hatchways cut on either side of each of the central towers.

No such strengthening was effected or intended to be effected to the said dock of the kind above set out, nor any strengthening in substitution therefor, but the dock was sent to sea without the same. The defendants would rely on the circumstance that none of the above material facts were disclosed to them at the respective dates which appear on the slips as the dates when the defendants severally initialled the same, such being the non-disclosure or concealment alleged in the said paragraph of the points of defence.

Scrutton, J. deals first with the defence of concealment, or, as I think it is more accurately called, having regard to the duty of the assured, non-disclosure, and leaves misrepresentation till the latter part of his judgment.

I will deal first with misrepresentation. As to misrepresentation, it is not necessary that the misstatement charged should be fraudulent. It is sufficient to justify an avoidance by the insurer of the contract of insurance if during the negotiations for the contract there is an untrue material representation made by the assured or his agent to the insurer. This appears by sect. 20 (1) of the Marine Insurance Act 1906. Clause 2 of the same section provides that: "A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk." Clause 3 says: "A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief" Clause 4 says: "A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer." Clause 5 says: "A representation as to a matter of expectation or belief is true if it be made in good faith." Clause 6 says: "A representation may be withdrawn or corrected before the contract is concluded." Clause 7 says: "Whether a particular representation be material or not is, in each case, a question of fact." Then sect. 21 provides: "A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not, and, for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped."

Scrutton, J. points out, when dealing with this part of the case, that it is sufficient to avoid the contract if the statement was in fact made and it was untrue, and that it is not necessary that the underwriter should have relied on it, and the learned judge in my opinion had present to his mind all the provisions of sect. 20. He comes to the conclusion that the representation, if made, that the dock had been strengthened to make the voyage was untrue—that is, in the sense in which any underwriter would understand it, it was untrue—but comes to the conclusion that the misrepresentation was not in fact made, or, at all events, was not proved to have been made, by the assured or his agent to the underwriters. If this finding stands, the defence of misrepresentation fails. The Court of Appeal may, of course, review the finding. In the case of a finding in fact by a judge sitting without a jury, the Court of Appeal may reverse the finding, although the finding in fact is not perverse, and it is the duty of the court to do so, if satisfied that the finding in fact is wrong; but the Court of Appeal should in my opinion in every case bear in mind that the judge saw and heard the witnesses, and not easily reverse findings in fact by the judge who saw and heard the witnesses. I think this of great importance in the present case in which Scrutton, J. obviously did not believe some of the evidence. I am of opinion that we should not in the present case disturb the findings of the learned judge that the misrepresentations alleged were not proved.

The defence of non-disclosure is not easy to deal with. Scrutton, J. says as to this in his judgment: "I will deal first with the defence of concealment of the material fact that the dock was being sent on a voyage without the necessary extra strengthening for such a voyage," and says:

"As this defence on a policy 'seaworthiness admitted' appears to me to raise somewhat novel questions, I proceed to state fully my findings in fact." I ask that I may have those findings taken as read.

Summarised, these findings are: (1) Dock not seaworthy at commencement of voyage; (2) dock not strengthened for the voyage; (3) this non-strengthening material to question whether and what premium they should insure; (4) neither Mr. Constant (the vendor of the dock to the plaintiffs) nor the plaintiffs nor any agent of theirs, whose duty it was to inform them, knew or believed that the dock was not seaworthy. They all thought she was fit for the voyage, but they knew that the dock had not at this time been specially strengthened for the voyage, but honestly thought it unnecessary. They did not know that she had not when built been strengthened for a sea voyage round to Avonmouth, and had not in fact made such a voyage as a dock.

Having found these facts, Scrutton, J. puts the question to himself: "What is the extent of disclosure necessary by an assured who asks an underwriter to insure 'seaworthiness admitted' a subject-matter such as a river steamer, or floating dock, which can never be seaworthy in the ordinary sense of the term, for it is not intended for sea work, but which can have additional temporary strengthening for a voyage built into it or added to it? There can be no doubt that, if the assured knows of any specific defect such as a leak, or badly corroded plates, he must disclose it in asking for an insurance 'seaworthiness admitted.' So, also, if the assured knows or believes that the dock is not fit to go to sea owing to the absence of some strengthening usually added, or has a report or opinion to that effect, though he thinks it erroneous, he must in my opinion disclose his knowledge or unfavourable report. But suppose none of these facts exist, and the assured and his servants honestly believe the dock is strong enough to go to sea, and tell the underwriter she is a 'floating dock' (in this instance one of some age), must they disclose anything else? If the policy did not admit seaworthiness they need not disclose anything, for the implied warranty excludes the necessity of disclosure of facts which would break it." See the Marine Insurance Act 1906, s. 18 (3), which clause is introduced with the words "In the absence of inquiry, the following circumstances need not be disclosed—namely, (*d*) any circumstance which it is superfluous to disclose by reason of any express or implied warranty." But if the warranty is excluded by the words "seaworthiness admitted," must they give the underwriter, without his asking for it, a full statement of the construction of the structure which they have informed him is a floating dock, or when they tell the underwriter it is a floating dock, and therefore not an ordinary sea-going vessel, and ask him to admit its seaworthiness, do they put him on inquiry as to its construction and the means adopted to send it to sea, with the result that, if he does not ask, he waives information?

Scrutton, J. then quotes the cases of *Carter* v. *Boehm* (3 Burr. 1910) and *Seaton* v. *Burnand* (82 L. T. Rep. 205; (1900) A. C. 135) as instances where the subject-matter of insurance was sufficient to put the underwriter on inquiry and relieve the assured from disclosure till asked. *Carter* v. *Boehm* seems the more appropriate authority, because in that case it was the character of the ship which put the underwriter on inquiry, whereas in *Seaton* v. *Burnand* the subject-matter of the insurance was a loan and surety.

Scrutton, J. proceeds: "The clause 'seaworthiness admitted' is put into these insurances of floating docks and river steamers not ordinarily engaged on sea voyages to avoid the doubtful and difficult inquiry whether sufficient temporary strengthening for an unusual service has been applied to a subject-matter not originally intended for that service; and, in my view, the proposal of such an insurance to an underwriter, while requiring the disclosures I have already suggested, puts him on inquiry as to the actual construction and strengthening, if any, of the subject-matter, if he wants to investigate it."

I think the reasoning of Scrutton, J. substantially sound. He does not exclude all obligation to disclose. He recognises this obligation in the instance he cites in the passage I have quoted. I think that in a case like the present of the insurance of a floating dock not fitted in its original construction to go a voyage on the ocean and insured under a "seaworthiness admitted" policy, the contract between the underwriter and the assured is something of this sort, "We will raise no defence that the 'dock' was not seaworthy, from the very fact that this floating dock of this class of construction could not be expected to be seaworthy in the ordinary sense of the word; but, nevertheless, if this dock has a peculiar defect not usual in docks of this construction which creates an extraordinary risk, this you must disclose, otherwise the policy may be avoided by the underwriter."

The avoidance of the policy in such a case would seem rather to be based on want of good faith in accordance with sect. 17 of the Act of 1906 than on sect. 18, which to a large extent seems excluded by the "seaworthiness admitted" form of policy. The non-disclosure alleged is, in my judgment, non-disclosure of matters as to which the underwriters were put on inquiry by the character of the dock, which was not built for voyages on the sea, and by the invitation given by those who wished to insure the dock to the underwriters to issue a "seaworthiness admitted" policy. I think this appeal must be dismissed.

FLETCHER MOULTON, L.J.—I do not propose to recapitulate the facts of this case, which are to be found very fully and accurately stated in the judgment of the learned judge in the court below and the judgment which we have just heard.

I will come at once to the two points at issue in this case. The first is, that the defendants are entitled to succeed, because there was an actual misrepresentation made to the underwriters by the agent of the plaintiffs who took out the policy, Mr. Bullock. This turns entirely on what has been called the Lotinga slip and the communications by Mr. Bullock to the underwriters whom he induced to insure the risk. Mr. Bullock wrote on the 16th Aug. to Messrs. Lotinga to ask for particulars of the dock which he was about to insure, and he inclosed in his letter, or left with them, a pencil memorandum of the points on which he required information. That pencil memorandum was filled up in ink by Messrs. Lotinga and sent by them, I think, on that day

or the next day to Mr. Bullock. It is common ground that it was filled up most inaccurately. The name of the makers was wrong, the date was wrong, the description of the construction was wrong, and there was a statement with regard to what had been done to the dock which the defendants say was wrong in most material points. Nothing is made of the small things, but that which related to what had been done to the dock reads as follows: "Just been nearly rebuilt; pontoons taken abroad and thoroughly repaired and strengthened to make the voyage," and it is asserted that that was communicated to the underwriters, and that it informed them that the dock had been strengthened for the voyage, whereas no strengthening had been done. It is not seriously contested, I think, that if a representation in that form was made to the underwriters, it would have been a misrepresentation. I say that it is not contested, but speaking for myself, and having looked at the original slip and seen how it is written, I am of opinion that the statement with regard to the strengthening related to the individual pontoons and that the words "just been nearly rebuilt" refer to the whole dock. There is a space then, and a new sentence begins with the words "pontoons taken abroad and thoroughly repaired and strengthened to make the voyage," so that if the information had been given to the underwriters precisely and exactly as it was given in this slip, as, for instance, by showing the slip, I am not certain that it would have been a representation that the dock as a whole had been strengthened. But I think that there was no bad faith at all in saying that the pontoons—that is to say, the individual parts of the dock—had been strengthened because they had been taken apart and something like 20,000 new bolts had been put in the place of those which were there originally and which, of course, had suffered by age. But it is quite clear on the evidence that the slip itself was shown to no one of the underwriters, and the whole question, therefore, is, "Was the information which it gave to Mr. Bullock orally given by him to the underwriters who underwrote the risk?"

We are, of course, entitled to review the decision of a judge of first instance, but I am obliged to say that this part of the judgment of Scrutton, J. seems to me to show not only that he properly weighed the evidence, but also that he was fully aware of what his proper task was, and that he applied himself to it with very great skill and with great impartiality. I have come to the conclusion that the grounds which he gave for thinking that it is not proved that Mr. Bullock gave the information contained in the slip to the underwriters are fully sustained. I agree with him that with regard to all the underwriters from Mr. Poole onwards who saw the report of Mr. Watkins this matter is practically unimportant, because Mr. Watkins' report is so clear that there had been no strengthening done and no strengthening proposed to be done to the dock as a whole that I do not think that any oral information, if it had been given, would have had any effect upon that, and, as I say, I think it would be most improbable that, if he did not show the slip when he had Watkins' report, he would do anything more than read Watkins' report. But with regard to the underwriters who come before Mr. Poole and who had not Watkins' report, I think that his criticism of the evidence is excellent. Really the evidence of the underwriters does not show that they received any information of this kind from Mr. Bullock. It is of the vaguest possible description, and when you look at Mr. Bullock's evidence, although in some respects it is very confident, I think that in truth it is evidence given *arguendo*. He had this slip and therefore he supposed that he communicated the contents to the underwriters. I do not think that he had any memory on the subject, and I think this, coupled with the evidence of the underwriters, makes it so doubtful whether the misrepresentation was in fact made that the learned judge was bound to come to the conclusion that the defendants had not in fact by evidence supported this part of the case.

I turn now to the much more difficult part of the case which depends on concealment. I say that it is difficult, not because I feel any doubt about it, but because it is difficult to lay down the law in general terms with regard to a matter like that which is raised under the head of concealment in this case. To understand it properly, one must consider what the nature of the construction of the dock was. It was a dock which had been used for something like eighteen years at Avonmouth as a dry dock for docking ships of different lengths. It was formed of six floating pontoons joined together by decks so that there was a continuous deck over them all, and upon them on each side was erected a wall, as it has been called. It really was a very big longitudinal girder, some 360ft. long on each side, rising, I think, for a height of something like 29ft. above the deck. To that were bolted these pontoons. The result of that structure would make it a longitudinal girder of great strength. It must be of great strength because, as it was intended to dry dock ships of different lengths, there would be very considerable transverse strain—that is to say, vertical strain—upon each of those girders. The method of docking ships in docks of this kind of course is to float the vessel in, and then pump out the water from the hollow pontoons, and then they float it up, and, if the ship is not the full length of the dock so that its weight is distributed evenly over the pontoons, it is quite clear that there must be a very considerable bending stress vertically on these side walls; that, of course, is resisted by the girder strength. When this dock was bought it had to be taken to pieces in order to get it out of the port where it had been in work—that is to say, the connection of the pontoons with the girders had to be broken. Each pontoon and the girders had to be taken out separately and then rebuilt outside. The man, to whom that task was given, was called, and it is clear from his evidence that the dock was rebuilt outside with all care, and that a very large number—I think something like 20,000—of bolts, which bolted the pontoons to the side girders and connected other parts of the structure, were put in, replacing the old ones, and, as will be seen by the evidence, the dock was in splendid condition. It was proposed to tow it out to the buyers, and that was the risk against which the owners wished Messrs. Lotinga to insure, and very properly Mr. Bullock applied for the insurance "seaworthiness admitted."

In my opinion, that phrase "seaworthiness admitted" signifies this: that no defence is to be

raised by the insurers on the ground that it was not fit to contend against the perils of the sea. It is very difficult indeed to give any definition of "seaworthiness" as applied to a construction like this, which is not properly a vessel at all, although it floats, and, from some points of view, may be regarded as a vessel, and might even be called so in a legal sense; but it is extremely difficult. Nobody supposes that a structure of this length and this nature can sustain perils of the sea which a ship ought to be able to sustain, and I should think that nobody imagines that a dock is ever sent to sea which is safe and seaworthy in the same sense that a tramp ship, or an Atlantic liner, would be, and "seaworthiness admitted" to my mind gives the insurers notice of the peculiarity of the risk when it is a dock, and puts them on examination as to whether with regard to this strange structure which is to be towed over the sea they are willing to take the risk. That it was recognised that it was not seaworthy in the ordinary sense is clear to me from the premium. A premium of about 5*l.* per cent. for a Mediterranean voyage shows quite clearly that both parties realised that the thing was not an ordinary risk. I have no doubt whatever that if you apply for a policy of insurance "seaworthiness admitted," you must measure your duty as a person applying for an insurance by the nature of the policy that you ask, and that, if seaworthiness is admitted, the duties of disclosure cover all those things which in such a policy would affect the premium or the willingness of the underwriters to accept the risk. I take it that sects. 17 and 18 apply to all policies of every kind, whatever risks be excluded. They apply to all policies by reason of the nature of the policy. Whether or not the particular act becomes the duty of the person seeking to insure depends upon the policy that is about to be taken out, and therefore I agree with the argument that if there was anything known to the owners which would tend to affect the premium, or the willingness of the underwriters to take the risk in a policy where seaworthiness was admitted, they were bound to disclose it. Sect. 17 lays it down that the contract is one of the utmost good faith. Sect. 18 says that the assured must disclose to the insurer before the contract is concluded every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which in the ordinary course of business ought to be known to him. Then the second sub-section says that every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. If there be something known to the owner within the meaning of those sections which would affect the willingness to take the risk, or affect the premium, I think that the obligation rested on the owner to disclose it, and that we must measure the extent of that obligation by remembering that the policy was one in which there was to be no defence raised on unseaworthiness.

What does that duty to disclose cover? I have not the slightest doubt, for instance, that if they knew that there had been corrosion in the plates of this dock so that the strength had diminished, if they knew that it was an old dock, they were bound to say so. All those matters they would be clearly under an obligation to disclose, and if they did not disclose them the person taking the risk could avoid the policy. But nothing of the kind is alleged. All that is alleged is that they did not say that the dock had not been strengthened. Now, once more may I say with regard to all those from Poole onwards who saw Mr. Watkins' report this case breaks down on fact? That was clear notice to them, not only that the dock was not strengthened, but that there was no intention to strengthen it, and that the risk was to take that dock, just as it was, out to the buyer.

But, of course, although that decides the case with regard to those underwriters, there were a certain number who did not see Mr. Watkins' report, and I must go into the case with regard to them. The true position with regard to a dock is this: There is no mystery about it; docks are made of various strengths; if a dock is not strong enough, or thought not to be strong enough, if you want it stronger, you strengthen it; if you think that it is strong enough you do not; to talk about there being a universal knowledge that docks have to be strengthened is to go far beyond the evidence. In my opinion, on the evidence, and there was considerable evidence given by Mr. Watkins, Mr. Weir, and Mr. Maclaren, evidence that I have no reason to doubt was given by competent people and honestly given, it is clear that docks may be built so that they are sent as they are on a sea voyage. Even the evidence of the witnesses on the other side admits that some docks may be safely sent to sea. Therefore, to say that if you ask persons to insure a dock, you have impliedly represented that it has been strengthened for sea, in my opinion wholly breaks down. What they were asked to do was to insure a dock, and there was no representation that it was strengthened nor was there any custom generally known to underwriters of strengthening docks before they go to sea anything like so universal or anything like so necessary in all cases as would make the application to insure "a dock" mean a "strengthened dock." What does the evidence of the defendants come to? In my opinion, that which has most impressed Scrutton, J. would have least impressed me. The learned judge is very much impressed by the fact that the people called before him are from the two firms which have probably got special knowledge with regard to docks, and substantially spend their lives in dealing with them. They have elaborated a course of individual treatment of docks—that is to say, of the docks they build—which has secured them in all their voyages across the sea. But the evidence speaks to me most eloquently of its being the private practice of these well-known firms with regard to their own docks, and I cannot find a trace of there being throughout the shipping world any custom of using these particular devices. Supposing that these two men were called and they said: "When we know that a dock is going abroad we always have a strengthening fin down the centre of the pontoons, or something of that kind," could it be said that a policy of insurance of a dock in which no representation whatever had been made, except that it was this particular dock, was void for concealment because the owner, who had never heard of this private practice of these particular firms to strengthen the pontoons by this internal

fin, did not tell the underwriters that there was not a strengthening fin down the centre of the pontoons?

Of course one realises that the duty which is put by the statute on owners is a duty based on good faith, and a duty which cannot be avoided by mere culpable ignorance, but that is the type of it, and I have no hesitation in coming to the conclusion that there was here no representation of anything except that this was a dock in its normal state, that there was no duty on the part of the owner to know of this private practice of these particular firms, and that in not referring to the fact that this private practice had not been carried out he was not failing in any duty whatever which he owed the insurers. In my opinion there is no evidence that the insurers themselves knew anything about this private practice at all. They were put on notice that this was an insecure structure by reason of its being a dock; they were going at a high premium to take the risk of its surviving the perils of the sea, and they were going to bear that risk, and it was for them to make any inquiries as to the condition in which it was going to be sent to sea, and therefore they undertook this risk, and there was no failure of duty on the part of the insured, and therefore this defence fails. I think, therefore, that this appeal should be dismissed with costs.

Buckley, L J. read the following judgment:— This is an action upon a policy of marine insurance of a dry dock "seaworthiness admitted." She was lost at sea. She had not been strengthened for the voyage. The defences are two: First, misrepresentation—namely, that the assured stated that she had been strengthened for the voyage. Secondly, and in the alternative, non-disclosure of a material circumstance—namely, that she had not been strengthened for the voyage. As to the former, the defendants have not proved the misrepresentation which they allege. I agree with all that Scrutton, J. has said as to the evidence on the point. I cannot improve upon it. I will add that in my opinion counsel who was cross-examining Bullock, if he was going to rely upon his answer as evidence of misrepresentation, was bound to obtain an amplification of his general statement by asking him as to details. His general answer is only in substance, "Certainly, as an honest man, I disclosed all the information I possessed." Counsel ought to have asked what disclosure he made; for instance, what he said, whether he said anything, and what, as to strengthening. It may, for instance, well have been that the dock had been strengthened (as she had), not that she had been strengthened for the voyage (as she had not). But upon the evidence it is not, I think, proved that he said anything about strengthening at all.

As to non-disclosure. This defence will succeed if it be shown either (1) that there was fraud (which is not alleged), or (2) that the duty of disclosure which lay upon the assured in inviting a contract in which *uberrima fides* must be shown has not been discharged. The conditions of this contract include "seaworthiness admitted." The result is not the same as if such admission were contained in a pleading. The result is not that seaworthiness can never be in issue. The result may be stated in either one of two ways, either (1) that the shipowner's warranty of seaworthiness is to be taken as fulfilled or (2) that the risk of unseaworthiness is one which the underwriter accepts with the result that if the vessel is lost by unseaworthiness the underwriter is liable: (*Parfitt* v. *Thompson*, 4 L. T. Rep. O. S. 116, 138; 13 M. & W. 392; 14 L. J. 73, Ex.). But in either case it remains that the duty of disclosure (now found by way of codification in the statute) must be discharged. If the shipowner knows any material circumstance within the meaning of the Act of Parliament, he must disclose it in obtaining the assent of the underwriter to the contract, and none the less because it contains as it does the condition "seaworthiness admitted": (*Brownlie* v. *Campbell*, 5 App. Cas. 925, 954).

I will endeavour to state the disclosure which the assured was bound to make, and to see whether he has made it. Before the contract was concluded he owed the duty of disclosing every material circumstance which he knew, and every material circumstance which in the ordinary course of business he ought to have known. This duty extended to every such circumstance as was material, and was not confined to such as he knew or thought to be material. Whatever was the character of the vessel which he desired to insure, he was bound to disclose any specific defect which he knew, or in the ordinary course of business ought to have known. But by material circumstance is, I think, meant a material circumstance of fact to the exclusion of a material circumstance of opinion. Whether the dry dock here tendered for insurance required to be strengthened for the voyage or not was, I think, a question of opinion. The assured honestly believed, and had the authority of Watkins' report for believing, that she did not require to be strengthened for the voyage, but might safely be towed to a Mediterranean port provided that suitable arrangements for towing were made. The assured was bound to disclose that report as soon as he had it. He did so. If he had received any other report, say to a contrary effect, the existence of the opinion which it contained was a matter of fact, and its disclosure was necessary as being a material circumstance. But whether she required to be strengthened for the voyage or not was not a question of fact, but a question of opinion. Further, the assured need not disclose (sect. 18 (3) (*b*), any circumstance known or presumed to be known to the insurer, and the insurer is presumed to know matters which an insurer in the ordinary course of his business, as such, ought to know. The insurer, in my judgment, must be presumed to know that a dry dock is not an ocean-going craft, and, unless she has been built with a view to or has been strengthened for a voyage, is not seaworthy. The effect of the words "seaworthiness admitted" is, I think, for the purposes of sect. 18 (3) (*b*), that the underwriter says: "I know that the subject tendered for insurance is a dry dock; I know that such a craft is not seaworthy unless she has been strengthened. I admit that this craft satisfies such a standard of seaworthiness as is to be reasonably expected in a craft of this kind, and as between you and me I will not raise the question that she is not seaworthy." The underwriter accepts the contract on the footing of that admission, and is bound, unless the assured has withheld some specific defect, or some specific knowledge or report as to some matter

such as I have mentioned. I may express the same thing in other words as follows: A defect known to the insurer need not be disclosed (sect. 18 (3) (*b*); a defect whose existence or non-existence is a matter of opinion need not be disclosed, at any rate to an insurer who admits that for the purposes of the contract the answer may be taken to be a particular answer which the assured believes to be the true answer. Scrutton, J. says: "The clause 'seaworthiness admitted' is put into these insurances of floating docks and river steamers not ordinarily engaged on sea voyages to avoid the doubtful and difficult inquiry whether sufficient temporary strengthening for an unusual service has been applied to a subject-matter not originally intended for that service, and in my view the proposal of such an insurance to an underwriter, while requiring the disclosure I have already suggested, puts him on inquiry as to the actual construction of and strengthening, if any, of the subject-matter, if he wants to investigate it." I entirely agree with the view thus expressed. Further, the insurer need not disclose (sect. 18 (3) (*c*)) any circumstance as to which information is waived by the answer.

The question of fact was not whether the craft ought to have been (which was matter of opinion), but whether she had been (which was matter of fact) strengthened for the voyage, By the words "seaworthiness admitted" the underwriter, in my opinion, waived any information as to what had been done. He was content to take the risk upon the conditions expressed or implied by the words that the subject of insurance was a dry dock, whose seaworthiness for the purpose of the voyage he was to accept without further information. It has been found as a fact: First, that the craft was not seaworthy without strengthening for the voyage; (2) that she had not been strengthened for the voyage; (3) that the fact that she had not been so strengthened was material; and (4) that the assured honestly thought that she was seaworthy without further strengthening. The first question that was material to the underwriter, however, was whether she wanted strengthening. This was a question of opinion, and is not, in my opinion, within the Act. If, and only if, this question was answered in one way, did the fact become material that she had not been strengthened. The fallacy of the appellants' argument seems to me to lie in this, that at every turn they start with the assumption that the craft being a dry dock necessarily required streugthening. In my judgment this is not true. Had she been built for a foreign purchaser she would have been built with sufficient strengthening for a sea voyage. She had not been so built, and did in fact require strengthening, but as matter of opinion the assured honestly thought that she did not. The terms upon which the underwriter accepted the risk, I think, were that upon this question of opinion he was prepared to admit that strengthening was not necessary. Under these circumstances the fact that she had not been strengthened was not a material circumstance. The underwriter cannot say, "I agree that I admitted that this vessel (as you believed) did not require strengthening for the voyage, but nevertheless it was material that she had not been strengthened." I am of opinion that Scrutton, J.'s judgment was right. He rests it upon waiver and upon disclosure which put the underwriter upon inquiry. As to the former, I agree. As to the latter, I prefer to express it as I have done, in the form that a question of opinion is not a material circumstance within the Act, and that there was no material circumstance of fact known, or which ought to have been known, to the assured which he failed to disclose. In my judgment the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Parker, Garrett, and Co.*

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

Solicitors for Mr. Constant, *Lowless* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 30 *and May* 1, 1912.

(Before HAMILTON, J.)

SCOTTISH SHIRE LINE LIMITED AND OTHERS *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY LIMITED. (*a*)

Marine insurance—Policy on freight—Construction—Chartered or as if chartered—Concealment—Marine Insurance Act 1906 (6 *Edw.* 7, c. 41), s. 18.

A policy of insurance taken out by the plaintiffs in respect of the steamship Ayrshire *was expressed to be upon "Freight of frozen meat and (or) apples and (or) other refrigerated produce, and valued at* 15,000*l. chartered or as if chartered. On board or not on board . . . lost or not lost at and from any ports or places in any order or rotation in the United Kingdom to any ports or places in any order or rotation in Australia and (or) Tasmania* via *Durban and (or) any route and wheresoever." Attached to the policy was a clause which contained* (inter alia) *the following stipulations: "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date." . . .*

On the construction of the policy:

Held, that the expression "as if chartered" did not extend the freight covered to the anticipation of freight under contracts which at the material time did not exist.

Held, also, that as the plaintiffs concealed from the defendants the fact that by the terms of a certain contract freight was liable to be lost if the steamer did not arrive in Tasmania to load on a certain date, this was a concealment of a material fact, and entitled the defendants to avoid the policy.

COMMERCIAL COURT.

Action tried by Hamilton, J., sitting without a jury.

By their points of claim the plaintiffs alleged that they were interested to the full extent under

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-La

a policy of marine insurance, dated the 7th Jan. 1910, for 2000*l.* on freight on the steamship *Ayrshire* subscribed by the defendants. The policy was upon freight of frozen meat and (or) apples and (or) other refrigerated produce, valued at 15,000*l.*, at or from any ports or places in any order or rotation in the United Kingdom to any ports or places in any order or rotation in Australia and (or) Tasmania *viâ* Durban or any route; risk to commence at once and continue in its entirety until steamer sailed from loading port on homeward voyage. The perils insured against were of the seas and other usual perils, including all damages and accidents attendant on steam navigation and all risks incidental to steam navigation. They alleged that, while on the voyage insured, on the 2nd Jan. 1910 the *Ayrshire* came into collision with the steamship *Arcadian* and was greatly damaged, and the said insured freight thereby became and was totally lost. They also pleaded that due notice of abandonment was given to the defendants, and alternatively that there was a constructive total loss of the said insured freight.

By their defence the defendants denied that there was any total loss under the policy, as the *Ayrshire*, having been repaired after the collision, loaded a full cargo in Australia and earned freight, and they also denied that there was a constructive total loss of freight as alleged. They pleaded alternatively that if the plaintiffs had any interest under the said policy it was by reason of certain freight contracts having been made by shippers in Australia with a body or partnership called the F. H. S. Lines or the F. H. S. Committee. In the further alternative they said the policy contained the following clause:

Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise, but this clause only to apply where the vessel is fulfilling a special charter containing a cancelling date.

They stated that among the contracts made by the F. H. S. Committee was one dated the 14th Oct. 1909 with Messrs. Jones Limited and Messrs. Peacock Limited providing for the shipment of 40,000 cases of apples on the *Ayrshire*, provided she was ready to load on or about the 20th March 1910. The amount was subsequently increased to 70,000 cases, and if and so far as the plaintiffs' claim was for loss on the freight of the apples the defendants were relieved from any liability therefor by reason of the clause.

In the further alternative they said that if the freight under the apple contract was freight insured under the policy sued on, the plaintiffs on effecting the policy concealed from the defendants a material fact, viz., that by the terms of such contract freight was liable to be lost if the steamer did not arrive in Tasmania to load on or about the 20th March 1910, and that the defendants were in consequence entitled to avoid the policy sued on.

They further alleged that it was arranged by the plaintiffs or alternatively by the F. H. S. Lines or F. H. S. Committee that all the cargo engaged for the *Ayrshire* should be loaded and carried by another steamer called the *Somerset* and (or) other steamers, and it was in fact so loaded and carried; and that by reason of the said fact the plaintiffs waived and abandoned the notice of abandonment they had purported to give to the defendants in that they themselves exercised or alternatively assigned to others the right to earn the freight which they had purported to abandon to the defendants.

The facts were as follows:—

A combination or conference consisting of the Scottish Shire Line, the Federal Steam Navigation Company, and Houlder Brothers and Co. Limited ran a line of steamers between the United Kingdom and all Australian ports by various routes. The line worked on a principle of endeavouring to fit into a programme the successive sailings of their respective steamers in such a way as to give each company a specific employment for its vessels. At the beginning of every twelve months the managers of the line arranged a number of programmes of sailings by various routes. The steamship *Ayrshire* was concerned in route No. 1, and the system was so arranged for a round voyage out from this country and back, with dates for leaving Brisbane, Sydney, Melbourne, and Adelaide, these dates being subsequently advertised among the persons whom it concerned. The object was to let the shipping public know the prospective arrangements which the line was making for the supply of tonnage for homeward cargo from the various ports. Evidence was given to the effect that sailing dates could not be guaranteed, and the business was worked as a berth business with running contracts, and no charters made for the ships.

There were certain constant contracts which the line kept on foot, amongst others being one with Messrs. Birt and Co. Limited, to the effect that when the combination took place all refrigerated cargo owned and controlled by Messrs. Birt for shipment to the United Kingdom or other destinations to which the line steamers might sail should, so far as the ships could afford space, be shipped in ships belonging to the line. Messrs. Birt from time to time made arrangements with exporters of frozen meat to freeze meat for such exporters, and in making such arrangements Messrs. Birt stipulated that such exporters for a large proportion of refrigerated and other freights belonging to the exporters at other places than where Messrs. Birt had freezing works should direct freight to the line through the agency of Messrs. Birt at all ports in Australia, and consequently, in the event of any of the line steamers being short of freight, Messrs. Birt had an exceptional call on the frozen meat exports of Australia to fill up the steamers. There were also other contracts on foot. One was with the Apollo Bay Dairy Company Limited, to commence on the 2nd Dec. 1907 and to last till the 31st March 1911. By that contract the shipper agreed to ship by the steamers of the line all butter consigned to the United Kingdom belonging to the shipper, but the shipper had the option of shipping by other steamers running to a regular time-table which did not carry at rates of freight less than the line. There was also a similar contract subsisting in Victoria and with the Berrima District Farm and Dairy Company Limited covering the same period, and a similar contract covering the dates in question with Foley Brothers Limited for Queensland, and a similar one with the Government Produce

Export Department covering the material dates for South Australia.

There was also a contract made with Messrs. H. Jones and Co. Limited and W. H. Peacock and Co. Limited of Hobart, dated the 14th Oct. 1909, which provided (*inter alia*) that

The owners on or about the 20th March next, subject to loss, detention, or injury from *force majeure*, agree to have the steamship *Ayrshire* at Hobart with a reserve space in the insulated holds, ready to start loading 40,000 cases of apples, which the companies agree to supply to the said ship

The *Ayrshire* sailed from Liverpool on the 31st Dec. 1909, but collided in St. George's Channel with the steamship *Arcadian*, sustaining considerable damage, in consequence of which she was under repair until the 17th March 1910. She did not reach Australian waters until three months after she had been expected. The *Ayrshire* was preceded in the programme by the steamship *Somerset*, and at the beginning of 1910 neither vessel was definitely booked to take cargo at particular dates at particular ports to such an extent that there would be any breach of contract in altering the dates, with the exception of the *Ayrshire's* engagement with regard to the Hobart shipment of apples. It was found practicable to alter the *Somerset's* dates, and the order of call at her last ports was so as to enable her to some extent to take the *Ayrshire's* duties and to call at Hobart just about the date at which the *Ayrshire* should have called to take the apple shipment, and she sailed a full ship. Some of the meat cargo which was expected to have gone by the *Ayrshire* was shipped in the steamship *Carpentaria.*

The policy of insurance taken out by the plaintiffs with the defendants was declared to be upon

Freight of frozen meat and (or) apples and (or) other refrigerated produce, and valued at 15,000*l*. chartered or as if chartered. On board or not on board . . lost or not lost at and from any ports or places in any order or rotation in the United Kingdom to any ports or places in any order or rotation in Australia and (or) Tasmania *viâ* Durban and (or) any route and whereseoever.

Attached to the policy was the following "special" T.P. clause:

Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date. . . . Risk to commence at once and continue in its entirety until steamer sails from final landing port on homeward journey. . . . It is specially agreed that in the event of a total loss being recoverable under this policy underwriters shall be entitled to receive by way of salvage the net amount of meat freight earned and actually payable to owners at the time of the accident.

The plaintiffs did not inform the defendants that under their contract with Messrs. Jones and Peacock of Hobart the *Ayrshire* was to arrive on or about the 20th March.

Bailhache, K.C. and *Leck* for the plaintiffs.—The words "chartered or as if chartered" really contain the whole point at issue in the action. These words have been treated twice as covering all freight contracted for, or as if contracted for, the phrase being a wide one, and intended to cover even all expectations of freight:

Turnbull, Martin, and Co. v. *Hull Underwriters' Association*, 9 Asp. Mar. Law Cas. 93; 82 L. T. Rep. 818; (1900) 2 Q. B. 402.

In the present case the freight expected to be earned by the *Ayrshire* as a programme boat in the ordinary course of events was all that could possibly have been meant to be covered by the policy, for there were no other interests of the assured at risk at the time when the policy was effected. [HAMILTON, J.—Though in fact no binding contracts may have been effected so as to come under the policy, yet there was always the possibility that such were being or were about to be concluded, so that the policy would have to attach to them.] The Marine Insurance Act, s. 26, sub-s. 3, expressly provides that the intention of the assured is to be regarded in any attempt to define the extent of the risk. The section means that where words are on the face of them ambiguous the assured's intention may assist interpretation. In this case the risk covered is doubtful, and the assured's intention may be referred to to explain it. As for the concealment point, the apple contract, to which alone it applied, was not a special contract, and it contained no cancelling date. Cancelling date is a term of art with a strict meaning which cannot be extended.

Leslie Scott, K.C. and *Mackinnon* for the defendants.—The case involves the contention that defendants would become liable to pay some 15,000*l*. on the steamer being delayed for, say, a fortnight by some accident. In the first place, no freight had been lost, because there had been no insurable freight at risk. In the second place, what expectation of freight was at risk had in fact been realised. The assured had, in fact, earned the expected freight, by rearranging their sailings for the purpose, immediately they heard of the collision. Thirdly, there was at best a constructive total loss, and at the very moment when plaintiffs were giving notice of abandonment to the underwriters, they were making arrangements in Australia to carry the same things at the same rates, which arrangements made the notice of abandonment meaningless. If plaintiffs are to be deemed to have a contract because they have a hope or expectation of one, they need not stop there. They might as well not be deemed to have a contract even if the ship is in fact sent to a desert island which produces nothing. The words relied on by the plaintiffs are "chartered or as if chartered," but the parties must be taken to have known what a charter-party is. The words "as if chartered" only cover cases wherein no charter-party is found, but various small parcels of goods, aggregating to a whole cargo, are contracted to be loaded under a separate binding contract in the case of each parcel. They do not affect the fundamental description of the interest insured, which is freight, and not the mere business hope of making money out of a ship. The postponement of the time of earning does not amount to loss: (*Everth* v. *Smith*, 2 M. & S. 278). This principle covers all the sources of freight in the case except the apples. Birts' contract is not on a par with the apple contract. A policy on freight on a particular vessel does not attach until either the goods are on board or a binding contract has been

concluded for the carriage of the goods by that vessel: (*Flint* v. *Flemyng*, 1 B. & Ad. 45). [HAMILTON, J.—That case only shows that a bare expectation is not enough.] As for the Marine Insurance Act, sect. 26, sub-sect. 3, only means that where language is general, evidence of intention is admissible, or that the assured may give evidence to show that the apple contract was the freight insured, not that a general loss was the risk he intended to cover. This is a valued policy. In order to succeed on the valuation, the plaintiffs must show a loss of the whole freight:

> *Denoon* v. *Home and Colonial Assurance*, 1 Asp. Mar. Law Cas. 309; 26 L. T. Rep. 628; L. Rep 7 C. P. 341.

The apple contract was a contract containing in effect a cancelling date, and the warranty in the policy therefore came into operation with respect thereto. The policy is therefore void for non-disclosure. They also referred to

> Marine Insurance Act 1906, s. 18;
> *The Bedouin*, 7 Asp. Mar. Law Cas. 391; 69 L. T. Rep. 782; (1894) P. 1;
> *Jackson* v. *Union Marine Insurance Company*, 2 Asp. Mar. Law Cas. 435; 8 Com. Cas. 61; 9 Com. Cas. 114.

Bailhache, K.C. in reply.—The case comes back to the point as to what is the meaning of the words "chartered or as if chartered." *Everth* v. *Smith* (*sup.*) only shows that where a particular freight is afterwards earned no claim is possible on a policy insuring it. An analogous case would arise where a mortgagor insures freight by a ship which was seized by a mortgagee *en voyage*. The mortgagee would earn the freight, and the mortgagor, though he lost it, would have no claim. But in the present case it was the *Ayrshire's* freight that was insured, and that freight was never earned. The other ships following the *Ayrshire* lifted their own cargoes, not the *Ayrshire's*, and earned their own freight, not hers. If the *Ayrshire* had been only a little late the case would have been different, and no useful argument could be drawn from considering what would then have happened. As for the warranty in the policy, a cancelling clause must be a cancelling clause:

> *Re Jamieson and Newcastle Steamship Freight Assurance, &c., Association*, 7 Asp. Mar. Law Cas. 562, 593; 72 L. T. Rep. 648; (1895) 2 Q. B. 90, per Lord Esher, M.R.

If the loss of freight in fact results not from the delay, but from the exercise by a freightee of an option to cancel, then by the operation of the rule *Causa proxima et non remota spectatur* the assured could not in any case recover:

> *Inman Steamship Insurance Company* v. *Bischoff*, 5 Asp. Mar Law Cas. 6; 47 L. T. Rep. 581; 7 App. Cas 671;
> *Mercantile Steamship Company* v. *Tyser*, 5 Asp. Mar. Law Cas. 6n.; 7 Q. B. Div. 72.

In *Jackson* v. *Union Marine Insurance Company* (*sup.*) there was a long delay, but a short delay is enough where the steamer is on a programme and running to advertised dates. No doubt the underwriters may claim a set-off, but here they have no proof of any such. The *Somerset* and the *Carpentaria* carried some of the *Ayrshire's* cargo, but they had in consequence to shut out cargo of their own and earned nothing. They also referred to

> *Bensaude* v. *Thames and Mersey Marine Insurance Company*, 8 Asp. Mar. Law Cas. 315; 77 L. T. Rep. 282; (1897) A. C. 609;
> *Barber* v. *Fleming*, L. Rep. 5 Q. B. 59;
> *Williams* v. *Canton Insurance Office*, 9 Asp. Mar. Law Cas. 247; 85 L. T. Rep. 317; (1901) A. C. 462;
> *Manchester Liners* v. *British and Foreign Insurance Company*, 9 Asp. Mar. Law Cas. 266; 86 L. T. Rep. 148.

HAMILTON, J.—[His Lordship having reviewed the facts and the evidence, and having referred to the contracts, continued:] I must find as a fact that in all probability if no accident had happened to the *Ayrshire*, she would have sailed with a full cargo at full rates; and that the *Somerset*, undisplaced in that event, would also have sailed with a full cargo at full rates; and that the subsequent steamships to the *Ayrshire* would equally have been able to get all the cargo that they could carry. Therefore, I think that as a fact, upon the working of the whole line for the whole period, it is true to say that the combination has lost that amount of refrigerated cargo freight which could have been earned upon one extra homeward sailing.

The question is now whether, in respect of that loss, they are covered by the policy sued upon. This policy is in a form which has been substantially in use for some twenty years. It was altered to some extent, I know not what, in 1905; but I can derive no useful inference from those facts, because it is also admitted that claims in respect of freight losses on these policies have been very few, and, therefore, there has been no occasion for any dispute between the parties that could throw any light upon what they between themselves conceived to be or agreed to be its real meaning. The first matter to look at is the language in which the subject-matter of the insurance is described. The insurance is declared to be upon "Freight of frozen meat and (or) apples and (or) other refrigerated produce, and valued at 15,000*l.*, chartered or as if chartered. On board or not on board." Then the vessel is "Lost or not lost at and from any ports or places in any order or rotation in the United Kingdom to any ports or places in any order or rotation in Australia and (or) Tasmania *viâ* Durban and (or) any route and wheresoever." Then attached are other clauses, one at least of which was specifically mentioned in the slip as what was known as the "special T.P. clause"—special time penalty clause. That clause is "warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date." The other two parts of the attached clause are: "Risk to commence at once and continue in its entirety until steamer sails from final loading port on homeward journey"; and "It is specially agreed that in the event of a total loss being recoverable under this policy underwriters shall be entitled to receive by way of salvage the net amount of meat freight earned and actually payable to owners at the time of the accident." What is the subject-matter covered? It is freight. It is freight on frozen or refrigerated produce on

board or not on board; words which no doubt are intended to meet difficulties which once arose when cargo alongside for loading, but not brought on board, was lost. It was then said that no right to freight had accrued because no lien upon that cargo for remuneration for its carriage had attached. I think they throw no light upon the present case.

"Chartered or as if chartered" are words which have given rise to considerable discussion. Those words have been in use many years. When they first came into use, or under what circumstances, I have been unable to find out. Words similar were used as long ago as 1869 in *Barber* v. *Fleming* (*sup.*), where the words are "on freight chartered or otherwise." The language of Blackburn, J. in that case is strong, and it is supported by Hannen, J. too, to show that they regarded the "freight chartered or otherwise" to which that policy referred, as freight as to which some binding instrument was in existence; the point being whether the ship had so started on the insured voyage as to commence to earn that freight. He says: "The spirit and reason of the rule are, that the interest commenced, not because the man acted under compulsion of the contract, but because he has acted so far under the contract as to show it is so no longer speculative, but he had actually begun to do something which makes the inchoate interest attach, and makes it a real thing." Hannen, J. says: "The policy may or may not apply to freight which might have been earned on the way from Bombay to Howland's Island. It may or may not apply to freight other than the chartered freight, but this particular freight is specified under the terms of the policy, inasmuch as it is chartered freight from Howland's Island to the United Kingdom." The words to my knowledge have been extremely common for a good many years. The next case which I have been referred to in which such words are discussed is in the case of *Turnbull, Martin, and Co.* v. *Hull Underwriters' Association Limited* (*sup.*). The words there are "upon freight of frozen meat chartered or as if chartered." It was argued by His Honour the late Judge Carver, who certainly would never have advanced an argument which he had not carefully considered and believed to be sound, that "the phrase 'chartered or as if chartered' means 'contracted for or as if contracted for,' the clause being a wide one and intended to cover even an expectation of freight." But it is important to observe that he was referring to a case in which there were contracts or engagements of some binding kind, because Mathew, J., in his judgment on p. 404, says: "The evidence showed that at the time when the vessel sailed no contracts had been secured by the plaintiffs for the shipment of frozen meat from the colonial ports, but such contracts were made and the homeward cargo was booked at Newcastle, Melbourne, and New Zealand ports while the vessel was making her outward voyage." The accident occurred, I think, at Sydney. The result, therefore, was at the time that was material, namely, the date of the accident, there were in existence contracts made, and the homeward cargo booked; and the argument that "chartered or as if chartered" means "contracted for or as if contracted for" referred to a case in which there really were actual contracts at the date which was material. It may well be that the phrase is intended to cover an expectation of freights which is an expectation only at the date of the insurance; but it is another matter altogether to say that it can apply to cover a freight which remains a pure expectation at the time of the loss. I cannot understand how "contracted for or as if contracted for" can mean "contracted for or not contracted for." If it is "as if contracted for," it must in substance be a legal obligation, although it may not be in the form of an ordinary mercantile contract. But "as if contracted for" implies the idea of a contract, and negatives the idea that there is no contract.

The matter then came up in *Williams* v. *Canton Insurance Company* (*sup.*) in the House of Lords. There there was a policy upon freight "chartered or as if chartered"; but the gist of the case was contrast between a lump sum charter freight and a bill of lading freight. In the opinions delivered there are three which deal with the question. The Earl of Halsbury, Lord Chancellor, says: "These words 'or as if chartered' have, to my mind, no meaning where there is, as in this case, a chartered freight, and if they have any meaning at all in other cases, of which I have some doubt, I decline to speculate what their meaning would be in a case different from the present." In the present case, *ut res magis valeat quam pereat*, I have to fit some kind of meaning on to those words. Then in the judgment of Lord Brampton it is said: "I am very much disposed to think that in using in the policy the words 'freight chartered or as if chartered,' it was intended by the framers of and the parties to it that, whatever the facts might be, whether the ship was wholly loaded by the charterers or wholly or partly under bills of lading by other shippers, the whole was to be treated for the purposes of the policy as one entire undivided cargo, loaded by the charterers, to be carried for that one lump freight." Lord Lindley says: "The alternative 'or as if chartered,' applies to freight, or what in business is treated as freight, although not payable by the express terms of any charter-party—*e.g.*, if the shipowner carries other people's goods without a charter-party, or perhaps if he carries his own goods. The phrase 'as if chartered' would also cover freight payable under a charter-party entered into after the date of the policy, if the policy without those words would not extend to such freight."

The one thing that is clear is that no colour is lent by any of those passages to the view that the words "as if chartered" mean "not contracted for" at any place, but evidently and reasonably expected to be earned. As Lord Lindley says, the words cover the case of a charter-party expected at the date of the policy, but only concluded after it. They cover, or may cover, the benefit that the shipowner derives from carrying his own goods, although it has been held that that is covered by the description of freight *simpliciter*, and they cover the case of other people's goods being carried without a charter-party—that is to say, either under a bill of lading, or, if there is no actual bill of lading, under that promise to pay which is implied from the fact that the goods are shipped and carried. But it is necessary to the plaintiffs' case to support the contention that "as if chartered" extends the freight covered to the anticipation of freight under contracts, which at the material time did not exist.

Lastly, it was suggested that a passage in the argument of counsel for the defendants in *Manchester Liners v. The British and Foreign Insurance Company* (7 Com. Cas. at p. 30) might assist. But all that that says is that insurances on expected freight are always effected in one of two ways—by a P.P.I. policy—that is to say, recognising that there is no insurable interest; or by the insertion of such words as "as if chartered" or "freight at risk or not." "Freight at risk or not" appears to me to have much the same effect as P.P.I., and the insertion of the words "as if chartered," at any rate there, is not alleged to be in practice a sufficient equivalent to give a legal right to recover upon a policy which is to be legally enforceable where there is no freight of any kind actually contracted for. The only colour I have been able to find for extending it further than that is in the valuable handbook of Mr. Gow on Marine Insurance, p. 233, where he says the underwriter, under these words, insures a sum on freight whether the vessel is under engagement or not, carrying cargo or not, and whether the cargo has already paid freight or not. But I have no evidence of any usage that attaches that meaning to these words. It seems to me that the first thing to be borne in mind is that, whatever "chartered or as if chartered" may mean, they are words which qualify and describe a noun substantive which is freight. The thing covered is first and foremost freight as known to the law—not all freight, but only freight which can be said to be "chartered or as if chartered." What chartered freight is there is no difficulty in understanding. Its only contrast would be with the bill of lading freight. Chartered freight is remuneration paid to the shipowner by another who hires his ship or part of it, generally with an added contract that the shipowner's captain shall sign bills of lading for the charterer's benefit. On the other hand, bill of lading freight is the shipowner's own contracted remuneration for the carriage of goods in his own ship by his own servants. But no doubt the word "freight" extends much beyond that. It extends to engagements of the one kind or the other which actually are binding engagements, although they do not take the form of either a charter or a bill of lading, such as berth notes. There are numbers of contracts which are illustrated in the reported cases where, when a vessel is loaded on the berth in one form or another, somebody undertakes with the shipowner either to ship cargo or to procure cargo to be shipped, and in those cases the shipowner has the right to say: "I have the right under this contract to receive cargo with which I shall earn freight for its carriage, and as soon as in pursuance of my contract I start the ship out to perform the contracted voyage I have commenced to earn that remuneration"—call it freight or not, call it chartered freight or as if chartered or not. There is no novelty in that idea. But has it ever been extended to the case of a ship going out with the best right to expect that her agents will fill her, but with no actual binding engagement to that effect? I cannot find that that has been so held.

I find numbers of cases and numbers of text-writers by whom it is said that freight involves either a possession of the goods so that you can imply a contract to carry in a certain event, or else a right in the sense of a legal right to have the goods so that you may earn the freight. I do not find any case which says that you can use the word "freight" at all on the mere expectation that you will get cargo and earn freight, and I think the contrary has been decided if one looks at the case of *Flint* v. *Flemyng* (*sup.*). The *Hope* there, while discharging outward cargo at Madras, was lost by perils of the seas. No part of the homeward cargo was then shipped. The captain had purchased at Madras, by order of his owner, 25 tons of redwood, and a firm called Binny and Co. had contracted to ship 122 tons of saltpetre; and Webster, one of the partners in that house, engaged to ship 90 tons of light goods, but as to those goods there was not any contract in writing. There was a policy on freight on the homeward voyage. Had any freight attached? or, to apply the usual test, was there any such right to freight as, but for the intervention of the perils insured against, would have resulted in freight being earned? At the trial before Lord Tenterden, the learned judge told the jury that if the captain had a reasonable assurance that 90 tons of light goods would be shipped, "the assured had a right to recover in respect of them the freight which the vessel would have earned if they had been shipped and she had performed the voyage, though there was not any such contract as could be enforced by action." That seems to me precisely to be the suggestion made in this case. A rule *nisi* was obtained for a new trial on the ground of misdirection upon two points, one of which was that very direction to the jury. The counsel showing cause, who included Campbell, afterwards Chief Justice, and Pollock, afterwards Chief Baron, admitted undoubtedly as to the light goods that there must be a contract, "but here there was evidence of a contract, for Webster engaged to ship light goods." The court, Lord Tenterden himself giving the first judgment, says: "To recover upon a policy of freight, the assured must prove that but for the intervention of some of the perils insured against, some freight would have been earned, either by showing that some goods were put on board, or that there was some contract for doing so. The question was not submitted to the jury, whether there was any contract between Webster (acting on the behalf of Binny and Co.) and the captain for the shipment of the light goods." The defendant therefore was entitled to a new trial, but instead of a new trial it was referred to a barrister to ascertain whether there was a contract to ship light goods.

Then if one looks at the text-writers: Phillips, sects. 328, 329, and 331, distinctly presents the alternative either of goods ready to ship or a contract with another person for freight. Arnould says much the same thing, the material sections, I think, being 266 and 269. Passages are cited from the judgments of Lord Ellenborough and other great authorities which seem amply to bear it out. *Forbes* v. *Aspinall* (13 East, 323) is a case in question. There the expression used is: "Where there was no complete contract by any person to load or pay dead freight but the ship was a mere seeking ship." If I might repeat an expression that I used in the course of the argument, it seems to me here that in fact the *Ayrshire* when she started was a seeking ship, and that on the 1st Jan. she was no more, except as to the apple contract and

possibly the Birt shipments, although at that time there was a strong expectation that when she arrived in the colony she would find a full and complete cargo; but in the ordinary course of business until five or ten days before her actual arrival no engagements, except for the apples, would be definitely made. If that is so, the test which I must apply is, was there, and if so to what extent, freight which was the subject-matter of some legal agreement giving the shipowner the same legal security as if he had a charter to load —I do not mean to say the same legal security in all its incidents, but legal security enforceable as a charter-party would have been. It is conceded that as regards the apple contract there was such a contract existing at the time of the loss. Of course the material moment for this purpose is the time of the accident, and the loss was occasioned by that accident. I think also, although the case is a little difficult, that I ought to hold that the arrangement with Messrs. Birt was of such a character as to constitute a binding contract to get the vessel a cargo so far as her space would enable her to take it; at any rate, so far as Messrs Birt and Co. were able to influence or to control a sufficient quantity. It is true that it does not take the form of a contract to load at all. It is true that the terms of it are not before me, but I think the effect of it is that, by something which was enforceable because it was definite and supported by consideration, Messrs. Birt were bound, had she arrived on the coast, to load at any rate at the ports in question, to do their best to get her a cargo, and as the evidence satisfies me that at the time she was expected on the coast there was a sufficiency of cargo, I think she was in the same position as though that quantity had been contracted for. Hence it seems to me that to the apple contract and to the Birt shipments the term "freight chartered" or "as if chartered" would sufficiently apply; but separate considerations apply to the apple contract.

I will deal with the meat shipments. As to that I think the issue between the parties may be stated in this way. Is this an insurance of the *Ayrshire* freight of the kind in question upon her round voyage, or is it an insurance of her freight of the kind in question upon cargo to be shipped at or about the dates at which it was expected that she would ship a cargo upon a round voyage? If it is the latter, she missed her dates, and missed them to a most material extent. If it is the former she made a round voyage, a round voyage which comes within the description in the policy, and in substance the very round voyage, apart from the sequence of ports and such like, that she was all along intended for. Therefore in the latter case it is suggested that the case comes within the principle of *Everth* v. *Smith* (*sup.*), a decision of Lord Ellenborough not, so far as I know, ever doubted, where, the insurance being simply on freight from Riga and Baltic ports to the United Kingdom, it was held that there was no loss because, although the ship first by embargo and afterwards by the port freezing up, failed to carry the cargo that she expected to carry, when she was able to sail got another cargo and earned freight upon the very voyage homewards named in the policy. There is nothing in the policy itself which makes any express limitation of the voyage to a voyage occurring at the dates or substantially in accordance with the programme contemplated. It is proved to my satisfaction that when the *Ayrshire* reached Australia some three months later she found cargo, she took cargo, she carried it home, and she earned the full freight upon her carrying capacity, though how much it was and what the cargo consisted of I have not heard. Mr. Bailhache contends that policy must be read in a more limited sense, as a policy upon the voyage commencing at the dates and loading at the ports in accordance with the programme substantially. He says the practice was to keep up the sailing dates, hence if the vessel missed her date by an accident she missed her place and missed her cargo, and the insurance therefore is really one conditioned by the sequence of times originally contemplated. I think that very considerable difficulties of a practical kind would arise in connection with such an insurance, although I am far from saying that such an insurance cannot be effected if appropriate language is used, but the said risk on the *Ayrshire* against the risk of such contemplated freight on cargo to be shipped at the dates mentioned in the programme or thereabouts, is a different risk, measurable, I should have thought, by different considerations, from a mere insurance on freight per *Ayrshire* homeward from Australia to the United Kingdom. In this very case a number of legal questions which may or may not be required to be answered are suggested to arise, if that is the real construction. I think there might be some substantial difficulty in deciding how the valuation, the concealment, and the disclosure are to apply if the subject-matter of the insurance is expectation of cargo being forthcoming in the event of the vessel keeping her programme dates, and if the loss is to arise in the event of her missing her programme dates and is to be measured by the expectation of cargo that has either not been forthcoming or has been taken by some other vessel. There can be no insurable interest in a bare expectation. It is difficult to see how one could assess the risk of the vessel missing the date sufficiently to fail to carry the cargo at the expected date, though she carries it at another date. If she carries it at another date, is that the same freight or another freight? If it is another freight, is it salvage to the underwriter? If it is the same freight, has there been any loss? All those questions arise if the policy is construed in this way. First of all, I see no necessity to construe the policy in this way, because of the evidence, which I accept, of the flexibility of the programme itself, and the extent to which in practice the programme is necessarily departed from in the six or eight months or more which elapse between its formulation and its performance. In the next place it seems to me that such an interpretation does violence to the language. It imports into the definition of the risk words which are not there. It is true that it is said both parties knew that they were insuring ships in a line, ships which endeavoured to run to a programme, ships which were governed by a programme. It is true that it is said that for some years past they have been insured in this way, and the question is asked what were they insured for if it was not this risk. I think the answer is that the policy does not fall to the ground because admittedly it would be sufficiently worded to attach to the apple contract,

a very valuable one, and that, beyond that, the notion that the assured may have had in framing his policy cannot be availed of for the purpose of construing it. But I do not see here that the circumstances of the line are such in fact as to make it necessary, and if not necessary it cannot be proper, to construe this as a policy which would limit the freight to freight earned by shipment at or about programme dates. I am therefore of opinion that, although the *Ayrshire* did not earn freight on the cargo that went by the *Somerset*, that cargo never was her definitely contracted cargo, because although Birt and Co. were under contract to get a cargo for her, they never declared any particular shipment, that I know of, for the *Ayrshire*, and it was simply frozen meat at large which might be expected to be available. She therefore did not get meat at the time expected, and in that sense did not get her expected cargo, but she did get a cargo at another time, and carried it on her homeward voyage, and did earn the freight. I therefore think there has not been, as regards the meat cargo, a loss of freight, and I think that the same is true of all the other cargo, with the exception of the apple cargo, because there was no cargo that I know of which was not definitely engaged for her, and for that sailing in the programme, except the Hobart apples.

Now comes the question of the Hobart apples. It is said that those are within the terms of the warranty which I have read—the special T.P. clause. I think that may be shortly disposed of. Whatever the contract of Messrs. Jones may have been, it was not a special charter—it was not even a general charter. It was not a charter at all. It was "as if chartered," which means that, although it was like a charter, it was not a charter. In the next place, it contained no cancelling date. As is said by Lord Esher in *Re Jamaica and Newcastle Steamship Freight Assurance Association* (*sup.*) cancelling is a strictly understood term in shipping business, and the cancellation clause has been known for some twenty years, at least, as a well-known clause. I have no doubt that this clause has direct reference to the well-known cancelling clause which contains a cancelling date. My view is, although it may be a matter of form, or even of pedantry, that, in the Hobart Jones contract, an arrival about the 20th March is a condition precedent to the obligation to load at all; whereas, if there had been a cancelling clause, the obligation to load would have been defeasible in the option of the shipper if the vessel failed to arrive at the specified cancelling date. I do not think, therefore, that clause covers the Hobart contract. Stopping there, the assured would have proved their loss in respect of the apples. They could have proved their insurable interest, and the attaching of it in respect of the Birt meat shipments, but I think they will not have proved the loss there. But for the questions which arise on the remainder of the case some possibly difficult questions would arise, because, in this view, first of all, the valuation of 15,000*l.* would require to be readjusted in the manner that has been indicated in various decided cases; and, secondly, it might be necessary to discuss and decide the question whether the loss of a portion only, be it about 50 per cent., of the refrigerated cargo contemplated could be described as a constructive total loss under the policy, or a partial total loss; and whether, in the event of its being a constructive total loss, it is necessary that there should be a notice of abandonment; and whether the subsequent carrying of the cargo of apples by the *Somerset*, and the earning of the freight on the apples, does not constitute a waiver of notice of abandonment by carrying for the benefit of the shipowner that which by the notice of abandonment he had abandoned, and was bound to leave abandoned to the underwriters.

But I do not think it necessary to discuss or decide these questions. There is a defence connected with the apple shipment, but going to the root of the whole question, and that is the defence of concealment. With regard to that, I want to say at the outset that there has been, and can be, no suggestion whatever in this case of any wilful concealment, or any impropriety whatsoever on the part of the plaintiffs; but, on the contrary, probably no one more genuinely would recognise the entire integrity of the conduct of those concerned than the underwriters, who appreciate the importance in insurance law of the rules as to concealment. By what was, no doubt, sheer inadvertence, because it had not actually occurred to anybody that it could be necessary to make any disclosure upon the subject, and without the very slightest notion of prejudicing the underwriters in any way, those who were concerned with instructing this insurance to be effected did not cause the underwriters taking the risk to be made aware that in the apple contract at Hobart the 20th March or thereabouts was stipulated as the date at which the *Ayrshire* was to arrive and take the cargo. The date to be looked at is the 2nd Dec., because that is the date when the slip was opened and the risk was first taken. It was subsequently closed on the 30th Dec., the day before the vessel sailed. At either date, of course, there was no engagement with regard to freight, except the apple contract, and the vessel was still in safety. There has been a discussion as to how much concealment is a matter of law, and how far it is a matter of fact, but it is well settled now that evidence is admissible on the subject; and unless I can be satisfied, as a matter of law, that the point in question could not be material, it is a matter upon which I must be guided by the evidence as to whether it was material to a reasonable underwriter, with a view either to his taking the risk, or to the premium he would charge for taking it, to be apprised of the fact in connection with this insurance that the Hobart apple contract specified a date about which the vessel had to arrive. The Marine Insurance Act codifies the law on that subject in sect. 18. It seems to me to be quite clear that in law it might be material. I cannot possibly say that it is not material. The risk, if there was no date in this contract, would be that when the vessel arrived at Hobart there might be no apples, in which case she could not earn freight by carrying them, and that she might be prevented from arriving at Hobart, while there were apples to ship, by perils of the sea. Considering that she was about to leave English waters at the end of the year, and considering that the apple season at Hobart appears to extend for about two months, to which, I suppose, must be added a few days—three or four, whichever it may be—during which apples in case may remain awaiting shipment

without deterioration, the underwriter would in that view have a very considerable time range within which the vessel might arrive and save her freight.

I do not say that the risk of her being injured, and so losing that freight, would not be a considerable one, but it would be a risk measured by the extent of the range of time within which she could arrive and save it. If the time was to be about the 20th March, not much before and not much after, it seems to me that the risk is intrinsically altered, and the likelihood of the underwriter being called upon to pay in the event of accident is considerally increased. The evidence called is all one way, and is all called by the defendants. [His Lordship having referred to the evidence continued:] I must come to the conclusion, therefore, that, as I should have expected personally, the circumstance in itself is a circumstance that is material to the risk.

Then the way in which it is answered is that the particular circumstances of the underwriter's knowledge made it unnecessary to disclose this matter to him. Nothing was done by the underwriter, that I have heard of, to waive any information at all. I think, therefore, the matter must turn upon what he knew or must be deemed to have known having regard to his position. There is nothing here to show that he did know, or that he ought to have inferred, or ought as an underwriter to have been aware that in one particular contract there would be a date which had the same business effect as the cancelling date, although it was not the same in legal form.

I think, therefore, the defence arising here of concealment is proved, and I must give my judgment for the defendants.

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

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

July 17 *and* 19, 1912.

(Before Pickford, J.)

HARROWING STEAMSHIP COMPANY LIMITED *v.* WILLIAM THOMAS AND SONS. (*a*)

Charter-party — Lump freight — Non-arrival of chartered ship—Delivery of part of cargo—Right of shipowner to freight.

By the terms of a charter-party it was provided that the steamship Ethelwalda *should load a full and complete cargo of pit props at a port in Finland and proceed to Port Talbot, a dock as ordered, and there deliver the cargo on being paid a lump sum of* 1600*l.*

The charter-party contained an exception clause including (inter alia) *perils of the seas. The* Ethelwalda *loaded her cargo and proceeded to Port Talbot, but before she could get into a dock she went ashore and ultimately became a total wreck. Part of the cargo was washed ashore, and a substantial part was collected on behalf of the shipowners and delivered to the consignees.*

Held, that the shipowners were entitled to payment of the lump freight as they had performed their contract save in so far as they had been prevented by an excepted peril.

COMMERCIAL COURT.

Action tried by Pickford, J. sitting without a jury.

(*a*) Reported by Leonard C Thomas, Esq , Barrister-at-Law.

The plaintiffs' claim was for freight payable under a charter-party dated the 1st Sept. 1911 for the carriage of a cargo of pit props per the plaintiffs' steamship *Ethelwalda.*

The charter-party was in the following terms:

It is this day mutually agreed between Messrs. Robert Harrowing and Co., owners of the good steamship called the *Ethelwalda,* of 1535 tons net register or thereabouts, now trading, and Messrs. William Thomas and Sons, of Swansea, charterers, that the said steamship . . . shall . . . sail and proceed to one place, Uleaborg district, as ordered . . . and there load . . . a full and complete cargo consisting of props. The steamer to carry a full and safe deck load, at charterers' risk, not exceeding what she can reasonably stow and carry . . . and being so loaded shall therewith proceed to Port Talbot, a dock as ordered, or so near thereunto as she may safely get, and deliver the same, always afloat, on being paid freight as follows: A lump sum of 1600*l.* (say sixteen hundred pounds) in consideration in full of all port charges and pilotages.

[In the form of charter originally the freight was to be paid per standard with regard to some of the timber, and per fathom with regard to the other, but that was struck out.] There was an exception clause including, among other exceptions, perils of the seas.

The *Ethelwalda* duly loaded her cargo and proceeded to Port Talbot, but on arrival was unable to get into dock, and before she was able to get into a dock, either through breaking her anchor or in consequence of her cable parting, she went ashore on the north side of the breakwater. Her deck cargo was swept off, some of it being stranded on the beach and some lost. The remainder of the cargo was washed out of the ship, and a substantial portion of it was subsequently collected on behalf of the owners by a firm called Jenkins and Co. The dock company took possession of the cargo as it was collected and held it under a lien for their own charges and also under a lien for freight on behalf of the shipowners.

Bailhache, K.C. and *Dunlop* for the plaintiffs.—The shipowners having substantially performed their contract are entitled to lump freight as provided by the charter-party. The owners are entitled to forward the cargo to its destination:

Rankin v. *Potter,* 2 Asp. Mar. Law Cas. 65 (1873); 29 L.T. Rep. 142; 6 H. L. 83.

The contract with Jenkins was a forwarding contract for the purpose of delivery under the charter-party, and not a salvage contract after abandonment of ship and cargo. The only answer to a claim for a lump freight is total failure of consideration. If the cargo is lost by excepted perils and the ship arrives, the lump sum is payable. They referred to

The Norway, 2 Mar. Law Cas. (O.S.) 17, 168, 254 (1864); 12 L. T. Rep. 57; 13 L. T. Rep. 50; 3 Moo. P. C. N. S. 245;
Carver's Carriage by Sea, sects. 547 and 550;
Mitchell v. *Darthez,* 2 Bing. N. C. 555;
Hunter v. *Princep,* 10 East, 378;
Guthrie v. *North China Insurance Company,* 6 Com. Cas. 25; 7 Com. Cas. 130.

Maurice Hill, K.C. and *Leck* for the defendants.—A lump freight is not really freight in the strict sense, but an amount payable for the use and hire of a ship for a voyage:

Robertson v. *Knights,* L. Rep. 8 C. P. 465.

It is an entire sum for an entire service:

Merchant Shipping Company v. *Armitage*, 2 Asp. Mar. Law|Cas. 51, 185; 29 L. T. Rep. 97; L. Rep. 9 Q. B. 99.

It therefore follows that nothing is payable unless the ship performs the voyage in its entirety. In *Mitchell* v. *Darthez* (*sup.*) it was decided that, the vessel having failed to complete the voyage, the lump freight could not be recovered although part of the cargo had been sent on and reached the intended destination.

Bailhache, K.C, in reply. — In *Mitchell* v. *Darthez* (*sup.*) the cargo was forwarded on behalf of the cargo-owners, whereas in the present case it was forwarded on behalf of the shipowners.

Pickford, J.—This case raises what I am told is a new question, certainly is a difficult one, namely, as to whether, under the circumstances of the case, a shipowner who has chartered his ship on what is called a lump-sum charter, namely, a charter in which the remuneration for the services to be performed by the shipowner is one lump sum and not a sum per ton, is entitled to recover his freight. Under the circumstances, being a lump sum, he must be entitled to recover all or none, and that is the situation which creates the difficulty. I do not think I need state the facts of the case at any very great length. [His Lordship stated the facts, and continued:] The question is whether, under those circumstances, the shipowners, who have contracted for payment of a lump sum, are entitled to their freight or not? The charter was in these terms: [His Lordship read the terms, and continued;] In the form of the charter originally the freight was to be paid per standard with regard to some of the timber mentioned there, and with regard to the other per fathom, but all that was struck out, and it reads now "on being paid freight as follows: A lump sum of 1600*l.* (say sixteen hundred pounds) in consideration of which owners place at charterers' disposal the full reach of steamer on and under deck, including spare bunkers, if any." Then there was an exception clause, which included the usual ordinary exceptions, and, amongst others, perils of the sea.

It was argued before me for the defendants that they were entitled to the cargo, as it was their cargo, but they were not liable to pay any freight because in the first instance under a lump-sum charter what is called the lump-sum freight is not freight at all, but is a payment for the use of the ship, and unless the ship arrives, although the whole of the cargo may arrive and may be delivered to the consignees, no freight is payable at all. That was the first proposition, the broad proposition, and if that be correct there could be no payment here, because it was not contended that the ship was an arrived ship. She got off the port, but she certainly had not got to her chartered destination, and it was not contended that she was an arrived ship. Besides that, it was also contended that even assuming that broad proposition not to be upheld, no payment was due in this case for two reasons, as I understand it: First, that only a part of the cargo was delivered, and that unless the whole of the cargo was delivered no payment became due at all, because it was a payment of one sum for one service; and, secondly, it was contended that in the circumstances of this particular case, even assuming that the shipowner might be entitled to perform his contract by transhipping the cargo and sending it, nothing of that kind had been done because the cargo had been washed away and taken out of his possession altogether, and that it was not like a case of transhipment; it was mere salvage. On that last point I should have to determine what was the result and effect of the contract made by the shipowner with Messrs. Jenkins and Co. I think that was a contract made by the shipowner for the purpose of earning his freight. I think that the representatives of each interest were quite willing that the representatives of the other interest should pay for the work being done so long as they retained their rights, and I think it shows that the shipowner at one time was quite willing, in fact rather anxious, that somebody else should pay Messrs. Jenkins so long as he retained his right to freight. But he had contracted with Messrs. Jenkins, and I think, looking at what the master did, and his stipulation that the cargo was to be held under a lien for freight, that that was a contract made by the shipowner for the purpose of earning, if he could, his freight.

With regard to the first point, I cannot think on this charter it is essential, in order that any freight could be earned, that it should be earned by the arrival of the ship which is mentioned in the charter. I do not say that there may not be lump-sum charters in which the amount of freight, as it is called, is payable for the use of the particular ship, and that, unless the particular ship performs the services, payment is not to be made. There may be such charters, but, looking at this charter, I do not think that is the effect of it. It is the ordinary and regular charter for the services of a ship to carry a particular cargo for a particular voyage. If the mode of payment of freight which was in the form of charter-party had been carried out, it is not disputed that the shipowner, if his ship was disabled from performing service by perils of the sea, would be entitled to tranship the cargo in another ship, send it on to its destination, and deliver it and be entitled to his freight. I take first the case where he sent on the whole of the cargo. I cannot see that altering the method of payment from a rate per standard or per fathom to a lump sum deprives the shipowner of perhaps that obligation, but that right, certainly, of performing his contract. I think that if in this case the shipowner having his ship disabled, as I say, from an excepted peril, had transhipped the whole of those pit props into another vessel and delivered them at Port Talbot, as ordered, to the consignees, the consignees could not have refused to pay the freight any more than they could if it had been payable per fathom or per ton, or per anything else you like. It does not seem to me that altering the method of payment alters the primary obligations and privileges and rights of the shipowner and the consignee under the charter, although, no doubt, the fact that there is only one sum payable for one service, or payable in respect of the services in the charter, made a little difference in their rights as to payment.

To deal with the last point before I come to the second one, namely, that the whole of the cargo was not delivered, I cannot see that it makes any difference that the cargo, instead of being taken out of one ship and transhipped into another was,

in fact, swept out of the ship by a peril of the sea and afterwards collected by the shipowner or by persons who contracted with him to do it and delivered to the consignee. He delivers the cargo to the consignee, and the fact, if it be a fact, that it was out of his control for a certain time while it was in the water and washed out of the ship, does not seem to me to matter if he afterwards collects it and delivers it. Therefore I think that, if the whole of the cargo had been collected and delivered, it is exactly as if the whole of the cargo has been transhipped and delivered in another ship.

But the difficult point, and, to my mind, the great difficulty in this case, is to ascertain whether, where only part of the cargo is delivered, the shipowner is entitled to his freight, because he must be entitled to the whole of his freight. There is no way of dividing it per ton delivered or per standard delivered, or anything of that kind; he must be entitled to the whole of his freight or not to any, and he can only be entitled to the whole of his freight if he has performed his contract, and that is the point which seems to me to be the difficult one, and as to which, I confess, I had very great doubts, which are not entirely removed at present. But I think you have to look at the contract as a whole, and by that I mean you have to look at it as a contract which has to be performed subject to certain excepted perils, and that the obligation upon the shipowner is to perform his contract so far as he is not prevented from doing so by perils which are excepted in the exception clause. If he were prevented from doing it altogether, that is to say, if the whole ship and cargo went to the bottom and nothing was ever delivered, there would be a total failure of consideration, and the freight, I take it, would not be payable. But that is not this case. In this case there is—I forget the exact proportion—but it is a very substantial amount of the cargo that was delivered, and which has been received, and everything was collected and delivered that could be. The fact that the whole was not delivered was due to a peril of the sea. Therefore it seems to me, though I express the opinion, I must say, with some doubts, as I think it is a very difficult point, that the shipowner in this case did perform his contract, because his contract was to carry this cargo and deliver it so far as he was not prevented by perils of the sea. He did deliver a substantial amount, and therefore there is not a total failure of consideration. Therefore I think he was entitled to his freight. What might be the result of a case such as is mentioned in *The Norway* (*sup.*), where the whole of the cargo was not delivered by default of the shipowner, is a matter which does not arise here, and I do not think it is necessary to deal with it. It is not this case. This case is a case of a substantial amount being delivered, and the remainder not being delivered by reason of an excepted peril, namely, perils of the seas. Therefore I think that the shipowner did perform his contract in this case, and that he is entitled to his freight.

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

Solicitors for the defendants, *Trinder, Capron, and Co.*

July 29 *and* 30, 1912.

(Before Hamilton, J.)

William Pickersgill and Sons Limited *v.* London and Provincial Insurance Company Limited and Ocean Marine Insurance Company Limited. (*a*)

Marine insurance — Policy — Assignment of — Concealment—Innocent assignee—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 50 (2).

An underwriter must have the opportunity of deciding for himself whether the knowledge of a material fact will affect him or not.

A defence of concealment of a material fact in connection with a policy of marine insurance is a good defence even against an innocent assignee of the policy. Such a defence arises "out of the contract" within the meaning of sect. 50 (2) *of the Marine Insurance Act* 1906.

Commercial Court.

Action tried by Hamilton, J. sitting without a jury.

The plaintiffs claimed in respect of a total loss under policies of marine insurance on the steamship *British Standard* which were subscribed by the defendants.

The plaintiffs were shipbuilders at Sunderland, and on the 16th Sept. 1909 they made a contract with T. Browne and Co., of Cardiff, to build a steamship for the sum of 32,500*l.*, of which 6000*l.* was to be payable by instalments on or before delivery, and the balance by approved acceptances. By way of security the purchasers agreed to execute a mortgage of the vessel, and hand over an assignment of the policies of insurance upon the steamer. T. Browne and Co. then formed a company called the British Standard Steamship Company to acquire and work the steamer, of which they were to be the managing owners, and on the 16th April 1910 they executed a statutory mortgage of the steamer to the plaintiffs to secure the amount due to them, and also executed a deed of covenant to indorse and deliver to the mortgagees all and every policy of insurance effected upon and in respect of the steamer. The company instructed Gardner, Mountain, and Co. to effect various insurances in respect of the ship, and on the 22nd April 1910 a policy of marine insurance was subscribed by the London and Provincial General Insurance Company Limited for 1698*l.* upon hull and materials valued at 20,000*l.* and machinery and boilers valued at 20,000*l.*, the usual perils being insured against. Another policy subscribed by the Ocean Marine Insurance Company Limited was in similar terms and for a like amount. Other policies on hull and machinery were effected to the total amount of 32,000*l.* Gardner, Mountain, and Co. also effected on behalf of the company insurances for 8000*l.* on freight, 5500*l.* on disbursements, and 3300*l.* on premiums, and these insurances were disclosed when the policies on hull and machinery were being effected. T. Browne and Co. also effected other policies of insurance with clubs for 6500*l.* for disbursements and management, but the fact that they had effected such policies was not disclosed when the policies in question were being effected.

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

On the 14th April 1910 Gardner, Mountain, and Co. at the request of the company informed the plaintiffs that they held the policies at the plaintiffs' disposal.

On the 25th May 1910 the *British Standard* was totally lost, and the company brought an action against the World Marine Insurance Company Limited upon a policy subscribed by them.

Hamilton, J. held that the policy was voidable on the ground that T. Browne and Co. had concealed the fact that they had effected other insurances in disbursements for 6500*l.* in addition to those effected through Gardner, Mountain, and Co.

Bailhache, K.C. and *Leck* for the plaintiffs.—Because a policy is voidable as against an immediate assured it by no means follows that it is voidable as against a *bonâ fide* holder such as an assignee. In such a case the defence of concealment is not a defence "arising out of the contract" within the meaning of the Marine Insurance Act 1906, s. 5 (2). Policies of marine insurance are not the same as other *choses in action*, but are subject to their own statutes. The Policies of Marine Insurance Act 1868 by sect. 1 provided that the defendant in any action brought by the assignee of a policy "shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected," while the corresponding words in the repealing Act of 1906 restrict the defendant to make any defence arising out of the contract, and these words were inserted to give effect to *Pellas* v. *Neptune Insurance Company* (4 Asp. Mar. Law Cas. 136, 213; 42 L. T. Rep. 35; 5 C. P. Div. 34), where it was held that a mere set-off was not a defence against an assignee. These words exhaust the defences, and no others are declared by implication or inference. The Judicature Acts passed between 1868 and 1906 made *choses in action* assignable subject to all equities. No notice of an assignment of policies was required by the Acts of 1868 or 1906, whereas other *choses in action* require notice. This clothes insurance policies with some of the *indicia* of negotiable instruments. *Pellas* v. *Neptune Insurance Company* (*sup.*) shows how strictly under the Act of 1868 the word "defence" was used. They also referred to

> White and Tudor's Leading Cases in Equity, 8th edit., pp. 143, 146;
> *Re Agra and Masterman's Bank*, 16 L. T. Rep. 162; L. Rep. 2 Ch. App. 391;
> *Pickard* v. *Sears*, 6 A. & E. 469;
> *Re Hercules Insurance Company*, 31 L. T. Rep. 747; L. Rep. 10 Eq. 302.

Leslie Scott, K.C. and *Mackinnon* for the defendants.—It is an implied term in all contracts of marine insurance that there shall be a full disclosure of all material facts. If this is not made at the time when the policy is effected the insurers are entitled to avoid the policy, and it can make no difference that the policy is subsequently assigned to some person who has no knowledge of the concealment. When the Marine Insurance Act 1906 was passed it was never intended by the Legislature that underwriters should be deprived of the right of setting up the defence of concealment against an assignee. The obligation to disclose arises out of an implied condition precedent contained in the contract, and therefore concealment is a defence arising out of the contract:

> *Blackburn, Low, and Co.* v. *Vigors*, 6 Asp. Mar. Law Cas. 216 (1887); 57 L. T. Rep. 730; 12 App. Cas. 531.

Bailhache, K.C. in reply.

Hamilton, J.—I need not recite the facts of the insurance of the *British Standard*, but may refer to my judgment in the case of *British Standard* v. *World Insurance Company.* I need not go through, again, the evidence that led me then, and leads me now, to the conclusion that there was at the time the policy now sued on was effected a concealment from the defendants of highly material facts, namely, that there was a very large insurance upon disbursements, or a risk which would be ordinarily described as disbursements, over and above the insurance on disbursements that was in course of negotiation or intended to be negotiated in London, and that the amount of such extra insurance was very excessive. By agreement in this case certain considerable parts of the evidence in the previous case have been admitted. The substantial modifications by the evidence in this case are two: first that, as against the evidence of Mr. Symons with regard to matters that might be taken into account as justifying the insurances on disbursements, that there might be considered a sum of over 2000*l.* for appreciation of the value of the steamer over and above its builder's contract price, I have now what I had not before, namely, the evidence of Mr. Tamplin, who is very experienced in these matters, and I have no hesitation in relying upon him on such a point in preference to Mr. Symons, and in saying, therefore, that as a fact there was no substantial appreciation between the date of the contract and the date when the insurances were effected. To that extent, therefore, the ability of the plaintiffs to justify the 11,500*l.* of disbursement insurances is diminished. I am satisfied that to the extent of upwards of 6000*l.* there was an over-insurance —I think in proportion to the amount that might properly have been insured on disbursements, a very large over-insurance; in any case so large as to be material in the judgment of an underwriter. The principle is that the underwriter must have the opportunity of deciding for himself whether the knowledge of the material fact would affect him or not, and whether or not this very large over-insurance relatively speaking would have affected the mind of the particular underwriter or not in a particular way, I am clear that the underwriter in question was entitled to have the fact discovered to him. In this case, however, no evidence has been given with regard to the 8000*l.* insurance on freight. For the purposes of this case, therefore, I assume that that insurance was justified by the assured's interest in the freight, and that there was no over- and at the same time no under-insurance as far as freight is concerned.

There was one further piece of evidence in the present case. It is here said by Mr. Secretan, whose evidence I accept because I think that his recollection is full and accurate, that he was expressly told by Mr. Hall that the owners had selected an excellent captain, with a clean record,

and one whom Mr. Storey had approved. In fact Captain Braun may have been an excellent captain. He certainly had excellent recommendations. He had not an absolutely clean record, owing to the losses of the *Frankfort* and the *Rook* about 1881 or 1882. But I do not rely upon that misrepresentation for the purposes of this judgment, because I think, having regard to the way in which Mr. Storey treated his knowledge of the three subsequent casualties, and the way in which Mr. Secretan has spoken of his real objection to the captain being that he was the managing owner's brother, and the distant date at which the *Frankfort* and the *Rook* casualties occurred, I am not warranted in saying that the misrepresentation here was so material as in itself to avoid the insurance. Assuming, therefore, that I find that the hull policy is effected by a concealment of material facts with regard to the over-insurances on disbursements, the question that is raised is whether, in the circumstances of this case, that is an answer to the present claim which is brought by the builders of the vessel. This is not one of those cases in which the person giving instructions to the insurance broker intended that the insurance ordered should apply for the benefit of the mortgagor and the mortgagee both. It is not one of those cases, therefore, in which the mortgagee is within the category of the persons who are mentioned in the Lloyd's policy, and are interested in the company's policies as persons having an insurable interest whom it is intended by this insurance originally to cover.

The building contract imposed upon the building owners the obligation to insure the vessel and to keep her insured with underwriters, clubs, or companies such as might reasonably be approved by the mortgagees, with the right in the mortgagees, in default, to insure at the expense of the mortgagors, and with the obligation upon the mortgagors to pay premiums and bear the expense of keeping the vessel insured. Accordingly, at the time when the vessel was completed, and the bill of sale granted to the owners and a mortgage in statutory form granted by the owners back to the builders, which is the 16th April 1910, there was executed as well a contemporaneous deed of covenant of the kind in question carrying out the obligations of the building contract, concurrently with the delivery of the vessel, to hand to the builders a first mortgage and an assignment of a good and approved policy of insurance. The policy in question, which was put on the slip in January, but which is only signed on the 22nd April, was effected for the purpose of satisfying those covenants, and although it was formally assigned to the plaintiffs, Messrs. Gardner, Mountain, and Co., the brokers who had possession of the policy, undertook, by the direction of the British Standard Company for the benefit of the plaintiffs, to hold the policies for them so as to satisfy their rights as mortgagees. The argument accordingly is raised that, this being a case in which the policy after being effected by and on behalf of the owners is assigned by the owners to the mortgagees by way of supplementary security, the rule of law ought to be that a defence which would have been good against the owners, the assignors, resting upon concealment of material facts, is not available to the underwriters against the assignees, the mortgagees of the policy.

Attention has been drawn properly enough to the hardship which the plaintiffs have sustained by reason of the fact that, having trusted the British Standard Company to make the proper disclosures, the policy is disputed because the proper disclosures were not made. I am quite satisfied, however, that that is a risk which is certainly not of a character that ought to affect my judgment in deciding whether the defence of concealment is available against the plaintiffs or not. Whatever hardship may be inflicted on the plaintiffs in this case, the case is exceptional; whereas to hold the contrary, and in favour of the plaintiffs to exclude the defendants from raising this defence, would, in my judgment, revolutionise the position of underwriters, and entirely shake the basis upon which their business is done, which is that they are entitled to rely as against all persons interested now or hereafter in the policy upon proper disclosure and true representations having been made when the policy was first negotiated.

Reliance is placed upon the Marine Insurance Act of 1906, s. 50, sub-s. 2. It is pointed out that the words of the Act of 1868 have not been repealed textually, although the Act is repealed by the Act of 1906. There are other differences between sect. 1 of the Act of 1868 and sect. 50, sub-sect. 2, of the Act of 1906, but in particular the words in the Act of 1868 were: "The defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected," whereas in the present Act, after the words "to make any defence," the words "arising out of the contract" are inserted. The argument is that this codification expresses the conditions and the whole of the conditions under which and under which alone the defendant defending himself against the assignee of a policy is to be entitled to set up defences. If by the insertion of these words "arising out of the contract" the Legislature intended to deprive underwriters of the right of setting up concealment against an assignee, and leave them with that remedy only against the assignor of the policy, under the form of codification the Legislature in fact enacted a drastic and far-reaching alteration in the law of marine insurance. One asks oneself whether no other explanation of these words is to be found consistently with the intention of the Legislature, which is clearly expressed, to codify the law relating to marine insurance. I think that quite adequate effect is given to the intention of the Legislature by reference to the case of *Pellas* v. *Neptune Marine Insurance Company* (*sup.*), which was decided in 1879, which resulted in the addition of these words so as to give the effect of the section of 1868 as interpreted in that case and as constituting the law prior to 1906.

Furthermore, the words are "arising out of the contract," and I think that I am bound by the authority of the Court of Appeal in *Blackburn* v. *Vigers* (*sup.*). I am bound to hold in accordance with what has long been stated by the majority of approved text-writers that the rule imposing an obligation to disclose upon the intending assured does not rest upon a general principle of common law, but arises out of an implied condition precedent contained in the

contract itself to the liability of the underwriter to pay, and therefore the defence that that condition has not been performed whereby the underwriter is entitled to avoid a policy is itself a defence which arises out of the contract—not, it is true, out of any written words in the contract, but one which arises out of the contract itself, because a condition precedent to the underwriters' liability implied in that contract has not been performed. If that is so, it becomes unnecessary to discuss at length the alternative argument advanced that, apart from the Act altogether, the rule with regard to marine insurance policies ought to be that the defence of concealment is not available against an innocent assignee for value of the policy itself. If sect. 50 contains the law and all the law upon this point, I think upon the clear construction of it that it entitles the defendant in this case to set up this defence, because it arises out of the contract sued upon.

Mr. Bailhache, has, however, contended that there is reason for placing marine insurance policies in the category of instruments which, though transferable, are tranferable without being attended by all the equities that would be enforceable against the transferor. No authority admittedly can be cited in support of this proposition, but the explanation offered is that such a case as the present arises but rarely, and therefore the occasion for discussing the matter may never have arisen until now. The principle upon which it must be put must, I think, be that cited from the argument in the case of *Re Agra and Masterman's Bank* (*sup.*), which is that from the nature of the instrument, or the terms of the contract, or both, some instrument may be intended by the parties to it to be assignable free from equities, at any rate in favour of a transferee taking full value without notice.

The instances of such instruments as have been cited are so different from the present case that detailed reference to them does not appear to me to be profitable. I can see nothing in the language of this instrument or in the language of any marine insurance policy to indicate an intention that, although assignable, it is to be assignable with special limitations with regard to the equities in favour of the underwriter. The term of the contract in this case—that "the person named as affecting the insurance or his assigns doth promise and agree with the said Robert Gardner, Mountain, and Co. Limited, their executors, administrators, and assigns that the company shall be subject and liable to pay"—is in itself absolutely neutral, equally consistent at the very least with its being an assignment which in the usual course is subject to all the defects in title of the assignor or an assignment that is free from those defects. The nature of the transaction is one which lends no colour to the suggestion that there should be this quasi-negotiability attaching to an instrument which, after all, is only a promise of indemnity, the action upon which, as has been stated in the *Pellas* case, is an action for unliquidated damages in case of nonpayment. I have not been able to extract from the argument advanced any reason for making this qualification in this particular case. There is no trace of any history of a practice of merchants to attach to this instrument this peculiarity. There is no decision upon the point. The only appeal in its favour rests upon the hardship which the plaintiffs suffer in this individual case. The price at which I should accede to that appeal would be, in my judgment, upsetting the business of insurance, and inflicting quite unwarrantable hardship upon underwriters. Therefore, with great respect to the argument, I am unable to accede to it, and I think that it is unfounded.

The result is, therefore, that there is judgment for the defendants with costs.

Solicitors for the plaintiffs, *Pritchard and Sons*, for *Simey* and *Iliff*, Sunderland.

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

Tuesday, Oct. 22, 1912.

(Before BRAY, J.)

SCOTTISH NATIONAL INSURANCE COMPANY LIMITED v. POOLE. (a)

Marine insurance — Reinsurance — Original policy—Policy "subject to same clauses and conditions as original policy, . . . and to pay as may be paid thereon"—Slips.

In Jan. 1911 *D. and W.* (*a firm of underwriters*) *initialled a slip insuring the steamships* Olympic *and* Titanic *for twelve months from delivery, and afterwards reinsured part of this risk with the plaintiffs. In Dec.* 1911 *the defendant initialled a slip reinsuring a portion of the plaintiff's risk for "twelve months from expiration or delivery, clauses and conditions as original." In Jan.* 1912, *whilst the steamship* Titanic *remained undelivered, D. and W. initialled another slip, as follows:* "Olympic, Titanic, *twelve months from expiry." No intimation was given to D. and W. or the plaintiff's agent that this was intended to be anything else than a renewal for a further twelve months after the expiry of the first twelve months, but before the policy was issued an intimation was given to the leading underwriter to explain that the insurance, so far as the* Titanic *was concerned, would commence from the delivery of the same. On the 3rd April* 1912 *a policy was issued by D. and W. insuring the* Titanic *for* 2500*l. from the 2nd April* 1912. *On the 10th April* 1912 *the plaintiffs, by a policy of that date, reinsured D. and W.'s risk to the extent of* 400*l., and on the* 11*th April* 1912 *the defendant underwrote a policy reinsuring the plaintiff's risk to the amount of* 80*l., the policy having the following clause: "Being a reinsurance for account, the Scottish National Insurance Company Limited, subject to the same clauses and conditions as original policy or policies, and to pay as may be paid thereon." The* Titanic *was lost on the* 15*th April* 1912, *and the plaintiffs paid D. and W. under the policy of the* 10*th April. They now sued the defendant under the policy of the* 11*th April.*

Held, that the defendant was liable on the grounds that the policy of the 10*th April* 1912 *was the original policy referred to in the policy of the* 11*th April* 1912; *that D. and W. were always under a contract of insurance of the* Titanic *for the first twelve months by virtue of the slip they initialled in Jan.* 1911; *that the plaintiffs agreed to reinsure them up to* 400*l. in Jan.* 1911, *and remained under this liability; that the*

(a) Reported by LEONARD J. THOMAS, Esq., Barrister-at-Law.

defendant agreed to reinsure the plaintiffs against their liability to the amount of 80l. by initialling the slip of Dec. 1911; *that he signed the policy of the* 11*th April in pursuance of that contract of reinsurance.*

Commercial Court.

Action tried by Bray, J.

The plaintiffs' claim was in respect of a loss on a policy of reinsurance on the steamship *Titanic.*

The facts and arguments are sufficiently stated in the judgment.

Bailhache, K.C. and *Chaytor* for the plaintiffs.

Atkin, K.C. and *Mackinnon* for the defendant.

Bray, J.—In this case the plaintiffs sued the defendant under a policy of reinsurance dated the 11th April 1912 for the sum of 80*l.*, for which the defendant had underwritten that policy. Their case was that by a policy dated the 3rd April 1912, Messrs. Dumas and Wylie had insured the *Titanic* for 2500*l.* for twelve months from the 2nd April 1912, that by another policy dated the 10th April they, the plaintiffs, has reinsured Messrs. Dumas and Wylie for 400*l.* That the *Titanic* had been lost on the 15th April, and that the plaintiffs were liable to pay and had paid Messrs. Dumas and Wylie the 400*l.* These facts were either proved or admitted, and the plaintiffs claimed that the defendant, under the policy of the 11th April, was bound to repay 80*l.*, part of the 400*l.*

The policy of the 11th April was in the usual form, and contained this clause at the foot: "Being a reinsurance for account the Scottish National Insurance Company Limited, subject to the same clauses and conditions as original policy or policies and to pay as may be paid thereon." The defendant contended that under the circumstances, which I shall presently mention, the policy of the 10th April under which the plaintiffs had paid was not the original policy mentioned in this clause, and that in fact there was no original policy. They sought to prove the following facts: that in Jan. 1911, Messrs. Dumas and Wylie had initialled a slip agreeing to insure the *Olympic* and *Titanic* for twelve months from delivery, that a few days after Messrs. Dumas and Wylie had reinsured this risk with the plaintiffs to the amount of 400*l.*, that on the 13th Dec. 1911 the defendant was asked to reinsure. He was told that the plaintiffs were giving up underwriting, and wanted to reinsure certain outstanding risks, of which this was one, aud he then initialled the slip for 80*l.*, which was in these words: "Twelve months from expiration or delivery, clauses and conditions as original"; but in Jan. 1912 the *Titanic* not having yet been delivered, Messrs. Dumas and Wylie initialled another ship, insuring the *Titanic* again for the same twelve months from delivery, which had the effect of cancelling the previous insurance and making a new contract of insurance, and that the result of this was that the reinsurance contract between the plaintiffs and the defendant was also cancelled because the liability of the plaintiffs which he had agreed to reinsure was gone, and he had never agreed to reinsure the plaintiffs against any new liability. In my opinion this defence fails, both in fact and in law.

First, as to the facts. These were admitted up to the date of the slip in Jan. 1912. As to what happened from this point facts were in dispute, and they turned upon the evidence of Mr. Allan, of Willis and Faber, the brokers who acted for the White Star Line, the owners of the *Olympic* and *Titanic,* and who negotiated the insurances in Jan. 1911 and Jan. 1912, and Mr. Pulbrook, who represented Messrs. Dumas and Wylie, and acted for them and for the plaintiffs. The evidence of Mr. Allan was to the effect that in Jan. 1912 he desired to renew the insurances on the *Olympic* and *Titanic* for another twelve months. The *Olympic* had been delivered in May 1911, so that the new twelve months would run from May 1912. The *Titanic* had not been delivered, so that the new twelve months would commence from the end of the first twelve months after delivery. With that object he drew out a new slip thus: "*Olympic, Titanic,* twelve months from expiry." This would correctly carry out what he proposed. When, however, he presented it to the leading underwriter that gentleman said it would be awkward to have so large an insurance open for another twelve months, as being so far forward, and suggested that the second slip might be used as a sort of confirmation by the first slip. Mr. Allan said that should be so if he could arrange it with the other underwriters, and it was left in this way, that if he could get the same amount of insurance on the second slip it should be treated, so far as the *Titanic* was concerned, not as a renewal, but as a confirmation of the original twelve months. He did get the same amount of insurance, although some of the underwriters were different. The wording of the slip, however, was never changed, and no intimation was ever given to Mr. Pulbrook, who initialled the slip on behalf of Dumas and Wylie, that it was intended to be anything else but what it purported to be—namely, a renewal for a further twelve months after the expiry of the first twelve months. Before it was closed—that is, before the policy was issued in respect of it, Mr. Allan sent round a notice to some of the underwriters to explain that the insurance, so far as concerned the *Titanic,* would commence from the delivery by the slip. No such notice was given to Mr. Pulbrook or to Messrs. Dumas and Wylie.

Mr. Pulbrook was called, and stated that the second slip was presented to him without any explanation and that he took it to be a renewal of both vessels—that is, as regards the *Titanic* from the expiry of the first twelve months from delivery, so that under the first slip he was liable for the first twelve months from delivery, and under the second for the second twelve months, two different insurances, and that when he was asked to close—that is, to issue a policy for the first twelve months, he signed the policy of the 3rd April in pursuance of the contract he had made when he signed the first slip in Jan. 1911. I accept the evidence of both these witnesses. There was a little confusion in Mr. Allan's evidence, but I have stated his evidence as I understood it, and in that sense I accept it as true.

On this evidence I find that as between Messrs. Dumas and Wylie and the owners of the *Titanic* the contract made by the initialling of the first slip was never cancelled. When he signed the second slip, Mr. Pulbrook had no intention whatever of cancelling the first slip, or even confirming it, and no com-

munication was ever made to lead him to believe that when he initialled he was doing otherwise than making a fresh contract for a second twelve months. Conversations with the leading underwriter may sometimes affect others initialling later, but they cannot, if not communicated to the others, make a perfectly different contract from the one appearing on the face of the slip. There may have been a misunderstanding about the second slip, but that was certainly not the fault of Mr. Pulbrook or the plaintiffs. The plaintiffs never heard of the supposed cancellation of the insurance of Jan. 1911, and made no fresh contract with Messrs. Dumas and Wylie. The letters of the 4th and 5th April 1912 show how the line was closed, and the policy was signed and sent to Messrs. Dumas and Wylie on the 10th April. The defendant, Mr. Poole, was called, but stated nothing material on this point. He signed the policy under the slip of Dec. 1911, without any objection, although in fact he knew of and had underwritten each of the slips of Jan. 1911 and Jan. 1912 for 5000*l.*

It was suggested by Mr. Atkin for the defence that the insurance under the first slip had run off by reason of the delay in the delivery by the *Titanic*, but he failed to prove this, and I am satisfied that none of the parties ever thought it had run off. I find that Messrs. Dumas and Wylie were always under a contract of insurance of the *Titanic* for the first twelve months by virtue of the slip they initialled in Jan. 1911; that the plaintiffs agreed to reinsure them up to 400*l.* in Jan. 1911 and remained under this liability, and that the defendant agreed to reinsure the plaintiffs against their liability to the amount of 80*l.* by initialling the slip of Dec. 1911, and that he signed the policy of the 11th April in pursuance of that contract of reinsurance. This makes it unnecessary for me to decide the question of law, but I am prepared to hold that if Dumas and Wylie had been in the position of the leading underwriter, and had, when intending to confirm the contract of insurance of the 1st Jan. in law made a new contract of insurance, the defendant would still have no defence.

As Mr. Atkin put it, the question to be decided is whether the policy of the 10th April 1912 is the original policy mentioned in the clause at the foot of the policy of the 11th April 1912. That is a question of law, or possibly mixed fact and law. Now, there was at this time no other original policy in existence in respect of the *Titanic*, on which the plaintiffs were liable, except this policy of the 10th April. Beyond all doubt that was the policy which the plaintiffs intended should be the original policy. The defendant made no inquiry as to the original policy, and I think he must be taken to have meant any original policy which the plaintiffs had then subscribed corresponding with the terms of the slip he had initialled. He was content to reinsure the plaintiffs against the risk which the plaintiffs were then under, provided it was the same risk. It was absolutely of no importance to the defendant whether this confirmation of the original slip took place or not, the risk being absolutely the same.

In my opinion if, in fact, there was this confirmation, constituting in law a new contract, I am bound to hold that the original policy mentioned in the policy of the 11th April was the policy of the 10th April. There is no business reason why I should not so hold, and no reason in law that I can see. The plaintiffs have paid, as in my opinion they were bound to pay, under this policy, and are entitled to recover from the defendant the 80*l.* for which he subscribed the policy of the 11th April.

I have carefully considered the cases of *Maritime Insurance Company* v. *Stearns* (1901) 2 K. B. 912) and *Lower Rhine and Wurtemberg Association* v. *Sedgwick* (8 Asp. Mar. Law Cas. 380, 466; 78 L. T. Rep. 496; (1899) 1 Q. B. 179), but I can find nothing in the judgments in those cases which conflicts with my opinion. There must be judgment for the plaintiffs for 80*l.* with High Court costs.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

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

Monday, Oct. 28, 1912.

(Before Bray, J.)

Meral and Co. *v.* Ropner and Co. (*a*)

Charter-party — Construction of — Liability for damage caused by "improper opening of valves . . ."—Damage caused by omission to close valve properly opened.

A charter-party provided that "nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage, or absence of customary ventilation, or by improper opening of valves, sluices, and ports."

Held, that the shipowners were liable for damage caused by a valve being improperly left open although it had originally been properly opened.

Commercial Court.

Action tried by Bray, J.

The plaintiffs, who had purchased a cargo of maize for shipment from Sulina to the United Kingdom, chartered the *Hurworth* for the carriage of the cargo by a charter-party dated the 3rd Jan. 1912. In January, when the loading was nearly finished, it was discovered that water had got into the engine-room to a considerable depth and from there had reached the holds. While the ship was loading, the engineer, with the view of preventing damage to the pipes by freezing, opened a valve in the side of the ship, and slacked back a door in the circulating pump, through which there was an inlet of water when the vessel got down to her marks. The water reached the cargo, which was seriously damaged.

The defendants, who were the owners of the ship, did not deny that there was negligence in allowing the water to enter, but said they were protected from liability by clause 14 of the charter-party, which was in the following terms:

The act of God, perils, dangers, and accidents of the sea or other waters of whatever nature and kind soever; fire from any cause on land or on water, barratry of the master and crew, enemies . . . explosions, burst-

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

ing of boilers, breakage of shafts, or any latent defects in hull and (or) machinery, strandings, collisions, and all other accidents of navigation, and all losses and damages caused thereby are excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners, but unless stranded, sunk, or burnt nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage, or absence of customary ventilation, or by improper opening of valves, sluices, and ports, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage.

Atkin, K.C., *Leslie Scott*, K.C., and *Leck* for the defendants.—Clause 14 of the charter-party exempts the defendants from liability. The words mean that the shipowner is only liable for the improper opening of valves. It does not follow that he is liable for damage occasioned by the valves being improperly left open after they have been quite properly opened. If the plaintiffs are to succeed, additional words must be read into the clause to cover "improper leaving open of valves," but as the addition of such words is unwarranted, in his argument in *The Southgate* (1893) P. 329) Mr. Cohen assumed it to be obvious that the shipowner would be exempt from negligence in leaving a valve open. [They also cited *Burton* v. *English* (5 Asp. Mar. Law Cas. 84, 187; 49 L. T. Rep. 768; 12 Q. B. Div. 218).]

Bailhache, K.C. and *Roche* for the plaintiffs.—If the clause has the meaning put upon it by the defendants, it would have been a complete answer to the claim in *The Southgate* (*sup.*). As the charter-party is a business document, care must be taken to give it a reasonable mercantile effect. The damage really arises from the improper leaving open of the valve, and the words cannot be confined to the mere act of opening, as otherwise the clause is reduced to an absurdity.

BRAY, J.—I have to decide what is the true construction of this clause, and perhaps the first thing I ought to consider is whether there is any particular canon of construction which ought to be applied. Mr. Leslie Scott says that I must construe it most against the shipper if there is any ambiguity, and he says the reason of that is this —that, although the clause is primarily intended for the benefit of the shipowners, this particular part of the clause is a protection to the shipper, and therefore it must, in case of ambiguity, be construed most strongly against him. In support of that proposition a passage in the judgment of Bowen, L.J. in *Burton* v. *English* (*ubi sup.*) was cited. In that case the Lord Justice said this: "What is the sound principle to apply? Why, it is that those who wish to make exceptions in their own favour, and by which they are to be relieved from the ordinary laws of the sea, ought to do so in clear words." In my opinion that passage does not support the principle enunciated by Mr. Scott. It says this: "If you are to override the ordinary law you must do so in clear words"; and I think it would be wrong to say that in this case the shipowners are trying to override the ordinary laws of the sea; they are trying to emphasise them, to make them applicable. Therefore, I am not disposed to apply the canon of construction which Mr. Scott puts forward. I do not think it necessary to apply the canon of construction the other way, and say that I must construe it most strongly against the shipowners. I will try to give it what in Scrutton on Charter-parties and Bills of Lading (p. 12 of the sixth edition) is said to be the proper construction of such documents—namely, that they are to be construed "according to their sense and meaning as collected in the first place from the terms used, understood in their plain, ordinary, and popular sense." Being a commercial document, the charter-party must be construed in a business sense—in a practical sense. What under those circumstances is the meaning of those words: "Nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by . . . improper opening of valves, sluices, and ports?" It may be said that the natural and ordinary meaning of that language is the act of opening of valves, &c. Mr. Bailhache, however, was I think right in saying that the damage caused by the mere act of opening is necessarily something small and that the words must have been intended to mean not only the act of opening the valves, &c., but also the leaving of them open; in other words, that a business interpretation cannot be given to these words except by reading them as including the case of improperly having the valves open or leaving them open. There are other reasons, it seems to me, from a business point of view, pointing to the same conclusion. It seems to me rather far fetched to suggest that the parties intended to make the distinction, suggested by Mr. Scott, between the case of opening and omission to shut, and that the shipowners should be liable in the one case and not in the other. Reading the language of the clause in the ordinary, plain, and popular sense, I am of opinion that the words "improperly opening" of valves, &c., include the case of having them improperly open or improperly leaving them open. The plaintiffs are therefore right in their construction of the clause, and there will be judgment for the plaintiffs with costs.

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

Solicitors for the defendants, *Lightbound, Owen, and MacIver.*

Friday, Nov. 1, 1912.

(Before BRAY, J.)

ASIATIC PETROLEUM COMPANY LIMITED *v.* LENNARD'S CARRYING COMPANY LIMITED. (*a*)

Cargo — Loss by fire — Unseaworthiness of ship — Liability — Fault or privity of owners— Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), s. 502.

A cargo of oil carried on board a ship was destroyed by fire, the cause of the loss being the stranding of the ship occasioned by the unseaworthiness of her boilers.

Held, that as the owners had not fulfilled their duty in seeing that the ship was seaworthy, they were not entitled to the protection of sect. 502 *of the Merchant Shipping Act* 1894, *as the loss had not happened without their actual fault or privity.*

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at Law.

COMMERCIAL COURT.

Action tried by Bray, J. sitting without a jury.

The plaintiffs' claim was for damages for breach of contract and breach of duty on the part of the defendants in and about the carriage of a cargo of benzine on board the defendants' steamship *Edward Dawson* from Novorossisk to Rotterdam.

The facts and arguments are sufficiently stated in the judgment.

Atkin, K.C., *Maurice Hill*, K.C., and *Mackinnon* for the plaintiffs.

Bailhache, K.C. and *Roche* for the defendants.

BRAY, J.—This action was brought by the endorsees of certain bills of lading under which benzine oil was to be carried by the defendants on board their tank steamer *Edward Dawson* from Novorossisk to Rotterdam. The *Edward Dawson* shipped the oil at Novorossisk and sailed on the 7th Sept. 1911. She went ashore near Flushing on Oct. 1, and within six hours after the oil tank took fire and was destroyed. The plaintiffs alleged that the *Edward Dawson* was unseaworthy when she left Novorossisk, owing to defects in the boilers, that she was driven ashore owing to want of steam arising from those defects, and that the fire was caused by the stranding and its consequences. The defendants disputed these allegations, and contended further that they were protected by sect. 502 of the Merchant Shipping Act 1894. The material part of the section is as follows:

> The owner of a British seagoing ship or any share therein shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely: (i.) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship. . . .

The first question I have to determine is whether the ship was unseaworthy when she left Novorossisk. The *Edward Dawson* (originally bearing another name) was built in 1890. New boilers were put in in 1896. She was bought by the defendants in 1907 for 7500*l.*, and a large sum, about 6550*l.*, was then spent upon her in repairs, which included repairs to the boilers. She arrived in Birkenhead in Jan. 1911, having sustained some damage on her last voyage. She was repaired there, and was then surveyed there on behalf of the Bureau Veritas. Mr. Viehoff, the surveyor, after the survey, endorsed a certificate extending her class (the first division) for another twelve months from March 1911, on condition that the working pressure in the boilers should be reduced from 160lb. to 130lb. She sailed from Birkenhead to Kustendje in ballast on the 20th Jan. 1911 and returned with an oil cargo to Cette. From Cette she sailed again in ballast to Kustendje, and came back to Cette with another oil cargo. She left again for Kustendje in ballast and took oil on board there, and brought her cargo to Thames Haven, where she arrived on the 10th June. After some repairs to her boilers there she left in ballast for New York where she shipped an oil cargo for Spanish ports, the last of which was Barcelona. She left Barcelona in ballast, arrived at Novorossisk on the 1st Sept., left that port with a cargo of benzine oil on the 7th Sept., and was lost in the North Sea, as I have already stated. A great deal of evidence was given as to the condition of the boilers during these voyages, the second and third engineers and some firemen being called for the plaintiffs, and the captain, the first engineer, and the chief officer for the defendants. A good deal of the evidence of the plaintiffs was not disputed, but some was. As regards nearly all these witnesses on both sides, there were some discrepancies between the evidence they gave before me and the evidence they gave at a Board of Trade inquiry held in Dec. 1911, to inquire into the loss. Owing to this, and the absence of any log-books, which were said to have been burnt or lost in the ship, it was not always easy to arrive at the truth, but as to the main facts I think my findings may be relied on as being correct.

In order to explain matters, I should say that there were two boilers, each having three furnaces, a centre furnace and two wing furnaces. It is not, I think, necessary for me to further describe them. Models and drawings were produced, explaining their construction quite clearly. During the voyages between February and June which ended at Thames Haven there were frequent leakages in the stays, the tubes, and elsewhere in the boilers; and when she arrived at Thames Haven there was salting up in the combustion chambers, and considerable repairs were required. The real fact was that the boilers had become weak in many places, owing to age. The particular leaks might be repaired, but others would speedily show themselves. The life of boilers of this description, if well cared for, might be anything between fifteen and twenty years. The life of tubes would be only about ten years. These boilers were now fifteen years old, and the tubes had never been renewed. The repairs that were done at Thames Haven were simply repairing stays, tubes, and patches where leakages had shown themselves. Nothing was done to repair the general weakness, although nearly 200*l.* was spent. The result was that on the voyage to New York there were again leakages, and so serious were they that the water came through the ashpit and covered the stokehold plates. The leakages showed themselves not long after leaving Portland, and again there was salting sufficient to almost destroy the heating power of one of the furnaces. At New York five of the firemen refused to continue with the ship, complaining of the leaky condition of the boilers, and the captain was obliged to consent that they should go, giving them V.G. discharges. The chief engineer said that he dismissed one of them for disobedience, and the other four left in consequence. This statement was corroborated by no one, and it was quite inconsistent with the evidence of many witnesses, including the captain. I do not accept the chief engineer's story. I accept the story that they left because of the leaky condition of the boilers. Whether they considered there was actual danger to the ship is perhaps doubtful, but they certainly considered the leakage serious. The combustion chambers were cleared out at New York and some repairs done by the staff, but nothing else, and no independent person was called in. Although the weather had been moderate, the ship had made a very slow voyage from Portland. She had originally been registered as, and I have no doubt had been, a nine and a half knot ship, but since 1907 she had rarely done over seven knots, and on this voyage she averaged only six and one-third

knots. The chief engineer said it was the firemen's fault, but I do not accept this. At New York she shipped a cargo, which was discharged at some three ports in Spain, the last of which was Barcelona. On this voyage the leakages were worse, and so was the salting-up. At Barcelona three men (two sailors and a fireman) went to the consul and claimed their discharge, on account of the condition of the boilers. Eventually, after some communication between the consul and the captain, the captain promised the men that when they got to Novorossisk a good job should be made, and the men agreed to go on. When they got to Novorossisk the two centre combustion chambers were salted-up above the bridge, the result of which was that the fires in the two centre furnaces were useless, there being no draught. It was admitted that the salting-up of the combustion chambers was the consequence of the leakages. There were also defects in the smoke box. Nothing was done at Novorossisk by way of repair of the boilers, except the partial clearing out of the combustion chambers and the stopping of some of the leaks. No assistance from outside was obtained, except that some chisels and tools were bought to cut out the salting.

I find that the boilers when she left Novorossisk were very defective. It was practically certain that before the end of the voyage to Rotterdam the combustion chambers would be salted-up, as they had been on the voyage from Barcelona. The boilers were generally weak. It would be impossible to maintain for any time anything like a pressure of 130lb. in the boilers; probably 115lb. or 120lb. would be the outside average, and when the chambers got salted-up still less, and it was extremely likely that in any stress tubes would burst. Sir Fortescue Flannery and Mr. Swainston, two eminent marine engineers, were called for the plaintiffs. They said that a pressure of 130lb. in the boilers would leave no reserve, and that if 120lb. only could be maintained the ship would be unseaworthy, and, further, that if the boilers were in such a state that the combustion chambers would be salted-up before the voyage was ended it would not be safe to send her to sea. No independent person was called to contradict this, and, indeed, Mr. Smaling, a marine superintendent and boiler-maker, called by the defendants, agreed with the last statement of the plaintiffs' experts. Everybody, including the captain and chief engineer, agreed that it was most unusual, if not unheard of, that there should be salting-up to the extent that was found at Novorossisk. What happened eventually on the voyage, in my opinion, strongly confirmed the view that the ship, when she left Novorossisk, was unseaworthy by reason of the defects in the boilers, and I so find as a fact without hesitation.

The next question is whether the ship was stranded owing to the inability of the boilers, from their defects, to raise sufficient pressure of steam. I will state, therefore, what happened on the voyage. One tube burst in the first forty-eight hours, and another before reaching Algiers. From Algiers to Dover the voyage was very slow, although the captain said the weather was moderate. It took ten and a half days to get to Dover, although it should have taken, according to the chief engineer, less than eight and a half. The average speed could not have been more than about six knots. Before entering the Channel the combustion chambers of the two centre furnaces had been completely salted-up, so that these furnaces were useless, and there were then only four available, instead of six. The ship passed Dover about 3 a.m. on Saturday, the 30th Sept., and soon after there was a gale, with a heavy sea. At 3.30 p.m. the captain, who up to that time had kept his course to Rotterdam, hove to—that is, turned the ship's head to the wind, which was slightly west of north. I see no ground for saying that this was not a prudent course. He was then about twenty miles off the shore, and the ship's head, when put to the wind, would be pointing straight away from the lee shore, and it would have been dangerous to try to enter Rotterdam. At 11 p.m. a tube burst, which necessitated drawing the fires of that boiler, leaving her, therefore, with one boiler only and two furnaces. By 3 a.m. the tube had been repaired, and the full pressure which the two boilers and four furnaces could raise was obtained. About 5.30 the ship grounded at Botkill Bank, and remained aground for twenty to thirty minutes. She then got off, but finally grounded at 7.40 in the Scheldt, close to Flushing. From the point where the ship's head was put to the wind to Botkill Bank is about twenty miles, and almost directly to leeward. What was the cause of the ship being driven this distance? According to the plaintiffs' evidence, this was owing to want of sufficient steam to drive the engines. The defendants, on the other hand, said, so far from this being the case, they did not use all the steam they could raise; they had to drive the engines at less than full speed, for fear that the ship would founder and break up, owing to the great violence of the wind. This raised an important issue of fact as to whether all the steam available was used. The story of the captain and the chief engineer, corroborated on one point by the chief officer, was that very soon after the ship's head was put to the wind he sent a message by the chief officer to the chief engineer not to carry so much steam, as she did not require it. The chief engineer stated that, in consequence, he told the third engineer to partly close the throttle-valve and reduce the speed to one-half or three-fourths, that this was done, and the throttle-valve was maintained in this position until she stranded, and the revolutions were reduced from fifty-five to fifty-six to forty-eight to fifty. This is, in my opinion, directly contrary to the evidence given by the captain and chief engineer at the Board of Trade inquiry, and to the protest, and to the deposition of the chief officer. In my opinion, on this point, as well on others, both the captain and the chief enginee gave their evidence in a very unsatisfactory manner. There were also many discrepancies between the stories of the men, and I am satisfied that this story of theirs was untrue, and, I am afraid I must say, invented to meet the case made by the plaintiffs.

I am satisfied that every effort was made to raise all possible steam, and that it was the want of steam that caused the ship to be driven to leeward. As to the strength of the gale, I had reports of the weather from several places. The wind varied in strength from eight to ten, with squalls. Ten is a strong gale, and the squalls might occasionally reach twelve, but it was not

the squalls that caused the stranding. I am satisfied that the ship was being driven to leeward all the time from when her head was first put to the wind. It was urged for the defendants that if there was want of steam it was mainly between 11 and 3, when they were repairing the burst tube. I daresay she drifted rather faster during that time, but, in my opinion, she would have been driven on shore anyhow, although possibly a little later. Observations were taken between 3 a.m. and 4 a.m., and during that time, when the two boilers were going, and she was using, according to the captain, all the steam she could, the ship drifted to leeward quite one and a half miles. If, however, it were otherwise, I find that the bursting of the tube was not an accident such as sometimes happens with the best machinery and boilers, but was the direct consequence of the weakness of the tubes, which were fifteen years old, and had already shown repeated signs of weakness. Captain Wood, of the *Wrexham*, which was in the North Sea on that night, said that it was a gale that an ordinary cargo-boat of the class of the *Edward Dawson* should have been able to ride out successfully with seaworthy boilers. There was no evidence to contradict this, except a list of wrecks which was put in. Without knowing the circumstances under which these wrecks took place this evidence was of little value. If this had really been an exceptional gale, some captains or officers who were in vessels on the North Sea that night could have been called, in the same way that Captain Wood was called. With seaworthy boilers the *Edward Dawson*, in my opinion, would never have stranded. I find, therefore, as a fact that the stranding on Botkill Bank was caused by want of steam, which was caused by the unseaworthy condition of the boilers. I find the same with regard to the second stranding. Once having been driven on to Botkill Bank, what happened afterwards was the natural consequence of having been driven into such a dangerous position, with possibly some injury to her steering gear.

The next question is whether the loss of the cargo was the consequence of the stranding. I suggested to counsel, in the course of their argument, that if it was shown that the stranding caused a danger to arise that, even though reasonable care were taken, the benzine might catch fire, and the benzine did catch fire, and not owing to any negligence, then the stranding was the effective cause of the loss of the benzine. I am not putting this as an exhaustive statement of the law on the subject, but both counsel accepted it as sufficiently correct in this case. Now, it was clear that the tanks were injured by the stranding to such an extent as to allow some of the benzine to escape. Where it escaped was not ascertained, nor the extent of the leakage, but the leakage was serious, and the captain and the engineers realised that there was a serious danger of the benzine causing explosion and taking fire. The fires were ordered to be drawn, and between 11 and 12 a.m. the chief engineer ordered everyone out of the engine-room and stokehold because of the danger. I am satisfied that there was a real danger of the benzine catching fire, even though due precautions were taken to prevent it. It was urged for the defendants that, if reasonable precautions had been taken, there would have been no explosion or fire. I think the probable cause of the explosion was the gas from the benzine getting into the combustion chamber. It was said for the defendants that the chief engineer should have had water poured into the combustion chamber by means of a hose from the ash-cock, so as to extinguish any hot ashes there. It is always easy to be wise after the event; but was this a precaution which a reasonably prudent engineer would have taken? It never occurred to any of the engineers or to the captain to suggest that it should be done, although everyone realised the danger of an explosion. It certainly is not a usual thing to do. I do not think any of the witnesses had ever heard of it being done under any circumstances. They differed as to its being a dangerous thing to do. I think it would obviously be somewhat dangerous. There was no hose attached to the ash-cock, though it was said there was a hose on deck. I find it impossible to say that either the captain or the engineers were negligent in not taking this precaution. I find that the loss of the cargo was caused by the unseaworthiness of the boilers.

I now come to the question of the effect of sect. 502 of the Merchant Shipping Act. It has been decided by the Court of Appeal, in *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam-Shipping Company* (12 Asp. Mar. Law Cas. 82 (1911); 105 L. T. Rep. 810), that the immunity given by this section applies, even though the fire was caused by the ship being unseaworthy, but the section itself provides that the immunity is not given unless it happens without the fault or privity of the owners. I think it may be right to say that it is the fire that must happen without fault or privity of the owners Inasmuch, however, as I have found that the fire was caused by the unseaworthiness, I think I must see whether the unseaworthiness was caused without the fault of the owner. It could not truly be said that the fire was caused without the fault of the owners if the unseaworthiness was caused by the fault of the owners. I have therefore to inquire whether they were to blame for the unseaworthiness. Now, it is not disputed that the fault of the managing owners is the fault of the owners. The managing owners were Messrs. J. M. Lennard and Sons Limited. Except that letters were apparently written to Mr. J. M. Lennard, I have nothing to show whether he or the board of directors of that company assumed the duty of management with respect to this ship. I do not think it matters. It has been suggested that they delegated their duty to Mr. Smaling as marine superintendent. I do not think they did. That gentleman was employed from time to time, but he did not in any sense represent the managing owners. He did not undertake the general supervision of the ship. He had not duties while the ship was at sea. The captain did not communicate with him, but with the managing owners. Mr. Snaling merely visited the ship when it came into port, and acted upon the instructions he received. The duty of supervision, I find, remained with the managing owners. Now, what is the degree of care which the owners must take in carrying out the duty of seeing that the ship is seaworthy? In my opinion, I ought to apply a high standard to this duty. If the ship is allowed to go to sea in an unfit state, grave consequences follow. The lives

of many men are at stake, and very valuable property. The utmost care must be taken. The duty must be fulfilled most thoroughly. Was it so fulfilled here?

Mr. Hill contends, first, that the owners were to blame in not having proper repairs done at Thames Haven; and, second, that the system was bad, that there was no sufficient supervision, and, if there had been, they would have learnt of the condition of the boilers at New York, Barcelona, and Novorossisk, and they would have known that the ship should never have been allowed to leave Novorossisk. They would have known of the condition of unseaworthiness which I have found to exist. As to Thames Haven, I doubt if the case is sufficiently proved. It is true that they received a copy of the letter from the charterers of the 9th June, but not till after the ship had arrived, and before Mr. Smaling was instructed, and they might have thought the instructions which had been previously given to Mr. Smaling were sufficient. I think I ought to give them the benefit of the doubt, but, in my opinion, something should have been done with regard to the future. They had ample warning that there might be danger. They had learnt when the ship was at Birkenhead that the boilers were so weak that the pressure had to be reduced from 160lb. to 130lb., a pressure which, if sufficient, in my opinion, left no margin. They learnt, when the ship was at Thames Haven, that even within four months increased weakness had developed, and that there had been leakages in many parts. The repairs there had cost nearly 200*l.*, and the items showed that what was done was merely repairing the then existing leaks. They had the letter from the charterers to which I have referred. Any reasonable man would know that the boilers could not last long, and that at any moment further weakness might develop. In my opinion, it was their duty at least to give special instructions to the captain and engineer to do two things—first, to report to them from each port where the ship touched as to how the boilers had behaved on the voyage; and, secondly, if further weakness developed, to have the boilers carefully examined by some competent independent person. It would not be sufficient, in my opinion, to leave everything to the discretion of the captain and chief engineer. What did they do? They realised that new boilers were urgently required. They ordered them at the end of July, and stipulated that they should be ready by the middle of November, but they gave no special instructions to the captain or the chief engineer, and no warning of the danger which they themselves probably realised, or, at all events, ought to have realised, and they did not even require that the log-book of the voyage which ended at Thames Haven should be sent to them. Mr. Marshall, the secretary, was called. His evidence was vague as to what the captain and the chief engineer should have done in the way of sending the log-book and reporting, but it is clear that, if they had any duties, neither the secretary nor the directors required that they should be carried out. Nothing in the way of reports was sent except the meagre letters from the captain, which gave no intimation of the real state of things. Now, none of the managing owners were called, not even Mr. J. M. Lennard, who probably was the person who took the most active part in the management of the ship. The directors' minute-book, containing the minutes of what was done at the board meetings, contained, I was told, nothing. There are no documents giving any information or explanation, I was told; there was no answer to the charterers' complaint.

In the absence of any explanation, I must come to the conclusion that the managing owners failed in their duty, and that, if they had done what they ought to have done—namely, insisted on having the fullest information given to them of the behaviour of the boilers subsequent to the ship leaving Thames Haven—they would have learnt that the ship was unseaworthy. I find that the cargo was not lost without their fault, but by their fault. They are not, therefore, entitled to the protection given by sect. 502 of the Merchant Shipping Act. Under these circumstances, it is unnecessary to consider whether the terms of the bill of lading excluded the operation of sect. 502. If the defendants are only entitled to the protection of the bill of lading and the terms of the charter-party incorporated therein, it is not contended they would not be liable. Under their contract, therefore, the defendants are liable for loss or damage caused by the unseaworthiness of the *Edward Dawson*. I have found that the cargo was lost by reason of this unseaworthiness, therefore I must decide the question of liability against them. The amount of the damages, I understand, is to be determined elsewhere. The plaintiffs must have the costs of the action up to now.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

Solicitors for the defendants, *Downing, Handcock, Middleton, and Lewis*, for *Bolam, Middleton, and Co.*, Sunderland.

Wednesday, Nov. 27, 1912.

(Before Ridley and Scrutton, JJ.)

Deering and Sons v. Targett. (a)

Pilot—Negligence by—Limitation of liability—Several claimants—Power of court to apportion amount of statutory liability — Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 620.

Where a Trinity House pilot has executed a bond under sect. 619 (*ii.*) *of the Merchant Shipping Act* 1894 *by reason of which his liability for negligence is limited under the provisions of sect.* 620 *of the Act to* 100*l. and the pilotage for the voyage during which such negligence has occurred, the court, in the event of several parties suffering damage by the pilot's negligence, has no power to divide the amount of the pilot's statutory liability rateably amongst the various claimants, and if none of the claimants have been paid by the pilot the person first suing is entitled to be paid the full and not the rateable amount of his loss up to the limit of the pilot's liability.*

Appeal from the decision of His Honour Judge Rentoul sitting at the City of London Court.

The defendant was a licensed Trinity House pilot and had duly executed a bond under the

(a) Reported by Philip B. Durnford, Esq., Barrister-at-Law.

Merchant Shipping Act 1894, s. 619 (ii.), which provides that

Every Trinity House pilot, shall, on his appointment. execute a bond for one hundred pounds, conditioned for the due observance on his part of the regulations and by-laws of the Trinity House, and that bond shall be free from stamp duty and from every other charge except the actual expense of preparing the same.

By sect. 620 of the Act

A qualified pilot appointed by the Trinity House who has executed a bond under this part of this Act shall not be liable for neglect or want of skill beyond the penalty of the bond, and the amount payable to him on account of pilotage in respect of the voyage in which he was engaged when he became so liable.

On the 12th June 1912 the defendant was in charge of the steamship *Batavier V.*, and owing to his negligence a collision occurred between the steamship *Batavier V.* and the plaintiffs' barge *Atbara* with the result that the barge was sunk and the cargo, which belonged to four different owners, was lost.

The plaintiffs and the owners of the cargo made claims upon the defendant in respect of the damage to the barge and cargo which amounted in the aggregate to 257*l.* 12*s.* 4*d.*, the plaintiffs' share being 72*l.* 15*s.* 3*d.* The total amount of the defendant's liability under the provisions of the Merchant Shipping Act was 100*l.* the amount of the bond executed by him, and 2*l.* 3*s.* 6*d.*, being the amount of the pilotage in respect of the voyage during which the collision occurred. The defendant admitted liability for the amounts claimed by the different claimants, but none of them had in fact been paid by him.

The plaintiffs brought an action against the defendant in which they sought to recover 72*l.* 15*s.* 3*d.*, the full amount of their loss.

The defendant paid into court the sum of 25*l.*, that being an amount slightly in excess of the rateable proportion of the total statutory liability of the defendant to which the plaintiffs would be entitled.

At the trial the learned judge admitted evidence to prove that the claimants other than the plaintiffs were entitled to the amounts respectively claimed by them, but he held that in the absence of judgments for these amounts recovered in a court of law, the plaintiffs as having been the first of the claimants to bring their action were entitled to recover the full amount of their claim.

The defendant appealed.

Maurice Hill, K.C. and *A. E. Nelson* for the defendant.—The learned judge was wrong in holding that the payment into court by the defendant of the rateable proportion of the amount of his statutory liability was not a good defence to the plaintiffs' claim. There is no machinery under the County Court Act or rules by which a pilot can take proceedings to limit his liability analagous to those which can be taken by a shipowner under sect. 504 of the Merchant Shipping Act 1894. In the absence of any such provision it is the right and duty of the pilot, if he is liable to several people in an amount exceeding the amount of his statutory liability, to see that one claimant does not come and perhaps recover the whole amount for which he is liable in the aggregate, leaving the other claimants without any chance of securing the amounts due to them. [Scrutton, J.—I think the pilot would have had a good answer to the plaintiffs' claim if he had either paid the whole amount for which he was liable, to one creditor or if he had paid away all except the proportionate amount to which the plaintiffs were entitled and had then paid that sum into court.] It is submitted that in the present case, the other claimants not having been paid by the defendant he adopted the only course by which the money could have been fairly distributed between them. If he were not justified in what he did, supposing that writs were issued by five different claimants on the same date, and the actions were all heard on one day, the plaintiff in the case which by accident came on first might recover a judgment which would absorb the whole amount for which the pilot was liable.

Adair Roche, K.C. and *Robertson*, for the plaintiffs, were not called upon to argue.

Ridley, J.—We are both of opinion that this appeal must be dismissed. We should be making fresh legislation if we were to say that the court has any power to receive this fund and distribute it rateably among the claimants.

Scrutton, J.—I am of the same opinion. Parliament, in 1854, made the following provision which is now contained in sect. 620 of the Merchant Shipping Act 1894: "A qualified pilot appointed by the Trinity House who has executed a bond under this part of this Act shall not be liable for neglect or want of skill beyond the penalty of the bond and the amount payable to him on account of pilotage in respect of the voyage in which he was engaged when he became so liable."

In this case this latter sum amounted to 2*l.* 3*s.* 6*d.* The Legislature omitted to follow that clause by a provision enabling the court to receive this sum and apportion it rateably amongst the people who might claim it. An earlier part of the Merchant Shipping Act provides that the owner of a British ship is entitled to limit his liability to 8*l.* or 15*l.* a ton, and that provision is followed by sect. 504 which enacts that the "court may determine the amount of the owner's liability and may distribute the amount rateably among the several claimants and may stay any proceedings pending in any other court in relation to the same manner."

Under that provision there is a well-known procedure of the Court of Admiralty under which a shipowner who expects to be sued in respect of sums far exceeding in the aggregate the amount of his statutory liability brings a limitation of liability action. In these proceedings the court pronounces that his liability is upon a number of tons at so much a ton, and the shipowner pays the amount into court, and the court then requires the claimants to bring in their claims, and the total amount is then divided rateably between them. There is no such power on the part of the court in the case of a pilot, and the question in this case is whether we can make such a power here.

In the present case the pilot having been guilty of negligence, claims were made against him, amounting in all to 257*l.* 12*s.* 4*d.* One of the claimants issued a plaint. The pilot desired to divide his liability proportionately amongst the claimants, and he paid into court the sum of

25*l.* in respect of a claim which amounted to 72*l.* 15*s.* 3*d.*, the sum paid in being rather more than the proportionate amount of the total liability to which the plaintiffs would be entitled. The question before the learned judge in the court below was whether that was a good defence, it being admitted that the pilot had not, at the time of the payment into court, paid any of the other claimants the proportionate amounts due to them. I wish to say at the start that so far as the learned judge's observations suggest that the pilot could not obtain any protection unless he had paid the other claimants under an order of the court, I entirely disagree with him. In my view it would be a good defence for the pilot to say if his total liability was 100*l.* that he had already paid sums amounting to 77*l.*, and that accordingly 23*l.* was left in respect of his statutory liability, and that he had brought that amount into court. That would be a method by which the pilot could apportion the amount of his total liability rateably among the claimants.

Putting that method of dealing with the question aside for a moment, can a pilot who is not in a position to say that he has paid the other claimants, come to the court and say to a claimant who is suing him, "Your right to recover against me is limited to your rateable proportion of my total liability, although at the present I have not paid anybody else." In my opinion he cannot do so. I cannot see any principle upon which it could be said that that would be a good defence. There is no statutory authority for it such as exists in the somewhat parallel cases of bankruptcy or the liability of a ship owner. Is there any inherent power in the court in the case of a fund to which several people are claimants, to divide it among them? I am not aware of any procedure in equity in which equity takes a fund to which various people have claims and divides it rateably among them, except in the case of administration proceedings, and these date from early times when the Lord Chancellor was accustomed to do what he thought right in a particular case. In this way arose a number of principles upon which a dead man's estate was divided rateably. That power has not been used in connection with other cases, and I have not been able to find any precedent in equity which might be of assistance in the present case. The only precedent in the Admiralty Courts is that for which there is the direct statutory authority which I have mentioned. At common law, so far as I know, that principle has never been adopted and the practice of the common law in a case where there have been several claimants to a fund is to let them race for it. Where there is a series of judgments against a man which are unsatisfied and the debtor subsequently becomes entitled to money from other persons, the creditor who garnishees it first gets it, and it never occurs to a court of common law to say that they will divide it justly and equally between them.

In the absence of any statutory right or inherent power on the part of the court, my view is that if a remedy is required for the present state of affairs it must be sought for from Parliament. I agree with Mr. Hill as to the extreme inconvenience which may arise from allowing the claimants in such a case as the present to race to recover the amount due. Fortunately there is a pilotage Bill before Parliament at the present time, and I hope, so far as I am entitled to suggest it, that the representatives of the pilots will see that this inconvenience is brought before the legislature. If this is done, I have no doubt that Parliament will deal with the matter as it dealt with the question of a shipowner's liability in sect. 504 of the Merchant Shipping Act. That, however, is not the question here. We have to say whether there is any power under which the court can sanction the procedure adopted in the present case by the defendant. Mr. Hill has been unable to show us that any such power exists, and I am therefore of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Keene, Marsland, and Co.*

Solicitors for the defendant, *Charles E. Harvey.*

Tuesday, Dec. 10, 1912.

(Before BAILHACHE, J.)

WIMBLE *v.* ROSENBERG. (*a*)

Sale of goods—F.O.B.—Shipment by seller—No notice of shipment given by seller to buyer—Sale of Goods Act 1893 (56 *&* 57 *Vict. c.* 71), *s.* 32, *sub-s.* 3.

By a contract dated the 27th June 1912 *the plaintiffs sold to the defendants* 200 *bags of rice f.o.b. Antwerp, cash against bills of lading.*

On the 9th Aug. the defendants sent instructions to the plaintiffs to ship the rice to Odessa and pay the freight on their account. The plaintiffs instructed certain merchants in Hamburg, from whom they had bought the rice, to ship it by first steamer to Odessa on account of the defendants.

On the 24th Aug. the rice was shipped per steamship Egyptian, *which sailed on the 25th Aug., and was lost at sea on the following day. The first intimation of the shipment that the defendants received from the plaintiffs was on the 29th Aug., when the plaintiffs presented the bills of lading for payment.*

The defendants had not insured the rice, evidence being given to the effect that it was not their practice to insure until after they had received notice as to which ship the goods had been dispatched by.

The plaintiffs claimed the price of the rice and the amount of freight paid by them on defendants' account. The Sale of Goods Act 1893, *s.* 32 (3), *provides that: "Unless otherwise agreed, where goods are sent by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit."*

Held, that the sub-section did not apply to a contract for the sale of goods on f.o.b. terms, and the defendants were therefore liable.

COMMERCIAL COURT.

Action tried by Bailhache, J.

The plaintiffs' claim was for the price of goods sold and delivered.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

Leck, K.C. and *Theobald Mathew* for the plaintiffs.

George Wallace, K.C. and *Chaytor* for the defendants.

The facts and arguments are sufficiently stated in the judgment.

Bailhache, J.—This case assumes some importance because I am told by counsel on both sides that this is the first case in which sub-sect. 3 of sect. 32 of the Sale of Goods Act 1893 has come before an English court for decision, and I am quite willing to take it from them, so far as my experience and knowledge go, that it is so.

The facts of the case are extremely simple and very little in dispute. They are these: By contract evidenced by a bought note dated the 27th June 1912, Messrs. Rosenberg and Sons, the defendants, bought 200 bags of rice. The rice was to be shipped as regards the buyers within three months. It was bought f.o.b. Antwerp, and by the contract of sale cash was to be paid against bills of lading accepted in London. The plaintiffs in this case are the brokers, Messrs. Wimble, Sons, and Co., but the contract, it is conceded on both sides, is in such a form as entitles Messrs. Wimble to sue upon it in their own names, and suing upon it in their own names they have all the rights of vendors and must fulfil all the duties which fall to be performed by vendors in respect of their contract, and I may treat them in this case as being the actual vendors. There was a little .delay in shipping this rice or sending it forward, and the defendants inquired, I think more than once, but certainly inquired once, as to when the rice was coming forward. It did not come forward until August, and on the 9th Aug. the defendants sent, as was their custom, shipping instructions to the vendors. The vendors' instructions were to ship these 200 bags of rice, but they were not on the usual form on which the defendants usually sent forward their instructions. The usual form was partly printed and contained in print a request that the vendors should inform them of the name of the ship by which the rice was about to be shipped. These particular instructions had not that print upon them. The book was for the moment exhausted, and instructions were written out upon a slip of paper. It was the practice between these parties that when these instructions were given, the vendors, as and when they could, secured shipping room for the rice which was to go forward, and sometimes at the request of the defendants they paid the freight. In this particular instance they were requested to pay and did pay the freight. The rice was actually shipped on board a steamer called the *Egyptian*, and it was shipped on the 24th Aug. 1912. The *Egyptian* sailed from Antwerp on the 25th, which was a Sunday. On the early morning of the 26th she stranded and became a total loss. At 3.45 on the afternoon of the 26th the loss was posted at Lloyds'. The defendants did not at this time know that the rice had been shipped by the *Egyptian* or by any boat at all. They knew nothing at all about it until the 29th, when an invoice and bill of lading reached them, and they were requested to pay against documents, in accordance with the terms of the contract. They immediately on receipt of the bill of lading attempted to insure this parcel of rice, but, of course, inasmuch as notice of the loss had been posted at Lloyd's some three days before, their attempts to insure was entirely ineffective. They thereupon declined to take up the shipping document and to pay for the rice.

The defendants insure any parcels that they may have sent by sea in a somewhat peculiar way. They have not an open cover, nor do they insure on giving shipping instructions, but apparently they wait for the actual name of the steamer, and then give their instructions. It has been proved before me that in many cases they have had the name of the steamer before the ship sailed and before their goods were put on board, and I am quite satisfied that when they got the name of the steamer before the goods were put on board they forthwith insured the goods which were to go by that particular steamer. In this instance they had no such opportunity. The name was not given to them before the 29th, and by the 29th it was too late to insure.

Under those circumstances the defendants told the plaintiffs not to pay the foreign vendors, but the plaintiffs, coming to the conclusion that they were legally liable, did pay the foreign vendors, and now sue the defendants.

The defendants make, in substance, two defences to this case. They say it is quite true that having regard to the nature of the terms of the contract and the form of the contract, you, the plaintiffs, should come forward and sue as principals, yet the fact is, that you were our agents, and at all material times you remained our agents, and you neglected your duty as our agents in that you did not find out for us when we asked you whether the goods were coming forward, and you did not find out for us the name of the ship by which the goods were to be shipped, and by reason of that breach of duty if we have to pay you we have suffered damage to the extent of the money that we may have to pay you, and therefore we are not liable to you at all. It is quite clear to my mind that the plaintiffs did not understand when these inquiries were put forward as to when the rice was going to be shipped and did not understand that the inquiries were being made for insurance purposes. They were not aware of the way in which the defendants carried on their insurance business, and they treated the matter as being an inquiry by buyers, who were anxious to get delivery, and who were a little tired of waiting, as to when their goods were coming forward, and as a desire to hurry up the shipment of their goods. I am not very much concerned to consider whether there was any breach of duty by the plaintiffs in not procuring the name of the steamer. I do not know what means they had of so doing; but, to my mind, the matter is not very material, because I certainly hold that the damage which was sustained was in no way the result of any breach of duty, if breach there was. It is quite simple to have open covers and also to insure before you know the name of the steamer. The defendants' own witness, their insurance broker, told me that it was so, and the little knowledge I have of the practice of insurance leads me to the same conclusion. There was, therefore, no damage which resulted from the breach of that duty if breach there was.

But Mr. Wallace has raised, to my mind, a more serious defence arising out of sub-sect. 3 of sect. 32 of the Sale of Goods Act 1893. That

sub-section says: "Unless otherwise agreed where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit." The first sub-section of sect. 32, to which my attention has also been called, is in these terms: "Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be a delivery of goods to the buyer."

Mr. Wallace says that, reading these two sections together I ought to come to the conclusion that sub-sect. 3 refers to and covers every case of an f.o.b. contract of sale. He says, though it is not necessary to put his case so high, wherever there is an f.o.b. contract of sale, it is now the duty of the vendor to give such notice to the buyer as may enable him to insure the goods during their sea transit. The words are "where goods are sent by the seller to the buyer by a route involving sea transit."

There are three common ways in which goods go forward by sea. I avoid the use of the word "sent" for the moment. There are three common forms of contract: (1) the f.o.b., (2) c.i.f., and (3) *ex* ship. It cannot be contended that any notice could be required to be given by the vendor either in the case of an *ex* ship or a c.i.f. form of contract, and it is a little startling to me to be told that under an f.o.b. form of contract goods are sent by the vendor. What one generally understands by an f.o.b. contract is that the goods are not sent by sea by the vendor, but are delivered by the vendor at the rail of the ship, and are there taken over by the carrier, the ship, that is nominated by the buyer, and are by him conveyed across the sea.

Mr. Leck says I must read sub-sect. 3 entirely in the light of sub-sect. 1, and that sub-sect. 3 has no sort of application except to a case where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, but performs his duty when he puts the goods on board the steamer.

Some Scottish cases have been cited to me, notably *Hastie* v. *Campbell* (19 Dunlop, 557), but unfortunately that case does not assist me very much because I do not know and cannot find out from the report precisely what the terms of the contract in that case were; but it is conceded and stated by counsel on both sides that there is no Scottish decision on the point dealing with the case of a contract f.o.b.

Under these circumstances, and the case not being covered by authority at all, I must do the best I can to form my own unaided opinion as to what this sub-section really refers to, and I am free to confess that during the argument of the case my mind has fluctuated a good deal about it. It is pretty clear to my mind that it cannot refer to the ordinary case of an f.o.b. contract. Under an ordinary f.o.b. contract the ship is engaged and designated or nominated by the buyer, and it cannot be in such a case that the vendor should have to give the buyer notice to enable him to insure, because the buyer himself knows the ship by which he is going to send his goods before the vendor can be aware of the name of the ship or what the ship is. It cannot, therefore, be that it refers to an ordinary f.o.b. contract. This, Mr. Leck says, is an ordinary f.o.b. contract. I was at first strongly disposed to think that this case was not the case of an ordinary f.o.b. contract. I was disposed to read the contract together with the shipping instructions and to say that this was a case in which the sale was at a price which was an f.o.b. contract price, but was a contract, reading these documents together, whereby the vendor undertook to send the goods by some ship to be selected by himself. If that is the true view by the contract in this case, then I think sub-sect. 3 of sect. 32 would have applied and would have covered this case, and so I at one time thought. But, upon the whole, Mr. Leck has convinced me that I must look to the actual contract in this case and, for the purpose of this decision disregard the shipping instructions. If I look to the actual contract in this case and nowhere else it is a contract of the ordinary f.o.b. kind, and I think Mr. Leck is probably right when he says that the vendors might have disregarded the shipping instructions and might have required the defendants to procure and provide their own shipping room. I have grave doubts about the case. I am not at all sure that I am right, but upon the whole I think that the view which Mr. Leck has suggested is the better view in this case, more particularly as I cannot bring myself to believe that sub-sect. 3 applies to an ordinary f.o.b. contract of sale.

It may be said, and I feel the force of this very strongly, that if I do not apply sub-sect. 3 to a contract of this kind, where shall I find in ordinary practical business the class of contract to which the sub-section does apply? I feel the force and difficulty of that, but I do not think that that of itself is sufficient to entitle me to say that sub-sect. 3 must apply to a contract of this kind.

Upon the whole, therefore, I have come to the conclusion that the plaintiffs are right in this case and are entitled to succeed, and there will be judgment in their favour with costs.

Solicitors for the plaintiffs, *Waltons* and *Co.*

Solicitors for the defendants, *Coward* and *Hawksley, Sons*, and *Chance*.

Friday, Dec. 13, 1912.

(Before Bray, J.)

WILES AND CO. LIMITED v. OCEAN STEAMSHIP COMPANY LIMITED. (a)

Bill of lading—Strikes—Clause exempting shipowners from liability in certain circumstances.

A bill of lading contained a clause to the following effect: "If the master reasonably anticipates that delivery will be impeded at the port of delivery by strikes, the master may at any point of the transit, at the risk and expense of the owner of the goods, tranship or land or otherwise dispose of the cargo, or any part thereof, and the same may be reshipped or forwarded, or he may proceed on the voyage with the whole or part of the goods, and dis-

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

charge the same on the return voyage, or forward them to their destination from another port always subject to the conditions of the forwarding conveyance. . . . If the discharge of the cargo be or threatens to be impeded by absence from whatever cause of facilities of discharge, the master to have liberty at ship's expense, but shipper's risk, to put the whole of the cargo into hulk, lighter. . . . Transhipment of cargo for ports where the ship does not call or for shipowner's purposes to be at shipowner's expense."

The A., owned by the O. S. Company Limited and managed by A. H. and Co., left Adelaide on the 10th April 1912, bound to London and Liverpool with a general cargo including 2794 sacks of flour belonging to plaintiffs for delivery in London. The A. arrived at Gravesend at 9.38 a.m on the 24th May (Friday before Whit Sunday), at which time there was a strike throughout the Port of London which would or might have prevented the discharge in London of the cargo in the A. The strike also would or might have prevented the loading of coal on the A. necessary for the working of her refrigerator. The vessel, which had only 100 tons of coal on board, equal to one day's consumption for refrigerator and steaming purposes, required an immediate further supply of coal. There was no way of ascertaining how long the strike would last, and in fact the strike continued till the month of August. Under these circumstances the A. proceeded at once to the Hook of Holland, arriving there on the 25th May, where she took a sufficient quantity of coal on board. Learning that the strike still continued, she proceeded on the 26th May towards Liverpool, where she arrived on the 28th May and discharged her cargo, including plaintiffs' cargo and other London cargo. As a result of the discharging of the plaintiffs' cargo at Liverpool instead of London, transhipment expenses and dock dues at Liverpool amounting to 30l. 15s. 7d. were paid by the defendants to the Mersey Docks and Harbour Board, and were charged to the plaintiffs by the defendants. Of this the plaintiffs had paid 30l. under protest, and now sought to recover the said sum.

Held, that the plaintiffs were entitled to succeed as in the events which happened the expenses were not thrown upon the owners of the goods.

Commercial Court.

Action tried by Bray, J.

The plaintiffs' claim was for 30*l.* for certain expenses and dues paid by them under protest.

The facts and arguments are sufficiently stated in the judgment.

Leck, K.C. and *Raeburn* for the plaintiffs.

Maurice Hill, K.C. and *Macardie* for the defendants.

Bray, J.—In this action the question I have to decide is whether certain expenses which were incurred in relation to the landing and transhipment of certain goods—bags of flour—ought to be paid by the plaintiffs, who are the owners of the goods, or by the defendants, who are the shipowners; and the question turns upon the true construction of the bill of lading. A statement of facts has been agreed, and, put shortly, it is this—that the goods in question, which consisted of a large number of sacks of flour, were shipped on board the *Anchises* at the port of Adelaide, in Australia, on or about the 10th April, that the *Anchises* was bound for London and Liverpool. She arrived at Gravesend on some day in May, and at that time the strike at the London Docks was on. The master, knowing of the strike, and not having sufficient coals on board to enable him to work the refrigerating machinery as far as Liverpool, and being afraid that he could not get the coals in London, went to the Hook of Holland. He got his coal there, and, the strike being still on, he came to the conclusion that he would be delayed in the discharge of the goods if he went to London, so he carried them on to Liverpool. At Liverpool, which was the final destination of the vessel on that voyage, the whole of the cargo was discharged, and amongst it these goods. Expenses were incurred as I have said. The goods were put on board another vessel belonging to the managers, Messrs. Alfred Holt and Co., and were taken to London on that vessel without any expenses for freight.

The plaintiffs, under protest, paid the charges incurred at Liverpool, which amounted to a sum of about 30*l.*, and they proceed to recover that sum. The defendants say that they are protected by a clause in the bill of lading, and that is the clause which I have to interpret. The bill of lading provides that the goods shall be taken to the port of London, and there are very wide powers of transhipment, calling at ports, deviation, and so on; but there is nothing very much in the bill of lading until you come to the important clause, which, leaving out the immaterial words, is to this effect: "If the master reasonably anticipates that delivery will be impeded at the port of delivery by strikes, the master may at any point of the transit, at the risk and expense of the owner of the goods, tranship or land or otherwise dispose of the cargo, or any part thereof, and the same may be reshipped or forwarded, or he may proceed on the voyage with the whole or part of the goods, and discharge the same on the return voyage, or forward them to their destination from another port, always subject to the conditions of the forwarding conveyance."

There are two alternatives given to the master in the events provided for. I think the statement of facts, although it does not say so in terms, implies—or at all events it is a reasonable inference to be drawn from it—that the master did reasonably anticipate that the delivery would be impeded at London by strikes. I do not think it very much matters whether he formed that opinion at Gravesend or the Hook of Holland; he probably reasonably anticipated it at both those places, so that the fact provided for in this clause did arise.

There are, as it seems to me, quite clearly two alternatives. One is, during the transit to land the goods, tranship and forward them; and the other is to go on with the voyage. He can discharge the goods and forward them. He can either discharge them on the return voyage or forward them by some other route. Which of these alternatives did the master exercise? It seems to me quite clear that he exercised the second option. I gave Mr. Maurice Hill an opportunity, if he wanted to alter the facts at all, to do so, but he was content with the facts as stated; and looking at the statement of facts this is what is stated: "Under these circumstances the *Anchises* pro-

ceeded at once to the Hook of Holland, arriving there on the 25th May, where she took a sufficient quantity of coal on board, and, learning that the strike still continued, proceeded on the 26th May towards Liverpool." Now, Liverpool was the final destination of the ship—that is, the course of their voyage. What she did was to abandon going to London, and to proceed on her voyage to Liverpool.

It seems to me, therefore, that what I have to see is whether, if she did proceed on her return voyage, in that event those are expenses which would be payable by the owners of the goods. Mr. Maurice Hill contended that the words which undoubtedly applied to the first alternative—namely, "at any point of the transit . . . tranship or put into lighter or land and warehouse or otherwise dispose of the cargo, at the risk and expense of the owner of the goods" apply here. Reading the clause according to its grammatical meaning, it is quite plain that those words "at the risk and expense of the owner of the goods," apply only in the case of transit. It is not that the master may at the risk and expense of the owners of the goods at any point of the transit from so-and-so: it is that he may at any point of the transit at the risk and expense. Now, Mr. Hill contends that, although that may be the grammatical meaning, there is no real reason why the expense should be thrown in one case upon the owner of the goods, and in the other case upon the shipowner. I do not think that is sufficient reason of itself; but when I look further I find that the case of goods being over-carried is provided for here: "Goods over-carried to be returned at ship's expense, but free of any liability for any loss, depreciation, or damages." Therefore, if I had any doubt about the construction of this clause before, when I read those words it seems to me fairly plain.

Mr. Leck called attention to a later clause: "If the discharge of the cargo threatens to be impeded by absence from whatever cause of facilities of discharge, the master to have liberty at ship's expense, but shipper's risk, to put the whole of the cargo into hulk, lighter," and so on. Of course, that clause does not cover the whole of the first clause, but rather contemplates the case of the ship arriving at the place where the goods are to be delivered, and the discharge being impeded then. But not necessarily that, because it is, "or threatened to be impeded," and therefore it may be said that here it was threatened to be impeded.

Again, I do not think it is necessary to decide if this case comes within that clause, and not the other only. There is the fact that the eventuality is provided for to a certain extent there; and in that clause it is said that the transhipment is to be at ship's expense. Then there are these further words: "Transhipment of cargo for ports where the ship does not call or for shipowners' purposes to be at shipowner's expense." Taking all those matters into consideration, it seem to me fairly clear that the event was provided for by the second alternative in the clause, and that does not provide for the owners of the goods paying the expense of transhipment.

I was asked by Mr. Leck to apply a canon of construction to this clause which applies undoubtedly to many exceptions in the bill of lading —that it should be construed most strongly against the shipowner, because he was seeking to protect himself from his common-law liability. There is no doubt about the existence of that principle, but I do doubt whether it is applicable here, and I do not, in fact, apply it. I think this was rather necessary. There is a clause exempting the shipowner from certain consequences of strikes; and there would remain a question—What was to be done when the strike happened? And I think this clause is rather intended for the benefit of both parties to some extent. It is intended to provide for a particular eventuality, not, certainly, entirely to protect the shipowner, but mainly to provide what should be done. I do not think, therefore, the rule is applicable, and I have not applied it. I have construed this clause from its natural, plain, ordinary, business meaning, or, rather, I have endeavoured to do so; and, construed in that way, it seems to me that the expenses are not thrown upon the owner of the goods in the events which happened.

Another point was raised by Mr. Leck which he told me it might be necessary for me to decide—namely, that there was a clause at the end called the paramount clause: "This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act 1904, had never been inserted therein or had been cancelled," and he drew my attention to sect. 5 of that Act, sub-sect. C. I do not think it is intended to apply to a case of this kind. However, it is not necessary for me to decided it, because I have decided in favour of Mr. Leck on the other ground. The result is that there will be judgment for the plaintiffs.

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

Solicitors for the defendants, *Field, Roscoe,* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 25, 26, *and Nov.* 11, 1912.

(Before Sir S. T. EVANS, President, and Elder Brethren.)

THE NICOLAY BELOZWETOW. (*a*)

Collision — Compulsory pilotage—Vessel entering the Humber for bunker coal—Exemption from pilotage — "Putting into the Humber for the purpose of obtaining stores or provisions only"— 2 *&* 3 *Will.* 4, *c. cv., s.* 24.

The defendant steamship on a voyage from Yarmouth to a Russian port was coming up the Humber to Grimsby for bunker coal in charge of a duly licensed Humber pilot, when she collided with and damaged a steam trawler. In a damage action brought by the owners of the steam trawler, the defendants alleged that if there was any negligence on board their steamship which caused or contributed to the collision it was the negligence of the compulsory pilot who was in charge, and that they were not liable.

Held, that the defendants were liable, for though the negligence on their vessel which caused the collision was that of the pilot, the vessel was exempt from compulsory pilotage as bunker coals were "stores,"

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

and so their vessel was putting into the Humber for the purpose of obtaining stores only within the meaning of sect. 24 of 2 & 3 Will. 4, c. cv.

DAMAGE ACTION.

The plaintiffs were the owners of the steam trawler *Scarborough*; the defendants and counter-claimants were the owners of the Russian steamship *Nicolay Belozwetow.*

The case made by the plaintiffs, the owners of the trawler, was that about 10.45 a.m. on the 29th Nov. 1911 the *Scarborough* was proceeding to sea and was in the river Humber between the Grimsby Fish Dock and the Lower Burcom Buoy. The weather being fog and the tide high water slack, the *Scarborough* was proceeding slowly, making one to two knots, heading E.N.E., and her whistle was being sounded for the fog.

The whistles of the *Nicolay Belozwetow* and her tug, the *Spurn*, were heard, and the engines of the *Scarborough* were stopped and her whistle was sounded in reply, and, when the defendants' vessel was seen about a length off, the engines of the *Scarborough* were put full astern, but the port bow of the *Scarborough* hit the port quarter of the *Spurn*, and the starboard bow of the *Scarborough* hit the starboard bow of the *Nicolay Belozwetow.*

The plaintiffs charged the defendants with bad look-out; with immoderate speed; with failing to stop on hearing a fog signal forward of their beam; with not sounding proper fog signals; and with not taking proper steps to keep clear of the *Scarborough.*

The case made by the defendants and counter-claimants was that about 10.56 a.m. on the 29th Nov. 1911 the *Nicolay Belozwetow* was proceeding to Grimsby for bunker coal and was in the Humber off the Fish Dock Basin, Grimsby. The weather was foggy, and the *Nicolay Belozwetow* was heading about west by north with very little headway. About one or two minutes before the collision the engines of the *Nicolay Belozwetow* were put full astern, and the tug's engines were stopped. Just before the collision the tug starboarded to throw her quarter clear and put her engines ahead, and the *Nicolay Belozwetow* put her helm hard-a-port, but the trawler struck the tow rope, and then the trawler's starboard bow hit the *Nicolay Belozwetow's* starboard bow.

The defendants and counter-claimants charged those on the trawler with bad look-out; with excessive speed; with not stopping on hearing a fog signal ahead; with not reversing; with not keeping clear; and with not sounding her whistle for fog.

They also alleged that if there was any negligence on the *Nicolay Belozwetow* it was that of the compulsory pilot who was in charge and whose orders were obeyed.

The case was heard on the 25th and 26th Oct. 1912, and it was held that both vessels were to blame for navigating at an immoderate speed, for not stopping on hearing a fog signal forward of the beam, and for not reversing. It was also held that the negligence on the *Nicolay Belozwetow* was solely that of the pilot.

The plaintiffs then submitted that the pilotage was not compulsory.

Bateson, K.C. and *D. Stephens* for the plaintiffs, the owners of the *Scarborough.*

Laing, K.C. and *C. R. Dunlop* for the defendants and counter claimants, the owners of the *Nicolay Belozwetow.*

The arguments of counsel appear in the judgment.

The following cases were referred to:

The Tongariro, 107 L. T. Rep. 28; 12 Asp. Mar. Law Cas. 235; (1912) P. 297;

Cairn Line v. *Trinity House*, 98 L. T. Rep. 86; 10 Asp. Mar. Law Cas. 602; (1908) 1 K. B. 528.

2 & 3 Will. 4, c. cv., s. 24, is as follows:

Provided also, and be it further enacted, that nothing in this Act contained shall oblige the master or other person having the command of any ship or vessel employed in the coasting trade of Great Britain or Ireland, whether laden or in ballast, or of any ship or vessel of less than six feet draught of water, the same being the property of a subject or subjects of the King of the United Kingdom of Great Britain and Ireland, or of any ship or vessel putting into the said river Humber for the purpose of shelter, or of obtaining stores or provisions only, to employ any pilot, nor to prevent any owner, part owner, master or mate of or any person belonging to any ship or vessel inward bound, from conducting or piloting the same into and up the said river Humber, in case none of the said Humber pilots shall be ready and offer to conduct and pilot the same, nor to prevent any person from assisting any ship or vessel in distress.

12 & 13 Vict. c. lxxxi., ss. 250 and 251, was also referred to.

On the 11th Nov the following judgment was delivered:—

The PRESIDENT.—The decision upon the facts in this case which I gave upon the hearing was that both the steam trawler *Scarborough* (the plaintiffs' vessel) and the steamship *Nicolay Belozwetow* (the defendants' vessel) were in fault and to blame for the collision. Thereupon the defendants claimed judgment on the ground that their vessel was in charge of a duly licensed pilot in a compulsory pilotage district, to wit, in the river Humber, and that the fault attributable to their vessel was solely that of the pilot.

Upon the case as proved, and by the admission of the plaintiffs' counsel, it must be taken that the defendants' vessel was in charge of a duly licensed pilot, and that so far as the defendants' vessel was concerned the fault was solely that of the pilot. Plaintiffs' counsel, however, submitted that the defence of compulsory pilotage did not avail the defendants, on the ground that the pilotage in the circumstances was not compulsory, because the case came within one of the exemptions contained in sect. 24 of 2 & 3 Will. 4, c. cv.) (local Act), which regulates pilotage in the river Humber. That exemption is the one which makes it non-obligatory for a master of a vessel putting into the river Humber "for the purpose of obtaining stores only" to employ a pilot.

The fact was that the defendants' vessel, which was on a voyage from Great Yarmouth to some Russian port with a cargo of herrings, had put into the Humber, and was proceeding to Grimsby for the purpose only of obtaining bunker coal for the vessel's use on the voyage, when the collision occurred. The defendants' answer to the plaintiffs' submission was twofold: (1) that the provision for compulsory pilotage in the port of Grimsby was not governed by 2 & 3 Will. 4,

c. cv., but by 12 & 13 Vict. c. lxxxi. (local Act), and that the latter statute contained no exemption in favour of vessels "putting in for stores only"; and (2) that even if the former statute and exemption therein contained applied bunker coals are not "stores" within that exemption, and that therefore the defendants' vessel did not come within the exemption, and was bound by law to take a pilot.

Grimsby Docks, and the place where the collision happened, are, of course, in the river Humber. The 12 & 13 Vict. c. lxxxi., contained certain provisions relating to pilots and pilotage rates which were enacted for the port of Grimsby when the docks were constructed; but on reference to the two Acts of Parliament it is quite clear that the provisions in the latter Act are only subsidiary to those in the former, and the obligations to employ a pilot, and the penalties for not employing a pilot, apply to Grimsby Docks as they did to the Grimsby Roads before 12 & 13 Vict. c. lxxxi., was passed.

I therefore must rule against the first contention of the defendants, and decide that the place where the vessels collided was within the compulsory pilotage area in which the provisions of 2 & 3 Will. 4, c. cv., are in force; and that therefore the exemption in favour of vessels "putting in for stores only" applies.

The question that remains is whether bunker coals are "stores" within the meaning of sect. 24 of this Act, so as to bring the defendants' vessel within the exemption, and so render the employment of a pilot optional and non-compulsory. The collocation of the word "stores" in the section is as follows: "Any ship or vessel putting into the river Humber for the purpose of shelter, or of obtaining stores or provisions only." There does not appear to be any logical reason for the exemption arising from considerations of avoiding perilous possibilities, or of ensuring safe navigation. The risk of local dangers of navigation are the same whether a vessel puts into the Humber for shelter or for articles which are undoubtedly "stores," such as anchors, cables, or sails for the vessel's use, or whether she proceeds thither for the purpose of receiving or discharging cargo. If speculation as to the reason for the exemption is permitted, the basis probably is that a vessel should be exempt if she puts in for something which is not directly freight-earning, like cargo. Of course, masters of vessels, though not compelled to take a pilot, can do so if the Humber be strange waters to them, or if for any reason they think it desirable. Sails, oils, ropes, &c., procured for the use of a vessel and required to enable her to navigate, are undoubtedly "stores" within the meaning of the section. Why should bunker coal procured for the like use and required for the like purpose not be "stores"? The necessary bunker coals in the case of a steamship must be provided before the ship can be seaworthy, and they have, of course, been held to be "necessaries." They are required for her navigation, just as sails are essential for a sailing ship. Some steamships carry a little sailing tackle as well as bunker coals. It would be strange if the former were included in "stores" and the latter not. It does not help much, perhaps, to look at other Acts of Parliament in which the word "stores" has been used in order to decide what it means in the section now under consideration, but it may be observed that in the Merchant Shipping Acts the phrase "stores and cargo" has often been used as in contradistinction [the Merchant Shipping Act 1853, s. 243 (now repealed). and the Merchant Shipping Act 1894, ss. 225, 376] In seafaring language "stores" may be ambiguous, but on the whole, having regard to the words of the section and to the juxtaposition of the words "stores or provisions," I am of opinion that they mean some things which are not cargo, and that it gives the word "stores" a natural and reasonable construction in the section to say that it comprises bunker coal. Giving it this meaning, the result is that the exemption applies, and that it was not compulsory upon the master of the defendant vessel to take a pilot in putting into the Humber for the purpose only of obtaining bunker coal at Grimsby. The defence of compulsory pilotage, therefore, fails, and, both vessels being equally to blame, I give judgment accordingly, and order the usual reference to ascertain the amount of damage sustained.

Solicitors for the plaintiffs, the owners of the *Scarborough*, *Pritchard* and *Sons*, agents for *A. M. Jackson* and *Co.*, Hull.

Solicitors for the defendants, the owners of the *Nicolay Belozwetow*, *Stokes* and *Stokes*.

DIVISIONAL COURT.

Wednesday, April 3, 1912.

(Before Sir S. T. EVANS, President, and BARGRAVE DEANE, J.)

THE UPCERNE. (*a*)

Collision—Steamship damaging a gas buoy—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3 (3)—*County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51), *s.* 4.

A steamship ran into a gas buoy and injured it. The owners of the gas buoy sued the owners of the steamship, bringing their action in a County Court in Admiralty. The County Court judge dismissed the action, holding that he had no jurisdiction to try the case.

On appeal to the Admiralty Divisional Court:

Held (affirming the decision of the County Court judge) that the County Court had no jurisdiction to try the case as the word "collision" in the County Courts Admiralty Jurisdiction Act 1868 *s.* 3, *sub-s.* 3, *only referred to collisions between ships.*

The Normandy (26 *C. C. C. Rep.* 314; 90 *L. T. Rep.* 351; 9 *Asp. Mar. Law Cas.* 568; (1904) *P.* 187) *followed.*

APPEAL from a decision of the County Court judge of Yorkshire sitting in Admiralty at Kingston-upon-Hull dismissing a claim by the Humber Conservancy Board for damages caused by injury to a gas buoy on the ground that the court had no jurisdiction to hear and determine the case.

The appellants were the Humber Conservancy Board; the respondents were the owners of the steamship *Upcerne*.

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

On the 10th April 1910 the steamship *Upcerne*, while proceeding up the river Humber, ran into a gas buoy owned by the Humber Conservancy Board and drove it from its moorings and damaged the buoy and its lighting apparatus.

On the 18th April the Humber Conservancy Board instituted proceedings in the County Court to recover 150*l.* damages sustained by the negligence of the defendants in running into the gas buoy.

On the 18th April the solicitors acting on behalf of the owners of the *Upcerne* delivered a notice to the Humber Conservancy Board and their solicitors alleging that if the collision referred to in the action was caused or contributed to by any act or default of anyone on board the *Upcerne* (which was denied), the same was solely the act or default of a duly licensed Humber pilot acting in charge of the *Upcerne* within a district in which pilotage was compulsory by law.

On the 19th May 1910 the appellants delivered a statement of claim in which they alleged that they were the owners of the No. 9 (Anson) gas buoy, and that the respondents were the owners of the *Upcerne*. They further alleged that at 6 a.m. on the 10th April 1910 the gas buoy was lying at its station, that the *Upcerne* while proceeding up the Humber on a voyage from Rosario to Hull negligently ran into the buoy, drove it from its moorings, and damaged the buoy and its lighting apparatus, causing the appellants expense, and loss, and claimed judgment against the respondents and a reference to assess the damage.

On the 15th July 1910 the respondents delivered a defence by which they denied that the *Upcerne* was negligently navigated by their servants, and alleged that at the time of the collision a duly qualified pilot was in charge of the *Upcerne* in a district where the employment of a qualified pilot was compulsory by law, and that the respondents were not answerable for any loss or damage caused by his fault or incapacity, and that the *Upcerne* was navigated throughout as ordered by the pilot.

On the 30th May 1911 the respondents gave notice to the appellants that they would contend that the claim made in the action was not within the jurisdiction of the court.

The case came on for trial on the 10th July 1911, when the following description of the gas buoy was agreed:

The buoy consists of a cylindrical steel body with welded joints, which provides the buoyancy and acts as a reservoir for the gas. A cage-like superstructure of wood and iron is carried on the top of the gas-holder, at the apex of which is fixed the lantern and optical apparatus. The buoy is charged with shale oil gas, and works continuously for a period of from three to six months. The flashing apparatus is arranged to give periods of light and darkness, being approximately two seconds light and four seconds dark. The moorings consist of from thirty to forty fathoms of 1½in. cable, with the necessary shackles, eyes, &c., and a mooring stone weighing about 1½ tons.

The case turned on the extent of the jurisdiction given to County Courts sitting in Admiralty by the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) and the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51). The material sections are as follows:—

County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71):

Sect. 3. Any County Court having Admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes): . . . (3) As to any claim for damage to cargo, or damage by collision—any cause in which the amount claimed does not exceed three hundred pounds.

The County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51):

Sect. 4. The third section of the County Courts Admiralty Jurisdiction Act 1868 shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds.

On the 10th July 1911 the following judgment was delivered by the learned County Court judge:—

This case raises a point of considerable importance as to the Admiralty jurisdiction of the County Court. The claim is made by the Humber Conservancy Board to recover damages for injury to one of its gas buoys by the steamship *Upcerne*. It is contended that although the County Court would have jurisdiction to deal with an injury to the steamship *Upcerne* caused by the gas buoy, it has no jurisdiction to deal with an injury caused to the gas buoy by the ship. So that if the owners of the ship sue in this court for injury to the ship, the owners of the gas buoy cannot meet it by a cross-claim or counter-claim for injury to the buoy received in a collision between the two. The question of the County Court jurisdiction does not, however, depend on what any tribunal may think convenient, but upon the words of the statutes giving Admiralty jurisdiction to the County Courts. The jurisdiction of the High Court (Admiralty Division) is primarly the ancient jurisdiction exercised from an early period by the Court of Admiralty, which is supplemented or defined by statute to some extent, but that of the County Court depends entirely on statute. By sect. 6 of the Admiralty Court Act 1840 (3 & 4 Vict. c. 65) the High Court has jurisdiction in all claims for damage received by a ship, and by sect. 7 of the Admiralty Court Act 1861 this jurisdiction is extended to damage done by any ship. The Acts giving jurisdiction to the County Courts do not in so many words give those courts jurisdiction over claims for damage done by ships. The wording of the County Court Acts is somewhat different from that of the above Acts. Sect. 3 of the County Courts Admiralty Jurisdiction Act 1868 gives to those courts jurisdiction as to any claim for damage by "collision" up to the limit of 300*l.*, and that section is amended by sect. 4 of the County Courts Admiralty Jurisdiction Act 1869, which enacts that the section is to extend and apply to all claims for damage to ships, whether by "collision or otherwise," within the limit of 300*l.* It is clear, therefore, that if the gas buoy in question in the Humber had injured the ship in question, the County Court would have had jurisdiction, whether a ship running into a gas buoy is to be called a collision or not, whilst a claim for injury to the gas buoy is only within the jurisdiction of the County Court if a ship running into a gas buoy is a "collision" within the meaning of the Act. It has been distinctly decided that a ship running into a pier or anything that is part of the land is not a maritime "collision" and does not fall within the Act,

but it is contended for the plaintiffs that where the thing with which the ship comes into contact is a floating matter, such as a raft, a dumb barge, or a floating buoy, as described in this case, there is a maritime collision—a collision with something over which, apart from any statute, the old Court of Admiralty had jurisdiction. On the other hand, it is said that collision means only collision between two ships, and that I am bound by the case of *The Normandy* (*infra*) so to hold. It seems to me I have no right to say, as I am invited to do, that the decision in that case was as to a collision with something that was part of the land, a pier only, and that although the reasoning of the judgment shows that the court in that case did not distinguish between floating things of a maritime character, other than ships and things attached to a part of the land, that that distinction ought to have been drawn. It seems to me that I am bound loyally to follow the judgment given, and that this court has no right to attempt to play the part of an appellate tribunal and make a distinction which the judges of the High Court intentionally did not make. If such a distinction is to be drawn, it must be by the Legislature or by some higher tribunal than this. I hold myself bound by that decision to say that there is no jurisdiction in the County Court. I consider, therefore, that it is useless for me to consider *The Zeta* (*infra*), or the language used by Wills, J. in *Robson* v. *The Kate* (*infra*), or by Grove, J. in *Hough* v. *Head* (*infra*), or the original jurisdiction of the ancient Court of Admiralty over maritime causes. In the present case the objection to jurisdiction was not taken, as it should have been, at once, but I am not asked to consider whether the defendants by prosecuting their defence and submitting to the jurisdiction up to a late stage could be considered to have given jurisdiction to the court, or whether any consent could in such a case give jurisdiction (as to which see *R.* v. *Newport*, 20 Q. B. Div. 242), but only to take the delay in making the objection into consideration on the question of costs. I must dismiss the action on the ground that this court has no jurisdiction to try it, and I order each side to bear its own costs, except as follows: The plaintiffs are to be paid by defendants the costs caused by or consequent on the delay in making the objection to the jurisdiction, and the defendants are to be paid by the plaintiffs the costs of making the objection and of the hearing of it: (*Watson* v. *Petts* (1899); 1 Q. B. 430). If either party incurred costs in or about procuring evidence after the objection was taken, those costs should, I think, be borne by the party incurring such costs, and that accordingly I order.

On the 14th July 1911 the Humber Conservancy Board gave notice of appeal from the judgment of the learned County Court judge.

The appeal came on for hearing on the 3rd April 1912.

Bateson, K.C. and *Adair Roche* for the appellants, the Humber Conservancy Board.—This is damage by collision within the meaning of the County Courts Admiralty Act. It is submitted that "collision" in the Act means impact between a vessel used in navigation not propelled by oars and anything either afloat or submerged or attached to a thing afloat.

The following cases were cited and referred to:

The Zeta, 21 C. C. C. Rep. 242; 69 L. T. Rep. 630; 7 Asp. Mar. Law Cas. 369; (1893) A. C. 468;
The Uhla, 19 L. T. Rep. 89; 3 Mar. Law Cas. O. S. 148 (1867); L. Rep. 2 A. & E. 29;
The Sylph, 17 L. T. Rep. 519; L. Rep. 2 A. & E. 24;
Hough v. *Head*, 5 Asp. Mar. Law. Cas. 447, 505;
The Warwick, 63 L. T. Rep. 561; 6 Asp. Mar. Law Cas. 545 15 P. Div. 189;
The Malvina, 8 L. T. Rep. 403; Lush. 493;
Clarke v. *Scattergood*, Burrell's Reports, 243;
Margetts v. *Ocean Accident*, 85 L. T. Rep. 94; (1901) 2 K. B. 792;
Chandler v. *Blogg*, 77 L. T. Rep. 524; 8 Asp. Mar. Law Cas. 349; (1898) 1 Q. B. 32;
Everard v. *Kendall*, 22 L. T. Rep. 408; L. Rep. 5 C. P. 428;
Robson v. *Kate*, 59 L. T. Rep. 557; 6 Asp. Mar. Law Cas. 330; 21 Q. B. Div. 13;
The Normandy, 26 C. C. C. Rep. 314; 90 L. T. Rep. 351; 9 Asp. Mar. Law Cas. 568; (1904) P. 187;
Gas Float Whitton (*No.* 2), 23 C. C. C. Rep. 101; 76 L. T. Rep. 663; 8 Asp. Mar. Law Cas. 272; (1897) A. C. 337;
The Sarah, Lush. 549.

Laing, K.C. and *Dawson Miller* for the respondents, the owners of the *Upcerne*.—It is submitted that this case is governed by the case of *The Normandy* (*ubi sup*).

Bateson, K.C. in reply.

The PRESIDENT.—I need not recapitulate the facts in this case.

We have made up our minds as to the course we ought to adopt, and are prepared to give judgment now.

The case of *The Normandy* (*ubi sup.*) was very much like this case, though, as counsel for the appellants have said, it is not actually on all fours so far as the facts are concerned. In that case there was a considered judgment of a divisional court, consisting of the then President (Sir Francis Jeune) and Gorell Barnes, J. The judgment was delivered by Sir Gorell Barnes. They entered fully into the same kind of argument as was addressed to us here; and it would be quite disrespectful for us in this court, following those learned judges, if we did not give effect to the conclusion to which they came, and which is expressed by Sir Gorell Barnes in the following passage: "If this matter were clear of all that has been said in other cases, the question would appear to me to be a simple matter of construction, and having regard to the object of the Act of 1868, and its general scope, and the ordinarily understood meaning of the words 'damage by collision' in the Admiralty Court, where the term 'causes of damage' is the general expression for damage cases, I should come to the conclusion that the word 'collision' referred to collision between ships. This opinion is in accordance with the case of *Everard* v. *Kendall* (*sup.*) and *Robson* v. *Owner of the Kate* (*sup.*), and there is nothing of substance to conflict with this view unless the argument based on the case of *The Zeta* (*sup.*) does so."

The particular object injured in the case before us was a gas float, being exactly the same kind of buoy as came under consideration by the House of Lords in the case of *The Gas Float Whitton* (*No.* 2), where it was decided that an object of this kind cannot in any way be regarded as a ship. Therefore, if the word "collision" in sect. 3 of the County Courts Admiralty Jurisdiction Act 1868 refers to collisions between ships, as stated by Sir Gorell Barnes, it cannot apply to this collision, which took place between a ship and a gas float, which, according to the decision, cannot be regarded as if it were a ship.

In the case of *The Zeta* (*ubi sup.*) the question arose under sect. 4 of the County Courts

Admiralty Jurisdiction Amendment Act of 1869, where the jurisdiction was determined by the words "or otherwise" which appear in that section. In the case of *The Zeta* (*ubi sup.*) and in the case of *The Normandy* (*ubi sup.*), the second object which the other object collided with or struck was a pierhead. To that extent the case of *The Normandy* (*ubi sup.*) may in its facts be distinguished from this case, but so far as principle is concerned I do not think there is anything to distinguish it at all. A pierhead is fixed. So in the material sense is a buoy. In one sense it is a floating object, but it is not intended to float here, there, and everywhere. It must float in order to be on the surface of the water, but the one purpose of fastening it in a particular place is to enable mariners to see what course to follow, and that purpose cannot be achieved unless the buoy is kept in a particular place, and in that sense fixed. I therefore see no distinction in principle between an object of this kind, which, though floating, is affixed to the bottom of the sea, in order that it may always be approximately in the same spot upon the surface of the water, and a pierhead, which is a more permanently fixed object. In these circumstances I think we should be doing wrong if we did not follow the case of *The Normandy* (*ubi sup.*), and I think the appeal fails. I may add this, that in following the decision in *The Normandy* (*ubi sup.*) we are fixing a clear line, I think, for the jurisdiction of the County Courts. It will not be necessary for them to ask themselves a question as to what kind of object this or that is. The line drawn for their jurisdiction in cases of collision is such that they will only have to ask themselves whether it is a collision, as described in *The Normandy* (*ubi sup.*), between ships. I think that is the safest line to draw.

Bargrave Deane, J.—I agree.

Solicitors for the appellants (plaintiffs), the Humber Conservancy Board, *A. M. Jackson and Co.*, Hull.

Solicitors for the respondents (defendants), the owners of the *Upcerne, Hearfields and Lambert*, Hull.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 13 *and* 14, 1913.

(Before Cozens-Hardy, M.R., Buckley and Hamilton, L.JJ.)

Gallant v. Owners of Ship Gabir. (a)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.

Employer and workman—Death caused by accident — Compensation — Claim by dependants — "Accident arising out of and in the course of the employment" — Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A seaman employed on board a fishing vessel was engaged in discharging fish from it across a gangway resting on a floating pontoon. While he was standing in the middle of the gangway it became necessary to lower the end of it that rested on the pontoon. Instead of walking off the gangway the seaman caught hold of the stem of another vessel which was moored alongside, and swung himself therefrom. While doing so he slipped and fell into the water, sustaining such serious injuries that he died.

Held, that the accident arose "out of" as well as "in the course of" the seaman's employment.

Decision of the County Court judge reversed.

An arbitration under the Workmen's Compensation Act 1906 was requested between the dependants of a deceased workman and his employers as to the liability of the latter to pay compensation to them under that Act in respect of the injury caused to them by the workman's death through an "accident arising out of and in the course of" his employment.

The deceased was employed as a trimmer on board a steam fishing trawler belonging to his employers.

In Feb. 1912 the trawler was in dock, and the deceased was engaged in discharging fish from it across a gangway consisting of wooden planks laid alongside one another and extending from the trawler to a floating pontoon that rose and fell with the tide.

For the purpose of keeping the planks at a proper incline the ends thereof on the pontoon rested on some boxes, and as the tide changed the number of boxes under the planks were required to be varied, one having to be taken out occasionally from the end of the planks, or one put in, as the case might be.

It was the deceased's duty to slide baskets full of fish down the planks. He was actually engaged upon that work and was standing in the middle of the planks when it became necessary to lower the end of the planks on the pontoon by removing two boxes so that the proper incline of the planks might be preserved.

One of the men on the pontoon called to the deceased, telling him to get off the planks on to the pontoon so as to lighten the weight on the planks. But instead of walking off the planks the deceased caught hold of the stem of another trawler, which was moored alongside some 3ft. or 4ft. off, and swung himself therefrom. While doing so he slipped and fell into the dock, sustaining such serious injuries that he died the following day.

The case came on to be heard at the County Court of Lincolnshire holden at Great Grimsby before His Honour Judge Sir Sherston Baker, who decided that although the accident to the deceased arose "in the course of" his employment it did not arise alone "out of" the same; and that therefore the dependants of the deceased were not entitled to compensation.

From that decision the dependants now appealed.

Gerald Dodson, for the appellants, referred to

Watkins v. *Guest, Keen, and Nettlefolds Limited*, 106 L. T. Rep. 818;

Parker v. *Pout*, 105 L. T. Rep. 493;

Barnes v. *Nunnery Colliery Company*, 105 L. T. Rep. 961; (1912) A. C. 44.

Sankey, K.C. (with him *L. S. Davies*), for the respondents, referred to

Brice v. *Edward Lloyd Limited*, 101 L. T. Rep. 472; (1909) 2 K. B. 804;

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

Gane v. *Norton Hill Colliery Company*, 100 L. T. Rep. 979; (1909) 2 K. B. 539.

Gerald Dodson replied.

COZENS-HARDY, M.R. — This appeal comes before the court in not an altogether satisfactory condition. But having carefully considered the learned County Court judge's short notes of the evidence, and having regard to what are the circumstances, which almost speak for themselves, I have come to the conclusion, as a matter of law, that the decision cannot be supported and the appeal ought to be allowed.

This is a case in which the deceased workman was a trimmer. I do not pause to consider quite the meaning of that term as distinct from other branches of seafaring life. He was a man whose business certainly made him familiar with vessels, the handling of vessels, and doing such simple things as sailors, or seafaring men, do. He was, at the time when the accident complained of happened, undoubtedly engaged in his employers' work. What was that work? There was a boatful of fish just come into Great Grimsby harbour. In order to get the fish out of the boat, and to get it to the market as quickly as could be in the morning, there are two rows of planks, one upon the hold of the vessel going on to the side and then down on to the pontoon on the other side. The pontoon, of course, goes up and down with the tide. The end of the planks on the pontoon is rested upon certain boxes, and it becomes necessary, according to the tide, to take out occasionally a box from the foot of the planks, or to put one in, as the case may be, so as to get a proper incline down the planks to the pontoon along which the fish would slide in baskets, or whatever they are in.

The deceased was, as I have stated, already engaged upon this work. It was his business to see that the fish went down the planks. According to the evidence, at the critical moment of time he was in the middle of the planks. It became necessary at that moment that for the proper working of the contrivance a box should be taken away from the pontoon in order to let the foot go a little further down, so that the proper incline might be kept. The men who were there told him to get off on to the pontoon or back into the ship—in either case a comparatively few yards, although the planks might have been, and probably were, dirty and slippery. The object was, of course, to lighten the weight on the planks to enable them to be slightly raised at the foot so that the box could be drawn out. He was, therefore, at that time actually on the planks. Alongside of the vessel *Gabir*, which was the vessel on which the deceased was serving, was a similar boat, the *Borneo*, and each of these boats was stem on to the quay. The distance between the two, it is said, was between 3ft. and 4ft. It was an extremely easy thing to do for the deceased instead of going back to the pontoon or to the *Gabir* to reach out to the stem of the *Borneo*, and either to lighten the amount of his weight on the planks or even to take his feet off the planks altogether. He did that, and in circumstances about which we know nothing more the poor man fell into the water and sustained such injuries that he died the next day.

In those circumstances, did the accident arise "in the course of" his employment? The answer is that it plainly arose "in the course of" his employment. But did it arise "out of" his employment? We have had our attention called to a great number of authorities, as is customary, and probably inevitable, in these cases, although I do not forget that each case must rest on its own facts. I am content to take as an accurate statement of law which it would be impossible for me to improve upon, what Lord Atkinson laid down in *Barnes* v. *Nunnery Colliery Company* (105 L. T. Rep. 961; (1912) A. C. 44, at p. 49). The learned Lord there said: "In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between doing a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with the employment. A peril which arises from the negligent or reckless manner in which an employee does the work which he is employed to do may well, and in most cases would rightly, be held to be a risk incidental to the employment."

It seems to me that the utmost which can be said against this unfortunate workman was that he did recklessly that which he was employed to do and which it was even his duty he should do. He being a seafaring man did that which is practised every day by that class of workman: he put his hand out on to the stem of another boat 3ft. or 4ft. off—an easy thing to do, as the evidence shows—and hung on there instead of going down on to the pontoon, or getting on to the deck of his own boat. He was doing that which it was his duty to do; which he was employed to do. It may be that he did it recklessly, although I think that even that is too strong a word to apply in a case like this. He did it in a way nine out of ten seafaring men would think it perfectly natural to do. He fell, in the circumstances which I have mentioned, and that being so, and the facts being—although very shortly told to us—not really in dispute, the conclusion seems to me to be that this accident was one which arose both "in the course of" and "out of" his employment, and the dependants in this case are entitled to compensation.

Of course it is not for us to go into the question of the amount for the dependants. That must go back to the learned County Court judge. The appeal will be allowed.

BUCKLEY, L.J. referred to the nature of the workman's employment, and continued:—

The discharge of the fish was by sliding the baskets or boxes of fish down a plank which was arranged at a proper angle from the ship to the pontoon. For the purposes of discharging that duty the workman was on the planks, and while he was doing that he fell into the water and was drowned. The risk that he might fall into the water under those circumstances in doing that work was therefore one reasonably incidental to his employment. So we have got over the first step.

Although that is so, Mr. Sankey might succeed, it seems to me, if he showed either one of two things: Either that the workman was larking about, not pursuing his business, or that he had made an excursion by way of a gymnastic feat by holding himself up on the stem of another vessel. There seems to me to be no evidence to support either of those suppositions. The evidence is very scanty, and we do not know

whether what the workman did was to lean over from the plank to the stem of the *Borneo*, and support himself by taking hold there, keeping his feet on the planks, and fell; or whether he took his feet off the planks altogether and suspended himself in the air from the stem of the *Borneo*. Unfortunately we have only the judgment of the learned County Court judge, but no facts on which he based his decision.

It seems to me that the workman has established—as of course he must establish—a *primâ facie* case that this was an accident that arose "in the course of" his employment, and that the risk was one incidental to his employment. That being so, the employers have not discharged the onus resting upon them by saying that was not so because he was larking about, or had left the sphere of his employment and went in for gymnastics. There is nothing to show that.

Under these circumstances I think that this appeal should be allowed.

HAMILTON, L.J.—I agree.

Appeal allowed.

Solicitor for the appellants, *A. D. B. Marsh*, agent for *H. K. Bloomer*, Great Grimsby.

Solicitor for the respondents, *Philip J. Rutland*, agent for *John Tonge*, Great Grimsby.

Wednesday, Jan. 15, 1913.

(Before COZENS-HARDY, M.R., BUCKLEY and HAMILTON, L.JJ.)

LUCKWILL *v.* AUCHEN STEAMSHIP COMPANY LIMITED. (*a*)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.

Employer and workman — Injury by accident — Compensation—Sub-contracting—" Principal " — " Contractor "—Execution of work " in the course of or for the purposes of " principal's " trade or business "—Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1. 4, *sub-s.* 1.

Where the owners of a steamship entered into a contract with a contractor to scale the boilers of the vessel, and he engaged certain workmen to do the work, the principals not exercising any control over the workmen, it not being their practice to undertake the scaling of the boilers of their steamships themselves, they always employing an independent contractor to do it, the operation that the contractor had contracted to perform for the principals was held not to be work executed " in the course of or for the purposes of " the principals' " trade or business " within the meaning of sect. 4, *sub-sect.* 1, *of the Workmen's Compensation Act* 1906, *so that the principals were not liable to pay compensation to one of the workmen who was injured by " accident arising out of and in the course of " his employment.*

Spiers *v.* Elderslie Steamship Company (1909, *S. C.* 1259; 46 *Sc. L. Rep.* 893), *the reasoning of which was adopted by the Court of Appeal in England in* Skates *v.* Jones and Co. (103 *L. T. Rep.* 408; (1910) 2 *K. B.* 903), *applied.*

Decision of the County Court judge affirmed.

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

AN arbitration under the Workmen's Compensation Act 1906 was requested between the applicant and the respondents as to the amount of compensation payable to the former under that Act in aespect of the personal injury caused to him by rccident arising out of and in the course of his employment.

On the 9th July 1912 the case came on to be heard at the County Court of Glamorganshire, holden at Barry before His Honour Judge Hill Kelly, when the facts as found by the learned County Court judge were stated by him to be as follows:—

The applicant was a boiler scaler and was employed with other boiler scalers on the *Auchenblae*, which was a steamship belonging to the respondents.

The respondents had entered into a contract with one Samuel Bubbins to scale the boilers and do some other work for the sum of 25*l.*

S. Bubbins engaged the applicant and certain others to do the work.

The applicant's contract was with S. Bubbins and with no one else.

The respondents did not exercise any control or any supervision over him.

On the 19th April 1912 the applicant was injured by an "accident arising out of and in the course of" his employment as he was going on board the *Auchenblae* and was incapacitated by reason of that injury, and thereupon instituted these proceedings to recover compensation from the respondents.

Whether he could recover depended upon whether he could bring himself within sub-sect. 1 of sect. 4 of the Act.

In relation to that section His Honour found that it was not the practice of the respondents to undertake the scaling of the boilers of their ships themselves. On the contrary, they always employed contractors to do it except when at a foreign port they employed members of the crew to do something in the nature of boiler scaling not so extensive or so thorough as what was being done on the *Auchenblae* under the contract with S. Bubbins. At British ports they always engaged an independent contractor to scale the boilers of their ships which was an operation which ordinary ship's firemen were not competent to perform.

His Honour accepted also the evidence that the practice of the respondents in this respect was the practice of shipowners in this country at large. He came to the conclusion, therefore, that the operation which S. Bubbins contracted to carry out for the respondents was not an operation "in the course of or for the purposes of their trade or business" undertaken by them.

These being the facts, the respondents could not, the learned judge decided, be held liable to pay compensation to the applicant.

The case was in the opinion of the learned judge covered by the decision in *Spiers* v. *Elderslie Steamship Company* (1909, S. C. 1259; 46 Sc. L. Rep. 893) by the Court of Session in Scotland, the reasoning and result of which was adopted by the Court of Appeal in the case of *Skates* v. *Jones and Co.* (103 L. T. Rep. 408; (1910) 2 K. B. 903).

The result was that His Honour made an award for the respondents.

From that decision the applicant appealed.

By sect. 4 of the Workmen's Compensation Act 1906 it is provided as follows:

(1) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, references to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed. . . . (2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section, and all questions as to the right to and amount of any such indemnity shall in default of agreement be settled by arbitration under this Act. (3) Nothing in this section shall be construed as preventing a workman recovering compensation under this Act from the contractor instead of the principal. (4) This section shall not apply in any case where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management.

The grounds of appeal were stated in the notice of appeal to be as follows: (1) That the finding of the learned judge that the operation which Bubbins contracted to carry out for the respondents was not an operation in the course of or for the purpose of the respondents' trade or business was erroneous and wrong in law; (2) that the learned judge misdirected himself on the evidence in not finding that the respondents in the course of or for the purposes of their trade or business had contracted with Bubbins, the applicant's employer, for the execution by or under Bubbins of the work of scaling the boilers of the steamship *Auchenblae*, undertaken by the respondents; (3) that upon the evidence the learned judge was bound in law to find that the respondents were liable to pay compensation to the applicant at the rate of 1*l*. per week from the 19th April 1912.

The appeal now came on to be heard.

Sankey, K.C. (with him *Ivor Bowen*, K.C.) for the appellant.—The question raised by this appeal turns upon the provisions of the Workmen's Compensation Act 1906, s. 4. The learned County Court judge was of opinion that this case was indistinguishable from the Scotch case of *Spiers* v. *Elderslie Steamship Company* (1909, S. C. 1259; 46 Sc. L. Rep. 893), which was dealt with by this court in *Skates* v. *Jones and Co.* (103 L. T. Rep. 408; (1910) 2 K. B. 903). Another case on the section is *Dittmar* v. *Wilson, Sons, and Co.* (100 L. T. Rep. 212; (1909) 1 K. B. 389). I submit that the present case is distinguishable from the Scotch case, and falls within the principle of *Dittmar* v. *Wilson, Sons, and Co.* (*ubi sup.*). No doubt the determination of the present case is rather embarrassed by the decision in the Scotch case. But it is, I suggest, nevertheless capable of being differentiated therefrom.

Albert Parsons, for the respondents, was not called upon to argue,

Their Lordships (Cozens-Hardy, M.R., Buckley and Hamilton, L.JJ.) were of opinion that the conclusion arrived at by the learned County Court judge was right for the reasons stated by His Honour based on the authorities referred to by him.

Appeal dismissed.

Solicitors for the appellant, *Helder, Roberts, Walton*, and *Giles*.

Solicitors for the respondents, *Botterell* and *Roche*, agents for *Donald Maclean* and *Handcock*, Cardiff.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, Jan. 31, 1913.

(Before SCRUTTON, J.)

PROPERTY INSURANCE COMPANY LIMITED *v.* NATIONAL PROTECTOR INSURANCE COMPANY LIMITED. (*a*)

Marine insurance — Policy—Reinsurance — Non-disclosure of material fact—Policy "subject without notice to the same clauses and conditions as the original policy"—Liability of reinsurer.

The plaintiffs insured the hull of a steamship on a time policy for 500l. at a premium of 6 per cent. The policy contained a clause that the ship had the option to navigate the Canadian lakes, and an additional premium of 3 per cent. was paid in respect thereof. The defendants reinsured 250l. on the risk at the same premium of 6 per cent., but no mention was made at the time the reinsurance was effected of the option to navigate the lakes or the additional premium. The defendants' policy was stated to be "subject without notice to the same clauses and conditions as the original policy." While in the lakes the ship sustained damage in respect of which the plaintiffs paid 117l. 13s on their original policy. The plaintiffs claimed 58l. 16s 6d., the proportion due from the defendants, but the defendants repudiated liability on the ground that a material fact had been concealed from them, and their policy of reinsurance was thereby rendered invalid

Held, that although the option to navigate the lakes was a material fact that ordinarily should have been disclosed when the reinsurance was effected, the defendants had agreed to be bound by the terms of the original policy without notice, and were therefore liable.

COMMERCIAL COURT.

Action tried by Scrutton, J.

The plaintiffs' claim was for 58*l*. 16*s*. 6*d*., the proportion which they alleged was due from the defendants under a policy of reinsurance.

G. P. Langton for the plaintiffs.

Morle for the defendants.

The facts and arguments are sufficiently stated in the judgment.

SCRUTTON, J.—In this case the Property Insurance Company Limited, who are underwriters, bring an action against the National Protector Insurance Company Limited, who are also under-

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

writers, to recover 58*l.* 16*s.* 6*d.*, being sums paid by the plaintiffs on a policy of reinsurance in consequence of certain losses to the steamship *Odland.* The defendants originally pleaded a number of defences which have all been abandoned now, except possibly one arising under par. 3 of the defence; but just before this trial they raised what appears to me to be really their substantial defence.

The facts, as I understand them, are these: The owner of the *Odland* insured her with a Norwegian company, the Nordskir Lloyd, for twelve months. I have not got the slip of that policy, or its date, but I conjecture, from what happened, that he had first insured her at 6 per cent. premium for the twelve months with a liberty to use her on the Canadian lakes if he was paid 3 per cent. more, making 9 per cent. On the 14th April the Nordskir Lloyd appear, through Messrs. Fothergill and Hatton, to have reinsured their risk in England with the plaintiffs, and they put on the slip " Original conditions usual Norwegian whole policy; additional premium 3 per cent. for navigation in the season in the Canadian lakes," and that was underwritten by the plaintiffs for 500*l.* On the 5th May the plaintiffs in turn reinsured part of the risk they had taken of 500*l.*—namely, 250*l.*—with the defendants, at a premium of 6*l.*, the slip being "R. I.," which would carry with it some clause as to the reinsurance being subject to the same terms and conditions as the original policy.

Meanwhile, on the 2nd May—that is, three days before that slip—in Norway, the original policy had been drawn up, and had been drawn up, as I conjecture, the option having been exercised, with liberty to trade on the Canadian lakes, and stating the premium at 9 per cent.

On the 10th June the Nordskir Lloyd, through their English agents, drew up the policy with the plaintiffs, which contained the clause which included navigation for the season on the Canadian lakes, and the premium of 9 per cent. The policy also contained this clause: " Being a reinsurance applying to a policy effected with the Nordskir Lloyd, Christiania, subject without notice to the same clause and conditions, and to pay as may be paid thereon." On the 27th July the plaintiffs drew up their policy with the defendants, which, however, while stating " This is a reinsurance applying to a policy effected by the Nordskir Lloyd, subject without notice to the same clauses and conditions and to pay as they pay thereon," says nothing about the Canadian option, and leaves the premium at 6*l.*

In that state of facts, when the claim arises the defendants ultimately take two points: first, in par. 3 of the defence, that there was a representation that the rate of premium offered was the same as that received by them and no more, and I may say that that representation is not varied in any way, but subsequently the plaintiffs demanded and received from their insurers an increased premium of 3*l.*, and did not disclose this fact to the defendants, or state for what additional risks they so demanded and received the same. It is quite plain that they did not demand and receive such a premium before the date of the slip in this case, and, that being so, that is not available as a defence on the ground of concealment in the slip. It appears to me that it only becomes material in that the policy, being under the same clauses and conditions as the original, the defendants can claim, or are entitled to claim, if the policy is valid, an additional premium of 3 per cent. on their risk. But the substantial point is that raised by the second amendment. The first amendment, which was that there was a representation that the plaintiffs were liable to 500*l.* on the risk themselves, fails because there is no proof that there was such a representation. The gentleman who is called very frankly says that he does so much business that he cannot profess to say what anybody said on this particular occasion, and consequently it is obviously impossible to find any representation as alleged. But the second amendment is this: " Wrongfully concealed from the defendants material facts then known to the plaintiffs and unknown to the defendants—namely, that the ship was at liberty to navigate in the season in the Canadian lakes, and in that event an additional premium of 3 per cent. was payable." The defendants called two experienced underwriters before me who gave me their opinions that in a reinsurance the clause giving liberty to navigate the Canadian lakes in the season was so unusual that notice ought to be given of it to the underwriters writing the insurance; that it was in their opinion a material fact which would influence the judgment of an underwriter as to what premium he should take the risk at, if at all, because, as is well known, many underwriters do not like Canadian lake business, which is a rather risky thing to meddle with unless you know a good deal about it.

If the matter had stopped there, I think I should have held that this was a material fact which ought to have been disclosed. I do not want to draw any hard-and-fast line (I do not think it is possible to draw such a line) as to what an underwriter offering a reinsurance risk on the same terms and conditions as the original policy must disclose. It must depend a great deal on the nature of the risk, and when he is offering a twelve months' time policy, obviously twelve months' time policies on ships differ so very much in their terms that I am inclined to think with regard to a great many of those terms, the man writing the risk is put on inquiry, and, if he wants to know the terms and conditions on which he is purporting to write, he should ask. But I think it is quite clear that the policy may be for such an extraordinary risk, as where the ship may have liberty to do unusual and dangerous things, that there may be clauses in the original policy which an underwriter offering ought to disclose because they are so out of the usual that a reinsuring underwriter would not expect them; and I am inclined to think and to accept the opinion of the two underwriters who were called that liberty to trade on the Canadian lakes in the case of a ship not bearing a name obviously suggestive of lake business is so unusual a feature that it ought always to be disclosed.

But the matter does not stop there, because in both these policies there is a clause which I do not remember myself ever to have seen before, although I have seen a good many of these policies, and which I do not gather from the evidence given before me is at all a usual clause in such policies. The usual clause, so far as my experience goes, is a reinsurance applying to a policy " subject to the same clauses and condi-

tions and to pay as may be paid thereon." This clause runs: "Subject without notice to the same clauses and conditions." It is not a printed clause, but a written one, and I start by assuming that the underwriters who wrote it out and agreed to it meant something by the words "without notice." Without notice of what? The only intelligible meaning that I can put upon it is: "Without notice of what the clauses and conditions are, you agree to the clauses and conditions in the original policy, and you waive any notice of what they are." I do not see any satisfactory meaning that can be given to these words except that, and, if so, it is probably put in by the person who tenders the risk as a measure of precaution to avoid points like this; to prevent the man who writes the risk coming and saying subsequently: "Oh, on now carefully considering the policy I think clause 22 is an unusual one, and you ought to have told me of it. I have got three underwriters at Lloyd's who will come and say that is their opinion." I can quite conceive a good business reason, if the clause means what I say, for its being put into the policy on the one side by the person who wants to insure himself, and it has in this case been accepted by the other side.

It may be that the clause gives a chance to bring in odd clauses against the underwriter; but, on the other hand, it gives the certainty of getting paid without a lawsuit, which is one of the things that an ordinary underwriter would desire, as he does not prefer a lawsuit as an incident of the settlement of his business.

On the whole, although the clause has puzzled me a little, I am inclined to think it was put in for the purpose I have mentioned, and even assuming, as I hold, that a clause giving liberty to use the vessel on the Canadian lakes is an unusual clause of which the reinsuring underwriter ought to be informed, I think the clause in this case "subject without notice to the same clauses and conditions" waives information as to that point, and binds him by the actual clauses and conditions though he was not told of them and though he had no notice of them at the time he issued the slip.

The result is that there must be judgment for the plaintiffs for the amount claimed with costs, but obviously they ought to give credit at once for the additional premium of 3 per cent.

Solicitors for the plaintiffs, *Swepstone, Stone, Barber*, and *Ellis*.

Solicitor for the defendants, *A. J. Carruthers*.

Tuesday, Dec. 12, 1912.

(Before Bailhache, J.)

France, Fenwick, and Co. Limited v. Philip Spackman and Sons. (a)

Charter-party — Demurrage — Exceptions — "Strikes . . . or any cause beyond the control of the charterer."

The following printed clause appeared in a charter-party: "The steamer to be loaded in usual turn, with customary dispatch at Goole, and discharged in thirty-six running hours, commencing first high water on or after arrival at or off the berth, unless berthed before, but time, unless used, not to commence between six p.m. and six a.m." The following written clause appeared in the margin: "When steamer loads at Hull seventy-two running hours will be allowed for loading and discharging, which time is to commence when steamer is at or off loading berth, but should steamer be prevented from entering the loading dock owing to congestion, time to commence from first high water after arrival off the dock."

Held, that when the steamer loaded at Hull the time commenced to run from the time the steamer got to the loading berth.

The charter-party also contained the following clause: "Strikes of workmen, lock-outs, pay days, idle days or cavilling days, or riots, or frost, rain or floods, or any accident or any cause whatsoever beyond the control of the charterer, which may prevent or delay her loading or unloading excepted."

There was a delay of seventeen hours at the port of discharge in consequence of a deficiency of railway waggons due to an abnormal demand upon the railway company. The plaintiffs claimed demurrage in respect of the seventeen hours.

Held, that the words "or any cause whatsoever were wide enough to exclude the ejusdem generis *rule of construction, and that the charterers were therefore not liable for demurrage.*

Commercial Court.

Action tried by Bailhache, J.

The plaintiffs, owners of the steamship *Stanton*, claimed from from the defendants, the charterers, demurrage alleged to be due under a charter-party dated the 7th April 1911.

By the charter-party it was provided (*inter alia*) that the *Stanton* should proceed to Goole or Hull, as ordered by the charterers, and load a full and complete cargo of coal, and proceed direct to Spackman's Wharf, Queenborough, and there deliver the same alongside any vessel, wharf, pier, or floating depots, or with lighters in the river, dock, or port, as ordered by the receivers of the cargo.

The following written clause appeared in the margin of the charter-party:

> When steamer lands at Hull seventy-two running hours will be allowed for loading and discharging, which time is to commence when steamer is at or off loading berth, but should steamer be prevented from entering the loading dock owing to congestion, time to commence from first high water after arrival off the dock.

The charter-party also contained the following printed clauses:

> The steamer to be loaded in usual turn, with customary dispatch at Goole, and discharged in thirty-six running hours, commencing first high water on or after arrival at or off the berth, unless berthed before, but time, unless used, not to commence between 6 p.m. and 6 a.m., nor commence or count between 4 p.m. Saturdays, and 6 a.m. Mondays, nor on any general holiday.
>
> Strikes of workmen, lock-outs, pay days, idle days, or cavilling days, or riots, or frost, rain, or floods, or any accident or cause whatsoever beyond the control of the charterer, which may prevent or delay her loading or unloading excepted.

The vessel loaded a cargo of coal at Hull, which she discharged at Queenborough. The plaintiffs

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

claimed that when the vessel loaded at Hull time began to run from the time she got to the loading dock, and that the loading time was therefore exceeded by eleven hours. The defendants' contention was that whether the vessel was loaded at Hull or Goole, time between 6 p.m. and 6 a.m. was not to count, and that there had been a delay of seventeen hours at Queenborough owing to a deficiency of railway waggons, due to abnormal circumstances prevailing at the time, which they said was beyond their control and within the exceptions in the charter-party.

Roche, K.C. for the plaintiffs.—With respect to the eleven hours' delay at Hull, the defendants cannot rely on the provision as to time between 6 p.m. and 6 a.m. not being connected, as that was only applicable to Goole and not to Hull. The delay at Queenborough was not covered by the exceptions in the charter-party, because the words used were not strong enough to oust the *ejusdem generis* rule:

> *Larsen* v. *Sylvester*, 11 Asp. Mar. Law Cas. 78; 99 L. T. Rep. 94; (1908) A. C. 295;
> *Thorman* v. *Dowgate Steamship Company*, 11 Asp. Mar. Law Cas. 481; 102 L. T. Rep. 242; (1910) 1 K. B 410;
> *Postlethwaite* v. *Freeland*, 4 Asp. Mar. Law Cas. 129, 302; 42 L. T. Rep. 845; 5 App. Cas. 599.

Leck, K.C. for the defendants.—The question as to the delay at Hull is governed by the printed clause, and therefore time between 6 p.m. and 6 a.m. does not count whether the port is Goole or Hull. This is clearly deducible from the charter-party read as a whole, and the written clause is not exhaustive. The delay at Queenborough was due to a cause entirely beyond the control of the charterers, which brings the case within the decision in *Larsen* v. *Sylvester* (*sup.*).

BAILHACHE, J.—In this case I am not going into any question of figures. The only question I have to deal with is as to the time the steamer took to load and discharge at Hull and Queenborough respectively, the difference between the parties being twenty-eight hours, made up as to eleven hours at Hull, and as to seventeen hours at Queenborough.

The question as to the eleven hours at Hull depends, when one fact is ascertained, upon the construction of the charter-party. The *Stanton* arrived at a loading berth at Hull at 7.30 p.m. on the 24th Aug. 1911. The charter-party, which was originally intended to be applicable only to Goole as the loading port, was altered so as to be applicable at Hull as well, the material words inserted for this purpose being as follows: "When steamer loads at Hull, seventy-two running hours will be allowed for loading and discharging, which time is to commence when steamer is at or off loading berth, but should steamer be prevented from entering the loading dock owing to congestion, time to commence from first high water after arrival off the dock." In speaking of "time to commence," that clause obviously means time for loading. Before the alteration, the clause in the charter-party was as follows: "The steamer to be loaded in usual turn, with customary dispatch at Goole (which related to the loading time), and discharged in thirty-six running hours, commencing first high water on or after arrival at or off the berth, unless berthed before, but time, unless used, not to commence between 6 p.m. and 6 a.m., nor commence or count between 4 p.m. Saturdays and 6 a m. Mondays, nor on any general holiday." The steamer having arrived at a loading berth at Hull at 7 30 p.m. on the 24th Aug., the defendants say that the time did not begin to count until 6 a.m. on the 26th Aug. The plaintiffs, on the other hand, say that the words "time . . . not to commence," &c., have in this case nothing to do with the loading time, but that they refer exclusively to the discharging time. Upon that I think the plaintiffs are right, and that the time of the *Stanton* began to count when she got to the loading berth.

The other question relates to what happened at the discharging port. The vessel was to be discharged in thirty-six hours, and that is the fixed time, but there is this exception clause: "Strikes of workmen, lock-outs, pay days, idle days or cavilling days, or riots, or frost, rain, or floods, or any accident, or any cause whatsoever, beyond the control of the charterer which may prevent or delay her loading or unloading excepted." The only words in that clause which can assist the present defendants are these: "Or any cause whatsoever beyond the control of the charterer." If these words are to be construed *ejusdem generis*, I do not think that upon the facts the defendants were excused. The facts, as I understand them, are these: At Queenborough the coal is not discharged immediately into waggons, but into a kind of hopper, which sifts the coal, and the coal is then taken away in waggons. No delay is caused by this operation, and if at the time in question there had been a sufficiency of railway waggons there would have been no delay at the port of discharge. There was, however, a deficiency in the supply of railway waggons, and that deficiency, I am told, was due to the fact that there was an abnormal demand for railway waggons. As we all remember, the summer of 1911 was quite exceptional; the fruit crop was heavy and the hops were moved some fourteen days before the usual time. There were about this time some manœuvres, partly of the territorial forces and partly of the regular army, and, in addition, there was the dislocation of the railway traffic owing to the few days' serious strike in August. Owing to all these circumstances, as Mr. Leck contends, the railway company were unable to supply waggons sufficient for the purpose of discharging the *Stanton* within thirty-six hours. Mr. Roche, for the plaintiffs, says that there was nothing at all abnormal, and that in truth and in fact the railway company never could, under any circumstances, supply the necessary number of waggons to discharge the *Stanton* within the thirty-six hours.

Upon the facts I have come to the conclusion that the circumstances were abnormal, and I adopt Mr. Leck's view that it was owing to the abnormal demands upon the railway company that trucks could not be got to discharge the vessel within the thirty-six hours. On that finding of fact the question remains whether the defendants have brought themselves within the words of the exceptions clause: "Any cause whatsoever beyond the control of the charterer." If these words are to be construed *ejusdem generis* with "strikes of workmen, &c.," the defendants have not, in my opinion, brought

themselves within them. I do not intend to go at length into the cases which, during the last few years, have dealt with the *ejusdem generis* rule of construction; it is sufficient for me to refer to *Larsen* v. *Sylvester* (*sup.*) and *Thorman* v. *Dowgate Steamship Company* (*sup.*): In the former of these cases the general words were "of what kind soever," and the House of Lords held that by the use of those words there was a sufficient expression of intention to exclude the ordinary *ejusdem generis* rule. In *Thorman* v. *Dowgate Steamship Company* (*sup.*) the general words were "any other cause." and Hamilton, J. decided that there was no sufficient indication to override the well-known *ejusdem generis* rule. In this case the words are not "any other cause" or "of what kind soever," but "or any cause whatsoever." In my opinion these words are, as the words in *Larsen* v. *Sylvester* (*sup.*) were held to be, sufficient to exclude the operation of the *ejusdem generis* rule. If I had not found that the circumstances at the time of the discharge were exceptional I should have acceded to Mr. Roche's argument, that to bring themselves within the exception clause it is not enough for the defendants to say that they were prevented, but they must say that they were prevented by some cause which was exceptional. If a person contracts to discharge in thirty-six hours unless prevented by some cause beyond his control, and if the cause beyond his control always would prevent the discharge within that time, then, in my opinion, it is not an exception at all, and if in such a case he fails to discharge within the thirty-six hours he is not within the exceptions clause.

In this case, as I have said, I think the circumstances were abnormal and unusual, and for that reason the defendants come within the exceptions clause. I decide in favour of the plaintiffs as to the eleven hours at Hull, and in favour of the defendants as to the seventeen hours at Queenborough.

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

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

Jan. 13 *and* 14, 1913.

(Before Scrutton, J.)

Anglo-Hellenic Steamship Company Limited *v.* Louis Dreyfus and Co. (*a*)

Charter-party — Demurrage — Custom of port of Novorossisk — Evidence — Distinction between law and custom.

A custom is a reasonable and universal rule of action in a locality, followed, not because it is believed to be the general law of the land or because the parties following it have made particular agreements to observe it, but because "it is in effect the common law within that place to which it extends, although contrary to the general law of the realm."

Alleged custom of the port of Novorossisk considered.

Lockwood *v.* Wood (6 *Q B.* 50) *considered.*

Commercial Court.

Action tried by Scrutton, J.

The Anglo-Hellenic Steamship Company, as plaintiffs, sued the defendants Louis Dreyfus and Co. to recover 300*l.* for demurrage at Novorossisk in the Black Sea.

It was agreed that the plaintiffs' vessel arrived at Novorossisk Roads in the port of Novorossisk on the 5th March, and alongside the pier where she leaded on the 15th March, and then took six days to load. The question was whether the defendants as charterers were liable to pay demurrage for the ten days during which she was waiting to load in Novorossisk Roads.

The charter was in the well-known English 1890 Black Sea form made between English firms in England for the carriage of goods to England, and it was agreed that unless modified by a custom of the port it was to be construed by English law. Under it the ship was "to proceed to Novorossisk and there load, eighteen running days to be allowed for loading and unloading." According to English law, the lay days begin when the vessel is at the disposition of the charterers for loading within the port, and their beginning is not postponed till the ship has reached the actual loading berth to which she is ordered, and it was admitted that on the charter alone by English law the defendants were liable for the sum claimed. The defendants sought to prove that there was a recognised and established custom of the port not to treat a ship as an arrived ship until she reached a loading berth. The evidence tendered by the defendants consisted of two affidavits—the first of a grain merchant, two grain shippers, a steamship broker, and a steamship agent, who said: "Vessels chartered for Novorossisk by charter-party with running days for loading and discharging, if not otherwise stated in charter-party, must, according to Russian law and consequently as customary at Novorossisk, count their days from the moment they are moored alongside the pier." The second affidavit was made by a Russian lawyer practising at Novorossisk, and was as follows: "Vessels chartered for Novorossisk by charter-party with running days for loading and discharging, if not otherwise stated in charter-party, must count their days from the moment they are moored alongside the pier, and that the days during which vessels wait for turn in the roads do not count . . . according to Russian civil law and the custom accepted by governing senate as Court of Appeal, justices of the peace, and other courts and tribunals." The Bourse Committee of Novorossisk certified to the effect that "vessels chartered for Novorossisk by charter-party with running days, if not otherwise stated in charter-party, must count their days from the moment they are moored alongside the pier, and that the days during which vessels wait for turn in the roads do not count."

Leck, K.C. and *L C. Thomas* for the defendants.—So far as the charter alone is concerned, the defendants are liable according to English law:

> *Leonis Steamship Company* v. *Rank*, (1908) 1 K. B. 499; reported in the court below in 10 Asp. Mar. Law Cas. 398.

If, however, the charterer can prove that by the custom of the particular port lay days do not count until the vessel reaches her berth, as distinguished from arriving within the port, they are not liable. The cumulative effect of the evidence tendered on behalf of the defendants proves that there is a custom at the port in

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

question by which the ship is not treated as being an arrived ship until she reaches her loading berth.

Roche, K.C. and *Raeburn* for the defendants.—The evidence adduced by the defendants does not go to the length of proving a recognised and established custom of the port so as to exempt them from liability to pay for demurrage. It amounts to no more than a statement that by Russian law no demurrage can be claimed under the circumstances. If that is so, there is a conflict between the Russian law and English law as stated in *Leonis Steamship Company* v. *Rank* (*sup.*), and the English law must prevail, and therefore the defendants are liable.

Cur. adv. vult.

Scrutton, J.—In this case the Anglo-Hellenic Steamship Company as plaintiffs sue Louis Dreyfus and Co. as defendants to recover 300*l.* for demurrage at Novorossisk in the Black Sea. It was agreed that the plaintiffs' vessel arrived at Novorossisk Roads in the port of Novorossisk on the 5th March and alongside the pier where she loaded on the 15th March and then took six days to load. The question was whether the defendants as charterers were liable to pay demurrage for the ten days during which she was waiting to load in Novorossisk Roads.

The charter was in the well-known English 1890 Black Sea form made between English firms in England for the carriage of goods to England, and it was agreed that unless modified by a custom of the port it was to be construed by English law. Under it the ship was "to proceed to Novorossisk and there load, eighteen running days to be allowed for loading and unloading." Since 1904 the construction of such a charter on the point when lay days begin has been settled by the decision of the Court of Appeal in *Leonis Steamship Company* v. *Rank* (*sup.*) to be that the lay days begin when the vessel is at the disposition of the charterers for loading within the port, and their beginning is not postponed till the ship has reached the actual loading berth to which she is ordered. Counsel for the defendants admitted that on the charter alone by English law he was liable for the sum claimed. But the case cited allows the charterer to prove in regard to a loading ship "that there is a recognised and established custom of the port not to treat a ship as being an arrived ship until she reaches a particular spot": (per Kennedy, L.J., at p. 520 of (1908) 1 K. B.). The defendants proposed to prove that there was at Novorossisk such a custom. The evidence they adduced has failed to satisfy me of the existence of such a custom. It does satisfy me that the Russian courts would decide against the plaintiffs' claim, partly because they would construe the charter in the opposite way to that in which the English courts construe it, and partly because they would regard the charterer as prevented by *force majeure*, the presence of other ships, from loading, and therefore not liable for failure to load. And I am satisfied that many people at Novorossisk believe that the construction of this charter by Russian law is the only correct one, and act on such a construction. But that in my view does not prove a custom.

A custom is a reasonable and universal rule of action in a locality, followed, not because it is believed to be the general law of the land or because the parties following it have made particular agreements to observe it, but because it "is in effect the common law within that place to which it extends, although contrary to the general law of the realm": (see per Tindal, C.J. in *Lockwood* v. *Wood*, 6 Q. B. 50). If this definition is correct, the evidence fails to bring what happens at Novorossisk within it. The evidence as tendered before me by the defendants consisted of three affidavits or certificates, the first of a grain merchant, two grain shippers, a steamship broker, and a steamship agent, who say: "Vessels chartered for Novorossisk by charter party with running days for loading and discharging, if not otherwise stated in charter party, must, according to Russian law and consequently as customary at Novorossisk, count their days from the moment they are moored alongside the pier." That, in my view, amounts to no more than a statement, which I should hope to be true, that people at Novorossisk obey the Russian law and they conceive the Russian law to be as stated in the certificate. The Russian lawyer expresses himself in this way: "Vessels chartered for Novorossisk by charter-party with running days for loading and discharging, if not otherwise stated in charter-party, must count their days from the moment they are moored alongside the pier, and that the days during which vessels wait for turn in the roads do not count, and that according to Russian civil law and the custom accepted by the governing senate as Court of Appeal, justices of the peace, and other courts and tribunals during the course of my lengthy legal practice," and so on. I am quite sure that that gentleman has not in his mind the slightest idea of what is a custom according to English law, and that he is expressing his view of the Russian law as applied to the charter-party in question. Then there is the certificate given by the Bourse Committee to Messrs. Louis Dreyfus "to enable them to prove that vessels chartered for Novorossisk by charter-party with running days, if not otherwise stated in charter-party, must count their days from the moment they are moored alongside the pier, and that the days during which vessels wait for turn in the roads do not count." That certificate does not profess to state that there is any custom of the port of Novorossisk. It is perfectly consistent with its wording that the Bourse Committee are of opinion that Russian law applies to the matter, and that by Russian law the construction of the charter is what they state. That is the only evidence put forward by the defendants. These all seem to me to point to a view taken according to Russian law of the true construction of this charter and action based upon it; and I am confirmed in this view by the correspondence which passed at the time, and by the affidavit of the plaintiffs' Russian lawyer.

A very similar state of things in my experience had existed at Genoa and Savona, where the English courts construe a well-known English form of charter as making lay days begin when the ship is ready to load though not in berth, and the Italian courts treat the lay days as beginning when the vessel is in berth. But I do not think that such a view as to the local law or action based upon it can in any way be treated as a custom of the port.

The result is that, though the plaintiffs have not given me the assistance I should expect in rebut-

ting the alleged custom by evidence, the evidence adduced by the defendants fails to satisfy me of the existence of such a custom as is alleged There must, therefore, be judgment for the plaintiffs for the amount claimed.

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

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

Tuesday, Jan. 28, 1913.

(Before Scrutton, J.)

Port of London Authority *v.* Cairn Line of Steamships Limited. (*a*)

Port of London—Right to weigh and measure goods shipped or unshipped—Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 *Vict. c.* 27), s. 82—*Port of London Act* 1908 (8 *Edw.* 7, *c.* 68).

The powers vested in the Port of London Authority include, on due publication of rates for weighing, the sole right of weighing and measuring any goods shipped or unshipped in the Surrey Commercial Dock, but not the sole right of providing machines for such weighing.

Commercial Court.

Action tried by Scrutton, J.

The plaintiffs claimed a declaration that they had the sole right of weighing and measuring goods, shipped, unshipped, or delivered in the Surrey Commercial Dock, and that the defendants were not entitled to weigh or measure, automatically or otherwise, goods shipped, unshipped, or delivered in the dock; and they also claimed an injunction restraining the defendants from so doing.

George Wallace, K.C. and *Wootten* for the plaintiffs.

Atkin, K.C., *Maurice Hill*, K.C., and *Mackinnon* for the defendants.

The facts and arguments are sufficiently stated in the judgment.

Scrutton, J.—In this case the Port of London Authority sue the Cairn Line of Steamships Limited, who use the Surrey Commercial Dock, for a declaration and injunction. The Cairn Line discharge their bulk grain steamers by an elevator, which, when adjusted, also records the weight of the grain. The port authority desire a declaration that they alone have a right to weigh cargo and to provide tne weighing machine, which, if granted, will indirectly prevent the defendants from using their elevator.

Involved in the real dispute between the parties are the questions whether the Port of London Authority have the sole right to discharge steamers in the Surrey Dock, and the question whether the defendants have any right to bring into and keep the elevator in the Surrey Dock, and, if so, on what terms. These questions are not raised in the pleadings here, and I do not decide them. The law stands as follows: "Where under their special Act the undertakers had the appointment of meters and weighers (and in this case the plaintiffs had under sect. 115 of the Surrey Commercial Dock Act of 1864 and the Port of London Act 1908 such appointment) they might, by sect. 81 of the Harbours, &c., Clauses Act 1847, appoint and license a sufficient number of persons to be meters and weighers, might make regulations for their government, and fix reasonable rates to be paid."

In this case the Surrey Company and the plaintiffs have had for many years persons described as grain weighers, some on their permanent staff, some temporarily employed, who in fact weighed grain. They have made no special regulations for their government; the weighers are usually employed where the dock performs the discharging, and a rate has been fixed "for working out, weighing, and delivering overside." As no one has asked the port authority to weigh a cargo not worked by the authority no special rate has yet been fixed by the authority and published as provided by the Surrey Act of 1864.

Sect. 82 of the Harbours, &c., Clauses Act 1847 provides: "When a sufficient number of meters and weighers have been appointed by the undertakers, under the powers of this and the special Act, the master of any vessel, or the owner of any goods shipped, unshipped, or delivered within or upon the harbour or dock or pier, shall not employ any person other than a weigher or meter licensed by the undertakers, or appointed by the Commissioners of Her Majesty's Customs, to weigh or measure the same; and if in such case any person other than a meter or weigher licensed by the undertakers, or a meter or weigher appointed by the Commissioners of Her Majesty's Customs, shall weigh or measure any such goods as aforesaid, such person, as well as the person by whom he shall be employed, shall for every such offence be liable to a penalty not exceeding five pounds, and the weighing or measurement of any such goods by any such person shall be deemed illegal."

The connection of the defendants with the matter is as follows: Before the various docks in London were brought under one governing body there was considerable competition between them, and the Thomson Line in 1904 moved from the Victoria Docks to the Surrey Commercial Docks on certain favourable terms which were set out in two letters of the 25th March and the 30th March 1904. The agreement was for five years as to rates, dock dues, and charges, but otherwise was terminable by either side on six months' notice. Under this agreement the Thomson Line brought into the Surrey Docks hopper-elevators, which discharged and weighed the grain. In Dec. 1907 the Cairn Line, the present defendants, were buying an interest in the Thomson Line and the elevators, and naturally desired to know where they stood with the Surrey Dock Company, who on request wrote in Dec. 1907 the following letter: "I have the authority of my board to inform you that if the proposed transfer of the Thomson Line is carried out my company will be prepared to enter into an agreement with them embodying the same terms and conditions as those of the existing agreement between yourselves and the company, including the arrangements for the use of the elevator plant."

Accordingly, after considerable discussion, an agreement dated the 30th Jan. 1908 was arrived at by which the berths and quay space were let to the Cairn Line for three years on certain terms. Clauses 18 and 19 were as follows: "The shipowners may provide and employ at the berth

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

allotted to them their grain elevating plant and machinery for discharging grain from their vessels together with their floating hoppers for weighing grain so discharged. They may also employ their elevating plant for discharging and weighing grain from such other vessels as the company may at their option determine by arrangement with the shipowners. The company shall afford accommodation in their dock for the floating hoppers free of charge. All grain that may be discharged by the shipowners for warehousing with the company shall be weighed and shot loose into the company's craft. On all grain so delivered the shipowner shall collect the working out charges from the consignees and shall pay the company at the rate of 4*d*. per ton."

Contemporaneously, the secretary of the dock company wrote a letter of the 21st Feb.: "My directors regret that they have no power to enter into an agreement for the appropriation of a berth for the accommodation of your steamers for a longer period than three years. I am, however, authorised by my board to state that if the circumstances permit they will at the expiration of three years favourably consider any application that may be made for the renewal of the agreement provided that the trade is conducted as it has been hitherto." This letter, clearly, gave no legal rights, and I am equally clear that no terms of the agreement of 1904 remained in existence after the agreement of 1908 was made. Meanwhile, the Port of London Authority became the owners of all the docks. The three years' tenure of the berth expired on the 30th Dec. 1910, and on the 14th Dec. the general manager of the authority wrote the defendants a letter as follows: "The authority will be prepared on hearing from you to consider the question of a fresh agreement with regard to an appropriated berth in the Surrey Commercial Dock. It must be understood the rent chargeable, for the space agreed must in future be computed at the rate of 3*s*. 6*d*. a square yard. I may state that on the expiry of the present agreement the special concession which you received from the Surrey Commercial Dock Company, under which you were permitted to discharge bulk grain from your vessels, will be discontinued, and the authority will be prepared to undertake the work."

The defendants, who were making a large profit out of their elevators (being the only owners in the Surrey Dock and, I think, in London in that position), naturally desired to retain it, and from that period to the present day a long diplomatic fight has gone on, and the defendants have succeeded up to the present in continuing the use of their elevators. Up till the 29th Feb. 1912 this course of action was taken under a series of extensions of time without prejudice to either party which gave the defendants no rights as by holding over. The letter of the 5th April 1911 was a fair sample of a series of letters to this effect. After Feb. 1912 the discussion continued on an application for a new agreement, which was complicated by the fact that the Cunard Company had bought some interest in the Cairn Line, and apparently wanted to be parties to the agreement, and that discussions were going on as to the buying of the elevators by the port authority. On the 16th Feb. 1912 the defendants asked for a new agreement, but stated that they did not ask for any renewal of clauses 18 and 19 of the agreement of the 30th Jan. 1908. These transactions again gave the defendants no rights as by holding over.

In the correspondence the plaintiffs claimed they had the sole right of discharging ships in the Surrey Commercial Docks; the defendants apparently claimed that they had the right to discharge, and to do it by an elevator-hopper which they might keep in the dock without payment other than the dues on steamer and goods. These contentions, each of which require most serious consideration before they are adopted, are not, however, raised before me in this case. The plaintiffs have apparently taken the view that by claiming the sole right of weighing and of providing the machines for weighing they can indirectly get rid of the elevators, and accordingly by writ issued on the 19th June 1912 the plaintiffs claimed a declaration that they had the sole right of weighing and of providing weighing machines, and that the elevators of the defendants were, as weighing machines, infringements of this right.

The defendants made a number of replies. They said they did not employ men to weigh in the elevators. They, in fact, had men who adjusted the weighing machine and recorded the weights the machine showed. This contention seems to me to be absurd. They said they had rights under the agreement of 1904 and subsequent history to use elevators. From my statement of the history of the case and my findings it will be seen that I disagree with this contention. They said that the plaintiffs have not appointed and licensed a sufficient number of meters in the Surrey Commercial Docks, but I find that a sufficient number of meters have been appointed.

I hold on the first part of the declaration that the plaintiffs, in fixing with the proper formalities a rate to be paid for the work of weighing, have the sole right of weighing the grain discharged by the defendants. This, however, though the defendants denied the plaintiffs' right in the pleadings, they had by letters of the 13th Oct. and the 21st June 1911 offered to comply with by employing the plaintiffs' properly appointed meters. It is quite a minor point of the dispute. But the plaintiffs' second claim is that, having the sole right to weigh, they have also the sole right to provide the weighing machines. I am unable to accept this contention. Sect. 82 of the Harbours and Docks and Piers Clauses Act 1847, which gives the plaintiffs the sole right to weigh by imposing a penalty on masters or goods owners employing unauthorised weighers, contains no words prohibiting the masters or goods owners from employing weighing machines other than those of the dock company. I can find no provision in the general or special Acts to that effect. There is no evidence that these elevators are improper weighing machines, and, in fact, they are all inspected and stamped by the county council inspectors. It is notorious that ships constantly weigh on deck with their own or consignee's scales, and I can find no prohibition of this practice.

I therefore grant the plaintiffs a declaration that on due publication of rates for weighing they had the sole right of weighing and measuring any goods shipped or unshipped in the Surrey Commercial Dock, but not the sole right of providing weighing machines for such weighing.

I decline to grant an injunction because I have no doubt that the defendants will comply with the declaration, and because the plaintiffs have not yet published the rates for this service. As to costs, the plaintiffs have only succeeded as to a minor point, while the defendants have raised a number of points on which they failed, and both sides seemed to avoid trying the real question in dispute between them. Under these circumstances I give no costs to either side.

Solicitors for the plaintiffs, *E. F. Turner* and *Sons.*

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

Feb. 4, 5, *and* 7, 1913.

(Before Scrutton, J.)

Ingram and Royle Limited *v.* Services Maritimes du Treport Limited. (a)

Bill of lading — Unseaworthiness — Fire — Exception—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60) *s.* 502.

The parties to a bill of lading excluded the operation of sect. 502 *of the Merchant Shipping Act* 1894, *which exempts the shipowner from liability for loss or damage to goods by fire. It was found as a fact that the vessel was unseaworthy, and that the unseaworthiness caused the loss either by perils of the seas or fire.*

Held, that the shipowner was liable, as the bill of lading was ambiguous and consequently did not exempt the shipowner from the obligation to provide a seaworthy ship.

Commercial Court.

Action tried by Scrutton, J.

The plaintiffs claimed 1368*l.* 12*s.* in respect of the loss of a cargo of mineral waters shipped on board the steamship *Hardy*, owned by the defendants, for carriage from Treport to London.

The facts and arguments are sufficiently stated in the judgment. The defendants relied on the following exceptions in the bill of lading as exempting them from liability:

(1) Fire on board, . . . and all accidents, loss or damage whatsoever from defects in hull, tackle, apparatus, . . . or from perils of the sea, . . . or from any act, neglect, or default whatsoever of the master, officers, engineers, crew, stevedores, servants, or agents of the owners; and (or) charterers ashore or afloat in the management, loading, stowing, discharging, or navigation of the ship or otherwise, the owners and (or) charterers being in no way liable for any consequences of the causes before mentioned. (2) All glass, . . . glass ware, or glass or earthenware goods of any description are carried at shipper's risk. (11) It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative, failing a class the exercise by the shipowners and (or) charterers or their agents of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage.

Leck, K.C. and *Raeburn* for the plaintiffs.

Dawson Miller, K.C. and *Mackinnon* for the defendants.

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

Scrutton, J. delivered the following written judgment:—

In this case Messrs. Ingram and Royle Limited sued the Services Maritimes du Treport Limited, the owners of the steamship *Hardy*, for the loss of certain mineral water on board the *Hardy* when she sank in the English Channel. They also alleged that the *Hardy* was unseaworthy on sailing, by reason of a large quantity of metallic sodium stowed on her main hatch, which if wetted was liable to explode, and which in fact sank the ship. The defendants replied that the steamer was lost by fire, from liability for which they were protected under sect. 502 of the Merchant Shipping Act 1894, or that if lost by fire, or perils of the seas, or negligence of their servants in stowage, or even unseaworthiness, they were not liable for such a loss under the terms of their bill of lading.

The facts are as follows: The owners of the sodium sent to Messrs. John Harrison Limited, who were managing the *Hardy* for her owners, an inquiry for a freight quotation to which Mr. Lindley, a director of John Harrison Limited, and of the defendant company, replied: "Replying to your favour of the 14th inst., we have pleasure in quoting under rates sodium. In iron drums, hermetically sealed, packed in strong wooden cases, on deck at owners' risk from Treport," with certain quotations for one ton and five-ton lots. Mr. Lindley did not know much about sodium, but turned up the English railway classification, to which he adhered after a further letter. About two tons of sodium were accordingly forwarded to Treport for shipment in twenty cases, roughly 36in. by 20in. by 16in. Each case contained 100 kilogrammes of sodium in a metal case, one-fiftieth of an inch thick, surrounded by a wooden case. They were labelled in French "Beware of damp." They were stowed on the *Hardy* on deck on a tarpaulin on the main hatch, in two rows of ten cases, each row fore and aft. The tarpaulin was turned over them, another tarpaulin put on the top, and the whole bundle lashed round and across with ropes fastened to ring bolts in the hatch.

The *Hardy* started on her voyage to England in the ordinary rough weather of the English Channel. In half an hour after leaving port a heavy sea came on board and knocked some of the cases of sodium off the hatch. The salt water got at the sodium and a series of explosions followed. The hatch was broken in and the hold set on fire. The poop and sides of the ship were broken and strained and began to leak, and the ship began to settle by the head. Some sodium falling down the fiddleys caused a fire in the engine-room. The crew were driven into the boats by the flames, and shortly afterwards a very heavy explosion in the hold broke the ship in two and she sank. The plaintiffs' goods, cases of Vichy water, were in the burning hold, and it is doubtful whether they had been destroyed by fire or not when the ship went down through the incursion of sea water.

Sodium when in contact with water combines with the oxygen of the water, making a ver fierce heat and liberating the hydrogen of the water. If the sodium is unable to move on the water and cool itself, fiercer heat is developed, and the hydrogen may be lighted, and if mixed with air may explode. Further, this sodium was saturated with petrol; the heat developed by

contact of sodium with water would vaporize the petrol, which supplied another explosive mixture. This amply accounts for the explosions and flames, and if there was any risk of the sodium coming into contact with water, the ship was obviously in a position of great danger.

I find that the sodium was shipped in cases insufficiently strong for the voyage, and was stowed with insufficient care and security having regard to its dangerous character if water came in contact with it. The ship's officers did not know the dangerous character of sodium; if they had they could have taken more precautions in stowage. Mr. Lindley knew there was some danger, though not its exact nature; he did not know about the petrol; and the sodium was not shipped, as he stipulated, in "iron drums," as they are ordinarily understood in commerce.

I further find that within the meaning of the authorities, especially *Hamilton* v. *Pandorf* (6 Asp. Mar. Law Cas. 44, 212; 57 L. T. Rep. 726; 12 A. C. 518), the plaintiffs' goods were lost either by perils of the sea, the entry of water causing the ship and goods to sink; or by fire; and that if they had not been destroyed by one, they would have been destoyed by the other. The cause of the fire, or the entry of sea water was the sodium coming into contact with sea water; and the cause of this again was a peril of the sea, a wave breaking over the ship acting on goods insufficiently packed and insecurely stowed.

I have considered whether this ship was unseaworthy on starting on her voyage. Bad stowage, which endangers the safety of the ship and cannot readily be cured on the voyage, is unseaworthiness: (see *Kopitoff* v. *Wilson*, 3 Asp. Mar. Law. Cas. 163; 34 L. T. Rep. 677; 1 Q. B. Div. 377; and *Steel* v. *State Line*, 3 Asp. Mar. Law Cas. 516; 37 L T. Rep. 333; 3 A. C. 72). It is otherwise if the defect can be readily remedied on the voyage: (*Hedley* v. *Pinkney Steamship Company*, 7 Asp. Mar. Law Cas. 135, 483; 66 L. T. Rep. 71; (1894) A. C. 222). In this case the vessel had on her hatch when she went out into rough weather two tons of cargo, very dangerous, if so knocked about that its casing admitted water to the sodium. There was room in the forehold for this cargo, but it would be a difficult and dangerous proceeding in the rough weather in which the ship started to get the twenty cases, each weighing 2cwt., out of their packing of ropes and tarpaulins and stow them in the forehold, without getting them broken and wet. And wet on a broken case did all the mischief. I find, therefore, that the *Hardy* was unseaworthy at starting on her voyage, and that the unseaworthiness caused the loss.

I now come to the defences pleaded. First, as to sect. 502 of the Merchant Shipping Act 1894. On the facts I have found I hold that the goods were "lost by reason of fire," and if so it is immaterial that unseaworthiness caused the fire: (see *Virginia Carolina Company* v. *Norfolk Shipping Company*, 12 Asp. Mar. Law Cas. 82, 233; 105 L. T. Rep. 810; (1912) 1 K. B. 229). The only exceptions to the protection given by the statute are (*a*) if the fire happened with the actual fault or privity of the owner, which, in the case of a limited company, means the person having the management—*i.e.*, Mr. Lindley; (*b*) if the shipowner by his contract of affreightment has excluded the operation of the Act: (see the *Virginia* case cited above).

As to "actual fault or privity," I have had some doubt as to my finding, especially in view of Bray, J.'s decision in *Asiatic Petroleum Company* v. *Lennard's Carrying Company Limited* (107 L. T. Rep. 651). On the other hand Mr. Lindley knew there was some danger, though not exactly what, and did not make inquiries, but relied on the railway classification as to packing, which does not with clearness apply to goods carried on decks of steamers. On the other hand, Mr. Lindley had nothing to do with the negligent stowage, or the insufficiency of packages. I think proper drums, properly secured, could have been carried safely on deck. In view of the fact that "fault or privity" implies blame or misconduct I have not been able to find Mr. Lindley guilty of this, and I find that the fire was without the fault or privity of the owner.

But it was next said that the parties by the bill of lading had by their contract excluded the operation of the statute, and reliance was placed on the *Virginia* case already cited, where Bray, J. and the Court of Appeal did hold that the operation of the statute excluded by the bill of lading. I gather that this decision was based on (1) the words "to be delivered subject to the clauses and conditions," &c.; (2) the exception "fire on board"; (3) the provisional liability for unseaworthiness interpreted to be "I will be liable for unseaworthiness causing fire, unless reasonable care has been used to prevent it."

I am bound by this decision, and it is immaterial whether I should have come to the same conclusion. In the case before me the same three points appear to exist except that the third should be expressed in the defendants' view, at least as strongly as: "I am liable for unseaworthiness of the ship causing fire unless I have kept up the class of the ship." Under these circumstances I consider I am bound by the decision of the Court of Appeal to hold that the operation of the statute has been excluded by the bill of lading.

The defendants next rely on exceptions in the bill of lading. Of these, in my view, "fire on board," "perils of the sea," and "any neglect of the officers in the stowing of the ship" only apply if the ship is seaworthy: (see *The Glenfruin*, 5 Asp. Mar. Law Cas. 413; 52 L. T. Rep. 769; 10 P. Div. 103, and numerous other cases). It was said that the last exception expressly covered this case, but ample meaning is given to it by restricting it to negligent stowage damaging the cargo, but not rendering the ship unseaworthy. Lastly, it was said that by clause 11 the shipowner had protected himself from liability for unseaworthiness. Clause 11 reads as follows: "It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative failing a class the exercise by the shipowners and (or) charterers or their agents of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage."

In its widest meaning this clause would allow the shipowner if he kept up the vessel's class to refuse to proceed to the port of destination and even to throw the cargo overboard. Counsel for the defendant shrank from this contention and

suggested it should be limited to duties arising out of implied warranties. But two of these are to proceed without deviation and without delay; and keeping up the ship's class has nothing to do with these matters. A further restriction may be that it is limited to such matters connected with the upkeep of the ship as are the subject of class, and that as to them, though in fact they are wrong and the ship is unseaworthy in respect of them, yet, if the ship has her class, the shipowner is excused; while in the matters connected with upkeep which are not the subjects of class, it is enough if the shipowner proves reasonable care in himself or his agents.

If this is the meaning I am not aware that the stowage on a particular voyage, though dangerous to the ship, affects her class, and if it is not the subject of class reasonable care was not used by the shipowner's agents in respect of thereto. If this is so, the clause does not protect the shipowner. But I prefer to rest my decision on the wider ground that a shipowner desiring to protect himself from liability for the unseaworthiness of his ship must do so in clear and unambiguous terms, intelligible to ordinary business men.

Loreburn, L.C. in *Nelson* v. *Nelson* (at p. 582 of 10 Asp. Mar. Law Cas.; 97 L. T. Rep. 812; (1908) A. C., p. 16) puts it in this way: "I think the clause, taken as a whole, so ill-thought out and expressed that it is not possible to feel sure what the parties intended to stipulate. The law imposes on the 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* (10 Asp. Mar. Law Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93, at p. 96), 'an ambiguous document is no protection.' That is the ground on which I rest my opinion"; and Lord Halsbury said: "The known condition of the law is that unless protected by protective clauses the defendant is liable; he has only put together, or jumbled together, a number of phrases to which no legal interpretation can be given, and the result is that the state of liability under the law remains what it was and the defendant is liable."

In my view this clause, though I do not think it applies to unseaworthiness through bad stowage, is at any rate ambiguous both to lawyers and business men, and I hold it does not protect the shipowner. For these reasons there must be judgment for the plaintiffs for the value of the goods, which I understand is agreed, with costs.

Solicitors for the plaintiffs, *Ballantyne, McNair, and Clifford*.

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

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 4, 5, and 6, 1912.

(Before VAUGHAN WILLIAMS, BUCKLEY, and KENNEDY, L.JJ.)

SMEED, DEAN, AND CO. LIMITED *v.* PORT OF LONDON AUTHORITY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Port of London—By-laws—Registration of craft —Sailing barge—"All lighters, barges, and other like craft"—Port of London Act 1908 (8 *Edw.* 7, *c.* 68), *s.* 11 (2) (*f*) (*i.*).

A sailing barge is a "barge" within the words "all lighters, barges, and other like craft" in the Port of London Act 1908, *s.* 11 (2) (*f*) (*i.*), *and therefore liable to registration under by-law No.* 4 *of the Port of London (Registration of River Craft) By-laws* 1910.

Decision of Hamilton, J. (12 *Asp. Mar. Law Cas.* 213; 106 *L. T. Rep.* 960; (1912) 2 *K. B.* 585) *affirmed.*

APPEAL from a decision of Hamilton, J. sitting without a jury in the Commercial Court.

The plaintiffs claimed to recover the sum of 1*l.* 0*s.* 9*d.* (paid under protest in respect of the registration by the defendants of the plaintiffs' sailing barge *George*) as money received by the defendants to the plaintiffs' use, and as money paid under duress, and they also claimed a declaration as to the true intent and meaning of by-law No. 4 of the Port of London (Registration of River Craft) By-laws 1910, and for a declaration that, if its meaning is such as to justify the charge in question, then the by-law is itself *ultra vires*.

The facts are taken from the judgment of Hamilton, J. (*sup.*).

The plaintiffs were brick and cement manufacturers carrying on business at Sittingbourne in Kent. The plaintiffs' vessel, *George*, is a vessel within the definition of a vessel in the Merchant Shipping Act 1894, being propelled otherwise than by oars—namely, by sails. She is accordingly registered at the port of Rochester under the Merchant Shipping Act, and under her registry she has a registered tonnage of 41·45 tons. She carries about 110 tons dead weight, and makes voyages regularly from the river Swale, which is not within the jurisdiction of the defendants, into London and back. She occasionally goes along the east coast as far as Harwich, and has been up the Thames as far as Walton-on-Thames. She is nearly square in section, has wing boards, and the typical rig of a Thames sailing barge, and a rudder outside the lines of the hull. She is regularly loaded down to a very small freeboard, and has her cargo in her central compartment battened down and tarpaulined down, and relies for her stability of flotation on the inclosed spaces in the bow and stern. She was described in the pleadings as a "sailing barge," and although she might be easily described as a ship, and might be described as a sailing vessel of some particular rig, "sailing barge" is her most appropriate description.

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

By-law No. 4 of the Port of London (Registration of River Craft) By-laws 1910 provides:

Every person shall on applying to the port authority for the registration or for the renewal of the registration of a steam tug, lighter, or barge other than a steam barge or canal barge or canal boat registered by the port authority as such respectively pay to the port authority the sum specified in this by-law—that is to say, for every lighter, barge, and other like craft for carrying goods, wares, or merchandises . . . a sum equal to sixpence for every ton of the tonnage thereof.

The point at issue in the action was whether a sailing barge was a barge within the meaning of the words "all lighters, barges, and other like craft for carrying goods" in sect. 11, sub sect. 2 (*f*) (i.), of the Port of London Act 1908, and was therefore liable to registration under the above by-law.

Hamilton, J. held that a sailing barge was a "barge" within the meaning of the above-mentioned words, and was accordingly prohibited from navigating, either wholly or partly, within the limits of that Act, unless she had been registered by the Port of London Authority, and he therefore gave judgment for the defendants.

The plaintiffs appealed.

Leck, K.C. and *Cranstoun* for the plaintiffs.—The word "barge" in the Thames Watermen's and Lightermen's Act 1893 does not include a sailing barge, which is a ship within the Merchant Shipping Act 1894, but deals with barges of the nature of a dumb barge. The collocation of the word "barge" with "lighter" and "other light craft" in sect. 11 (2) (*f*) (i.) of the Port of London Act 1908 suggests that "barge" does not include a sailing barge. The sub-section extended this legislation to two new species of vessel—*i.e.*, steam tugs and river steamboats—and if there had been an intention to extend it also to sailing barges, they would have been expressly included. The word "all" in the section must be construed in an enumerative sense, and not as meaning "all kinds of barges." Hamilton, J.'s construction of the section would give rise to many difficulties and inconveniences, and it is contended that one unfortunate result would be that, on coming within the limits of the port of London, the master of a sailing barge would by reason of sect. 66 of the Watermen's and Lightermen's Act 1859 be compelled to put his vessel in charge of a lighterman's apprentice, whose qualifications would not necessarily include any knowledge of sailing. They referred to

Reed v. *Ingham*, 3 E. & B 889;
Blanford v. *Morrison*, 15 Q B. 724;
Reg. v. *Tibble*, 4 E. & B. 888;
Doick v. *Phelps*, 9 W. R. 70.

G. Wallace, K.C. and *C. B. Marriott* for the defendants.—The decision of Hamilton, J. was right. The fact that the *George* must be registered under the Merchant Shipping Act 1894 does not exempt her from registration under sect. 11 of the Port of London Act 1908. Many sailing barges, according to evidence given at the trial, were registered under the Thames Watermen's and Lightermen's Act 1893. The difficulty suggested by the appellants would not arise, for sect. 66 of the Act of 1859 would not be applicable as it is excluded by the joint effect of sect. 311 of the Thames Conservancy Act 1894 and sect. 11, sub-sect. 2 (*a*) (*d*) (*f*) (i.), of the Port of London Act 1908.

[They were stopped by the Court.]

Leck, K.C. in reply.

Vaughan Williams, L.J.—The question in this case is whether a sailing barge is "a lighter, barge, or other like craft" within the meaning of sect. 11, sub-sect. 2 (*f*) (i.) of the Port of London Act 1908, and is accordingly prohibited from navigating, either wholly or partly, within the limits of that Act, unless she has been registered by the Port of London Authority.

I think that the question is of some difficulty. The main object of sect. 11, sub-sect. 2 (*f*), no doubt, in transferring to the port authority the powers of the Watermen's Company was to raise revenue for the maintenance of the port. The by-law in question purports to be made under the powers given by sect. 29 of the Thames Watermen's and Lightermen's Act 1893. The by-law was made for the purpose of carrying into effect the provisions of sect. 7 of the Act of 1893, which provides that no craft shall be worked or navigated within the geographical—the word "geographical" I put in to explain the next word—the geographical limits of that Act unless a certificate relating to such craft shall have been issued in pursuance of that Act, and shall for the time being be in force. By sect. 3 the expression "craft" is defined to mean "any lighter, barge, or other like craft for carrying goods within the limits of this Act," a definition which, so far as the class of craft is concerned, is repeated in sect. 11, sub-sect. 2 (*f*), of the Port of London Act 1908 with the addition of "steam tugs." I would here observe that there is no evidence to satisfy me that sailing barges were before the passing of the Port of London Act 1908 ever required to obtain a certificate under the powers of the Thames Watermen's and Lightermen's Act 1893, and one would have expected sailing barges to be expressly mentioned in sect. 11, sub-sect. 2 (*f*), of the Port of London Act 1908, just as steam tugs were expressly mentioned when it was proposed to put them under the operation of this section of the Act which requires a certificate to be obtained. Hamilton, J. in his judgment mentions the fact that the sailing barge *George*, the vessel in question in this action, is registered under the Merchant Shipping Act, and says that this is by no means conclusive to show that she does not also require registration under the Port of London Act; and he further says that the reference in sect. 11, sub-sect. 2 (*f*), of that Act to the river steamboats negatives such a conclusion, and adds these words: "*Primâ facie*, as this sailing barge is a barge, it is within the words 'all barges,' and I think the word 'all' cannot be limited to an enumerative use of that word, but is wide enough to cover all kinds and descriptions of barges. If the clause was intended to deal only with all barges in the enumerative sense, it would have been enough to say that the provisions should extend to 'lighters, barges, and other like craft,' omitting the word 'all'; and therefore, on the plain construction of these words, 'all barges' must include this sailing barge. She is not the less a barge because she is ordinarily propelled by sails."

It must be remembered that, in construing an Act of Parliament, one must bear in mind

what is the subject-matter of the section, and see what is its scope and object, as is pointed out by Bowen, L J. in *Lightbound* v. *Higher Bebington Local Board* (53 L. T. Rep. 812; 16 Q. B. Div. 577). I wish to say for myself that I do not think, and I do not think that Hamilton, J. thought, that, if you put a different construction upon the word "all" from that which he put upon it, you are necessarily treating the word "all" as a meaningless introduction of the word. I think it was said that it would then be an otiose word; I do not think Hamilton, J. really meant that. I think, if you take the word "all" in either of the two senses, either in the sense which Hamilton, J. does not adopt, or in the sense which I think he recognises as being a possible sense, one cannot avoid the conclusion that the learned judge did think that these words were capable of two constructions. Hamilton, J. recognises that there are many considerations which show that this construction—that is, the construction of "all" in its wide sense, as being wide enough to cover all kinds and descriptions of barges—is highly inconvenient, and some which show that it cannot have been intended. I dwell on this because it was argued before us, and of course it was a very forcible argument, as if really the only alternative to giving the wide construction to these words which Hamilton, J. adopts is to treat the word "all" as being utterly otiose. As I have said, I do not agree; I do not think Hamilton, J. meant to be so understood.

The defendants' counsel have brought before us, in their excellent and forcible argument, these considerations as to inconvenience which may arise from the construction of the subsection adopted by Hamilton, J. These considerations are indeed, as I have said, fully recognised by Hamilton, J. I need not repeat them in detail. I do not propose to do so. I reluctantly accept the conclusion of Hamilton, J. that the words of sect. 11, sub-sect. 2 (*f*), of the Act of 1908 are too explicit to warrant the restriction of their scope, or to warrant one in saying that, although the registration provision extends to "all barges," still it does not extend to a sailing barge, merely because the consequence might follow that, at a certain point on her voyage within the area ordinarily navigated by barges, she might have to be taken out of the charge of her master and placed in that of a licensed lighterman or an apprentice. I only mention that one instance of inconvenience because it is the one which Hamilton, J. particularises in the concluding words of his judgment. Hamilton, J., as I have already pointed out, recognised that there were a quantity of provisions relating to the obtaining of this certificate which are very difficult to reconcile with the intention of the Legislature being to insist on the certificate being obtained in the case of a sailing barge. It may be that in the pressure of work the House of Commons had not these matters brought before it, but I am afraid we must deal with the Act as we find it. The remedy, if one is needed, must rest with Parliament. The result is that this appeal must be dismissed.

Buckley, L.J.—The question here is whether the Port of London Authority is entitled to demand payment from the owners of the *George*, the *George* being a sailing barge, of a sum required to be paid under by-law No. 4 of the by-laws for the regulation and the registration of river craft within the port of London. That by-law was made under powers contained originally in sect. 80 of the Act of 1859, altered and extended by sect. 29 of the Act of 1893, and transferred from the Watermen's Company to the Port of London Authority by sect. 11 of the Act of 1908. For the determination of the question, the whole point is whether the barge, being a sailing barge, is a barge within the words "all barges" in sect. 11, sub-sect. 2 (*f*), of the Act of 1908. Hamilton, J. has held that she is. In my opinion that decision is right.

Before coming to the sub-section itself, the question being whether "barge" includes "sailing barge," I am going to endeavour to trace through the Acts of Parliament dealing with the subject many indications which, to my mind, show that there is no discrimination to be made between one floating craft and another by reason of the fact that one is a sailing craft and the other is propelled by oars or some other means than sails. Beginning with the earliest of these Acts, an Act which is now repealed—7 & 8 Geo. 4, c. lxxv.—I find that the Act of Parliament recites—this is only historical—a number of Acts of Parliament down to and ending with an Act of 10 Geo. 2 in which the "watermen, wherrymen, and lightermen" are always spoken of as rowing. No doubt at that date rowing was the means of propulsion used. After that Act of 10 Geo. 2 I do not find in regard to these things which are recited in the preamble of 7 & 8 Geo. 4 that the reference to the mode of propulsion continues to be the same. It will be found in the subsequent Acts that the words which are used are the words which were used in this Act—"rowing," with the addition sometimes of the word "working," and sometimes also of the word "navigating." For instance, 7 & 8 Geo. 4, c. lxxv., in sect. xxviii., says that "no person shall be admited a freeman of the company until he shall have rowed and worked, &c." We have a new verb there, and in sect. xxxvi. in the same way the expression used is "rowed and worked." At first the expression used is "rowed and worked," but sect. xxxviii. adds a third word; it speaks of the conviction of a person for an offence, and it says that, if he shall be convicted, he shall be disfranchised, and "he shall not be allowed to work, row, or navigate," and then, subsequently, you get the words "every person who shall work or navigate." In this Act of Parliament, 7 & 8 Geo. 4, c. lxxv., you find in sect. liv. "sailing vessels" mentioned by that name. I need not read it through; it is in a bracket: "(sailing vessels detained by want of wind only excepted)." So that in that Act of Parliament, it is quite plain, we have got beyond rowing; we have got to "working and navigating," and we have a first indication of "sailing." In the next Act of 1859, the Watermen's and Lightermen's Amendment Act 1859 (22 & 23 Vict. c. cxxxiii.), sailing craft are included for certain purposes. You have the preamble which recites that it is expedient that regulations should be made for the navigation of "barges, lighters, boats, and other like craft carrying goods," and so on. Then you have in sect. 2 a definition of a passenger boat, and that is included in "sailing boat, river steamboat, rowboat, wherry, or other like craft, used for carrying passengers." Then

sect. 3, I think, is instructive: "'Lighterman' means any person working or navigating for hire a lighter, barge, boat, or other like craft." So there the list does not in so many words include sailing, but I am going to show that to my mind it really does so. Then there is a definition of a "waterman." A "waterman" means "any person navigating, rowing, or working for hire a passenger boat." There we have the words "working" and "navigating" over again, and we have the word "rowing," a waterman being a person who navigates, rows, or works for hire a passenger boat. We have seen that a "passenger boat" includes any boat. A sailing boat is not a rowing boat, and therefore such a boat must be, I think, "worked or navigated," otherwise the words do not hit it, and consequently the words "working and navigating" must there include "sailing." If you include sailing, going back to the definition of "lighterman," you find that a "lighterman" is a person who works or navigates a barge, and, if the words "work or navigate" include "sailing," the lighterman may sail a barge. So far, it is quite plain that the word "sailing" is in the Act with regard to passenger boats, and I think it is equally plain in the Act that it applies to a barge. Then, coming to 1893, the next Act is the Registration Act (the Thames Watermen's and Lightermen's Act 1893, 56 & 57 Vict. c. lxxxi.). It is an Act which entitled the authority to require registration of certain floating bodies to which this legislation applies. I do not know that I need comment in particular on any section of this Act. Sect. 7, of course, is important, but not for my present purpose. Then we come to the Act of 1894 (the Thames Conservancy Act 1894, 57 & 58 Vict. c. clxxxvii.), which was a Thames Conservancy Act. Sect. 15 provides that "for the purposes of registration" the provisions of the Acts of 1859 and 1893 shall apply to steam tugs and the owners thereof. So there we have a section which provides that the provisions of the Thames Lightermen's and Watermen's Act 1893 as regards registration shall apply to steam tugs. So we get beyond propulsion by sails and have to deal with steam tugs. Sect. 16, as I have said, is one of the clauses dealing with the election of persons authorised to vote as representatives for the election of Thames conservators. It provides that "the qualification of electors of conservators, elected by owners of sailing barges, lighters, and steam tugs, shall be as follows." So here we have the "sailing barge" mentioned in so many words, and meaning such a floating body as is within the scope of the legislation with which the Lightermen's and Watermen's Acts have to do. I have gone through these enactments for the purpose of showing that I cannot myself find any *primâ facie* reason for saying that a "sailing barge" is not a "barge"; on the contrary, I consider that there is a great deal indicating that it is a barge, that sailing is "working" and "navigating" within these Acts of Parliament, and that floating bodies "worked or navigated" are the bodies which are dealt with by this scheme of legislation.

I pass on now to the Act of 1908 for the purpose of considering its provisions. The Act of 1908 by sect. 11 transferred to the Port of London Authority all powers and duties of the Watermen's Company, so that it handed over to them, of course, this power of making by-laws, and such authority as there was to require registration under the scheme of registration with which I have been dealing. Sub-sect. 2 of that section provides that "all enactments relating to the Watermen's Company and the court of the Watermen's Company shall, so far as not repealed by this Act, and so far as they relate to the powers and duties transferred, have effect as if references to the port authority were substituted for references to the company," subject to certain provisos. The material proviso for my present purpose is this: (*f*) "The provisions of the Thames Watermen's and Lightermen's Act 1893"—which is the registration Act—"as amended by this Act, so far as they relate to craft, shall extend to all lighters, barges, and other like craft for carrying goods." The exact question for decision is, What is the meaning there of "all barges"?

You may give to these words either one of two meanings. You may say that the word "barge" there is a word of limited meaning; that it is applied and limited to a certain class of craft, and that "all barges" simply means every barge or vessel of that class which you have identified; or, on the other hand, you may say that the words "all barges" may mean all sorts of barges. The question is which of those two meanings is intended. If you take the former meaning, and assume that "barge" has a limited meaning, to the exclusion of "sailing barge," then, if you understand all barges to mean every barge, the word "all" becomes meaningless and otiose. With all respect to what the learned president has said, it seems to me that that is demonstrable. If you leave that word out—if you assume that "barge" has a limited meaning—the Act would have the same effect if it simply ran: "The provisions of the Thames Watermen's and Lightermen's Act 1893 as amended by this Act, so far as they relate to craft, shall extend to barges," and there is no need to say anything more. If they extend to "barges" of a certain class they extend to every such barge. But I have to take notice that the word "all" is there, and I have to give it a meaning if I can. I can give it a meaning if I say that the words "all barges" mean all sorts of barges. The word "all" thus receives a meaning, and I ought, I think, to give it a meaning. It seems to me that that is the true meaning of the section. I arrive, therefore, at the conclusion that these words include sailing barges for two reasons so far: the first is, that it seems to me that sailing vessels are within the scope of the legislation; I cannot find anything to exclude them; and, secondly, I think that they are not excluded from the scope of the legislation, because, as I have shown, these words mean all sorts of barges; and, even if sailing barges without these words would not have been included, I think these words are sufficient to include them.

There is a third consideration, which is this: the Port of London Authority was being established with very large jurisdiction and very large powers, and it is evident from reading this Act of Parliament that it was recognised that the authority would want revenue. The sub-section which immediately precedes sub-sect. (*f*) is a revenue sub-section: "So much of any such enactment as limits the fees which

may be imposed in respect of the registration or licensing of craft and boats shall be repealed, but the fees so imposed shall not exceed such as may be allowed by a provisional order made by the Board of Trade"; so that the limited fees which theretofore had been taken in respect of these craft were no longer to be kept at their low level; the limit upon them was removed, and a new limit imposed which the Board of Trade was empowered to regulate, but, subject to that, the fees could be imposed, and the fee was 5s., if I remember rightly. It is immediately on that section that this sub-sect. (*f*) follows, and it is perfectly intelligible that, whereas by sub-sect. (*e*) the Legislature were giving to the authority power to charge more per boat, by sub sect. (*f*) they were empowered to extend the number of boats upon which the fee might be charged. I think that the purpose was that the Act of 1893, which allowed registration of boats, was to be altered so as to allow the port authority to increase the sum per boat, and that also the area over which the fees might be collected was to be extended so that it might include "all lighters, barges, and other like craft." I think that meant all sorts of lighters, barges, and other like craft.

I do not find myself able to escape from the pressure of the fact that this decision raises many questions of difficulty. I am not going through them. The learned judge went through them and dealt with them, and they are, I think, serious; but however great they may be, it seems to me that, as a matter of construction, I am bound in construing any Act of Parliament, if I find plain words, to give those words their plain effect, regardless of consequences. The consequences may be lamentable, but still, if an Act of Parliament so provides, the Act must be obeyed. It seems to me that I have here plain words, and therefore, if the proper interpretation of those plain words results in difficulty, all I can say is that I am sorry for it, but I cannot alter the true construction of those words. But I want to add something as to one point by which Hamilton, J. was much struck, and in which he finds what would, no doubt, be a formidable difficulty if it existed, but in my opinion it does not exist. It arises in this way: It is suggested that if a sailing barge is included in the term "barge" for the purposes of sect. 11 of the Act of 1908, the result is that sect. 66 of the Watermen's and Lightermen's Act 1859 will apply to a sailing barge. The effect of that section is that any craft to which the section applies cannot be worked within the limits of the Act of 1893 unless the master employs for the navigation of the vessel a person who may be a mere apprentice who would be qualified if for two years he had rowed a wherry on the Thames. The consequence would, no doubt, be exceedingly formidable if the master of a sailing vessel like the barge in question, through any such clause as that with which I have dealt, were put in the position, immediately he came within the limits of the Act, of being compelled to give place to a boy who might be nineteen years of age, and might have done nothing to qualify himself but row a wherry on the river Thames with a pair of sculls for two years, and be without any knowledge of sailing at all. No doubt that would be a formidable difficulty. The learned judge solved that difficulty, but, I confess, solved it in a way which I do not follow. He said this: "The answer to that objection is that sect. 66 has no application to a sailing barge, for it applies only to barges navigated 'within the limits of this Act,' that is wholly within its limits, and barges navigated wholly within the limits of the Act are not such as are propelled by sails." I do not know whence he gets the proposition that barges navigated wholly within the limits of the Act are not such as are propelled by sails. I know of nothing in this legislation which would prevent a barge which never went outside the limits of the port being navigated by sails, and I am sorry I do not agree; but there is another answer which I think is a satisfactory one, and that is this: Sect. 311 of the Thames Conservancy Act 1894 dealt with sect. 66 of the Thames Watermen's and Lightermen's Act 1859, which is the one which requires the employment of the services of this very moderately experienced master. That section says: "Nothing in sect. 66 shall apply to any lighters passing entirely through the limits of the Act"; so that, if a lighter came from outside the limits, navigated through the limits, and concluded its journey outside the limits, it is not bound to take the apprentice on board to assist the lighter in passing through the limits. That Act of 1894 was subsequently amended by sect. 11, sub-sect. 2 (*d*), of the Act of 1908, and it was amended by adding words to the effect that this lightermen's apprentice clause shall not apply "to any lighters on a voyage commencing or ending at any place eastward or westward of the limits of that Act." So that now the section as amended is a section which has this effect: that sect. 66, compelling the employment of an apprentice or a lighterman, does not apply either to a lighter which begins its journey outside the limits and ends outside the limits—that was the section as it originally stood—or commences its journey outside the limits and finishes inside the limits, or which commences its journey inside the limits and finishes it outside the limits. By the definition clause of the Act of 1894 "lighter" includes "any barge or other like craft for carrying goods"; and the result of that section is that a lighter thus defined, which would therefore include a barge, and include a sailing barge, is not bound by sect. 66 of the Act, which compels the employment of the apprentice. That difficulty therefore is gone. I do not say that there are not still formidable difficulties; I think there are; but notwithstanding those difficulties I arrive at the conclusion, for the reasons I have given, that the words "all barges" in sect. 11, sub-sect. 2 (*f*), of the Act of 1908 include sailing barges. The result of that is that this barge is one that requires registration, and to which by-law No. 4 applies. I therefore think that the appeal fails.

KENNEDY, L.J.—I am of the same opinion. Buckley, L.J. and Hamilton, J., as he then was, have so fully dealt with this case from the point of view with which I concur, that I may state my opinion very shortly.

The sound principle, in dealing with a statutory enactment, as has, indeed, lately been emphasised in the House of Lords, is to construe plain words in their natural sense. It is for us so to construe them; it is the province of the Legislature to remove any inconveniences,

or, as some people might judge, unjust results, which may be traced to the construction of the plain words of the enactment construed as according to their natural meaning they ought to be construed. Here the words are "all lighters, barges, and other like craft for carrying goods navigating either wholly or partly within the limits of the Act." The plaintiffs' counsel, in the very able arguments addressed to us by them, say: "Do not construe the words as meaning all lighters, barges, and other like craft for carrying goods, but except from them barges, the motive power of which consists in the use of sails." I must decline to do so altogether. It is clear that a sailing barge is a barge in the ordinary sense, and, when the words in the text are "all barges," I have no right, as it appears to me, to exclude from the plain language used something which I may be led by other enactments to think it might have been convenient or desirable to exclude from the general enactment by the Legislature.

I agree that there are some inconveniences apparently arising from the view of the enactment which we are taking. I think myself that the inconvenience which seems to have impressed Hamilton, J. more than any other—namely, that which arises from sect. 66 of the earlier Act of 1859—has been met by the view of the relation of this Act of 1908 to the earlier statutes which was put before us by Mr. Wallace, but there still are some difficulties which remain. I cannot, however, consider those difficulties as entitling us to disregard the plain enactment; and I would merely say with regard to the past that I can trace in the argument that has been addressed to us, which has carefully gone through the earlier legislation, nothing which would justify me in saying, either with regard to the Watermen's and Lightermen's Acts or to the Thames Conservancy Act, that those who prepared those enactments drew a distinction between a "sailing barge" and a "barge" for purposes akin to those which are the purposes of the Act of 1908. It appears to me that, if I wanted an inference from past legislation to help me, which I do not, in construing this Act, it is distinctly a point in favour of the decision in the court below that I cannot find that at any point "barge" has been so used as to exclude sailing barges. The term "barge" in ordinary parlance, whether in regard to the carriage of goods or the other purposes for which one knows barges were used in times past, does not connote the absence of sail; it never has done, as far as I know; certainly it does not as far as I have discovered from anything in the statutes to which our attention has been called. The thing that strikes me most is that, whereas in the Act of 1859 which has been referred to, the word "boat" is connected with "barge, lighter, or other craft," the word "boat," if I follow the history of the legislation correctly, disappears in that connection from that date, and we get such words as "lighters, barges, and other like craft." I suppose one is at liberty to conjecture that, because of the gradual increase of the size of these helps to the trade of the port of London, and of the loading and unloading of ships, and the amount of the cargo which had to be carried, it has been found desirable to add to the use of oars, which were alone used in the earliest stages, sails, and now steam in many cases, to the methods of propulsion. If the earlier legislation does not make any distinction between sailing and other barges, I should say that that is some sort of confirmation of the view that the "barge" is to be treated in the section in question as indicating the genus, and not merely a species of barges which is distinguished by the fact that it is propelled in a particular way. In the Thames Conservancy Act 1894 there is a reference to the owners of sailing barges, and, when that phrase is used, it tends rather to show that as early as 1894 the use of sailing barges was contemplated; and therefore, if the Legislature were minded to create a distinction between sailing and other barges in regard to legislation in years following, I think they would have made such a distinction as the earliest of these clauses suggests.

Lastly, it seems to me that, looking, if one may be permitted to look, at the reasonableness of this kind of legislation, there is the fact that the sailing barge, at least as much as the lighter or barge propelled by oars, is making profit for its owner out of the use of the appliances and docks, and the trade of the port of London; and, inasmuch as this is apparently a financial measure, the sailing barge may be not unreasonably included amongst those who have to pay this sum, whatever it is, for the certificate upon registration. When it is said that some of these barges are of a character which will require them also to be registered as ships for the purposes of the Merchant Shipping Act, I can see no reason in that fact myself why, if they are using the port of London, especially with the frequency that these barges do, they should not come under the same category as "lighters and other like craft carrying goods," as mentioned in this Port of London Act 1908, s. 11, sub-s. 2 (*f*) (i.). The ground of my decision is that which has been already stated in this court by my colleagues, and is the ground upon which the decision in the court below was based—namely, that, even if all the inconveniences existed which were suggested, that would be no reason for disregarding the plain words of the Act and not construing them in a natural manner; and, further, if it were necessary to go beyond that, I think, as I have said, that that which appeared to Hamilton, J. to be the greatest of the difficulties, though not the only one, has been in fact removed. I may also say that, apart from the word "all" in the statute, it does appear to me that this appeal labours under the difficulty that a "barge" in itself is in practice a thing which may be propelled by sails, and, if the word "all" had not been there, I myself should have been very slow to say that the word "barge" did not cover a barge whether propelled by oars or by sails. I think this appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Jackson, Bowles, and Jackson.*

Solicitor for the defendants, *E. Glenshaw.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 3 *and* 4, 1913.

(Before SCRUTTON, J.)

LONDON AND NORTHERN STEAMSHIP COMPANY LIMITED *v.* CENTRAL ARGENTINE RAILWAY LIMITED. (*a*).

Charter-party — Strike — Demurrage—Construction of clause relating to time allowed for discharging.

A charter-party contained the following clause: "Time to commence when steamer is ready to unload and written notice given, whether in berth or not. In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count unless the steamer is already on demurrage."

Held, that the clause did not mean that time was not to count at all if a strike delayed the discharging, but that time should not count to the extent of any delay caused by a strike.

THE plaintiffs were the owners of the steamship *Holgate*, and the defendants were the charterers under a charter-party dated the 9th Nov. 1911.

The plaintiffs' claim was for damages and demurrage in the discharge of their vessel at the defendants' port at Villa Constitucion. The plaintiffs claimed forty-two and a half days' demurrage, amounting to 1173*l.* 14*s.* 2*d*, and the defendants paid into court twenty-eight and a half hours' demurrage, being 32*l.* 15*s.* 10*d.* The charter-party provided (*inter alia*) as follows:

The cargo to be taken from alongside by consignees at port of discharge free of risk and expense to steamer at the average rate of 200 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver at this rate; if longer detained, consignees to pay steamer demurrage at the rate of 4*d.* per net register ton per running day (or *pro rata* for part thereof), time to commence when steamer is ready to unload and written notice given, whether in berth or not. 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.

By their defence the defendants said that a strike of the defendants' workmen (drivers, firemen, and others) began on the 6th Jan. and continued up to and including the 15th Feb. During all the said time the discharge of the *Holgate* was prevented and delayed by the strike, and by the terms of the charter-party the time did not count as part of the time for discharging. They further said that the mode of discharging was into railway trucks right alongside the steamer on the wharf, and the strike made it impossible to get trucks alongside the *Holgate*, no other mode of discharge being practicable.

Roche, K.C. and *Raeburn* appeared for the plaintiffs.

Atkin, K.C. and *Leck*, K.C. appeared for the defendants.

The facts and arguments are sufficiently stated in the judgment.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

SCRUTTON, J.—In this case the London and Northern Steamship Company, who are the owners of the steamship *Holgate*, sue the Central Argentine Railway Company Limited for demurrage in the discharge of their vessel at the defendants' port at Villa Constitucion. The plaintiffs claim forty-two and a half days' demurrage, amounting to 1173*l.* 14*s.* 2*d.* The defendants pay into court twenty-eight and a half hours' demurrage, being 32*l.* 15*s.* 10*d.* There is obviously, therefore, plenty of room for a compromise between the two parties.

The charter is the Welsh coal form of charter to carry cargo to Villa Constitucion to be taken alongside at port of discharge at the average rate of 200 tons a day, which, under an option, was increased to 250 tons a day, weather permitting, Sundays and holidays excepted. "If longer detained, consignees to pay steamer demurrage at the rate of 4*d.* per net register ton per running day (or *pro rata* for part thereof). Time to commence when steamer is ready to unload and written notice given, whether in berth or not." In case of strikes which prevent or delay the discharging "such time is not to count."

The defendants, the railway company, from a very early stage in the events that happened, took the view that this clause had a particular meaning, which Mr. Atkin argues it plainly had. They said "such time is not to count" means the time that has commenced in the previous sentence; and they say it is not to count if a strike delays the discharging, so that if on any day the discharging is delayed, that day is not to count at all, and if there were a strike the whole time the vessel was there, although the defendants were able to do in spite of the strike 75 per cent of their ordinary work every day, the time would never count, and they would not be under any obligation to discharge the work at all. Mr. Atkin, counsel for the defendants, tells me that that contention is plain, and he also tells me it is not absurd. I am afraid I do not agree with either proposition that is put forward. He points to the language of the loading clause, "any time lost," and says that the parties who framed this charter would be very careful when they wanted to say "time lost" to say so, and when they wanted to say time was not to count at all and no more could be done, to say so. I am not certain that the proper way to construe a charter is to treat it as if you were a scholastic logician, and endeavour to make each clause of the charter perfectly grammatical and of the best style. Business people do not write in that way, and I do not think that such time as is spoken about in the clause in question is the time that is mentioned in the preceding clause. I think it is the time which is mentioned inferentially in the early part of the sentence, in case of strikes which prevent the discharging. While strikes prevent the discharging, time is consumed. In case of strikes which delay the discharging, when anything delays the discharging, time is consumed, and, in my view, what these business men meant when they said "such time" was the time they had spoken of inferentially in the words immediately preceding, the time which was lost by the complete prevention, or partial prevention, or the delay of the discharging: they were to be allowed either for the time when they could not discharge at all because

of the strike, or they were to be allowed for the delay in discharging by the strike, which would have occasioned them a longer time in discharging. If there is any absurdity in either contention, or either possible construction, I think the absurdity is in the construction put forward by the defendants. However, the defendants did not take that view.

The facts were that the *Holgate* gave notice that her lay days began to count on the 2nd Jan., and, as I follow, on the 6th or 7th the strike broke out. The plaintiffs have made out their claim on the assumption that there was no strike at all; they have ignored it and not allowed anything for it. The master himself on the 24th Jan. wrote: "I regret to have to inform you that there is no change in the strike, all work in port being still paralysed by same." The plaintiffs have paid no attention to that, or any other of the master's remarks, and have treated the matter as if there were no strike at all, which is not, in my view, a particularly businesslike proceeding in this court. The strike, I have no doubt, was a serious one. It was a strike of the people employed on the railway, the engine-drivers and other people connected with the working of the railway, and the crane drivers of the port. The port was one where ships inwards were discharged alongside two moles on which ran railway lines, and the regular method of discharging was to put cargo or coal from the ship into trucks on the railway line, and to send it off inland by the railway whose port it was. The ordinary method of discharging did not include any stacking of goods on the moles, because there was no room for them, and the room for stacking adjoining was extremely limited. There were apparently two small plots, one of them of very doubtful possibility for stacking goods in view of the fact that it is alongside a muddy river, and one knows by constant experience that the ground is not very solid, where the water becomes mud, and the mud becomes land. Up to the 16th Jan. there was no berth available for the *Holgate*, which would not have affected her lay days, but also no ship was working at the port at all, and I find that the strike stopped all work at the port up to the 16th or 17th. It has been a little difficult to extract from the defendants exactly what did happen to the ships in berth, because for a businesslike railway company they do not appear to have much idea of what they are doing. But I think a vessel with a general cargo had stacked her cargo on the only available bit of land, and had come out somewhere about the 19th, leaving an available berth, and the *Holgate* might have gone into that berth. I further find that if she had gone into that berth she would not have been able to begin discharging, owing to the strike, until somewhere about the 27th Jan. Why she did not go in arises in this way: In my view, the strike began to diminish in severity towards the end of January, and there was a possibility of working. The defendants thought the charter meant one thing, but apparently it did not then occur to them that it was very unlikely that the ships would take their view. They appear to me to have tried about the time they thought it would first be possible to work to make a bargain with the ships that the ships should go alongside and begin discharging, not counting their time for lay days until the strike was over. Such an agreement as that was a recognition of the construction put by the defendants on the charter-party. It would be contrary to the true meaning of the charter-party, because on the true meaning the defendants, in my view, were bound to work unless they were prevented by a strike, and they had the protection of the strike to the extent to which it delayed their work, and no further.

The captain of the *Holgate* very properly refused to accept the terms on which a compromise was offered to him, a compromise which was almost entirely in the defendants' favour, and thereupon notice was given to him on the 25th Jan. by the shipping agents of the defendants as follows: "We cannot accept any responsibility for such delay as might occur in view of existing strike. We will not entertain any claim for demurrage that may accrue, nor count the time used in discharging as lay days." That appears to me quite plainly to put forward the defendants' construction of the charter, which, as I have said, is wrong. Though they used time in discharging, and they were not delayed by the strike, therefore, in the discharging, because they can to that extent discharge, they say they did not count the time. It was a refusal to perform the charter which might have been accepted as a final breach, in my view, but for the fact, the inconvenient business fact, that there was a cargo of coal on board with which the ship would not know what to do. Mr. Russell said before me he thought that was merely a way of saying that they claimed to the extent of the delay by the strike. I do not think he is right. I think the people at Villa Constitucion meant to put forward the claim as put forward by their construction of the charter. That is quite clear, I think, from the next letter of the 29th Jan. in which a representative of the defendants writes to the captain of the *Holgate:* "Kindly note that your time will not commence to count until such time as the existing strike ends." It is quite clear what that means, and Mr. Russell, one of the defendants' witnesses, agrees that that letter is unfortunately and wrongly expressed, because if they could discharge during the strike, they were bound to do so, claiming the benefit of the clause to the extent to which they were delayed by the strike. At that time, in my view, the defendants had given two perfectly clear and unambiguous statements that they would only discharge in certain time, which were not the terms of the charter.

On the 30th Jan. they put forward what is said to be a proper letter, but which, in my view, is a perfectly ambiguous letter, and does not in any way withdraw their two previous letters. In my view of these business matters, when either party makes an entirely wrong claim, the other side is justified in acting on his wrong claim, and going on the assumption that it is still put forward until it is unambiguously withdrawn. The letter of the 30th Jan. runs: "The company will discharge as much coal as it is possible to do under existing conditions, but on the understanding that the paragraph relating to strikes, lock-outs, &c., in clause 8 of the charter-party is applicable until the strike has terminated."

The defendants were saying all the time that the paragraph relating to strikes meant that they need not count time until the strike had terminated, and this letter seems to be merely an ambiguous way of putting forward a contention

which, judging by their previous letters, was the one they really held the whole time, and I do not think this letter at all entitled them to say to the master: "You ought to have gone in on this letter because what it really means (although it is not very clear) is that we are only claiming on the true construction of the charter."

What did happen was that a good deal of muddle took place. Agreements were made at Buenos Ayres and Rosario on the one hand, and they were not communicated to the railway people at Villa Constitucion. The railway people say that the captain refused to go into the berth until he had got a letter withdrawing this. The captain says he would not go into the berth because he was never told to. All he had been told was, "We will give you a berth on these terms," and he was never told to go into a berth under the charter. I think the captain's view was right, and I do not accept the view of the facts as stated by the railway company. The ship in fact did go in on the 9th Feb., began discharging, and finished on the 2nd March. I have received from the railway company an elaborate table showing me the amount of coal actually put out on every day from the 27th Jan., when the discharging began, until the 2nd March, and I have very carefully considered what the position as to lay days is, in view of these figures. I think the discharge was affected as to the quantity put out by two matters, mainly by the strike, and, secondly, to a small extent, by scarcity of waggons. I do not think the defendants had enough waggons to do the work, and I am confirmed in that by several letters of the defendants in which they say that in the then demand for waggons in all departments of trade they had not enough. Apart from these two causes, I do not think the defendants were doing their best and their utmost in discharging at the port, and consequently I think that, in so far as these figures run short of what they should do to the four ships, the shortage is accounted for to a great extent by the strike, and to a very small extent by the shortage ot waggons.

In my view, the defendants should have divided their work equally between the four ships, and they stopped the *Holgate* from discharging by the unfounded claim based on the construction of the charter-party that they were putting forward. I have looked into these figures on the basis that the *Holgate* was entitled to do, roughly, one-quarter of the whole put out each day—that is, four berths and the *Holgate* in one. I see that another vessel got out a great majority of coal at the start, and I have taken into account that if that other vessel had only had her quarter of the coal, she would have lasted longer and affected the number of days. But I have come to the conclusion that, first of all, three days had expired at the time of the strike; secondly, that up to the 16th Feb. the *Holgate* ought to have had coal amounting in all to six days. I then look at the period after the strike, taking into account that in my view the strike is getting less in its effect every day after the 16th, and more importance is to be attached to the scarcity of waggons, and, forming the best conclusion on the figures that I can (and I have worked very carefully through the figures furnished by the plaintiffs and defendants), I come to the conclusion that the plaintiffs are entitled to six days' demurrage, which comes to some 165*l.* 14*s.*

Solicitors: for the plaintiffs, *Thomas Cooper and Co.*; for the defendants, *Norton, Rose, Barrington, and Co.*

Thursday, Feb. 13, 1913.

(Before ROWLATT, J.)

JOHNSTON BROTHERS v. SAXON QUEEN STEAMSHIP COMPANY. (a)

Ship—Charter-party—Safe port.

A charter-party provided that a ship should "trade between any safe ports between Hamburg and Brest and the United Kingdom." The ship was ordered by the charterers to go to Craster, a port in the United Kingdom which was perfectly safe to make provided the sea were smooth, but which might become dangerous if a change of wind altered the conditions. At the time the vessel was ordered to Craster the sea was smooth.

Held, that the port was not a safe port within the meaning of the charter-party.

NORTHUMBERLAND ASSIZES.

Action tried by Rowlatt, J.

The plaintiffs claimed damages for breach of a charter-party contract.

The facts and arguments are sufficiently stated in the judgment.

Short, K.C. and *Meynell* for the plaintiffs.

Scott Fox, K.C. and *Cuthbertson* for the defendants.

ROWLATT, J.—This is an action claiming damages which have been agreed, if it should become necessary to give them, at 115*l.* for breach of a charter-party. The plaintiffs are the charterers, and the ship, which was chartered to them by the defendants, was the *Saxon Queen*, which was a vessel of about 300 tons dead-weight capacity. And she was to be employed, according to the charter-party, in such lawful trades between such safe ports between Hamburg and Brest and the United Kingdom as the charterers should direct. The charterers ordered her to Craster to load stone, and the owners refused to go to Craster because they said it was not a safe port within the meaning of the charter-party. For that alleged breach of contract the action is brought. It is not necessary for me to go through the correspondence to throw any light on the question of damage, because that has been agreed at 115*l.* Suffice it to say that the ship, when ordered to Craster, after objecting to go there, did consent in fact to go outside the harbour, but when she got there declined to enter. Craster is a small place on the coast of Northumberland where a sort of glen comes down to the sea, and where for a long time apparently there had been a little fishing cove. But recently two piers have been built there, and a stone quarry has been developed in the neighbourhood, and it has become a place of a little more importance. The nature of the place can be seen at a glance from the ordnance map which has been put in before me. The little harbour practically dries up; at low water spring tides there is hardly any water inside the pier heads. It was

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

not contested that a ship like the *Saxon Queen* could not lie afloat anywhere which could possibly be called within the port of Craster; but she could come to the end of the south pier and load her stone there from a bin which has been erected there for two or three hours during high water, and that was all the visit it was claimed and admitted she could make to Craster. It is a place which is exposed to the east, to the north-east, and to the south-east, but it is sheltered and the water is smooth when the wind is off the shore. It would not be, in my judgment, in any sense safe, nor was it, I think, seriously contended it would be, for a ship like the *Saxon Queen* to go to Craster and stay the tide round, because she would be there helpless for a number of hours, and it was impossible to say when the water rose again whether she would float in safety or would not incur damage from the swell that had got up in the meantime. It was said all that was intended in this case was that she should make a visit to this south pier for a couple of hours at high water, which would have been ample time for her to have loaded her cargo and get away.

It was not seriously denied that it would be safe for the *Saxon Queen* to go to that position during high water if the wind was off shore, provided the wind stayed off shore. But the only contest in the case was one of opinion really, whether you could say it was safe, having regard to the contingency that the wind might shift round to the seaward, and that if the wind did not come strong from the seaward you could get out again by heaving on the warp from the mooring buoy which was put there for that purpose, to the stern of the ship; that, although you could do that, there was always a risk of something going wrong, and you could not say it was safe to go there even in fine weather because of the contingency of the wind shifting and some hitch occurring in getting out. I think I must come to the conclusion that that contingency is the only risk in fact of going to Craster in fine weather for the limited period contemplated.

On those facts, is it a safe port within the meaning of this charter-party? I think Craster is a port. It is not a technical term in this charter-party. It is not a mere quay on a beach. Public money has been spent on the works there, and there are regulations under Acts of Parliament and orders of the Board of Trade with regard to it. There is a pilot, and a harbour-master, and what I hope is a thriving little trade in stone and some fishing carried on there. So if anything turns on the word "port" I think it would be a port.

Then comes the question whether it would be a safe port within the meaning of this charter-party, and that to my mind is a much more difficult question. The call that the *Saxon Queen* was invited to make on the particular occasion in question might have been safely made. At the time she was asked to go there the sea was smooth. That is what I find upon the evidence, and, looking at the matter after the event, it remained smooth during that tide and for some days afterwards; in point of fact, she could have gone there without damage and got away again without damage had she gone. It is argued for the plaintiffs that that really disposes of the case, because I am bound to look at the actual position to decide at the moment on the occasion in question whether it is a safe port or not. Of course, that is quite true; you have to look at the actual position. A port may be unsafe at the moment of any order and yet it may be really a safe port under different circumstances. You have to look undoubtedly to see whether it is a safe port at the moment, but I do not think it follows from that that the converse is true, that any port which is safe at the moment, but which is liable to become dangerous at short notice, is necessarily a safe port within the meaning of a charter-party like this. I am not deciding that. You are not only to look at the actual position, but also to every contingent position. I do not think you get any further forward by seeking to draw nice verbal and logical distinctions between actual and contingent in a case like this. There is not really any such distinction, because contingencies are infinite in their degree of remoteness. But it seems to me one must look at it much more broadly, and consider the nature of the charter-party and the facts as a whole. If a small coasting steamer, for instance, were chartered, say, in the Tyne to trade between any safe ports on the coast of Northumberland, I should think it might very well be contended really as a question of the construction of that particular document that that was what was in the contemplation of the parties here, that they should make little sudden visits at favourable moments to small ports which were then safe, like Craster, although those would be ports which were only safe for the moment, and which might contingently become very dangerous. But I have got to consider the use of these words in a charter-party of a much wider and more general description.

This is a charter-party which requires the ship "to trade between any safe ports between Hamburg and Brest and the United Kingdom," practically what I think are called in the Merchant Shipping Act home trade limits, a wide branch of shipping trade. I have got to consider whether a place like Craster was a safe port within the meaning of a document like that, and I have come to the conclusion that it was not. I do not think that in a charter-party dealing with that wide expanse of coast, Kiel to Brest and the United Kingdom, that the parties had in contemplation anything so special as this harbour of Craster seems to me to be. I do not think they contemplated their vessel being ordered to make a visit for an hour or two at high water to what is really an unprotected loading place at the head, as will be seen, of a funnel between two reefs of rocks where, however safe it may be at the moment, a change of wind would put the vessel on a lee shore, where she would have to rely upon a warp out of the stern from a mooring buoy in the offing to get her out if it became necessary. I think that is a position which may be safe at the moment, free from apparent danger at the moment, but the contingency of it becoming dangerous is so near that unless there were special circumstances in the nature of the charter-party, it being called a local charter-party indicating that people had that sort of place in their mind, I do not think I can say that a place like that was contemplated as a safe port by the people who made this charter. When the vessel is there, it is true, she is out of immediate and apparent danger; but I think it would be really

an abuse of language to say that within the meaning of a wide charter-party like this she could be said when lying there to be in a safe port. Think of her position when lying there. I mean that there is a harbour inside is immaterial. She is lying at the end of a pier absolutely exposed to the German Ocean, between two rocks with nothing to get her out in case of any difficulty except a warp away astern to a mooring buoy in the offing. Is she in a safe port within the general meaning of such a document as this among commercial men? There is nothing to indicate that such a port as this was particularly contemplated, and I do not think I could soundly come to the conclusion that she was. Therefore I must give judgment in this case for the defendants.

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

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

Monday, March 17, 1913.

(Before CHANNELL, BRAY, and COLERIDGE, JJ.)

WEEKS (app.) *v.* ROSS (resp.). (*a*)

British ship—Passenger steamer—Motor-boat—Plying for hire—Carrying more than twelve passengers—"Ply or proceed to sea"—"Any voyage or excursion"—"Vessel used in navigation"—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 318—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 267, 271, 421, 742, 743—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 21.

By sect. 271 *of the Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60) *it is enacted* (inter alia): *"Every passenger steamer which carries more than twelve passengers shall . . . not ply or proceed to sea or on any voyage or excursion with any passengers on board unless the owner or master has the certificate from the Board of Trade as to survey under this part of this Act, the same being in force and applicable to the voyage or excursion on which the steamer is about to proceed." By sect.* 267 *of the same Act "passenger steamer" shall mean "every British steamship carrying passengers to, from, or between any places in the United Kingdom." By sect.* 742, *"'ship' includes every description of vessel used in navigation not propelled by oars." By sect.* 743, *"any provisions of this Act applying to steamers or steamships shall apply to ships propelled by electricity or other mechanical power." The penalty for the contravention of the above-named provision is contained in sect.* 21 *of the Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48).

The respondent R. used two petrol-driven motor-boats for carrying passengers, exceeding twelve in number, on two specified days on the river Exe, and into and along the Exeter Canal, without having obtained a certificate of survey from the Board of Trade under sect. 271 *of the Merchant Shipping Act* 1894. *The canal is connected with the sea by means of locks, and is used by seagoing ships for the purpose of getting to and from Exeter, but the motor-boats did not proceed to sea, nor did they go beyond non-tidal waters.*

Held, reversing the decision of the justices, that the motor-boats were passenger steamers within the meaning of the Act, that they were used for carrying passengers on an excursion, and that they were used "in navigation," and that, although they did not proceed to sea, a certificate of the Board of Trade was required to be held by the owner or master.

Mayor, &c., of Southport *v.* Morriss (68 *L. T. Rep.* 221); (1893) 1 *Q. B.* 359) *distinguished.*

CASE stated by the justices of Exeter, sitting as a court of summary jurisdiction.

The following are the facts set out in the case stated by the justices:—

1. Two separate informations were laid for alleged offences under sect. 271 of the Merchant Shipping Act 1894. the penalties of which were enacted by sect. 21 of the Merchant Shipping Act 1906, and it was agreed by the respective solicitors for the appellant and the respondent that both informations should be heard together, and be subject to the same decision.

2. The appellant is the principal officer for the Plymouth District Surveyor's Branch of the Board of Trade and the respondent is the owner of two petrol-driven motor-boats, named respectively the *Dorothy* and the *Otranto*, used by him on the river Exe, at Exeter, on the 27th May and the 19th June 1912 for conveying for payment more than twelve passengers, without having obtained a certificate of survey from the Board of Trade under the third part of the said Merchant Shipping Act 1894 in respect of the boats.

3. It was proved in evidence and admitted that the *Dorothy* plied for hire on the 27th May from the Exe Bridge at Exeter, along the quay, a distance of half a mile, and into and along the Exeter Canal for a further mile, to a point known as the Double Locks, thence returning to the starting-point, having on board eighteen adults and two children; and that the *Otranto*, with twenty adults and five children on board, on the 19th June, proceeded from the same point to Double Locks, which was the extent of the excursions alleged in the information.

4. It was further proved in evidence by the respondent that the *Otranto* did not exceed twelve tons burden, and the *Dorothy* was much smaller, and it was admitted that no survey certificate had been obtained from the Board of Trade in respect of either of the boats.

5. The river Exe at the points named is not tidal, and is entirely fresh inland water, confined by double locks, which are more than two miles from tidal water, the mean width of the river being 150ft., with a depth of 12ft., and the mean width of the said portion of the canal being 30ft., with a depth of 13ft.

6. The offences charged were offences under sect. 271 of the Merchant Shipping Act 1894, which enacts:

(1) Every passenger steamer which carries more than twelve passengers shall . . . (*b*) not ply or proceed to sea, or on any voyage or excursion with any passengers on board, unless the owner or master has the certificate from the Board of Trade as to survey under this part of this Act, the same being in force and applicable to the voyage or excursion on

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

which the steamer is about to proceed. (2) A passenger steamer attempting to ply or go to sea may be detained until such certificate as aforesaid is produced to the proper officer of customs.

7. By sect. 267 of the same Act it is enacted:

For the purposes of this part of this Act . . . the expression "passenger steamer" shall mean every British steamship carrying passengers to, from, or between any places in the United Kingdom, except steam ferry boats working in chains (commonly called steam bridges). . . .

By sect. 2, sub-sect. 1:

Every British ship shall, unless exempted from registry, be registered under this Act.

By sect. 3:

The following ships are exempted from registry under this Act: (1) Ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom. . . .

8. No penalty for the omission to obtain the aforesaid certificate is imposed by the said Act, but by sect. 21 of the Merchant Shipping Act 1906 it is enacted that:

If the provisions of the Merchant Shipping Acts which require a passenger steamer to be surveyed and to have a passenger steamer's certificate are not complied with in the case of any such steamer, the master or owner of the steamer shall, without prejudice to any other remedy or penalty under the Merchant Shipping Acts, be liable on summary conviction to a fine not exceeding ten pounds for every passenger carried from or to any place in the United Kingdom. . . .

9. On the part of the appellant it was contended that the boats were passenger boats plying on an excursion within the meaning of sect. 271, and that the distance travelled from Exe Bridge aforesaid to Double Locks, as alleged in the informations and summonses, was within the definition in sect. 267—namely, "to, from, or between any places in the United Kingdom"—and that the term "excursion" had no reference to or was limited by the preceding words "proceed to sea," but that the term extended to and included plying elsewhere than on the sea or tidal waters.

10. On the part of the respondent it was contended that it was obligatory to read the word "sea" into all the conditions named in sect. 271, and, further, that the provisions were not intended to apply to ships used on inland waters. That the boats in question were not passenger steamers intended to go to sea, but for use only on the canal, and that the word "sea" was rightly defined as a body of salt water. That the plying at Exeter was at one and the same place, and was not to, from, or between any places in the United Kingdom.

11. It was admitted that there had been no decisions of the High Court on the interpretation of the above sections, which were enacted in substitution of similar provisions in sect. 318 of the Merchant Shipping Act 1854, but certain decisions prior to 1894 bearing on various points affecting the aforesaid information were quoted—namely: (a) *Ex parte Ferguson* (1 Asp. Mar. Law Cas. 8; 24 L. T. Rep. 96; L. Rep. 6 Q. B. 280), that if a ship's habitual business is to go to sea it is under the Board of Trade, but not otherwise; (b) *Hedges* v. *Hooker* (6 Asp. Mar. Law Cas. 386; 60 L. T. Rep. 822; 37 W. R. 491), where it was held that a steamer used on a pleasure trip without going to sea and without payment to the owner was not constituted a passenger steamer within the Merchant Shipping Act 1854, and was not liable to have the Board of Trade certificate; (c) *Kiddle* v. *Kidston* (15 Cox C. C. 379; 14 L. R. Ir. 1), referred to by the appellant, in which the question of payment or not for the hire of a boat was considered; (d) *Mayor, &c., of Southport* v. *Morriss* (7 Asp. Mar. Law Cas. 279; 68 L. T. Rep. 221; (1893) 1 Q. B. 359), in which it was decided that a small launch used on an inland lake was not a ship within the meaning of the statute, and no certificate was necessary, as the steamer was not a ship used in navigation within sects. 318 and 303 of that Act and a conviction by justices was quashed.

12. The justices found upon the evidence that the boats were propelled by a petrol engine and were not "steamships" or "steamers"; that they did not ply or proceed to sea, but that the river and canal was solely fresh inland water controlled by locks, the property of the Exeter City Council, and that the distance traversed was wholly at Exeter and not within the alleged conditions of plying to, from, or between any places in the United Kingdom. They further found that the motor-boats were not vessels used in navigation on the sea, and being each under fifteen tons burden employed solely on a locked body of water were not British steamships requiring registration, and therefore were not under the control of the Board of Trade for the purposes aforesaid.

13. The justices were also unanimously of opinion that the respondent in so using the motor-boats as aforesaid did not contravene the provisions of the Merchant Shipping Act 1894 requiring in certain cases a survey certificate from the Board of Trade and dismissed the information.

The various sections of the Acts of Parliament set out in the headnote and in the case stated are sufficiently referred to therein.

The *Solicitor-General* (Sir John Simon), *Ginsburg*, and *Branson*, for the appellant.—The sole question was whether the motor-boats used by the respondents should be licensed under the Board of Trade. Sect. 271 of the Merchant Shipping Act 1894 had reference to every passenger steamer carrying more than twelve passengers. The definition of passenger steamer given in sect. 267 and of ship given in sect. 742, and the extension of the provisions of the Act applying to steamers to "ships propelled by electricity or other mechanical power" in sect. 743, made it clear that whatever was necessary in the general case of a passenger steamer was also necessary in the case of these motor-boats. The justices had come to the conclusion that it was necessary that the boats should go to sea in order to render a licence necessary. That was incorrect. The words of sect. 271 were "ply or proceed to sea." The word "ply" indicated a movement forward and backward; the word "proceed" a forward movement only. Therefore the words "to sea" were connected with "proceed" only, and it was not necessary that there should be a journey to the sea in order to bring the boats within the Board of Trade requirements. The next words of sub-sect. 1 (a) of sect. 271 made the matter more clear still, as they were "on any voyage or excursion." The use of the word "any" showed that the section applied to fresh water as well as to sea

water. The section of the Act aimed at all vessels which came within the definition of a "ship"—that is, a vessel used in navigation not propelled by oars. This was shown by various other sections of the Act, especially 274, 285, and 421. Therefore, also, the exemption from registry of ships under 15 tons, as provided by sect. 3, sub-sect. 1, of the Act did not apply to the case of "every passenger steamer." If, then, there was navigation at all by a passenger steamer, this was provided for by the Act whether it was on fresh water or on the open sea. "Navigation," moreover, was a word often specially applied to canals. One of the main objects of the Merchant Shipping Acts was legislation to avoid risks, and that was why regulations were required in the case of passenger steamers. There was little authority upon the subject, and the principal case relied upon by the justices was decided before the Act of 1894 was passed, though sect. 318 of the Merchant Shipping Act 1854 was nearly the same as sect. 271 of the Merchant Shipping Act of 1894 as far as this particular point was concerned. They criticised the cases referred to in the case stated, and also cited *The Mac* (4 Asp. Mar. Law Cas. 507, 555; 46 L. T. Rep. 907; 7 P. Div. 126), in which Cotton, L.J. questioned the decision in *Ex parte Ferguson* (*ubi sup.*), and stated that in his opinion the term "ship" need not be confined to a vessel which was sea-going.

J. A. Hawke for the respondent.—The decision of the justices was right. It was unnecessary to go into the sea-going question. Although there were certain expressions in *Ex parte Ferguson* (*ubi sup.*) by Blackburn, J. dealing with this point, there was the later judgment of Cotton, L.J. in *The Mac* (*ubi sup.*) which disposed of that part of the case. The real question before the court was whether there was navigation in the present case or not. In the *Southport* case it was held that there was no navigation. It was really a question of fact in each case as to whether there was navigation or not. These motor-boats were plying for hire on an enclosed piece of water, and the justices had treated this locked sheet of water as though it had been a pond, as in the *Southport* case. The findings, therefore, amounted in fact to this, that there was no navigation.

The *Solicitor-General* in reply.

Channell, J.—We are all agreed that this appeal must be allowed.

It is a little difficult to see exactly upon what grounds the magistrates really proceeded, because they have put a great many grounds into the case, and they have put grounds which it is admitted quite frankly by Mr. Hawke have no bearing upon the case. But they put them in, and that creates some difficulty in ascertaining what their exact findings were.

The question which we have to decide is whether this case comes within sect. 271 of the Merchant Shipping Act 1894. The section begins, "Every passenger steamer which carries more than twelve passengers shall," and then, after dealing with certain provisions as to surveying, it says, "shall not ply or proceed to sea or on any voyage or excursion with any passengers on board," unless it is certificated by the Board of Trade. What I think was the main and the real point that the magistrates intended to decide was that in order to bring a vessel within that section it must go to sea, and that the section did not apply to passenger launches that were used simply on inland waters. That is the real point which they meant to decide, and there is no doubt that this was the real basis of their decision, although I quite agree that they stated a good many other points besides. The question upon that would have been (and Mr. Hawke has admitted it) whether "ply or proceed to sea" meant it must go to sea, and whether "ply" meant plying on the sea. It is not necessary to go through them all, but if one looks at a great many other sections of the Act, it will be found that the Act does deal with vessels that are simply used on inland waters, and therefore one cannot put it upon the broad ground which, I think, was the main ground upon which the magistrates proceeded. If that view is correct, the point about the register of the vessel being under fifteen tons has nothing in it at all.

In my opinion the only point of difficulty is raised by *Mayor, &c., of Southport* v. *Morriss* (*ubi sup.*), and I do think that that case requires some careful consideration. There was the case of a pleasure lake, if I may call it so, at Southport. Southport is a place where the tide recedes to a very great distance. The lake has been constructed in order that children and other people may amuse themselves with a sort of quasi sea when the other sea has gone nearly out of sight. I imagine that they have sand on the bank of it where the children can dig and amuse themselves just as they do on the seashore. I do not think that Southport is the only place where that happens. There may be many other such places, and I know that there is one at Ryde, corresponding to that used just in the same way as the Southport lake was said to have been used. In the *Southport* case there was a small launch which was used for amusement, which carried people who certainly were passengers, and I think it was found in the case that the number carried was greater than twelve. At any rate if it was not, the point would not have arisen. In that case the court decided that it was not within the Merchant Shipping Act 1854—the Act which was then, in 1893, in force, although now repealed, and which contained many provisions very similar to, and in some cases identical with the corresponding sections of the Merchant Shipping Act 1894. What we have to examine is the ground upon which that case was decided. I think when one comes to examine the judgment, which is really a very short one, there can be no doubt as to the ground of the decision. It is quite possible to read the whole of it without detaining the court at any length. I will take what the Lord Chief Justice, Lord Coleridge, says: "I am of opinion that this appeal must be allowed. The launch in question cannot be held to be within the provisions of sect. 318 unless it can be said to be a ship, for the section requires the duplicate certificate to be put up in a conspicuous part of the ship. And by sect. 2, the term 'ship' is defined to include 'every description of vessel used in navigation not propelled by oars.' We are therefore reduced to the question whether this launch was a vessel used in navigation. I think that, having regard to the size of the sheet of water on which it was used, it was not. Navigation is a term which, in common parlance, would never be used in connec-

tion with a sheet of water half a mile long. The Attorney-General has asked where we are to draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn."

It is quite clear, then, that that judgment proceeds entirely upon the view of the court as to the place where the alleged navigation was, and the Lord Chief Justice says it could never be used in connection with a sheet of water half a mile long. He must be considered to have used those words as referring to the facts of the case that were before him. It was not only a sheet of water half a mile long, but an inclosed sheet of water half a mile long, so that one could not take a boat, or a vessel, or anything else, over this half mile of water, and proceed further on. That being so, I should absolutely agree with the decision there given. A pleasure pond cannot be a place on which, in any reasonable sense of the word, anyone could say that there was navigation, and that is the ground upon which the decision of the Lord Chief Justice proceeded.

Then there is the judgment of Charles, J., who says: "I am of the same opinion. I agree with my Lord that this launch, used in the place in which it was used, was not a vessel used in navigation within sect. 2 of the Merchant Shipping Act 1854, and therefore not a passenger ship within the meaning of sect. 303 and 318."

Of course, as I have already remarked, the sections of the Merchant Shipping Act which had to be considered in that case differ from those sections which are now before us, because the *Southport* case was decided in 1893, the year before the present Merchant Shipping Act was passed, but the sections referred to are almost verbatim. That being so, Charles, J. agrees on almost exactly the same grounds that the launch was used in the place where it was used, and on that ground he says that on such a sheet of water it was not navigation to paddle a boat about, whether it is done with oars, or with a small motor engine, or with any other means of propulsion. If the water is a mere pond not communicating with anything else, then that is not navigation in any reasonable sense.

Does that reasoning apply in the present case, assuming that the matter is open for our consideration? I do not think that there can be the slightest doubt that it does not, because here, although the length of water on which these launches ply is only about one and a half miles in length (I do not lose sight of the fact that it has been stated that sometimes they do extend their journey to a further lock), and they only go down from the Exe Bridge to the first lock of the canal, which is in a sense an inclosed piece of water, thereby preventing in a sense their journey being classed as navigation, yet it is not so, because at the end of that mile and a half there are locks which communicate with a further cut (to use an ambiguous expression) which goes on to another lock, and then there is a sea lock, through which you can go out to sea if you are going to sea, or can come in if you are coming from the sea, and go up to the dock which exists at Exeter, where vessels of a substantial size do in fact go. Vessels are passing up and down this canal constantly, but, of course, only at a time of high water in the estuary, because outside the lock in the estuary there is no water at low tide, and they only go down to the lock to get to the sea when the tide is high. But there is navigation there, and it is a place for navigation. And since it is a place for navigation it is not the less navigation by this launch than by any other craft. The launch is navigating. The grounds upon which the judge decided the *Southport* case do not in point of fact exist in the present case. No one could say that this place is one where there could not be navigation, when in point of fact there is a very considerable amount of navigation. On that ground, if the matter is open to us, there can be no doubt about what our decision should be.

The only remaining question is whether the justices have found anything which, as findings of fact, we cannot review, and which preclude us in any way from allowing the appeal; or whether their findings are so ambiguous that we ought to send the case back to them to find definitely upon the point. I do not think that they are ambiguous. I do not know that I quite agree with the Solicitor-General, who in his reply said that it was found as a fact that the vessel was used in navigation. My view of the facts is that the statement about the place is really conclusive. Of course, there is a little more difficulty where a finding is an affirmative one than where a finding is a negative one. When it is a negative one, the point which is always put is that there is no evidence upon which they could so find, and that is clearly a question of law. There is more difficulty about it, naturally, when the finding is an affirmative one, as I think it is here; but I am not sure it is, because one can always turn a thing round and say that there is no evidence upon which the justices could come to the conclusion at which they are supposed to have arrived. I do not care myself which way it is put, because I think that there is quite enough on this case for us to say that upon the facts which they have found the case is not brought within the *Southport* case, and that being so there is really no difficulty. Upon the facts found here there is no doubt that this is a case in which upon their findings there clearly was navigation.

On these grounds I think that the present appeal must be allowed.

Bray, J.—I am of the same opinion.

The only real question, as my brother has put it, is whether these vessels were used in navigation. Now the case finds that they proceeded for half a mile along the river Exe, and for a mile along the canal, and that the canal continues over two miles, going through certain locks, and finally reaches tidal waters. These being the facts, whether the magistrates have found any fact that they were used for navigation or not, in my opinion, on those facts there could be no other proper finding than that they were used for navigation. A river is a place for navigation, and a canal is a place for navigation, and they are none the less places for navigation because as it happens the vessel only used a portion of them.

Coleridge, J.—I am also of the same opinion.

I have had some difficulty in this case because the only point that the magistrates had to decide was whether the vessels were used in navigation, and there is no finding on that point. The

magistrates directed their attention to other and irrelevant points—as to whether the vessels were steamships, as to whether they were used in navigation on the sea. They were quite irrelevant, and the difficulty I have had is that the court must be satisfied that, apart from the findings of the magistrates, the magistrates have stated such facts as will make it conclusive evidence that they must convict on the ground that on the facts the vessels were used in navigation.

I do not think that the *Southport* case, which the magistrates considered was binding upon them, is binding here; because in the present case these vessels were proceeding over waters which were used by ships coming from the sea to the docks and back again. Clearly such ships would be held to be navigating these waters purely on the ground of the nature of the waters they were traversing. If those ships which were coming from and going to the sea were undoubtedly navigating these waters, the facts that these particular vessels did not proceed to sea does not prevent these waters being navigated by them as they would be by ships going to or coming from the sea.

On these grounds I think that there is conclusive evidence in the findings of fact that conviction was a necessary result. I leave out of consideration various alternatives that might be suggested, such as the use of large reservoirs or small lakes or tarns. When those questions arise it will be time enough to decide whether these are waters which can be navigated.

Appeal allowed.

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

Solicitors for the respondent, *Field, Roscoe, and Co.*, for *Ford, Harris,* and *Ford*, Exeter.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 1, 2, *and Dec.* 5, 1912.

(Before Sir S. T. EVANS, President, and Elder Brethren.)

THE BRAVO. (a)

Collision — Both to blame — Different degrees of fault — Liability for damage — Costs — Maritime Conventions Act 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1.

When in a collision action both ships are held to be in fault, but in different degrees, the practice in force before the passing of the Maritime Conventions Act, that each party to the action should bear their own costs, is to be followed unless there are special circumstances in existence to induce the court to depart from it.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Berbera*; the defendants and counter-claimants were the owners of the steamship *Bravo*.

The case made by the plaintiffs was that shortly before 8.15 a.m. on the 7th July 1912 the *Berbera* a steel screw steamship of 4352 tons gross and 2792 tons net register, manned by a crew of seventy-five hands all told, was in the North Sea, about six miles to the northward and westward of the Haisborough Light vessel, on a voyage from Middlesbrough to Calcutta, *viâ* London, with a part cargo of general merchandise. The weather was a dense fog, with light, variable airs from the eastward, and the tide was ebb of the force of about half a knot to a knot. The *Berbera* was on a course of S.S E. magnetic. Her engines, which had just previously been reversed, had afterwards been put slow ahead and full speed ahead for a few turns and then half speed ahead to clear a steamship on her starboard bow, and she was making about three knots through the water. Her whistle was being sounded a prolonged blast at proper intervals, and a good look-out was being kept on board of her.

In these circumstances the whistle of the *Bravo* was heard sounding a two prolonged blast signal on the starboard bow of the *Berbera*. The engines of the *Berbera* were at once stopped, her whistle was sounded a prolonged blast in reply, and her helm was starboarded half a point and steadied. The *Berbera* continued to sound her whistle a prolonged blast at proper intervals, and two more signals of two prolonged blasts were heard from the *Bravo* on the starboard bow of the *Berbera*. The *Bravo* then came in sight about four points on the starboard bow of the *Berbera* at a distance of about a cable or rather less, and at the same time sounded two prolonged blasts. The engines of the *Berbera* were then put full speed ahead, and her helm was put hard-a-starboard, but the *Bravo*, instead of being stopped as her whistle indicated, was observed to be coming on at considerable speed heading for the *Berbera*, and shortly afterwards with her stem struck the starboard side of the *Berbera* forward of the bridge, doing her damage. Immediately before the collision the *Bravo* sounded three short blasts.

The plaintiffs charged those on the *Bravo* with not keeping a good look-out: with going at an immoderate speed; with neglecting to stop on hearing a fog signal forward of their beam; with neglecting to reverse; with improperly porting; with sounding improper whistle signals; and with failing to indicate by whistle signals the course she was taking.

The case made by the defendants and counter-claimants was that shortly before 8 20 a.m. on the 7th July the *Bravo*. a steel screw steamship of 1512 tons gross and 930 tons net register, manned by a crew of twenty hands all told, was in the North Sea between three and four miles to the northward of the Haisborough Light vessel. The *Bravo*, bound from London to Blyth in water ballast, was heading north magnetic, having altered her course for another steamer which she had passed on the port side, and, with her engines working at dead slow, was making two and a half knots through the water. Her whistle was being duly sounded a prolonged blast for fog, in accordance with the regulations, and a good look-out was being kept on board of her.

In these circumstances those on the *Bravo* heard a prolonged blast from the *Berbera*, which appeared to be on the port bow and a long way distant. The engines of the *Bravo* were at once stopped and her whistle was sounded a prolonged blast in reply, and afterwards prolonged blasts were sounded at regulation intervals until the *Bravo*, whose engines were kept stopped, had lost

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

all headway, when two prolonged blasts in quick succession were sounded instead of one blast at regulation intervals. Meanwhile the *Berbera*, whose whistle was heard sounding prolonged blasts as she approached, drew nearer, and shortly afterwards came in sight, distant about two to three ships' lengths and bearing about two to three points on the port bow. Directly the *Berbera* was seen the engines of the *Bravo* were put full speed astern and her whistle was sounded three short blasts, but, notwithstanding these measures, the *Berbera* came on at considerable speed, apparently acting under hard-a-starboard helm, and with her starboard side about amidships struck the port side of the stem of the *Bravo*, causing her serious damage.

The defendants and counter-claimants charged those on the *Berbera* with not keeping a good look-out; with neglecting to keep clear of the *Bravo;* with proceeding at an immoderate speed; with neglecting to stop on hearing a fog signal forward of the beam; with improperly starboarding; and with neglecting to ease, stop, or reverse her engines.

Bateson, K.C. and *Dawson Miller*, K.C. for the plaintiffs, the owners of the *Berbera*.

Laing, K.C. and *D. Stephens* for the defendants, the owners of the *Bravo*.

The PRESIDENT.—The collision in this case took place between two steamships, the *Berbera* and the *Bravo*, about five miles more or less northward of the Haisborough Light vessel in the North Sea. It occurred about 8.15 in the morning of the 7th July last, in thick weather. The downward and upward courses set some little time before the collision were S.S.E. magnetic on the *Berbera* and N. by W. ¾ W. magnetic on the *Bravo*. About five minutes before the collision, according to the statements of the captain and pilot of the *Berbera*, the *Berbera* starboarded half a point, making her heading S.E. by S. ½ S. magnetic. The *Bravo's* head was said to have been altered one and three-quarter points by porting for another steamer, and she afterwards steered a course of about N. magnetic. The vessels sighted each other when about a cable apart. The master of the *Berbera* said that when he sighted the *Bravo* she headed from N. to N. by E., and that at the time of the impact she headed N.E. by E., a change of about four points. The pilot, who stood on the bridge with the master, said that when she was sighted she headed E.N.E., which with a similar change would make her head about E. when the vessels came in contact. Upon this part of the case, as upon most others, I think the account of those on the *Bravo* is the more accurate and reliable. Apart from conflicts about headings, bearings, and helm manœuvres, the main contest, as is usual in fog cases, was as to the speeds of the two vessels. The case made for the *Berbera* was that her speed at the time of the collision was about two knots through the water, and the *Bravo's* from three to five. That made for the *Bravo* was that she had no headway at all, but a little sternway, and that the *Berbera's* speed was five or six knots. Criticisms were made on the speeds of the two ships at earlier stages on that morning, and they were made chiefly as bearing on the credibility of the witnesses on either side, but they are not very helpful in deciding the case. It will be sufficient to examine the facts for about thirty-five or forty minutes before the accident.

I will first consider the case of the plaintiffs' vessel. At 7.40 a.m. the *Berbera* entered a thick fog. She went into it at a speed of over eleven knots. She proceeded at that speed in the thick fog on the admission of her own witnesses, travelling a distance not much less than half a mile. Her engines were then put half speed ahead, at which speed she travelled about five and a half knots; and afterwards she slowed and stopped for various whistle signals. Later on, still in thick fog, her engines were put full speed ahead for a minute. This was about 8.5 according to her own time. Then at 8.6 and for about four minutes—viz., to 8.10—she was at half speed ahead, which when attained made her travel, as stated, about five and a half knots. Her engines were stopped at 8.10 for the whistle of the *Bravo*. By her time the collision occurred at 8.14. Her master said that her engines were not put at full speed, but at half speed, about 8.5; but her pilot said that she was at full speed for about a minute (for as many as fifty or fifty-five revolutions); and corroboration of this is supplied by the engineer's log and by the bridge note book. It may also be observed that in the chief officer's log her speed at eight o'clock is entered at seven and four-fifth knots, which no doubt means the distance covered in the hour from seven to eight o'clock. Enough has been stated to show not merely that she was not navigated at a moderate speed, but that her navigation was reckless in such weather.

I have had greater difficulty in dealing with the *Bravo*, whose case I now proceed to consider. She has been attacked for immoderate speed, for neglecting to stop her engines and navigate with caution on hearing signals in a fog, for not reversing, for improperly porting, and for giving wrong or misleading signals.

I have stated that on passing another steamer the *Bravo* altered her course about one and three-quarter points from N. by W. ¾ W. to about N. This is more reliable than the evidence from the *Berbera* as to the courses. I find that the collision was not due to porting by the *Bravo*, as alleged by the other vessel. It is difficult to determine the speeds of the *Bravo* before she heard signals from the *Berbera*. The master of the *Bravo* stated in evidence that immediately he heard a one-long-blast signal from what turned out to be the *Berbera* he stopped his engines; that he blew four or five single long blasts to the *Berbera* in answer to her signals every half-minute to a minute; that the signal from the *Berbera* sounded two or three points on his port bow; that the way was taken off his vessel, and that thereupon he blew about four signals of two prolonged blasts to indicate that his vessel was stopped in the water; that the *Berbera* when sighted was two or three points on his port bow and about 500ft. to 750ft. away; that on her coming into view he put his engines full speed astern and sounded three short blasts to show that; and that at the time of impact he had a little sternway.

The times of the two vessels vary by about seven minutes; the collision according to one being at 8.14, and according to the other at 8.21. This difference in times has to be borne in mind in examining the story of each vessel separately. The log of the engineer of the *Bravo* gives what

her witnesses said was the sequence of events just before the collision—namely, 8.15, stop; 8.20, full speed astern; and 8.21, shock of collision. Just after the collision it was admitted that the master of the *Bravo* said something to the effect: "I am all stopped," or "You can see my ship was stopped," and that the pilot of the *Berbera* said something to the effect: "Why are you not going astern, as you have signalled?" I have stated that the *Bravo* was not proved to have ported as alleged, and that her account of the bearings is more reliable.

The questions remain whether the *Bravo* stopped on hearing the first signal from the vessel forward of her beam; whether her way was off when she sounded the "stopped in the water" signals; and whether she reversed as early as she should have done.

I was struck by the fact, admitted as it was, that immediately after the collision her master said that his ship was stopped. This, however, does not prove that he stopped in time, or that he was actually stopped when he first sounded the two prolonged blasts signal. The deposition of the master before the chief officer of Customs was put in. The material parts of it on this subject are as follows: "Heard a steamer's whistle about two points on the port bow, and shortly after heard the sound again much nearer. The engines were then stopped, and when the way was off the ship gave two long blasts. About three or four minutes afterwards observed a steamer coming at a good speed about two points on the port bow. When quite close to he starboarded and came on, striking our stem with his starboard side just before his midships." Although I have accepted the evidence of the master of the *Bravo* in the main, I have come to the conclusion, especially having regard to the fair reading of his deposition, that he did not stop his engines on first hearing the signal from the *Berbera*, but that he only stopped on hearihg it the second time "much nearer."

The look-out on the *Berbera* was also defective. There was a cadet at the forecastle head. There was also a lascar somewhere up aloft—one witness said in the crow's nest; another said in the foretop, there being no crow's nest. He does not appear to have reported any vessel or signal. One witness said he had a bell with which to communicate reports; another, that if he reported he would have to do it by shouting. I was satisfied that the *Bravo* sounded fog signals of one long blast before she sounded "stopped in the water" signals of two prolonged blasts; and that they ought to have been heard on the *Berbera*. No one did hear them. The only signals heard which the witnesses agreed upon were three signals of two prolonged blasts. The preliminary act and the statement of claim said that there were four such signals. The *Bravo* also sounded a signal of three short blasts. The *Berbera's* pilot heard this, but the master and cadet said they did not. The pilot and master said they first heard the *Bravo's* signal two points on their starboard bow; the look-out man said it was four points. The master said that when the *Bravo* came in sight she bore four points on his starboard bow, the pilot said six points, and the look-out man about at right angles, or eight points. I can place no reliance on the evidence of the plaintiffs' witnesses in reference to the bearing either of the sounds or of the vessel when observed.

When the signal from the *Bravo* signifying "stopped in the water" was heard on the *Berbera* it was said that her engines were stopped. I am not satisfied that they were. When the signal was afterwards heard "close on" the starboard bow, the engines were not reversed; but her helm was altered, although, as I find, she had not properly located the signalling vessel. The pilot said he gave the first helm order in Hindustani to the lascar at the wheel, "Starboard half a point." The master first said about this that their course was "altered half a point to starboard, but afterwards he said he had made a mistake, and that he should have said "starboarded half a point." In two of the logs the entry is found "a/c" (altered course) "½ a point to starboard." What the order was, and how it was carried out, is therefore left in doubt, but it is admitted that the course was altered when the signal was heard, and it was altered before the sound was located. Whatever the alteration was at that time, and it probably was a starboarding, I am satisfied that the *Berbera* was starboarded more before the collision, and that she was swinging under a starboard helm when she struck the *Bravo*. When she sighted the *Bravo* at a distance of about a cable she did not reverse her engines.

I find that the *Berbera* is to blame for excessive speed in thick fog, for not stopping, for starboarding, for not reversing in time, and for not navigating with the caution which the circumstances demanded.

I have also regretfully to add that after the collision the *Berbera* steamed away immediately, without waiting to see, or to hear, how much or how little damage had been caused to the *Bravo* by the collision.

The next question is as to whether the way was off the *Bravo* when the master gave the "stopped in the water" signal. He said that after looking over the side of his vessel he gave the "stopped in the water" signal because her way was off, and that he repeated it about four times. His evidence was that it would take him about three minutes to get the way off, even if he was only going at "dead slow," making about two and a half knots through the water. He further stated that the backwash from his propeller was about up to his bridge when the collision happened. His engineer said that he made about seventy-five revolutions on his engines full speed astern before the collision. If the vessel had been stationary before the operation was performed she would have had considerable sternway at the end of it. The backwash which the master described showed that she had not; and it was more consistent with her having some slight headway when the engines began to reverse. It is difficult, no doubt, to say exactly when the way is off a ship when in open water and in thick fog, but it is important that the signal that a ship is stopped in the water should not be given unless she is in fact so stopped, because it is a signal which must or ought to affect the navigation of other vessels.

Expert evidence was given as to the kind and extent of damage caused to each vessel, and I have consulted my nautical assessors on the subject. The expert evidence was not very

convincing either way. The place of impact was about 100ft. abaft the stem of the *Berbera*. There were no signs or marks of scraping on the *Berbera*. There was no material dispute as to the damage suffered by either vessel. The evidence described it. I need not repeat it. Taking the whole of the evidence and considering also the character of the blow and the nature of the damage, I have come to the conclusion that just before the collision the *Bravo* probably had a little headway; or in any event that she could not have had all her way off but had some headway on her when she began sounding the signal that she was stopped in the water, and for some time afterwards. She put her engines full speed astern soon after the *Berbera* was sighted, and made about seventy-five revolutions, and I do not find that she ought to have reversed earlier. On the foregoing grounds I have come to the conclusion, not without hesitation or reluctance, owing to the fact that I think her story in the main the more trustworthy, that some blame for the collision is also attributable to the navigation of the *Bravo*, in that she was not stopped on hearing the first signal of the *Berbera*, and was not completely stopped in the water while the two prolonged blast signals were sounded.

The degrees of fault, however, are very different. I allocate the fault under the Maritime Conventions Act 1911 as follows: The *Berbera* is to blame in proportion to the *Bravo* as four is to one—in other words, four-fifths of the blame is due to the fault of the *Berbera* and one-fifth to that of the *Bravo*. Judgment will be entered accordingly, and there will be a reference to ascertain the damages in the usual way.

Laing, K.C.—The *Bravo* having only been held liable for one-fifth of the damage, it is submitted that the costs of the claim and counter-claim should be borne in the same proportions, and that the owners of the *Bravo* should recover four-fifths of their costs. The old rule that there should be no costs when both vessels were held to blame was fair when each paid half the damages of the other, but now that the liability to make good the damage is in proportion to the degree in which each vessel was in fault the costs should be borne in the same proportion.

Bateson, K.C.—The cost of fighting the claim and counter-claim is exactly the same whether the parties to the action are held to be equally in fault or whether they are held to be in fault in different proportions. The costs are incurred in fighting the question of liability, and the proportion of the fault makes no difference in the costs incurred. The old rule should be followed, and each side should bear their own costs when both are in fault.

The PRESIDENT.—This is the first case in which there has been a very great difference in the finding of the court as to the degrees of fault attributable to one vessel and the other. I have had to consider the question of costs, and I thought at one time to have had it argued, so as to lay down some general rule, but perhaps it is better not to lay down any strict rule, in order to preserve the exercise of the discretion of the court in every case which comes before it. It might be that if any strict rule were laid down the Court of Appeal would say the adoption of any such rule would fetter discretion.

I think on the whole the practice which has prevailed, of each vessel paying her own costs where both are to blame, ought to be applied to the new cases under the Maritime Conventions Act. I do not know what the origin of the rule was. Some people say it was due to a desire to maintain discipline at sea. However that may be, the preparation of the case does not alter in character by reason of the degree of fault being large or small, and I think in practice it will be generally found that the best course is for me to say, apart from any special circumstances, that each delinquent vessel if she comes into court, either to make an attack or to repel an attack, will have to bear her own costs.

Solicitors for the plaintiffs, *Walton* and *Co.*

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

Nov. 6 *and* 19, 1912.

(Before Sir S. T. EVANS, President.)

THE DEVONSHIRE AND ST. WINIFRED. (a)

Tug and tow—Collision between tow and third ship—Action by cargo owners on tow against tug and third ship—Towage contract—Third-party notice served by tug owners on towowners—Implied contract to indemnify tug owners.

A tug towing a laden barge brought it into collision with another ship. The barge and her cargo were sunk. The owner of the cargo on the barge brought an action against the tug-owners and the steamship owners to recover their damage. The tug owners served a third-party notice on the barge owners claiming an indemnity from the latter for any damage paid or costs incurred in the action against them on the ground that in the requisition under which the towage was performed such an indemnity was implied.

Held, that no such indemnity was implied in the requisition, and that the third parties, the barge owners, should be dismissed from the action with costs.

ACTION for damage,

The plaintiffs were the owners of the cargo on board the barge *Leslie*; the defendants were the owners of the steamship *Devonshire* and the steam tug *St. Winifred*; the third parties were the owners of the barge *Leslie*.

On the 4th Feb. 1911 the barge *Leslie* with the plaintiff's cargo on board was towed by the tug *St. Winifred* into collision with the *Devonshire*. The *Leslie* and her cargo were sunk.

The owners of the *Leslie* brought an action against the owners of the *Devonshire* to recover their loss, and on the 10th May 1911 the President of the Admiralty Division on the trial of that action held that both the steam tug *St. Winifred* and the steamship *Devonshire* were to blame for the collision, and after further argument and consideration he held, on the 29th May 1911, that the owners of the *Leslie* were entitled to recover the whole of their damage from the owners of the *Devonshire*.

That decision was affirmed by the Court of Appeal and by the House of Lords: (*The Devonshire*, 107 L. T. Rep. 179; 12 Asp. Mar. Law Cas. 210; (1912) A. C. 634).

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

On the 23rd March 1911 the Manchester Ship Canal Company, the owners of the steam tug *St. Winifred*, served a third-party notice on the owners of the barge *Leslie*.

The notice, after reciting the fact that the cargo owners were sueing the owners of the *Devonshire* and the owners of the *St. Winifred* to recover the damage caused by the loss of the cargo proceeded:

The defendants, the Manchester Ship Canal Company, the owners of the *St. Winifred*, claim to be indemnified by you against liability in respect of the plaintiffs' claim in this action, and in respect of any costs which the said defendants may incur, or be ordered to pay, on the ground that the tug *St. Winifred* was at the time of the collision the subject of this action, performing the said towage services subject to special conditions of towage entered into between the said Manchester Ship Canal Company and the Manchester Barging Company Limited, the owners of the barge *Leslie*. And take notice that if you wish to dispute the plaintiffs' claim in this action as against the defendants, the owners of the *St. Winifred*, or your liability to the said defendants, you must cause an appearance to be entered for you within eight days after service of this notice. In default of your so appearing you will be deemed to admit the validity of any judgment obtained against the owners of the *St. Winifred* and your own liability to indemnify them to the extent herein claimed which may be summarily enforced against you, pursuant to the rules of the Supreme Court 1883, Order XVI., Part 6.

The Manchester Barging Company, the owners of the *Leslie*, entered an appearance to the third-party notice, and the owners of the steam tug were ordered to deliver a statement of claim.

On the 16th Jan. 1912 the action of the cargo owners on the *Leslie* against the owners of the steam tug *St. Winifred* and the steamship *Devonshire* came on for hearing before Bargrave Deane, J. No evidence was called, and an order was made that the owners of the cargo should recover judgment against both defendants for the full amount of their damage, but as the decision of the Court of Appeal in the action of the owners of the *Leslie* v. the owners of the *Devonshire* was under appeal to the House of Lords execution in the cargo owners action was stayed, except as to half damages against each of the two defendants.

The owners of the tug *St. Winifred* applied that the order as to execution against them should be stayed until the question as to their right of indemnity against the owners of the *Leslie* had been decided, but the application was refused.

On the 20th Sept. the owners of the steam tug *St. Winifred* delivered a statement of claim in which they alleged that by a towage requisition of the 22nd July 1907 the third parties, the owners of the barge *Leslie*, had requested them to tow vessels belonging to the third parties, or any vessels hired or chartered by the third parties on the Mersey, and had agreed that such towage should be undertaken on the usual terms of the steam tug owners, and on the conditions set out in the requisition.

They further alleged that it was an express term of the requisition that the tug owners should not be responsible or liable for damage or injury to any ship, vessel, or craft, or the persons or goods on board any ship, vessel, or craft of which the tug-owners undertook the towage, or for any loss sustained or liability incurred by anyone by reason of such damage or injury, or for any loss or liability incurred in consequence of such ship, vessel, or craft colliding with or otherwise damaging any other vessel or thing, or for any loss or liability of any kind whatsoever arising from the towing, whatever might be the cause or causes of such damage, injury, loss, or liability, or under whatever circumstances such damage, injury, loss, or liability might have happened or accrued, even though arising from or occasioned by the act, omission, incapacity, negligence or default, whether wilful or not, of the company's servants or agents, or any other person; and it was an implied term of the said requisition that the third parties agreed to indemnify the tug owners against any loss or liability of any kind whatsoever arising from the towing, even though arising from or occasioned by, *inter alia*, the negligence or default of the tug owner's servants or agents.

They also alleged that on the 4th Feb. 1911 the steam tug *St. Winifred*, while towing in the Mersey the barge *Leslie* belonging to the third parties, and laden with cargo belonging to the plaintiffs, brought the said barge into collision with the steamship *Devonshire* whereby the *Leslie* was sunk and her cargo was lost. That the collision and loss were caused by the joint negligence of those on the tug and those on the steamship, and that the tug owners had in consequence thereof become liable to the plaintiffs for the loss sustained by them. That the total loss caused the plaintiffs was 1973*l*. 17*s*. 2*d*., of which sum the owners of the *Devonshire* had paid 1092*l*. 16*s*. 4*d*., and that the balance 881*l*. 0*s*. 10*d*., together with interest at 4 per cent., making a total of 937*l*. 4*s*. 8*d*., the tug owners became liable to pay and had paid to the plaintiffs, and they claimed to be indemnified by the barge owners against such liability and against any liability for the costs incurred in defending the cargo owners' action.

The terms of the requisition referred to were as follows:

The Manchester Ship Canal Company—(Bridgewater Department).—Towage Requisition.—To the Manchester Ship Canal Company (Bridgewater Department).—22nd July 1907.—We request that you will tow on the river Mersey and (or) the Manchester Ship Canal and (or) the Bridgewater Canals from time to time our vessels, or any vessels hired or loaded on our account, without requiring such vessels to be specially booked at your respective offices wherever the vessels may be taken in tow, and we agree that the towage is to be undertaken on your usual terms and following conditions, viz.:—The company are not to be responsible or liable for damage or injury to any ship, vessel, or craft, or the persons or goods on board any ship, vessel, or craft, of which the company may undertake the towage or docking in the river Mersey, the Manchester Ship Canal and the Bridgewater Canals or which may be piloted by any of their servants to or from any place in the river Mersey, the said ship canal and the said Bridgewater Canals or for any loss sustained or liability incurred by anyone by reason of such damage or injury or for any loss or liability incurred in consequence of any such ship, vessel, or craft colliding with or otherwise damaging any other vessel or thing or for any loss or liability of any kind whatsoever arising from the towing, docking, or piloting whatever may be the cause or causes of such damage, injury, loss, or liability, or under whatever

circumstances such damage, injury, loss, or liability may have happened or accrued even though arising from or occasioned by the act, omission, incapacity, negligence, or default whether wilful or not of the company's servants or agents or any other persons or any defect, imperfection, or insufficiency of power in or any delay, stoppage, or slackness of speed of any tug or vessel her machinery or equipment engaged in towing or docking any ship, vessel, or craft whether such defect, imperfection, or insufficiency of power be in existence at the beginning of or during the said towing or docking.—Signature, *per pro.* MANCHESTER BARGING COMPANY LIMITED.—(Sgd.) FRANK CLARKE.

On the 9th Oct. 1912 the third parties, the owners of the barge *Leslie*, delivered a defence denying that it was an implied term in the requisition that they should indemnify the tug owners and alleged that there was no contract of indemnity, either express or implied.

The owners of the barge also raised further defences that if there was a contract to indemnify it did not apply as the contract was to tow from Manchester to the Cheshire side of the Mersey, and that the tug had towed the barge from Manchester to the Lancashire side of the Mersey and then to the Cheshire side, and that the accident had happened during the deviation, that the terms of the requisition in so far as they exempted the company from loss caused by negligence were contrary to the Railway and Canal Traffic Act 1854, that the tug owners were not empowered by the powers given them by their Acts of Parliament to impose such conditions, and that they were *ultra vires*, and that they were unreasonable and in restraint of trade and illegal.

On the 17th Oct. the owners of the barge delivered a reply denying the deviation, alleging that the accident happened while the tug was following the usual route. They also alleged that the provisions of the Railway and Canal Traffic Act 1854 were inapplicable and constituted no defence to the claim, and that the terms of the requisition were not *ultra vires.*

The questions between the barge owners and the tug owners came on for trial before the President on the 6th Nov. 1912.

Laing, K.C. and *Raeburn* for the tug owners.

Bateson, K.C. and *Stephens* for the barge owners.

The arguments of counsel as to the indemnity are summarised in the judgment. In addition to the cases referred to in the judgment the following cases were cited in the course of the arguments on the question of indemnity:

Cory and Son v. *France, Fenwick, and Co.*, 103 L. T. Rep. 649; 11 Asp. Mar. Law Cas. 499; (1911) 1 K. B. 114;

Nelson Line v. *James Nelson and Sons*, 97 L. T. Rep. 812; 10 Asp. Mar. Law Cas. 581; (1908) A. C. 16;

Elderslie v. *Borthwick*, 92 L. T. Rep. 274; 10 Asp. Mar. Law Cas. 24; (1905) A. C. 93;

The Louise, 1901, 18 Times L. Rep. 19;

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

Agius v. *Great Western Colliery Company*, 80 L. T. Rep. 140; (1899) 1 Q. B. 413.

Judgment was reserved.

On the 19th Nov. the President delivered judgment.

The PRESIDENT.—The question arising for decision under the third-party procedure in this case is, whether under a contract of towage between the Manchester Ship Canal Company—tug owners—and the Manchester Barging Company Limited—barge owners—the former (hereinafter called the tug owners) are entitled to an indemnity from the latter (hereinafter called the barge owners) from and against a judgment obtained against the the tug owners by the owners of cargo carried upon a barge belonging to the barge owners for loss occasioned by the negligence of the tug owners.

The facts arise out of a collision in the Mersey on the 4th Feb. 1911. The tug owners' tug *St. Winifred* had the barge owners' barge *Leslie* in tow. In the course of the towing the *Leslie* collided with a steamship, the *Devonshire.* This caused damage to the *Leslie* and to her cargo. The collision and damage were due to the negligence of those responsible for the navigation of the tug *St. Winifred* and of the steamship, the *Devonshire.* The *Leslie* may be described shortly as the "innocent barge in tow." Her owners recovered judgment against the owners of the steamship *Devonshire.* Subsequently the owners of the cargo on board the barge *Leslie* (the plaintiffs in the present action, in which the barge owners have been brought in as third parties) recovered judgment against the owners of the steamship *Devonshire* and the tug owners. Under this judgment the tug owners have paid a sum of 937*l.* 4*s.* 8*d.*, and certain costs have also been paid, or are payable. The claim now made by the tug owners against the barge owners is to be indemnified in respect of that sum and costs. The contract between them was one for towage under the terms specified in a General Towage Requisition, dated the 22nd July 1907. The barge owners may be described as customers of the tug owners, in respect of the towage of barges since that date upon contracts incorporating the general terms contained in that requisition; and those terms are applicable to the contract for the towage of the *Leslie* in this particular case. The terms of the Towage Requisition are as follows: [The learned President then read the requisition set out above, and proceeded:] Certain facts were given in evidence relating to various questions which were raised in argument, which, in the view I take of the contract between the parties, need not be set out or discussed. The tug owners' contention was that there was an implied contract of indemnity. The barge owners' contention was that there was not; and, alternatively, that if there was, they were freed from liability on other grounds which were pleaded, and to which the facts referred to related. The argument for the tug owners was that they were relieved by the contract from all liability and from all loss, however incurred or caused, while the towing was carried out; and that consequently there was in their contract with the barge owners an implied term that they should be indemnified from all liability and loss whatsoever. Authorities like *Hamlyn* v. *Wood* (1891, 2 K. B. 488), *The Moorcock* (6 Asp. Mar. Law Cas. 357, 373; 14 P. Div. 64), *Kruger and Co.* v. *Moel Tryvan Co.* (10 Asp. Mar. Law Cas. 416, 465; (1906) 2 K. B. 801; (1907) A. C. 272) were relied upon.

In my view the contract in this case is an ordinary business contract which speaks for itself, and which does not require any implied term to give it efficiency, or to give it the effect which was intended by the parties. Dealing with contracts of indemnity and third party procedure, Bowen, L.J. in *Birmingham and District Land Company* v. *London and North-Western Railway Company* (34 Ch. Div. 274) says as follows: "I think it tolerably clear that the rule"—*i.e.*, the third party rule—"when it deals with claims to indemnity, means claims to indemnity as such either at law or in equity. In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract; by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do. I say in nine cases out of ten, for there may possibly be a tenth. Thus there might be a statute enacting that under certain circumstances a person should be entitled to indemnity as such, in which case the right would not arise out of a contract, and I do not say that there may not be other cases of a direct right in equity to an indemnity as such which does not come within the rule that all indemnity must arise out of contract express or implied."

The contract in this case is between A. (the tug owners) and B. (the barge owners). It means that A. is not to be responsible or liable to B. for damage, injury, or loss however occasioned; not that A. is not to be responsible or liable to anyone. In the circumstances of this case A. was responsible and liable to, and suffered judgment at the suit of, other persons—namely, the cargo-owners, for the negligence of A. A. seeks to say, not merely, "I shall not be responsible or liable to you, B., for any damage," but, further, "You, B., are responsible and liable to me, A., for any such damage, &c., for which I may be responsible or liable to the rest of the world." The contract does not say so. I do not believe that the parties intended that it should impliedly mean that. To make such an implication is not in any sense necessary for the efficient performance of the contract. To introduce such an implied term would, I think, be to make a wholly different contract from that which was made, or which the parties intended to make.

Many instances might be given of liability by the tug owners to persons entirely unconnected with either themselves or the barge owners, as well as to persons in their employ, which the contention of the tug owners would comprise, and which the general words of the contract would cover according to that contention—*e.g.*, where an independent craft was run down, even wilfully, by the tug master; where personal injuries were suffered by the crew of the tug by reason of defective tackle provided by the employer, in respect of which a judgment might be obtained in a common law action for negligence; or where compensation was awarded for injuries caused to them under the Workmen's Compensation Act 1906. Could it be said that the barge owners by this contract had impliedly agreed to indemnify the tug owners against damages or loss in such cases, or that it was contemplated between the parties that such damages or loss should be borne by the barge owners? I think not. No doubt parties in similar situations can make contracts of indemnity, as was done in the case of *The Millwall* (10 Asp. Mar. Law Cas. 15, 110, 113; (1905) P. 155); but they should make them in express terms.

In this contract there is no express indemnity, and I find that no indemity is implied. Judgment, therefore, must be entered for the third parties, with costs.

Solicitors for the owners of the *St. Winifred*, *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the owners of the *Leslie*, *Bateson, Warr*, and *Wimshurst*, Liverpool.

Monday, Jan. 27, 1913.

(Before BARGRAVE DEANE, J.)

THE KANAWHA. (a)

Collision—Pleadings—General allegation of negligence—Application for particulars—Failure to give particulars—Allegation struck out—Power of court to give effect to negligence proved but not pleaded.

A vessel at anchor was run into and damaged by a vessel in motion.

In an action for damage, the owners of the vessel at anchor delivered a statement of claim in which they alleged that those on the vessel colliding with them did not take proper and seamanlike measures to keep clear.

A summons for particulars of the measures which should have been taken was dismissed by the registrar.

The defendants appealed to the judge in chambers.

On appeal:

Held, that as the plaintiffs could give no particulars the allegation should be struck out, the judge at the trial having power to deal with any negligence proved but not pleaded.

DAMAGE ACTION.

Appeal by the defendants in the action from a decision of the assistant registrar to the judge in chambers for an order that the plaintiffs should give certain particulars of an allegation in par. 6 of the statement of claim.

The case made by the plaintiffs, the owners of the steamship *Cambria*, was that shortly before 11 p.m. on the 8th Oct. 1912 the *Cambria*, a steel screw cable steamship, was lying moored fore and aft, with her head up stream, off the end of Enderby's Wharf on the south side of the river Thames in Blackwall Reach. The weather was foggy and the wind easterly, a light air, and the tide was quarter flood. The *Cambria* had two anchor lights, one in her starboard fore rigging and one at her stern, duly exhibited and burning brightly; her fog bell was being duly sounded at short and regular intervals, and a good look-out was being kept on board her. In these circumstances the two masthead lights of the *Kanawha*,

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

which appeared to be heading up the river, were seen over the top of the fog away off the starboard quarter of the *Cambria*. The fog bell of the *Cambria* was then kept ringing continuously, and shortly afterwards the steam tug *Sun II.* loomed in sight. The *Sun II.* was heading towards the *Cambria*, and she directly afterwards with her stem struck the starboard side of the *Cambria* about abreast of the funnel a heavy blow, and then rebounding struck the *Cambria* a glancing blow leading forward. Shortly afterwards the *Kanawha* fouled the starboard cable of the *Cambria*, carrying it away. The *Cambria* sustained considerable damage by reason of the matters hereinbefore set forth.

The plaintiffs charged the defendants, the owners of the *Kanawha* and the *Sun II.*, with not keeping a good look-out; with neglecting to keep clear of the *Cambria*; with not taking proper and seamanlike measures and precautions to prevent the *Kanawha* and the *Sun II.* from doing damage.

After the statement of claim was delivered, the defendants took out a summons before the registrar asking for an order that the plaintiffs should deliver particulars of the proper and seamanlike measures which they alleged should have been taken to prevent the *Kanawha* and the *Sun II.* from doing damage.

On the 10th Jan. the assistant registrar, who heard the summons, dismissed the application with costs.

The defendants appealed to the judge in chambers.

The appeal was heard by Bargrave Deane, J., sitting in chambers, on the 27th Jan. 1913.

Lewis Noad for the appellants, the owners of the *Kanawha*.—The registrar should have made the order. The defendants are entitled to know what case is to be made against them under this general accusation.

D. Stephens for the respondents, the owners of the *Cambria*.—The plaintiffs cannot give the particulars asked for; their ship was moored and she was run into by the defendant vessel. The charge is pleaded to cover any negligence which may be proved at the trial.

BARGRAVE DEANE, J.—As the plaintiffs can give no particulars in support of the allegation that the defendants did not take proper and seamanlike precautions to prevent the *Kanawha* and *Sun II.* from doing damage, I shall amend the pleading by striking out that allegation. If at the trial the plaintiffs make out further charges of negligence against the defendants which have not been pleaded, the court can give effect to them.

Solicitors for the appellants, the owners of the *Kanawha*, *Downing* and *Handcock*.

Solicitors for the respondents, the owners of the *Cambria*, *Walton* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 28, 1912, *and March* 4, 1913.

(Before VAUGHAN WILLIAMS, BUCKLEY, and KENNEDY, L.JJ.)

THE OLYMPIC. (a)

Wages—Seaman—Termination of service by reason of the wreck or loss of the ship—Discharge otherwise than in accordance with the terms of the seaman's agreement — Meaning of the word "wreck"—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 158, 162.

The word "wreck" in sect. 158 *of the Merchant Shipping Act* 1894 *should be construed in relation to the subject-matter of the section, and the words "wreck of the ship" in that section include such a structural injury to the hull of a ship as will render her incapable of continuing the maritime adventure in respect of which the seamen's contract is entered into.*

A seaman and fireman entered into an agreement to serve on a passenger steamship, the voyage being described as "from Southampton to New York (*via Cherbourg and Queenstown*) *and* (*or*) *if required to any port or ports within the North Atlantic and South Atlantic Oceans trading as may be required until the ship returns to a final port of discharge in the United Kingdom for any period not exceeding twelve months." There was also a clause in the agreement which provided that "if from any cause the said ship cannot sail on the date appointed or should the vessel put back into port through accidents the said crew will be transferred to any other vessel belonging to the same owners taking the place of the vessel herein named, at the same rate of wages and in the several capacities herein named."*

The day the steamship started from Southampton she came into collision with a warship, and on the following day returned to Southampton. The Board of Trade required that she should surrender her passenger and free-board certificates. The steamship had to go to Belfast to be repaired; the repairs took about two months to complete. The voyage was abandoned, no other vessel taking the place of the steamship the seamen had agreed to serve on.

The seamen were dismissed on the return of the steamship and given three days' pay. They claimed in addition to the three days' wages earned by them a further sum of one month's wages as compensation for being discharged otherwise than in accordance with their agreement without fault on their part and without their consent. This claim was made by them under sect. 162 *of the Merchant Shipping Act* 1894. *The owners refused to pay them compensation on the ground that the service terminated by reason of the wreck of the ship. This contention was based upon the wording of sect.* 158 *of the Merchant Shipping Act* 1894.

Held, by the Court of Appeal (*Vaughan Williams and Buckley, L.JJ., Kennedy, L.J. dissenting*),

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

affirming the decision of Bargrave Deane, J., that on the facts proved the service had terminated by reason of the wreck of the ship, and that the seamen had been rightly dismissed and were not entitled to a month's wages.

Held, by Kennedy, L J. dissenting: The word "wreck" means such a disaster to a ship as destroys her character as a ship, and also that the contract with the seamen was not dissolved by the damage to the ship, so that if the defendant owners of the ship chose for their own pecuniary advantage to discharge the seamen otherwise than in accordance with the terms of their contract, they were liable to pay the compensation contemplated by sect. 162 *of the Merchant Shipping Act* 1894.

Appeal from a decision of Bargrave Deane, J. by which he held that a seaman and fireman serving on board the *Olympic* were not entitled under sect. 162 of the Merchant Shipping Act 1894 to damages for wrongful discharge. The question was referred to the Admiralty Court by the justices of the borough and county of the town of Southampton under the provisions of sect. 165, sub-sect. 3, of the Merchant Shipping Act.

The appellants, T. D. Fraser and William Weller, served on board the *Olympic* as fireman and seaman respectively under articles which they signed on the 16th Sept. 1911, under which they were entitled to 6*l.* and 5*l.* per month respectively.

The voyage for which they agreed to serve was described as from Southampton to New York (*viâ* Cherbourg and Queenstown), and (or), if required, to any port or ports within the North Atlantic and South Atlantic Oceans, trading as may be required until the ship returns to a final port of discharge in the United Kingdom, for any period not exceeding twelve months.

There was also a clause in the articles which provided that "if from any cause the said ship cannot sail on the date appointed, or should the vessel put back into port through accident, the said crew will be transferred to any other vessel belonging to the same owners taking the place of the vessel herein named, at the same rate of wages and in the several capacities herein named."

On the 20th Sept. the *Olympic* sailed from Southampton with the appellants on board, and, while proceeding on her voyage to New York, was run into off Cowes by H.M.S. *Hawke* and sustained damage.

On the 21st Sept. the *Olympic* returned to Southampton.

On the 22nd Sept. the owners of the *Olympic* tendered to the plaintiffs three days' wages, and refused to pay more.

The appellants claimed to be entitled to the sums of 6*l.* and 5*l.* being a month's wages, on the ground that they had been discharged otherwise than in accordance with the terms of the agreement before one month's wages had been earned and without their consent.

The owners refused to pay any such sum on the ground that the only wages the men were entitled to were wages up to the time of the termination of the service, and that the service had terminated by reason of the wreck of the ship.

On the 25th Sept. the appellants applied for a summons against the respondents claiming the sums of 6*l.* and 5*l.*

On the 29th Sept. the summons was heard at the petty sessions for the borough and county of the town of Southampton, when the magistrates were equally divided, and the summons was adjourned *sine die.*

On the 11th Oct. the summons was by consent of the respondents restored to the list, and with the consent of all parties the justices referred the claim to the Admiralty Court under the provisions of sect. 165, sub-sect. 3, of the Merchant Shipping Act 1894.

On the 29th Dec. the parties to the summons agreed that the evidence adduced before the magistrates should be treated as a statement of facts, and that the questions arising between the parties should be decided on the evidence so given.

The men stated in evidence that they had been discharged without their consent before they had earned a month's wages, and otherwise than in accordance with the articles. That they had tried to get other ships and had failed and that they had lost more than the 6*l.* and 5*l.* claimed. They admitted that the *Olympic* could not have proceeded to America and that they would not have liked to proceed in her in the condition in which she was after the collision, and that only eighteen days would have been occupied on the voyage.

The owners proved that the repairs would take some months to do, that the only place they could be effected was at Belfast, and that the vessel's passenger certificate was withdrawn by the Board of Trade. They also proved that no other steamship ran in the place of the *Olympic*, so that the crew could not be transferred.

The case came before the Admiralty Court on the 5th and 6th March 1912.

The manager of the White Star Company was called and proved that the Board of Trade first made a verbal demand for the *Olympic's* passenger certificate, and that on his requesting the Board of Trade to make the demand in writing, the Board of Trade on the 21st Sept. 1911 sent him the following letter: "In confirmation of request made to you by Captain Clarke, I have to request that you will be good enough to return the passenger certificates and freeboard certificates of the *Olympic* to this office pending the completion of repairs."

The manager then surrendered the two certificates asked for, and the Board of Trade then wrote on the letter which contained the demand, "Received from the White Star Line, Passenger Certificate and Freeboard Certificate of the *Olympic.*—J. W. H. Clarke, Surveyor, Southampton, 22.9.11."

The certificates were returned about 29th Nov. 1911.

The following are the material sections of the Merchant Shipping Act 1894:

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

162. If a seaman, having signed an agreement, is discharged otherwise than in accordance with the terms

thereof before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying that discharge, and without his consent, he shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage caused to him by the discharge not exceeding one month's wages, and may recover that compensation as if it were wages duly earned.

165. A proceeding for the recovery of wages not exceeding fifty pounds shall not be instituted by or on behalf of any seaman or apprentice to the sea service in any superior court of record in Her Majesty's dominions, nor as an Admiralty proceeding in any court having Admiralty jurisdiction in those dominions, except . . . (iii), where a court of summary jurisdiction acting under the authority of this Act, refers the claim to any such court.

Emanuel for the seaman and fireman contended that the facts of the case brought them within the provisions of sect. 162 and not within sect. 158, and cited and referred to the following cases:

Legge v. *Boyd*, 14 L. J. 138, C. P.
The Elizabeth, 2 Dods. 403;
Constable's case, 5 Cokes Rep. 106*a*;
Rex v. *Forty-nine Casks of Brandy*, 3 Haggard, 257;
Rex v. *Two Casks of Tallow*, 3 Haggard, 294;
Union Steamship Company of New Zealand Limited v. *Melbourne Harbour Trust Commissioners*, 5 Asp. Mar. Law Cas. 222; 50 L. T. Rep. 337; 9 App. Cas. 365, at p. 368;
Merchant Shipping Act 1894, s. 331 (*a*).

Laing, K.C. and *Raeburn* for the owners of the *Olympic* referred to and cited the following cases:

The Woodhorn, 92 L. T. Jour. 113;
Austin Friars Steamship Company v. *Strack*, 93 L. T. Rep. 169; 10 Asp. Mar. Law Cas. 70; (1905) 2 K. B. 315;
Sivewright v. *Allen*, 94 L. T. Rep. 778; 10 Asp. Mar. Law Cas. 251; (1906) 2 K. B. 81, at p. 85;
Tindle v. *Davison*, 66 L. T. Rep. 372; 7 Asp. Mar. Law Cas. 169;
Taylor v. *Caldwell*, 8 L. T. Rep. 356; 3 B. & S. 826;
Nicholl v. *Eldridge*, 84 L. T. Rep. 804; 9 Asp. Mar. Law Cas. 209; (1901) 2 K. B 126;
Stroud's Judicial Dictionary;
The Century Dictionary;
Kay's Law of Shipmasters and Seamen.

They contended that the service had terminated by the wreck of the vessel.

April 1, 1912.—BARGRAVE DEANE, J.—In this case two members of the crew of the *Olympic* of the White Star Line, belonging to the Oceanic Steam Navigation Company, brought a plaint before the magistrates at Southampton, claiming wages for their services, one as fireman and the other as seaman, on board the *Olympic*, on an agreement contained in the ship's articles, as follows: They agreed to serve on a voyage "from Southampton to New York (*viâ* Cherbourg and Queenstown), and (or), if required, to any port or ports within the North Atlantic or the South Atlantic Oceans, trading as may be required until the ship returned to a final port of discharge in the United Kingdom for any period not exceeding twelve months." They joined the ship on the 20th Sept. in last year, and the vessel proceeded from Southampton on her voyage to New York, but, as is well known, she came into collision off Cowes in the Isle of Wight, on that same day, with H.M.S. *Hawke*, and received such serious damage that she had to go back to Southampton, where she discharged her cargo and her passengers, and, after being patched up sufficiently to enable her to proceed to Belfast, she went to Belfast, where alone she could be properly docked, and was there repaired. She was not able to continue her engagements until the 29th Nov. when she started for New York, and did her voyage.

The crew claim their wages—these two men—I need not trouble about anybody else—under the provisions of the Merchant Shipping Act 1894, s. 162, which is as follows: [His Lordship read it, and continued:] These two men's wages were 6*l*. and 5*l*. a month, and they have claimed that amount as having been discharged without fault, and therefore improperly. The answer to the claim is sect. 158 of the Merchant Shipping Act 1894 "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship . . . he shall be entitled to wages up to the time of such termination, but not for any longer period." Those are the two sections which are relied upon —on behalf of the plaintiffs sect. 162 and on behalf of the defendants sect. 158—and the whole question turns upon the meaning of the words "wreck or loss of the ship" in sect. 158. There is no definition in the Merchant Shipping Act or in any of the Acts of what "wreck" is, and it is agreed, practically, between the parties that I have got to base my decision upon the meaning of the word "wreck"—whether the *Olympic* was a "wreck" within the meaning of the section, or whether she was not. If she was a wreck, then sect. 158 applies; if not, then it does not apply.

A good many cases have been cited to me on one side and the other. Counsel for the claimants was unable to adduce any case where it had been held that a ship was or was not a wreck within the meaning of the Merchant Shipping Act; but he has based his argument upon various cases in which goods have been decided to be wreck or not wreck, and those cases are *Legge* v. *Boyd* (14 L. J. 138, C. P.); *Rex* v. *Forty-nine Casks of Brandy* (3 Haggard, 257); *Rex* v. *Two Casks of Tallow* (3 Haggard, 294). There, undoubtedly, the question was raised as to whether certain goods which were found ashore were or were not *wreccum maris*. It is an odd word, *wreccum*. Where it comes from I am not quite sure. I believe it comes from the old Saxon, which is *wraccum*—but those cases do not in my opinion apply. They are cases in which the question arose whether goods which undoubtedly were landed ashore in two of the cases out of a vessel which had been damaged belonged to the owner of the foreshore or some other person. It was a question of a claim for property arising out of what was or what was not *wreccum maris*. The other case was a case in which the customs claimed duty on tobacco brought ashore out of a ship for its protection for fear it should be lost, and the question arose whether it was *wreccum maris* or not. But that does not affect the question of what the meaning of the word "wreck" is in sect. 158, because I take it that goods may be *wreccum maris* on one principle, whereas a ship cannot be treated quite in the same way.

In my opinion, this vessel was, within the meaning of the words of sect. 158, "a wreck." The words of the section are "wreck or loss." Wreck must be something short of loss. A

vessel may founder at sea; well, she would be a loss and not a wreck. A wreck is something in which the vessel falls short of being a loss, and in the case of the *Elizabeth* Sir William Scott uses the word *semi naufragium.* We use the words partial wreck nowadays, and we use the words constructive wreck, "constructive total loss." We recognise qualifications of losses and wrecks, and the whole question, I think, depends upon this: Was this vessel so injured and damaged that she ceased to be, so far as her owners were concerned, a ship of any service to her owners?

There is a case which I mentioned in the course of the argument, *The Suevic* (11 Asp. Mar. Law Cas. 149; 99 L. T. Rep. 474; (1908) P. 292). If the argument of counsel for the claimant applies —that a wreck is any vessel which is cast on shore —then the *Suevic* was cast on the shore; but half of her is afloat to this day. She was cut in two. The fore part, which was cast on the rocks, was left there, and, I suppose, has since broken up. The after part was towed away, and a new fore part fitted to it, and she is still at this moment a navigable ship. She was wrecked in one sense and not in another; and one has to look in every case which comes before the court to see what are the true facts of the case, to see in what way those facts come within the section. I think the nearest approach to this case is the case of the *Elizabeth* (*sup.*), to which I have referred. There a vessel was in danger of damage—I think she was burnt—and she was eventually repaired, and the master, in the exercise of his discretion—it was before the Merchant Shipping Act—discharged the crew. It was in a foreign port. He provided that the crew should be sent home. Everything was done, as far as possible, to mitigate the damage that they sustained by being discharged; but they were discharged, and an action was brought by one of them for wages, similarly to this case. This is what Sir William Scott said in deciding that the master was justified in discharging the crew: "I confess it appears to me that the circumstances in which this vessel was placed did vest in him an authority to discharge his crew, upon proper conditions. Here was a ship that had encountered what the law might call a *semi-naufragium*—full of water, as they themselves state, so that they could not live on board"—she caught fire and they scuttled her—"she is put into the hands of foreign carpenters for the course (a protracted course) of necessary repairs. It was doubtful whether she could at all receive such repairs as would restore her to a navigable state. It was by no means doubtful that she could not receive such repairs as would enable her to proceed till after the approach of spring in that climate had restored the seas to a navigable state, so as to allow her a passage. Is it clear law that the master, acting for his owners, could not, in such circumstances, dismiss the mariners on any terms whatever? If so, then he was bound to keep this crew in an unemployed state, living on shore, and keeping holiday all winter, at the expense of his owners, who were to continue all that time to pay, *pro opere et labore*, by virtue of the contract, though no work or labour could be performed; and thus the price of industry was to be regularly paid to unoccupied idleness! I know and feel the partiality which the Maritime Law entertains for this class of men, but it must not overrule all consideration of justice to other classes, particularly to merchants, their employers; for what is oppressive to the merchants cannot but be injurious to the mariner. The seaman cannot be ultimately benefited by that which, as far as it operates, must operate to the discouragement of navigation."

That to my mind properly states what are the principles upon which this Court has to act. The *Olympic* was so seriously damaged that she ceased to be a navigable ship. She was taken under her own steam up Southampton Water to Southampton. On the 22nd, two days afterwards, these men were discharged, and they were offered wages up to the date of that discharge. They claimed wages for a month. Was the master justified in discharging them? In my opinion he was. The men themselves, who gave evidence before the justices both agreed that it was impossible for them to continue serving in the ship, that they would not, in her condition, have continued to serve—what stronger evidence can there be of the state of the ship?—and that she was in their opinion a wreck. Beyond that I find that on the 22nd Sept. the day they were discharged, the following letter was handed to the manager of the White Star Line at Southampton by the officers of the Board of Trade: "Dear Sir,—In confirmation of the request made to you by Capt. Clarke, I have to request that you will be good enough to return the passenger certificate and free-board certificate of the *Olympic* to this office pending completion of the repairs." Thereby the Board of Trade, acting in its official capacity, forebade this vessel to proceed on her voyage, even if she could do so, because she was not in a seaworthy condition to do so. The same day the certificates were returned and on the back of this letter is this minute: "Received of the White Star Line, passenger certificate and free-board certificate of the *Olympic.*—(Signed) Clarke, Surveyor." That vessel could not proceed. She was under an embargo by the Board of Trade. She could not proceed as a passenger ship and she could not proceed to sea without getting a clearance from the port of Southampton. She eventually, having been patched up sufficiently, got a certificate to enable her to go to Belfast and no further and therefore this voyage, so far as the voyage was concerned which the men had agreed upon, was brought to a summary and proper conclusion.

In my opinion that ends the case, and I must find that these men were not entitled to recover more than the amount offered them—namely, the money due up to the date on which they were discharged, the 22nd Sept. There will be judgment for the defendants.

On the 15th April 1912, the claimants delivered a notice of appeal seeking to set aside the judgment of Bargrave Deane, J.

The appeal came before the court on the 28th Nov. 1912.

Emanuel for the appellants.

Laing, K.C. and *Raeburn* for the respondents.

The cases cited on the appeal were the same as those cited on the hearing in the Admiralty Court.

On the 4th March 1913 the following judgments were delivered:—

Vaughan Williams, L.J.—I agree with Bargrave Deane, J. that the only question

raised before him on the hearing before him in this case was whether the *Olympic* was a "wreck," within sect. 158 of the Merchant Shipping Act 1894 or whether she was not. If she was a "wreck," then sect. 158 applies; if she was not, then it does not apply.

It further seems to me that, if sect. 158 applies, the plaintiffs respectively were not discharged within the meaning of sect. 162 of the Merchant Shipping Act 1894 but the service of these seamen terminated before the date contemplated in the agreement. [His Lordship read them, and continued:]

I agree further that in construing the word "wreck" in sect. 158 of the Merchant Shipping Act 1894 one should construe the word in relation to the subject matter of the section, and should not limit the meaning of the word "wreck" to the meaning laid down in the cases decided with reference to whether goods belonged as "wreck" to the owner of the foreshore.

Sect. 158 of the Merchant Shipping Act 1894 deals with a very different subject matter; it deals with the termination of the service of a seaman before the date contemplated by the agreement by reason of certain specified causes, each of which fall within the category of involuntary causes for which neither the master nor owner on the one side, nor the seaman on the other are actively responsible. I think it follows that any damage to the ship from a cause falling within the category I have mentioned, which does not constitute a loss of the ship but of necessity terminates the service of the seaman, will come within the term "wreck" in section 158.

I think the word "wreck" means something less than total loss. I think that, in determining whether the wreck in question has terminated the service of the seaman, the tribunal which has to determine this question must first satisfy itself that the damage which is alleged to have terminated the service is physical damage caused at sea by perils of the sea to the ship; and, secondly, that such damage, although repairable, would make the ship unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture.

I think therefore that this appeal must be dismissed.

Buckley, L.J.—The question upon this appeal is as to the meaning of the word "wreck" in sect. 158 of the Merchant Shipping Act 1894. If there has not been a wreck of the ship the appellants are entitled to succeed. If there has, then they fail.

The words "wreck" or "wrack," for both were originally the same, import primarily injury, including, but not necessarily amounting to, destruction. I may speak of the wreck of a railway train, or, metaphorically, of the wreck of a woman's happiness or the wreck of a man's fortunes. The question is as to the meaning to be attributed to the word in maritime affairs. What amount of injury or destruction, and how occasioned, satisfies the words "the wreck of a ship"?

The appellants have argued that there can be no wreck of a ship unless she has touched the ground. If this were right, it would follow that a ship could never be wrecked in mid-ocean unless she went to the bottom. If by collision with another vessel or by violence of the wind and the waves she was so injured as to cease to be navigable as a ship, she would not be wrecked. The contention seems to me to be impossible. It is rested solely upon authorities which, as I shall show, have no bearing upon the question.

The word "wreck" in maritime matters is used in two senses which for the present purpose it is essential to distinguish. The first (that with which I am here concerned) is the casualty, the injurious accident, or event, which is described by the words "the wreck of the ship." The word in its other use describes goods, or something physical, which by reason of the casualty are affected in a particular manner. Goods or broken pieces of the vessel herself which in consequence of the casualty are cast into or found in the sea are described as flotsam (goods floating) or jetsam (goods thrown overboard to lighten the ship), or ligan, sometimes called lagan (goods cast overboard but buoyed so as to be capable of being recovered), or, lastly, "wreck." The characteristics of all these will be found detailed in *Sir Henry Constable's* case (5 Coke's Reports, 106*a*). As regards "wreck" in this latter sense, it is essential that the goods or articles shall have touched the ground. If they have not, they may be flotsam, jetsam, or ligan, but are not wreck. The importance of this characteristic of touching the ground was that, if the goods had ceased to float and had stranded on the foreshore, they became subject to the land jurisdiction, whereas, if that were not the case, they were within the Admiralty jurisdiction. The lord of the manor in the one case and the Lord High Admiral in the other might be entitled to claim them.

The cases of *Rex* v. *Forty-nine Casks of Brandy* (3 Haggard, 257) and *Rex* v. *Two Casks of Tallow* (3 Haggard, 294) are cases of that kind. The case of *Legge* v. *Boyd* (14 L. J. 138, C. P.) is another case of similar character, except that the question was there discussed whether the goods were wrecked because the ship was wrecked, and that led to a consideration whether the ship was wrecked. Tindal, C.J. there said that "the ship remained entire." Erle, J. repeated that statement, and added that after she was lightened she floated, and Maule, J. said that she was repaired and might have continued her voyage. The case, therefore, whatever might otherwise have been its value, is, I think, of no assistance where the ship was so injured as that she could not have continued her voyage. I may add that that case was not decided under this Act, and has no bearing except as some guide as to what in maritime matters is understood by the words "wreck of a ship." No one of these cases gives any assistance in determining the present case, for they were all decisions upon the meaning of the word "wreck" in the sense which I secondly above stated. They throw no light upon the meaning of the word when used to describe the casualty spoken of by the words "the wreck of a ship."

I therefore reject the consideration of touching the ground as having any weight in the matter we have to decide.

The one authority which deals with the meaning of "wreck" in the sense of casualty to the vessel is *The Elizabeth* (2 Dodson's Admiralty Reports, 403). The result of Sir William Scott's judgment in that case, so far as it bears upon the

question here to be decided, is, I think, that, inasmuch as the vessel had encountered what he called a *semi-naufragium* (which, as a matter of fact, meant that she was full of water and required necessary repairs to restore her to a navigable state), the seaman's contract had terminated. The judgment goes on to decide what it was that under those circumstances the seaman was entitled to receive. This was held to be gratuitous conveyance home (which from the statement at p. 404 seems to have been offered him) and payment of his wages until he arrived home. The decision is that the misfortune had arisen from *vis major*, the act of God, which neither party had in contemplation at the time of the contract, and that the circumstances vested in the master an authority to discharge the crew under proper conditions. The proper conditions or consequences of his so discharging them were then determined to be as above stated. The consequences of termination are now supplied by sect. 158 of the Act of 1894, and, even if the rule in *The Elizabeth* were held operative in this case, it would give them no more than they have received, for in the present case they were at home when discharged at Southampton.

I notice that in the present case the learned judge puts the question whether the *Olympic* was, within the meaning of sect. 158, a "wreck." It follows from what I have said that this, in my judgment, does not accurately state the question. I have not to inquire whether the ship was a wreck—that is to say, whether she had become a certain physical thing—but whether there had been a wreck of the ship—that is to say, whether a certain casualty had happened to the ship. This is not necessarily the same question. Further, I think the question is not whether the vessel had been so injured and damaged that she ceased to be a ship of any service to the owners, but a smaller question—namely, whether she had been so injured and damaged that she ceased to be a ship of service for the purposes of the adventure—the subject of the seaman's contract.

Looking to the Merchant Shipping Act 1894, I find that there are two sections which seem to me to deal with different subject-matters. The one is sect. 162, which uses the word "discharged," meaning, as I understand it, not "paid off," but "dismissed." It is a section which reproduces sect. 167 of the Merchant Shipping Act 1854 upon which *Tindle* v. *Davison* (*sup.*) was decided; but without some words in which the expression "so improperly discharged" occurred. Those words no doubt made the point more plain, but in my judgment the true construction of the present section is the same. The present section speaks of "without fault on his part justifying that discharge." Sect. 162 deals with the case where a seaman is discharged—that is, dismissed—otherwise than in accordance with the terms of his agreement, and under circumstances conferring upon him a right to a month's wages. This section is one dealing with the case of the employer dismissing the seaman without fault on the part of the seaman, and without the seaman's consent. The other section is sect. 158, and the verb there is "terminates." The section applies in an event—namely, "where the service of a seaman terminates"—and deals with that event in two aspects: first, where the termination results from something happening to the ship; and, secondly, the case where it terminates from something happening to the seaman. The latter of these is unfitness or inability on the part of the seaman to proceed on the voyage. The former is "the wreck or loss of the ship."

In this context the meaning to be attributed to these last words is, I think, *primâ facie* something which renders the ship, like the man, unfit or unable to proceed on the voyage. The section contemplates that by reason of something for which neither party is voluntarily responsible a case has arisen in which the agreement between the ship and the seaman cannot be performed because either the seaman by reason of his unfitness or inability or the ship by reason of the wreck or loss of the ship has become unable to proceed on the voyage, and the service of the seaman has terminated by reason of that fact. The wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into.

Under these circumstances the wreck of the ship for the purposes of the section includes, I think, such a structural injury to her hull as to render her incapable of continuing the adventure the subject of the contract.

I have purposely limited this to structural injury to the hull because that is all it is necessary to decide in this case. I do not say whether this is or is not exhaustive. If there has been such a structural injury to the hull as that the ship is incapable of being used as a ship for the contemplated adventure, the words of sect. 158, I think, are satisfied. It must in every case be a question of fact whether the result is such as I have stated. If, for instance, the injury be such as could be repaired within, say, twenty-four hours, it does not follow that the ship cannot perform the contemplated adventure. In every case it will be necessary to investigate what was the adventure the subject of the contract, and whether the injury is such as that it is found as a fact that such an injury has been caused as that the ship cannot continue that adventure notwithstanding that after repair she could perhaps perform some other adventure. The facts here are that, as the learned judge states, the *Olympic* was so seriously damaged that she ceased to be a navigable ship, and that the Board of Trade forbade her to proceed on her voyage because she was not in a seaworthy condition to do it. The facts found seem to me to show that, as the judge says, the agreed voyage was brought to a summary and proper conclusion.

This being the case, the services of the seaman terminated under sect. 158, and he was entitled to wages up to the termination, but not for any longer period.

This appeal therefore fails and must be dismissed.

KENNEDY, L.J.—The appeal in this case is an appeal on the part of the plaintiffs against the judgment of Bargrave Deane, J., who dismissed their claims for compensation under sect. 162 of the Merchant Shipping Act 1894.

The case is one of general importance.

The material facts are these: On the 20th Sept. 1911 the defendants' steamship *Olympic* sailed in the forenoon from Southampton on a voyage to New York. The plaintiffs were respectively a fireman and a seaman on board that

vessel. The plaintiffs had signed articles on the 11th Sept. The agreement was for "a voyage from Southampton to New York, *viâ* Cherbourg and Queenstown, and (or) if required to any port or ports within the North Atlantic and South Atlantic Oceans trading as may be required until the ship returns to a final port of discharge in the United Kingdom for any period not exceeding twelve months."

The agreement also provided that "if from any cause the said ship cannot sail on the date appointed, or should the vessel put back into port through accident, the said crew will be transferred to any other vessel belonging to the same owners taking the place of the vessel herein named, at the same rate of wages and in the several capacities herein named."

The wages to which the plaintiffs were entitled under the agreement were 6*l.* per month and 5*l.* per month respectively.

Within a short time after leaving Southampton, the *Olympic* came into collision with H.M.S. *Hawke* and sustained damage to her hull at a point on the starboard side about 90ft. forward from her stern. Anchor was dropped and she remained at anchor until the 21st Sept., when she steamed back into Southampton.

The damage was local, but it was so far serious that she could not proceed to sea again on an Atlantic voyage without some permanent repairs. After receiving temporary repairs at Southampton, she proceeded under her own steam to Belfast and remained there for some time whilst those repairs were being executed, and it was not until the 29th Nov.—*i.e.*, almost nine weeks after her mishap—that the *Olympic* resumed her place in the defendants' Atlantic service. Her passenger and freeboard certificates were on the 22nd Sept., upon an official application, returned to the Board of Trade surveyor at Southampton, to whom, in accordance with the terms of the passenger certificate, the defendants were bound to report in writing within twenty-four after the occurrence "any material damage affecting the seaworthiness of the *Olympic* either in the hull or in any part of the machinery," and who, of course, upon receiving such report of this mishap, was bound to require the return of these documents, in order to ensure before she made an Atlantic voyage that sufficient repairs had been executed, and that the nature of the repair was such as not to alter the position of the centre of the load-line disc. These certificates were returned to the defendants a day or two before the *Olympic* sailed for New York on the 29th Nov.

On the same 22nd Sept., the plaintiffs, without their consent, were discharged by the defendants, together with the rest of the crew of the *Olympic*. The defendants have either paid, or have always been willing to pay, their wages up to that date, but have refused to pay them any compensation for the loss of wages which the plaintiffs would have earned if the contract period of service had been completed.

Hence the present action, which the plaintiffs have brought, claiming to be paid compensation in the nature of wages under sect. 162 of the Merchant Shipping Act 1894.

The plaintiffs' claims were brought in the first instance before the justices at Southampton, sitting as a court of summary jurisdiction under the Merchant Shipping Act 1894, s. 164. The circumstances which I have stated in regard to the plaintiffs' engagement, service, and discharge, and also their pecuniary loss, inasmuch as they were in fact unable to get their employment, were duly proved. The justices, after hearing this evidence, referred the claims to the Admiralty Division of the High Court under the provisions of the Merchant Shipping Act 1894, s. 165 (iii.). There never has been any dispute as to the facts There has never been any suggestion that the plaintiffs committed any fault justifying their discharge without their consent. Nor has any controversy been raised by the defendants as to the amount of the compensation not exceeding one month's wages which the plaintiffs are entitled to recover, if sect. 162 applies to this case, although it appears from the evidence that in ordinary course the *Olympic's* voyage to New York and back would have occupied a period variously stated to be seventeen or eighteen or twenty-one days. The defendants' contention is that sect. 162, and which would seem *primâ facie* to be applicable to the facts of the present case, is not the section to be applied, but that the rights of the parties are governed by sect. 158. That section is in substance and without any material alteration of language a re-enactment of sect. 185 of the Merchant Shipping Act 1854.

It is indisputable that, if the defendants are right in their contention that this section is applicable to the circumstances of the present case, the plaintiffs' claims cannot be allowed. The defendants, as I have already stated, have either paid or been willing to pay them their wages up to the 22nd Sept., when they were discharged, as I have said, at Southampton.

The question is whether the facts bring the case under sect. 158 as the defendants contend or not. Have the services of these seamen, within the true meaning of this section, terminated before the date contemplated in the agreement by reason of the wreck or loss of the *Olympic?* Or, in other words, did that which happened to the *Olympic* constitute a wreck or loss of the *Olympic*, whereby the voyage contract of the seamen on board of her was determined so that they could rightly be discharged by her owners without any compensation at all?

Bargrave Deane, J. has held that this question must be answered in favour of the shipowners. I am unable to concur in his decision. It is a decision which so materially affects the relative rights of seamen serving under voyage contracts and of those whom they serve that I feel it to be my duty to deal with it at some length, especially as I have the misfortune to differ from my brethen in this court as well as from the learned judge in the court below.

I think it will be the most convenient course, for the case of clearness, if I indicate, in the first place, the grounds of my dissent from some points in the reasoning of his judgment.

After citing sects. 158 and 162 of the Merchant Shipping Act, the judgment commences with the statement that, if the *Olympic* was a wreck, then sect. 158 applies; if she was not, then it does not apply. This is true; but, at the same time, it is, in my view, important, in construing the section, not to regard that word alone, but also to consider the language which immediately precedes it.

The enactment, as I have said, continues, and is an almost literal re-enactment of sect. 185 of the Merchant Shipping Act 1854, and, as it seems to me, the Legislature, when alike in the earlier and the later Act it used the expression "where the service of a seaman terminates before the date contemplated by the agreement by reason of the wreck or loss of the ship," is referring to two events, wreck and loss, which it regarded as being, at the time of the passing of the Act, recognised causes of termination—viz., the termination by wreck and the termination by loss.

It is, therefore, material in seeking the true interpretation of the statute, and finding out, if we can, what "wreck" denotes, to consider by reason of what degree or kind of misfortune (to use a neutral word) to his ship it was, at the time of the passing of the Act of 1854, recognised that a seaman's services terminated before the date fixed by his agreement, by which words I understand to be intended came automatically to a conclusion.

The learned judge, after stating the question in the words which I have quoted, proceeds to consider what "wreck" ought to be held to mean. I agree with him that we are not materially assisted by the decisions or the dicta to be found in the cases to which he refers—*Legge* v. *Boyd*, *Rex* v. *Forty-nine Casks of Brandy*, and *Rex* v. *Two Casks of Tallow* (*sup.*). I agree that the law to be deduced from them as to *wreccum maris*, which included both parts of ships and sea-borne cargo, is not pertinent to our present inquiry. But when the judgment goes on to found itself upon the theory that "the words of the section are 'wreck' or 'loss'; wreck must be something short of loss . . . a wreck is something in which the vessel falls short of being a loss," I must respectfully confess my inability to see any sort of foundation in the language of the section for such an assumption.

When we read in the text of sect. 158 "terminates by reason of wreck or loss," the natural and the only necessary inference, as it appears to me, is that "wreck" and "loss" refer to two events either of which may happen to a vessel, and either of which the Legislature recognises as terminating the services of a seaman serving on board that vessel. There is nothing in the text, grammatically considered, which warrants the learned judge's assumption that the first of the two events mentioned must be something less serious than the second. If any inference from the collocation of the words is justifiable, it is, I think, that as "wreck" precedes "loss" the Legislature intends to say "wreck or any other kind of loss."

There are two other matters upon which stress appears to be laid in the judgment of the court below.

The first of these is the judgment of Lord Stowell in the case of *The Elizabeth* (2 Dods. 403). With this I think it will be more convenient to deal somewhat later. The other matter is the requirement of the Board of Trade that the passenger and freeboard certificates should be returned to their Southampton officer. This, as I have said, was in the circumstances of such an incident a matter of course. The learned judge, however, relies upon this action as constituting an embargo by the Board of Trade which brought this voyage so far as the voyage was concerned which the men had agreed upon to a summary and proper conclusion. If this comparison of the action of the Board of Trade to an "embargo" is just, it is in my view clear that it creates an argument in favour not of the defendants but of the plaintiffs. The embargo which prevents a laden ship from proceeding from port on her voyage does not dissolve the mariner's engagement, any more than it dissolves the contract between the shipowner and the merchant whose cargo has been loaded. Referring to such an embargo, Lord Tenterden, in his Law of Merchant Ships and Seamen (5th edit., p. 450, 14th edit., p. 252) says: "The latter case does not in general dissolve the contract between the owners and merchant by the law either of France or England, yet it may be reasonable on such an occasion to discharge the greater part of the mariners, who may readily find in other ships an employment equally beneficial to themselves, and are therefore not likely to sustain or recover special damage to any considerable amount by the non-performance of the contract made with them." In this sentence one of the greatest of judicial authorities on matters of shipping clearly indicates his opinion even in the case of the embargo of a laden ship—*i.e.*, in the case of an obstacle to the prosecution of the voyage imposed by the Government, an obstacle of indefinite and unascertainable duration (which the detention for repairs is not)—that, while, in his own interest and in order to save himself the risk of expense, it may be a reasonable and indeed very prudent step on the part of the shipowner to discharge the greater part of the crew, yet, if that step is taken, the shipowner must compensate those whom he so discharges for the loss of the wages during the unfulfilled residue of the contract period, unless, as is likely enough, they find equally remunerative employment in another ship. And I may add that what is true of an embargo by the Government to which the ship belongs is true also of seizure for temporary purpose by a hostile Power. The same learned author at a later page, summarising the judgment of the King's Bench delivered by Lord Ellenborough in *Beale* v. *Thompson* (1803, 3 Bos. & Pull. 405), says: "The court thought it unnecessary to decide in this case whether or not the dissolution of contracts for freight and wages is the necessary effect of perfect and complete capture, where the right of the original proprietor is not re-vested by subsequent recapture nor recognised as continuing in force by any judgment or authoritative act of restitution on the part of the capturing nation; considering this as an act of hostile seizure with a view to measures of retaliation, if they should ultimately be thought just and necessary, but of subsequent restitution and abandonment of the right of seizure, on the part of the Power by whom the seizure had been made; and observing that there was no case where property so dealt with had been considered as captured, or the contract, for freight, or wages, dissolved." Briefly, then, if the action of the Board of Trade is, as the learned judge has held, to be likened to an embargo, it was not an act which operated in any way to terminate, in the eye of the law, the seaman's contract of service on board the vessel so detained. If in either case the shipowner prefers in his own interest to discharge the seamen rather than to keep them

on the ship's articles so that they can have the advantage of their contract of service, he must pay compensation for such loss, if any, as they actually sustain in consequence, the amount of which by virtue of sect. 162 of the Merchant Shipping Act 1894 has now been limited to a sum not exceeding one month's wages.

I come now to the consideration of the case of *The Elizabeth* (2 Dods. 403), which I have already mentioned, which was decided by Lord Stowell in 1819. I agree with the learned judge in the Admiralty Court that it proceeds upon principles which ought to be affirmed. But, in my opinion, when the case is rightly apprehended, the application of them to the facts of the present case, so far from supporting his judgment, justifies the present appeal. The *Elizabeth*, in June 1818, sailed from the United Kingdom to St. Petersburg and back to Portsmouth. The plaintiff was a seaman on board, engaged for the whole voyage, outward and homeward. She sailed from St. Petersburg on the 25th Sept. with a homeward cargo, and, two days later, without the default of any person, ran on a reef near the Island of Gothland. After the cargo had been unloaded, she was with much difficulty got off the reef by the exertions of the crew and with native assistance, and was carried to Ostergam. So severe were the injuries to the *Elizabeth*, that she then filled with water, and the crew could not stay on board. "It was doubtful," in Lord Stowell's words, "whether she would at all receive such repairs as could restore her to a navigable state. It was by no means doubtful that she could not receive such repairs as would enable her to proceed till after the approach of spring in that climate had restored the seas to a navigable state." The master seeing that if he kept them his owners would be put to great expense for several months, determined to discharge the members of the crew, of whom the plaintiff Brokershaw was one. The crew protested against being thus discharged before the service for which they had been engaged had ended. The master persisted, discharged them, and sent them home without paying them either the expenses of the voyage home or compensation. The plaintiff sought redress in the Admiralty Court. He claimed (1) those expenses, (2) wages up to the time when in fact the *Elizabeth*, after having been repaired in Sweden and sailed for Portsmouth, arrived at Portsmouth in April 1819. What did Lord Stowell decide? So far as regards the expenses, he decided (and the present law is the same) that the plaintiff being discharged in a foreign port was entitled to the expenses of his passage home. That does not affect the present case. But he also decided that while the master had a right in the circumstances to discharge the crew, and therefore the plaintiff was not entitled to claim wages until the actual return of the *Elizabeth* to Portsmouth in April 1819, the exercise of the right involved a liability on the part of the shipowner not merely to pay the expenses of the homeward passage of the seamen, but also to pay compensation to them for the loss of the wages occasioned by their discharge. In other words, while he held that it was, in the language of Lord Tenterden, which I have cited in reference to the embargo, in the interests of the shipowners reasonable for the master to discharge the crew, the contract with the seamen was not dissolved—did not (to use the language of sect. 158) "terminate" upon the happening of the disaster to the ship; and that if their services were terminated by the master's act, the owner thereupon became liable to pay compensation to the seaman for the loss of the wages which he could have earned on the voyage for which he had contracted to serve. That is, in principle, exactly what the plaintiffs claim to be their right in the present case; it is the right which the law has recognised in sect. 162, while it recognises in the enactment limiting the amount of compensation recoverable by the provision in favour of the shipowner that the seaman's compensation shall not exceed one month's wages. Lord Stowell, not being fettered by any such statutory limitation, awarded the plaintiffs in the case of the *Elizabeth* wages up to the time of their being landed in their own country, and this was in effect, though not in intention, giving them wages for the whole of the period which the homeward voyage of the *Elizabeth* would have lasted, if she had not been damaged, for Lord Stowell (p. 410) says: "They have all that they could have had under their first contract; they are set down where they were taken up in their own country, and with some money in their pockets, and open for further employment." The damage of the *Elizabeth*, be it observed, was incomparably greater than that suffered by the *Olympic* in the present case. She actually filled with water, and the crew could not stay on board. In the present case, the damage to the *Olympic* was damage only to a section quite small as compared with the whole hull; she remained navigable, although, until repaired, unfit for an Atlantic voyage.

It was, indeed, very doubtful, in the case of the *Elizabeth*, whether the vessel could ever be repaired; it was never doubtful in the case of the *Olympic*, and it was, in fact, a matter only of some nine weeks. And yet, in his judgment, Lord Stowell would not describe even the case of the *Elizabeth* as "Naufragium," "Wreck," but as "Semi-Naufragium," "A half wreck," and, as I have said, would not hold that the services of the seamen serving on her to have been "terminated" by the disaster, but held them to be terminable by the owner subject to the right—in Lord Stowell's time not a statutory but an equitable right—to be paid wages as and from the period which I have stated from the report. The principle of the decision is that which since 1854 has been embodied in the Merchant Shipping Acts—in sect. 185 of the Act of 1854, and in sect. 162 of the Act of 1894. The only just inference from his judgment in the *Elizabeth* is, in my mind, that if Lord Stowell had had to apply the Merchant Shipping Act 1894 in the present case, he would have applied sect. 162, and not sect. 158. He would have said to the other person: "It is to your interest, no doubt, to discharge your seamen, but if you do so, you are discharging them otherwise than in accordance with the terms of your contract with them, and you must therefore pay them that compensation which in such circumstances sect. 162 provides.

I have now dealt with the points upon which the defendants in the present action rely. I proceed to deal, as shortly as the importance of this case permits, with the case, as it presents itself to me, generally.

Let us consider in the first place what is the meaning of the word "wreck" in ordinary parlance and apart from the context of sect. 158. Would anyone, sailor or layman, say that the *Olympic*, as she lay at anchor in the Solent after the collision, or when afterwards she was navigating the waters of the Solent under steam on her way back to Southampton, was a "wrecked" ship, or describe the disaster as the "wreck" of the *Olympic?* In my view "wreck" means such disaster caused by collision with some external object, be it stationary, such as a rock, or moving, as, *e.g.*, another ship or some substance floating in the waves, as destroys her character as a ship, and reduces her practically to the condition which, speaking from memory, I think has been judicially described in the case of a wooden ship as a "congeries of planks." I think that this is what would be ordinarily understood. If one turns to the dictionaries, I find Webster (New International Dictionary) describes "wreck" as "that which has been wrecked or in a state of ruin; the remains of anything ruined or fatally injured." Johnson describes "wreck" as "destruction by being driven on rocks or shallows at sea; destruction by sea," and the verb "To wreck" as "To destroy by dashing on rocks or sands." Of course, neither ordinary parlance nor dictionary is conclusive where we have to construe a word in a particular context. Is there any reason in this context in which we find "wreck" in sect. 158 of the Merchant Shipping Act to induce us to give "wreck" not its ordinary meaning, but some less serious meaning which will under the term "wreck" include, as the defendants here contend, such a damage by collision as, although it does not render the ship innavigable, requires some two or three months' repair in order that she may safely carry passengers and cargo on an intended Atlantic voyage? In my humble judgment the context in sect. 158 plainly indicates the reverse. The words are, "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship." The maritime law, as it existed at and before the time of the Act of 1854 was strict—one might almost be tempted to say harsh—towards the seaman on account of the rigidity with which the indissoluble character of his contract was maintained in the face of misfortune to the ship on which he served. The "wreck" which was held to "terminate" his service was a wreck in the fullest possible sense of the word. One quotation is, I think, a sufficient illustration. In his judgment in *The Florence* (14 Jurist, 573) in 1852, Dr. Lushington had occasion to consider the seaman's contract, and in regard to shipwreck he says: "In shipwreck the contract continues so long as a plank can be saved." The judgment of the same learned judge in *The Warrior* (Lushington, 476) in 1862, and the judgment of Lord Stowell in the well-known case of *The Neptune* (Ad. Rep. 227), in 1824, appear to me also to illustrate the same point. No case has been cited, and I venture to think that no case could be found, to justify the defendants' contention (and it is a contention which they must establish in order to bring the case within sect. 158) that a seaman's services terminate by reason of the "wreck" of the vessel, where the vessel remains in specie and actually navigable, although not seaworthy for the prosecution of the intended voyage without repairs being executed which will cause a considerable temporary delay. And it may be noted that in the course of his judgment in *The Elizabeth* (*ubi sup.*) Lord Stowell says in regard to the law: "A total loss by wreck happens. This operates a total loss of wages."

But then it is said on behalf of the defendants if the plaintiffs' interpretation is right, why are the words "wreck or loss" used? I regret that I am unable to see the force of this comment. "Wreck" denotes destruction by the collision of the vessel with some external object, either moving or stationary. But it is not the only form of loss which the maritime law has recognised, and did recognise in 1854, when the expression found a place in sect. 185 of the Merchant Shipping Act of that year, as making a termination of the seaman's services. There may be loss of the ship by fire, by internal explosion, and by foundering, or, as Dr. Lushington mentions in his judgment in *The Florence* (*ubi sup.*), by capture. "By capture certainly," said the learned judge. "If there be no re-capture, the contract (*i.e.*, the contract between shipowner and seaman) is at once put an end to, and this, I apprehend, whether by an enemy or by pirates."

The Legislature, it seems to me, used a very natural phrase when by "wreck or loss" it intended to express all the forms of loss (of which "wreck" is the commonest) by which the law recognised that the services of the seaman, *ipso facto*, terminated. No decision has been cited to us to show that any of the courts have recognised that those services terminated upon the ship being merely damaged to an extent which requires her to undergo repairs for a period of time which is so long as to make it the interest of the shipowner to put an end to the contract and discharge the seamen. If he did discharge them, then, as Lord Stowell decided in *The Elizabeth* when there was no Merchant Shipping Act which dealt with such a case, he may do so, but he must compensate them for their loss of prospective wages under their contract, unless, of course, they got other equally beneficial service elsewhere; and if he so acts now, I think that he is, upon the same principle, obliged by the Legislature to compensate them, but to a more limited extent, under sect. 162 of the Merchant Shipping Act 1894 upon which the plaintiffs are suing in the present action.

There is only one further remark which I desire to add. The learned counsel for the defendants invited us to treat the misfortune to the *Olympic* as one which brought the adventure to an end, and the learned judge in concluding his judgment, after referring to the delivery to the Board of Trade of the passenger and freeboard certificates, and the voyage of the *Olympic* to Belfast for repairs, speaks of the "voyage, so far as the voyage was concerned which the crew had agreed upon, being brought to a summary and proper conclusion." If this is intended as the statement of a legal proposition, I respectfully dissent.

In the absence of some special terms, the damage caused to the *Olympic* by collision with the *Hawke* in no way terminated or dissolved the contracts of the owners in respect of passengers or cargo; why, in point of law, should it terminate or discharge their contract with the seamen?

The voyage of the *Olympic* was delayed, but the delay, in my opinion, could not justify its owners in treating any contract with the crew as at an end, simply because it would cost them so large a sum to keep them and pay them until the *Olympic* was sufficiently repaired to proceed on an Atlantic voyage.

In my view, if they chose for their own pecuniary advantage to relieve themselves of this burden, and, in the words of sect. 162, to discharge the seamen otherwise than in accordance with the terms of their agreement, *i.e.*, before the completion of the contract voyage, that section required them to pay the compensation, not exceeding one month's wages, which they have claimed in these proceedings.

For the reasons which I have been obliged to state at greater length than I should have desired, I am of opinion that this appeal ought to have been allowed.

Appeal dismissed.

Solicitors for the appellants, *Nicholls, Herbert, and Co.*, for *C. A. Emanuel* and *Emanuel*, Southampton.

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 18 *and* 19, 1913.

(Before SCRUTTON, J.)

SOUTH WALES AND LIVERPOOL STEAMSHIP COMPANY LIMITED *v.* NEVILL'S DOCK AND RAILWAY COMPANY LIMITED; NEVILL'S DOCK AND RAILWAY COMPANY LIMITED *v.* MAATSCHAPPIJ STEAMSHIP BESTEVAER, ROTTERDAM. (*a*)

Docks—Berth—Preferential right to occupy berth —Damages.

A shipping company had a preferential right to occupy a certain berth in a dock on Wednesday and Saturday in each week and were not entitled to use any other berth in the same port. The berth was situated at a wharf in a channel which was partly natural and partly artificial. The agreement between the two companies provided (inter alia) *that in the event of any accident beyond the control of the dock company which caused loss or delay to the shipping company, the latter should be entitled to use some other berth, the dock company being under no liability to make good or pay compensation for such loss or delay.*

On the 28*th Oct.* 1911 *the shipping company's steamer* P. *arrived in the port, and found that the particular berth to which she should have gone was occupied by the steamship* B., *belonging to a Dutch company, which had gone to the berth and remained there contrary to the orders of the dock company. Owing to shortness of water in the dock the* B. *could not be moved to admit of the* P. *occupying the berth, and the* P. *accordingly went into an inner dock by the direction of the dock company, and by reason of shortness of water was detained there for a week, and consequently lost a complete round voyage. A portion of her cargo was shut out, and taken on by the next steamer of the line. The shipping company claimed from the dock company damages for the delay suffered by the* P., *and the dock company in turn sued the owners of the* B. *to recover any damages they might be called upon to pay to the shipping company.*

Held, that the dock company were liable to the shipping company, as they had not in fact used their best endeavours to ensure that the shipping company should have the use of the berth, and that the wrongful action of the owners of the B. *was not an accident beyond the "control of the dock company" within the meaning of the agreement;* (2) *that the owners of the* B., *being guilty of a trespass, were liable to pay damages to the dock company, but not in respect of the whole of the detention of the* P., *as she did not go into the inner dock owing to the order of the master of the* B.; *and* (3) *that the owners of the* B. *were not liable to pay the dock company's costs in defending the action brought by the shipping company, because it was unreasonable for the dock company to defend the action.*

COMMERCIAL COURT.

Two actions tried together by Scrutton, J.

The South Wales and Liverpool Steamship Company Limited claimed 220*l.* damages against Nevill's Dock and Railway Company Limited for breach of contract contained in an agreement and supplemental agreement dated the 25th June 1902 and the 17th May 1907 respectively, made between the plaintiffs and the predecessors in business of Nevill's Dock Company Limited. Alternatively, the plaintiffs claimed damages for the wrongful detention of the steamship *Portia.*

The defendants in the first action claimed against the Maatschappij Steamship *Bestevaer*, Rotterdam, damages for breach of contract and duty in respect of the use and enjoyment of a berth or wharf belonging to the dock company, and for trespass in and upon the berth and wharf.

The South Wales and Liverpool Steamship Company Limited maintained a bi-weekly service between Liverpool and South Wales ports. By an agreement dated the 25th June 1902 made between the South Wales and Liverpool Steamship Company Limited and Nevill, Druce, and Company it was provided (*inter alia*) that the steamship company should have the preferential right to use and occupy the Liverpool Wharf, Llanelly, during a period of twenty-four hours, calculated from the hour of high water of the morning tide on Wednesday and Saturday in every week, for the purpose of loading and discharging their vessels. The dock company were not to be liable for any loss, damage, or delay incurred by or caused to the steamship company through neap tides, shortness of water, or other similar cause. In the event of any strike or riot or the occurrence of any accident beyond the control of Nevill, Druce, and Co., causing loss or delay to the steamship company, the remedy of the company was to use any other dock during the continuance of any such strike or riot, or for the period that the user of the berth should be prevented by any such accident; but Nevill,

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

Druce, and Co. were not to be liable to make good or pay compensation for any such loss or delay. The steamship company were to use the wharf in question to the exclusion of all other wharves and docks at Llanelly.

By a supplementary agreement of the 17th May 1907 the operation of the first agreement was extended for a term of five years from the 1st Nov. 1906.

The Liverpool wharf was in a channel leading to the dock, which was partly natural and partly artificial.

Nevill's Dock and Railway Company Limited were the successors in business of Nevill, Druce, and Co.

On the 28th Oct. 1911, the steamship company's vessel *Portia* on her arrival at Llanelly found the steamship *Bestevaer* lying alongside the Liverpool wharf, thereby preventing the *Portia* from getting to her berth. The *Portia* was directed by the assistant dockmaster to go into the Copper Works dock, where the depth of the water on the side of the dock was 18in. less than at the Liverpool wharf. The *Portia* was under contract to take 130 tons of cargo from Llanelly, and in order to get away safely she had to shut out about 64 tons, and owing to the neap tide she got away from the dock on the 3rd Nov. instead of on the afternoon tide of the 28th Oct., consequently losing a complete second voyage.

The steamship company pleaded that it was an implied term of the agreement that the dock company should keep the berth and wharf free from obstruction, and that the dock company would be liable for any loss, damage, or delay caused by their failure to do so, and that there had been a breach of the express and implied terms of the agreement.

By their defence the dock company denied that there had been any breach of contract, and pleaded that the Liverpool wharf was not available for the *Portia* on the 28th Oct. 1911, because the steamship *Bestevaer* had proceeded thereto on the 27th Oct. and had remained there contrary to the directions of the dock company's servants, and that by reason of shortness of water she could not be got out of the berth in time for the *Portia* to occupy it. They further pleaded that these causes were expressly excepted by the agreement, or constituted accidents beyond their control which were excepted by the agreement.

In the second action, Nevill's Dock and Railway Company Limited pleaded that the master of the steamship *Bestevaer* by bringing his vessel to the Liverpool wharf, though told by the dockmaster to remain in the channel of the river, and in refusing to move her when requested to do so, constituted a trespass upon the dock company's premises and a breach of duty and of an implied warranty and agreement on the part of the defendants that their master would obey the orders of the dockmaster. They said that in consequence of the *Bestevaer* occupying the berth the first action had been brought against them, and they claimed the damages and costs which they might be liable to pay.

The defendants in the second action by their defence admitted that the master placed his vessel alongside the wharf contrary to the directions of the dockmaster under the belief that he had a right to proceed there, as the wharf was free at the time and he had been there previously. They said that immediately the fact that the wharf was reserved for the use of another vessel was brought to the knowledge of the master he attempted to move the vessel away from the wharf, but could not do so as the tide had fallen. They said that the alleged damages were not the natural and probable result of the act complained of, but as the result of special circumstances which were not known to them, and that the damage was too remote.

Maurice Hill, K.C. and *A. T. Miller* for the South Wales and Liverpool Steamship Company Limited.—The dock company were under a binding contract to give the plaintiffs a preferential right to use the Liverpool wharf, and, having failed to comply with this primary contractual obligation, they were liable for the damages caused thereby.

Inskip (*Roche*, K.C. with him) for Nevill's Dock and Railway Company Limited.—The dock company is not liable, as there was no absolute promise to give the plaintiffs the use of the berth. The event which happened was an accident within the meaning of the agreement. It was an accident notwithstanding that it was due to the act of a wrongdoer:

Nisbet v. *Rayne*, 103 L. T. Rep. 178; (1910) 2 K. B. 689.

It was also an accident beyond the control of the dock company. In any event the defendants cannot be liable for the whole of the detention.

Maurice Hill, K.C. in reply.—The mere breach of the undertaking to give the plaintiffs the use of the berth, irrespective of how the breach may have been brought about, gives rise to a claim for damages:

Coe v. *Clay*, 5 Bing. 440.

The word "accident" cannot include anything done intentionally, and if the word included everything fortuitous the insertion of the words "riots" and "strikes" was redundant. A wide meaning has been given to the word "accident" under the Workmen's Compensation Act which is not construed as if it were a policy of insurance against accidents:

Fenton v. *Thorley*, 89 L. T. Rep. 314; (1903) A. C. 443, 454, per Lindley, L.J.

As the dock company could have prevented the *Bestevaer* from going into the berth, it was not an occurrence beyond their control. The plaintiffs are entitled to damages for the whole of the detention of the *Portia*.

Inskip (*Roche*, K.C. with him) for Nevill's Dock and Railway Company Limited.—The dock company are entitled to recover any damages which they may be liable to pay to the plaintiffs in the first action from the defendants in the second action, as all the trouble was caused by the wrongful act of the master of the *Bestevaer*.

Dunlop for the Maatschappij Steamship *Bestevaer*, Rotterdam.—The owners of the *Bestevaer* committed no legal wrong, as she was rightfully in the channel, which is a public highway. Having got alongside the berth, there was no lack of diligence on the part of the master in trying to get out when he appreciated the position. The damages claimed are too remote, but, in the event they are the results of the negligence of the dock company's officials or those in charge of the *Portia*, or both.

Inskip in reply.—The dock company are the owners of the bed and soil of the channel, but if they are not they are, as owners of the wharf, entitled to prevent any obstruction:

Lyon v. *Fishmongers' Company*, 35 L. T. Rep. 569; 1 App. Cas. 662, per Lord Cairns;
Original Hartlepool Collieries Company v. *Gibb*, 3 Asp. Mar. Law Cas. 411; 36 L. T. Rep. 433; 5 Ch. Div. 713, per Jessel, M.R.

As the action is in tort the measure of damages is not that which could have been within the contemplation of the parties. The dock company are entitled to recover from the owners of the *Bestevaer* the costs incurred in defending the first action:

Henderson v. *Squire*, 19 L. T. Rep. 601; L. Rep. 4 Q. B. 170;
Merest v. *Harvey*, 5 Taunt. 442.

Scrutton, J.—On the 28th Oct. 1911, the Dutch steamer *Bestevaer* came to the narrow channel leading to Nevill's Dock and Railway Company's wharf. Her captain was told not to bring the steamer alongside the wharf, but seeing that the wharf was vacant he thought he had a right to go in, and accordingly he went in. The result of that half-hour's action is that we are now trying these two actions, in which I have listened to a large number of legal problems stated by counsel. The litigation is likely to be expensive for someone, but probably the Dutch captain, who caused all the trouble, will not have to pay.

The cases arise in this way: The plaintiffs in the first of the two actions run a line of steamers from Liverpool to South Wales ports, and they call twice a week at Llanelly. Nevill's Dock and Railway Company have a private dock and a half natural, half artificial cut leading up to it, in which they have a wharf. The steamers of the South Wales and Liverpool Steamship Company discharged there, and there was an agreement by which, in consideration of the shipping company only using a berth belonging to the dock company, that company gave the shipping company the exclusive use and occupation of a certain wharf—a preferential right to use the berth in front of a warehouse on certain named days for the purpose of loading and discharging.

The *Portia*, one of the shipping company's steamers, was due at Llanelly on the morning of Saturday, the 28th Oct. 1911, and she would in the ordinary course of events have gone to the Liverpool wharf in the half natural, half artificial cut I have referred to. She was to discharge and then to load cargo. The Dutch steamer had a cargo of pig iron for Llanelly, and was going to discharge it at the dock company's wharf. She came outside the port of Llanelly on Friday evening, the 27th Oct., was met by a tug and pilot, and brought up on the high tide that evening until she was opposite the wharf at which the shipping company's steamers discharged. She was told by the harbour-master, and the captain understood that she was not to go into the wharf, but the captain apparently thought, either from the point of view of getting the *Bestevaer* to be an arrived ship under his charter-party, or desiring to get the berth while it was vacant, he should disregard the order, and he went in. His agent arrived and told him he had done wrong, and that he ought to get out, but the tide had then turned, and as he was grounded he was unable to get out. Next morning the *Portia* with her cargo arrived, and the Dutch steamer tried to get out of the berth, but, probably owing to the depth of mud, she was unable to do so. Consequently the owners of the *Portia*, the dock company, and the *Bestevaer* were face to face with the question as to what was to be done with the *Portia*. The harbour-master ordered the *Portia* into the closed portion of the dock, and I find as a fact that he told the master that he could safely load to 12ft. 9in, whereupon the *Portia* went into a berth in the dock and her cargo was brought along. She loaded to 12ft. 1in. forward and 12ft. 6in. aft., and then tried to get out. She could not get out of the berth, and, even if she could have got out, she could not have got over the dock sill at the height of the tide for that day. In consequence she was neaped and was detained in the dock for a week, and a week's round voyage disappeared.

The owners of the *Portia* now sue the dock company for breach of the agreement to give them the preferential right to use the wharf for twenty-four hours from the Saturday morning. They claim as damages the loss of profit on the round voyage, which they calculate at 201*l*., and they also claim some incidental expenses in respect of extra coal, cost of transhipping cargo, and freight in respect of some cargo shut out. The dock company in their turn sue the Dutch company, the owners of the *Bestevaer*, alleging that that steamer was a trespasser or was violating a right of the wharfowners in grounding alongside the wharf, and they claim as damages the sums they might have to pay to the owners of the *Portia*, and the costs of defending their action.

As to the first action, that at the instance of the South Wales and Liverpool Shipping Company against the dock company, it is said for the defendants that the preferential right to use and occupy the berth and wharf is only a sort of licence and not a tenancy, and the fact that another vessel was in the berth without, as they say, any fault on their part is no breach of the contract.

This is an ordinary case of a dock company promising that a particular shipowner shall, on a particular day, have a particular berth. No doubt it is not an absolute promise that the shipowner shall have that berth, because the authorised existence of the berth is a condition of the contract, but it seems to me, to put it in the mildest way, a promise that the dock company will do their best to ensure that the shipowner shall have the use of the berth on the particular day.

The contract being such, the second defence raised is that there is an exception in the contract that in the event of any strike or riot or the occurrence of any accident beyond the dock company's control causing loss or delay to the steamship company, the remedy of that company was to be the right to use any other dock during the continuance of such strike or riot, or for the period that the user of the berth should be prevented by any such accident, and that the dock company should not be liable to make good or pay compensation for any such loss or delay. It is said by the defendants that what happened was an accident beyond their control; that the *Bestevaer* came in wrongfully against their orders, and that was an accident that they were unable

to control; and that the plaintiffs' remedy was to go elsewhere and not to claim damages from them. It may also be expressed thus: "We have done our best, and it i not our fault that you did not get the berth." I do not agree that what happened was beyond the dock company's control. They had a contract under which they knew that the trader was coming on Saturday morning for that berth, and they also knew that the Dutch boat which had frequently lain at that berth was coming up the channel that night. It was their duty to use reasonable, and their utmost, endeavours to take care that the boat coming up on Friday night did not go into the berth which the trader was to occupy next morning. They might have communicated with the Dutch ship's agent telling him to give orders that the *Bestevaer* must not go into the berth. Neither would there have been any difficulty in sending a letter to the master of the *Bestevaer* by the pilot or the tug. The harbour-master was on the quay side when the *Bestevaer* came up, and I am not satisfied that he did all he could when he found that the *Bestevaer* was hauling in to the berth. He did not, in my opinion, do his best to prevent her coming in, and I therefore think the Dutch vessel being in the berth was not an accident beyond the dock company's control.

These two points dispose of the question of liability, and the next question is as to the amount of damages the shipping company are entitled to recover from the dock company. Here, questions of considerable difficulty arise as they do in the second action. What actually happened was most unfortunate. The *Portia* put out 12 tons and wanted to load 130 tons. The harbour-master told her master to go into the inner dock, and that he would be all right if he loaded to 12ft. 9in. That was wrong, for when the vessel was loaded to 12ft. 6in. she grounded, and she would have had great difficulties with the sill of the dock even if she had got out of the berth. There was a considerable muddle on the part of the dock company, and the captain of the *Portia* went into the dock in a somewhat light-hearted way, knowing that there might be difficulties owing to neap tides. It is not open to the defendants to say that the plaintiffs did not act reasonably in going into the dock, for they told the captain to go in and he acted upon their instructions.

This was the case of one vessel in a line having to shut out part of her cargo, but the part shut out being taken on by the following steamer without shutting out an equal quantity of her goods. If a sailing is lost, but the goods are carried on in the next boat, which has to shut out an equal quantity, then the damages are in respect of that quantity. In this case, however, it is admitted that the goods shut out of the *Portia* were taken on by the next steamer, and I have no satisfactory evidence that any goods were by reason thereof shut out from that next steamer. In the circumstances I must do the best I can with the multitude of figures which have been placed before me. The plaintiffs are entitled to the damages reasonably flowing from the dock company's breach of contract, and the dock company are not at liberty to say they are not liable for the *Portia* being neaped in the dock. On the best consideration that I can give to the figures placed before me, I think the plaintiffs are entitled to recover 75*l.* from the dock company.

In the second action the defendants in the first action become the plaintiffs, and they claim from the Dutch company the damages they might be called upon to pay in the first action, together with the costs of defending that action. It is said for the Dutch company that they committed no legal wrong, as the *Bestevaer* was navigating an arm of the sea and grounded where she had a right to ground. I doubt whether the *Bestevaer* had any right to navigate this artificial cut, and there was no right to ground if it would interfere with the rights of others. The *Bestevaer* was told by the wharfowners that she must not come into the berth. She persisted, and grounded alongside the wharf when told not to do so. Whether that is described as a trespass or as an infringement of the wharfowners' rights does not seem to matter. I think it was both. I think that when the *Bestevaer*, contrary to the orders of the wharfowners, grounded she committed a legal wrong; and, once having committed a legal wrong, it does not matter that she was detained there by the falling tide. She should not have been there, and that she is there subsequently is because of her original wrong. In *Jones* v. *Adamson* (3 Asp. Mar. Law Cas. 253; 35 L. T. Rep. 287; 1 Ex. Div. 60), where a ship, by the default of the defendant, lost her regular turn for loading and was then detained by the act of God, the defendant was made liable for the whole detention. I therefore treat the Dutch company as continuing trespassers so long as their vessel kept the *Portia* out of the berth.

As to the damages, the Dutch company are liable for the reasonable and natural consequences of their wrongful act. The first natural consequence is that when the *Bestevaer* grounded she kept out some ship. The Dutch master did not know what the ship was or her engagements. The Dutch company can only be liable for the reasonable and natural consequences of keeping out the *Portia*. As between the owners of the *Bestevaer* and the dock company, was it a reasonable and natural consequence of the keeping out the *Portia* that she should go into the dock and be neaped? I do not think so. The Dutch company are not in the difficulty of the dock company, for the *Portia* did not go into the dock on the Dutch captain's orders. In my opinion, therefore, the Dutch company are not liable for the neaping detention, but they are liable for the detention of the *Portia*, which naturally followed from the *Bestevaer* going into the berth and staying there. It is easy to be wise after the event, and it is now said that the *Portia* could have gone elsewhere or could have discharged across the *Bestevaer*. In either case nothing like the loss that actually occurred would have happened. No doubt, to discharge across the *Bestevaer*, although not impossible, would have been slow, and would probably have caused delay until Monday evening or Tuesday. This would involve a couple of days of the time in fact spent in the dock. I think, therefore, that the Dutch company are liable to the dock company for 25*l.* as damages for that detention of the *Portia*. It is also said that they are liable for the costs of the first action. I am not aware of any case where the principle laid down in *Agius* v. *Great Western Colliery Company* (80 L. T. Rep. 140; (1899) 1 Q. B. 413) and

Hammond v. *Bussey* (20 Q. B. Div. 79) has been applied in actions of tort, but, in any view, I do not think it was reasonable for the dock company to defend the first action at all. I therefore do not give the plaintiffs in the second action any of the costs of the first action. There will be judgment for the South Wales and Liverpool Steamship Company Limited for 75*l.* against the dock company, and judgment for 25*l.* in favour of the dock company against the Dutch company.

Solicitors for the South Wales and Liverpool Steamship Company Limited, *Field, Roscoe,* and *Co.*, for *Batesons, Warr,* and *Wimshurst*, Liverpool.

Solicitors for Nevill's Dock and Railway Company Limited, *Smith, Rundell,* and *Dods,* for *Roderick* and *Richards*, Llanelly.

Solicitors for Maatschappij Steamship *Bestevaer*, Rotterdam, *Williamson, Hill,* and *Co.*, for *Ingledew, Sons,* and *Phillips*, Swansea.

March 3 *and* 4, 1913.

(Before Channell and Bray, JJ.)

Henry *v.* Hammond. (*a*)

Statute of Limitations—Shipping agent—Employment in ordinary course of business—Balance of account—Liability for, as express trustee.

The plaintiff, who was the sole surviving partner of a French firm of average adjusters carrying on business in Paris, sued the defendant to recover the sum of 96*l.* 11*s.* 4*d. as money had and received in the following circumstances:*

In 1883 *a vessel called the* I., *which was loaded with coal, became a total wreck near R. The defendant at that time was carrying on business as a shipping agent at R., and the plaintiff's firm, acting for the insurers of the vessel, sent over the bill of lading to the defendant with instructions to sell the cargo on the plaintiff's behalf.*

The cargo was duly sold by the defendant, and after deducting certain payments from the sum received there remained in his hands the sum of 96*l.* 11*s.* 4*d., which amount for several years appeared in the defendant's books as a sum owing to somebody in respect of the* I.

The entry ceased in 1888, *and the amount in question had not been paid over to the plaintiff firm or the insurers.*

In 1906 *the plaintiff became aware of the facts in connection with the sum of money, and in* 1912 *he brought an action to recover it.*

It was contended by the defendant that the plaintiff's claim was barred by the Statute of Limitations.

For the plaintiff it was submitted that the defendant was an express trustee of the money sued for, and that, consequently, the Statute of Limitations did not run against his claim.

Held, that in the circumstances the mere fact that at some time there had been a fiduciary relationship in existence did not prevent the Statute of Limitations succeeding as a defence, and that, the case being one of an ordinary commercial agent who had incurred a debt, the statute applied.

Appeal from the decision of His Honour Judge Shortt sitting at the Ramsgate County Court.

(*a*) Reported by Philip B. Durnford, Esq., Barrister-at-Law.

The facts and arguments appear from the judgment of the learned judge, which was as follows:—

The plaintiff is the sole surviving partner of a French firm of Dupuis, Jaillon, et Henry, who carried on in Paris the business of *depêcheurs*, or average brokers. A vessel called the *International* became a total wreck near Ramsgate in the year 1883. The bill of lading was sent over in that year by the plaintiff's firm, acting for the insurers, to Messrs. Hammond, shipping agents at Ramsgate, with instructions to sell the cargo on their behalf. The cargo was sold by Messrs. Hammond, and, after deducting from the proceeds of sale salvage claims paid and expenses incurred, there remained in the hands of Messrs. Hammond a sum of 96*l.* 11*s.* 4*d.*, which for several years appeared in their books as a sum owing to somebody in respect of the *International.*

This entry ceased to appear after the year 1888, and I am convinced by the evidence that, whatever became of that sum, it was not paid over to the plaintiff's firm, or the insurers. The defendant retired from business after the year 1889, and his business was taken over with all his old books by a Mr. Acock, who had been his cashier and book-keeper for many years. As such Mr. Acock was intimately acquainted with everything relating to the *International*, and knew the amount realised by the sale of the cargo, as well as the net amount of 96*l.* 11*s.* 4*d.* due to the plaintiff's firm after payment of expenses and salvage claims. He was also aware of the fact that such sum had not been paid over to the plaintiff's firm. Mr. Acock kept this knowledge to himself from 1883 down to the year 1906, a period of about twenty-three years. Something, I know not what, then aroused his conscience from its long slumber, and impelled him to communicate to the plaintiff the facts relating to the 96*l.* 11*s.* 4*d.* But the plaintiff's firm, who had slumbered over their rights for these twenty-three years without any inquiry, chose to indulge in a further delay of five or six years, and it is not till June 1912 that the surviving partner commences this action to recover a sum of money that had been owing for at least twenty-seven years. The question for determination is whether it can now be recovered by the plaintiff in this action.

Several objections were taken by counsel for the defendant: (1) That the plaintiff is not entitled to sue, being only assignee from former partners of the firm, and that no notice of assignment was given; (2) that, as the money belonged to the insurers of the cargo, the plaintiff's firm could not sue for it, as they were merely agents acting for the insurers.

I am not satisfied that either of these objections is sustainable. I am of opinion (1) that the plaintiff as sole surviving member of the firm who employed the defendant is entitled to sue; and (2) that the defendant cannot dispute the title of his immediate employers.

The third objection is that the action is barred by the Statute of Limitations, and this is the point which was most strenously argued before me.

Both the learned counsel who argued the case were agreed that the question of the applicability of the Statute of Limitations depends on this: whether the defendant held the money as an "express" trustee for the plaintiff's firm, or as a "constructive" trustee only; it being admitted that, though the Statute of Limitations is no bar in the case of an "express" trust, it may be successfully pleaded where the trust is merely constructive. According to Bowen, L.J., this "is a doctrine which has been clearly and long established": (*Soar* v. *Ashwell*, 69 L. T. Rep. 585; (1893) 2 Q. B. 390). Though this is clearly established, "the authorities do not seem to have drawn with any precision the line of distinction between express and constructive trusts": (per Kay, L.J., *ib.*, p. 401). It would be a long task to go through all the cases on the subject the contradictory nature of which is referred to

by Bowen, L.J. in the case above referred to: Dicta as to "express trustees" may be found in many of them wide enough to embrace the case of every person who receives money for or on behalf of another.

But these dicta will be found in all cases to be merely *obiter*, and not necessary to the decision of the actual case in which they are uttered, and they can always be met by dicta and, more important, by express decisions of an opposite character. Dealing with decisions only, I do not find one in which an agent employed by a principal merely to effect a sale and, after payment of certain charges and expenses, to remit the balance to his principal has been held an "express trustee" of such balance for his principal. The two cases chiefly relied on by the plaintiff are *Soar* v. *Ashwell* (*sup.*) and *Burdick* v. *Garrick* (22 L. T. Rep. 502; 5 Ch. App. 233). In *Soar* v. *Ashwell (sup)* there was a trust fund held by trustees under a will which they intrusted to a solicitor, as solicitor to the trusts, apparently for investment by him. The solicitor was held to be an express trustee for the beneficiaries. This was put by Kay, L.J. on the ground that there was an express trust, and that the solicitor, though strictly a stranger to the trust, had assumed to act, and had acted, as a trustee, and had received the trust money under a breach of trust in which he concurred: (see pp. 405, 406). If this had been the ordinary case of money received by a solicitor for his client, the decision in *Re Hindmarsh* (7 D. & Sm. 129) shows that the client must pursue his remedy within the statutory period of six years. I can see no resemblance between the facts of the present case and those in *Soar* v. *Ashwell* (*sup.*). In *Burdick* v. *Garrick* (*sup.*) an agent who was a solicitor in London held a power of attorney from his principal in America to sell his property and invest the proceeds in his name. The solicitor was held to be a trustee of the fund, and as such debarred from setting up the Statute of Limitations as a defence. Lord Hatherley in his judgment (p. 239) points out the very wide nature of the power with which the solicitor was intrusted: "Beyond all doubt this power was in a very large and ample form. This gentleman authorised his attorneys to sell his real estate and collect his personal estate, and he directed that, if they thought fit, they should invest the money produced by such sale and collection in the funds, or, if they thought fit, they should invest it in real estate, and they had power to vary the securities, and to deal with the fund in any way they thought fit, just as if the principal himself was dealing with it. . . ."

The facts of *Burdick* v. *Garrick* (*sup.*) are wholly unlike those of the present case. How Lord Hatherley would have regarded the present case may, I think, be gathered from that passage in his judgment where he says (p. 240): "In the present case we have an agent who is intrusted with these funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner in the purchase of land or stock."

The case of *Friend* v. *Young* (77 L. L. Rep. 50; (1897) 2 Ch. 421) more nearly resembles the present case than any other case I have come across. In that case E. and Co., manufacturers, employed F. and Co. to sell goods for them on commission, F. and Co. to receive the purchase money and, after deducting their commission, to account to E. and Co. for the balance. Stirling, J. held that the existence of the fiduciary relation of principal and agent did not prevent the application of the Statute of Limitations, and pointed out that in *Burdick* v. *Garrick* (*sup.*) "there was much more than in the ordinary case of money received for the principal." I consider that, having regard to the language used by Lord Hatherley, the case of *Burdick* v. *Garrick* (*sup.*) is equally with *Friend* v. *Young* (*sup.*) an authority for the proposition that, where the duty of the agent is of the limited kind referred to, no action can be brought against him after the expiration of the statutory period of limitation. Another case which, in my opinion, throws a very clear light on the matter is that of *Knox* v. *Gye* (L. Rep. 5 H. L. 656), in which the House of Lords (Lords Westbury, Colonsay, and Chelmsford, *dissentiente* Lord Hatherley) held that there was nothing fiduciary in the relation between a surviving partner and a represetative of a deceased partner, and that an action of account could not be brought by the latter against the former after the statutory period of limitation had elapsed. Certain legal rights and duties no doubt existed, but, in the words of Lord Westbury (p. 676), "it is a mistake to apply the word 'trust' to the legal relation which is thereby created." And his Lordship pointed out the misleading use frequently made of the word "trust" and the error of "the application to a man who is improperly and by metaphor only, called a trustee of all the consequences which would follow if he were a trustee by express declaration—in other words, a complete trustee." The right of the representatives of the deceased partner consisted, said Lord Westbury, "in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership."

The right of the plaintiff in the present action might be described in almost exactly the same terms—viz., the right to have an account of the proceeds of sale, the charges and expenses paid out of it, and of the clear balance accrued to the plaintiff's firm. And, if that is so, the law relating to it is clear, as set forth in the judgment of Lord Westbury.

The Statute of Limitations of 21 Jac. 1, c. 16, enacted (sect. 3) that "all actions of account and upon the case shall be commenced and sued within six years next after the cause of such action or suit, and not after." It made an exception in the case of accounts between merchant and merchant, their factors or servants. But this exception was abolished by the Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97), s. 9, and all actions of account must now be brought within six years. And the case is the same in equity as at law. "The general principle," said Lord Westbury in the case above referred to, "was laid down as early as the case of *Lockey* v. *Lockey* (Prec. in Ch. 518), where it was held that where a court of equity assumes a concurrent jurisdiction with courts of law, no account will be given after the legal limit of six years, if the statute be pleaded . . . for where the remedy in equity is correspondent to the remedy at law, and the latter subject to a limit in point of time by the Statute of Limitations, a court of equity acts by analogy to the statute and imposes on the remedy it affords the same limitations.

The present action is, like that of *Knox* v. *Gye* (*sup.*). in effect an action of account, and the Statute of Limitations is, in my opinion, an express and a fatal bar to it. That the plaintiff is able to name the exact sum owing to his firm does not prevent the action being in effect one of account. For in every such action the plaintiff must state the amount he claims, subject to an account, and, if no amount is stated, it is deemed to be 100*l.*: (County Court Rules and Orders, Order VI., r. 2).

For the reason above given I am of opinion that the plaintiff's claim is barred by the Statute of Limitations, and that the defendant is entitled to judgment.

The plaintiff appealed.

Hilbery for the plaintiff.

Pollock, K.C. and *Thorn Drury* for the defendant.

In addition to those referred to above, the following cases were cited in the course of the arguments:

North American Land and Timber Company v. *Watkins*, 91 L. T. Rep. 425; (1904) 1 Ch. 242

Reid-Newfoundland Company v. *Anglo-American Telegraph Company*, 106 L. T. Rep. 691; (1912) A. C. 555;

Foley v. *Hill*, 2 H. L. C. 28.

Channell, J.—This case raises a somewhat nice point of law. The question is whether or not the defendant can be treated as an express trustee in respect of a sum of 96*l.* 11*s.* 4*d.* which was the ultimate balance upon an account in connection with a transaction which he was employed by the plaintiff's firm to carry out in the course of his business as a shipping agent. He was employed to do the work in question some twenty-seven ago, and, so far as his books show, the ultimate result of the various dealings between the parties was that the balance which I have mentioned remained in the defendant's hands. He is unable to show that he ever in fact paid the sum in question over to the plaintiff's firm, and, but for the lapse of time, there can be no question that the plaintiff is the proper person to recover it. Inasmuch, however, as the Statute of Limitations has been pleaded as a defence, the only way in which the plaintiff can recover it is by establishing that the defendant is in the position of express trustee of the money for him.

It is clearly settled that a constructive trust is not sufficient, although I do not think that any case of a constructive trust arises in this case. A considerable number of authorities have been quoted to us, and the one which I think has been most often referred to in recent cases is *Burdick* v. *Garrick* (*sup.*). There is a passage in the judgment of Giffard, L.J. in that case which has been referred to with approval by many learned judges. Lord Macnaghten in *Lyell* v. *Kennedy* (*sup.*) said this: "The principle which governs the case may be stated concisely in the words of the late Giffard, L.J. In *Burdick* v. *Garrick* (*sup.*) that learned judge expressed himself as follows: 'I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to someone entitled to it.'" That passage has been approved by several other learned judges, and in particular by Bowen, L.J. in *Soar* v. *Ashwell* (*sup.*), and I think we may take it that Lord Macnaghten's words concisely express the principle which governs this case.

Here we must apply that principle to the case where the property in question is a sum of money. I think it is quite clear that if the terms upon which a person receives a sum of money are that he is bound to keep it separate either in a bank or elsewhere and to hand that money so kept to the person entitled to it, then he is a trustee of that money, and must hand it over to the person who is his *cestui que trust.* If, however, he is not bound to keep the money separately, but is entitled to mix it with his own money and to deal with it as he likes, and, when called upon for it, to produce an equivalent sum of money, then, in my opinion, he is not a trustee of a fund within the meaning of the principle I have quoted, but is a mere debtor for the amount. All the authorities seem to me to be consistent with that statement of the law. I agree with the forcible observation made by Bramwell, L.J. in *New Zealand and Australian Land Company* v. *Watson* (44 L. T. Rep. 675; 7 Q. B. Div. 374) that it would be most unfortunate to see the intricacies and doctrines connected with trusts introduced into commercial transactions. A shipping agent is a person who carries on a perfectly well understood business, and it cannot possibly be said that he is bound to keep separate the money of each of the persons by whom he is employed. There is not in the present case the element which there was in *Lyell* v. *Kennedy* (*sup.*) of the moneys being in fact kept separate. If the defendant was bound to keep the money separate, the fact that he did not do so cannot assist him. The only use of looking at the facts to see whether in a particular case he has kept the money as a separate fund is to see whether he has recognised that he was under an obligation to do so, the obligation itself being the essential thing.

This principle seems to me to reconcile all the cases. With reference to the case of *Reid-Newfoundland Company* v. *Anglo-American Telegraph Company* (106 L. T. Rep. 691; (1912) A. C. 555), upon which Mr. Hilbery strongly relies, the circumstances seem to me to be quite different from those of the case before us.

There the money sought to be recovered came into the possession of the defendants owing to an unauthorised use of the plaintiffs' property, and when a person, not in the ordinary course of his business and not in the course of doing something which he was employed to do, makes a profit by using someone else's money, there is no possible doubt that he becomes a trustee of that profit for the owner of the property. I think that that case does not help us in a case such as the present, where there is a mere debt arising out of transactions in respect of property—namely, coals—as to which property no doubt it might possibly be said that the defendant was, in a sense, a trustee. For instance, I do not think that he could have bought the coals himself. His employment was to sell the coals and receive the cash for them; he was under no obligation to keep the money separate as a fund of which he was to be the trustee, but, as it seems to me, he was entitled to mix it with his own property, and he was merely a debtor for the amount of the ultimate balance due from him as an ordinary agent would be.

I do not think it is necessary to go through all the cases, but the case of *Friend* v. *Young* (*sup.*) is an important and valuable one. Stirling, J. in giving judgment said, after referring to the authorities: "In my judgment, the existence of a fiduciary relation does not prevent the defence of the statute being set up in the present case." So, in the present case, the mere fact that there had been at some time the existence of a fiduciary relationship does not necessarily prevent the statute succeeding as a defence. I think the case is one of an ordinary commercial agent who has incurred a debt, and with reference to that debt the Statute of Limitations applies. I agree with the judgment of the County Court judge, and, that being so, the appeal must be dismissed.

Bray, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the plaintiff, *Church, Adams,* and *Prior*, for *Emery* and *Emery*, Ramsgate.

Solicitors for the defendant, *Kingsford, Dorman,* and *Co.*, for *J. Thorn Drury*, Ramsgate.

Thursday, April 17, 1913.

(Before Scrutton, J.)

Jones v. Mersey Docks and Harbour Board. (a)

Sunken vessel—Obstruction to navigation—Right to destroy vessel—Conditions precedent—Mersey Docks Act 1874 (37 & 38 *Vict. c. xxx.*), *s.* 11—*Mersey Docks and Harbour Board Act* 1889 (52 & 53 *Vict. c. cxl.*), *s.* 29.

A schooner of 44 *tons burthen was on the morning of the* 17*th June* 1912 *in distress at the mouth of the Mersey. After drifting about for some time, she sank in Crosby Channel, within the defendants' jurisdiction. The defendants destroyed the schooner by blowing her up. Sect.* 11 *of the Mersey Docks Act* 1874, *as amended by sect.* 29 *of the Mersey Docks and Harbour Board Act* 1889, *empowers the Mersey Docks and Harbour Board to raise, destroy, or remove any wrecks of vessels or any vessels sunk or stranded in any dock or elsewhere within the port of Liverpool which are an obstruction to safe and convenient navigation "in the judgment of the marine surveyor . . . of the board . . . such judgment being recorded in writing and deposited with the secretary of the board."*

In an action by the owners of the schooner:

Held, that it was not a condition precedent to the exercise by the board of their statutory powers that the judgment of the marine surveyor that the vessel was an obstruction to safe and convenient navigation should first have been recorded in writing and deposited with the secretary of the board. In order that the board might exercise their powers it was sufficient that the marine surveyor had honestly arrived at the conclusion that the vessel should be raised, destroyed, or removed, and that his judgment to that effect should be put in writing and deposited with the secretary of the board within a reasonable time thereafter.

Commercial Court.

Action tried by Scrutton, J.

The plaintiff claimed damages for the destruction by the defendants of his vessel.

The facts and arguments are sufficiently stated in the judgment.

The Mersey Docks Act 1874 by sect. 11 provides as follows:

The section numbered 59 of the Act of 1858 is by this Act repealed, and in lieu thereof be it enacted, that the board may raise, destroy, or remove any wrecks of vessels, or any vessels that may have been or shall hereafter be sunk or stranded in any dock or elsewhere within the port of Liverpool, or any of these channels leading thereto, and which shall be in their judgment an obstruction to the safe and convenient navigation or use thereof, and may also raise, destroy, or remove any cargo or part of any cargo of any such vessel or wreck, and also any stone, timber, anchor, chain, or other matter, article, or thing being in their judgment an obstruction or impediment to such use or navigation in any dock, sea channel, or elsewhere as aforesaid; and the board may sell in such manner as they may think proper the said vessel or wreck and cargo or other matter or thing so raised or removed, or any article or thing which may be saved from any wreck which may be destroyed, and out of the proceeds of such sale, which when arising from any vessel, wreck, or property saved therefrom, and from the cargo of such vessel or wreck, shall be regarded as a common fund for that purpose, may retain the expenses of raising, destroying, or removing such vessel or wreck and the cargo or any part of the cargo thereof, or of raising, destroying, or removing any stone, timber, anchor, chain, or other obstruction or impediment, together with the expenses of detainer and sale, rendering the overplus (if any) to the person or persons entitled to the same; provided that, except in the case of property which is of a perishable nature or which would deteriorate in value by delay, no sale shall be made under the provisions of this section until notice of such intended sale shall have been given for at least seven clear days by advertisement in two Liverpool newspapers, and at any time before any property shall be sold the owner thereof shall be entitled to have the same delivered to him on payment to the board of the fair market value thereof, to be ascertained by agreement between the board and such owner, or, failing such agreement, by some person to be named for that purpose by the Mayor of Liverpool for the time being, and the sum paid to the board as the value of any property under this provision shall be deemed to be proceeds of sale for the purposes of this section.

Sect. 29 of the Mersey Docks and Harbour Act 1889 provides as follows:

From and after the passing of this Act sect. 11 of the Mersey Docks Act 1874 shall be read and construed as though in relation to the raising, destroying, or removing any wrecks of vessels or any vessels that shall hereafter be sunk or stranded in any dock or elsewhere within the port of Liverpool or any of the sea channels leading thereto the words "in the judgment of the marine surveyor for the time being of the board, or in case of his absence or disability then of the assistant marine surveyor for the time being of the board, such judgment being recorded in writing signed by him and deposited with the secretary of the board" were substituted in the sixth line of that section for the words "in their judgment," and as though in relation to the raising, destroying, or removing any cargo or part of any cargo of any vessel or wreck and also any stone, timber, anchor, chain, or other article, matter, or thing the same words were substituted in the tenth line of that section for the words "in their judgment. . . ."

Roche, K.C. and *Langridge* for the plaintiff.

Maurice Hill, K.C. and *Raeburn* for the defendants.

Scrutton, J.—Mr. Richard Jones represents the owners of a small schooner called the *Alice and Eliza*, forty-four years of age and of 44 tons burthen. On the 17th June 1912 the *Alice and Eliza*, drifting up the Crosby Channel on the flood tide, drifted into the bow of a boat-shaped buoy, stuck there for some time, swung away, and, either by the original contact or by the swinging, leaked to such an extent that she sank in half an hour. Having sunk on the flood tide, being a light schooner she appears to have drifted and jumped up the river for two miles on that flood tide. The officials of the Mersey Docks and Harbour Board, within whose jurisdiction she was, looked out for her, and ultimately saw at some distance from where they were looking the top of her broken masts appear. They got to her and stuck to her from that time more or less in the neighbourhood until the evening, when, the marine surveyor being present as well as his junior assistant surveyor, the officers of the Mersey Docks and Harbour Board determined to blow her up. She was partially blown up that night, and the destruction was completed on the next morning. The owner had in fact no notice. He and the representative of the insurance club

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

came, one from Plymouth and one from a place in Wales, but they did not get there in time to be told of or to offer any protest against the blowing up. Thereupon, the owner of the schooner brings an action against the Mersey Docks and Harbour Board alleging that they have destroyed his property without any lawful justification. The justification of the board, if any, is to be found in sect. 11 of the Mersey Docks Act 1874 and sect. 29 of the Mersey Docks and Harbour Board Act 1889, which read together provide that the board may raise, destroy, or remove any wrecks of vessels, or any vessels that may have been or shall hereafter be such or stranded in any dock or elsewhere within the port of Liverpool, or any of the sea channels leading thereto, and which shall be in the judgment of the marine surveyor for the time being of the board, or in the case of his absence or disability then of the assistant marine surveyor for the time being of the board, an obstruction to the safe and convenient navigation or use thereof, provided that such judgment is recorded in writing and deposited with the secretary to the board.

The condition precedent to the board having any power to deal with such stranded or sunken vessels is that in the judgment of the marine surveyor the vessel is an obstruction to the safe and convenient navigation of the port. Before any destruction of this vessel took place the marine surveyor, being present above the vessel, formed the judgment that she was an obstruction to the safe and convenient navigation and use of the port. In my view, he having honestly formed that judgment, there is no court of appeal from that judgment. He is to regulate the port of Liverpool, and, provided he forms his honest judgment, that judgment is final, subject to this, that it must be recorded in writing, signed by him, and deposited with the secretary of the board.

I understand Mr. Roche to argue that there are two conditions precedent to the board's acting: (1) That the surveyor must form his judgment, and (2) that, having formed his judgment, before any action takes place he must deposit his judgment in writing with the secretary of the board. I find no words in the Act which justify that view, which seems to me to be extraordinarily inconvenient. An urgent matter arises, there is a ship sunk or stranded in a critical part of the port, the marine surveyor goes down and forms a judgment that she is an obstruction. Before he can do anything, according to the view put forward by Mr. Roche, he must return to Liverpool, put his judgment in writing, deposit it with the secretary of the board, and inform the people at the spot that this has been done before they can take any action. That seems to me so extremely inconvenient that unless there are clear words in the statute I should be very slow to hold that there was such a condition precedent. It appears to me that the words of the statute are satisfied if within a reasonable time after forming his judgment he does deposit a definite written record of his judgment with the board in order that there may be a record of his action. As I have said, there was in this case a judgment of the marine surveyor to the effect that this vessel was an obstruction. That gave the board a right and power to raise, destroy, or remove. Obviously this is not a power to be exercised by the board, and nobody would be more astonished than the board if they were called upon to raise, destroy, or remove themselves. It is a power they must exercise by their servants, and, in my view, once the marine surveyor has decided that the matter is an obstruction, it is not necessary that the board themselves should settle what exactly has to be done with the ship; that is clearly a matter they may delegate to their expert servants, and in this case they appear to have delegated it to the marine surveyor, his action being afterwards approved by a committee of the board.

Besides having the power I think it is clear that the board has a duty, and a duty to two classes of persons. They are chosen by the commercial men of Liverpool in various ways to regulate the trade of a very important port. They receive dues from ships and goods using that port. They have a duty to the people from whom they receive those dues to remove obstructions so that ships and goods may not be damaged, and if they are negligent in performing their duty, an action will lie against them by the owners of the ships or goods damaged by their failure to raise, destroy, or remove.

But they also have a duty to the owner of the vessel they destroy to use this power with reasonable care. To take an extreme case, supposing a vessel strands at low tide, which will float at high tide, and there is nothing the matter with her except that she is aground and cannot float because there is not water enough, they are not justified in blowing her up sooner than wait from low tide to high tide. That is an obvious case where their action would be so negligent or reckless if they blew her up that the owner of the vessel would have an action against them. That is their public duty, a duty to the people from whom they receive dues to preserve the navigation to the port, and to use reasonable care to preserve the navigation of the port without obstructions, and a duty to the owner of the vessel with which they deal under this power to use reasonable care, having regard to the interest of the owner of the goods and to the enormous interests of the people who use the port.

If that is their duty the plaintiff has to satisfy me that they have been negligent in performing it. It is not enough that I might form a different opinion. The port of Liverpool is not to be regulated by a judge of the High Court, or by a judge and jury, supposing I had a jury in the box. If it is an honest judgment, and within the limits within which an honest judgment can be formed, there is no cause of action. The plaintiff must satisfy me that it was a careless and negligent judgment, and one which no reasonably careful man could form. That he has quite failed to satisfy me of.

At the time when it was determined finally, the marine surveyor being there, to blow up the vessel, she had already drifted two miles on one flood tide. Another flood tide was coming, and two miles more would put her into the narrow part of the river where the current was twice as strong, and where as anyone who knows Liverpool knows there are large liners lying at anchor in the river, and landing stages attached to the sides where great damage to life and property might result from a substantial wooden vessel being rolled along by a six-knot tide and getting mixed up with anchor chains, landing-stage chains, ferry

boats, and all the enormous traffic that goes on at Liverpool. That being the position, the marine surveyor representing the board came to the view that the proper thing to do in an urgent and critical situation, as he regarded it, was to blow up this vessel. The plaintiff has not satisfied me that that was a negligent decision. I am inclined to think that it was a right decision, but in my view it is not necessary to hold that it was a right decision. It is enough if the plaintiff has failed to satisfy me that it was a negligent decision.

Further, although it is not necessary for me finally to decide the point, my strong impression is that if the vessel had been raised the cost of raising her plus the damage to her would have been more than her value when raised. Quite apart from any risk to other traffic, she was, as she lay at the bottom of the river, a constructive total loss, so that in my view no damage was done to the plaintiff by the act.

For these reasons, I am of opinion that the plaintiff's claim fails, and there must be judgment for the Mersey Docks and Harbour Board with costs.

Solicitors for the plaintiff, *W.* and *W. Stocken.*

Solicitors for the defendants, *Rawle, Johnstone, and Co.*, for *W. Calthorp Thorne*, Liverpool.

Friday, April 25, 1913.

(Before Scrutton, J.)

Dennis and Sons Limited v. Cork Steamship Company Limited. (a)

Bill of lading—Freight—Consignee to pay freight before delivery and take delivery from alongside—Deposit of goods with warehouseman—Liability of consignee for freight—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 493-496.

Certain goods were shipped at Antwerp in a steamship owned by the defendants and consigned to the plaintiffs at Southampton under a bill of lading which provided (inter alia) *as follows: "The goods to be taken from alongside by the consignees as soon as the vessel is ready to discharge . . . or otherwise they may be landed, put into lighters, or stored . . . at the expense of the consignee of the goods. . . . Freight to be paid at destination before delivery. . . . The company shall have a lien upon the goods for the payment thereof, as well as a general lien, not only for the freight of the same, but for all other freights, storages, or other charges owing to the company by the shipper, consignee, or owners."*

The vessel arrived at Southampton, and was ready to discharge, but the plaintiffs did not take delivery. The goods were landed by the master and stored with a warehouseman, with instructions that the goods were to be held for the shipowners, and not to be delivered to any person without their instructions, which were to be accompanied by their release for the freight. The bill of lading was sent by the plaintiffs to the warehouseman with the sum due for freight as under sects. 493-496 *of the Merchant Shipping Act* 1894. *The warehouseman, acting upon the instructions of the shipowners that the goods were not to be delivered to the plaintiffs until payment of freight to the shipowners had been made, refused to deliver the goods.*

In an action by the plaintiffs for the delivery of the goods on payment of freight to the warehouseman:

Held, that as the shipowners had not landed the goods and stored them in the warehouse under the provisions of the Merchant Shipping Act 1894, *the consignees had no right to delivery of the goods by the warehouseman on depositing the amount due for freight.*

Commercial Court.

Action tried by Scrutton, J.

The plaintiffs' claim was to establish their right to delivery of certain goods upon payment of freight to a warehouseman as under sects. 493-496 of the Merchant Shipping Act 1894.

The facts and arguments are sufficiently stated in the judgment.

Sects. 493-496 of the Merchant Shipping Act 1894 are as follows:—

Sect. 493. (1) Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or, having made entry thereof, to land the same or take delivery thereof, and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the goods at the following times:—(*a*) If a time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the time so expressed. (*b*) If no time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, from the time of the report of the ship. (2) Where a shipowner lands goods in pursuance of this section he shall place them or cause them to be placed—(*a*) If any wharf or warehouse is named in the charter-party, bill of lading, or agreement, as the wharf or warehouse where the goods are to be placed and if they can be conveniently there received, on that wharf or in that warehouse; and (*b*) in any other case on some wharf or in some warehouse on or in which goods of a like nature are usually placed; the wharf or warehouse pay, if the goods are dutiable, a wharf or warehouse duty approved by the Commissioners of Customs for the landing of dutiable goods. (3) If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed to do so, and his entry shall in that case be preferred to any entry which may have been made by the shipowner. (4) If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of that landing has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, the goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment, and the expense of and consequent on that landing and assortment shall be borne by the shipowner. (5) If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make that delivery, and has also failed at the time of that offer to give the owner of the goods correct information of the time at which the goods can be landed and delivered, then the shipowner shall, before landing or unshipping the goods, in pursuance of this section,

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

give to the owner of the goods or of such wharf or warehouse as last aforesaid twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without that notice, do so at his own risk and expense.

Sect. 494. If at the time when any goods are landed from any ship, and placed in the custody of any person as a wharfinger or warehouseman, the shipowner gives to the wharfinger or warehouseman notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount mentioned in the notice, the goods so landed shall, in the hands of the wharfinger or warehouseman, continue subject to the same lien (if any) for such charges as they were subject to before the landing thereof; and the wharfinger or warehouseman receiving those goods shall retain them until the lien is discharged as hereinafter mentioned, and shall, if he fails so to do, make good to the shipowner any loss thereby occasioned to him.

Sect. 495. The said lien for freight and other charges shall be discharged (1) upon the production to the wharfinger or warehouseman of a receipt for the amount claimed as due, and delivery to the wharfinger or warehouseman of a copy thereof or of a release of freight from the shipowner; (2) upon the deposit by the owner of the goods with the wharfinger or warehouseman of a sum of money equal and in amount to the sum claimed as aforesaid by the shipowner. But in the latter case the lien shall be discharged without prejudice to any other remedy which the shipowner may have for the recovery of the freight.

Sect. 496 (1). When a deposit as aforesaid is made with the wharfinger or warehouseman, the person making it may, within fifteen days after making it, give to the wharfinger or warehouseman notice in writing to retain it, stating in the notice the sums, if any, which he admits to be payable to the shipowner, or, as the case may be, that he does not admit any sum to be so payable, but if no such notice is given, the wharfinger or warehouseman may, at the expiration of the fifteen days, pay the sum deposited over to the shipowner. (2) If a notice is given as aforesaid the wharfinger or warehouseman shall immediately apprise the shipowner of it, and shall pay or tender to him out of the sum deposited the sum, if any, admitted by the notice to be payable, and shall retain the balance, or, if no sum is admitted to be payable, the whole of the sum deposited, for thirty days from the date of the notice. (3) At the expiration of these thirty days unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any disputes which may have arisen between them concerning the freight or other charges as aforesaid, and notice in writing of these proceedings has been served on the wharfinger or warehouseman, the wharfinger or warehouseman shall pay the balance or sum to the owner of the goods. (4) A wharfinger or warehouseman shall by any payment under this section be discharged from all liability in respect thereof.

Mackinnon for the plaintiffs.

Roche, K.C. and *R. A. Wright* for the defendant.

Scrutton, J.—This case raises a question of some difficulty and importance between owners of perishable goods carried on a steamer and the steamship owners. The point in dispute is this: The plaintiffs are indorsees of a bill of lading for bags of potatoes, freight to be paid before delivery, with a lien for freight and a general lien for other freights, or arrears of freights, storage or charges owing to the company by the shipper, consignee, or owners, and a provision printed in such small print that some judge will probably some day hold that it does not form part of the contract: "The goods to be taken from alongside by the consignees as soon as the vessel is ready to discharge . . . otherwise they may be landed, put into lighters, or stored by the steamer's agents . . . at the expense of the consignees of the goods."

The steamer arrived at Southampton, and was ready to discharge. The goods' owners broke their contract. They did not take delivery. They did not pay freight. A writ could have been issued against them that moment for the freight, and judgment under Order XIV. with costs would have been got against them. But, for the convenience of their own business, they desired to substitute for payment of freight before delivery (delivery being as soon as the vessel was ready to discharge) another arrangement by which delivery should be when they chose to take it from a warehouse, and freight should be paid when they had had a good look at the goods and satisfied themselves that there were no claims. They desired to substitute that in effect for the payment of freight before delivery. This controversy seems to have arisen by the goods' owners taking this course of action during December and January. In February the shipowners took this course: They wrote to the warehouse saying, "Any goods we land with you are landed for ship's purposes, and you must not deliver them to anyone without our instructions, but our instructions must be accompanied by a release for the freight"; that is, "Any goods we land to you you hold for us to deliver to our instructions." The dock at first said, "We note your instructions, but we cannot stop the consignees using the Merchant Shipping Act"; whereupon the shipowners' agents said, "Yes, you can, because we are not landing under the Merchant Shipping Act." Whereupon the warehouse wrote to the consignees, "The shipowners say this: Our solicitors agree with them. We want to keep friendly with both of you, and we suppose that if you fight it out we shall have to interplead." Then the ship came in. The consignees had given nobody instructions to take delivery. Thereupon, under the general notice, the goods were landed with the warehouse with no notice of a lien for freight for any amount. Through something which is said to have been the mistake of a clerk, some goods were delivered out against payment of freight in by the goods' owners; but it was found out that the mistake had been made, and the shipowners, through the warehouse, declined to deliver anything further unless all freight was paid to them. The consignees objected, and said, "The landing is under the Merchant Shipping Act, and we are entitled to the goods when we deposit the money with you on the terms of sects. 495 and 496." The shipowners said, "You have no right to take advantage of those clauses. We have not landed under the Act." A provisional arrangement was made by which the goods were released and the money put in joint names; the warehouse-keepers, the South-Western Railway Company, were let out of the action, and the shipowner and the goods' owner are now fighting as to who was right in the construction that they placed on the Act.

It seems quite clear, under the clauses of the bill of lading, first of all, that the ship might keep the goods on board until it was paid the freight, and the consignee could not have com-

plained; secondly, that the ship might put the goods into lighters and keep them until it was paid the freight, and the consignee could not complain. Thirdly, I agree, though I had some doubt about it at first, with Mr. Roche's argument here. If, without any reference to lien, the consignee came and said, "Deliver me my gooods," the ship could say, "It is a condition of my delivery that you should pay freight, and I do not deliver till you pay freight."

The remaining question is this: If, instead of putting into lighters, the shipowner stores, saying to the warehouse-keeper, "You do not take them under the Merchant Shipping Act, but you hold for me," is he in the same position as if he had put the goods into lighters, or kept them in the ship? I think that he is. I think that, if he deals with the matter in that way, he can say, "I do not deliver unless you pay me freight. You are not paying me freight and I shall not deliver." The clauses of the Merchant Shipping Act, after stating the power of the shipowner to land, say, "Where a shipowner lands goods in pursuance of this section," words which clearly contemplate that he may be landing goods for some other reason. I am inclined to think, although it is not necessary to decide it, that sect. 494 only applies to cases under sect. 493; but, if it does not, it only applies to cases where the goods are stored with a notice that they are to remain subject to a lien for freight "to an amount mentioned in the notice." It appears to me not to apply to a case where they are put with a warehouseman with a notice, "Do not deliver to anybody without instructions," saying nothing about the amount of freight, but leaving the shipowner to settle all questions as to freight. That, I think, exhausts the questions between the parties. I hold that the shipowner did not store under the Merchant Shipping Act, and that the goods' owner had therefore no right to get the goods by depositing money with the warehouse, but had only a right to get the goods by fulfilling his contract to pay before delivery, and that the plaintiffs' claim therefore fails, and that the usual consequences as to costs must follow.

Solicitors for the plaintiffs, *William A. Crump and Sons.*

Solicitors for the defendants, *Cattarns and Cattarns.*

Tuesday, April 22, 1913.

(Before BAILHACHE, J.)

GORDON STEAMSHIP COMPANY LIMITED *v.* MOXEY SAVON AND CO. LIMITED. (a)

Charter-party — Lay days — Stoppage owing to strike—Avoidance of charter.

By the terms of a charter-party it was agreed that a vessel should proceed to a dock, there to load from the charterers a cargo of coal. The cargo was to be loaded in 140 *running hours, and it was provided that "any time lost through riots, strikes, lock-outs, or any disputes between masters and men occasioning a stoppage of pitmen, trimmers, or other hands connected with the working or the delivery of the coal for which the steamer is stemmed; or by reason of accidents to mines or machinery, obstructions on the railway or in the docks; or by reason of floods, frosts, fogs, storms, or any cause beyond the control of the charterers, not to be computed as part of the loading time (unless any cargo be actually loaded during such time). In the event of any stoppage or stoppages arising from any of these causes continuing for the period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages."*

The vessel was ready to load in the dock on the 4th April 1912 *at* 1 *p.m. At that time a national coal strike was in progress, which terminated on the 9th April* 1912. *No coal had been received at the dock during the continuance of the strike, and after its termination none was ready for shipment until the* 11*th April, a period of more than six days after the vessel was ready to load. On the* 10*th April the charterers gave notice to the shipowners that, a stoppage having continued for six running days within the meaning of the charter-party, such charter-party was null and void.*

In an arbitration between the shipowners and the charterers an umpire held that the charter-party was void by reason of a stoppage arising from the specified causes or some of them—viz., a colliers' strike and causes beyond the control of the charterers within the meaning of clause 3 *of the charter.*

Held, that although the actual strike was over, it had directly caused a state of affairs in the collieries which physically prevented the output of coal, and that in these circumstances there was a stoppage due to strike within the meaning of the charter-party, and the decision of the umpire was right.

Observation: In order that there may be a "stoppage due to strike," the stoppage and the strike must be absolutely intimately connected one with the other.

AWARD, and SPECIAL CASE stated by an umpire

AWARD.

Whereas by charter-party dated the 15th Feb 1912 made between the London Steamship Company Ltd., owners of the steamer called the *Khartoum* (hereinafter called the shipowners) and Messrs. Moxey Savon & Co. Ltd., as agent for the charterers (hereinafter called the charterers) it was agreed (*inter alia*) that the said steamer should proceed to Cardiff, Penarth, or Barry, as ordered by the charterers, and there load from the charterers a cargo of steam coal not exceeding 3700 tons and not less than 3400 tons, and not exceeding what she could reasonably stow and carry, and, being so loaded, should proceed on a voyage to Buenos Ayres, and there discharge the said cargo on payment of freight as therein mentioned. By clause 3 of the said contract it was agreed as follows:—

3. The cargo to be loaded in 140 running hours (excluding bunkering time, Sundays, Custom house, colliery, and local holidays, Easter Monday and Tuesday, Whit Monday and Tuesday, and three days following Christmas Day, and from 5 p.m. on Saturday or the day previous to any such holiday to 7 a.m. on Monday or the day after any such holiday unless used), commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load, such notice to be given between business hours of 9 a.m. and 5 p.m., or 1 p.m.

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

on Saturdays. Any time lost through riots, strikes, lock-outs, or any dispute between masters and men occasioning a stoppage of pitmen, trimmers, or other hands connected with the working or the delivery of the coal for which the steamer is stemmed; or by reason of accidents to miners or machinery, obstructions on the railway or in the docks; or by reason of floods, frosts, fogs, storms, or any other cause beyond the control of the charterers, not to be computed as part of the loading time (unless any cargo be actually loaded during such time). In the event of any stoppage or stoppages arising from any of these causes continuing for the period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages. In case of partial holiday or partial stoppage of colliery or collieries from any or either of aforenamed causes, the lay hours to be extended proportionably to the diminution of output arising from such partial holiday or stoppage. If longer delayed charterers to pay 16*s.* 8*d.* per running hour demurrage. No deduction of time shall be allowed for stoppages unless due notice be given at the time to the master or owner. Any question arising under this clause shall be referred to a committee, consisting of one shipowner, to be nominated by the Cardiff Shipowners' Association, and one colliery owner, to be nominated by the Monmouthshire and South Wales Coal Owners' Association, and should they be unable to agree, the decision of an umpire selected by them shall be final.

And whereas the said Moxey Savon and Co. Ltd., in fact admitted that they were principals under the said clause, and wheras questions having arisen under the said clause three of the said charter, the same were referred to the arbitration of William James Tatem of Cardiff Docks, shipowner, and John Andrews of Cardiff Docks, merchant, who were both duly nominated as provided by the same clause 3.

And whereas the said arbitrators were unable to agree upon an award, and they appointed me, Fred Vaughan, of Cardiff Docks, to be the umpire in the matter of the said arbitration. Know all men by these presents that having taken upon myself the burden of the said reference and arbitration, and having heard all the evidence that was adduced before me and admissions made before me by the parties to the said reference, their counsel, and solicitors, and having read and considered the documentary evidence put in by them and carefully considered the arguments of counsel by which I was assisted in this case, I do hereby award and determine as follows:

1. That at 1 p.m. on the 10th day of April 1912 the said charter-party became void by reason of a stoppage or stoppages arising from the specified causes or some of them, viz., a colliers' strike and causes beyond the control of the charterers, within the meaning of clause 3 of the charter lasting for the period mentioned in the clause, no coal having been shipped on board the steamer prior to such stoppage or stoppages; that the charterers have not become liable under the said charter to pay to the shipowners any sum of money by way of damages for breach of charter-party or otherwise, and that the shipowners do pay the cost of and incident to the said reference and arbitration . . .

And I make the above award subject to the opinion of this honourable court upon the special case hereinafter stated by me at the request of the parties.

Special Case.

Upon the hearing of the said reference the following facts were admitted, or proved to my satisfaction—namely:

(1) Moxon Savon and Co. Ltd. were in fact the charterers of the steamer under the aforesaid charter party.

(2) The steamer was ordered by charterers to proceed to Penarth Dock, for the purpose of loading her cargo, under the said charter, and on the 4th April 1912 the steamer arrived in Penarth Dock, and was in fact ready to load at 8 a.m. on that day; and, having been overlooked by the shipowners' overlooking engineer, notice in writing of the steamer's readiness to load cargo was given on behalf of the shipowners to the charterers, pursuant to the said clause 3 of the charter, at 1 p.m. on the 4th day of April 1912.

(3) The steamer was, on the 29th day of March 1912, stemmed within the meaning of clause 3 by charterers with the Powell Duffryn Steam Coal Company Ltd. (hereinafter called the "colliery company") to be laden with a cargo of coal as described in the charter, to come from that colliery company's collieries, known as the Powell Duffryn Collieries.

(4) The Powell Duffryn Collieries consist of two groups of several collieries, one group being in the Aberdare Valley, in the county of Glamorgan, and the other group being in the Rhymney Valley, situate partly in the county of Glamorgan and partly in the county of Monmouth. The said cargo (hereinafter referred to as the chartered cargo) was to come partly from certain collieries in the one group, and partly from certain collieries in the other group. All the collieries from which the said cargo was intended to come (hereinafter referred to as the chartered collieries) were distant by railway from Penarth Dock from twenty to twenty-five miles, such railway journeys involving junctions between different systems.

(5) In the best circumstances for forwarding traffic along such journeys no output from any of the chartered collieries put out in the morning of any day could reach Penarth Dock at the earliest until some time later than 5 p.m. on the same day.

(6) On the 4th day of April 1912 when the *Khartoum* became ready to load and for several weeks prior thereto a colliers' strike was pending at the chartered collieries, and all other collieries in the district, and was part of the general national strike of colliers pending at the same time.

(7) In consequence of the said strike no coal had been put out from any of the chartered collieries, and no coal had been received from any of the chartered collieries at the said Penarth Dock or any dock or port for several weeks prior to the 4th day of April 1912, and this state of things continued until the morning of the 11th day of April 1912, when the Colliery Company were in the receipt at the said dock of some coal from their collieries, and were able for the first time after the strike to make any delivery of their coal at Penarth Dock. On that morning they issued their first tipping order after the strike.

(8) Until the 9th day of April 1912 there had been in consequence of the strike a complete cessation of all work and labour at the chartered collieries. On that day (all parties having by that time agreed for a termination of the strike) the colliery repairers re-entered the chartered collieries before any colliers re-entered. No colliers went into the chartered collieries, and no coal was raised on that day.

(9) On the 10th day of April 1912 "a very small proportion of the colliers" re-entered the chartered collieries. Before any colliers could cut coal it would be necessary that they should do certain other work described as clearing up work. During the 10th day of April 1912 some coal was raised from the chartered collieries. Some of the coal raised during that day was coal cut before the strike and some coal cut on that day. Such coal as previously stated could not and did not arrive at Penarth Dock until some time later than 5 p.m. on the 10th day of April, and in the circumstances could not be and was not available for shipment until the morning of the 11th day of April 1912.

(10) While the colliery company received no coal from their collieries at the docks in consequence of the

strike of colliers, the colliery company's trimmers were stopped in their work for want of coal wherewith to load the ships, and this state of things was common to colliery companies and other coal shippers, but the trimmers were not on strike, and had no dispute with their masters; they were forced to be idle and wanted work.

(11) On the 10th day of April 1912 the charterers notified the shipowners of the *Khartoum*, steamship, in writing as follows:

We beg to give you notice that a stoppage having continued for six running days within the meaning of clause 3 of the charter-party of the *Khartoum*, steamship, dated the 15th Feb. 1912, such charter-party is now null and void.

The shipowners claimed that the steamer should be loaded, but the charterers refused to load.

If the court is of opinion that upon the foregoing facts there was no stoppage or stoppages for the period of six running days mentioned in clause 3 of the aforesaid charter-party within the meaning of that clause, that the charter party did not become null and void, and that the refusal of the charterers to load was wrongful, I find the damages to the shipowners to be 1313*l.* 13*s.* 1*d.*

If my award is reversed or varied, may the court be pleased to deal with the costs of the parties in connection with the arbitration award and special case.

Leslie Scott, K.C. and *Raeburn* for the shipowners, said that they could not argue that the decision of the learned arbitrator was wrong, but the parties desired to have the decision of the court.

Leck, K.C. and *Inskip* for the charterers.

Bailhache, J.—This case arises on an award stated by an umpire on the meaning of a clause in the well known Welsh coal charter. The facts are stated in his special case, and all that need be said about them is that the steamer in question, the *Khartoum*, was chartered in this form of charter, and was ready to load in Penarth Dock on the 4th April 1912, at one o'clock in the afternoon. At that time the coal strike with which we are all familiar was in full force and had not come to an end; but it did come to an end some four or five days afterwards, with the result, however, that although the strike came to an end sometime on the 9th April, no coal could be received from the Powell Duffryn Collieries, which are the collieries in question, in time, as the umpire has found, to reach Penarth Dock, before the morning of the 11th April. The 11th April was more than six days after the 4th April at one o'clock in the afternoon, and under those circumstances the charterers claimed to avail themselves of a clause in the charter-party which I will now read. The clause reads: "In the event of any stoppage or stoppages arising from any of these causes continuing for the period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages." It follows, of course, from what I have already said, that no coal had or could be loaded on board the steamer previous to the stoppage or stoppages. The strike had, in fact, begun, as we all know, on the 1st March and had continued without intermission. It was a case, therefore, in which no coal had, in fact, been loaded on board the steamer. No coal having, in fact, been loaded over a period of six running days, the charterers claimed that the charter had become null and void, and that they were under no obligation to load the steamer.

In order to find out if that is so or not, one must look at the earlier part of the strike clause to see what are the causes from which such a stoppage must arise, if the charterers' contention is to be good. One must begin with the words "Any time lost through riots, strikes, lock-outs, or any disputes between masters and men occasioning a stoppage of pit men, trimmers or other hands connected with the working or delivery of the coal for which the steamer is stemmed; or by reason of accidents to mines or machinery, obstruction on the railway or in the docks; or by reason of floods, frost, fogs, storms or any cause beyond the control of the charterers, not to be computed as part of the loading time." The actual strike in this case was over about two days before the six running days had expired, but the effect of the strike continued beyond the six days. Those effects continued for the well-known reason that after a long stoppage of a colliery, it is not possible to go down into the colliery immediately and forthwith to get coal and send it to the bank. There is always a lot of repairing and dead work to be done before that operation can be performed.

In my opinion, in such a case as that, it is correct to say that the stoppage is a stoppage due to strikes, although the actual stoppage may continue for a few days beyond the time at which the strike itself, as a matter of dispute between masters and men, has come to an end. In my opinion in this case there was a stoppage due to strikes, although the strike had ended two days before the six days were up, and that being so, in my opinion the arbitrator has correctly found that the stoppage continued for a period exceeding the six days. I should like to say that while I think that is the true construction of this contract, I should myself, in a doubtful case, if the stoppage extended beyond the actual period of the strike, or is alleged so to extend, require to be satisfied that the stoppage was very closely and intimately connected with the strike itself. In this case no such question arises, because here the stoppage arose directly from the strike. The strike had caused the state of affairs to come into existance in the colliery itself by reason of the non-working of the colliery for upwards of a month, which physically prevented coal from being sent to the surface. In such a case as that, I have no hesitation in saying that there was a stoppage due to the strike. I have added that last observation lest it should be thought in future that all that it is necessary to say is that there was a strike and a stoppage due to it, and that something very remotely due to the strike might be connected with it and it might then be alleged that there was a stoppage due to the strike. I do not think that that is the case, and I am to that extent in accord with what I am told has been the opinion of commercial men, namely that the stoppage and the strike must be absolutely intimately connected one with the other. Subject to that observation, I think the learned umpire was right.

Solicitors for the shipowners, *Williamson, Hill, and Co.* for *Ingledew and Sons*, Cardiff.

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 23 *and* 24, 1913.

(Before Sir S. T. EVANS, P. and Elder Brethren.)

THE HARBERTON. (*a*)

Collision—River Thames—Vessel turning in river — Sound signals — Thames By-laws 1898, *by-law* 40.

When a steamship is turning round in the Thames and has in accordance with by-law 40 *of the Thames By-laws* 1898 *given four blasts to signify her manœuvre, that signal for the time being supersedes signals as to engine movements, and good navigation does not require that three short blasts should be blown every time engines are put full speed astern in such circumstances.*

DAMAGE ACTION.

The plaintiffs were the Port of London Authority, the owners of the steam hopper No. 11; the defendants and counter-claimants were the owners of the steamship *Harberton.*

The case made by the plaintiffs was that the hopper No. 11, 173ft. in length, was proceeding down Woolwich Reach on a voyage from Deptford to the Black Deeps with mud and shingle, manned by a crew of eleven hands. The weather was fine and clear, the wind a moderate southerly breeze and the tide flood of the force of from two to three knots. The hopper was proceeding down on the south side of the river and was making about seven or eight knots through the water. The regulation lights were being duly exhibited and were burning brightly, and a good look-out was being kept.

In these circumstances the masthead and green lights of a steamship which proved to be the *Harberton* were seen about three quarters of a mile distant and bearing a little on the port bow. The hopper sounded one short blast and ported a little and then steadied, shortly afterwards the *Harberton* shut in her green light and opened the red on the hopper's port bow, and the hopper sounded another short blast and ported a little more. The vessels continued to approach in a position to pass in safety port to port till they were within a quarter of a mile of each other, when the *Harberton* sounded four blasts and began to swing with her head to the northward. The hopper at once stopped and reversed her engines full speed, sounded three short blasts, and kept her helm aport. The stern of the *Harberton* swung rapidly athwart the river and as she appeared to be coming astern, she was hailed to go ahead but instead of keeping clear as she could and ought to have done, her port quarter struck the port bow of the hopper and then swept along the port side doing so much damage that the hopper had to be beached.

Those on the hopper No. 11 charged those on the *Harberton* with not keeping a good look out, with not keeping clear of the hopper, with not passing port to port, with manœuvring to turn round at an improper time, or when in an improper position, with letting go their anchor at an improper time in an improper place, with reversing their engines, with not going ahead, and with not indicating their manœuvres by sound signals in proper time.

The case made by the defendants and counter-claimants was that the *Harberton*, a steel screw steamship of 1443 tons gross and 893 tons net register, 247ft. in length, manned by a crew of seventeen hands, was in Woolwich Reach, in the course of a voyage from Swansea to London, laden with coal. The regulation lights of the *Harberton* were duly exhibited and burning brightly, and a good look out was being kept on board of her.

In these circumstances the *Harberton* having arrived just below her destination, four short blasts were blown on her whistle, the engines were ordered slow ahead and the helm was put hard-a-port. As the ship's head began to cant to the northward her anchor was let go and her engines were worked ahead and astern as required, the four short blasts being again sounded. About this time the masthead and red lights of the hopper coming down the river were observed about a mile distant and bearing about ahead. Shortly afterwards the four blast signal was again blown, and as the hopper approached at great speed she was loudly hailed to keep clear, the engines of the *Harberton* being put full speed ahead, but instead of easing her engines as she could and ought to have done, the hopper continued on at high speed and attempting to pass while the *Harberton* was turning with her port bow, came into collision with the port quarter of the *Harberton*, doing damage.

Those on the *Harberton* charged those on the hopper No. 11 with bad look out, with failing to keep clear, with failing to ease, stop or reverse their engines and with attempting to pass the *Harberton* at an improper time and in an improper manner.

The following by-laws for the river Thames were referred to:

39. When two steam vessels are in sight of each other and are approaching with risk of collision, the following steam signals shall be intimations of the course they intend to take: (*a*) One short blast of the steam whistle of about one second's duration to mean "I am directing my course to starboard." (*b*) Two short blasts of the steam whistle, each of about one second's duration, to mean "I am directing my course to port." (*c*) Three short blasts of the steam whistle, each of about two seconds' duration, to mean "My engines are going full speed astern."

40. When a steam vessel in circumstances other than those mentioned in by-law 36 is turning round or for any reason is not under command and cannot get out of the way of an approaching vessel, or when it is unsafe or impracticable for a steam vessel to keep out of the way of a sailing vessel, she shall signify the same by four blasts of the steam whistle in rapid succession, each blast to be of about one second's duration.

42. The words "short blast" used in this by-law 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 by-laws, shall indicate that course by the following signals on her whistle—viz.: One short blast to mean "I am directing my course to starboard"; two short blasts to mean "I am directing my course to port"; three short blasts to mean "My engines are going full speed astern."

48. Steam vessels and steam launches crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river.

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

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.

Bateson, K.C. and *Dunlop* for the plaintiffs.—The collision happened close over to the barge roads. The *Harberton* reversed when athwart the river to let some barges pass ahead of her and so brought about the collision. The *Harberton* came astern although she was hailed to go ahead. The look-out on the *Harberton* was defective. There was no one on the look-out on the port side, for the attention of those on board was taken up with watching the tug and barges passing up the river ahead of them. The *Harberton* did not sound proper signals; she did not give a port helm signal when turning under port helm; she did not sound three short blasts when she went astern, and only sounded four short blasts when the hopper No. 11 was very near her. She turned at a wrong moment. The letting go of the anchor shows when she began to turn.

Laing, K.C. and *Noad* for the defendants.—The engine log of the *Harberton* shows she had been going ahead for some little time before the collision. The evidence shows that the hopper No. 11 was seen a mile off and a four blast signal was then sounded by the *Harberton*, and ample warning was given to the hopper No. 11 of what was being done. It is difficult to suggest what signals the *Harberton* should give other than those given; if she gave three short blasts when she gave her engines a touch astern, what is she to do when she is giving her engines a touch ahead. The only proper signal is the four blast signal which was given, for everyone knows that after sounding that signal a vessel may be going ahead or astern until she has turned round.

The PRESIDENT.—This is a fairly simple case, and I think it is quite clear what the decision of the court ought to be. The defendant vessel, the *Harberton*, was proceeding up with the tide, intending to anchor at Atlas No. 3 in the ordinary course, and in order to get to that place she turned or began to turn round at or near the locality spoken to—the exact spot is not important—and performed the evolutions for that purpose which are duly recorded in the engine-room log. The master of the hopper, curiously enough, was a man who himself had been in the collier trade and knew perfectly well how they swing these vessels, and also knew that vessels bound to Atlas No. 3 turn round about where this vessel was. At a considerable distance away this vessel was seen by those on the hopper, the distance being given by them as three-quarters of a mile. It was a calm, clear night, and it is in evidence, and I think substantially true, that the hull of this vessel, without the lights, could be seen at a distance of half a mile. The hopper, notwithstanding all this, proceeded on her own side of the river, and with the full intention from the beginning, I think, of going under the stern of this vessel, she proceeded too near that vessel, took the risk of passing under the stern of the vessel, failed in the attempt, and the collision was brought about.

Comments have been made upon the conduct of the *Harberton*. I have said that in my view it is abundantly shown by the evidence that she was proceeding to swing in the ordinary way, as every vessel is entitled to do in the river when the necessary precautions are taken. She gave several separate signals of four short blasts which were appropriately given in the river by a vessel intending to make a turn. The first signal of four blasts was given in the open reach, without reference to the hopper, and, so far as I know, without reference to any particular vessel. The second signal of four blasts was given with reference partly to the hopper, which had been seen about that time. The third signal was given a little later—some three or four minutes later—and it is said, and I daresay accurately said, that nothing else could be done to indicate the manœuvres of this vessel, the *Harberton*, until it was too late to prevent any on-coming vessel from coming into collision with her.

I have come to the conclusion, and am advised, that the signals which I find in fact were given by this vessel were appropriate and sufficient. Yet it is said this collision was brought about by the *Harberton* coming astern. I accept the evidence of the *Harberton*, which is corroborated by the engineer's log put in here, that for about two minutes—more than a minute, perhaps less than two minutes—this vessel, so far from coming astern with her engines, was going with her engines full speed ahead. That she came astern now and again in the course of these evolutions is admitted. According to the record, which, as I say, I accept as substantially true, these evolutions for about fourteen minutes before the collision were as follows: Full ahead 11.30, slow 11.31, stop 11.35, full astern 11.37, stop 11.39, full ahead 11.40, full astern 11.41, stop and full ahead 11.43, collision 11.45. Now counsel for the plaintiffs said: "When you came astern you ought to have given the appropriate signal," and he says it would have been three short blasts. Well, as counsel for the defendant says, what is the appropriate signal when the vessel is going ahead? The truth is that when a vessel is turning, after she has given four blasts, that signal supersedes for the time being all the other signals as to the orders which are given to the engines. You cannot possibly, when backing and filling, which is, I think, the phrase used in this case—when you are performing these quick manœuvres for the purpose of turning your vessel you cannot be expected, and good navigation does not require you to give three blasts every time your engines are put full speed astern. So far as the *Harberton* is concerned, I see no fault at all in her navigation or with regard to her manœuvres.

With regard to the hopper, it is admitted, as I have said, that the *Harberton* was seen three-quarters of a mile away. Further, it is admitted that the vessel was reported a quarter of a mile away; and at about that distance, a quarter of a mile away, the hopper not only heard four short blasts, but immediately afterwards the anchor chain, and possibly the falling of the anchor itself on the *Harberton*, were actually heard by those on the hopper. They knew the vessel was dropping her anchor for the purpose of turning, or ought to have known it, when a quarter of a mile away, and I think it is fully in accordance with the evidence given here, and I am advised that beyond all question, if at that time the hopper had thought fit to ease up or reverse her engines this collision would have been avoided without trouble.

Some comment was made with regard to the *Harberton* not hearing the one blast signal which is said to have been given twice by the hopper; and the fact is that none of the witnesses on the *Harberton* heard any such signal. If it be necessary to determine the question, one has to ask oneself whether the signal was given. According to the evidence of the master of the hopper there was a porting and keeping the helm to port, and notwithstanding that he said they only changed a point. According to the evidence of the man at the wheel this porting only achieved a change of half a point. The hopper was going on the south side, and I think it is very questionable whether, if she had ported half a point first and half a point the second time, this signal would have been given. Whether she was directing her course to starboard within the meaning of the rule, or merely getting a little more to the south side—in other words, whether she was really navigating or only giving a special direction to the man at the wheel, I doubt very much whether any signal was given, and for the purpose of my decision I come to the conclusion that these whistles were not given. They were not heard by those who were, as I find, navigating carefully and giving signals, nor by the man on the tug, and I therefore come to the conclusion that it has not been proved to my satisfaction that the signals were given. Therefore there is no fault to find with the *Harberton.* In a word, this case shows that the *Harberton* was turning in the river in the ordinary course, and while so doing she was seen athwart the river, and was heard by those on the hopper, and notwithstanding that the hopper, which could have eased, did not do so, but took the risk of passing the vessel, and in taking that risk brought about the collision. My judgment, therefore, must be that the hopper is alone to blame.

Solicitors for the plaintiffs, *Pritchard and Sons.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 20, 21, 24, *and March* 14, 1913.

(Before VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L.JJ.)

HARROWING STEAMSHIP COMPANY LIMITED *v.* WILLIAM THOMAS AND SONS. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Lump freight — Non-arrival of chartered ship — Delivery of part of cargo — Right of shipowner to freight.

By the terms of a charter-party it was provided that a steamship should load a full and complete cargo of pit props at a port in Finland and proceed to Port Talbot, a dock as ordered, and there deliver the cargo on being paid a lump sum of 1600*l.*

The charter-party contained an exception clause including (inter alia) *perils of the seas.*

The steamship loaded her cargo and proceeded to Port Talbot, but before she could get into a dock she went ashore and ultimately became a total wreck. Part of the cargo was washed ashore, and a substantial part was collected on behalf of the shipowners and delivered to the consignees.

Held, that the shipowners were entitled to payment of the lump freight as they had performed their contract save in so far as they had been prevented by an excepted peril.

Judgment of Pickford, J. (12 *Asp. Mar. Law Cas.* 261; 107 *L. T. Rep.* 459) *affirmed.*

APPEAL by the defendants from a decision of Pickford, J. sitting as judge of the Commercial Court (12 Asp. Mar. Law Cas. 261).

The plaintiffs' claim was for freight payable under a charter-party, dated the 1st Sept. 1911, for the carriage of a cargo of pit props per the plaintiffs' steamship *Ethelwalda.*

The charter-party was in the following terms:

It is this day mutually agreed between Messrs Robert Harrowing and Co., owners of the good steamship called the *Ethelwalda*, of 1535 tons net register or thereabouts . . . and Messrs. William Thomas and Sons, of Swansea, charterers, that the said steamship . . . shall . . . sail and proceed to one place, Uleaborg district, as ordered . . . and there load . . . a full and complete cargo consisting of props. The steamer to carry a full and safe deck load at charterers' risk not exceeding what she can reasonably stow and carry . . . and being so loaded shall therewith proceed to Port Talbot, a dock as ordered, or as near thereto as she may safely get, and deliver the same, always afloat, on being paid freight as follows: a lump sum of 1600*l.* (say, sixteen hundred pounds) in consideration in full of all port charges and pilotages. . . . The freight to be paid in cash . . . on unloading and right delivery of the cargo.

[In the form of charter originally the freight was to be paid per standard with regard to some of the timber, and per fathom with regard to the other, but that was struck out.] There was an exception clause which included, among other exceptions, "perils of the seas."

The *Ethelwalda* proceeded to Haukipudas, in the Uleaborg district, and after loading a cargo of props she proceeded to Port Talbot and anchored off the port on the night of the 29th Oct. 1911. On the following day before she was able to get into a dock, either through breaking her anchor or in consequence of her cable parting, she went ashore on the north side of the breakwater. Her deck cargo was swept off, some of it being stranded on the beach and some lost altogether. The remainder of the cargo was washed out of the ship, and a substantial portion of it was subsequently collected on behalf of the owners by a firm called Jenkins and Co.

The dock company took possession of the cargo as it was collected and held it under a lien for their own charges, and also under a lien for freight on behalf of the shipowners.

Pickford, J. held that the shipowners were entitled to payment of the lump freight as they had performed their contract save in so far as they had been prevented by an excepted peril, and gave judgment for the plaintiffs.

The defendants appealed.

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Maurice Hill, K.C. and *Leck*, K.C. for the appellants.—The main question on this appeal is whether lump sum freight is payable in the case of a charter-party for a lump sum where the ship is lost before she arrives at the destination named in the charter-party and only part of the cargo—namely, that which was cast up on the beach—is brought forward at all. It is submitted on behalf of the defendants that there was no delivery of that cargo within the meaning of the charter-party. The lump sum freight is only earned when the ship is arrived and has performed the voyage in its entirety. Lump sum freight is really a payment in the nature of rent for the use and hire of the ship for the voyage:

Robinson v. *Knight and another*, 2 Asp. Mar. Law Cas. 19; 28 L. T. Rep. 820; L. Rep. 8 C. P. 465.

It therefore follows that nothing is payable unless the ship completes her voyage, the condition of payment being the arrival of the ship. They referred to

Appleby v. *Myers*, 16 L. T. Rep. 669; L. Rep. 2 C. P. 651;
Merchant Shipping Company v. *Armitage*, 2 Asp. Mar. Law Cas. 51, 185; 29 L. T. Rep. 97; L. Rep. 9 Q. B. 99;
The Cito, 4 Asp. Mar. Law Cas. 468; 45 L. T. Rep. 663; 7 P. Div. 5;
The Arno, 8 Asp. Mar. Law Cas. 5; 72 L. T. Rep. 651;
Guthrie v. *North China Insurance Company*, 6 Com. Cas. 25; 7 Com. Cas 130;
Mitchell v. *Darthez and another*, 2 Bing. N. C. 555;
The Norway, 2 Mar. Law Cas. O. S. 17, 168, 254; 12 L. T. Rep. 57; 13 L. T. Rep. 50; 3 Moo P. C. N. S. 245; Bro. & Lush. 377;
London Transport Company Limited v. *Trechmann Brothers*, 9 Asp. Mar. Law Cas. 518; 90 L. T. Rep. 132; (1904) 1 K. B. 635;
Forman and Co. Proprietary Limited v. *Ship Liddesdale*, 9 Asp. Mar. Law Cas. 45; 82 L. T. Rep. 331; (1900) A. C. 190;
Shipton v. *Thornton*, 9 A. & E. 314;
Matthews v. *Gibbs*, 1 Mar. Law Cas. O. S. 14; 3 L. T. Rep. 551.

George Wallace, K.C. and *Dunlop* for the plaintiffs.—The judgment of Pickford, J. was right. It is most material here to see what is the meaning of the charter-party, and it is this, that the shipowners are entitled to the lump sum freight if they have substantially performed their contract by making a right delivery of the cargo. This vessel did proceed to Port Talbot, or so near thereunto as she might safely get, and but for the perils of the seas which are excepted would have delivered the whole of the cargo. By causing the goods which were washed ashore to be forwarded to the place of delivery mentioned in the charter-party, the shipowners had done everything that was necessary to entitle them to their freight. They referred to

The Norway (*sup.*);
Robinson v. *Knight and another* (*sup.*);
Mitchell v. *Darthez and another* (*sup.*);
Hunter v. *Prinsep*, 10 East, 378, 394;
Williams and others v. *Canton Insurance*, 9 Asp. Mar. Law Cas. 247; 85 L. T. Rep. 317; (1901) A. C. 462;
Merchant Shipping Company v. *Armitage* (*sup.*);
Sutton v. *Buck*, 2 Taunt. 302;
Hanson v. *Dunn*, 11 Com. Cas. 100.

Maurice Hill, K.C. in reply.

Cur. adv. vult.

March 14.—Vaughan Williams, L.J. read the following judgment:—I doubt very much whether at the date of the earlier decisions cited before us in this case the judges before whom the question of the construction of lump freight charters came would have decided on the lines adopted by Pickford, J. in this case, but I cannot but think that there has been for a long time a tendency not to apply the ordinary rules of construction in commercial cases, and in particular in shipping cases. The courts have modified the natural construction to make decisions accord with commercial practice and convenience, which I have heard described as commercial equity.

I will go through the authorities cited to us, and see how far this construction in accordance with commercial convenience has regulated the decisions of the courts in construing lump sum charters.

I accept for the purpose of this judgment the facts found by Pickford, J.—namely, that a large part of the cargo, having been thrown up on the shore by perils of the sea, was collected by persons whose services were accepted and paid for by the master of the ship *Ethelwalda* after the master had given the underwriters notice of abandonment; and that these pit props—for that was the nature of the cargo—were carried into a dock at Port Talbot and there delivered to the defendants, the charterers, under an order of Scrutton, J. upon a certain sum being paid into joint names in a bank.

This action was brought by the plaintiffs to recover the lump sum freight, and Pickford, J. has held that the plaintiffs, having delivered to the defendants so much of the cargo as was not lost by the excepted perils of the sea, are entitled to the payment of the whole lump sum freight.

I will now deal with the authorities. First there is the case of *Hunter* v. *Prinsep* (10 East, 378). This case does not seem to have been cited before Pickford, J., but was cited and relied on by the plaintiffs before this court, and in particular a passage in the judgment of Lord Ellenborough on p. 394 of the report was relied on. It is this: "If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the shipowner has no right to withhold the possession from him, unless he has either earned his freight or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession. The captain's conduct in obtaining an order for selling the goods and selling

them accordingly, which was unnecessary, and which disabled him from forwarding the goods, was in effect declining to proceed to earn any freight, and therefore entitled the plaintiff to the entire produce of his goods, without any allowance for freight. The *postea* must therefore be delivered to the plaintiff." This case has no direct application to lump sum freight. It was a case of freight payable per ton. The most that can be said of this decision is that it established, or, rather, affirmed, the right of the shipowner whose ship has been disabled in the course of the voyage to earn freight in respect of goods saved because the merchant receives advantage from the voyage. The same proposition had been sanctioned in the cases cited by Richardson, counsel for the defendants. I have looked up those cases. The case in its facts had no reference to lump sum freight. It only affirms that, in a case where freight is payable *pro rata itineris*, the merchant in fairness must pay freight for goods saved and accepted by him, because he receives advantage from the voyage. It does seem to recognise an inference outside the actual words of the contract. I wish to say that the freight there spoken of is, I think, a reasonable freight payable by the owner of the goods on the acceptance by him of the goods.

Next I will deal with the case of *Mitchell* v. *Darthez and another* (2 Bing. N. C. 555). This was a case in which there was a charter under a lump freight contract. Lawrence, J. is cited on p. 565 of 2 Bing. N. C. as having said in *Cook* v. *Jennings* (7 T. R. 381): "He"—meaning the master—"is not entitled to the whole freight unless he performed the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro rata* unless under a new agreement." After this observation of Lawrence, J. there was then cited by Serjeant Spankie, counsel for the defendants, at p. 565, the following passage from Abbott on Shipping—I have not got the number of the edition, but it was from an edition prior to 1836—chapter 7, which runs thus: "The contract for the conveyance of merchandise is in its nature an entire contract; and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and labour expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week." "In the case of a general ship or of a ship chartered for freight to be paid according to the quantity of the goods, there can be no doubt that freight is due for so much as shall be delivered, the contract in these cases being distinct, or, at least, divisible, in its own nature. But suppose a ship chartered at a specific sum for the voyage without relation to the quantity of the goods (in which case the contract, as observed by Hardwicke, L.C.—see *Paul* v. *Birch*, 2 Atk. 621—is more properly a contract for the use of the ship than for the conveyance of the merchandise) should lose part of her cargo by a peril of the sea, but convey the residue to the place of destination, In this case I do not find any authority for apportioning the freight, and it seems to have been the opinion of Malyne that nothing would be due; and the case of *Bright* v. *Cowper* (1 Brownlow, 21), which will be mentioned hereafter, may be considered as an authority in support of that opinion. But probably if the question should arise again the determination of it would depend upon the particular words of the charter-party: without a very precise agreement for that purpose it seems hard that the owners"—that is the shipowners—"should lose the whole benefit of the voyage where the object of it has been in part performed, and no blame is imputable to them." The decision in this case was, first, that in the circumstances of that case the goods could not properly be said to have been carried to their destination; secondly, that there was no new and implied contract founded on meritorious service rendered to the charterers by the shipowner, in the partial performance of the voyage contemplated and the acceptance of the goods from Fayal to Gibraltar, the carriage not having been the act of the plaintiff, the shipowner, because the goods were forwarded by the Vice-Consul acting as the agent of the freighters, although the Vice-Consul was desired by the master to forward them, and the agents of the freighters accepted the goods and paid the freight, and thereby recognised the act of the Vice-Consul as their agent. At p. 571 Tindal, C.J. winds up his judgment by saying: "The claim of the shipowner must, therefore, rest upon an implied contract to remunerate him for service performed, not according to the agreement, but a service from which the freighters have received a benefit." I cannot infer from anything in the judgment of Tindal, C.J. that he would have held the full lump sum freight to have been payable had the goods been forwarded to their destination by the master of the ship on behalf of the shipowner. The only passage which I can find in the judgment favouring the claim of the shipowner to recover the lump sum freight is on p. 568, where Tindal, C.J. says: "But the plaintiff never performed that homeward voyage either in the ship mentioned in the charter-party or any other."

The next case I will refer to is *The Norway* (*sup.*). There are two reports—one in the court below and one in the Privy Council. That case was a case in which the contract was for a lump sum freight, and it was held that there is no deduction from the lump freight of proportional freight for part cargo not delivered, and that, even if the loss had been by the negligence of the shipowner, the shipper's remedy would only be a cross-action, and it was stated that "the lump sum called freight was not properly so called, but was more properly a sum in the nature of a rent to be paid for the use and hire of the ship."

I do not think any of the subsequent cases have in any way displaced or modified either of these propositions.

Next I will deal with *Robinson* v. *Knight and another* (*sup.*), in which Keating, J. describes lump freight as an entire sum to be paid for the hire of a ship for one entire service. In neither of these cases was the necessity in the performance of the contract for the arrival of the ship discussed, but it seems to have been assumed. Brett, J. says: "The terms of the charter are not precisely the same in this case as in the case of *The Norway* (*sup.*), but I think that the freight in both cases is a stipulated gross sum to be paid for the use of the whole ship for the whole voyage." Transhipment does not seem consistent with this view. Use of the whole ship for the whole voyage *primâ*

facie is an essential part of the consideration, and not the less so because the payment of the lump sum freight is only to be made on the delivery of the cargo, except such as is lost by excepted perils of the sea. I cannot see anything in either *Merchant Shipping Company* v. *Armitage* (*sup.*) or in *Williams and others* v. *Canton Insurance* (*sup.*) which in terms militates against the view that the arrival of the ship hired at a lump freight is essential to earning that lump freight. Indeed the case of *Williams and others* v. *Canton Insurance* is wholly irrelevant to the case that we have to decide. What is relied on is the dictum of Lord Lindley at p. 473 (of L. Rep. 9 Q. B. 99; p. 250 of 9 Asp. Mar. Law Cas.): "A lump sum freight is a definite sum agreed to be paid for the hire of a ship for a specified voyage; and, although only payable on the right and true delivery of the cargo, those words are not taken literally, but are understood to mean right and true delivery, having regard to and excluding the excepted perils." I wish to say in regard to that dictum of Lord Lindley that it is an instance of that which I mentioned; there is a tendency at the present day towards really modifying the actual words of the contract in order to do what is fair and just as between the shipowner and the charterer. Then the quotation goes on: "In other words, the cargo, in this clause of the charter-party, does not mean the cargo shipped, but the cargo which the shipowner undertakes to deliver. The non-delivery of some of that affords no defence to a claim for the lump sum freight, although such non-delivery, if wrongful, will give rise to a cross-action. This was settled by the Court of Exchequer Chamber in *Merchant Shipping Company* v. *Armitage* (*sup.*), which followed a decision to the same effect by the Privy Council in *The Norway* (*sup.*).

But at the same time I agree, though, like Pickford, J., not without doubt, with the judgments of my brethren which they are about to read, because, as I have already stated, having regard to the present universal practice of insurance, it seems to me that to hold that the arrival of the chartered ship is not a condition precedent to earning the lump sum freight does more complete justice between the shipowner and the charterer, and for that reason I concur in the judgment of my brethren. The great difficulty in this case has been that the ship of which the charterers were to have the whole use for the whole voyage has never performed the whole voyage. The claim is not for reasonable remuneration for delivery and acceptance of the goods, but for the whole lump sum freight. The appeal must be dismissed.

Farwell, L.J. read the following judgment:—The cases have established a rule of construction with regard to lump sum freight charter-parties, which is thus stated by Lord Lindley in the House of Lords in *Williams and others* v. *Canton Insurance* (*sup.*): "A lump sum freight is a definite sum agreed to be paid for the hire of a ship for a specified voyage; and, although only payable on a right and true delivery of the cargo, those words are not taken literally, but are understood to mean right and true delivery having regard to and excluding the excepted perils." The object of the rule is to avoid the injustice that might be done by the doctrine of *Cutter* v. *Powell* (6 T. R. 320) in many cases, if the shipowner were thereby deprived of his freight, and the charterer got his goods without any payment, although the ship arrived at her port of destination, but with the loss of some of the cargo shipped owing to excepted perils, and which would, of course, in accordance with the ordinary practice, be covered by insurance. The rule, like all other rules of construction, yields, of course, to clear evidence of contrary intention, but, being founded on honesty and fair dealing, ought not to be made dependent on small variations of phraseology. Lord Lindley goes on to add to the sentence quoted above: "In other words, the cargo in this clause of the charter-party does not mean the cargo shipped, but the cargo which the shipowner undertakes to deliver. The non-delivery of some of that affords no defence to a claim for the lump sum freight, although such non-delivery, if wrongful, will give rise to a cross-action." The question of wrongful non-delivery of all or part, either of the cargo undertaken to be delivered, or of the cargo shipped, does not arise in this case, and I express no opinion on it. There are several dicta on the point in *The Norway* (*sup.*) and in Lord Bramwell's judgment in *Merchant Shipping Company* v. *Armitage* (*sup.*).

The rule being as stated, it is said that the first essential is that there must be an arrived ship, and that such ship must be the actual ship chartered. I agree that some ship must have arrived to such an extent as either mediately or immediately to discharge the cargo that the shipowner undertook to deliver. The gist of the contract is that the shipowner should convey and deliver to the charterer or his consignee the goods included in the charter. But it was laid down by Lord Ellenborough in *Hunter* v. *Prinsep* (*sup.*) that "if the ship is disabled from completing her voyage, the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded, unless the forwarding them be dispensed with, or unless there be some new bargain upon the subject." It is said that this ruling did not apply to a lump sum freight, but no case in the books, nor any text-writer, has been cited to us to show that it is not of general application, and it appears to me to be founded on good sense and to be as applicable to lump sum freights as to others. The contrary proposition is hardly consistent with *Mitchell* v. *Darthez and another* (*sup.*), for the court would not have spent time in determining that the shipowner could not earn his freight by transhipping, unless he chartered the substituted vessel at his own expense, if he could not earn it at all under any terms of transhipment, nor would Tindal, C.J. have said in the beginning of his judgment, "But the plaintiff never performed that homeward voyage, either in the ship mentioned in the charter-party or in any other," if the only way of performing the contract was by employing the ship mentioned in the charter-party. He must not impose any greater risk by enlarging the excepted perils in the substituted ship (*The Bernina*, 56 L. T. Rep. 258; 58 L. T. Rep. 423; 12 P. Div. 58: 13 App. Cas. 1), but as a general proposition he can tranship and so earn his freight by delivering the cargo undertaken to be

delivered. Then it is said that there was nothing like transhipment here, but that the timber was delivered to the waves and by them cast upon the beach; and this is true, but it was to the extent of about two-thirds of the entire cargo collected and taken in carts to and delivered at the place of destination. Lord Ellenborough does not specify transhipment, but says "by forwarding the goods by some other means." If the vessel had run upon a rock outside the harbour and become fixed there, I cannot doubt that, if the sea and wind abated and the shipowner either carried the timbers in lighters, or towed them into the harbour, and then transported them by land to their place of destination, this would have been good delivery; the mode of delivery is only a means to an end; the substance is the delivery in fact of the cargo undertaken to be delivered.

Whether the shipowner was the person who delivered or not is a question of fact on which I agree with the finding of Pickford, J. Captain Barge's duty was to act promptly on behalf of whomsoever it might concern; he was acting, not for himself, but on behalf either of the shipowner or of the Salvage Association, whichever might elect to adopt his acts, and the shipowner did so.

I am of opinion that this appeal fails.

KENNEDY, L J. read the following judgment:—In this case the plaintiffs chartered their steamship *Ethelwalda* to the defendants to load a cargo of pit props at a place in the Uleaborg district of Finland, and carry it to a dock at Port Talbot for a specified lump sum as freight. The freight was payable under art. 9 on unloading and right delivery of cargo. The charter-party contained the usual exception of perils of the seas. The *Ethelwalda* arrived with her cargo, which consisted in part of a deck load, outside the port of discharge, when owing to heavy weather she was driven against the breakwater and became a total loss. About two-thirds of the cargo was washed ashore and was collected on the beach by the directions of the master of the *Ethelwalda*, acting on behalf of the plaintiffs, and placed on the dock premises and there delivered to the defendants, the residue of the cargo being lost by perils of the seas. The plaintiffs brought the present action to recover the lump sum freight. Pickford, J. has held that the plaintiffs, having delivered to the defendants so much of the cargo as they were not prevented by the excepted perils from delivering, had performed their contract, and were entitled to require payment of the lump sum freight. It is against this judgment that the present appeal has been brought.

The material facts as I have summarised them are not really in dispute. It is true that Jenkins, the contractor who collected the timber as it came ashore and carted it to the dock premises, where the defendants claimed and got delivery, commenced his work at the instance of Captain Barge, the agent of the Salvage Association at Port Talbot, acting, I infer—as the plaintiffs had given notice of their abandonment of the *Ethelwalda* to their underwriters—for whomsoever it might concern. But at Captain Barge's suggestion Jenkins then applied to the master of the *Ethelwalda* and asked him to enter into a contract for the collection of the timber and its delivery by means of cartage on the dock premises, and the master of the *Ethelwalda* on behalf of the plaintiffs did enter into the contract with a stipulation that the cargo was to be held under a lien for freight; and the work was carried out under that contract, and the plaintiffs have paid the contractor for these services. In the court below and before us the learned counsel for the defendants argued, or rather, I think I should say, suggested, that there was some intervention by the underwriters which affected the plaintiffs' claim, but, like the learned judge in the court below, I must confess myself unable to see any substance in such a contention. Whatever the effect of their action may be in law, in regard to the present claim, I hold it to be clear, as a matter of fact, that it was the plaintiffs who by their agent collected the cargo and delivered it to the defendants.

Whilst, however, there is not, I think, any substantial dispute as to facts, two questions of law, each of which is of considerable general importance, have been raised by the appellants both in this court and before my brother Pickford. They contend in the first place that as the stipulated freight was a lump freight, it could be earned by the plaintiffs only if the cargo was carried to its destination in the *Ethelwalda*, and therefore, inasmuch as she was wrecked outside the breakwater, and the cargo as it came ashore was conveyed to the dock in the way in which I have described, no freight could become due, even if the whole cargo had been thus delivered to the defendants. Secondly, they contend that, if they are wrong in this, yet, inasmuch as part of the cargo loaded on board of the *Ethelwalda* was lost and not delivered, that circumstance bars the maintenance of the plaintiffs' claim.

I proceed to consider each of these contentions.

It is certainly to me a novel view that in the case of every lump sum freight charter-party the shipowner, in order to earn that freight, must perform the whole voyage in the particular ship named in the charter-party, and that its performance in part by means of a substituted ship or other instrument of delivery, if the chartered ship becomes disabled in the course of the voyage, is not permissible, even though the whole cargo is in fact carried to its appointed destination. I asked the appellants' counsel if they could cite in support of the proposition a decided case or a text-book of recognised authority on shipping law, and none was, or, as I believe, could be, adduced. I am unable to see any sound reason for grafting, merely because the stipulated freight is, as is common enough in the case of homogeneous cargoes such as timber, a lump freight, and not one calculated by weight or measurement, so serious a qualification as the appellants' contention would involve upon the general law as it was laid down long ago by Lord Ellenborough in *Hunter* v. *Prinsep* (*sup.*). He said: "The shipowners undertake that they will carry the goods to the place of destination, unless prevented by dangers of the seas or other unavoidable casualties; and the freighter undertakes that, if the goods be delivered at the place of their destination, he will pay the stipulated freight; but it is only in that event—namely, of their delivery at the place of destination—that he, the freighter, engages to pay anything. If the

ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination." The appellants contend that the law laid down by Lord Ellenborough in this quotation from a passage which has, I think, ever since been treated as the *locus classicus* in reference to the relative rights and duties of the parties to a contract of affreightment has, if the freight be a lump freight, no application. They ask the court to hold that a shipowner whose laden ship is by perils excepted in the charter-party disabled in the course of the voyage from carrying her cargo to its destination is not entitled to earn the lump sum chartered freight by transhipment or any other means. They are prepared to argue—logically, indeed, they must be—that he is under the like disability if, when his ship is by the like perils stranded outside the place of destination, he employs lighters to carry the cargo to that place. I venture to think that one ought to hesitate long before adopting as a part of the law of affreightment a rule which would be as little consistent with justice as it would be conducive to the interest of commerce. I say "as little conducive to the interest of commerce" because if you deprive the shipowner of the right to earn his freight by procuring means to forward the cargo, which the chartered ship has been disabled by excepted perils from carrying to its destination, it may easily happen that the cargo owner will for an indefinitely long time be unable to get his property landed from the disabled ship at some distant or little frequented port. I say "as little consistent with justice" because, where the disaster which disables the carrying ship, as it well may do, occurs close to the place of destination, the shipowner, who has performed, say, nine-tenths of the essential service, will, unless he can make some new agreement with the cargo owner, get no recompense, although by lighters or other means of conveyance he is able and willing immediately to put the cargo owner in possession of his property at the place of contracted destination.

It is admitted, as I have said, that the appellants can produce no decision for their contention on this point. But, in truth, the reasoning of Tindal, C.J. in *Mitchell* v. *Darthez and another* (*sup.*) is, I think, manifestly opposed to it. That was a case in which the plaintiff's vessel was chartered for a voyage under a lump freight contract. She was disabled at an intermediate port. Part of the cargo was sent on in another ship and arrived at its destination. The shipowner sued for his lump sum freight. Tindal, C.J., who delivered the judgment of the Court of Common Pleas, held that he was not entitled to succeed, expressly because it appeared that this cargo had been so forwarded, not by the shipowner or his agents but on behalf of and at the expense of the cargo owners. It is, I think, a clear inference from his judgment that he considered that, had the cargo been forwarded to its destination by the master of the vessel on behalf of the plaintiff, the shipowner, the charter freight would have been payable, and I would refer in regard to this to Judge Carver's reference to this case in his work on the Carriage of Goods by Sea, especially at pars. 551 and 559 (5th edit.).

The only sort of authority which the defendants' counsel put forward for their contention consisted of inferences which they invited us to draw from expressions to be found in the judgments in two reported cases, in each of which the freight reserved by the charter-party under consideration was a lump sum. In the judgment of the Privy Council in *The Norway* (*sup.*) it was said that the lump sum called freight was not properly so called, but was more properly a sum in the nature of a rent to be paid for the use and hire of the ship. In *Robinson* v. *Knight and another* (*sup.*) Keating, J. described the freight payable under the charter-party in that case as an entire sum to be paid for the hire of the ship for one entire service, and Brett, J., as he then was, in regard to it used the expression "a stipulated gross sum to be paid for the use of the whole ship for the whole voyage." It appears to me that none of these statements really afford support to the contention of the present appellants. They must, of course, be read in each case in reference to the particular charter-party which was under the consideration of the court and in reference to the particular question which had to be decided in respect of that charter-party. Neither in *The Norway* (*sup.*), nor in the case in the Common Pleas, was there any question as to the arrival of the chartered vessel at the port of destination. In each case the vessel had in fact arrived, and therefore the courts had not to consider any question of the shipowner's right, in Lord Ellenborough's words, to earn the whole freight by forwarding the goods by some other means to the place of destination. What they had to decide was the distinct and different question whether under the particular terms of the charter-party before them the shipowner was entitled to claim payment, without deduction, of the whole freight where only part of the cargo was delivered out of the arrived ship—a question involved in the second contention of the defendants which I shall consider presently. Further, it is to be noted that in each of these cases the terms of the charter-party, as I understand the report, were in a material respect different from those of the charter-party with which we are concerned in the present case. In both of them the lump freight was, as to some portion, expressly made payable at a time to be ascertained by reference to the ship's arrival at her destination. In *The Norway* (*sup.*), as is pointed out in the judgment on p. 409 of Browning and Lushington's Reports, one-third in cash was made payable "on arrival at the port of delivery." In *Robinson* v. *Knight and another* (*sup.*) the provision was that freight should be paid in cash half on arrival and the remainder on unloading and right delivery of the cargo. I must not be understood to say that even such stipulations in a charter-party ought, if that question should ever arise for decision, to be held to affect the shipowner's right, in case of his ship's disablement in the course of the chartered voyage, to forward the cargo and earn the lump sum freight. But the presence of those stipulations in the particular charter-party in each case under consideration cannot properly be left out of sight when we have to consider the expressions in the judgments to which I have referred, and it differentiates the charter-parties which contained such stipulations from the charter-party in the present case, which, except

that the freight is to be a lump sum and not calculated per standard or per fathom of the timber shipped, in no way differs from the ordinary charter-party for the services of a ship to carry a particular cargo to a particular port, and which expressly provides for the payment of the lump freight, not in reference to the arrival of the ship, but, according to art. 9, "on unloading and right delivery of cargo." I agree with Pickford, J. when he says: "I do not say that there may not be lump sum charters in which the freight, being payable for the use of the particular ship, is not to be paid unless the ship completes her voyage. There may be such charters, but I do not think that this is the effect of the present one." I may add in this connection that it may be worth noting that by the terms of this charter-party in this case the charterers' agents were to load a full and complete cargo.

I now come to that which I have called the second contention of the defendants, which is that only a part of the cargo was delivered, and, therefore, the contract not having been completely performed by the plaintiffs, they are, according to the principle exemplified by the leading case of *Cutter* v. *Powell* (*sup.*), not entitled to claim the lump sum which constituted the agreed remuneration for the performance of the contract of affreightment. Upon this point also I am of opinion that the judgment of Pickford, J. in favour of the plaintiffs was right. What, under the contract contained in the charter-party, was the condition precedent to the plaintiffs' right to the payment of the lump freight? It was, as I construe the document, the right delivery of the cargo. What is, under this charter-party, meant by "the cargo"? To ascertain this, we must look at the charter-party, and, so looking, we find that what the shipowner has to deliver is not in all circumstances the quantity of cargo shipped, but all which was shipped and of which delivery was not prevented by any of the excepted perils. This is the law as enunciated in the judgments both of Lord Coleridge, C.J. and Bramwell, B. in the case of *Merchant Shipping Company* v. *Armitage* (*sup.*), in which the charter-party under the consideration of the Exchequer Chamber was in its terms, as to payment of a lump sum freight, excepted perils, and right delivery of cargo, like the charter-party in the present case, and in which, as in the present case, part of the cargo had been lost by excepted perils, and therefore the cargo owner had got only a partial delivery. Lord Coleridge, C.J. dealt with the point in these terms: "If it were a matter entirely free from authority there might be some ground for saying that 'entire discharge and right delivery of the cargo' meant the entire discharge and right delivery of the cargo originally put on board. But the fair and reasonable construction of it, regard being had to the contract being for a lump sum, seems to me to be that which the courts have already put upon similar contracts—that the cargo is entirely discharged and rightly delivered, if the whole of it not covered by any of the exceptions in the contract itself is delivered. Now in this case that which was not delivered and which was not discharged was not so delivered and was not so discharged by reason of perils within the exceptions of the very contract itself; and, therefore, according to these authorities, and according to the reason of the thing, it appears to me that the contract was complied with, and that the lump sum was earned, and that what has not been paid of the lump sum ought to be paid." Bramwell, B. expresses the same opinion: "What is the meaning of 'the cargo'? In my opinion it is the cargo which she has to deliver. It does not mean the cargo she has shipped, but which she is not bound to deliver, which the shipowner is excused from delivering; it means the right delivery of the cargo which is to be delivered, not the right delivery of the cargo which was originally shipped on board of her."

In a comparatively recent case in the House of Lords the law has been laid down in the same way by Lord Lindley. The case was *Williams and others* v. *Canton Insurance* (*sup.*). "A lump sum freight," said his Lordship, "is a definite sum agreed to be paid for the hire of a ship for a specified voyage; and, although only payable on the right and true delivery of the cargo, those words are not taken literally, but are understood to mean right and true delivery, having regard to and excluding excepted perils. In other words, the cargo in this clause of the charter-party does not mean the cargo shipped, but the cargo which the shipowner undertakes to deliver. The non-delivery of some of that"—namely, the cargo shipped—"affords no defence to a claim for a lump sum freight, although such non-delivery, if wrongful, will give rise to a cross-action. This was settled by the Court of Exchequer Chamber in *Merchant Shipping Company* v. *Armitage* (*sup.*), which followed a decision to the same effect by the Privy Council in *The Norway* (*sup.*).

These authoritative pronouncements of the law—to which may be added the inference of the opinion of Tindal, C.J. from the reasoning of his judgment in *Mitchell* v. *Darthez and another* (*sup.*), to which I have already referred, in the case of the transhipment and delivery of part of a cargo—constitute, in my judgment, a sufficient answer to the defendants' second contention. It is common ground that the goods not delivered in the present case were not delivered because they had been lost by excepted perils. The defendants' counsel asked in the course of the argument what, as to the right to freight, ought to be the legal consequence of the chartered ship arriving without any of the cargo on board, so that nothing was delivered, and they further asked whether, if the loss had been caused not by excepted perils, but by the wrongful act or negligence of the shipowner, the lump freight would nevertheless be payable. It is, I think, sufficient to say that it is quite unnecessary for the purpose of our judgment in the present case to decide either of these points which are not involved. But it is clear from his judgment in *Merchant Shipping Company* v. *Armitage* (*sup.*) that Bramwell, B., for the reason that the delivery of cargo is a condition precedent to payment, would have answered the first of the appellants' questions in favour of the owner of cargo as he there states; and that in regard to the second question he would have concurred in the opinion expressed by Lord Lindley in the concluding sentence of the passage in his judgment in *Williams and others* v. *Canton Insurance*, which I have already quoted, that, even if the non-delivery of part of the cargo is due to

wrongful conduct or negligence on the part of the shipowner, the proper remedy of the cargo owner is by cross-action. It is, however, in my judgment, as I have already intimated, useless, for the purpose of deciding the present case, to consider how these questions ought to be decided, the relevancy of which is excluded by the facts of the case under consideration.

In my opinion, the judgment of Pickford, J. was right, and this appeal should be dismissed.

Appeal dismissed.

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

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, April 7, 1913.

(Before Channell and Coleridge, JJ.)

Thompson v. H. and W. Nelson Limited. (a)

Seaman — Steward — Ship's articles — Wages — Agreement for payment of additional sum not specified in articles — Right to recover — Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 113, 114, 742.

The Merchant Shipping Act 1894, *s.* 113, *provides that the master of a ship shall enter into an agreement with every seaman whom he carries to sea as part of his crew.*

Sect. 114 *provides that the agreement shall contain* (inter alia) *the amount of wages which each seaman is to receive.*

Sect. 742 *defines "seaman" as including every person except masters, pilots, and apprentices employed in any capacity on board any ship, and by the same section the word "wages" includes "emoluments."*

The plaintiff was a ship's steward in the employment of the defendants, who were the owners of a line of steamers. He signed the usual form of agreement of ship's articles under sects. 113 *and* 114 *of the Merchant Shipping Act* 1894, *in which his wages were stated to be* 10*l. a month.*

In his evidence at the trial he stated that in addition he was to be allowed 5 *per cent. commission on the profits of the bar, which was under his charge.*

After he had made two voyages on the defendants' ships he had a conversation with the superintendent steward, and it was arranged that, instead of receiving 5 *per cent. of the bar profits, he should be paid a fixed sum of* 5*l. a month in addition to the amount to which he was entitled under the ship's articles, such additional sum not appearing therein.*

In the action the plaintiff sought to recover 10*l., being the amount of two months' additional remuneration at* 5*l. a month.*

Held, that as the plaintiff's duties in connection with the bar were part of the duties for which he was engaged and which he was bound to perform, the payment of 5*l. a month in respect of those duties formed part of his wages and, not being set out in the ship's articles, could not be recovered.*

(a) Reported by Philip B. Durnford, Esq., Barrister-at-Law.

Appeal from the decision of His Honour Judge Rentoul sitting at the City of London Court.

In May 1911 the plaintiff entered the service of the defendants as chief steward on board a steamship of which they were the owners. Before each voyage he signed articles of agreement under sects. 113 and 114 of the Merchant Shipping Act 1894 in which his wages were stated to be 10*l*. a month. It was part of his duty as chief steward to take charge of the bar upon the ship, and he was paid a commission of 5 per cent. on the profits of the bar, no reference to such commission appearing in the articles.

At the end of two voyages the plaintiff had a conversation with the superintendent steward who had originally engaged him, and it was arranged that, instead of receiving a commission on the profits of the bar, he should be paid an additional sum of 5*l*. a month, but no agreement in respect of this amount was signed by the parties in the ship's articles.

The plaintiff was duly paid his wages of 10*l*. a month, but, the defendants having failed to pay the additional sum of 5*l*. a month, the plaintiff brought an action against them in which he claimed 10*l*., being the amount alleged to be due to him in respect of two months' additional remuneration.

The action was tried before the learned judge sitting with a jury, and the latter were asked whether the sum of 5*l*. a month, payable in lieu of commission, was a bonus payable only at the option of the defendants, in which case could not be recovered by the plaintiff.

The jury returned a general verdict for the plaintiff, and judgment was entered in his favour.

The defendants appealed.

J. Sankey, K.C. and *Chute* for the defendants. —The learned judge was wrong in entering judgment for the plaintiff. The 5*l*. a month which the plaintiff was to receive was "wages" within the meaning of sect. 742 of the Merchant Shipping Act 1894, and, as it was not mentioned in the articles as required in sects. 113 and 114, it is clear upon the authorities that it cannot be recovered. They referred to

White v. *Wilson*, 2 Bos. & P. 116;
Elsworth v. *Woolsmore*, 5 Esp. 84;
Dafter v. *Cresswell*, 7 Dow. & Ry. 650.

J. P. Oliver for the plaintiff.—The learned judge was right in entering judgment for the plaintiff. The additional 5*l*. a month which the plaintiff was to receive were emoluments not coming within the definition of wages in sect. 742 of the Merchant Shipping Act 1894. In addition to his ordinary duties as a steward, the plaintiff managed the bar, and, in order to induce diligence on his part so that the defendants might make a profit, he was given first of all a commission on the sales, subsequently commuted for a fixed sum per month. Neither the commission nor the payment in lieu thereof was part of the plaintiff's wages, and he was entitled to recover it notwithstanding that it did not appear in the articles.

J. Sankey, K.C. in reply.

Channell, J.—This case presents some little difficulty. Looking at the facts which were proved, and disregarding for the moment the findings of the jury, I think that the sum claimed by the plaintiff, which was originally a 5 per cent. commission on the profits made by the bar, subsequently commuted for a payment of 5*l.* monthly in respect of the same matter, was a bonus which the plaintiff was to receive. In other words, his services as steward were remunerated by the wages paid to him as set out in the ship's articles, and an additional sum was promised to him by way of bonus if his services were satisfactory and produced a satisfactory profit to the defendants. I think, if the whole matter were open to me to decide on this evidence as a judge without a jury, that I should have come to that conclusion, but I cannot say that there was no evidence to go to the jury that it was not a sum payable at the option of the defendants if they were satisfied with the plaintiff's work, but was a sum which under a contract made with the superintendent steward on behalf of the defendants could be claimed by the plaintiff as of right. I think there was evidence of that, and, although the summing up of the learned judge is not very clear, there being such evidence the jury must be taken to have found that the sum was payable by contract, and not as a bonus to the plaintiff. That being so, we have to consider whether the sum claimed represents the wages of a seaman within sects. 113 and 114 of the Merchant Shipping Act 1894, and within the definition of a seaman and of wages given in sect. 742 of that Act.

I cannot help thinking that if one had a clear case of duties to be performed by a person who was a seaman within the meaning of that section, for which duties he is to be paid wages as set out in the articles of agreement, and a further agreement is made by which he is to be paid something extra for doing work which he was not originally employed to do, that there is anything in law which prevents such an agreement from being binding. There may be some difficulty about such an agreement if it is made at the same time as the original contract, but it might quite well be agreed during the voyage that some additional services, not contemplated at all at the time of the signing of the ship's articles, might be arranged for and a payment in respect of them promised. In such a case the payment in question would be for something outside the duties which the seaman was originally engaged to perform. Therefore I do not propose to throw any doubt upon that proposition if it should ever arise.

Here the plaintiff was employed in the capacity of steward, and as steward he had, as I understand it, charge of this bar. It was therefore his duty to do his best for his employers in regard to the bar, and I do not think that any remuneration promised to him for securing profits for his employers by carrying out his duty in that respect was promised in relation to services which were outside of the duties which he was engaged to perform. If what was to be paid him was a contractual sum it seems to me that it was part of his wages, and if it was part of his wages it must be entered in the ship's articles. It therefore appears to me that we must give effect to the objection taken on the part of the defendants and say that if, as found by the jury, this was a contractual sum, then it was a sum contracted to be paid as part of the plaintiff's wages for the performance of his duties and ought to have appeared in the ship's articles. As it did not so appear, in my opinion the plaintiff was not entitled to recover it. The result is that this appeal must be allowed, since we cannot hold that the sum claimed was payable in respect of any additional services beyond those which the plaintiff was bound to perform by the terms of his engagement.

Coleridge, J.—I am of the same opinion. By sects. 113 and 114 and by sect. 111, sub-sect. 4, of the Merchant Shipping Act 1894, if a seaman seeks to recover wages, those wages must appear in the ship's articles. By the interpretation section of the Act wages includes emoluments. Therefore to make the Act applicable the person seeking to recover must be a seaman and the sum demanded must be in the nature of wages as defined by the Act. The word "seaman" includes every person, with certain exceptions, employed or engaged in any capacity on board any ship. The first point we have to consider is whether a man in control of a bar on board a ship is a seaman within the meaning of the Act. It seems to me that he must be a seaman just as much as a ship's cook or any other person engaged in a similar capacity on board a ship.

The next question is what does the plaintiff seek to recover? He seeks to recover not only his fixed wages as appearing in the ship's articles, but a sum in addition which does not appear in the articles and which is arrived at by taking an estimate of the commission to be derived from the profits on the bar. In my opinion the Act applies to all forms of emolument which are directly in respect of the employment of a man as a seaman. The question is whether the sum claimed here comes within that definition. I think the jury must be taken to have found that the sum in question was a sum payable under a contract entered into at the same time as the contract with regard to wages. It was payable under a contract in respect of the performance of duties. Those duties were the duties of a seaman, and they were duties which the plaintiff was bound to perform, I cannot for myself see how any distinction can be drawn between the sum in dispute in the action, which was a sum payable by way of commission, and the original sum payable by way of wages. They seem both to be contained in the same legal category and must both appear in the ship's articles. The sum sued for not appearing therein cannot, in my opinion, be recovered, and this appeal must be allowed.

Appeal allowed.

Solicitor for the plaintiff, *E. H. Rideout.*
Solicitor for the defendants, *F. A. Stern.*

Wednesday, June 18, 1913.

(Before ATKIN, J.)

WATSON STEAMSHIP COMPANY LIMITED *v.* MERRYWEATHER AND CO. (*a*)

Charter-party—Construction—Date specified for termination of hire—Retention of vessel beyond date specified—Time essence of contract.

By the terms of a charter-party a vessel was chartered from 15/31 *May* 1912 *until* 15/31 *Oct.* 1912 *at the rate of* 615*l. per current month "hire to continue from the time specified for terminating the charter until her redelivery to owners (unless lost) at a port on east coast of United Kingdom between the* 15*th and* 31*st Oct.* 1912."

On the 18*th Oct.* 1912 *the vessel was at West Hartlepool, and upon that day she was despatched by the charterers on a voyage from which, to the knowledge of the charterers, it was impossible that she could return in time to be redelivered to the owners by the* 31*st Oct. She was in fact redelivered on the* 20*th Nov. The current rate obtainable for the vessel on the* 31*st Oct. was* 900*l. per month, and the owner sought to recover from the charterers damages for twenty days detention of the ship calculated at the difference between the current rate and the chartered rate for the period in question.*

Held, that the clause in the charter-party set out above indicated an intention on the part of the parties to make the time specified in the charter for the redelivery of the vessel of the essence of the contract, and that as she was not redelivered by the 31*st Oct. the charterers had committed a breach of contract for which they were liable in damages at the rate claimed.*

AWARD stated by an umpire in the form of a special case.

The special case, after reciting that disputes had arisen between the Watson Steamship Company Limited the owners of the steamship *Hugin* (hereinafter called the owners) and J. Merryweather and Co., the charterers of the steamship (hereinafter called the charterers), as to the meaning and effect of a charter-party dated the 26th Jan. 1912, and that the dispute had been referred to two arbitrators, and that they having failed to agree the matter was referred to the umpire who made his award in the form of a special case at the instance of both parties, proceeded as follows:—

1. The umpire found as facts: (*a*) The charter-party (a copy of which was annexed to and formed part of the special case) was made between the owners and charterers on the 26th Jan. 1912, and by it the *Hugin* was chartered by the owners to the charterers for the term from 15/31 May 1912 until 15/31 Oct. 1912. (*b*) The *Hugin* was delivered to the charterers in pursuance of the provisions of the said charter-party on the 6th June 1912. (*c*) On the 18th Oct. 1912 the *Hugin* was at West Hartlepool on which day she was despatched by the charterers from that port on a voyage to St. Petersburg and back. (*d*) It was impossible for the *Hugin* to perform the said voyage and to return in time to be redelivered to the owners at a port on the east side of the United Kingdom by the 31st Oct. 1912, and this fact was known to the charterers. (*e*) The *Hugin* was in fact redelivered to the owners at West Hartlepool on the 20th Nov. 1912. (*f*) The current rate obtainable for the *Hugin* on the 31st Oct. 1912 was admitted to be 900*l.* per month, an increase beyond the chartered rate of 285*l.* per month.

2. It was contended on behalf of the owners that, having regard to the provisions of the charter-party, and particularly to the provisions of clauses 1 and 5, the charterers were bound to redeliver the *Hugin* to the owners not later than the 31st Oct. 1912, and that not having done so the charterers had committed a breach of the said charter-party, in respect of which they were liable to pay damages to the owners.

3. On the other hand it was contended on behalf of the charterers that they were not bound to redeliver the steamer to the owners upon the 31st Oct. 1912, but were entitled to retain her until the expiration of any voyage upon which they had reasonably sent her; and it was further contended that they were acting within their rights and acting reasonably in sending her upon the voyage to St. Petersburg on the 18th Oct. 1912, and the case of *Gray and Co.* v. *Christie and Co.* (5 Times L. Rep. 577) was relied on in support of this contention.

4. The umpire found that the charterers were bound by the said charter-party to redeliver the *Hugin* to the owners not later than the 31st Oct. 1912. The case was, in his opinion, distinguishable from the case of *Gray and Co.* v. *Christie and Co.* (*sup.*) on the ground that in that case no provision had been made for a margin of time in which redelivery could take place, whereas with reference to the *Hugin*, having regard to clauses 1 and 5 of the said charter-party and an absence of a continuation clause, the umpire found that the owners and charterers had fixed with definite limits a margin of time within which redelivery could be made without the charterers being liable for more than the chartered rate, and that margin expired on the 31st Oct. 1912.

5. The umpire therefore declared that the charterers committed a breach of the said charter-party in not redelivering the *Hugin* on or before the 31st Oct. 1912, and were liable to pay to the owners damages in respect of such breach.

6. A claim was made by the owners for damages for dislocation of business and other special damage, but there was no evidence before the umpire that such damages were within the contemplation of the parties at the time the said charter-party was entered into, and he therefore found that such damages were too remote.

The umpire directed and awarded that the charterers should pay to the owners 190*l.*, being damages for twenty days' detention of the *Hugin* calculated at the difference between the chartered rate and the current rate for the said period.

The question for the court was whether the umpire was right or wrong in law in making the declaration, finding, direction, and award contained in pars. 5, 6, and 7 hereof.

The material clauses of the charter-party were as follows.—

1. The said owners agree to let and the said charterers agree to hire the said steamship for the term from 15/31 May 1912 until 15/31 Oct. 1912 from the day (such a day not to be a Sunday or a legal holiday) and hour the said steamer is delivered and placed at the disposal of the charterers, and after written notice has been given between the hours of 9 a.m. and 4 p.m., or between 9 a.m. and 12 noon if on Saturdays . . . at a British channel coal port in such dock, or at such wharf or place . . . as charterers may direct . . . to be employed in such lawful trades between ports or places within the following limits: United Kingdom and Continent of Europe, Mediterranean or Adriatic, Marmosa, Black Sea, Azof, Danube, West Africa (not south of Sierra Leone), Madeira, Azores, Canary and Cape Verde Islands also Baltic, Gulf of Bothnia

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

and Finland and White Sea (in season)—regular coal trade and regular ore trade and regular coast trade excluded—as charterers or their agents shall direct—on the following conditions: (2) The owners shall provide and pay for all provisions, wages, and Norwegian Consular fees . . . also for all the . . . necessary stores . . . and maintain the steamer in a thoroughly efficient state . . . for and during the service. . . .

5. The charterers shall pay for the use and hire of the said vessel 615*l*. (six hundred and fifteen pounds) stirling per calendar month, commencing on and from the date of her delivery as aforesaid, and at and after the same rate for any part of a month; hire to continue from the time specified for terminating the charter until her redelivery to owners (unless lost) at a port on east coast of the United Kingdom between the 15th and 31st October 1912.

11. The captain, although appointed by the owners, shall be under the orders and directions of the charterers.

19. Any dispute between owners and charterers shall be settled by arbitration under the provisions of the Arbitration Act 1889. . . .

22. If required by charterers time not to commence before the 15th May, and in the event of the steamer not arriving at the port at which the hire is to commence, and being ready to load before 4 p.m. on the 31st day of May 1912 the charterers have the option of cancelling this charter. Owners are not to charter steamer for any employment which she could not reasonably be expected to finish in time to enable her to deliver within the above dates.

24. The charterers to have liberty of subletting the steamer, they remaining responsible to owners for the fulfilment of this charter.

27. The act of God, perils of the sea, fire on board in hulk, or craft, or on board, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by negligence, default or error of judgment of the pilot, master, mariners or other servants of the shipowners. . . .

Lewis Noad for the shipowners.

Raeburn for the charterers.

ATKIN, J.—In this case the charterers had taken on hire the *Hugin* under a charter-party dated the 26th Jan. 1912, which provided that the owners agreed to let and the charterers agreed to hire the vessel for the term from 15/31 May 1912 until 15/31 Oct. 1912. That means that the owners would be entitled to deliver the ship to the charterers at any time between the 15th to the 31st May, and the charterers would be obliged to accept the ship if it was tendered within the period mentioned. On the other hand the charterers would be entitled at the termination of the period to tender the ship back to the owners at any date between the 15th and the 31st Oct., and the owners would be obliged to accept the ship and the hire would then cease. There was a cancelling date in clause 22 by which the charterers were entitled to cancel the charter if the vessel did not arrive ready to load before 4 p.m. on the 31st May. I do not attach much importance to that except as showing that there was an express provision which entitled the charterers to throw up the charter which probably they would not have been entitled to do if the vessel were tendered within a few days of the 31st May. Then there comes the provision in clause 5 which is as follows: "The charterers shall pay for the use and hire of the said vessel 615*l*. (six hundred and fifteen pounds) sterling per calendar month, commencing on and from the date of her delivery as aforesaid, and at and after the same rate for any part of a month; hire to continue from the time specified for terminating the charter until her redelivery to owners (unless lost) at a port on the East coast of the United Kingdom." Then the parties have added these words in writing: "Between the 15th and 31st Oct. 1912," which, as I have said, was the time specified for terminating the charter.

That clause, to my mind, raises a difficulty on the facts of this case. It seems to me that the position under a charter-party of this kind is that if there is no express provision in the contract to that effect the parties are not bound to regard the period fixed for the termination of the contract as a time which is of the essence of the contract. The exigencies of maritime business demand that the charterers shall have a reasonable time within which the hire shall continue after the date fixed for the redelivery of the vessel. In other words, it is contemplated that the ship shall go on a succession of voyages, and it is impossible to arrange that the voyage shall end precisely at the date mentioned, and, as the document must be construed reasonably, it would not be a breach of the contract if the ship were redelivered within a reasonable time of the date specified if it happened that she was still on a voyage upon which she had been reasonably sent during the subsistence of the contract. That, I think, is the effect of the decision in *Gray and Co.* v. *Christie and Co.* (*sup.*), and there is no reference in that case to the fact of there having been a continuation clause providing for what was to happen if the period of time mentioned in the charter-party were exceeded. The parties might, of course, specifically provide for this matter, and what is generally provided is that the hire shall continue until redelivery to owners (unless lost). It seems to me reasonably plain that that means that the contractual obligation to pay the hire is to continue after the date named in the charter-party for its termination and until the vessel is redelivered to the owners. I think that, again, would have to be read "redelivered within a reasonable time," and, if the vessel were not so redelivered, I think there would be a breach of the contract and the owners would be entitled to recover damages.

If the clause in the charter-party had stopped there I think there is nothing in the facts which would entitle the owners to say that there had been a breach of contract because what has been found by the learned umpire was that on the 18th Oct. the vessel was at West Hartlepool, and from there was despatched to St. Petersburg, and that it was impossible to perform that voyage, and redeliver to the owners by the 31st Oct., and that this was known to the charterers. The *Hugin* was not in fact redelivered until the 20th Nov. If the contract had remained without the additional words I have mentioned being added I think there would be no breach, because there is no finding that this was not a reasonable voyage, or that the period of twenty days was an unreasonable period, so as to amount to a breach of contract. But in this case the parties have not left the clause in relation to hire in that form.

They have said, "hire to continue from the time specified for terminating the charter until her redelivery to owners (unless lost) at a port on east coast of the United Kingdom between the 15th and 31st Oct. 1912." It is very difficult to give any effect to that clause so far as it creates a further contractual obligation to pay hire. It appears to be the same thing as saying that hire shall be paid until the expiration of the time specified for the hiring. But the parties have adopted the words I have read, and I think they must have had some intention in their minds when they did so, and, so far as I can see, the proper inference to draw is that they intended expressly to negative the right to continue the contract beyond the 31st Oct.; in other words, they used these words for the express purpose of showing that they intended to make the period of time mentioned in the charter-party of the essence of the contract, so that the hire was to terminate on the 31st Oct, and the ship was to be redelivered by that date. I do not think that any other meaning can be given to those words. That being so, I think the conclusion arrived at by the learned umpire was right, and that there was a breach of contract by reason of the non-delivery of the vessel by the 31st Oct. There is no question as to the measure of damages. For the reasons I have given I think the award of the umpire must stand, and the shipowners must have their costs.

Judgment accordingly.

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

Solicitors for the shipowners, *Busk, Mellor,* and *Norris,* agents for *Vaudrey, Oppenheim,* and *Mellor,* Manchester.

Friday, July 4, 1913.

(Before PICKFORD, J.)

BENNETT STEAMSHIP COMPANY LIMITED *v.* HULL MUTUAL STEAMSHIP PROTECTING SOCIETY LIMITED. (*a*)

Marine insurance — Lloyd's policy — Collision clause—Construction—Collision with nets of fishing vessel.

A collision with nets attached to a fishing vessel is not a "collision with any other ship or vessel" so as to bring it within the terms of the usual collision clause of a Lloyd's policy.

COMMERCIAL COURT.

ACTION tried before Pickford, J.

The plaintiffs' claim was as members of the defendant association to recover the sum of 509*l.* 14*s.* due to them under the rules of the association as an indemnity in respect of a claim for damage done by the plaintiffs' steamship *Burma.*

The following case was stated by agreement of the parties for the opinion of the court:—

1. On the evening of the 11th Oct. 1912 the plaintiffs' steamship *Burma* came to anchor about two miles off Boulogne, being prevented by fog from going into the roadstead. At about 8.45 p.m., the fog clearing, the anchor was lifted, but shortly afterwards the fog came down again and the anchor was let go, it being impossible to see more than about a ship's length. At 9.30 p.m. in a clearing interval the anchor was hove on, but it was found to be foul of the nets of a fishing vessel, which nets apparently enveloped the steamer and were also foul of the propeller. When the fishing vessel to which the nets were attached was sighted she was about a mile away or more with the nets extending from her to the *Burma.* The hull of the *Burma* did not at any time come into contact with the hull of the fishing vessel.

2. The damage done by the steamship *Burma* to the nets and the costs and expenses in connection therewith amounted to the sum of 509*l.* 14*s.*, which had been paid by the plaintiffs to the owners of the nets with the consent of all the plaintiffs' underwriters, including the defendants', given without prejudice to the denial of each underwriter that such loss was covered by the insurance granted by him.

3. The plaintiffs were members of the defendant association, and claimed payment of the 509*l.* 14*s.* from the defendants under the rules of the defendant association, which provided protection in respect of (*a*) the sums which the member might become liable to pay, and should pay in respect of: By collision, &c.; (*c*) claims for losses, damages, or expenses arising from, or consequent upon collision, and for losses, damages, or expenses arising from or consequent upon damage caused by the interested steamship to other ships or property without actual contact or collision, so far as such claims are not recoverable under the usual forms of Lloyd's or Mutual Insurance Association's policy with collision clause attached; and (*e*) loss or damage caused by such steamship to any harbour, dock, or pier, or the quays or works connected therewith, or to any jetty, erection, or other fixed or movable things whatsoever, other than ships or vessels, whether caused by negligence or otherwise.

4. The collision clause attached to the usual form of Lloyd's policy is as follows: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship herein insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured."

5. The defendants contended [that the proportion of three-fourths of the damages in question was recoverable by the plaintiffs under the collision clause attached to the usual form of Lloyd's policy, and that their liability extended only to the one-quarter, or the sum of 127*l.* 8*s.* 6*d.* not recoverable under such Lloyd's policy with collision clause attached.

6. The defendants paid to the plaintiffs the sum of 127*l.* 8*s.* 6*d.* prior to the commencement of these proceedings.

The question for the opinion of the court was whether in the circumstances set forth in par. 1 there was a collision within the collision clause of a Lloyd's policy. If the court should be of opinion in the negative, judgment has to be entered for the plaintiffs for the sum of 382*l.* 5*s.* 6*d.* and costs of the action. If the

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

court should be of opinion in the affirmative judgment was to be entered for the defendants with the costs of the action.

H. M. Robertson for the plaintiffs.—There was no collision within the collision clause attached to the usual form of Lloyd's policy. Contact with fishing nets attached to a vessel a mile distant was not a "collision with any other ship or vessel":

The Niobe, 65 L. T. Rep. 502; (1891) A. C. 401; 6 Asp. Mar. Cas. 300

Re Margetts and Ocean Accident and Guarantee Corporation, 85 L. T. Rep. 94; (1901) 2 K. B. 792; 9 Asp. Mar. Cas. 217;

Re Salmon and Woods, 2 Morrell, 137, per Wills, J.

Mackinnon for the defendants.—On the application of the principle laid down in *Re Margetts and Ocean Accident and Guarantee Corporation* (*sup.*) there was a collision with another vessel. There an anchor was held to be a vessel within the meaning of the policy. The term "ship" includes the ship and her appurtenances, which again include fishing nets:

Re Salmon and Woods (*sup.*);
Gale v. *Laurie*, 5 B. & C. 156.

PICKFORD, J.—I think that the plaintiffs are entitled to recover here. [His Lordship, having stated the facts set out above, continued:] The question is whether under those circumstances the *Burma* came into collision with the fishing vessel. I think it is perfectly clear that, as a matter of ordinary language, nobody would say that she did anything of the sort. If anybody were asked, apart from decided cases, whether to run into a net a mile away from a ship, to which the ship was attached at the other end, was running into the ship, I do not suppose, apart from decided cases, anybody would say, as Lord Bramwell said in *The Niobe* case (*sup.*), that as a matter of ordinary English she did anything of the sort.

But there have been cases decided, and it is said that this comes within those cases. I ought to have said, perhaps, that this is not quite like the case of a trawler, because in this case the drift net is put out. No doubt the drifter generally remains close to, and no doubt a great part of the time it is attached to one end of the net, which may be a mile long or more, by a warp; but at times she is disconnected from the nets altogether and steams about for the purpose of examining the nets. I say, as a matter of ordinary English, I do not think anybody would say that coming into collision with the end of the net a mile away from the ship is coming into collision with the ship. But it is said that there are cases the principles of which oblige me to say it is coming into collision with the ship, and the first is *The Niobe* (*sup.*). The decision in the *Niobe* case, as it seems to me, goes almost entirely upon the theory that the tug and the tow were one ship. Whether that theory is held quite so strongly now as it was in the days of the *Niobe* is a matter I need not discuss, but it goes upon that, and upon what is suggested by one of the learned Lords—namely, Lord Morris—that really the tug was a part of the machinery of the ship; those are not the exact words, but he considered the tug part of the apparatus for moving the ship.

The other case is a case of *Re Margetts and Ocean Accident and Guarantee Corporation Limited* (*sup.*). In that case the collision was with an anchor by which the ship was anchored, and that was held to be a collision with the ship. That may be going rather further, possibly, than the *Niobe*—I do not know—but it may very well be said, perhaps, that the anchor, which is used for the purpose of mooring the ship and is necessary for the navigation of the ship, and without which she could not prudently put to sea, to use the words of Wills, J. in the case cited in the Bankruptcy Reports, is a part of the ship. It may very well be said so; but it does not seem to me there is any principle laid down in those cases which obliges me to extend it still further and to say that the end of a net a mile away from the ship, to which the ship is not necessarily always attached at all, because she leaves it from time to time, is a part of the ship, or that collision with the end of that net is collision with the ship. It may be that the principle of these cases, whatever that principle may be, ought to oblige me to extend the meaning of the words to this case. I do not see anything to compel me to do so, and I think that such an extension must be made by the Court of Appeal if it is to be made. I cannot see that I can, giving any weight to the ordinary meaning of language, say that this is a collision with the ship. Therefore I think it was not within the collision clause of Lloyd's policy, and, not being within the collision clause of Lloyd's policy, it is within the rules of the defendant society, and therefore they are liable for the amount sued upon. There is no dispute as to the amount claimed. There will be judgment, therefore, for the plaintiffs for the amount claimed.

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

Solicitors for the defendants, *Botterell* and *Roche*, for *Hearfields* and *Lambert*, Hull.

Tuesday, July 8, 1913.

(Before BRAY, J.)

STREET *v.* ROYAL EXCHANGE ASSURANCE. (a)

Marine insurance — Reinsurance — Reinsurance against total or constructive total loss only—Provision "to follow hull underwriters in event of a compromised or arranged loss being settled"—Claim for constructive total loss or alternatively for partial loss compromised by hull underwriters.

The plaintiff took out a policy of reinsurance with the defendants which contained the following clause: "Being a reinsurance and to pay as per original policy or policies, but the insurance is against the risk of the total or constructive total loss of the steamer only, but to follow hull underwriters in the event of a compromised or arranged loss being settled." The owner of the insured ship brought an action against the hull underwriters claiming for a constructive total loss and alternatively for a partial loss. This action was compromised without anything being said as to whether the settlement was as for a constructive total loss or as for a partial loss. In an action on the reinsurance policy:

Held, that the plaintiff was entitled to recover as, there having been a claim for a constructive total

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

loss and that claim having been compromised, there was, within the meaning of the clause in question, " a compromised or arranged loss," notwithstanding that there was at the same time a claim for a partial loss.

Commercial court.

Action tried by Bray, J.

The plaintiff's claim was for 229*l.* 9*s.* 6*d.* on a policy of reinsurance in respect of the steamship *Ivy*, dated the 29th Nov. 1910 issued to him by the defendants.

The policy contained (*inter alia*) the following clause: " Being a reinsurance and to pay as per original policy or policies, but the insurance is against the risk of the total or constructive total loss of the steamer only, but to follow hull underwriters in the event of a compromised or arranged loss being settled."

The steamship *Ivy*, which was insured against total or partial loss, was seriously damaged during the currency of the policy. The owner gave notice of abandonment to the underwriters, and made a claim in an action on the policy for a constructive total loss, or, alternatively, for a partial loss. This claim was compromised on the terms set out and referred to in the judgment of Bray, J.

The plaintiff in the present case alleged that a claim for a constructive total loss under the original poli y was compromised or arranged, and that he was therefore entitled to recover from the defendants under the clauses in the reinsurance policy above set out.

The defendants by their defence pleaded that the *Ivy* was not in fact a constructive total loss, and that there was no " compromised or arranged loss settled " within the meaning of the reinsurance policy. They also pleaded that the claim on the original policy was in substance only a claim for a partial loss.

Leslie Scott, K.C. and *Darby* for the plaintiff.

Chaytor for the defendants.

Bray, J.—This is not an easy case to decide. The facts are these: The *Ivy* was seriously damaged; she was ultimately dry-docked, and she was sold for about 1200*l.* or 1300*l.* and a claim was made undoubtedly for a constructive total loss; notice of abandonment was given; and the plaintiff—that is to say, the owner of the vessel—claimed in respect of a constructive total loss. That claim was resisted by the underwriters, who declined to accept the notice of abandonment, and thereupon a considerable correspondence took place, and in that correspondence it was emphasised on two different occasions that the owner of the vessel was insisting upon his claim for a constructive total loss, although undoubtedly they were discussing the question of settling it on some terms less than he would otherwise receive for a constructive total loss. Then an action was brought, and the claim was for a constructive total loss, and, alternatively, for a partial loss. The defendants denied the constructive total loss; they also denied the particular average loss; and, alternatively, denying liability, paid a sum of money into court, undoubtedly upon the supposition that the claim could only be sustained as a particular average loss. The case was put down for trial. By chance it happened to come on for trial before me and a special jury at Liverpool, and before the case was opened the parties compromised. The compromise I will read. The compromise is contained in two documents, but there is not much relevancy in that; I must consider them as one. " Defendants to pay plaintiff on basis of settlement of 6250*l.*" —that is to say, the claim was only on a particular policy for 1000*l.*, and that is the reason for these words " on basis of settlement of 6250*l.*"; that is upon the supposition that the total sum which the plaintiff would be entitled to receive if the whole vessel had been lost was 6250*l.*; " with interest at 5 per cent. on the sums payable for twelve months: plaintiff to keep proceeds of sale of wreck: tax costs," and so on; I need not read that. Then " Maritime "—that was the defendants—" guarantee plaintiff's recovery from Newcastle Club on agreed basis of settlement and plaintiff keeps his claims against cargo for general average expenditure."

There is nothing said in that as to whether this settlement is upon the footing that the defendants were settling the claim for total loss or the claim for any partial loss. It has been sought to prove that in fact this was a settlement for partial loss. I do not know that I have any right to go into the minds of the parties when they made this settlement, except so far as it is shown by the terms of the contract itself, but if I were I have really no evidence to guide me. I have the solicitor, Mr. Wimshurst, who was defending the action, and he said that he had no idea of the plaintiffs possibly succeeding on their claim for a constructive total loss. That may very well be. But then he left the matter to counsel, and I have no evidence as to what counsel had in their minds, except so far as it appears from the documents. Therefore, I am left in this position that I have nothing to look at to see what was settled except the terms of the documents that were signed by counsel. Then the defendants say: We will prove you could not have recovered on a constructive total loss, and they give evidence before me that the cost of the repairs would only have come to some 5000*l.*, or so, and therefore would fall very far short indeed of 9000*l.* Of course, if I had to decide on the evidence whether the plaintiffs would have succeeded on their claim for a constructive total loss, I can only say that I, on this evidence, should decide that they were not. But that is not the question. It was not a question for me what I should decide at the trial; it was a question for the jury, and the jury would hear evidence on both sides. I have it before me on documents that there were surveyors who could have been called, prepared to give evidence on the part of the plaintiffs to show that the cost of the repairs would have been 9300*l.*, and would, therefore, exceed the 9000*l.* I do not think I can go into those questions. I do not think I ought to or can decide this case upon whether the plaintiffs probably would have succeeded or probably would have failed on their constructive total loss. I must look and see what the facts are.

That being so, I come to the clause itself— " being a reinsurance and to pay as per original policy or policies, but this insurance is against the risk of the total or constructive total loss of the steamer only." If it stopped there, there would be no difficulty in this case, because in that case the plaintiff, Mr. Street, would have to prove

before me that in fact there was a constructive total loss, and Mr. Leslie Scott has said he does not intend to prove it, and no evidence is given before me to show that it was. But then come these words, upon which the whole question arises: "but to follow hull underwriters in the event of compromised or arranged loss being settled." That cannot mean that if there was a claim for a partial loss only and that was compromised and the loss was arranged the Royal Exchange Association would be responsible. It cannot mean that. It is quite clear that it must mean a case where, at all events, there was a claim for a constructive total loss, because I think it must read "in the event of a compromise of a claim for constructive total loss." But now the difficulty that arises here is that it was a compromise of something more than a claim for a constructive total loss; it was a compromise for a claim for a constructive total loss and an alternative claim for a partial loss. I asked Mr. Chaytor whether he contended that a settlement of an alternative claim for total or partial loss, as this may be, could not be a compromise within the meaning of the clause, and he said he did not so contend, and I am inclined to think he was right. I think from the nature of this policy the parties must have contemplated that there might be a claim for constructive total loss and an alternative claim for partial loss, and that they did intend to cover that claim being arranged. I say that for this reason. It says: "as per original policy or policies," that is to say, whatever the policy may be. I do not suppose in point of practice they do see the original policy; they do not look at it, but they say, "We do not care what the original policy is, we will be responsible to pay or be paid as on the original policy." The policy in this case was quite a common form policy—namely, for constructive total loss and for partial loss, and the parties must have contemplated an alternative claim because that occurs every day; it is the most common form; it is the regular common form of a claim in respect of a policy of that kind where there is any ground whatever for supposing there was a constructive total loss.

The parties have settled that, and it seems to me that there has been a compromise by the underwriters of a claim for a constructive total loss, because one of the things which the parties had to consider in arranging the settlement was the possible chance of the plaintiff recovering for a constructive total loss. He might induce them to pay a little more because of the existence of that claim. They did pay a considerable sum, as we know, because they paid on the footing of 6250*l.* The plaintiff was to keep the 1250*l.*, or whatever was the purchase price, which would make that 7500*l.*, and in addition the plaintiff was to have the right of the claim against the cargo owners for a general average loss. Therefore, it is not a case where I can say it could not have been in the contemplation of the parties. There was the whole claim, and the whole claim was compromised. Mr. Leslie Scott placed great reliance upon the words "plaintiff to keep proceeds of sale of wreck," as if that were excluding him from a right which he would otherwise have, or, rather, which the defendants would otherwise have. Of course, the defendants would be entitled to keep the proceeds of sale of the wreck this were a total loss. It deals with that. I do not place so much reliance as Mr. Leslie Scott did upon that, but it is one of the circumstances; equally so, the guarantee of the recovery from the Newcastle Club on agreed basis of settlement, because the Newcastle Club, if it was a partial loss, were entitled to one-third; and equally the plaintiff keeps his claim against the cargo owners for general average expenditure which otherwise he would not do if it were a claim for a constructive total loss. I do not place much reliance on those facts. The ground of my decision is this, that there was a claim for a constructive total loss, and that claim was compromised, and it does not prevent that being a compromise under the particular clause, because at the same time there was a claim for a partial loss. I have some hesitation in arriving at the conclusion, but I say that is the difficulty which always arises if people do not put their agreements into clear language. Perhaps after this decision they may think it right to alter the terms of the clause which they use, but on the clause, as it stands, I think the plaintiff is entitled to succeed.

Solicitors for the plaintiffs, *Lightbound, Owen, and McIver.*

Solicitors for the defendants, *Coward and Hawksley, Sons, and Chance.*

Wednesday, July 9, 1913.

(Before Bray, J.)

Western Steamship Company Limited v. Amaral, Sutherland, and Co. Limited. (a)

Charter-party — Demurrage — Agreed rate — Damages for detention.

A charter-party provided that cargo was to be taken from alongside the ship at the port of discharge at the average rate of 500 tons per day, and "if longer detained consignees to pay steamer demurrage at the rate of 4d. per net register ton per running day."

Held, that no provision, either express or implied, was contained in the charter party that the agreed rate of demurrage should only apply to a reasonable number of days over and above the lay days.

Commercial Court.

Trial of a preliminary point of law by Bray, J.

The plaintiffs, who were owners of two steamships, the *Glenelg* and *Glencluny*, claimed from the defendants, who were the charterers of the vessels, under two charter-parties dated respectively the 11th and 26th April 1912, damages for the detention of the vessels at Rio de Janeiro, the port of discharge.

Each charter-party contained the following clause:

> The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to the steamer, at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate; if longer detained consignees to pay steamer demurrage at the rate of 4*d.* per net register ton per running day (or *pro rata* for part thereof). Time to commence when steamer

(a) Reported by Leonard C. Thomas, Esq., Barrister-at Law.

is ready to unload and written notice given, whether in berth or not.

The *Glenelg*, carrying a cargo of 5760 tons of coal, arrived at Rio de Janeiro and her time began to count on the 17th May 1912. Her lay days expired on the 21st May, but the discharge was not completed until midnight on the 14th July 1912. The *Glencluny*, carrying a cargo of 6421 tons of coal, arrived at Rio de Janeiro on the 11th June 1912 and her time began to count on the same day. Her lay days expired on the 29th June at midnight, but the discharge was not completed until the 13th Aug. 1912. The plaintiffs' case was that in each case a reasonable time for the ship to be on demurrage was ten days.

By their defence the defendants pleaded, *inter alia*, as follows:

(3) Each of the said charter-parties contained a provision for the payment of demurrage at a fixed rate in the event of the said steamships respectively being detained longer than the time allowed by the terms of the said charter-parties for discharging, and the plaintiffs have been paid the full amount of such demurrage in each case in accordance with the terms of the respective charter-parties and the bills of lading thereunder. (4) No provision, either express or implied, was contained in either of the said charter-parties that the agreed rate of demurrage should only apply to a reasonable number of days over and above the lay days in each case. (5) A reasonable time on demurrage would not in the case of either of the said steamships have been limited to ten or any other number of days, and the defendants deny that they detained either of the said steamships in excess of the demurrage days as alleged or at all.

Leck, K.C. and *Raeburn* for the plaintiffs.—The defendants were only entitled to keep the ships on demurrage for a reasonable time. It has been held that where there is no contractual limitation in respect of the demurrage days they will be limited by law to what is reasonable under the circumstances:

Lilly v. *Stevenson*, 22 Sess. Cas. (4th series), 278.

It has been held also that where a charter-party provides for payment of demurrage at a specific rate after the expiration of the time limited for loading, but does not specify any time during which the ship may be kept on demurrage, the charterer is entitled to keep her on demurrage for a reasonable time:

Wilson and Coventry Limited v. *Otto Thoresen's Line*, 103 L. T. Rep. 112; (1910) 2 K. B. 405; 11 Asp. Mar. Law Cas. 491;
Carver's Carriage by Sea, sect. 609.

The master of a ship is not bound to land the cargo and assert his lien, as that is merely an alternative remedy:

Hick v. *Rodocanachi*, 65 L. T. Rep. 300; (1891) 2 Q. B. 626; 7 Asp. Mar. Law Cas. 23, 97, 233.

The principle laid down in that case applies equally to loading and unloading of ships.

Sankey, K.C. and *Inskip* for the defendants.—The plaintiffs are only entitled to recover at the demurrage rate. In any event the shipowners would have to give notice to the charterers before they could recover special damages for detention other than that stipulated for in the charter-party, and there was no allegation in the pleadings that such notice was, in fact, given. Under the circumstances the plaintiffs might have landed and warehoused the goods at the charge of the charterers after waiting a reasonable time.

Cargo ex Argos, 28 L. T. Rep. 745; L. Rep. 5 P. C. 134; 1 Asp. Mar. Law Cas. 519.

They also referred to

Mors-le-Blanch v. *Wilson*, 28 L. T. Rep. 415; 1 Asp. Mar. Law Cas. 605; L. Rep. 8 C. P. 227;
Western Transportation Company v. *Barber*, 56 New York Rep. 544.

Leck, K.C. in reply.

Bray, J. — I think the point raised here really is the point in par. 4 of the defence: "No provision, either express or implied, was contained in either of the said charter-parties that the agreed rate of demurrage should only apply to a reasonable number of days over and above the lay days in each case." For that purpose I have got to look at the charter-party, and I have got to look at clause 8, which is: "The cargo to be taken from alongside by consignees at port of discharge free of expense and risk to the steamer at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate; if longer detained, consignees to pay steamer demurrage at the rate of 4*d*. per net register ton per running day (or *pro rata* for part thereof). Time to commence," and so on. I need not read the rest. I think in all these cases, when one has to construe a written document, it is advisable to take the words as they are, and to add nothing to them and to detract nothing from them unless you see that you are obliged to do so. The steamer was detained for a large number of days—forty-four days, or whatever it was. What was to happen in that case? "If longer detained, consignees to pay steamer demurrage." There is no limitation to those words, and why should I put a limitation upon them? The real limitation that Mr. Leck asks me to put is something of this kind: "if rightfully detained." I have no right to put in that word "rightfully." "Detained" means rightfully or wrongfully; it does not confine it. I have no right to put that limitation upon it unless I can see that it is necessary; therefore without the light of authorities, I should have no hesitation in coming to the conclusion that "if longer detained" means detained rightfully or wrongfully; so long as she is detained, that is what the charterer has to pay.

But then I am referred to authorities, and first of all to the authority of a case which was decided by myself—*Wilson and Coventry Limited* v. *Otto Thoresen's Linie* (*sup.*). That was a case to begin with, at the port of loading, and what I there decided was that under that charter-party—I do not think I confined myself to the particular clause—the charterer had a right to detain the vessel for a reasonable time beyond the lay days, the days allowed for loading. That does not apply to the port of discharge; but I think the authorities show, and the same reasons which induced me to decide that case will show, that that would also apply to the port of discharge. But I did not decide, if it was detained beyond a reasonable time or during a reasonable time, what the damages should be; it was not necessary because there the shipowner had wrongfully sailed; he had not been detained. I guarded myself by saying: "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 shipowner receives the agreed or a proper compensation." I did not decide, and I did not intend to decide, what would be the right which the shipowner would have if his ship was in fact detained. I think the cases show this, that, first of all, after a reasonable time has expired at the port of loading, the shipowner may go. I think they also decide that at the port of discharge, after a reasonable time or after the stipulated time, he may land the goods, and he may land them in such a way as to preserve his lien, and, if he cannot land them at the port, acting in the interests of the owner of the cargo, he may go and land them at the nearest possible place—take them away, or do whatever is best for the owner; take them away and bring them back or send them back, whatever it may be. That, in my opinion, does not militate against the construction that I am proposing to put on clause 8; it is not inconsistent with it, and the shipowner is under no real difficulty because he has that right. He can, after the expiration of the reasonable time, go and land the goods; the ship will no longer be detained; he can land them or go to another port, and he will have damages in respect of that damage to him because it is not damages for detention but damages for some other thing that has happened. Therefore he can, if he likes, terminate the privilege or terminate the contract which settles the damages in case of detention. He can do what he likes. He did not choose to do it in this this case, but he might have. If he had thought, "This is quite sufficient to pay me," he might have landed the goods or taken them elsewhere and done the best he could for the cargo owner, and in that case he would be entitled to all the damages which might have happened from that. Whether they would be more or less than the detention may be a question which would have to be decided; but it does not, to my mind, affect the general working of clause 8, which says: "If longer detained, consignees to pay steamer demurrage at the rate of 4*d.* per net register ton per running day," and so on. Mr. Sankey is right that there is no provision, either express or implied, that the agreed rate of demurrage should only apply to a reasonable number of days over and above the lay days in each case. So long as the ship is in fact detained, in my opinion, it applies. Therefore there must be judgment on this preliminary point for the defendants.

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

Solicitors for the defendants, *Rubinstein, Nash,* and *Co.*, for *Vachell* and *Co.*, Cardiff.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Monday, July 14, 1913.

(Before BARGRAVE DEANE, J.)

THE PRINCESSE MARIE JOSÉ. (a)

Collision—"Excessive bail"—Cost of bail fees.

A steamship ran into another moored alongside a wharf in the river Thames, doing damage to the moored vessel and breaking her adrift. The vessel which had been moored did damage to others after she was broken adrift. In an action for damage brought by the owners of the vessel broken adrift they demanded bail in 10,000*l., but ultimately reduced their demand to* 9000*l. The question of liability having been fought and determined in favour of the plaintiffs, they filed a claim in the registry amounting to* 3451*l.* 13*s.* 5*d. The defendants tendered* 3100*l., which was accepted by the plaintiffs.*

On a motion by the defendants that the plaintiffs should bear the cost of the excessive bail fees:

Held, that the bail demanded was excessive, and that the plaintiffs were to bear the cost of the fees for the bail demanded above 6000*l.*

MOTION.

On the 9th June 1912 the steamship *Ijstroom* was lying moored outside the steamship *Sheldrake*, which was lying moored alongside Fresh Wharf, river Thames. The steamship *Ijstroom* was partly laden.

The steamship *Princesse Marie José*, while manœuvring in the river to take up a berth below the steamship *Ijstroom*, came into collision with her and broke her adrift.

The *Ijstroom* then fell alongside the *Sheldrake* and drove up the river with the tide, damaging the wharf and London Bridge, and subsequently towage assistance had to be obtained to get the *Ijstroom* clear of London Bridge.

Claims for damage were sent in to the owners of the *Ijstroom* by the owners of the *Sheldrake*, by the owners of London Bridge Wharf, Fresh Wharf, and the Corporation of London as trustees of the Bridge House Estates, the owners of London Bridge. Salvage actions were also brought against the *Ijstroom* by the tugs which were employed to tow her clear of London Bridge.

The damage done to the *Ijstroom* was surveyed on the 10th, 13th, and 14th June 1912.

On the 12th June the solicitors acting for the owners of the *Ijstroom* demanded bail in the sum of 10,000*l.* from the owners of the *Princesse Marie José.*

On the same day the solicitors for the defendants wrote protesting against the demand, which they alleged was excessive, as they understood that the damage to the *Ijstroom* amounted to about 2000*l.*, and stating that they would ask that the plaintiffs should be condemned in the excessive bail fees.

On the 15th June the plaintiffs' solicitors replied saying they would reduce the bail asked for to 9000*l.*, but reserving the right to increase the demand if necessary.

On the same day the defendants' solicitors replied saying that they adhered to their remarks, as they thought the sum of 9000*l.* excessive.

The action between the owners of the *Ijstroom* and the owners of the *Princesse Marie José* was tried in Nov. 1912, the defendants' steamship being held alone to blame, and the plaintiffs' claim was referred to the registrar and merchants.

The plaintiffs then filed a claim which amounted to 3451*l.* 13*s.* 5*d.*

On the 17th June 1913 the defendants tendered the sum of 3100*l.*, which sum was accepted.

On the 2nd July 1913 the defendants' solicitors wrote to the plaintiffs' solicitors saying that it was clear that bail grossly in excess of the amount necessary to cover the plaintiffs' damages

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

and costs had been given, and asking if the plaintiffs were prepared to pay the costs of the bail fees over 4000*l.*

The plaintiffs declined to make any return in connection with the bail fees.

On the 14th July the solicitors for the defendants moved the court that the plaintiffs might be condemned to pay the defendants the bail fees incurred in respect of the bail provided by the defendants in the action over and above the sum of 4000*l.*, or over and above such other sum as to the court might seem just.

H. C. S. Dumas for the defendants, the owners of the *Princesse Marie José*, stated the facts, and said it was not suggested by the defendants that the *Ijstroom* was at fault. The only defence raised by the defendants was one of compulsory pilotage, and it was clear that no claim could be made against the *Ijstroom* for negligence. The amount of bail demanded was excessive and unreasonable. The cost of finding bail was 1*l.* per cent. Such an application was unusual in a collision action, but there was no reason why it should not be made. Such an application was frequently made in salvage cases when bail was demanded in an excessive sum:

The George Gordon, 50 L. T. Rep. 371; 5 Asp. Mar. Law Cas. 216; 9 P. Div. 46.

D. Stephens for the plaintiffs, the owners of the *Ijstroom.*—No case can be found in which such an application as this has been made, much less granted. An order such as this should not be made unless it is clear that the bail was negligently demanded. At the time this bail was demanded claims were being brought against the *Ijstroom*, and it was difficult to say what the *Ijstroom* might have to claim against the defendants. If the *Ijstroom* had been found to blame even in part, she might have had to pay the whole damage:

The Devonshire, 107 L. T. Rep. 179; 12 Asp. Mar. Law Cas. 210; (1912) A. C. 634.

BARGRAVE DEANE, J.—I think the plaintiffs should pay the bail fees incurred in respect of the bail demanded over 6000*l.* I shall make no order as to costs.

Solicitors for the plaintiffs, *Cattarns* and *Cattarns*.

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

Judicial Committee of the Privy Council

April 21, 22, 23, *May* 2, 5, 6, 7, 8, 27, 28, *and July* 25, 1913.

(Present: The Right Hons. the LORD CHANCELLOR (Viscount Haldane), Lords SHAW, MOULTON, and PARKER OF WADDINGTON.)

ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA *v.* ADELAIDE STEAMSHIP COMPANY LIMITED AND OTHERS. (a)

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Restraint of trade—Contract—"Intent to restrain trade to the detriment of the public"—Construction—Proof of intent—Evidence—Contracts in restraint of trade unenforceable at common law —Australian Industries Preservation Act 1906, ss. 4, 7, 9, 15A.

It is an essential element of an offence under sect. 4 (1) (*a*) *and sect.* 7 (1) *of the Australian Industries Preservation Act* 1906, *that there should be an actual intent to restrain trade or commerce to the detriment of the public, and the mere intent to restrain trade or commerce without the further intent to cause detriment to the public, is not sufficient.*

All contracts in restraint of trade or commerce which are unenforceable at common law, and all combinations in restraint of trade or commerce which, if embodied in a contract, would be unenforceable at common law, are not necessarily detrimental to the public within the meaning of the Act, nor are those who enter into such contracts or combinations necessarily to be taken to have intended to act to the detriment of the public merely from being so concerned.

In establishing the contract, or combination, or the monopoly, or attempt to monopolise, the prosecutor may, in default of evidence to the contrary, rely on averments in the information, declaration, or claim, but the wrongful intention must always be proved by proper evidence. The prosecutor cannot plead the evidence whereby he hopes to establish wrongful intention and rely on the provisions of sect. 15A (*inserted in the Act of* 1906 *by sect.* 4 *of the amending Act of* 1908) *as rendering the proof of what he pleads unnecessary.*

The principles of law relating to monopolies and contracts in restraint of trade considered.

Decision of the High Court of Australia affirmed.

APPEAL from a judgment, dated the 30th Sept. 1912, of the High Court of Australia in its appellate jurisdiction reversing as regards the present respondents a judgment of Isaacs, J., dated the 22nd Dec. 1911, in favour of the Attorney-General. The defendants other than the present respondents against whom Isaacs, J. gave judgment entered appeals against it, but subsequently abandoned them and paid the penalties imposed by such judgment.

The action was brought by the Attorney-General of the Commonwealth under the provisions of an Act of the Commonwealth Parliament, No. 9 of 1906, intituled "An Act for the Preservation of Australian Industries and for the Repression of Destructive Monopolies," and also of two amending Acts, No. 5 of 1908 and No. 26 of 1909.

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

The more material sections of the Act of 1906 are as follows:

Sect. 4 (1). Any person who either as principal or as agent makes or enters into any contract or is or continues to be a member of or engages in any combination in relation to trade or commerce with other countries or among the States: (*a*) With intent to restrain trade or commerce to the detriment of the public; or (*b*) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth having due regard to the interests of producers, workers, and consumers, is guilty of an offence. Penalty, five hundred pounds. (2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

Sect. 7 (1). Any person who monopolises or attempts to monopolise or combines or conspires with any other person to monopolise any part of the trade or commerce with other countries or among the States with intent to control to the detriment of the public the supply or price of any service, merchandise, or commodity is guilty of an offence. Penalty, five hundred pounds. (2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

Sect. 9. Whoever aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned or privy to (*a*) the commission of any offence against this part of this Act; or (*b*) the doing of any act outside Australia which would if done within Australia be an offence against this part of this Act shall be deemed to have committed the offence. Penalty, five hundred pounds.

Sect. 10 (1). The Attorney-General or any person thereto authorised by him may institute proceedings in the High Court to restrain by injunction after hearing and determining the merits and not by way of interlocutory order the carrying on of any contract made or entered into after the commencement of this Act or any combination which (*a*) is in restraint of trade or commerce to the detriment of the public; or (*b*) is destructive or injurious by means of unfair competition to any Australian industry the preservation of which is advantageous to the Commonwealth having due regard to the interests of producers workers and consumers. Provided that except in the case of foreign corporations or trading or financial corporations formed within the Commonwealth this section shall only apply to contracts or combinations in relation to commerce with other countries or among the States. (2) On the conviction of any person for an offence under this part of this Act the justice before whom the trial takes place shall upon application by or on behalf of the Attorney-General or any person thereto authorised by him grant an injunction restraining the convicted person and his servants and agents from the repetition or continuance of the offence of which he has been convicted.

Sect. 13 (1). Any offence against this part of the Act (not being an indictable offence) shall be tried before a justice of the High Court without a jury.

The Act of 1908 provides by sect. 4:

Part 2 of the principal Act is amended by inserting therein after sect. 15 the following sections: "15A. In any prosecution for an offence against sects. 4, 5, 7, 8, or 9 of this Act the averments of the prosecutor contained in the information, declaration, or claim shall be deemed to be proved in the absence of proof to the contrary, but so that (*a*) the averment in the information of intent shall not be deemed sufficient to prove such intent, and (*b*) in all proceedings for an indictable offence the guilt of the defendant must be established by evidence.

This action was commenced by writ dated the 4th June 1910 and was brought against forty defendants to recover pecuniary penalties for alleged breaches of sects. 4 (1) (*a*), 7 (1), and 9 of the Act of 1906, and also for an injunction restraining the defendants from the repetition or continuance of the alleged offences.

The original defendants consisted of two main divisions: the first (hereinafter called "the colliery defendants") consisting of companies owning or working various coal mines in the Newcastle and Maitland Districts of New South Wales, together with the managers or other responsible officers of such companies; and the second division (the present respondents) consisting of four shipping companies and their respective managing directors. There were also named as defendants to the writ the Associated Northern Collieries, which was alleged to be an unincorporated association constituting a "commercial trust" within the meaning of the Australian Industries Preservation Act, and which was alleged to include all the colliery defendants other than individuals; and the Associated Steamship Companies, which was also alleged to be an unincorporated association constituting a "commercial trust," and alleged to include all the respondents other than individuals. The last-named defendant did not enter an appearance to the action, plead, or appear at the trial, and Isaacs, J. held that the material allegations as to the respondents being combined in the alleged "trust" were not proved.

The statement of claim was delivered on the 25th Aug. 1910. The charges in the action as there set out were very numerous in point of form in order to make alternative allegations against the defendants sufficient to satisfy the language of the alternative offences created by the legislation in question. But their general import is briefly stated in the following passage from the judgment of Isaacs, J.: "Now, broadly speaking, the allegations against the defendants amount to this: first, that very shortly after the Act came into operation a complete express contract was entered into between the collieries owners of the first part and the shipowners of the second part in relation to inter-State trade and commerce in Newcastle and Maitland coal, that this contract was renewed and continued to exist and operate with some intermediate modifications down to the commencement of this action and was then still in force, and that it was entered into and at all events was renewed with intent to restrain that trade and commerce to the detriment of the public. In other words, the contract itself is relied on as constituting an offence against sect. 4. Next, it is said that there existed during the period mentioned a combination between the two sets of proprietors—coal and shipping—created by the conduct of the parties, that conduct consisting of concerted business action carried on upon certain recognised lines laid down probably by some contract in the nature of that already referred to, or, if not, then by some understanding or practice of a similar tendency and effect, and that during the greater part of that period two other shipping companies not defendants were added to the combination, the Melbourne Steamship Company and James Paterson and Co. This combination, it is averred, was maintained with the like intent to restrain the inter-State trade and commerce in Newcastle and Maitland coal to the detriment of the public. The defendants concerned are said

to come within the ambit of sect. 4 as to combinations—in three different ways—inasmuch as each of them was and continued to be and was engaged in the combination. Next, it is charged that the business conduct of the defendants and their established relations with each other amounted to monopolising or attempting to monopolise and to a combination and conspiracy to monopolise the trade and commerce in Newcastle and Maitland coal with intent to control to the detriment of the public the supply and price of the coal. And, lastly, as to those who might be considered as merely assisting others to effect the probibited acts, it is charged that they come within the provisions of sect. 9 as aiding, abetting, counselling, or procuring and are therefore to be deemed to have committed the principal offences. The detriment to the public which is alleged to have arisen and to have been intended, as a result of the matters complained of, consists in the practical and persistent annihilation of competition on land and sea, excessive, arbitrary, and capricious prices charged to consumers, restriction of their opportunities of choice, difficulties in obtaining particular classes or grade of coal desired, substitution really compulsory of other coal for coal preferred, delays in obtaining delivery. The defence is in effect a denial of all that is charged by the plaintiffs. An objection raised on the ground of the Statute of Limitations (31 Eliz. c. 5) has not been persisted in, and need not be considered."

The contract and combination above referred to were contained in two documents, which are respectively referred to as the vend agreement and the shipping agreement. The effect of both documents is sufficiently stated in the judgment of Lord Parker of Waddington, but the legality of the vend agreement was not in question in these proceedings.

At the trial, which lasted seventy-three days, the plaintiff adduced a large amount of evidence, but no evidence was tendered by the defendants.

The following is a brief summary of the conclusions at which Isaacs, J. arrived in the course of his judgment. He found that the defendant colliery proprietors or some of them early in 1906 entered into negotiations between themselves to form an association to raise and maintain the price of coal. That these negotiations were concluded and the terms of the vend agreement ascertained and the association formed under the name of the Associated Northern Collieries about Sept. 1906, and that all the defendant colliery proprietors who were not originally members of the Associated Northern Collieries became members thereof before the commencement of the action. That the negotiations for the vend agreement and the shipping agreement proceeded concurrently and that one of the purposes and objects of the formation of the vend was to enter into the class of contractual or business arrangements with the respondents which in fact ensued under the shipping agreement, and that the respondents knew of this. That the respondents and the defendant colliery proprietors had entered into a contract and had been and continued to be members of a combination substantially in the terms of the shipping agreement, and had acted and carried on their respective businesses in accordance therewith and continued to do so up to the time of the action. That at the time the vend agreement was entered into the defendant colliery proprietors controlled a percentage of the total volume of the trade and commerce in coal between the State of New South Wales and the other States of Australia excepting Tasmania, which was much understated in the statement of claim as being 80 per cent. of coal generally and 85 per cent. of coal from the Newcastle and Maitland Districts, and that at the time when the shipping agreement was entered into the respondents substantially controlled about 80 per cent. of the whole carrying trade both in coal generally and in Newcastle coal between the State of New South Wales and the other States of the Commonwealth. That the defendant colliery proprietors acting in pursuance of the said contract and combination raised the price of coal (which during 1904, 1905, and the early part of 1906 had not been more than 7*s.* 6*d.* to 9*s.* per ton) as follows—namely, to 10*s.* during part of 1906 and during 1907, and to 11*s.* during 1908, 1909, and 1910. And also that a price of 9*s.* 1*d.* per ton would have been extremely profitable during the year 1907, and a price of 9*s.* 8*d.* per ton would have been equally profitable during the years 1908, 1909, and 1910. That the respondents in accordance with the shipping agreement paid these increased prices to the defendant colliery proprietors, but increased their prices for Newcastle coal to consumers in 1907 to a price substantially higher than was warranted by the increased price paid by them to the defendant colliery proprietors, and also substantially higher even allowing for that increased price than the general level of market prices in 1904, 1905, and 1906. And that in the years 1908 and 1909 and in some cases in 1910 the respondents still further increased their prices to consumers in the States of the Commonwealth other than New South Wales. That the contract and combination aforesaid occasioned serious detriment to the public in the shape of arbitrary and capricious discrimination of prices. That the defendants intended the prevention or destruction of all reasonable and effective competition both of production and of carriage, and that this elimination of competition was the main and central object of the whole combination complained of.

He accordingly convicted the respondents and the defendant colliery proprietors of offences under sects. 4, 7, and 9 of the Act of 1906 and inflicted a single penalty on each of the respondents and on each of the other defendants except one, and granted an injunction against the repetition or continuance of the said offences and also against the carrying out of the contract and combination aforesaid, and ordered the respondents and the other defendants to pay the costs of the action.

The respondents thereupon appealed to the full court of the High Court against the judgment, and the appeal was heard on the 26th Aug. 1912 and following days by Griffith, C.J., Barton and O'Connor, JJ., and on the 20th Sept. 1912 the Chief Justice delivered the reserved judgment of the court reversing the judgment of Isaacs, J. and ordering judgment in the action to be entered for the respondents with costs of the action and of the appeal.

The general reasoning on which that judgment proceeded may be summarised as follows: That

both under sect. 4 (1) (a) and under sect. 7 (1) of the Act "it is an essential element of the offence that there should be an intent to restrain trade or commerce to the detriment of the public, and that mere intent to restrain trade or commerce without the further intent to cause detriment to the public is not sufficient; that the intent which is made by sect. 4 an essential element of the offence must be a real actual intention; that the real subject of the inquiry in this case is whether the appellants entered into the contract or combination alleged with an actual intent to restrain trade to the detriment of the public. That is entirely a question of fact and the relevant facts are not very complicated though a vast mass of evidence was put before the court. There is no real dispute as to the actual facts. The conflict is as to the proper inference to be drawn from them." And then the judgment, accepting the finding that the respondents and the colliery proprietors had entered into an arrangement (including both contract and combination) which operated and was intended to operate in restraint of trade, proceeded to inquire with regard to the arrangement, "whether it operated to the detriment of the public, and, if so, whether it was intended so to operate."

In pursuing this inquiry doubt was first cast in the judgment upon the following two assumptions—namely: (1) That the public referred to in sects. 4 and 7 of the Act of 1906 is the consuming public; and (2) that a rise in the price of a commodity is *primâ facie* a detriment to the public; that at the date of the vend agreement "all parties honestly believed that the prosperity of the Newcastle and Maitland Districts was in danger as well as their own individual interests by reason of the excessive competition and unremunerative prices obtained for coal; that the fair inference to be drawn from the tenor of the vend agreement itself is that the intention of the parties was to put the Newcastle coal trade on a satisfactory basis which would enable them to pay adequate wages to their men and to sell their coal at a price remunerative to themselves having regard to the capital and risk involved in the enterprise. It may also, we think, be fairly inferred that they intended to ask as high a price as they could get in the market without running the risk of being underbid by other competitors in Australia or abroad and so losing the trade. This is not in our opinion an intention to cause detriment to the public. So far as we can see all the terms of the agreement were reasonably necessary for securing this perfectly lawful object." In the case of the shipping agreement the court declined to draw that inference that its provisions indicated a "sinister intention," and said that "whether the powers conferred by it could be exercised in such a manner as to cause detriment at this stage is unimportant since an actual intention to cause such detriment must be shown. We cannot (as seems at one time to have been done in England) infer an intention 'to do evil' from a mere power to do so." The judgment then dealt with the question: "Whether an intention to cause detriment to the public should be inferred from the acts of the defendants consequent upon the agreement," and stated: "Under ordinary circumstances the selling price of a commodity is governed by what is commonly called the law of supply and demand, so that if a seller asks too much he will not be able to sell, and if a buyer offers too little he will not get what he wants. At the same time it must be recognised that in the case of necessary commodities a seller having a complete or practically complete control of supply may be able to extort exorbitant or unreasonable prices, *i.e.*, prices beyond all reason, which as we understand the term means prices such as to shock the ordinary sense of fair play." The court then declined to attach any weight to the level of prices for Newcastle coal which had existed prior to the vend agreement and the shipping agreement, and concluded that the price of 10s. a ton f.o.b. in 1907 and of 11s. a ton f.o.b. in 1908 and subsequently were not only not unreasonable prices, but had been affirmatively established to be reasonable. It then further found that the additionally increased prices asked by the respondents as shippers and merchants were not unfair or unreasonable or necessarily detrimental to the public, and that, even if they were, that fact would not be any ground on which to impute to the other members of the combination a common intention to cause detriment to the public.

With reference to the argument that the natural effect of the vend agreement and the shipping agreement was to create a monopoly, the court pointed out that an agreement to create a monopoly is not unlawful under the Act of 1906, and that on the facts the alleged monopoly did not keep the price of coal unreasonably high.

With reference to sect 15A, Isaacs, J. came to a conclusion against the defendants irrespective of the assistance of that section, but on the appeal the court held that "the term 'averment' must be confined to pure allegations of fact, and does not include an allegation of a conclusion of mixed law and fact. It is settled law that the question whether an agreement in restraint of trade is unenforceable on the ground of being unreasonable is a question of law. The question whether a price is unreasonable for the purpose of the inquiry in which we are engaged would seem to be a mixed question of law and fact. In such a connection the mere allegation that the price is unreasonable is no more conclusive than a mere allegation that an act is fraudulent, to which, as has often been said, no court will pay any attention. The word 'arbitrary' is open to the same comment. But in any view of the matter we are of opinion that the section has no application when the prosecutor elects to put the actual facts of the case before the court."

The appeal was accordingly allowed and judgment entered for the appellant defendants with costs.

The plaintiff appealed to the Privy Council.

The further facts and material sections of the Acts of Parliament are sufficiently stated in the judgment of the Privy Council.

Sir *Robert Finlay*, K.C., *Wise*, K.C. (of the Australian Bar), and *Arthur Page* for the appellant.—The decision of Isaacs, J. is correct. This agreement is most objectionable from a public point of view. It substantially establishes a monopoly. The terms of the vend agreement and the shipping agreement in themselves show an intent to restrain trade or commerce and to monopolise trade or commerce in a manner which

would both in fact and to the knowledge of the contracting parties operate to the detriment of the public. This is a combination in restraint of trade and commerce which is unenforceable at common law, and therefore it is detrimental to the public within this Act, and in that case the defendants must be taken to have intended such detriment:

Monopolies, Coke Rep., part 11, p. 159;
Mitchel v. *Reynolds*, 1 P. Wms. 181; 1 Sm. L. Cas. (11th edit.), 406;
Rex v. *Warrington*, 1 East 143;
Hawkins' Pleas of the Crown, vol. 1, book 1, c. 29, sect. 8;
Wickens v. *Evans*, 3 Y. & C 318;
Mallan v. *May*, 11 M. & W. 653;
Hilton v. *Eckersley*, 6 E. & B. 47;
Hare v. *London and North-Western Railway*, 3 L. T. Rep. 289; 2 J. & H. 80;
Collins v. *Lock*, 41 L. T. Rep. 292; 4 App. Cas. 674;
Nordenfelt v. *Maxim Nordenfelt Guns and Ammunition Company Limited*, 71 L. T. Rep. 489; (1894) A. C. 535;
Mogul Steamship Company v. *McGregor, Gow, and Co.*, 61 L. T. Rep. 820; 66 L. T. Rep. 1; 23 Q. B. Div. 598; (1892) A. C. 25;
North-Western Salt Company Limited v. *Electrolytic Alkali Company Limited*, 107 L. T. Rep. 439;
Allen v. *Flood*, 77 L. T. Rep. 717; (1898) A. C. 1;
Quinn v. *Leatham*, 85 L. T. Rep. 289; (1901) A. C. 495;
United Shoe Machinery Company v. *Brunet*, 100 L. T. Rep. 579; (1909) A. C. 330;
Russell v. *Amalgamated Society of Carpenters and Joiners*, 106 L. T. Rep. 433; (1912) A. C. 421.

The cases decided in the United States under the analogous statute known as the Sherman Act apply to this case:

Standard Oil Company of New Jersey v. *United States*, 221 Sup. Ct. Rep. 1;
United States v. *American Tobacco Company*, 221 Sup. Ct. Rep. 106.

The reasonableness of such a contract does not depend on the view of the parties to it, but on whether it is injurious to the interests of the public, and the court may consider the surrounding circumstances to see if the contract is against public policy. The defendants have not proved any compensating advantages for the public. The fact that the workmen employed by the defendants will derive benefit from the contract of this class will not make it legal. The essence of a destructive monopoly at common law was not the concentration of the trade under one control, but the deliberate intention to prevent others joining in it. An attempt to control the trade by raising the prices is a destructive monopoly. Here there was an attempt to compel their rivals in trade to carry it on on their terms to the detriment of the public. To constitute an offence under sects. 4 or 7 of the Act it is not necessary to prove actual detriment to the public; it is sufficient to prove that an agreement or combination has been entered into or continued with intent to restrain or monopolise trade or commerce to the detriment of the public. There was a considerable raising of the price of coal, which is a commodity of prime necessity, and that in itself was a detriment to the public.

C. F. Mitchell K.C. (of the Australian Bar), *Atkin*, K.C., *F. P. M. Schiller*, and *A. C. Nesbitt* for the respondents.—There was no "contract" or "combination" constituted by the shipping agreement in restraint of trade within the meaning of sect. 4 (1) (*a*). The mere intention to restrain trade or commerce is not sufficient to bring the case within it. Nor did the respondents monopolise or attempt to monopolise any trade to the detriment of the public within sect, 7, subsect. 1. These things must be proved by affirmative evidence, and the evidence was not sufficient to prove them. In order to bring the respondents within these sections an intent to injure the public must be proved, it will not be presumed, and there was no such proof. A mere intent to restrain competition is not an offence under sect. 4 (1), because, even if the restraint is so large as to be intended to create a monopoly under sect. 7 (1), there must be an intent to control the supply or price of any merchandise to the detriment of the public. The public in the sections includes not only the consumers, but also the producers and workers. A combination to raise prices so as to give proper remuneration to capitalists and employees is lawful. There is evidence that the prices charged were not excessive. As regards the alleged excessive f.o.b. prices, the evidence shows that such prices were fixed from time to time by the colliery defendants under the provisions of the vend agreement without the respondents directly or indirectly taking any part in their fixing. [They were stopped by the Court.]

Wise, K.C. in reply.

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

July 25.—Their Lordships' judgment was delivered by

Lord PARKER OF WADDINGTON.—This is an appeal from an order of the High Court of Australia in its appellate jurisdiction reversing a judgment of Isaacs, J., dated the 22nd Dec. 1911, and made in an action instituted by the Attorney-General of the Commonwealth under the provisions of the Australian Industries Preservation Act 1906 and two amending Acts—No. 5 of 1908 and No. 29 of 1909. The Act of 1906 was a new departure in legislation, and its true construction may be a matter of far-reaching economic importance. Their Lordships propose to consider its provisions with some particularity. Before doing so, however, it will be convenient, having regard to the arguments both here and in the courts below, to refer to the law as it existed prior to and at the passing of the Act in relation to monopolies and contracts in restraint of trade.

At common law every member of the community is entitled to carry on any trade or business he chooses, and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation, no one can lawfully interfere with another in the free exercise of his trade or business unless there exists some just cause or excuse for such interference. Just cause or excuse for interference with another's trade or business may sometimes be found in the fact that the acts complained of as an interference have all been done in the *bonâ fide* exercise of the doer's own trade or business and with a single view to his own interests: (*Mogul Steamship*

Company v. *McGregor, ubi sup.*). But it may also be found in the existence of some additional or substantive right conferred by letters patent from the Crown or by contract between individuals. In the case of letters patent from the Crown this additional or substantive right is generally described as a monopoly. In the latter case the contract on which the additional or substantive right is founded is generally described as a contract in restraint of trade. Monopolies and contracts in restraint of trade have this in common—that they both, if enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases, and in such manner as he thinks best in his own interests.

The right of the Crown to grant monopolies is now regulated by the Statute of Monopolies, but it was always strictly limited at common law. A monopoly being a derogation from the common right of freedom of trade could not be granted without consideration moving to the public, just as a toll being a derogation from the public right of passage could not be granted without the like consideration. In the case of new inventions the consideration was found either in the interest of the public to encourage inventive ingenuity or more probably in the disclosure made to the public of a new and useful article or process. In the case of sole rights of trading with foreign parts it might be found in the interest of the public in new countries being opened to trade. But for the validity of every monopoly some consideration moving to the public was necessary. Many of the monopolies purported to be granted by the Tudor or Stuart Sovereigns were bad for want of such consideration, and it was the vexatious interference with trade under cover of these invalid grants which led to the passing of the Statute of Monopolies. Further, monopolies were in the eyes of the lawyers of that time attended with the following evils: First, increase in the price of the wares; and, secondly, deterioration of the wares themselves, both evils being due to the want of healthy competition: (11 Coke, 86*b*).

Contracts in restraint of trade were subject to somewhat different considerations. There is little doubt that the common law in the earlier stages of its growth treated all such contracts as contracts of imperfect obligation, if not void for all purposes; they were said to be against public policy in the sense that it was deemed impolitic to enforce them and not because every such contract must necessarily operate to the public injury. The old common law rule against enforcing such contracts has, however, been relaxed in more recent times. Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits. The existing law on the point is laid down in the case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (*ubi sup.*). For a contract in restraint of trade to be enforceable in a court of law or equity, the restraint, whether it be a partial or general restraint, must (to use the language of Lord Macnaghten, evidently adapted from that of Tindal, C.J. in *Horner* v. *Graves*, 7 Bing. 735) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public. Lindley and Bowen, L.JJ. had suggested in the court below that though a restraint might be reasonable as between the parties to the contract it might be unenforceable because of the "law which forbids monopolies," or because it was calculated to create "a pernicious monopoly," and there is a similar suggestion by Lindley, L.J. in *Underwood* v. *Barker* (80 L. T. Rep. 306; (1899) 1 Ch. 300.) The term "monopoly" cannot be here used in its proper legal signification of a right granted by the Crown, nor can the expression "the law which forbids monopolies" refer to any common law or statutory rule limiting the Crown's prerogative in this respect. The learned Lords Justices are contemplating a state of circumstances in which some trade or industry has passed or is likely to pass into the hands or under the control of a single individual or group of individuals, and are indicating that if a restraint on trade is likely to produce this result, it may on grounds of public policy be unenforceable, however reasonable in the interests of the parties to the contract. Such a state of circumstances may, by eliminating competition, entail the evils thought to be incident to monopoly rights granted by the Crown, and may therefore in a popular sense be called a monopoly. It is so called by Farwell, L.J. in the case of *North-Western Salt Company* v. *Electrolytic Alkali Company Limited* (*ubi sup.*), now under appeal to the House of Lords.

The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense, was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led, no doubt, to the enactment of most, if not all, of the penal statutes repealed by 12 Geo. 3, c. 71. It also lay at the root of the common law offence of Ingrossing, which, according to Hawkins' Pleas of the Crown (vol. 1, book 1, c. 29, sect. 9), consisted in buying up large quantities of wares with intent to resell at unreasonable prices. It influenced the courts in their attitude towards contracts in restraint of trade. Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to by Lindley and Bowen, L.JJ. as a pernicious monopoly—that is to say, a monopoly calculated to enhance prices to an unreasonable extent. In this connection it should be noticed that the Act of 7 & 8 Vict. c. 24, which abolished the

common law offence of engrossing, does not apply to the States of the Commonwealth, and that monopolies in the popular sense of the word are more likely to arise, and if they do arise, are more likely to lead to prices being unreasonably enhanced in countries where a protective tariff prevails than in countries where there is no such tariff. It is, however, in their Lordships' opinion, clear that the onus of showing that any contract is calculated to produce a monopoly, or enhance prices to an unreasonable extent, will lie on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties this onus will be no light one. Further, it must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible.

It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similar combinations, not amounting to contracts, in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful or something lawful by unlawful means. The right of the individual to carry on his trade or business in the manner he considers best in his own interest involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others: (*Mogul Steamship Company* v. *McGregor*, *ubi sup.*).

Such having been the state of the law when the Act of 1906 was passed, their Lordships will proceed to consider the various provisions of that Act and its proper interpretation.

The full title of the Act is "An Act for the Preservation of Australian Industries and for the Repression of Destructive Monopolies," and Part 2, comprising sects. 4 to 14, inclusive, is intituled "Repression of Monopolies." The 4th section provides that any person who either as principal or agent makes or enters into any contract, or is or continues to be a member of, or engages in any combination in relation to, trade or commerce among the States of the Commonwealth (*a*) with intent to restrain trade or commerce to the detriment of the public, or (*b*) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers, is guilty of an offence the penalty for which is fixed at 500*l.* The 6th section defines unfair competition as "unfair under the circumstances," and specifies certain cases in which the competition is to be deemed to be unfair unless the contrary be proved. The 7th section provides that any person who monopolises or attempts to monopolise, or combines or conspires with any other person to monopolise, any part of the trade or commerce among the States with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence the penalty for which is fixed at 500*l.* The 9th section provides that whoever aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or privy to an offence under sect. 4 or sect. 7 shall be deemed to have committed the offence and be subject to a penalty of 500*l.* The 10th section of the Act enables the Attorney-General of the Commonwealth to institute proceedings for an injunction restraining the carrying out of any contract or combination which is, in fact, in restraint of trade or commerce to the detriment of the public, or is, in fact, destructive or injurious by means of unfair competition to any such Australian industry as mentioned in the 7th section. The amending Act No. 5 of 1908 contains a provision that in any prosecution for an offence against sects. 4, 7, or 9, of the Act of 1906 the averments of the prosecutor contained in the information, declaration, or claim shall be deemed to be proved in the absence of proof to the contrary, but so that the averment of intent shall not be deemed sufficient to prove such intent.

It is in their Lordships' opinion quite clear that the terms "monopolies" and "monopolise," as used in the Act of 1906, do not refer to a monopoly in the strict legal sense, but in the more popular sense, in which Lindley and Bowen, L JJ. used the term "monopoly" in the dicta above mentioned. "Destructive monopoly" is equivalent to "pernicious monopoly" as used by the learned Lords Justices, and, no doubt, undue enhancement of the prices of goods or services is contemplated as one of the evils which may render a "monopoly," in the popular sense, destructive or pernicious, it being assumed that such enhancement is to the public injury or detriment. Similarly there can be little doubt that one of the ways in which a restraint of trade might in view of the Commonwealth Legislature be detrimental to the public was by its creating a pernicious "monopoly" in this popular sense of the word. There may, of course, be other ways in which a monopoly or restraint of trade may enure to the public detriment, but undue enhancement of prices must certainly be one. It should be observed that for the statutory misdemeanours created by clauses 4 and 7 there must be an intention to bring about all or some of the evils against which the Act is directed, and, if there be such an intention, it is quite immaterial whether these evils have or have not actually ensued. But, in proving the intention, the actual results of the contract or combination, or the monopoly or attempt to monopolise, may be of great materiality, for in a court of law every man is taken to intend the natural or necessary consequences of his action. This point is emphasised by contrasting sects. 4 and 7 with sect. 10, under which the contract or combination must be proved to have led to the evils against which the Act is directed. Thus, in proceedings for offences under sects. 7 and 9, the prosecutor must first establish the contract or combination or the monopoly or attempt to monopolise. He must then establish the

wrongful intention necessary to constitute the misdemeanour. In establishing the contract or combination or the monopoly or attempt to monopolise, he may, in default of evidence to the contrary, rely on averments in the information, declaration, or claim. But the wrongful intention must always be proved by proper evidence. For this purpose the prosecutor may, if he chooses, tender proof that the evils against which the Act is directed were the natural or necessary consequences of the contract or combination, monopoly or attempt to monopolise, and that these evils have in fact ensued. He cannot, however, in their Lordships' opinion, plead the evidence whereby he hopes to establish wrongful intention and rely on the provisions of the Act of 1908 as rendering proof of what he pleads unnecessary. With regard to the 10th section, these last-mentioned provisions appear to have no application at all, and the 10th section itself has nothing to do with monopolies or attempts to monopolise, but is limited to contracts or combinations in restraint of trade or destructive of Australian industries.

It was strongly urged by counsel for the Crown that all contracts in restraint of trade or commerce, which are unenforceable at common law, and all combinations in restraint of trade or commerce which, if embodied in a contract, would be unenforceable at common law, must be detrimental to the public within the meaning of the Act, and that those concerned in such contracts or combinations must be taken to have intended this detriment. Their Lordships cannot accept this proposition. It is one thing to hold that a particular contract cannot be enforced because it belongs to a class of contracts, the enforcement of which is not considered to be in accordance with public policy, and quite a different thing, to infer as, a fact, that the parties to such contract had an intention to injure the public. It is quite common, in a contract of service, to find a clause restricting the area in which the employee may carry on a business similar to that of his employer after the termination of the service, and such area is often held too wide for the restraint to be enforceable. In such cases both parties have as a rule bargained with a single view to their own interests, though, in the opinion of the court, they have been mistaken as to the area of the restraint required in their own interest, but it would be wrong to infer from this that they had any intention of injuring the public. It would be equally wrong to infer that such a sinister intention must have existed in cases of trade combinations, such as that which was the subject of the decision in *Hilton* v. *Eckersley* (*ubi sup.*). If this were the true effect of the Act, no trade union would be free from the risk of proceedings under sect. 4. It was said that this result with regard to trade unions was foreseen and provided against, by making the fiat of the Attorney-General necessary for any such proceedings, but their Lordships cannot believe that the Legislature intended to make the existence of trade unions, the economic advantage of which has often been recognised in modern legislation, dependent on the economic views of the Government for the time being or its law officers.

It was also strongly urged that in the term "detriment to the public" the "public" means the consuming public, and that the Legislature was not contemplating the interest of any persons engaged in the production or distribution of articles of consumption. Their Lordships do not take this view, but the matter is really of little importance, for in considering the interests of consumers it is impossible to disregard the interests of those who are engaged in such production and distribution. It can never be in the interests of the consumers that any article of consumption should cease to be produced and distributed, as it certainly would be unless those engaged in its production or distribution obtained a fair remuneration for the capital employed and the labour expended.

In the argument upon the true construction of the Act of 1906 considerable stress was laid on the cases decided by the Supreme Court of the United States under the analogous statute known as the Sherman Act, and in particular on the case of *Standard Oil Company of New Jersey* v. *United States* (221 Sup. Ct. Rep. 1). Although the judgments in this case are valuable for the light they throw in the development of the common law touching monopolies and contracts in restraint of trade, their Lordships do not think that the decisions themselves are of any real assistance in the present case. The Sherman Act, construed strictly, makes every contract or combination in restraint of trade and every monopoly or attempt to monopolise a statutory misdemeanour irrespective of any sinister intention on the part of the accused and irrespective of any detriment to the public. The actual decision is that contracts in restraint of trade which are enforceable at common law are impliedly excepted from the express provisions of the Act. The enforceability of the contract becomes in this way the test of its legality. There is, however, no justification for appplying a similar test in the case of an Act which, like the Act of 1906, only deals with contracts or combinations or monopolies or attempts to monopolise which involve detriment to the public, and in which a sinister intention is of the essence of the offence.

Their Lordships are now in a position to consider the actual facts of the present case and the inferences to be drawn therefrom, it being borne in mind that the offences charged against the respondent companies are under sect. 4 (*a*), and alternatively under sect. 7, of the Act of 1906, while the other respondents are charged under sect. 9 with aiding and abetting the respondent companies in those offences.

The chief coalfield in New South Wales is the Newcastle coalfield This field has been worked for nearly a century, and was for many years the only coalfield worked in New South Wales. Later, the Southern Collieries and the Lithgow or Western Collieries were opened up, and their coal began to compete with the Newcastle coal. The latter coal has, however, the advantage of easier access to deep water, and is for some purposes better than coal from the southern or western collieries.

For the last forty years wages in the Newcastle coalfield have, by agreement between the colliery proprietors and the workmen, varied with the selling price of coal. There is an assumed minimum price paid per ton for the best coal f.o.b. at Newcastle corresponding with an assumed minimum hewing rate. The probable

price f.o.b. at Newcastle is declared for each year in advance, by agreement between the colliery proprietors and the workmen, and for every 1*s*. by which the declared price exceeds the minimum price, the minimum hewing rate is increased by 4*d*. and the wages of certain other workmen by sums amounting to 2½*d*., so that out of every shilling advance in price, 6½*d*. in all goes to the workmen. It is not the practice to vary the declared price by fractions of 1*s*. This method of determining wages appears to their Lordships to be eminently reasonable and well calculated to prevent labour troubles. The declaration of the probable price for any year for the purpose of determining wages does not, however, in itself preclude the colliery proprietors from selling their coal at such prices as they think fit. It does not itself prevent the actual price of coal being determined by free competition, and for this reason the colliery proprietors of the Newcastle coalfield have from time to time entered into a combination or agreement, usually called "a vend," upon terms which on the one hand precludes any of its members selling the best coal at less than the declared price, and other grades of coal at proportionate prices, and on the other assure to each individual proprietor a certain proportion of the total output. Such a combination or agreement would, of course, be in restraint of trade, and the question whether or not it was enforceable at common law would depend on the considerations to which their Lordships have already referred.

In the first years of the present century, a new coalfield situate about twenty miles from Newcastle, and sometimes called the Maitland coalfield, began to be developed, and Maitland coal gradually forced its way into the market in competition with Newcastle coal. The competition was so fierce that it became impossible to maintain any "vend" among the colliery proprietors in the Newcastle field. These proprietors accordingly entered on a course of ruinous competition with each other and with the colliery proprietors in the Maitland field, until the spring of 1906, though the declared price of the best coal was for the purposes of the hewing rate 9*s*., such coal was being actually sold f.o.b. at Newcastle at 7*s*. 6*d*. only. The collieries in the Newcastle coalfield were ceasing to pay dividends and falling into the hands of the banks who had financed them; the miners had little chance of an advance in wages, though there had been a general advance in prices; and the prosperity of Newcastle, which is dependent on the coal industry and the shipping industry in connection therewith, was seriously threatened.

Further, the coal output of the Newcastle field was, in the spring of 1906, about equally divided between the home trade, the inter-State trade, and the foreign trade. For the purpose of the inter-State and foreign trade the colliery proprietors sold their coal f.o.b. at Newcastle. In the case of the inter-State trade such coal was for the most part bought by shipping companies who owned coal vessels in which they carried it to the various ports of disembarkment in the States and there sold it wholesale or retail. In some cases the coal sold was delivered to the purchasers straight from the vessel itself. In other cases it was landed and stored by the shipping companies and subsequently sold. The shipping companies, in fact, carried on the business of coal merchants as well as the business of shippers. Under these circumstances it was essential in the interest of the colliery owners that there should be a sufficient number of shipping companies always ready to purchase and ship their coal, and it was essential in the interest of the shipping companies that they should always be able to purchase and ship coal as soon as their vessels arrived at Newcastle; otherwise the colliery proprietors might be put to expense in storing coal pending the arrival of a vessel in which it could be shipped, and the shippers might incur expense in the nature of demurrage. J. and A. Brown and Co., who owned the chief colliery in the Maitland field, had vessels of their own and were themselves exporting coal to Melbourne and Adelaide, and selling it there through their own agents. The shipping companies were already suffering from the low prices at which J. and A. Brown and Co. sold their coal in those towns. Moreover, some of the shipping companies had controlling interests in companies owning collieries in the Newcastle and Maitland fields, and were suffering from the reduction due to the competition of J. and A. Brown in the f.o.b. prices at Newcastle as well as the c.i.f. prices at Melbourne and Adelaide.

It was under these circumstances that on the 5th Jan. 1906 there was a meeting of some of the proprietors of collieries in the Newcastle and Maitland fields. The chairman pointed out the necessity of forming an association of all the collieries if the present very unsatisfactory state of the coal trade was to be improved. The meeting thereupon passed a resolution that it was desirable to form an association to raise and maintain the price of coal, and a committee was appointed to draft a scheme. The idea, obviously, was to reconstitute the "vend," admitting the colliery owners in the Maitland field, whose competition had proved so disastrous. The necessity of obtaining the concurrence of those shipping companies who had interests in the Newcastle and Maitland fields was expressly recognised. Lengthy negotiations followed, of which a record was preserved and put in evidence at the trial. Ultimately a draft agreement, hereinafter called "the vend agreement," was prepared, and in April 1906 assented to by a number of the colliery proprietors, including Messrs. J. and A. Brown, and, though never actually executed, was no doubt acted on and considered binding by the assenting parties.

The chief provisions of the vend agreement may be stated as follows: An association is formed of which the colliery companies and firms parties thereto are the original members. There is provision for the admission of new members and the withdrawal of members under defined circumstances. Each constituent company or firm appoints a representative, and these representatives constitute a board. The voting power of each representative on the board is determined by the proportion of the total trade which under a subsequent clause of the agreement is allotted to the company or firm by which he is appointed. The board may appoint and delegate any of its powers to an executive committee, and (under clause 9) must appoint a representative whose duty it is to allocate to the particular collieries the proportions of the inter-State trade to be

fulfilled by them respectively. The resolutions of the board are to be binding on the members of the association. Each member contributes to the general funds of the association, as to the application of which the board has complete discretion. The total trade is alloted in certain proportions between the original members, provision being made for the increase or decrease of these proportions in the event of the admission of new members or the withdrawal of old members, or in other events specified. No member is to open up any new shaft, pit, or adit unless there be danger of his being unable to maintain his allotted proportion of the total trade by means of his existing shafts, pits, and adits. The board is to fix the selling price of all coal won from the collieries of the members of the association, and for this purpose these collieries are divided into four classes. The prices are to be the same for all collieries in the same class, and to all purchasers irrespective of quantity, but so that the board may, to meet the exigencies of trade, fix differential rates for particular markets, contracts, or classes of coal, and if it sanctions a contract for the supply of coal at less than the selling price for the time being may compensate the contractor out of the general funds of the association. All members of the association may dispose of the produce of their collieries without restriction as to quantity and manner except as therein provided, but in order to induce members whose trade may fall off not to endeavour to increase it by underselling contrary to the agreement, every member whose trade in any quarter exceeds his estimated proportion is to contribute in manner therein provided to a fund for compensating those members whose trade is less than their estimated proportions, accounts in this respect being adjusted at the end of each year, having regard to the total trade for such year and the actual proportions in such trade allotted to the various members. The agreement also contains clauses with regard to strikes, lock-outs, and references to the Industrial Court. The agreement is expressed to commence on the 1st Jan. 1907, and to continue in operation for a year, but there are provisions for its earlier determination and its extension for a further period. Their Lordships are of opinion upon the evidence that the vend agreement was acted upon from early in April 1906, and must be taken to have been extended and renewed with minor variations from year to year, and to have been in force at the commencement of these proceedings. It is obviously an agreement in restraint of trade.

During the negotiations which led up to the vend agreement, the possibility and desirability of securing a steady market for coal for the inter-State trade was a subject of discussion. This was a matter of interest, not only to the colliery proprietors, but to those shipping companies who were interested in Newcastle or Maitland coal. A suggestion was made that with this object it might be advisable for the vend when constituted to enter into some agreement with the shipping companies who had theretofore purchased most of the Newcastle coal for the purposes of the inter-State trade. After prolonged negotiations between the colliery proprietors on the one hand and the shipping companies on the other hand, a draft agreement, hereinafter called the shipping agreement, was prepared, and in Sept. 1906, assented to by the colliery proprietors constituting the vend, including J. and A. Brown on the one hand and the four respondent companies and J. and A. Brown on the other hand, J. and A. Brown assenting both as colliery proprietors and as shippers. The shipping agreement was never actually executed, but it was no doubt acted upon and considered binding by the assenting parties. Its chief provisions may be stated as follows: The colliery proprietors, therein called the vendors, are to sell to the shipping companies, therein called the purchasing agents, all the coal which the latter may require for the inter-State trade, such coal being purchased from all or some of the collieries therein referred to as mentioned in a schedule which is not in evidence, but which no doubt comprised the vend collieries, classified in the same manner as in the vend agreement. The vendors and purchasing agents are each to appoint a representative; the representative of the purchasing agents is, a week before the commencement of each month, to give notice to the vendor's agent of the approximate quantity and the particular class of coal required during such month, and the vendors are to supply that quantity and class accordingly. The vendors are, if possible, to comply with any requisition of the purchasing agents if they require coal from any particular colliery, but only when such colliery has not already reached its limit of output. When, however, the purchasing agents have with the assent of the vendors contracted to supply coal from a particular colliery, such coal is, if practicable, to be supplied, whether or not such limit has been reached. This provision undoubtedly refers to the vend agreement. The coal is to be delivered f.o.b. at Newcastle, the prices to be paid for the various classes being fixed by the colliery proprietors each year in November and to take effect for the ensuing year commencing the 1st Jan. The vendors are not to supply any coal for the inter-State trade except to the purchasing agents, and the purchasing agents are not (with certain exceptions) to deal in or carry any coal except what they purchase from the vendors. The purchasing agents are not to resell any coal purchased from the vendors at higher prices per ton that the c.i.f. prices therein specified. These maximum c.i.f. prices vary with the f.o.b. prices at Newcastle, but to an extent which cannot be accounted for by any increase in cost, insurance, or freight attributable to the increased f.o.b. prices. The intention obviously is to give the purchasing agents an opportunity of benefiting by any increase in the f.o.b. prices provided they can obtain orders at increased c.i.f. prices. The purchasing agents may exceed these c.i.f. prices by 3s. a ton on large coal supplied under contracts with a single consumer not exceeding 10,000 tons in any one year, and also where the resale is not c.i.f. at any port of delivery by the amount of costs actually incurred for lighterage, wharfage, carriage, or otherwise as therein mentioned. If the purchasing agents sell at prices exceeding the maximum prices specified, they are to account to the vendors for the excess, it being the intention of the parties to place the purchasing agents in the position of agents only, but clothed with a liability for all coal ordered at the rates agreed

on, and that the difference between such rates and the maximum prices on resale shall represent compensation for freight and remuneration for work of realisation. Where, however, the vendors consent to a resale at a price higher than the maximum, the amount of the excess is to be equally divided between the vendors and purchasing agents. The shipping agreement is expressed to commence on the 1st Jan. 1907, and to continue for one year from that date. There are no provisions for its earlier determination or for its renewal, but their Lordships are of opinion, on the evidence, that it was acted upon not only in 1907, but in 1908, and also in 1909 and 1910, and must be taken to have been renewed accordingly. It also is without doubt a contract in restraint of trade.

It is the shipping agreement and not the vend agreement which is impeached in these proceedings, but the Crown does not admit that the vend agreement could not itself have been impeached under sects. 4 (*a*) and 7 of the Act. If the intention with which the vend agreement was entered into be unlawful, it would be evidence of a like unlawful intention in entering into the shipping agreement, for the latter agreement was undoubtedly entered into by the colliery proprietors in furtherance of the policy embodied in the vend agreement, and the shipping companies were well acquainted with the terms of the vend agreement. If, on the other hand, the vend agreement were entered into with no unlawful intent, it would make it much harder to infer an unlawful intent from the shipping agreement. Their Lordships therefore propose to consider whether an unlawful intention, *i.e.*, an intention to restrain trade to the detriment of the public, can be gathered from these agreements considered separately or as part of a general scheme, it being admitted that each agreement constitutes a contract or combination in restraint of trade. The unlawful intention alleged is, so far as the vend agreement is concerned, in substance an intention to injure the public (1) by raising the price of coal, and (2) by annihilating competition in the Newcastle coal trade. There was some suggestion of an intention to injure the public in other ways—namely, by causing delays or difficulties in prompt compliance with contracts for the supply of coal or a particular class of coal. This suggestion can, in their Lordships' opinion, be properly ignored. It attributes to the parties an intention to bring about delays and difficulties from which they could derive no possible benefit, and that, too, though the vend agreement, from which the court is asked to infer the intention, contains provisions designed, so far as consistent with its main object, to preclude such delays or difficulties from arising at all.

There can be no doubt that the vend agreement was intended to preclude competition in the sense of underselling among its members, and by this means to raise and maintain the price of coal won from the Newcastle and Maitland coalfields. *Ceteris paribus* low prices are of advantage to the consuming public, and their Lordships will assume that in default of anything to indicate that the prevailing prices were too low to afford the colliery proprietors a reasonable profit, having regard to the capital embarked and the risk involved in their trade, a combination to raise prices would from the standpoint of public interest require some justification.

In the present case, however, it was proved that the prices prevailing when negotiations for this agreement commenced were disastrously low owing to the "cut-throat" competition which had prevailed for some years. Even Isaacs, J., who decided in favour of the Crown, was apparently of opinion that there was early in 1906, at any rate, some case for raising the price of coal considerably above its then selling price of 7*s.* 6*d.* per ton. It can never, in their Lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public. The Crown, therefore, cannot, in their Lordships' opinion, rely on the mere intention to raise prices as proving an intention to injure the public. To prove an intention to injure the public by raising prices, the intention to charge excessive or unreasonable prices must be apparent. Not only can no trace be found in the vend agreement of an intention to raise the price of coal to an unreasonable extent, but such an intention is highly improbable, for it was not in the interest of the vend to charge unreasonable prices. The vend did not comprise all the collieries in the Newcastle and Maitland fields, nor any of the southern or western collieries. It did not, therefore, eliminate competition either in home trade, the inter-State trade, or the foreign trade. It is to be observed that the selling price to be fixed under the vend agreement applies to all these trades. If the vend fixed the prices too high, it would inevitably lead to the trade of its members being lost to competitors outside the vend. It might also lead to the development of further pits or shafts, and the consequent creation of new competitors. It would certainly check the demand for the coal of its members. That this is so is apparent from the action of the vend in 1909, when, in spite of pressure from the miners, they refused to advance the price of coal for the ensuing year more than 1*s.*, because, in their opinion, it would be impossible to obtain any greater price in the foreign market. It was argued that the vend controlled so large a proportion of the home and inter-State trade that they could afford to ignore the competition of others in the home and inter-State markets, but in the foreign market there was no limit to the competition to which they were subject. Had there been any intention of charging excessive prices in the home or inter-State trade, as opposed to the foreign trade, one would have expected the vend agreement to provide for reduced prices for coal supplied for foreign consumption. It was argued that this might have been done under the terms of the vend agreement. But no inference adverse to the vend can in their Lordships' opinion be drawn from this possibility, and it was never, in fact, done. Indeed, their Lordships cannot find

any satisfactory evidence that, except in some few isolated cases, and for some special reason, coal was ever supplied for the foreign trade at less prices than for the inter-State or home trade. The vend agreement may or may not contain provisions unenforceable at common law, but it certainly does not, on the face of it, disclose any such intention to injure the public as would make it illegal under sect. 4 (*a*) of the Act, either because it was intended to limit competition among its members, or because it was intended to raise and maintain prices. Again, even assuming that the vend agreement amounts to an attempt to create a monopoly within the meaning of sect. 7 of the Act, it certainly does not, on the face of it, disclose any intention of controlling the supply or price of coal to the detriment of the public by unduly raising prices or otherwise.

Passing to the shipping agreement, their Lordships are of opinion that there is still less justification for inferring from its provisions any such unlawful intention as would make it an offence under either sect. 4 (*a*) or sect. 7 of the Act. In substance it constitutes the shipping companies sole agents of the colliery proprietors for the purposes of their inter-State trade; the agents, as is not unusual in such cases, being responsible to their principals for the wholesale prices of the goods supplied, and being dependent for their own remuneration on the difference between the wholesale and retail prices. In contracts of this sort it is not uncommon to find a provision specifying the minimum retail price, a provision which might be very material from the standpoint of public interest. But there is no such provision in the present case. On the contrary, the agreement contains provisions specifying the maximum retail prices and imposing penalties if these prices be exceeded; and, further, it leaves it open to the shipping companies to compete with and undersell each other on the market. It is of course possible, if not probable, that the shipping companies had some arrangement between themselves precluding such competition, but there was no evidence whatever of any such arrangement. The inference their Lordships draw from the provisions of the shipping agreement fixing the maximum retail prices is that the colliery proprietors considered that it was not to their advantage that the shipping companies should unduly raise the price of coal to the ultimate consumer. It would give too great an advantage to their competitors in the coal trade. There is no ground for supposing that these maximum prices were intended to be minimum prices, or that if intended to be minimum prices, they were necessarily excessive. Much stress was laid on those clauses of the agreement under which the colliery proprietors were not to sell coal for the inter-State trade to any persons other than the shipping companies, and the latter were not for inter-State purposes to purchase or carry coal for any persons other than the colliery proprietors. Similar provisions are quite common in contracts of exclusive agency, and, in their Lordships' opinion, are not necessarily unreasonable or injurious to the public. There is no evidence that the tonnage of the shipping companies was more than sufficient for their inter-State trade in coal, or that the effect of the agreement was to render their vessels idle. Of course the agreement precluded colliery proprietors not parties thereto from being able to avail themselves of these vessels. But a similar result follows whenever vessels are chartered by a single person or by a group of persons. The shipping companies were not the only persons engaged in the shipping trade in coal; they owned only about the same proportion of the total tonnage engaged in the Newcastle inter-State coal trade as the proportion of such trade represented by the parties to the vend agreement. So far as other colliery proprietors were concerned they were not by reason of the shipping agreement in any worse position than they would have been had the parties to the vend chartered all the vessels of the shipping companies, and, having regard to the exigencies of the inter-State trade, such action on the part of the parties to the vend would have been quite reasonable. With regard to the other provisions of the shipping agreement, their Lordships are of opinion that they were really to the advantage of the consumers as tending to ensure a reasonably steady supply to meet the inter-State demand.

There being nothing on the face of the vend agreement or of the shipping agreement from which an intention to injure the public by raising the price of coal to an unreasonable extent can be inferred, the question remains whether these agreements, if considered together as parts of a single scheme, can give rise to an inference of any such intention. Their Lordships are of opinion that this question, too, must be answered in the negative. If, as their Lordships think, there was justification for a combination of colliery proprietors to raise the price of coal, it was obviously reasonable on their part to take precautions to secure a market for their coal at the increased price. They could do this in various ways. At one time they appear to have contemplated forming a company by the agency of which their coal would be distributed to the ultimate consumers, but they finally adopted the plan of appointing the shipping companies their exclusive agents for that purpose. On the other hand, the shipping companies, if a vend were formed, would either have to purchase coal from the vend at increased prices or obtain their coal elsewhere with considerable risk of loss from an unsteady or insufficient supply and the introduction of fresh competitors in the shipping business. Some arrangement with the vend would be advisable in their own interest, and again it was not unreasonable that this arrangement should take the form of an agreement of exclusive agency. Their Lordships conclude that neither the vend agreement nor the shipping agreement taken separately, nor both agreements taken together as parts of a single scheme, can raise any legitimate inference that any of the parties concerned, whether colliery proprietors or shipping companies, acted otherwise than with a single view to their own advantage, or had any intention of raising prices or annihilating competition to the detriment of the public.

It remains to be considered whether, if no illegal intention can be gathered from the agreements themselves, such an intention can be inferred from what was actually done pursuant to the agreements. The selling price of the best

coal, f.o.b. at Newcastle, was during the negotiations for the vend agreement raised from 7*s.* 6*d.* to 9*s.*, and this price prevailed during the last months of 1906. It was under the vend agreement itself raised to 10*s.* for the year 1907, and 11*s.* for 1908 and subsequent years. It was contended that these prices were unreasonable and excessive, and Isaacs, J. found as a fact that in 1907 9*s.* 1*d.* and in 1908, 1909, and 1910 9*s.* 8*d.* were the highest prices which could reasonably have been charged. On the other hand, the Court of Appeal was of opinion on the evidence that the f.o.b. prices actually charged were not only not shown to have been excessive or unreasonable, but were shown affirmatively to have been reasonable. Their Lordships agree with the opinion of the Court of Appeal and consider that the criticisms of the Chief Justice on the process by which Isaacs, J. arrived at his conclusions of fact in this respect were fully justified. The onus of proving that the prices charged were unreasonable clearly lay with the Crown, and the Crown tendered no satisfactory evidence in this respect. There was no evidence whatever as to the profits made by the colliery proprietors when the prices in question prevailed. On the other hand, there was evidence that with the hewing rate at 4*s.* 2*d.*, which was admitted to be the lowest hewing rate consistent with a fair remuneration to the miners, and which corresponds to a declared price of 11*s.*, the colliery proprietors could not afford to sell the best coal, f.o.b., at less than 11*s.* Further, there is evidence that the prices actually charged inter-State were also obtained in the foreign market, where at any rate free competition prevailed.

With regard to the prices charged c.i.f. or in the retail trade by the shipping companies there is, again, no satisfactory evidence that they were not perfectly reasonable prices. The shipping companies do not appear to have raised the c.i.f. or retail prices even to the maximum prices they were entitled to charge as between themselves and the colliery proprietors. There is no evidence as to the profits they made either before or after the shipping agreement came into operation. The most noticeable instances of a rise in c.i.f. or retail prices after the agreement came into operation are in the case of sales in Melbourne and Adelaide, where the shipping companies had been suffering from the competition of J. and A. Brown. There is, in their Lordship's opinion, no justification for the assumption that the c.i.f. or retail prices which prevailed early in 1906 were prices which ensured to the shipping companies a reasonable profit in respect of the carriage and distribution of the coal, or that, assuming this and making proper allowance for the rise in f.o.b. prices, the c.i.f. or retail prices charged in subsequent years were unreasonable. As pointed out by the Chief Justice, the rise in the f.o.b. prices is only one of the many considerations which would be material in forming an opinion as to whether an increase in c.i.f. or retail prices was justifiable.

As to the other modes in which it was said that the public were injured by reason of the agreements in question, their Lordships consider that even if there were ample proof of the injury alleged, no inference could be drawn therefrom as to the intention of the parties in entering into these agreements. The parties to the agreements might gain by raising the price of coal, but they could gain nothing by putting difficulties in the way of their own customers. Such inconvenience as from time to time arose did not exceed what was to be expected from time to time in the conduct of so great a business.

Finally, it was contended that a sinister intention might be inferred from the policy of the colliery proprietors and shipping companies towards their competitors in the coal trade, and great stress was laid in this connection on the efforts made to bring the Burwood Extended, the Lymington, and the Newcastle Wallsend Collieries into the combination, and to check the competition of Scott, Fell, and Co. and Kethel and Co. Their Lordships do not think that it would be proper to draw any inference from this policy as to the intention of the parties in entering into the agreements in question; the policy pursued is in no way foreshadowed or contemplated in either agreement, nor was it the necessary outcome of either agreement. It must not, however, be supposed that their Lordships view with approval everything which was done in pursuance of this policy.

In their Lordships' opinion the decision appealed against was right, first, because so far as the Crown relied upon sect. 4 (*a*) and sect. 7 of the Act, there was no evidence (at any rate no satisfactory evidence) of any sinister intention on the part of either colliery proprietors or shipping companies; and, secondly, because, so far as the Crown relied on sect. 10, there was no evidence (at any rate no sufficient evidence) of injury to the public.

Their Lordships desire, in conclusion, to acknowledge the assistance which they have received from counsel on both sides in a case of much difficulty and complexity.

Solicitors: *J. H. Galbraith; Wadeson* and *Malleson.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 26, 27, *and July* 30, 1913.

(Before VAUGHAN WILLIAMS, BUCKLEY, and HAMILTON, L.JJ.)

WIMBLE *v.* ROSENBERG. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Sale of goods—Shipment by seller—No statutory notice of shipment given by seller to buyer—Sale of Goods Act 1893 (56 *&* 57 *Vict. c.* 71), *s.* 32, *sub-s.* 3.

By a contract dated the 27th June 1912 *the plaintiffs sold to the defendants* 200 *bags of rice f.o.b. Antwerp, cash against bills of lading.*

On the 9th Aug. the defendants sent instructions to the plaintiffs to ship the rice to Odessa, and pay the freight on their account, leaving it to the plaintiffs to select the ship. The plaintiffs instructed certain merchants in Hamburg, from whom they had bought the rice, to ship it by first steamer to Odessa, on account of the defendants.

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

On the 24th Aug. the rice was shipped per steamship Egyptian, *which sailed on the 25th Aug., and was lost at sea on the following day. The first intimation of the shipment that the defendants received from the plaintiffs was on the 29th Aug., when the plaintiffs presented the bills of lading for payment.*

The defendants had not insured the rice, evidence being given to the effect that it was not their practice to insure until after they had received notice as to the ship by which the goods had been dispatched.

The plaintiffs claimed the price of the rice and the amount of the freight paid by them on defendants' account.

The Sale of Goods Act 1893, *s.* 32 (3) *provides that: "Unless otherwise agreed, when goods are sent by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit."*

Held, by Vaughan Williams and Buckley, L.JJ. (Hamilton, L.J. dissenting), that sub-sect. 3 *of sect.* 32 *of the Sale of Goods Act* 1893 *applies to a contract for the sale of goods on f.o.b. terms.*

Decision of Bailhache, J. on this point reversed.

But, held by Buckley L.J. that in the circumstances no notice to enable the buyer to insure was necessary, and that if this were not so, the contract of the 27th June was in itself a sufficient notice.

Decision of Bailhache, J. (ante, *p.* 275) *in favour of the plaintiffs affirmed.*

APPEAL by the defendants from a decision of Bailhache, J. sitting in the Commercial Court without a jury, reported 12 Asp. Mar. Law Cas. 275; 107 L. T. Rep. 798; (1913) 1 K. B. 279), who held that sub-sect. 3 of sect. 32 of the Sale of Goods Act 1893 does not apply to a contract for the sale of goods on f.o.b. terms.

The plaintiffs' claim was for the price of goods sold and delivered.

The facts found by Bailhache, J. were quoted verbatim in the judgment of Vaughan Williams, L.J. (*infra*), and were as follows, in the words of the learned judge:

"The facts of the case are extremely simple, and very little in dispute. They are these. By contract evidenced by a bought note dated the 27th June 1912, Messrs. Rosenberg and Sons, the defendants, bought 200 bags of rice. The rice was to be shipped, as regards the buyers, within three months. It was bought f.o.b. Antwerp, and, by the contract of sale, cash was to be paid against bills of lading accepted in London. The plaintiffs in this case are the brokers, Messrs. Wimble, Sons, and Co., but the contract, it is conceded on both sides, is in such a form as entitles Messrs. Wimble, Sons, and Co. to sue upon it in their own names, and suing upon it in their own names they have all the rights of vendors, and they must fulfil all the duties which fall to be performed by the vendors in respect of their contract, and I may treat them in this case as being the actual vendors. There was a little delay in shipping this rice or sending it forward, and the defendants inquired, I think, more than once, but certainly inquired once, as to when the rice was coming forward. It did not come forward until August, and on the 9th Aug. the defendants sent, as was their custom, shipping instructions to the vendors. The vendors' instructions are in these terms. I will not refer to the terms except to say that they were instructions to ship these 200 bags of rice, but they were not on the usual form on which Messrs. Rosenberg generally sent forward their instructions. The usual form was partly printed, and contained in print a request that the vendors should inform Messrs. Rosenberg of the name of the ship by which the rice was about to be shipped. These particular instructions had not that print upon them. The book was, for the moment, exhausted and instructions were written out upon a slip of paper. It was the practice between these parties that when these instructions were given, the vendors as and when they could, secured shipping room for the rice which was to go forward, and sometimes, at the request of Messrs. Rosenberg and Sons, they paid the freight. In this particular instance they were requested to pay, and did pay, the freight. The rice was actually shipped on board a steamer called the *Egyptian*, and it was shipped on the 24th Aug. 1912. The *Egyptian* sailed from Antwerp on the 25th Aug. which was a Sunday. On the early morning of the 26th she stranded and the rice became a total loss. At 3.45 on the afternoon of the 26th the loss was posted at Lloyd's. The defendants did not at this moment know that their rice had been shipped by the *Egyptian* or by any boat at all. They knew nothing at all about it until the 29th, when an invoice and bill of lading reached them, and they were requested to pay against documents, in accordance with the terms of the contract. They immediately on receipt of the bill of lading attempted to insure this parcel of rice, but, of course, inasmuch as the notice of the loss had been posted at Lloyd's some three days before, their attempts to insure were entirely ineffective. They thereupon declined to take up the shipping documents and to pay for the rice. The defendants insure any parcels that they may have sent by sea on their account in a somewhat peculiar way. They have not a open cover, nor do they insure on giving shipping instructions, but apparently they wait for the actual name of the steamer, and then give their instructions. It has been proved before me that in many cases they have had the name of the steamer before the ship sailed and before their goods were put on board, and I am quite satisfied that when they got the name of the steamer before the goods were put on board, they forthwith insured the goods which were to go by that particular steamer. In this instance they had no such opportunity. The name was not given to them before the 29th, and by the 29th it was too late to insure."

The Sale of Goods Act 1893 (56 & 57 Vict. c. 71), s. 32 provides that:

(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *primâ facie* deemed to be a delivery to the buyer. (2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit to do so, and the goods are lost or damaged in course of transit, the

buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

George Wallace, K.C. and *Chaytor* for the defendants.—The decision of Bailhache, J. was wrong, and sub-sect. (3) applies to an f.o.b. contract. The words "sent by the seller to the buyer" in sub-sect. 3 must have the same meaning as in sub-sect. 1; the two sub-sections should be read together, and in the earlier sub-section the words include an f.o.b. contract. It would be difficult to find a case more precisely within the terms of the sub-sect. 3 than the present, and if f.o.b. contracts are excluded from the operation of the sub-section, it is difficult to see to what the sub-section applies, for it can have no reference to "ex ship" or c.i.f. sales which are excluded from the sub-section by the words "unless otherwise agreed." It was for the seller to designate the ship and make known the destination of the goods so that the buyer might insure:

Arnot v. *Stewart*, 5 Dow. 297.

This was a case where the seller was "authorised or required" in pursuance of a contract of sale to "send" the goods to the buyer within sub-sect. 1, although the goods reached their destination as soon as put on board ship, for the sub-section provides that delivery to a carrier shall be *primâ facie* delivery to the buyer; and the word "send" in sub-sect. 3, as in sub-sect. 1, means "transmit" or "dispatch" even though the property is in the buyer and the goods are delivered when they reach the ship's rail. The sub-section, which is for the benefit of the buyer, deals with circumstances in which it is usual to insure, and all contracts involving transit by sea, and the Legislature never intended to leave out of the section f.o.b. contracts. There was no notice given here, for if the contract were notice here, it would always be notice, and sub-sect. 3 would be futile. They referred also to

Anderson v. *Morice*, 2 Asp. Mar. Law Cas. 424; 3 Asp. Mar. Law Cas. 31, 290; 33 L. T. Rep. 355; L. Rep. 10 C. P. 609;
Reliance Marine Insurance Company v. *Duder*, 12 Asp. Mar. Law Cas. 95; 106 L. T. Rep. 936; (1913) 1 K. B. 275;
Fleet v. *Morrison*, 16 Dunlop, 1122;
Hastie v. *Campbell*, 19 Dunlop, 557;
Stock v. *Inglis*, 4 Asp. Mar. Law Cas. 596; 5 Asp. Mar. Law Cas. 294, 422; 51 L. T. Rep. 449; 52 L. T. Rep. 821; 12 Q. B. Div. 564; 10 App. Cas. 263;
Vacher v. *London Society of Compositors*, 107 L. T. Rep. 722; (1913) A. C. 107;
Brown on Sale, pp. 285, 287, 288;
Hoog v. *Kennedy*, Morison, p. 10,090.

Leck, K.C. and *Theobald Mathew* for the plaintiffs.—Sub-sect. 3 of sect. 32 of the Sale of Goods Act does not apply to an f.o.b. contract. That section throughout is only applicable when goods are sent by the seller to their destination to the buyer in pursuance of the contract of sale. Here the goods were not so sent, for the sale being f.o.b. the delivery was complete as soon as the goods reached the ship's rail. Under an ordinary f.o.b. contract the seller is never "authorised or required" to send the goods to the buyer, for he has done all he has to do when he puts the goods on board; he delivers them on the ship, and does not "send" them to the buyer. It has been argued that unless sub-sect. 3 applies to an f.o b. contract, it can apply to nothing, but there are several kinds of contracts to which it might apply, such as, for example, the contract in *Badische Anilin, &c.* v. *Basle Chemical Works* (76 L. T. Rep. 21,434; (1897) 2 Ch. 324). Secondly, it was unnecessary for the seller to send notice to the buyer, for the buyer already had all the materials necessary to enable him to insure, and further, even if it had been necessary to give the buyer notice, the seller did so, for the contract of the 27th June itself was notice. It is superfluous to tell the buyer what he knows already, and here the buyer practically named the ship himself, for he nominated any reasonable Odessa-bound ship from Antwerp in the ordinary course of trade.

George Wallace, K.C. in reply. *Cur. adv. vult.*

July 30.—VAUGHAN WILLIAMS, L.J. read the following judgment:—

This is an appeal from the judgment of Bailhache, J. sitting without a jury.

The case in question turns on the construction of sect. 32 of the Sale of Goods Act 1893, and, in particular, of sub-sect. 3 of that section.

It is to be remembered, I think, throughout the interpretation of the Sale of Goods Act 1893, that it is a codifying Act, and subject, therefore, to the provisions of the Interpretation Act 1889, and subject also to the canon of construction, when dealing with a codifying Act, laid down by Lord Herschell in the House of Lords in the case of *Vagliano* v. *Bank of England* (61 L. T. Rep. 419; (1891) A. C. 144), a case on the Bills of Exchange Act 1882, which also was a codifying Act, where he says: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

[The Lord Justice here read the facts found by Bailhache, J., which are set out verbatim above.]

As is stated by Bailhache, J., Messrs. Wimble, the plaintiffs, were the brokers, but it was agreed that they might sue as if they were the sellers. The defence consists of two parts, on one of which the defendants set up the negligence of the plaintiffs as their agents—that defence has been abandoned; the other part of the defence relies upon sub-sect. 3 of sect. 32 of the Sale of Goods Act, and, in effect, says that by reason of the notice enabling the defendants as buyers to insure not having been given, the sea transmission was at the risk of the sellers.

An argument before us was on the basis that sub-sect. 3 of sect. 32 had, and could have, no application to a contract of sale f.o.b. It was argued also that the buyers did not require a notice because they might have insured these goods by a "general cover contract," or by a "ship or ships'" contract, and the Scottish authority of *Fleet* v. *Morrison* (16 Dunlop, 1122) was disposed of on the ground that, although it is mentioned in the argument, the judges of the Scottish Court had not the question of insurance by "cover" or

"ship or ships'" policies present to their minds, and it is agreed by counsel on both sides that there is no Scottish decision on the point dealing with the case of a contract f.o.b.

At the conclusion of Mr. Leck's argument on behalf of the plaintiffs, Mr. Theobald Mathew, his junior, put forward a new point, that notice enabling the buyers to insure already had been given, for that the contract of purchase itself was notice.

I will now read sub-sects. 1, 2, and 3 of sect. 32 of the Sale of Goods Act 1893. [The Lord Justice read the sub-sections, and continued:]

I think it is agreed that sub-sect. 3, and indeed the whole of sect. 32, includes agreements, if any, outside the contract, and includes also the proof of "the circumstances in which it is usual to insure," and, I think, includes cases where it has been usual *inter partes* to insure, although the agreement of sale itself contains no reference to insurance. See *Fleet* v. *Morrison* (16 Dunlop, p. 1124), a Scottish case referred to by Mr. Chalmers in his book on the Sale of Goods; and the judgments of the Scottish judges were very much relied on in the arguments before us, but I do not think they have any direct application to this case.

This case, to my mind, turns on construction. No facts are in dispute. I am of opinion that sub-sect. 3 of sect. 32 of the Sale of Goods Act covers an f.o.b. contract. To say generally that sub-sect. 3 does not cover an f.o.b. contract seems to me to be a conspicuous illustration of departure from Lord Herschell's canon of construction, which I have already quoted.

The natural meaning of the words of sub-sect. 3 does not exclude an f.o.b. contract. The real ground for the suggested exclusion is that the sub-section, construed according to its natural meaning is hard to reconcile with some of the previous law laid down in the cases relating to the carriage of goods under an f.o.b. contract, and that it is highly improbable that the Legislature intended to alter or modify law which is the result of a series of decisions laid down by great commercial lawyers.

Mr. Leck, in his excellent argument on behalf of the plaintiffs, to my mind, was evidently pressed by a strong desire to avoid a breach of Lord Herschell's canon of construction of codifying statutes, and argued that sub-sect. 3 read in the light of sub-sect. 1 has no application to a case where, in pursuance of a contract of sale, the seller is "authorised or required" to send goods to the buyer, and says that under an f.o.b. contract the seller is never "authorised or required to send the goods to the buyer," but completely performs his duty when he puts the goods on board the steamer.

Bailhache, J. based his judgment on this contention of Mr. Leck, and, as I understand his judgment, in effect held that an f.o.b. contract is excluded unless it includes some words whereby the vendor undertook to send the goods by some ship selected by himself, and that in this case the shipping instructions ought not to be regarded as part of the contract, in which case Bailhache, J. thought sub-sect. 3 would have applied.

I construe the word "send" both in sub-sect. 1 of sect. 32 and in sub-sect. 3 in the sense of "forward" or "dispatch," and in my opinion the word "send" covers every obligation of the seller in reference to effecting or securing the arrival of the goods, the subject of sale at the destination intended.

It is not true in fact to say that the purchased goods are being sent to the ship on which they are placed for the purpose of delivery at the port of destination. The purchased goods are not the less being sent to the buyer at the port of destination because delivery f.o.b. is *primâ facie* delivery to the buyer, or because the property has passed to the buyer.

Sub-sect. 3 in my opinion casts the duty on the seller forwarding the goods to the buyer by a route involving sea transit, under circumstances which it is usual to insure, to give such notice as may enable the buyer (to whom, be it observed, the property in the purchased goods has passed) to insure them during the sea transit. The penalty for not performing this duty is that the goods, though the goods of the buyer, shall be at the risk of the seller during such sea transit. Moreover, the same result is arrived at if the words "when the goods are sent by the seller to the buyer," at the beginning of sub-sect. 3 are construed as describing the whole transaction.

I have already said that I cannot agree with the argument of Mr. Theobald Mathew, that the contract of sale itself was notice within the meaning of sub-sect. 3, and I have arrived at this conclusion, not only on the ground that the contract did not afford sufficient information to enable the buyer to insure the purchased goods during their sea transit, but also on the ground that knowledge of the buyer, actual, inferred or assumed, which would enable the buyer to insure does not dispense with the statutory obligation of the seller, when the route involves sea transit, under circumstances in which it is usual to insure, to give such notice to the buyer as may enable him to insure the goods during their sea transit. The obligation, unless dispensed with by the agreement, and in this case there was no dispensing agreement, on the seller is to give such notice, with such details to the buyer as may be necessary to effect insurance of the goods during sea transit. It is to my mind impossible to construe those words as meaning that the obligation to insure does not arise in case the buyer happens to have sufficient information from some other source than the statutory notice to enable him to insure the goods.

I have only to add that whichever of the suggested constructions relieving the seller from obligation to give the statutory notice in the case of an f.o.b. contract is adopted, the practical utility and application of sub-sect. 3 of sect. 32 is reduced to nothing.

I think this appeal should be allowed, and judgment should be given for the defendants.

BUCKLEY, L.J. read the following judgment:—

Before Bailhache, J., counsel for the seller contended that under an f.o.b. contract the seller is never "authorised or required to send the goods to the buyer," a contention which the learned judge seems to have adopted, adding "more particularly as I cannot bring myself to believe that sub-sect. 3 applies to an ordinary f.o.b. contract of sale."

This contention has been repeated before us. I propose in the first instance to consider it.

The contention is that sub-sect. 3 is a qualification of sub-sect. 1, and may be read as if it were prefaced by the words "provided always that." To this I agree. Then it is said sub-sect. 1 applies only where the seller is authorised or required to send the goods to the buyer, and that this is not the case where the contract of sale is f.o.b., inasmuch as the delivery is complete so soon as the goods are handed over the ship's rail; that the sending by the seller to the buyer is then complete.

In my opinion this is erroneous. The sending of the goods is not within the language of the section equivalent to the delivery of the goods to the buyer. The first sub-section uses the word "send" and the word "transmission" and the word "delivery." The word "send" is so used as to bear the same meaning as that for which the word "transmission" is next employed, and both the one and the other are contrasted with "delivery," the word last used. In sub-sect. 1 the word "send" means, I think, "despatch" or "transmit" in a physical sense, and not "deliver" so as to pass the property at law. The same meaning is, I think, to be attributed to the word "sent" in sub-sect. 3. After the property has passed by placing the goods on shipboard under an f.o.b. contract the goods may, I think, within the meaning of sub-sect. 3 be "sent"—that is to say, transmited or despatched by the seller to the buyer. Goods are capable of being sent by the vendor, in whom the property is not, to the buyer, in whom it is.

Next I wish to deal with the words "unless otherwise agreed." The operative words which follow that expression are "the seller must give such notice," &c. The agreement must therefore be an agreement agreeing "otherwise" in respect of the giving such notice as is mentioned. An f.o.b. contract is one under which the seller is to put the goods on board at his own expense on account of the buyer, but it is a contract in which neither expressly nor by implication is there involved any agreement as to notice to be given by the former to the latter. Whether notice ought to be given or not depends not upon anything expressed in or implied from the contract as an f.o.b. contract, but might arise *aliunde*, say, from the course of business between the parties. Neither from the use of the word "sent" nor from the words "unless otherwise agreed" therefore can I see that there is anything to render sub-sect. 3 inapplicable to an f.o.b. contract of sale. On the contrary, it seems to me that the effect of sub-sect. 1 is to add to every contract *primâ facie* as an incident that which is involved in an f.o.b. contract—namely, that delivery to a carrier is delivery to the buyer.

The effect of the section seems to me to be as follows: Where in pursuance of a contract of sale goods are to be sent, it shall be an incident of every contract, as it already is of an f.o.b. contract, that delivery to a carrier is delivery to the buyer, with the result that the goods at sea will be at the risk of the buyer. But neverthess (unless otherwise agreed) if the seller fails to comply with sub-sect. 3 the risk shall be that not of the buyer but of the seller. From these provisions I can find no exception of an f.o.b. contract, but, on the contrary, I find a reduction of every contract for this purpose to the position of an f.o.b. contract.

So far, therefore, it seems to me that the appellants are right, and that it is necessary to see whether in the present case sub-sect. 3 has been complied with. Sub-sect. 3 requires the seller to give such notice to the buyer as will enable the latter to insure. These words will be satisfied if either (*a*) the buyer is already in possession of knowledge of all the facts which it is necessary to know in order that he may insure the goods, in which case nothing is wanting to enable him to insure them; or (*b*) if such notice (if any) as has been given him completes his knowledge of the facts so as to enable him to insure.

The contract of the 27th June 1912 was a contract for sale of 200 double bags of rice f.o.b. Antwerp to be shipped as required by the buyers within three months. From this document the buyer knew the particulars of the goods and the port of loading, but not the port of discharge. It was for him to name the port to which he asked the goods to be shipped. The shipping instructions of August named the port—namely, Odessa; and also contained further matter in the nature of a request to the seller with which they were not bound, but, out of courtesy in business, no doubt, would comply. This request in fact left it to the sellers to select the ship, and asked them to pay the freight on the buyers' account. In naming the port to which the goods were to be shipped the buyer was but completing a term of the contract of the 27th June which was left to his determination. To that extent the shipping instructions formed part of, and put the sellers in a position to complete, the contract. Further, the shipping instructions in leaving it, as impliedly they did, to the seller to select the ship, were a further completion by the action of the buyers of the terms of the contract. All was now complete; port of discharge and ship—namely, as regards the latter, any ship which the seller selected sailing to Odessa. The further request that the seller should pay the freight formed no part of the contract, and was a matter with which the seller was not bound to comply. The conjoint effect of the documents of June and August was this, that in August the buyer had a complete knowledge of the particulars of the goods, the port of shipment, and the port of discharge, and he had waived any right to know the name of the ship by leaving it to the seller to select one.

In this state of facts it was contended that the buyer could have protected himself by a general covering policy. For this purpose a knowledge of all the facts which I have been detailing would be unnecessary. In my judgment this would not constitute a good answer to the buyers' contention. To say that he could cover himself by a general policy is equivalent to saying that in every case without any knowledge of the particulars he is already in possession of all the information which enables him to insure. The result is that the sub-section is reduced to silence. This argument I think proves too much. But in the facts which I have stated it seems to me that no notice to "enable" the buyer was wanted, for he already had ability; he had all materials necessary to enable him to insure. Those words of the section, therefore, which require the seller to give notice do not apply, for no notice was wanted to enable him to insure. But if this is not so, and the seller was under an obligation to give him such notice,

&c., then I think he had done so. The contract itself of the 27th June 1912 was a sufficient notice. It gave the buyer knowledge of all the necessary particulars other than knowledge which rested with himself or was determined by himself—namely, first, the port of discharge; and, secondly, the name of the ship. The former lay within his own knowledge, and was supplied by him in August. The latter was not necessary to enable him to insure, and in fact he waived knowledge of it by leaving it to the seller to select the ship. For these reasons I am of opinion that, although sub-sect. 3 is applicable to this case, notwithstanding that the contract was an f.o.b. contract, yet that the seller has not failed to do anything which by sub-sect. 3 he was bound to do. I therefore think that the appeal fails, and must be dismissed.

HAMILTON, L.J. read the following judgment:—

The question in this case is whether the contract is or is not within sect. 32 (3) of the Sale of Goods Act.

The action is brought for the price of goods sold and delivered. The plaintiffs were not the sellers, who were foreign millers, but were the brokers between the parties. In the events which happened they conceived themselves liable to pay the sellers, and have done so, and the case, here and below, has proceeded on the footing that, as regards the contract in dispute, the plaintiffs have the rights, and are subject to the liabilities of the sellers. This is worth noting because of this reason. The case is unaffected by any prior course of business between the defendants and the actual sellers. What was done in regard to contracts which the plaintiffs did not put in suit would now be material only to reasonableness in performing this contract, but there is no such question. Further, there was no contention and no finding below, as to general custom or particular practice, such as would add any implied term to the present contract. Hence the case as between the present parties rests barely on the written contract of sale itself.

As the goods clearly were sold and delivered, subject to the question which is raised by the alleged failure to give notice as provided by sect. 32 (3) of the Sale of Goods Act, the burden of proof is on the defendants. They further alleged against the plaintiffs, in the alternative, that the latter were not sellers to but agents of the defendants, and that they were negligent in the performance of their duty to their principals. These defences were mutually exclusive. If the plaintiffs were not sellers to but agents of the defendants, sect. 32 of the Sale of Goods Act had nothing to do with them. In my opinion this was the real defence, if there was one; but Bailhache, J. decided against this alternative contention, not, be it said, on the ground that the plaintiffs were not in fact agents or not in law open to any defence arising out of a contract of employment, but solely on the ground that no damage resulted from any breach of such contract. No point has been made before us that the decision should have been for the defendants for nominal damages on a counter-claim if they chose to amend; in fact, the learned judge's decision on this part of the case is not appealed against.

Bailhache, J. decided that sect. 32 (3) of the Sale of Goods Act did not apply to this case. This is the subject of the appeal. The question is whether he was right. I think he was right.

The "sending" of the goods in sub-sects. 1 and 3 of sect. 32 is the same thing in each case—an actual forwarding or transmission. The use of the same word "send" in sect. 29 of the same Act shows this. But in sub-sect. 1 the case is "where the seller is authorised or required to send the goods," and that, too, "in pursuance of a contract of sale." In sub-sect. 3 the case is "where goods are sent by the seller to the buyer" simply. In the former, which is a provision in favour of the seller, limiting his responsibility, the questions are: Was he authorised or required to send the goods—that is, to transmit or forward them, to start them on their journey? Has he done so? When and where does his responsibility cease? A further question was raised which we need not decide—namely, does "in pursuance of a contract of sale" mean "in performance of," or "as required under the terms of." On the other hand, the latter sub-sect. 3 is one in favour of the buyer, and makes his responsibility in certain circumstances conditional on the sellers giving a certain notice. Here the question is not merely have the goods been "sent" in the above sense, but have they been so sent by the seller to the buyer—that is, by the sender as seller to the receiver as buyer—or, in the language of sub-sect. 1, sent "in pursuance of a contract of sale"? Hence, in spite of the use of the same verb "to send," it does not necessarily follow that a contract involving sending, if within sub-sect. 1, must therefore also be within sub-sect. 3. It is well settled that in an ordinary f.o.b. contract, when "free on board" does not merely condition the constituent elements in the price, but expresses the seller's obligations additional to the bare bargain of purchase and sale, the seller does not "in pursuance of the contract of sale" or as seller send forward or start the goods to the buyer at all, except in the sense that he puts the goods safely on board, pays the charges of doing so, and for the buyers' protection, but not under a mandate to send, gives up possession of them to the ship only upon the terms of a reasonable and ordinary bill of lading or other contract of carriage. There his contractual liability as seller ceases, and delivery to the buyer is complete as far as he is concerned. In such a case the goods are not "sent by the seller to the buyer," though they then begin a journey which will end in the buyer's hands. In law, as between buyer and seller, they are then and there delivered by the seller to the buyer, and thereafter it is by the buyer and his agent, the carrier, and not by the seller, that the goods are "sent" to their destination. It is in this sense that I understand the words of Bailhache, J.: "What one generally understands by an f.o.b. contract is that the goods are not sent by sea by the sender, but are delivered by him at the rail of the ship, and are then taken over by the shipowne nominated by the buyer and conveyed by hin across the sea." So understood I agree with them.

The sub-section obliges the seller under circumstances in which it is usual to insure to give a notice, and that notice "such as may

enable the buyer to insure the goods." The sub-section does not say how or by whom it is usual to insure or that the buyer is to be enabled to insure at any particular time or in any particular way. Nor, again, does it say "such notice as would be reasonably sufficient to enable him to insure," but such as may enable, that is, in fact, and under the circumstances, actually enable him to insure. If the seller fails to fulfil this obligation, then, in addition to or in substitution for (I know not which) any provable damages for the breach, he loses both the goods and the price, in case the goods are lost at sea. It is a heavy responsibility. Without his fault, and perhaps without his knowledge, without negligence, and perhaps in spite of his diligence, the notice may miscarry, or fail to convey sufficient information to the particular buyer, or be such as in his particular case may not enable him to insure, though in other circumstances it might suffice well enough.

In the present case the buyer was in London buying to sell, or at any rate to send abroad. The contract only named the port of loading; ordinarily it would have been an implied obligation upon the buyer to declare the port of discharge within a reasonable time, here it is an express obligation that this should be done within three months. Till the buyer performs this the seller cannot deliver. Delay in declaring is a breach for which the seller may recover damages, if he can prove them and under certain circumstances such delay might give the seller the right to treat the contract as repudiated by the buyer. When the buyer declared the port of discharge, Odessa, he did not name any ship, or even any line, by which the goods were to be sent. He might have done either or both, provided they were such as would enable the seller to get the goods delivered on board within a reasonable time, and gave him a reasonable time within which to do so. No new promise or obligation can be implied from the sending or acceptance of such instructions. They are sent, and completed, with, under, and in performance of the contract of sale. In the present case the buyer's instructions were accompanied by a request to the brokers to prepay the freight, and the brokers did so. They were not bound to do so, but they were accommodating. Beyond the obligation of the buyer to indemnify them, no new obligation arose. The transaction is not "send the goods to Odessa; choose your own ship, but let me know her name"; it is "I nominate as the ship on which you are to put the goods, free of all charge, any reasonable Odessa-bound ship from Antwerp in the ordinary course of trade"; there is no new transaction separate from the contract of sale—no mandate to send, or a new contract to forward. In choosing a ship, and in shipping the goods, the seller is acting solely in performance of the contract of sale; and the parties are governed by its terms, especially by the term "free on board." If, then, the seller at this stage does send the buyer notice of the ship's name, is he giving him "such notice as may enable him to insure the goods"? If he does not, does he "fail" to give him such notice as may enable him to insure them? I think the answer to both questions is in the negative. If the buyer chose, he could, as far as the practice of insurance is concerned, cover the goods himself by "ship or ships," or "by steamer to be declared," or in other forms. If, owing to circumstances affecting himself, he cannot do so, or does not know the name of a suitable ship, the seller, being a stranger to them, is not affected, and cannot have his obligations increased thereby. Independently of the seller, the buyer has information enough to enable him to insure, and if the seller sends none, he does not thereby fail to send an enabling notice; he merely omits to make a superfluous communication. I do not think the sub-section is meant to bind men of business to write immaterial letters, and to penalise the omission in the price of the goods, if they should afterwards be lost at sea uninsured.

It has been argued that, in signing and sending to the buyer the contract note itself, the seller, to the benefit of whose acts the plaintiffs succeed, did give to the buyer such notice as might enable him to insure the goods. Literally this is undeniably true. The appellants say that this is a paradox which would make every f.o.b. contract its own enabling notice, and so, or so far, nullify the sub-section. I think this is true, too, but my conclusion is that the paradox helps to show that f.o.b. contracts are not within the sub-section. It is a *reductio ad absurdum.* Whether on giving the instructions the buyer waived any further information as to the ship's name is a question of fact not answered, or, I think, raised in the court below, on which I prefer to express no opinion.

The whole sub-section is prefaced by the words "unless otherwise agreed." The mercantile meaning of f.o.b., of the words "free on board," has long been known, and is stated by the high authority of Brett, M.R. in *Stock* v. *Inglis* (5 Asp. Mar. Law Cas. 274, 422; 51 L. T. Rep. 449; 12 Q. B. Div. 573): "If the goods dealt with by the contract were specific goods, it is not denied but that the words 'free on board,' according to the general understanding of merchants, would mean more than merely that the shipper was to put them on board at his expense; they would mean that he was to put them on board at his expense on account of the person for whom they were shipped; and in that case the goods so put on board under such a contract would be at the risk of the buyer, whether they were lost or not on the voyage. Now, that is the meaning of those words 'free on board' in a contract with regard to specific goods, and in that case the goods are at the purchaser's risk, even though the payment is not to be made on the delivery of the goods on board, but at some other time, and although the bill of lading is sent forward by the seller with documents attached in order that the goods shall not be finally delivered to the purchaser until he has either accepted bills or paid cash." This passage is adopted, not in terms, but in substance, by Lord Blackburn in the same case in the House of Lords (5 Asp. Mar. Law Cas. 422; 52 L. T. Rep. 821; 10 App. Cas., at pp. 271, 273), where he, too, says that the seller's obligations were at an end when the goods were put on board. The important point is to observe that Brett, M.R. states it is part of the mercantile meaning of "f.o.b." that the seller should do the things he mentions, and no more. True the contract does not in terms say anything about giving notice, but in saying that all the

seller need do is to ship, it says, in the understanding of merchants, that he need not go on to give a notice. If, instead of the letters f.o.b., their meaning were written out at length in the contract in the words of Lord Esher, it would be plain that there was no liability upon the seller to be at the risk of the loss of the goods at sea, if he failed to give a notice, because the parties had otherwise agreed—namely, had agreed that "the goods so put on board (without any notice called for or given) would be at the risk of the buyer, whether they were lost or not on the voyage." It is not that the common law annexes as an incident to such a contract that the seller should deliver on board and be liable no further. If that were so, the statute of 1882 might have altered and increased his obligations. It is that by agreement between buyer and seller in these words, the contract means that only certain obligations are incumbent on the seller, and giving notice is not one of them. If so, "unless otherwise agreed" ousts the application of sub-sect. 3 to an f.o.b. contract.

The appellants' argument rests on two propositions—(*a*) that the whole section must be read together; if f.o.b. contracts are within sub-sect. 1, they cannot be outside of sub-sect. 3, which is in the nature of a proviso upon sub-sect. 1, and (*b*) that if sub-sect. 3 does not apply to f.o.b. contracts, there is nothing to which it can apply, and, if it does not contemplate notice *inter alia* of the name of the actual ship, it is futile, for without any notice from the seller the buyer can always insure his purchase by "ships or ships." I think both propositions to be fallacious. I agree that, the section being divided into sub-sections, the sub-sections must be read together, but the appellants' proposition (*a*) would only be true if sub-sect. 1 applied only to f.o.b. contracts; then any proviso on it must apply to f.o.b. contracts too, but only then. As it is expressed in perfectly general terms, including not only f.o.b. contracts, which have a specific mercantile meaning, but any other contract of sale in which in any terms the seller is authorised or required to send, sub-sect. 3 may have application as a proviso to contracts within sub-sect. 1 other than f.o.b. contracts, and so have ample effect as a proviso upon sub-sect. 1. For this reason I think this formal contention (and it is no more) is ill-founded.

Next it is said that any thing can always be insured against marine risks. Hence no notice can ever enable a buyer to insure. Knowing that he has bought he can forthwith cover his interests by appropriate description by a floating policy (or subject to the Stamp Act) by open cover, to be followed by a declaration. In practice this has long been done, and is, in fact, very general.

Further it is said that *Arnot* v. *Stewart* (5 Dow. p. 274) may be treated as a decision on the sub-section, though in time it precedes it by over sixty years, laying down that the Scotch rule, which sub-sect. 3 embodies, was a rule requiring the ship's name to be notified to the buyer. Finally, it is argued that no contracts of sale can be within sub-sect. 3 if f.o.b. contracts are not, for sales "ex ship" operate only after the seller has run all the marine risk; c.i.f. sales specifically deal with insurance and "otherwise agree," and nothing (or nothing much) is left but f.o.b. contracts, to which the sub-section could relate.

It is commonly said, I know, that you can always insure anything at Lloyd,s, and we have all of us in our time quoted extraordinary instances of risks covered by underwriters, but, "freak" insurances apart, one ought to recollect that insurance, like every other operation in commerce, is an actual thing, for which it is necessary that a person willing to risk his money in the transaction should be found, and there are times when, owing to the state of the market or of the individual underwriter's books, a particular insurance may be difficult, or even impossible, to effect. Again, free as the London insurance market is, and for ordinary goods, by ordinary conveyance, it is in practice free almost without limit, this freedom is largely due to the fact that insurance business is centralised in London, a circumstance that for the buyers resident at a distance from London, or indeed from the United Kingdom, may make it by no means easy for them to effect their particular insurances. Hence I do not think it would be safe to hold that the Legislature assumed the universal feasibility of insuring goods against any marine risks without particulars of ship or voyage at all times and in all places as the foundation of sub-sect. 3, which, be it remembered, is of continuous, permanent, and general application. Yet nothing less than this will support the contention that the notice required must by necessary implication include notice of the ship's name, and for the appellants' case no less contention will do.

It is to be remembered that the Sale of Goods Act is a codifying Act. Historically it is known that the rule laid down in sub-sect. 3 was, before 1883, a rule of Scots law only, and had no application to, or counterpart in, English law. Where any difficulty arises in construing the Act, it is legitimate to consider the previous decisions which it codified, as a clue to the meaning and application of the enactment. Now, on looking at the Scots decisions, one notes, first, that from *Hoog* v. *Kennedy* (*sup.*) in 1754 to *Hastie* v. *Campbell* (*sup.*) in 1857, as many cases are decided on the relationship of principal and agent as on that of seller and buyer, and, as Lord Deas says in the last-named case (19 Dunlop, p. 557), "the obligation to give notice arises out of, and is incident to, the relative position of mandatory and mandant however constituted, although the precise degree of diligence prestable may not be the same in both relations"; next, that none are decided on f.o.b. contracts in terms; and that in every case the facts stated are consistent with the goods having been sent on the terms of "carriage forward" or "freight payable on delivery," or with the senders charging any prepaid freight to the receiver in account, and, lastly, that in those which deal with contracts of sale the seller's obligation to send the goods arises, not on the sale itself, but only incidentally to it, as part of a simultaneous mandate given by the buyer to the seller. The consideration for the sending may be the contract of purchase, but it is nowhere stated, as one of the facts of the case, that the cost of sending was not chargeable by the seller to the buyer. The highest at which the appellants can put it is that in *Arnot* v. *Stewart* (*sup.*) the action was brought for the price, and the appellant contended that, "his constituents having

delivered the goods at the wharf, had nothing further to do with the transaction."

These considerations support the construction that f.o.b. contracts are outside of sub-sect. 3, if it needs support, and they definitely answer the appellants' contention, that the sub-section covers no contracts, if not f.o.b. contracts. It covers such contracts as were passed upon by the Scots cases or such as on the very similiar one in *Badische Anilin, &c.* v. *Basle Chemical Works* fully set out in 76 L. T. Rep. 21, 434; (1897) 2 Ch. 324. They may not be important contracts individually, but they are numerous, and of common occurrence. Trade between Ireland and Great Britain, or between Holland and Belgium and this country, and sales, to which coastwise transport is naturally incident, afford numerous instances of transactions to which the sub-section would apply, and give it abundant application apart from f.o.b. contracts.

It only remains to notice the suggestion that *Arnot* v. *Stewart* (5 Dow, 297) controls the matter. On examining the report of this case I think it appears that the single reason to which the judgment is confined refers to the respondent's second contention, which was that a notice containing a representation was sent to him by the seller and accepted by him, that it would have resulted in an insurance had he not put a limit on the premium in instructing his insurance broker; and that an insurance effected on those instructions would not have been such as he could have enforced. I think it is pressing the report much too far to say that the case decided that the seller's notice must name the ship, or that when the buyer had already all the information needed for his insurance in the ordinary form, the seller must still send a notice with the ship's name, on pain of being liable for the loss of the goods. It is worth notice that in *Hastie* v. *Campbell* (19 Dunlop, 557) this point was discussed as an open contention, and was not relied on as a matter no longer open to argument, but determined by *Arnot* v. *Stewart* (*sup.*).

I think the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors for the defendants, *Coward* and *Hawksley, Sons,* and *Chance.*

Solicitors for the plaintiffs, *Waltons* and *Co.*

May 23, 25, 26, 27, 28, 29, 30, *and July* 30, 1913.

(Before VAUGHAN WILLIAMS, BUCKLEY, and HAMILTON, L.JJ.)

ASIATIC PETROLEUM COMPANY LIMITED *v.* LENNARD'S CARRYING COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Cargo—Loss by fire — Unseaworthiness of ship — Liability — Fault or privity of owners — Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 502.

A cargo of oil carried on board a ship was destroyed by fire, the cause of the loss being the stranding of the ship occasioned by the unseaworthiness of her boilers.

Held (*Vaughan Williams, L.J. dissenting*), *that the owners were not entitled to the protection of sect.* 502 *of the Merchant Shipping Act* 1894, *as the loss had not happened without their actual fault or privity.*

Per Buckley, L.J., the words "actual fault or privity" infer something personal to the owner, something blameworthy in him as distinguished from the fault or privity of his servants or agents.

Per Hamilton, L.J., that if the sources of information had been used and not neglected, the condition of the boilers would have been learnt in time. In the present case the managers had from time to time such knowledge of the matter as made them blameworthy for the ship's unseaworthiness.

Decision of Bray, J. (*reported* 12 *Asp. Mar. Law Cas.* 269; 107 *L. T. Rep.* 651) *affirmed.*

APPEAL by the defendants from a decision of Bray, J. in an action tried by him in the Commercial Court without a jury.

The plaintiffs' claim was for damages for breach of contract and breach of duty on the part of the defendants in and about the carriage of a cargo of benzine on board the defendants' steamship *Edward Dawson* from Novorossisk to Rotterdam.

BRAY, J. held that as the owners had not fulfilled their duty in seeing that the ship was seaworthy, they were not entitled to the protection of sect. 502 of the Merchant Shipping Act 1894, as the loss had not happened without their actual fault or privity, and he gave judgment for the plaintiffs.

The defendants appealed.

The facts and arguments are sufficiently stated in the judgments.

Sankey, K.C. and *Roche*, K.C. for the appellants.

Atkin, K.C., *Maurice Hill*, K.C., and *Mackinnon* for the respondents.

Cur. adv. vult.

July 30.—The following judgments were delivered:—

VAUGHAN WILLIAMS, L.J.—Bray, J. begins his judgment by thus stating the cause of action: "This action was brought by the indorsees of certain bills of lading under which benzine oil was to be carried by the defendants on board their tank steamer *Edward Dawson* from Novorossisk to Rotterdam. The *Edward Dawson* shipped the oil at Novorossisk, and sailed on the 7th Sept. 1911. She went ashore near Flushing on the 1st Oct., and within six hours thereafter the oil took fire and was destroyed. The plaintiffs alleged that the *Edward Dawson* was unseaworthy when she left Novorossisk owing to defects in the boilers; that she was driven ashore owing to want of steam arising from those defects; and that the fire was caused by the stranding and its consequences. The defendants disputed these allegations, and contended further that they were protected by sect. 502 of the Merchant Shipping Act 1894."

This statement by Bray, J. seems to me to state sufficiently the matters in dispute in this action. Sect. 502 of the Merchant Shipping Act 1894 runs thus: "The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases—namely, (1) Where any goods, merchandise, or other things

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." Bray, J. deals first with the question whether the ship *Edward Dawson* was unseaworthy when she left Novorossisk. He comes to the conclusion that the *Edward Dawson*, when she left Novorossisk, was unseaworthy by reason of the defects in the boilers, and Mr. Sankey, who argued this case on behalf of the defendants, admitted this unseaworthiness at Novorossisk.

The next question Bray, J. propounds to himself is: "Whether the ship was stranded owing to the inability of the boilers from their defects to raise sufficient pressure of steam." Bray, J. comes to the conclusion that before entering the channel the combustion chambers of the two centre furnaces had been so completely salted up that there were then only four available instead of six. The ship passed Dover at 3 a.m. on Saturday, the 30th Sept. Soon after there was a gale, with heavy sea; at 3.30 the captain, who up to that time had kept his course to Rotterdam, hove to—that is, turned the ship's head to the wind, which was slightly west of north. After stating these facts, Bray, J. says: "I see no ground for saying that this was not a prudent course."

I agree that this statement of the condition of the ship up to the time of the turning of the ship's head to the wind is fully justified by the evidence, except that I think Bray, J. understates the violence of the gale. Looking to the independent weather reports, I think it is plain that the gale was of a hurricane type, notwithstanding the evidence of Captain Wood, of the *Wrexham*, which was in the North Sea on that night, who said that it was a gale that an ordinary boat of the class of the *Edward Dawson* should have been able to ride out successfully with seaworthy boilers. The *Wrexham* was in a different part of the North Sea, under the shelter of the English coast, and not on the Dutch coast; and the list of wrecks which was put in is eloquent of the violence of the sea on that night on the Dutch coast.

I think that the evidence shows that until the tube burst the boilers of the *Edward Dawson* enabled her to hold her own against the drifting and that there is no evidence to show that the tube which burst was an old tube of fifteen years' standing, and not a new tube, which sometimes burst unexpectedly with the best machinery. I therefore doubt if the evidence justifies the conclusion by Bray, J. "that the stranding on the Botkill Bank was caused by want of steam which was caused by the unseaworthy condition of the boilers. I find the same with regard to the second stranding. Once having been driven on to Botkill Bank, what happened afterwards was the natural consequence of having been driven into such a dangerous position with possibly some injury to her steering geer." If this conclusion of Bray, J. had been a conclusion arrived at on a conflict of evidence or a conclusion of fact based on evidence of actual facts spoken to by witnesses, the duty of this court would, *primâ facie*, at all events, be to accept such findings, but the conclusions with which the court has to deal here are mere probabilities based on evidence which has no direct application to the conclusions arrived at by the learned judge.

The next question dealt with by Bray, J. is whether the loss of the cargo was the consequence of the stranding. The learned judge says: "I suggested to counsel, in the course of their arguments, that if it was shown that the stranding caused a danger to arise, that even though reasonable care were taken the benzine might catch fire, and not owing to any negligence, then the stranding was the effective cause of the loss of the benzine. I am not putting this as an exhaustive statement of the law on the subject, but both counsel accepted it as sufficiently correct in this case. Now it was clear that the tanks were injured by the stranding to such an extent as to allow some of the benzine to escape. Where it escaped was not ascertained, nor the extent of the leakage, but the leakage was serious, and the captain and the engineers realised that there was serious danger of the benzine causing an explosion and taking fire. The fires were ordered to be drawn, and between 11 and 12 a.m. the chief engineer ordered every one out of the engine room and stokehole because of the danger. I am satisfied that there was real danger even though due precautions were taken to prevent it. It was urged for the defendants that if reasonable precautions had been taken there would have been no explosion or fire. I think the probable cause of the explosion was the gas from the benzine getting into the combustion chamber. It was said for the defendants that the chief engineer should have had water poured into the combustion chamber by means of a hose from the ashcock so as to extinguish any hot ashes there. It is always easy to be wise after the event, but was this a precaution which a reasonably prudent engineer would have taken? It never occurred to any one of the engineers to suggest that it should be done, although every one realised the danger of an explosion. It certainly is not a usual thing to do. I do not think that any of the witnesses had heard of its being done under any circumstances. They differed as to its being a dangerous thing to do. I think it would obviously be somewhat dangerous. There was no hose attached to the ashcock, though it was said there was a hose on deck. I find it impossible to say that either the captain or the engineers were negligent in not taking this precaution. I find that the loss of the cargo was caused by the unseaworthiness of the boilers."

The evidence is that there was a hose on deck. I see no evidence to the contrary, and it is notorious that vessels of this class which carry benzine as a rule have a hose on deck, and in case of fire or danger of fire and explosion the hose would be a natural thing to use to prevent fire or explosion. Against this it is said that it never occurred to any one of the engineers to suggest that water should be passed by means of the hose into the combustion chamber so as to extinguish any hot ashes there, and that the witnesses (not being those who were in fact on board the unfortunate ship) differed as to its being a dangerous thing to do. Bray, J. seems, from the language of part of his judgment, to doubt whether there was a hose on deck, and treats it as negligence if there was not a hose on deck, but to have come to the conclusion that if there was, it was not proved that the hose could have been safely used to extinguish any hot ashes which might find their way into the combustion chamber. Of course, it is for the interest of the shipowners to show that there was negligence of the engineers

or crew which contributed to the explosion. I should mention here that besides the findings of Bray, J. there was a suggestion put forward in the argument that, even if there had been no fire, the cargo was lost on the second stranding, as thereafter it could never have been conveyed to its port of destination. As to this contention, I may at once say that there was no evidence to support it, and at best it was merely a suggestion of a possibility. Having now set forth the findings of facts of Bray, J., I propose to consider the question whether there was evidence to support them.

It was argued before us that even if there was no evidence to support any one of these findings, the defendants cannot rely on such absence of evidence, because the onus of negativing actual fault or privity lay on them. I cannot agree. In the first place, the plaintiffs by their pleadings took on themselves this onus, and, moreover, when they launched their case, called many witnesses to prove the actual fault or privity of the defendants. In my opinion, not only did the plaintiffs, by their pleadings, their evidence, and their conduct of their case, assume that the onus was on them, but Bray, J. accepted this view, and never suggested that the onus was on the defendants. Moreover, in my opinion, the words of sect. 502 of the Merchant Shipping Act 1894, when rightly construed, threw this onus on the plaintiffs. Perhaps it is worth while to set out the substance of the pleadings. The points of claim, pars. 7 and 8, allege the unseaworthiness of the ship at the commencement of the voyage from Novorossisk, and "that the boilers were at all times during the said voyage in an unfit and unseaworthy condition. They were old and worn out. Tubes had burst on a previous voyage and had been stopped with wooden plugs. Many tubes were leaking, whereby salt accumulated in the tubes and prevented the fires drawing. All these defects were not remedied, and increased on the voyage from Novorossisk to Rotterdam. On or about the 1st Oct. 1911, the steamer encountered a gale off the coast of Holland, and in consequence of the said defective condition of the boilers it was impossible to generate sufficient steam power to withstand the effect of the gale. The vessel was in consequence driven on the Zoutelands Banks and her cargo totally lost."

The defence, by par. 4, says "that the said cargo was lost by reason of fire on board the *Edward Dawson* on the 1st Oct. 1911, and subsequent days, and by virtue of sect. 502 of the Merchant Shipping Act 1894 the defendants are not liable." The plaintiffs, by their points of reply, par. 1, "deny that the cargo was lost by fire within the meaning of the section of the Merchant Shipping Act," and further allege that "if the vessel was lost by fire such fire was occasioned by the unseaworthiness."

It is of the greatest importance in this case to determine the precise meaning of the words of sect. 502 of the Merchant Shipping Act of 1894. It was held in *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company Limited* (12 Asp. Mar. Law Cas. 82; 105 L. T. Rep. 810; (1912) 1 K. B. 229) that sect. 502 applies, and affords to the shipowner protection from liability, even though the ship was unseaworthy, for the words of the section are "British sea-going ship," and not "British seaworthy sea-going ship." I do not say that if the ship commenced its voyage unseaworthy with the actual fault or privity of the shipowner, this would not deprive the shipowner of the exemption from liability, but I think that the fault or privity must relate to the actual voyage, and must be the result of fault or privity of the owner in respect of the voyage in the course of which the fire occurred causing the loss of or damage to the cargo. I agree that the words "fault or privity" covers faults of omission as well as of commission, but I think such fault or privity must relate directly to the voyage in which the loss by fire occurred, and, further, I think that the captain ought not, in the condition in which the vessel then was, to have started on the voyage from Novorossisk to Rotterdam, and that the shipowner cannot be held liable for the loss by fire of this cargo occurring on a voyage which, if the captain had done his duty, should not have been commenced until the ship had been put by repairs in a proper condition. The omission of the responsible officer of the company which, on behalf of the shipowners, acted as managers, to get information from time to time as to the condition of the ship during the successive voyages does not seem to me in principle to be distinguished from faults of the captain. The manager and the captain are each of them acting as the agent or servant of the shipowner, and, in my opinion, a fire which results from the fault either of the captain or of such a manager is not from the fault or privity of the shipowner, so as to deprive him of the exemption from liability given to shipowners by sect. 502.

Moreover, the fault of omission which is imputed to the shipowners in this case seems to me altogether too remote to be recognised as a *causa causans* of the loss. I cannot find in the evidence sufficient to show that the shipowners, or even their manager, had information from which the inference necessarily ought to have been drawn that the ship was in an unseaworthy condition. I do not think that it was argued that there was any such necessary inference to be drawn from the captain's communications by letter. I do not think that it was a necessary inference from the scantiness of communication that there must be something wrong.

If these considerations which I have been setting forth are well founded, it necessarily follows that the findings in fact of Bray, J. cannot be supported. I have not mentioned the question of warranty arising on the terms of the bill of lading. That we have left over to be raised hereafter if necessary, as it has been decided in *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company Limited* (*sup.*) that the operation of the statute may be excluded by special contract and the owners be liable where it can be established that there has been a breach of warranty of seaworthiness. In my opinion, this appeal should be allowed, but no judgment in the action should be entered until the point on the terms of the bill of lading has been determined by judgment or abandonment.

BUCKLEY, L J.—The plaintiffs sue for breach of contract and breach of duty in and about the carriage of a cargo of benzine from Novorossisk to Rotterdam. Their claim is for damages for

non-delivery of the goods. The goods have been totally lost. The defendants plead by way of defence two separate matters, the first that they are relieved from liability by sect. 502 of the Merchant Shipping Act 1894, and the second that the loss was due to perils excepted by the contract of carriage. The learned judge decided the case, and we have heard the appeal upon the first only of these grounds of defence. In case the defendants elsewhere put forward the second it will remain open to the plaintiffs to resist that defence upon grounds into which it has been unnecessary to go before us.

Before going to the facts of the case I will state what, in my view, is the effect of sect. 502 of the Merchant Shipping Act 1894. If the loss of the goods by fire happens without the owner's actual fault or privity he is free from liability even if his ship was unseaworthy. The benefit of the section extends to British sea-going ships generally, and is not confined to seaworthy British sea-going ships. That was the decision of this court in *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company Limited* (*sup.*). But if the unseaworthiness itself was not without the actual fault or privity of the owner, and if the fire was occasioned by the unseaworthiness, the owner is, in my judgment, not relieved by the section from liability. The loss in that case has not happened without the owner's actual fault or privity; it has happened with his actual fault or privity, for the *causa causans* of the loss was the unseaworthiness which occasioned the fire which destroyed the goods.

The words "actual fault or privity," in my judgment, infer something personal to the owner —something blameworthy in him as distinguished from constructive fault or privity, such as the fault or privity of his servants or agents. But the words "actual fault" are not confined to affirmative or positive acts by way of fault. If the owner be guilty of an act of omission to do something which he ought to have done he is no less guilty of an "actual fault" than if the act had been one of commission. To avail himself of the statutory defence he must show that he himself is not blameworthy for having either done or omitted to do something or been privy to something. It is not necessary to show knowledge. If he has no means of knowledge which he ought to have used and does not avail himself of them, his omission so to do may be a fault, and if so it is an actual fault, and he cannot claim the protection of the section.

As regards the facts of the present case, the learned judge finds first that the ship, when she left Novorossisk, was unseaworthy. The appellants do not dispute before us that this finding was right. Secondly, that the stranding of the ship was due to the unseaworthiness in that the boilers were not seaworthy, and that it was by reason of their inability to provide a sufficient head of steam that the ship was stranded. That finding, in my opinion, was right. Thirdly, that the escape of the benzine was due to injury to the tanks in which it was contained, caused by the stranding; that by reason of the unseaworthiness of the ship she was so strained that the tanks began to leak and the benzine was thus exposed to the probability of fire. That finding, in my opinion, was right. From these facts the judge concludes that the loss of the cargo was caused by the unseaworthiness of the boilers. The destruction of the cargo was due, of course, to the fire. But the loss of the cargo may or may not have been caused by the fire. That depends upon whether the cargo was lost when the ship stranded for the second time and before the fire occurred. If it was, then I need not concern myself with sect. 502. The first question, therefore, is whether the cargo was lost before the fire broke out. Upon this point a question arises as to the onus of proof. The ship was stranded. Could she ever have been got off, in an efficient sense, that is to say, so that the cargo could have been delivered according to the contract of carriage? Starting with the fact that she was stranded, the onus was, I think, upon the defendants to show that she could have been so efficiently got off and the cargo taken to Rotterdam, or that the cargo could have been got out and carried to Rotterdam had there been no fire. They have not discharged that onus. There is some evidence, I do not say more than that, that if there had been no fire the vessel might possibly have been got off. But there is no evidence that in the condition in which she was—strained, injured, with her decks buckled, with the benzine escaping from the tanks, and no possibility of lighting her fires and getting up steam without danger of ignition—that she could have been so dealt with by tugs or otherwise as that the cargo could have been delivered. Upon this first ground, therefore, I think that the defendants fail. But, secondly, I will assume that the cargo was not lost before the fire broke out. It remains, however, that it was lost by a fire which would not have taken place had the vessel been seaworthy for the conveyance of this cargo. Under those circumstances the statute is, in my opinion, no defence unless the defendants show that the unseaworthiness which was the cause of the fire was without their actual fault or privity.

It remains to decide whether the unseaworthiness existed without the actual fault or privity of the defendants. I must now apply the principles which I first stated as regards that which, in my opinion, is the true construction of the section. I do not propose to detail the facts which the learned judge has given at considerable length. I shall do no more than suggest or sketch the heads which seem to me material upon this question. The exact question to be answered, I think, is this: When the ship left Novorossisk, had she become, and did she subsequently remain, unseaworthy without the actual fault or privity of the defendants?

The defendants are a limited company. The actual fault or privity must under these circumstances be that of some natural person or persons acting on their behalf. Those persons are the managing owners, or, inasmuch as the managing owners were themselves again a limited company, the person who acted for that company in the matter. That person was Mr. Lennard. The actual fault or privity to be looked for, therefore, is that of Mr. Lennard. Going back no further than 1909, it was known to him from the logs in his possession that on the 8th Jan. 1909, the 15th and 17th Feb. 1909 tubes in these boilers were bursting, and that on the 8th April 1909 there were heavy leaks and that the pressure was reduced to

110lb. He knew also that the standing order to the master was to send the log-books to the managing owners. That was the master's duty, although it was practically unobserved, and it was the master's duty to report direct to the managing owners if the boilers had been found to be leaking. The ordinary life of the tubes in boilers such as these is eight to ten years according to the evidence of Sir F. Flannery, or nine or ten years according to the evidence of Mr. Swainston. These tubes were fifteen years old. In Feb. or March 1911 the vessel was surveyed by the Bureau Veritas, and her certificate was extended for twelve months. Upon this fact the defendants place great reliance. But soon after that—namely, on the 9th June 1911—the managing owners received the letter of that date suggesting that there was something greatly wrong with the engines and boilers, and giving reasons. Then came the visit of Mr. Clark, in place of Mr. Smaling, to Thameshaven, some two days later, and the repairs at that port. Then followed the repairs, miscellaneous, but not serious, at New York, and the subsequent voyages to Barcelona, and then to Novorossisk. At Barcelona the salt, which had formed to a depth of about 18in., was all, or practically all, cut out, and she started from Barcelona to Novorossisk clear of salt. When she reached Novorossisk—a journey which took eleven or twelve days, and was substantially shorter than would be the voyage from that port to Rotterdam (twenty-three or twenty-four days)—the furnaces were salted up above the bridge—a state of things which Sir Fortescue Flannery said he had never heard of in his life. The salt was cut out again, and by the time she reached the English Channel she was so salted up as that both the port and starboard centre furnaces were blocked up altogether; and the climax came, when during the gale (for I have no doubt at all that the weather was very heavy), a tube burst in the one boiler, which put that boiler out of action and left that vessel for some hours so hopelessly without power as that she was driven on the bank, and the results ensued.

Under these circumstances it seems to me that the managing owners had affirmatively to a very large extent knowledge, and had, beyond that, most substantial means of knowledge, and that if they had called upon the master to report, as he was bound to report, they would have had actual knowledge of the state of the boiler. So far as they did not know, their absence of knowledge was due to their default to avail themselves of their means of knowledge. This was, I think, an actual fault, and was the actual fault of the owners by Mr. Lennard, their managing owner. It follows that, even if the loss of the cargo is to be attributed not to the stranding, but to the fire which followed upon the stranding, the defendants are not entitled to the relief from liability given by sect. 502 of the Merchant Shipping Act 1894. For these reasons I am of opinion that the judgment under appeal was right, and that this appeal must be dismissed with costs.

HAMILTON, L.J.—I agree that this appeal fails. I accept Bray, J.'s conclusions of fact, I think that the steam dropped, and eventually the tube gave out, owing to that continuing leakiness and general deterioration of the boiler and tubes, which made the ship unseaworthy before she left Novorossisk. I think that the stranding followed the failure of steam during a gale on a leeshore, the leakage of the oil tanks followed the stranding, and the ignition and consumption of the oil cargo followed the leakage in each case as the natural and direct consequence of the preceding event. In my opinion there was no negligence on the part of the master, officers, and crew in failing to inject cold water with hose into the hot combustion chamber in order to extinguish every possibility of ignition of the benzine vapour. I am not prepared to say that the vessel might not have been got off and towed into Rotterdam and have then discharged her cargo if no fire had occurred. Certainly there is no express evidence of it; but nowadays tugs are so plentiful and salvors so skilful that I will not say that it could not have been done. I am clear that the operation would have been very speculative. The ship must have been steered as well as towed by her tugs—must have secured a spell of fine weather during October, and must have had the luck with her both in getting afloat and in getting into Rotterdam. If she strained a butt or two or broke adrift, I think she would have been lost. If Bray, J. had found that ship and cargo were truly lost as soon as she took the ground on the Zoutelands Bank, I should not have differed from him, and so I was disposed to read his judgment, but some doubt having been expressed about it, I do not assume or act upon any such finding.

Can it be said that the cargo was burnt without the actual fault or privity of the owners? Though I think the whole onus lies on the shipowner of proving as a defence loss by a fire of which he can predicate that it happened without his actual fault, and that "without his actual fault or privity" in sect. 502 of the Merchant Shipping Act 1894 differs in this respect from negligence in connection with excepted perils in a bill of lading—see *The Glendarroch* (7 Asp. Mar. Law Cas. 420; 70 L. T. Rep. 344; (1894) P. 226) — I need not decide it, for the facts proved are quite sufficient for the purpose, let the onus lie as it may. Where the Legislature selected one adjective for employment, I think little is to be gained, and often much to be lost, by paraphrasing it with another. Actual fault negatives that liability, which arises solely under the rule of *respondeat superior*. In that sense it conveys the idea of personal fault, but it does not necessarily mean that the owner must have laid the train or lit the torch himself. Nor, again, does it mean that the owner must have been the sole or next or chief cause of the fire. It is fire "without his actual fault," not fire "except when caused by his actual action."

The question is, Could it be said of the fire that the owners had nothing to do with it, but only their servants, or that for this fire not they, but only their servants, if any persons, were to blame? It is not enough that the happening of the fire is the servants' fault; it must also not be the owner's fault. The cases show this. Channell, J. uses the word "personal" in *Smitton* v. *Orient Steam Navigation Company Limited* (10 Asp. Mar. Law Cas. 459; 96 L. T. Rep. 848). "If they come within the section the defendants are not liable unless the loss is occasioned by their personal fault"; but his next words show that he was, in accordance with the facts of the case, speaking strictly of a matter

that fell within the servants' sphere and not the master's—namely, the placing a watch-pocket in a berth on a large passenger steamer. If actual meant personal in the sense that the owner must have caused the fire himself, the whole of the discussion and judgments of this court, as reported in *The Fanny* (28 Times L. Rep. 217), were superfluous. Butt, J. in *The Warkworth* (5 Asp. Mar. Law Cas. 194, 326; 49 L. T. Rep. 715; 51 L. T. Rep. 558; 9 P. Div. 20, 145), a case affirmed on appeal and repeatedly cited with approval, says that the words "show an intention to relieve the shipowner when damage has been caused by the fault of his servants, and he himself has not been in any way to blame"; and in *Spillers and Bakers Limited* v. *W. Robertson; The Diamond* (10 Asp. Mar. Law Cas. 286; 95 L. T. Rep. 550; (1906) P. 282), Bargrave Deane, J. says similarly: "The owner is not liable unless he has himself been guilty of some fault or privy to the matters which caused the damage." In the case most in the appellants' favour, *The Spirit of the Ocean* (12 L. T. Rep. 239), Dr. Lushington speaks of the limitation of liability section as applying where the owners "have not incurred any blame as to the collision in question," and adds that "it is personal blame which is the ground of the forfeiture of the exemption from limited liability." But there clearly the owners could only have been liable for their captain's negligent navigation as his responsible principals.

In the case of a company, the "owners" within the meaning of the section must be the person or persons with whom the chief management of the company's business resides. In this case one, and seemingly the chief, of such persons was Mr. John Lennard, the owning company itself being managed by another limited company in which he is a, if not the, moving spirit. If "fault" is to be defined, I know no better definition than that given by Bowen, L.J. in *Re Young and Harston's Contract* (53 L. T. Rep. 837; 31 Ch. Div. 168, 174): "Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction." True, this is said of "default" occurring in a contract for the sale of land, but I think that the words are synonymous and the context for present purposes immaterial.

In the present case the managers had from time to time such knowledge of the matter as made them blameworthy for the ship's unseaworthiness, and for not interfering to prevent her sailing on her last voyage in that state of continuing unseaworthiness which directly caused the loss of ship and cargo. They knew the boilers to be old, and when the Bureau Veritas surveyor continued the vessel's class, but with a reduction of pressure, early in 1911, they supposed, somewhat oddly, that the repairs then done freed them from further expenditure on wear and tear during twelve months. In June they were disillusionised. The boilers were then found to have various defects, which, on the 12th June, the first day they were examined and before the full extent of the defects was known, were reported as miscellaneous and "not very serious." A considerable sum was spent, but merely in dealing with and making good leaks and other defects, and not on general strengthening or renewal.

The time charterers complained that she was very slow, and the captain's letters admitted the fact, and gave explanation as to bad coal and foul bottom that do not seem to me sufficient. At least by July the owners were fully put upon inquiry, and should have made it their business to find out why the boilers were so soon again requiring expenditure for wear and tear, and whether the complaints of want of speed did not point to the same cause—namely, further leakage from old age, for they knew that the boilers were old. They did in July order new boilers for delivery in November. I have no doubt this was a matter for the managers and not for any mere subordinates. Various explanations of their conduct were offered. One given by the secretary as to the reason for requiring delivery in November broke down. The rest were given by counsel in argument. But the state of the manager's mind is matter of fact, and, in my opinion, it ought not to have been suggested but proved. As they did not choose to prove what their reasons and inferences were, we must infer them from what was proved, and I agree with Bray, J. that they realised then how much faster the boilers were deteriorating than they had expected. They then saw that they could count on nothing like the twelve months' life which they had expected in March. They took the proper step of preparing to replace the boilers at the end of nine months, but they took no step to ascertain whether the nine months might not be as over-sanguine an estimate as the twelve; they took none to enable them to stop the vessel in case of need before she started on a voyage on which, as it turned out, life and property were not only risked but lost. From motives not accounted for, but not unaccountable, they let the pitcher go once too often to the well. I think the true inference is that they acted from carelessness or economy, or both, both being equally reprehensible.

There was a very simple way in which the managers could have kept themselves informed of the vessel's condition, so as to control her fate and fortunes. It was their rule, as it should be in all steamship owners' services, that at the end of each voyage the engineer's logs should be sent to the office and presumably be examined by those whose business it was to inform themselves about the condition of the engines and boilers. This rule the managers allowed to be systematically disregarded. In the case of boilers which required close watching, it would have been natural to instruct the chief engineer to take advantage of ports of call, and to report on their condition and progress by letter. This was not done. At Thameshaven, Clark is said to have looked at the log. That is all. Till the ship was at Novorossisk the managers were receiving no reports about the boilers, and for inexplicably long periods no letters at all about the ship, and yet they made no inquiry. It is impossible to say that there was no actual fault in this. Logs and reports, if sent, would, in my opinion, have disclosed what was happening, and would have told the manager, a man of experience, that the ship must no longer go to sea depending alone on her own supply of steam. In the ordinary course such things as tubes giving out would have been

noted in the log. It had been so before in the case of this ship. In the ordinary course there would have been some, and probably many, entries showing how steam was falling and boilers leaking; entries about filling up the boilers with sea water and clearing salt from the combustion chambers. A mere examination of the deck log to check the number of knots run against conditions of wind and weather would, over a period of a week or two, have been useful in showing whether steam power was failing, and, therefore, leakage increasing. Careless the engineers might be, but I see no reason why they should keep such things out of the log or out of their letters to their owners. If the managers had used these sources of information, which they unjustifiably neglected, they would have learnt, and learnt in time, how much worse the condition of the boilers was. I do not say that a written report from Novorossisk would have informed them in time to stop the ship when coaling at Algiers or when passing Gibraltar, for the course of post to England is not proved, but, from the time the ship reached the Mediterranean from New York, that alarming process of salting up the combustion chambers was in progress, which ultimately filled the back ends bridge high with salt on the passage between the Black Sea and the Straits of Dover and sent the ship to her doom. In fact the boilers were, and long had been, so leaky in seams and stays and tubes that the water soaked out of them as if out of a sponge. One has only to realise the size of the combustion chambers and the cubical contents of the spaces up to the height of the bridges, and to remember that this was filled with salt left after the evaporation of water, which at first could only have been brackish—for the ship would at least start with fresh water in her boilers—and it will be seen how prodigious this leakage was. There may be some exaggeration in the story. Some salt was left in at Novorossisk; some, even a considerable part, of the solid matter may have been coal or cinders. Still, the amount of the leakage was enormous, and it had been going on a long time. Even a landsman can see the significance of it. I picture to myself this vessel labouring up the North Sea with a north-easterly gale on her port beam and the shoals of the Scheldt to leeward, then lying head to wind and sea and still failing to hold her own, then breaking down and going astern—and all for want of steam. I recall that with proper diligence the owners might have prevented all this, and must have known the special perils attending the transport of benzine in bulk, for it was their trade. When these owners ask this court to find that the fire which naturally ensued in the circumstances, "happened without their actual fault or privity," I refuse to do so.

This conclusion makes it unnecessary to discuss the question whether the bill of lading, which contains excepted perils, including fire, but does not mention unseaworthiness, is expressed in terms which would oust the application of sect. 502, and I express no opinion about it.

Appeal dismissed.

Solicitors: for the appellants, *Downing, Handcock, Middleton,* and *Lewis*, agents for *Bolam, Middleton,* and *Co.*, Sunderland; for the respondents, *Parker, Garrett,* and *Co.*

Nov. 12 *and* 13, 1913.

(Before Vaughan Williams, Buckley, and Kennedy, L.JJ.).

Ingram and Royle Limited *v.* Services Maritimes du Tréport Limited. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Exemptions from liability—Fire—"Actual fault or privity"—Perils of the sea—Dangerous cargo — Unseaworthiness — Maintenance of vessel's class—Merchant Shipping Act 1894 (57 *&* 58 *Vict.* c. 60), *s* 502.

By sect. 502 *of the Merchant Shipping Act* 1894, *the owner of a British sea-going ship is not liable to make good any loss or damage happening without his actual default or privity where any goods, merchandise, or other things taken in or put on board his ship are lost or damaged by reason of fire on board the ship.*

A bill of lading, on the terms of which the plaintiffs shipped certain goods on the defendants' ship, contained the following exemptions from liability: (1) "*Fire on board . . . and all accidents, loss, and damage whatsoever from . . . perils of the seas . . . or from any act, neglect, or default whatsoever of the master, officers, crew . . . or agents of the owners . . . in the management, loading, stowing, discharging, or navigation of the ship or otherwise. . . .*" (11) "*It is agreed that the maintenance by the shipowners of the vessel's class . . . shall be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage.*"

A fire broke out on the ship, which went down, and the plaintiffs' goods were lost.

Scrutton, J. found as facts that the ship was unseaworthy; that the unseaworthiness caused the loss of goods either by perils of the sea or by fire, and that the fire occurred without the actual fault or privity of the shipowner, and he held that the parties to the bill of lading had excluded the operation of the above sect. 502; *and that the shipowners were liable as the bill of lading did not in unambiguous terms exempt them from the obligation to provide a seaworthy ship.*

Held, that there was no contract between the parties excluding the protection afforded to the shipowners by sect. 502, *and substituting in its place a contractual liability of the shipowners, and, therefore, the shipowners were not liable.*

Virginia Carolina Chemical Company *v.* Norfolk and North American Steam Shipping Company (12 *Asp. Mar. Law Cas.* 82, 233; 107 *L. T. Rep.* 320; (1912) 1 *K. B.* 229) *distinguished.*

Decision of Scrutton, J. reversed.

Appeal from a decision of Scrutton, J., sitting without a jury in the Commercial Court, reported 12 Asp. Mar. Law Cas. 295; 108 L. T. Rep. 304; (1913) 1 K. B. 538.

The plaintiffs claimed 1368*l.* in respect of the loss of a cargo of mineral waters shipped on board the steamship *Hardy*, owned by the defendants, for carriage from Tréport to London. The ship caught fire and sank.

The defendants relied on the following exceptions in the bill of lading as exempting them from liability:

(1) Fire on board . . . and all accidents, loss, or damage whatsoever from defects in hull, tackle,

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

apparatus, . . . or from perils of the sea . . . or from any act, neglect, or default whatsoever of the master, officers, engineers, crew, stevedores, servants, or agents of the owners; and (or) charterers ashore or afloat in the management, loading, stowing, discharging, or navigation of the ship or otherwise, the owners and (or) charterers being in no way liable for any consequences of the causes before mentioned. (2) All glass, . . . glass ware or earthenware goods of any description are carried at shipper's risk. (11) It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative, failing a class, the exercise by the shipowners and (or) charterers or their agents of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfilment of every duty, warranty, or obligation, and whether before and after the commencement of the said voyage.

The following facts were found by Scrutton, J.:—In this case Messrs. Ingram and Royle Limited sued the Services Maritimes du Tréport Limited, the owners of the steamship *Hardy* for the loss of certain mineral water on board the *Hardy* when she sank in the English Channel. They also alleged that the *Hardy* was unseaworthy on sailing by reason of a large quantity of metallic sodium stowed on her main hatch, which, if wetted, was liable to explode, and which in fact sank the ship. The defendants replied that the steamer was lost by fire, from liability for which they were protected under sect. 502 of the Merchant Shipping Act 1894, or that if lost by fire or perils of the seas, or negligence of their servants in stowage, or even unseaworthiness, they were not liable for such a loss under the terms of their bill of lading.

The owners of the sodium sent to Messrs. John Harrison Limited, who were managing the *Hardy* for her owners, an inquiry for a freight quotation to which Mr. Lindley, a director of John Harrison Limited and of the defendant company, replied: "Replying to your favour of the 14th inst., we have pleasure in quoting under rates sodium. In iron drums, hermetically sealed, packed in strong wooden cases, on deck at owner's risk from Tréport," with certain quotations for one ton and five ton lots. Mr. Lindley did not know much about sodium, but turned up the English railway classification, and inserted its requirements as to packing, to which he adhered after a further letter. About two tons of sodium were accordingly forwarded to Tréport for shipment in twenty cases, roughly 36in. by 20in. by 16in. Each case contained 100 kilogrammes of sodium in a metal case, one fiftieth of an inch thick surrounded by a wooden case. They were labelled in French: "Beware of damp." They were stowed on the *Hardy* on deck on a tarpaulin on the main hatch in two rows of ten cases, each row fore and aft, The tarpaulin was turned over then, another tarpaulin put on the top, and the whole bundle lashed round and across with ropes fastened to ring bolts in the hatch.

The *Hardy* started on her voyage to England in the ordinary rough weather of the English Channel. In half an hour after leaving port a heavy sea came on board and knocked some of the cases of sodium off the hatch. The salt water got at the sodium, and a series of explosions followed. The hatch was broken in and the hold set on fire. The poop and sides of the ship were broken and strained, and began to leak, and the ship began to settle by the head. Some sodium falling down the fiddleys caused a fire in the engine-room. The crew were driven into the boats by the flames, and shortly afterwards a very heavy explosion in the hold broke the ship in two, and she sank. The plaintiffs' goods—cases of Vichy water—were in the burning hold, and it is doubtful whether they had been destroyed by fire or not when the ship went down through the incursion of the sea water.

Sodium when in contact with water combines with the oxygen of the water, making a very fierce heat, and liberating the hydrogen of the water. If the sodium is unable to move on the water and cool itself, fiercer heat is developed, and the hydrogen may be lighted, and if mixed with air may explode. Further, this sodium was saturated with petrol; the heat developed by contact of sodium with water would vaporise the petrol, which supplied another explosive mixture. This amply accounts for the explosions and flames, and if there was any risk of the sodium coming into contact with water, the ship was obviously in the position of great danger.

I find that the sodium was shipped in cases insufficiently strong for the voyage, and was stowed with insufficient care and security, having regard to its dangerous character if water came into contact with it. The ship's officers did not know the dangerous character of the sodium; if they had they could have taken more precautions in storage. Mr. Lindley knew there was some danger though not its exact nature; he did not know about the petrol; and the sodium was not shipped, as he stipulated, in "iron drums," as they are ordinarily understood in commerce.

I further find that within the meaning of the authorities, especially *Hamilton* v. *Pandorf* (6 Asp. Mar. Law Cas. 44, 212; 57 L. T. Rep. 726; 12 A. C. 518), the plaintiffs' goods were lost either by perils of the sea, the entry of water causing the ship and goods to sink; or by fire; and that if they had not been destroyed by one they would have been destroyed by the other. The cause of the fire or of the entry of sea water was the sodium coming into contact with sea water; and the cause of this again was a peril of the sea, a wave breaking over the ship acting on goods insufficiently packed and insecurely stowed.

I have considered whether this ship was unseaworthy on starting on her voyage. Bad stowage, which endangers the safety of the ship and cannot readily be cured on the voyage is unseaworthiness: (see *Kopitoff* v. *Wilson*, 3 Asp. Mar. Law Cas. 163; 34 L. T. Rep. 677; 1 Q. B. Div. 377; and *Steel* v. *State Line*, 3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. 333; 3 App. Cas. 72). It is otherwise, if the defect can be readily remedied on the voyage: (*Hedley* v. *Pinkney Steamship Company*, 7 Asp. Mar. Law Cas. 135, 483; 36 L. T. Rep. 71; (1894) A. C. 222). In this case the vessel had on her hatch when she went out into rough weather two tons of cargo, very dangerous if so knocked about that its casing admitted water to the sodium. There was room in the forehold for this cargo, but it would be a difficult and dangerous proceeding in the rough weather in which the ship started to get the twenty cases, each weighing 2cwt., out of their packing of ropes and tarpaulins and stow them in the forehold, without getting them broken and wet. Wet on a broken case did all the mischief. I find

therefore, that the *Hardy* was unseaworthy at starting on her voyage, and that the unseaworthiness caused the loss.

The conclusions at which Scrutton, J. arrived are set out in the headnote of this report.

The defendants appealed.

The arguments are sufficiently stated in the judgments.

Dawson Miller, K.C., and *MacKinnon* for the defendants.

Leck, K.C. and *Raeburn* for the plaintiffs.

Nov. 13.—Vaughan Williams, L.J.—I think that the decision of Scrutton, J. in this case was wrong, and I think, therefore, this appeal succeeds. We have heard a great deal of argument in reference to the warranty of seaworthiness and as to whether it continues notwithstanding that the case is one which falls within sect. 502 of the Merchant Shipping Act 1894. I think that the decision of this court in *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (*sup.*) is really conclusive on this point.

In my opinion, looking at the evidence, it is perfectly plain that the fire in this case did occur without any actual fault or privity of the owner. In my opinion, there was no evidence of any fault or privity on his part. That being so, a question might be raised as to the construction of the 502nd section, as to the onus of proving that it was "without his actual fault or privity," having regard to the words in which the section is expressed, "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases," and then the first case is, "Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." In my judgment the onus is not upon the owner to prove the negative: that he has not been guilty of any fault of privity: it is not on the shipowner to prove the negative, but on those who seek to sue the shipowner to prove the affirmative. I have now gone only the one step; that the loss happened, in my opinion, without any proof of his actual fault or privity. Then, again, I am of opinion that the goods on board the ship were "lost or damaged by reason of fire on board the ship" within the meaning of those words in that section. I do not believe that one need trouble oneself with whether the cause is the last cause, the proximate cause, or what step in the causation it is; it is sufficient if you can say truly and reasonably that the loss was a loss by reason of the fire.

The headnote to the case I have mentioned states: "A bill of lading contained a clause providing that the shipowner was not responsible for any loss of or damage to the goods received thereunder for carriage occasioned by (*inter alia*) fire or unseaworthiness, provided all reasonable means had been taken to provide against unseaworthiness. Held, by Bray, J. and by the Court of Appeal, that a shipowner is not deprived of the protection of sect. 502 merely by reason of the fact that the fire is caused by the unseaworthiness of the ship." I stop there for a moment. Of course, we act upon that, and I do not think Mr. Leck has in any way invited us not to do so. So, if you have the three steps which I have spoken of, the result is that you have a state of the law and a state of fact under which, as far as we have got, the owner is not liable to be sued. The fact that the ship was unseaworthy is, according to the previous decision of this court, not such a fact as excludes in any way the protection given under sect. 502. Then the note goes on: "But that the effect of a bill of lading containing the above clause is to preclude the shipowner from setting up the section as an answer to a claim for the loss of goods, shipped under the bill of lading, by reason of fire on board the ship caused by the unseaworthiness of the ship." I therefore only have to find this: *primâ facie* and until something to the contrary is proved, the shipowner has (and in this case the shipowner has) the protection of the 502nd section; but we have to see whether or not in this case the bill of lading, or the contract generally between the parties, was such that the parties of their own will on either side substituted a new contract which barred the operation of the statute; whether, in other words, there was an agreement between the parties that, in the case of this particular voyage and these particular goods (it was sodium, as a matter of fact), prevented or debarred the operation of the section protecting the owner, and instead of that excluded the section and made the liability dependent upon the bill of lading alone. In my opinion, there was no such contract which excluded the protection afforded by sect. 502 and substituted therefor the contractual liability of the bill of lading.

I do not think I can do better in this matter than read a portion of the judgment of Buckley, L.J., delivered in the case of the *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (*sup.*). He says on p. 240 of (1912) 1 K. B. and p. 85 of 12 Asp. Mar. Law Cas.: "The first question is as regards the true construction of sect. 502 of the Merchant Shipping Act 1894. Apart from statute, a shipowner was at common law under two liabilities—the one that of an insurer arising from the fact that he was a carrier, and therefore bound to produce the goods which had been entrusted to him for carriage, and the other under an implied warranty of seaworthiness. The statute in the case of fire, if I rightly understand it, relieves him from both the first and the second of those liabilities, if the fire happens without his actual fault or privity." I may say here what I have already said before, that in my opinion that does not make the negation of his fault or privity a matter of defence, but it makes it a matter which has to be proved by the plaintiffs. "It relieves him not only from the liability as an insurer, but also from the liability under an implied warranty of seaworthiness. To express the same thing in other words, the section is not to be read as if it said 'the owner of a seaworthy British sea-going ship'; it is 'the owner of any British sea-going ship,' be it seaworthy or unseaworthy, 'shall not be liable' for damage by fire unless it happens with his actual fault or privity. That is the construction which I place upon the statute. If there is no special contract, the defendants can rely on the statute construed as I have construed it. That answers the first question. But in that state of things, and the liability of

the shipowner being such as I have stated, the contract was made which is contained in this bill of lading. I think the true construction of the contract is this: I read it as if the shipowner had said, 'I know that I am under these two liabilities, the one as insurer, the other under an implied warranty of seaworthiness, and I further know that in respect of both those liabilities I have the benefit of sect. 502 of the Merchant Shipping Act, unless I contract myself out of the statute'; it is common ground it is competent for him to do so if he chooses to do so, and if he uses apt words." I have said before that I think it must be perfectly plain in the contract: it is not sufficient to show a contract which is capable of two possible interpretations. Before any benefit can be got by the plaintiffs here we must come to the conclusion that the interpretation asked for, excluding the statute, is the real and the true interpretation of the contract, not a possible interpretation of the contract. "That being the state of affairs, the bill of lading commences by saying that the shipowner is to deliver the goods 'in the like good order and condition.' If it stopped there he would be liable under both heads of liability, subject to the protection afforded by the statute. But it says further that he is to do that, 'subject to the clauses and conditions expressed in this bill of lading, which constitutes the contract of freight.' I have therefore to see whether the liability thus assumed with the protection that the statute has given him is varied in any way by the clauses and conditions of this special contract. There is one clause on which, in my opinion, the whole contest arises. It is a long clause commencing with the words, 'The shipowners and (or) charterers are not responsible,' ending with the words, 'unseaworthiness or by any other clause whatsoever.'"

I ought, I think, at this point to read that particular clause which is to be found on p. 231 of the report. It provides: "The shipowners and (or) charterers are not responsible for any loss, detention of or damage to the goods, or the consequences thereof, or expenses occasioned by any of the following causes—namely: . . . fire on board, in hulk, in craft, or on shore; explosions, heat, defects in hull, tackle, engines, boilers, machinery or their appurtenances, or accidents arising therefrom; perils of the seas . . . and all accidents of navigation . . .; nor for any act, neglect, or default of the pilot, master, crew, stevedores, engineers, or agents of the shipowners; . . . or by unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any other cause whatever."

Buckley, L.J. then proceeds: "I read that clause as divided into two parts; the first part is the whole of the clause with the exception of the last line and a half; the second part is the last line and a half. That second part is addressed to unseaworthiness. It is in these words: 'Shall not be responsible for damage to goods by unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against unseaworthiness.' It then concludes with the words, 'or by any other cause whatever.' By that portion of the clause it seems to me that the shipowner was contracting as to what was to be his liability under the head of implied warranty of seaworthiness, and his whole liability in respect of that is defined there. The earlier part of the clause is, in my opinion, to be read as if it said, 'As for unseaworthiness, I am going to deal with that presently. In this first part of the clause I am not going to deal with it at all. For the first part of this clause I am content to take it that my ship is to be a seaworthy ship.' I think that part of the clause expresses this: 'If my ship is seaworthy, my contract is that I shall not be liable for fire on board as insurer against fire, and that exemption from liability is to apply not only in the cases mentioned in sect. 502 of the statute, but in any case whatsoever.' Having said that, he had finished with his liability as insurer. Then he proceeds to deal with his liability under the implied warranty of seaworthiness, and the next words, I think, define all his responsibility in respect of that. He says, 'I will not be liable for unseaworthiness provided all reasonable means have been taken to provide against such unseaworthiness.' These last words are negative words, but I think they are pregnant words, and infer an affirmative. In that clause he has in effect said, 'I will be liable for unseaworthiness if I have not taken all reasonable means to provide against unseaworthiness.'"

If the words in the present bill of lading had been words the same as, or to the same effect as, the words which I have been reading from this bill of lading that Buckley, L J. was dealing with, then the judgment of Scrutton, J. would have been right; but when you come to look at the clause which is relied upon here, you will find that the words are very different. The words begin with the statement that the goods are to be delivered (the word it begins with is "shipped") "subject to the exceptions and conditions herein mentioned"; and then it sets forth these exceptions: first, act of God, and other matters which are mentioned but which include, and that is the important part of it, fire on board, "or from any act, neglect or default whatsoever of the pilot, master, officers, engineers, crew, stevedores, servants or agents of the owners and (or) charterers, ashore or afloat, in the management, loading, stowing, discharging or navigation of the ship or other craft, or otherwise, the owners and (or) charterers being in no way liable for any consequences of the causes before mentioned." Then the only other clause it is necessary to read is the 11th clause in this bill of lading. It runs: "It is agreed that the maintenance by the shipowners of the vessel's class," then "(or in the alternative failing a class the exercise by the shipowners and (or) charterers or their agents of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage."

The sole question that we really have to determine in this case is whether, having regard to those words which I have read from the bill of lading, they do contain a new contract between the parties excluding the benefit of the protection under sect. 502. In my opinion there is nothing in the words which I have read from that bill of lading which in any way constitutes an agreement between the parties that the benefit of sect. 502 shall be excluded. On the contrary, I think that, if you read the words carefully, it is obvious that

the parties, so far from having, by any words that they have used, impliedly got rid of or revoked, as between themselves, the protection of sect. 502, if the words are read carefully, they really assume that that protection will continue.

Under those circumtances I do not think that I need prolong my judgment by criticising the judgment of Scrutton, J. Some difficulty has been suggested that Scrutton, J. at one part of his judgment treats clause 11 as too ambiguous to safely draw any inference from, and at another part of his judgment treats the clause as really being the effective clause on which the conclusion of the learned judge is arrived at. As I have already said in the argument, I think the learned judge only meant that it was too ambiguous to derive from it a particular reference as to the meaning of the words which was set up in favour of the defendants; but I do not think he meant that the clause generally was too ambiguous to be construed; so I do not propose to say anything more about that.

Shortly, my judgment simply is this: That if you look at the bill of lading, *primâ facie* among the conditions which are included is the statutory protection of the shipowner. If it is not expressly excluded, and is not excluded by words of exclusion either expressed or implied, it follows that you start with the proposition that all the conditions that are included in this bill of lading are included in company with one protection, which is the protection of the owner arising under sect. 502; and really I think it cannot be denied that that proposition is true. Then what have we to do? We have to look and see if we can find anything in the words of this bill of lading which excludes the operation of that protection section. I find nothing of the sort myself. It is obvious, without going into details, that the bill of lading in this case is wholly different from the bill of lading upon which the decision was given in the *Virginia Carolina Chemical Company's* case (*sup.*). It is said, as I understand, that you ought to infer an exclusion from the operation of that section because there is mentioned in the bill of lading that loss by fire is not to be charged against the shipowner in certain cases; and then it is said: Does not that clause assume that the protection is gone and that the liability to be charged under certain conditions is substituted for it. I do not think that that contention is right at all. It is always possible when you are dealing with the protection given under the 502nd section that it may be proved that there is some privity or some fault of the shipowner, and in my view, ample meaning is given to the words with reference to the conditions under which the shipowner in this particular bill of lading is to be held liable, if you treat the words as intended to apply to a case where through actual fault or privity, the owner has lost the benefit of the protection; and he goes on: These words mean that even in that case I am not to be liable except on the grounds which are mentioned. I think that this appeal ought to be allowed, and that the judgment in the court below ought to be reversed.

I have already expressed my view that there is no evidence whatsoever justifying the conclusion either that the owner himself was actually in fault or that he was privy to an act which he ought to have known to be a fault, and, standing by, allowed it. Mr. Leck read us some correspondence, and the suggestion is that upon that correspondence it ought to have occurred to his mind: this is a thing which obviously requires careful and proper packing; and therefore the man who got the information which appeared by those letters ought to have taken some special steps. I do not know what special steps he was to take. In my opinion, he was guilty of no fault in the matter, and therefore that is no reason for coming to any decision but that the appeal ought to be allowed.

BUCKLEY, L.J.—The plaintiffs' goods were lost by reason of fire. This is not a matter which I am going to elaborate. It is not really the point which has been argued before us. The learned judge found that they were lost by reason of fire, and I think he is right. I content myself with saying that. That being so, the question is whether the shipowner is protected under sect. 502 of the Merchant Shipping Act, whether that section of the Act applies; and the further question has been raised by Mr. Leck that if he is wrong in the contention which he puts forward, that it does not apply, and if the section does apply, then he says still the learned judge was right because he wrongfully held that the fire occurred without the actual fault or privity. Mr. Leck says that it occurred with the fault or privity. Those are the only two questions that have to be decided. The first of them, of course, is the far more important. As between shipowner and owner of cargo there existed, apart from the statute, two liabilities by the former towards the latter; the one a liability as insurer arising from the fact that the shipowner owed the duty of reproducing the goods which had been intrusted to him for carriage; and the other arising from the implied warranty of seaworthiness. Sect. 502 of the Merchant Shipping Act qualifies those liabilities. The effect of the section was that neither as insurer nor under the implied warranty of seaworthiness was there liability for loss by fire happening without the owner's actual fault or privity. This statutory qualification of the shipowner's liability was a statutory provision in favour of the shipowner and adverse to the cargo owner. It deprived the cargo owner of remedy in the particular case. The statute, however, can be excluded by express contract.

The question here to be determined is whether the bill of lading is such as that, by express contract, there has been restored to the cargo owner that which otherwise the statute has taken away. I have therefore to look at the contract and see what stipulations there are relevant to this matter which are in favour of the cargo owner, and whether they have the effect of excluding the statute. The contract is for carriage of goods and delivery subject to the exceptions and conditions herein mentioned. These words in themselves tell me nothing. I must look at the exceptions and conditions which are introduced by reference. I have to see whether those exceptions and conditions include, expressly or by implication, a contract or condition that the statute shall not apply. The articles which are relied upon for this purpose are art. 1, or rather the first half of art. 1, which is the only relevant portion, and art. 11. The first sentence of art. 1 contains an exception of risks; that is to say, it is an exception in favour

of the shipowner. There is nothing in it at all in favour of the cargo owner. I am not sure that I might not leave this article with that observation, for it is only stipulations in favour of the cargo owner which can assist the respondents. But I will go on to say this: Art. 1 being as it is an article in favour of the shipowner might mean either one or two things, it might mean he shall not be liable for loss by fire in any circumstances; or it might mean he shall not be liable for loss by fire except in the case of unseaworthiness. If the former be the true meaning, the statute is not wanted, and the plaintiffs fail, for contractually there is excluded loss by fire under whatsoever circumstances that loss shall occur. If, as is in my judgment is the true view, the latter is the true meaning, that he is not to be liable except in the case of unseaworthiness, then it remains that the liability is such as arises in the case of unseaworthiness. The liability which arises in that case is the common law liability as it existed before the statute, but subject to the qualification imposed by the statute; and therefore the liability is only that which remains after you have applied sect. 502 of the Act. So much for art. 1.

The other article relied upon is art. 11. It is said that that contains by implication some stipulation in favour of the cargo owner. First as to the true construction of art. 11—upon that I think the respondents are right. They contend that it is an article controlling the warranty of seaworthiness or dealing with the warranty of seaworthiness so far as relates to the upkeep of the ship, and nothing more. I agree to that construction of the article. It is an article dealing with liability in respect of any duty, warranty, or obligation arising from duty in respect of the upkeep of the ship. But now, first, it seems to me that that article is wholly an affirmative and in no sense a negative article. It does not deal with any matter by way of exclusion. The frame of the article is such that the existing liability remains, but is contractually incapable of being enforced. I may express what I mean in this form: if an action were brought, the defence arising from that clause would not be "I am not liable"; the defence would be a defence by way of confession and avoidance; "I am liable but for the fact that you have contracted not to sue me." It will be found that those observations are relevant in this sense: that if the article were an article of exclusion something might be implied from that as to what is included; if it is not an article by way of exclusion nothing arises therefrom. Further, the article is silent as to any matters relating to seaworthiness arising not from the upkeep of the ship (if the construction which I adopt is the true one); to seaworthiness arising from other considerations. The implication which arises from the fact of silence as regards the relevant unseaworthiness in this case is not, I think, that there is any express stipulation with regard to that state of things, but simply that passing that matter *sub silentio* all rights of the cargo owner in that respect are left unaffected. What were his rights in that respect? They were the rights which arise from the warranty of seaworthiness controlled, as it was, by the exception enacted by sect. 502 of the Act. In none of this can I find any agreement to exclude the statute. I must read the contract in the first instance as if the exception contained in the statute were written into it. I must then find whether there is anything in the contract which says that provision of the statute shall not apply. What I do find is that there is nothing said about it, and in my judgment it results that the liability of the shipowner in this respect is unaffected, and the statute is left to take its effect.

The decision of this court in *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (*sup.*) is in my opinion wholly different in this respect. The parties there had expressly contracted as regards unseaworthiness generally in that, by the latter part of the article relating to exceptions, they had contracted by negative words that there should be no liability for unseaworthiness provided that all reasonable means had been taken to provide against unseaworthiness. Words of exclusion necessarily infer that the subject from which the exception is made is included within the document which contains the exception. A contract can only exclude that which, in the absence of exclusion, would be included in it. From those negative words, therefore, it followed by implication that there was an affirmative contract that the shipowner should be liable for unseaworthiness if reasonable means had not been taken. That was an express contract as to unseaworthiness, and dealt with every cause of unseaworthiness. From that, in the judgment of this court, it resulted that the particular cause of unseaworthiness which resulted in fire, which was excepted by sect. 502, was dealt with by the general words dealing with unseaworthiness; in other words, there was a provision which showed that that was the whole of their contract, to the exclusion therefore of that which the statute had provided. Under those circumstances, it necessarily followed that the statute was excluded. There are no such words in this case. Art. 11, as I have pointed out, is not a clause of exclusion at all; it therefore raises no implication of that kind. Moreover, the respondents can say no more than that unseaworthiness not connected with the upkeep of the ship is a matter which this contract leaves unmentioned, with the result that I think it leaves it unaffected; that is to say, there is no liability for it if it be such as the statute has excepted. From this it results that on this ground the appellants are right.

The respondents, however, raise a contention which is singular and, according to my experience, unique. They say: Take it that we are wrong that sect. 502 is excluded, and take it that it is included, then we say that the conditions of sect. 502 are not satisfied, for this fire did not occur without the actual fault or privity of the owner. The learned judge has held that it did occur without the actual fault or privity of the owner. The respondents say in that the judge was wrong, and it results that the order of the judge was right. That, I think, is a unique situation. It is not a matter of surprise that it is not a ground either of a notice of appeal or a notice of cross-contention; it is a matter that is certainly open to the respondents. They say: If we are defeated on the first ground we are going to support the judge's order upon the footing

that he was wrong upon another ground. The learned judge having held that the fire was without the fault or privity of the owner, the respondents now contend it was; they say it was with the fault or privity of the owner, from which, if it were so, it would result that sect. 502 does not apply, and the shipowner would be liable. This contention of the respondents is rested upon some correspondence, but I confess that I have failed to understand how actual fault or privity of the owner is in any way thereby shown. What appears is that the shipowner contracted to ship the goods on deck at owners' risk with a packing of a definite kind, and that, as the respondents say, the shipowners required for a different commodity much more stringent requirements as to packing than they required for this commodity. I fail to see how this shows either fault or privity. There is nothing to show that for the commodity handled they ought to have made the more stringent requirements which they did require for the other commodity, or that they had any knowledge that the wooden cases in which the goods were packed contained metal cases of thickness insufficient to withstand the blow in case the goods were struck, as they were, by a sea. I see no ground for attacking the learned judge's finding in this respect. Upon the first ground which I stated it seems to me that the appeal succeeds, and that the judgment which the plaintiffs have obtained for the value of their goods ought to be discharged.

Kennedy, L.J.—This is a case of considerable importance, the amount at stake is large, and it involves, I think, questions important to the commercial community which are not commonly raised. The question which we have to decide is whether or not Scrutton, J. was right in holding upon the facts and the documents in this case that the defendants were liable to the plaintiffs for the loss of their goods.

The fact is that the goods in question were lost either by sinking to the bottom with a ship whose sides were burnt out or blown out, or were actually destroyed by fire while still carried on board the ship itself. I do not think it can be successfully questioned, and it was only faintly questioned here, that the loss of these goods was correctly found by the learned judge to have been a loss occasioned by reason of fire. At the same time, of course, it is important to bear in mind that to constitute the defence under the statute upon which reliance is placed it is essential, in my humble judgment, for the party who is relying upon sect. 502 not merely to show that the goods for the loss of which he is being sued were goods that were lost by reason of fire, but that he should also show, and show affirmatively, that they were lost by a particular kind of fire, a fire as to which the actual words, as they appear in the statute itself, are: "Happening without his actual fault or privity"—that it is a loss or damage happening without his actual fault or privity.

I do not want to enlarge upon it, but I think it is important that one should be clear upon that point, although it has been most lucidly stated already in the judgment of Lord Sumner, then Hamilton, L.J. in *Asiatic Petroleum Company* v. *Lennard's Carrying Company* (12 Asp. Mar. Law Cas. 269; 109 L. T. Rep. 433) where he states that he thinks the whole onus lies on the shipowner of proving as a defence loss by fire of which he can predicate that it happened without his actual fault or privity. I agree that as a mere matter of grammar I think it is clear, because he points out that any other view would confuse two different statements—namely, a fire without his actual fault and a fire except when caused by his actual action. Further, I think, as we have dealt so much with this section, it is important to bear in mind, upon the question of the owner being able to prove that it happened without his actual fault, not merely that the loss happened by reason of fire, but a fire which happened without his actual fault, that, as pointed out also by Lord Sumner, it is perfectly possible that the owner would be liable, although it was also true to say of the fire that it happened through the fault of a servant. The fault of the servant, in other words, does not exclude the fault or privity of the owner. In my judgment, in this case Scrutton, J. came to a right conclusion in holding that there had been sufficient proof by the owner in this case that it was a loss which had happened without his actual fault or privity.

To my mind, taking as I do the finding of Scrutton, J. as being correct when he says, "I think proper drums properly secured could have been carried safely on deck," then it is difficult to see how it could be said that this fire happened with the fault or privity of the owner when he had himself given directions, which he had a right to presume would be obeyed by the shipper, and therefore a right to assume that these goods would be secured, as they were not, in proper iron drums as well as being enclosed also, in those drums, within strong wooden cases. I should draw on the whole the same inference that the learned judge did, although he said that he had some doubt as to his finding in the absence of special instructions to the stevedores shipping this, as it is admitted, unusual cargo in character and carriage.

Assuming, therefore, that it was a case within the 502nd section in which the owner can say, "I have a right to protection because the cause of the loss has been a fire happening without my fault or privity," then we have to consider logically what is the position which results from that. It is this: That if the judgment of this court in the case of *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (*sup.*) is right in its answer to the first question, it will be no sort of argument in the mouth of the owner of the goods to say, "Yes, but though these goods were lost by fire without your privity and without your fault, they were in fact goods which were destroyed by a fire which resulted from the unseaworthiness of your ship; your ship was unseaworthy, as that term is now habitually used—namely, to include something which may not at all affect the actual safety of the vessel as a carrying vessel, but which will affect the safety during the voyage of any of the goods entrusted to the shipowner for carriage on that voyage in that ship." Our answer to the question, which we all recognised, as Bray, J. had done, as a difficult question, as to whether or not in the statute, when there is the protection given to the shipowner in the case of fire without his fault or privity, you ought or ought not in effect to say:

It may be put in one of two ways—either the statute is passed subject to the implication of law which gives no protection to a shipowner as against a shipper whose goods have been damaged on the voyage if that damage arises from a breach of the implied warranty of unseaworthiness; or, to put it in the other way, that when the ship is described there as a British sea-going ship you ought also to read into it: a British sea-going seaworthy ship. We held in the case to which I have referred, while acknowledging the difficulty of the question, and came to a clear decision, that that view was a wrong view; that even if the vessel was in fact unseaworthy, and even if the fire arose from the unseaworthiness, nevertheless the statute was express, and that, for reasons which we then gave (and which I still think perfectly correct reasons, but which, at any rate, I could not if I wished question now), it is not permitted to alter the statute by reading in a further qualification of "ship"; and that, what may be called general rule of construction, is strengthened in the particular case, because when the law-giver wished to make a qualification he made it, because he limits it, the loss or damage, to one happening without his actual fault or his privity; and he could have limited it to a seaworthy ship had he been so minded.

That being so, the shipowner in this case would be protected, but it is said there is in this case a form of contract by which he has excluded himself from relying on that which is the common right of every citizen, of relying upon the statute which would otherwise protect him; and the main issue is whether or not, when we come to that contract, we have a case in which the second branch of the decision of this court in the *Virginia* case ought to be held to apply, with the result that, according to the special contract between shipowner and shipper contained in the bill of lading, the shipowner has excluded himself from the defence which he would otherwise have. Upon that I do not wish, after what the president of the court has said, to say much. I may be wrong in thinking that a difficulty arises in following, as one is anxious to do, the reasoning of the learned judge upon this point in the way in which he has dealt with the case; but I confess, as it seems to me, I have a difficulty in seeing how a part of this bill of lading contract can be treated as too ambiguous to have the meaning assigned to it which the defendants require. I do not want, after what has been very carefully said, to deal at length with the terms of this document, but I wish to call attention to this, that the first exception or condition, whichever you like to call it, containing the words "fire on board," is absolutely general. It is not "fire on board caused by default of my servants, the master, pilot, officers, engineers, crew, stevedores, or servants or agents"; it is fire in the absolute—fire absolutely, whether caused by the owner or caused by his servants. It is fire on board in hulk, or craft, or on shore, stranding, and all accidents, and so on; then it proceeds to enumerate a number of other possible misfortunes to the ship, and then it proceeds afterwards to deal with "or from any act, neglect or default whatsoever of the pilot, master, servants, or agents." *Prima facie*, therefore, as you read that, if it could stand alone and without any implication, there is a contract which would free in every case the shipowner from liability for loss caused by fire; however occasioned, fire is to be the cause of damage for which the shipowner is not to be responsible. But then it is said, and truly said, that if you leave the statute out of sight you do have an inference, an implication, that if the mischief is caused by any one of these matters so specially excepted, owing to the ship being unseaworthy, which includes, of course, unfitness to carry the goods existing at the commencement of the voyage, if you have such a clause excluding fire you have to read also "Subject to my remaining liable if that fire is caused by unseaworthiness," as an implication. But it is also an implication that, with regard to fire as distinguished from any of the other causes (it is also a fact, I should say, rather than an implication) the law of the country has said that in the case of fire caused only in a particular way, in so far as it is without the privity of the owner or without the owner's fault, it is a thing for which the owner shall not be responsible; and unless you can get that, which we did find in the *Virginia* case, from which you could imply a surrender of that statutory liability, it seems to me clear that you cannot have the case for which the present respondents contend. Now can I find it? I certainly cannot find it in the first clause, which goes to give a freedom from liability in all cases for damage from fire. Where can I find it elsewhere? It is sought, if at all, in the 11th clause, and that, as I say, occasioned some little difficulty to me in following the judgment of the court below on this important point.

That clause, as Buckley, L J. has pointed out, if it has any meaning at all that is intelligible, if it is not so ambiguous, in the words of the learned judge, that neither lawyer nor business men can be sure what its meaning is, is a clause that relates solely to the question of upkeep, and it is merely a clause which affirmatively says if the vessel is kept in her class, or if in the absence of being kept in her class (as she has in fact been) there has been reasonable care and diligence in connection with the upkeep, it shall be considered the fulfilment of every duty, warranty, or obligation. If it has any meaning at all it can only be read as referring to her upkeep as a ship; and that is irrelevant in the present case; there is no question as to her upkeep as a ship, the question is as to her fitness by reason of her having stowed on board of her at the time when she commenced her voyage something which made her an unsafe vessel for the continuance of that voyage both to herself as a vessel and in regard to the cargo which she carried. It therefore seems to me to come back to this, that whether it is intelligible or unintelligible, you cannot infer from it what we are able to infer from the terms of the latter part of the exceptions clause, worded as that clause was, in the earlier case, which we held to constitute a contract which did exclude the operation of the statute, which did make the shipowner give up the special protection of that statute. I can find nothing here, and in clause 1 I find the assertion of a protection larger even than the statute has given them. And though seaworthiness may be, and is no doubt, a general implication, what in effect the true construction of this bill of lading, as it seems to me, leaves us with is a clause saying:

I am not to be liable for fire, true subject to a common law liability, but also subject to that which we are left face to face with (in the absence of some special clause which I cannot find, denoting an intention to abandon statutory protection), a protection to the owner under statute which I think he is entitled to obtain in this action.

Appeal allowed.

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

Solicitors for the respondents, *Ballantyne, Clifford*, and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, July 3, 1913.

(Before PICKFORD, J.)

KACIANOFF AND CO. *v.* CHINA TRADERS' INSURANCE COMPANY LIMITED. (a)

Marine insurance — Total loss — War risk — Cargo not sent forward for fear of capture — Whether constructive total loss.

In Dec. 1903 *the plaintiffs took out a marine policy with the defendants to insure a cargo against war risk only at and from San Francisco to Vladivostok* viâ *Nagasaki.*

In Feb. 1904, *when some of the cargo had been loaded, war had broken out between Russia and Japan, and the Japanese fleet was blockading Vladivostok, and stopping and capturing vessels. Under these circumstances the underwriters telegraphed to the plaintiffs that if the cargo was sent to Vladivostok* viâ *Nagasaki they would take up the position that the plaintiffs had deliberately caused the loss. The plaintiffs then gave notice of abandonment to the underwriters, which the latter refused to accept, and the plaintiffs discharged the cargo and sold it in order to minimise the loss to the underwriters. In an action by the plaintiffs to recover on the policy:*

Held, that in the circumstances anticipation of loss by capture did not constitute a constructive total loss; that at the time of the abandonment there was no constructive total loss; that partial loss was insufficient, and the plaintiffs were not entitled to recover. See The Knight of St. Michael (*infra*) *and* Butler *v.* Wildman (*infra*).

COMMERCIAL COURT.

Action tried by Pickford, J.

The plaintiffs' claim was for a loss under a policy of marine insurance, dated the 16th Dec. 1903, on cargo at and from San Francisco to Vladivostok.

The facts were as follows: The plaintiffs were merchants, carrying on a general import business at various places in Russia and Siberia. They took out a policy of marine insurance with the defendants to cover the shipment of a cargo at and from San Francisco to Vladivostok *viâ* Nagasaki. The policy was expressed to be against war risk only, being in terms against the risk excepted by the clause "warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." The steamer was to have left San Francisco on the 26th Feb. 1904, but at the time she was about to sail, and when some of the cargo was on board, it was known that the Japanese fleet was in the Pacific and was stopping and capturing vessels. Under these circumstances the underwriters telegraphed to the plaintiffs that if the cargo was sent to Vladivostok *viâ* Nagasaki they would take up the position that the plaintiffs had deliberately caused the loss. The plaintiffs' representatives at San Francisco proposed that the cargo should be discharged at San Francisco and sold elsewhere, and subsequently notice of abandonment was given to the underwriters, who refused to accept, but agreed that the plaintiffs should be placed in the same position as if a writ had been issued and an action commenced immediately after the refusal of the notice of abandonment. The cargo was discharged at San Francisco for sale and delivery at Shanghai. The plaintiffs claimed the value of the cargo, giving credit for the salvage realised by the sale at Shanghai.

Mackinnon (*Maurice Hill*, K.C. with him) for the plaintiffs.—There was a constructive loss by perils insured against. The cargo had been put on board and a bill of lading issued. This was equivalent to starting on the insured voyage, and there was a certainty of capture if the cargo had gone forward. There was thus an actual existing peril within the policy, and the case fell within the principle of

The Knight of St. Michael, 78 L. T. Rep. 90; (1898) P. 30; 8 Asp. Mar. Law Cas. 360.

In that case a cargo of coals was in danger of spontaneous combustion, and, although no part of it was ever actually on fire, it was held that, inasmuch as there was an actual existing state of peril by fire and not merely of fear of fire, and that the loss, although not a loss by fire, was a loss *ejusdem generis* and covered by the general words "all other perils, losses, and misfortunes," the defendants were therefore liable to make good to the plaintiffs the loss of freight as a partial loss under the policies. This view was, in the opinion of Gorell Barnes, J., supported by the case of (1820) *Butler* v. *Wildman* (3 B. & Ald. 398). In that case the master of a Spanish vessel, in order to prevent a quantity of dollars from falling into the hands of an enemy by whom he was about to be attacked, threw the same into the sea and was immediately afterwards captured. It was held that it was a loss by jettison or by enemies, and if not strictly a loss by either peril it was a loss within the general words.

Leslie Scott, K.C. and *Leck*, K.C. for the defendants.—There was no loss by a peril insured against. The insurance was in respect of a loss against capture, and there was no such loss. In *The Knight of St. Michael* (*sup.*) Gorell Barnes, J. drew a distinction between the actual existence of fire and the mere fear of fire. What happened in the present case was due to the voluntary act of the insured as the result of one of two fears—fear of capture or fear that if the cargo was captured the underwriters would repudiate liability. In *The Knight of St. Michael* the peril insured against had actually commenced to operate. In *Butler* v. *Wildman*

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

(*sup.*) the loss was covered by the general words of the policy. They also referred to

McCarthy v. *Abel*, 5 East, 388;
Hadkinson v. Robinson, 3 Bos. & P. 388.

Mackinnon in reply.—In *Jackson* v. *Union Marine Insurance Company* (1874, L. Rep. 10 C. P. 125; 2 Asp. Mar. Law Cas. 435) the point that this kind of loss was a loss due to the act of the assured was not taken. This case can be distinguished from *Hadkinson* v. *Robinson* (*sup.*), which conflicts with *The Knight of St. Michael* (*sup.*) and *Butler* v. *Wildman* (*sup.*).

Pickford, J. (after stating the facts) said:—The point is whether there was a loss by perils insured against. That depends upon whether there was a constructive total loss at the time of the notice of abandonment. At that time the position was this: The war between Russia and Japan had broken out, the Japanese fleet was blockading Vladivostok, and soon afterwards the Japanese captured the *Korea* and the *Coptic*, the vessels carrying the plaintiffs' previous shipments. I do not know the precise distance between San Francisco and Vladivostok, but it is very considerable. It was anticipated that if this cargo was sent forward it would almost certainly be captured by the Japanese. Is it possible to say that in these circumstances that cargo lying in the ship at San Francisco was constructively totally lost by capture, any captor being many hundreds of miles away at the time? To hold that the cargo was constructively totally lost would go much beyond any of the authorities to which I have been referred, and I think it is not possible to say that the cargo was lost by capture. The nearest case to this is *The Knight of St. Michael* (*sup.*), as to which it is unnecessary to say whether it overrules *Hadkinson* v. *Robinson* (*sup.*), but it is different in one or two respects. It differs by the use of the general words, and further, although fire had not actually broken out, heating, the preliminary stage of fire, had already begun. If in this case the position had been similar to that in *Butler* v. *Wildman* (*sup.*), where a ship which jettisoned part of her cargo was actually being pursued at the time by a hostile vessel which eventually captured her, I do not say whether that would be a constructive total loss, but if that was the position the case might come within the principle of *The Knight of St. Michael* (*sup.*). In that case the cause which began to operate directly upon the subject of the insurance, the heating of coal, was actually the same cause which must produce the peril insured against. The present case does not come anywhere near that. It is impossible to say that this cargo was in fact constructively totally lost because if it had been sent forward there was every reason to think that it would be lost by the perils insured against. There was not a constructive total loss at the time of abandonment, and partial loss will not do. There must be judgment for the defendants.

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

Solicitors for defendants, *Waltons and Co.*

PROBATE DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, May 8, 1913.

(Before Sir S. T. Evans, President, and Elder Brethren.)

The Tempus. (*a*)

Collision — Crossing vessels—Duty to give way—Duty to keep course—Look-out

Where in an action for damage by collision the facts showed that two vessels were approaching each other so as to involve risk of collision, the duty upon one being to keep out of the way and upon the other to keep course and speed, the President (Sir Samuel Evans) found as a fact that the officer in charge of the keep course and speed vessel was closely watching the other vessel, up to the last expecting her to carry out her obligation to keep out of the way, and said that in such circumstances the court should not be too ready to cast blame upon a vessel placed in a difficulty by, and left in doubt as to the intentions of, another vessel whose duty it is to keep out of the way.

The plaintiffs were the owners of cargo on the steamship *Breiz Huel*; the defendants were the owners of the steamship *Tempus*.

The case made by the plaintiffs was that shortly before 0.50 a.m. on the 9th March 1913 the *Breiz Huel*, a steamship of 4845 tons gross, 3074 tons net register, 390ft. in length, manned by a crew of thirty-nine hands all told, was, between Hartland Point and Trevose Head, bound from Barry to Algiers with a cargo of coal. The weather was fine and clear, the wind westerly, a light breeze, and the tide ebb. The *Briez Huel* was proceeding on a course of S.W. ¼ W. magnetic, 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 those circumstances those on the *Breiz Huel* saw about two miles off and about a point on the starboard bow the masthead lights, and then with the aid of glasses the red light of the *Tempus*. Those on the *Breiz Huel* were unable to alter their course to starboard on account of a sailing ship which was showing her green light a little on the starboard bow of the *Breiz Huel*, and as the course of the *Breiz Huel* had been altered to port to pass astern of the sailing vessel almost immediately before the lights of the *Tempus* were sighted, those in charge of the *Breiz Huel* again altered her course about one and a half points to port, as there was plenty of time and room for the *Breiz Huel* to pass ahead well clear of the *Tempus*, provided the *Tempus* kept her course and speed. As the vessels approached one another the lights of the *Tempus* broadened on the starboard bow of the *Breiz Huel*, and her masthead lights came almost into line, but the *Tempus*, instead of keeping her course, as she could and ought to have done, altered her course to starboard and failed to blow any port-helm signal, and although the helm of the *Breiz Huel* was put hard-a-starboard when the vessel was about two or three ship lengths distant, and as soon as the *Tempus* was seen to be swinging rapidly to starboard

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

towards the *Breiz Huel*, causing great risk of collision, the *Tempus* came on at high speed and with her stem and port bow struck the starboard side of the *Breiz Huel* in the way of No. 2 hatch, doing such damage to the *Breiz Huel* as to cause her to founder, and her cargo was lost.

The plaintiffs charged the defendants with bad look-out, with not keeping their course and speed with altering their course to starboard, and with omitting to indicate their course by whistle signal.

The case made by the defendants was that shortly before 0.30 a.m. on the 9th March 1913 the *Tempus*, a steel screw steamship of 2980 tons gross and 1898 tons net register, manned by a crew of twenty-five hands all told, was, whilst on a voyage from Barcelona to Cardiff, in water ballast in the British Channel between Trevose Head and Hartland Point. The weather was fine and clear, the wind about W.N.W., a moderate to fresh breeze, and the tide flood of the force of about two knots. The *Tempus*, steering N.E. by E. ½ E. magnetic, was making about ten 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 of her.

In those circumstances those on board the *Tempus* sighted about seven miles off and bearing slightly on the port bow the two white masthead lights of the *Briez Huel*. After a time the green light of the *Briez Huel* came into view on the port bow of the *Tempus*, which steamship kept her course and speed until the *Briez Huel*, which could and ought to have ported and passed port-side to portside, and which gave no signal by whistle indicating her intended manœuvre appeared to be opening her masthead lights as if acting under starboard helm, causing imminent danger of collision, when the helm of the *Tempus* was ported and immediately afterwards put hard aport and her engines were put full speed astern. Notwithstanding these manœuvres, which were taken to try and ease the blow of collision, the *Briez Huel*, swinging under a hard-a-starboard helm, came on at great speed, and with her starboard side between the foremast and the bridge struck the stem of the *Tempus*, causing her damage.

Those on the *Tempus* charged those on the *Briez Huel* with bad look-out, neglecting to keep clear of the *Tempus*, neglecting to port, with improperly starboarding, with crossing ahead, with neglecting to indicate her course by whistle signals, and with failing to ease, stop, or reverse.

The collision regulations material to the issues raised were:

21. When 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.

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.

Bateson, K.C. and *Bucknill* for the plaintiffs.

Laing, K.C. and *Stephens* for the defendants.

The PRESIDENT.—The plaintiffs in this action are the owners of a cargo which was carried in the vessel *Breiz Huel*. The *Breiz Huel* was sunk in a collision between that vessel and the defendants' vessel, the *Tempus*, and thereby the cargo of the plaintiffs became totally lost.

The question whether the plaintiffs can recover depends upon the question whether the defendants' vessel was either wholly or partially to blame for the collision. It is admitted in this case that these steam vessels were on crossing courses when they first sighted each other. The course of the *Breiz Huel* is pleaded and accepted, I think, for this purpose, as S.W. ¼ W. magnetic, and the course of the *Tempus* as N.E. by E. ½ E. magnetic, constituting a difference of about one and a half points. The speeds were approximately the same. They are pleaded exactly the same. In evidence it was said that the *Tempus* had a speed of about nine, and not quite ten knots, as pleaded. It is admitted that the speed of the *Breiz Huel* was ten knots. The facts show that there was a risk of collision. The *Breiz Huel* was a vessel which had the *Tempus* on her own starboard side, and the obligation therefore rested on the *Breiz Huel* to keep out of the way of the *Tempus*. The respective duties of the two vessels, therefore, were, first of all, of the *Breiz Huel* to keep out of the way of the *Tempus*, and, secondly, of the *Tempus* to keep her course and speed. As a corollary, under rule 22 the *Breiz Huel* should in the circumstances of the case have avoided crossing ahead of the *Tempus*. Further, under rule 23, the *Breiz Huel* should, on approaching the *Tempus*, if necessary, have slackened her speed or stopped or reversed.

On the other hand, the *Tempus*, whose primary duty it was to keep her course and speed, was bound to act in accordance with arts. 21, 27, 28, and 29, and with the requirements of good navigation. Now, counsel for the plaintiffs argued that his ship was right in navigating as she did, and that the *Tempus*, the defendant vessel, defeated the operations of the *Breiz Huel* by porting early and continuing to port, and by, at the last, hard-a porting. In the pleadings the case made for the *Breiz Huel* in justification for trying to pass ahead of the *Tempus*, out of whose way

she ought to have kept, is that "those in charge of the *Breiz Huel* were unable to alter their course to starboard on account of a sailing vessel which was showing her green light a little on the starboard bow of the *Breiz Huel*, and as the course of the *Breiz Huel* had been altered to port to pass astern of the sailing vessel almost immediately before the lights of the *Tempus* were sighted, those in charge of the *Breiz Huel* again altered their course about one and a half points to port, as there was plenty of time and room for the *Breiz Huel* to pass ahead well clear of the *Tempus*, provided the *Tempus* kept her course and speed." The case the *Breiz Huel* set out to make, therefore, was, "I was driven to try to pass ahead of the *Tempus* by reason of difficulties and the embarrassment created by the presence of the sailing vessel." When, however, the evidence came to be given, it was abundantly clear from the evidence of the plaintiffs themselves that there was no difficulty and no embarrassment created by the presence of the sailing vessel at all, which involved the *Breiz Huel* in the course which she took. She, therefore, omitted to avoid trying to cross ahead of the defendant vessel. That was wrong. She was wrong in almost everything she did. She gave no signal of the alteration of course, which she said she made, to the sailing vessel, but that, of course, does not involve her in liability in this particular action, but it shows the kind of navigation which she was indulging in; and it is admitted that from first to last she gave no indication of anything she was doing to the vessel out of whose way she ought to keep, and which, up to almost the very last, was under an obligation to keep her course and speed. The vessels were approaching upon these crossing courses for some considerable time. Evidence was given from the defendant vessel of various courses which it is said that vessel made after twelve o'clock. The courses remain in considerable doubt. I am not at all satisfied that the account given is correct, and of course it is impossible to say, on the evidence, where it was that one course was dropped and another course began. The minute calculations made by counsel for the plaintiffs involve great difficulties, and are subject to great uncertainties. They depend not only on speed but accuracy of observation, accuracy of recollection, &c., and I cannot in this case act upon them. I must act upon the evidence which I believe is accurate evidence, given by the officer in charge of the *Tempus*. The collision took place a little after the watch began at midnight. The second officer was in charge on the *Breiz Huel*, and I think the first officer was in charge of the *Tempus*. The chief officer of the *Tempus* said he was watching the vessel, having observed the *Breiz Huel* some considerable distance away, and was not merely watching her with the naked eye, but was picking up her lights with the glasses; and he was watching closely, expecting her to port and show her red; and he did that until he approached the vessel to within a distance of about a quarter of a mile. I accept that story. I am satisfied that is a true story. At a quarter of a mile, according to the chief officer of the *Tempus*, the other vessel bore about one and a half points, and there was risk of collision. The *Breiz Huel* hard-a-starboarded about that distance away. One side puts the distance at about a quarter of a mile, and the other at about 200 or 300 metres. The hard-a-starboarding on the *Breiz Huel* was done without any warning to the other vessel at all, and it was done, according to the *Breiz Huel*, in order to try to ease the blow of the collision, which was then inevitable. If at a quarter of a mile or thereabouts, this vessel, instead of hard-a-starboarding, had ported—especially if at about this distance also the *Tempus* ported, as she in fact did—the collision would no doubt have been avoided. I have no doubt, and am so advised, that even if the *Breiz Huel* at this stage had stopped and reversed her engines the collision would have been avoided, because another half length would have made all the difference. She did neither one thing nor the other, and, as I have said, from beginning to end her navigation was faulty and blameworthy. Then comes the question whether at the last the *Tempus* ought to have done something which she did not do, or ought to have omitted to do something which she did do. A quarter of a mile sounds a considerable distance, but when we remember the speeds of these vessels and picture them approaching each other, they were at pretty close quarters. Apart from any lengthening of the distance by reason of the swinging, if the vessels were approaching at these speeds that quarter of a mile means that one vessel and the other had just two of their own lengths to travel, and they would cover the distance in something like forty seconds.

It has been pointed out over and over again that one ought to be careful not to be too ready to cast blame upon a vessel which is placed in a difficulty by another vessl. In the first place, the *Breiz Huel* gave no indication at all to the other vessel of what she was going to do, up to the very last. Therefore the *Tempus* was left in doubt as to whether at the very last something would be done by the *Breiz Huel* to avoid collision. I have said that if the *Breiz Huel* had reversed her engines I think the collision would have been avoided, and I do not think I ought to cast blame upon the *Tempus* if she expected, as no doubt she did, that up to that stage something would be done by the other vessel to carry out the obligations placed upon her. So far as the *Tempus* is concerned, she about that time did take action. She ported her helm to try to avoid the collision. She then, almost as one order, put her engines full speed astern and hard-a-ported. If she had reversed a little earlier than she did, I think it is very doubtful whether the collision would have been avoided. It is said she did not signal when she ported, or when she hard-a-ported, or when she put her engines astern. I have blamed the other vessel for not signalling, and it may be said that I ought to blame the *Tempus* also for not signalling. The circumstances are very different. The *Breiz Huel* was directing her course to port, and ought to have given a starboard helm signal. In one sense the *Tempus* when she ported and hard-a-ported, was directing her course to starboard. In another sense she was hardly directing her course at all, but was trying to run away from the vessel which had placed her in difficulty. I do not say she is to be excused from sounding a signal if sounding that signal would make it easier for the other vessel to do something to avoid collision, but I think I ought not to be so strict in regard to the omission to signal on the

part of the *Tempus* as I should have to be if she had been directing her course in the ordinary way for the purpose of navigation. Moreover, I think that even if the signal had been given by the *Tempus* when she ported and hard-a-ported in the agony of the collision, it would not have had any effect upon the collision—that the want of that signal was neither the cause of the collision nor did it contribute to the casualty.

This question has given me some trouble because I am anxious that, if possible, vessels should observe these salutary rules. The question which I have to determine—namely, whether the defendant vessel did something, at the last moment, which she ought not to have done, or omitted to do something which she ought to have done, is mainly a nautical question, and my assessors advise me that under art. 21 the *Tempus* could not be expected to take action earlier than she did, that she did not act too late, and that in the agony she did not act improperly. I have applied my mind independently to this question, and after consideration I am happy to say that my view coincides with the advice which I have received. For the reasons I have given, I think the collision was wholly due to the faulty navigation of the vessel in which the plaintiffs' cargo was being carried, and therefore judgment must be entered for the defendants.

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

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

April 21 *and May* 9, 1913.

(Before Sir S. T. EVANS, President.)

THE CAP BLANCO. (a)

Short delivery—Damage to goods—" Goods carried to any port in England "—Power to arrest—Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 6 *—Submission to arbitration—Arbitration Act* 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

Ten cases of gold coin were shipped at Hamburg by the plaintiffs on a German steamship to be carried to Montevideo or Buenos Ayres.

The bill of lading on the terms of which the cases were carried gave the shipowner liberty to call at intermediate ports, and provided that any disputes as to its interpretation were " to be decided in Hamburg according to German law."

The steamship called at Southampton and then went on to Montevideo, where only nine cases of gold coin were delivered. The steamship put into Southampton on her voyage back from Montevideo to Hamburg. The owners of the case arrested the steamship at Southampton, alleging that damage had been done to goods carried into a port in England by breach of duty or contract on the part of the owner, master, or crew of the steamship. There was no evidence as to where the case was lost.

The owner of the ship, having entered an appearance under protest, took out a summons asking that the writ, the warrant of arrest, and the undertaking to put in brief should be set aside on the ground that the court had no jurisdiction to arrest the vessel or try the case, or that the action should be stayed under sect. 4 *of the Arbitration Act* 1889.

Held, by the President (*Sir S. T. Evans*), *that the court had jurisdiction to try the case as the goods were goods carried into a port in England, but that the proceedings in the action should be stayed in order that the parties might litigate in Germany as they had agreed to do under the terms of the bill of lading, the clause therein relating to disputes amounting to a submission to arbitration within the meaning of sect.* 4 *of the Arbitration Act* 1889.

SUMMONS to set aside a writ and warrant of arrest, or to obtain a stay of proceedings.

The plaintiffs were the owners of ten cases of gold coin shipped on the *Cap Blanco*; the defendants were the owners of the *Cap Blanco*.

On the 10th Dec. 1912 ten cases of gold coin were shipped on the *Cap Blanco* for delivery at Montevideo or Buenos Ayres.

The *Cap Blanco* called at Southampton on the 11th Dec., and then proceeded to Monte Video, when all the cases were delivered except one.

The *Cap Blanco* put into Southampton on the voyage back from Montevideo to Hamburg, and she was then arrested on the 4th April 1913 by the plaintiffs in an action brought to recover the damage they had sustained.

The defendants entered an appearance and gave an undertaking to put in bail under protest, and then took out a summons asking that the writ and arrest should be set aside on the ground that the court had no jurisdiction to entertain the action, or that the action should be stayed on the ground that the bill of lading contained a submission to arbitration.

Sect. 6 of the Admiralty Court Act 1861 (24 Vict. c. 10) is as follows:

Sect. 6. The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: provided always, that if in any such cause the plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court.

Sect. 4 of the Arbitration Act 1889 (52 & 53 Vict. c. 49) 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 com-

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

menced, 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.

Clause 14 of the bill of lading was as follows:

Any disputes concerning the interpretation of the bill of lading are to be decided in Hamburg according to German law.

The summons was adjourned into court and the argument was heard on the 21st April 1913.

Laing, K.C. and *Dunlop* for the defendants.

Mackinnon for the plaintiffs.

Judgment was delivered on the 9th May 1913.

The President.—In this action the plaintiffs, as owners of certain cases containing German gold coin, sue the defendants for damages for breach of duty or of contract in respect of the non-delivery at Montevideo or Buenos Ayres of one of such cases and its contents, which were shipped on the *Cap Blanco* under a bill of lading dated the 10th Dec. 1912.

The vessel was arrested in the action on the 4th April 1913 at Southampton, and was released on the undertaking of the defendants' solicitors to appear under protest and to put in bail. Appearance was entered under protest, and the undertaking to put in bail was given in due course. The defendants issued a summons asking that the service of the writ and warrant of arrest, and the undertaking to put in bail, should be set aside on the ground that this court has no jurisdiction to entertain the action, or to arrest the vessel; or alternatively, that all further proceedings should be stayed under sect. 4 of the Arbitration Act 1889; or alternatively, on the ground that the court in Hamburg is a more convenient tribunal for the trial of the action. The summons was adjourned into court for argument.

The material facts are as follows: The plaintiffs are the owners and consignees of the case of gold coin in question, which was shipped by them on the *Cap Blanco*, a German vessel, under bill of lading, which was made in Hamburg between the plaintiffs and the defendants by their agents and is in the German language. A translation duly verified has been supplied to me. It shows that the defendants received from the plaintiffs in external good condition for shipment per the steamship *Cap Blanco*, or another steamer from Hamburg bound for Montevideo, option Buenos Ayres, with liberty to call at any places for discharging and loading goods, cattle, or passengers, the goods stated in the margin—viz., German gold coin in cases which are to be marked and numbered as stated for delivery to the plaintiffs or order in Montevideo, option Buenos Ayres, therein called the place of destination, under the following conditions (*inter alia*): (1) The company (*i.e.*, the defendant company) has the right to tranship, land, and reload the merchandise by one of their vessels, or any other vessel, or by any other means of transport, and all vessels have the right to touch once or several times at any places, in any sequence, whether in accordance with the itinerary or exceptional ones. The bill of lading contains other clauses dealing with exceptions and other matters. Clause 14 provides that "any disputes concerning the interpretation of this bill of lading are to be decided in Hamburg according to German law."

The case of gold in question was shipped in accordance with the bill of lading on the *Cap Blanco* at Hamburg. The vessel proceeded on her voyage and called at Southampton on the 11th Dec. 1912 with the case on board. She arrived subsequently at Montevideo, when all the cases except the one in question were delivered. After the discharge of her cargo in South America the *Cap Blanco* proceeded on her return voyage to Hamburg. On this return voyage she called again at Southampton when she was arrested at the suit of the plaintiffs on the 4th April. The *Cap Blanco*, it appears, calls regularly in the ordinary course of business at Southampton on her passages from Hamburg to South America, and back.

The question whether or not this court has jurisdiction to arrest the vessel depends upon the construction of sect. 6 of the Admiralty Court Jurisdiction Act 1861. That section reads as follows: "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee of any bill of lading of any goods carried into any port in England or Wales on any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner is domiciled in England or Wales." The 35th section of the same Act enacts that the jurisdiction provided by the Act may be exercised either by proceedings *in rem* or by proceedings *in personam*.

The decision in this case turns on the question whether or not, in the circumstances above stated, the goods in question were "carried into" the the port of Southampton within the meaning of sect. 6. If they were so carried this court had jurisdiction to arrest the *Cap Blanco*, and can entertain the action; otherwise there is no such jurisdiction, for apart from the provisions of the Act, the Admiralty Court had no power to entertain a suit *in rem* in the circumstances.

The sections referred to have been the subject of many judicial decisions in this court. I have taken the opportunity of looking into all of them. Most of them have have been cited and dealt with in the decision of the Privy Council in the case of *The Piéve Superiore* (30 L. T. Rep. 887; 2 Asp. Mar. Law Cas. 319; L. Rep. 5 P. C. 482). The general object and scope of the statute was described by Dr. Lushington in *The St. Cloud* (8 L. T. Rep. 54; Br. & L. 4), and in *The Bahia* (Br. & L. 61). The result of the authorities is that clause 6 of the Act was intentionally framed in large and general terms, and ought to be construed with as great latitude as possible within the fair meaning of the words, on the ground that "the statute, being remedial of a grievance, by amplifying the jurisdiction of the English Courts of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow": (*The Piéve Superiore, ubi sup.*).

The cases were so fully dealt with in the Privy Council in the decision last referred to that it is quite unnecessary for me to discuss them further. In some of the cases the goods were only "carried into an English port" by reason of casual or

fortuitous circumstances entirely extrinsic to the contract of carriage. Nevertheless it was held that jurisdiction existed in this court. It is wholly unnecessary in order to found the jurisdiction under the statute that the goods should be carried into an English port for the purpose of delivery, or in pursuance of the contract. But, in the case now before the court, the gold coin was carried into Southampton—not for the purpose of delivery, it is true, but in full accordance with the contract. It might then have been transhipped and reloaded into any other of the defendants' vessels, or, indeed, any other vessel, under the express terms of the contract itself. Southampton was a regular and contractual port of call of the defendants' vessel, and the vessel and the goods it carried had the advantage of the facilities and the protection afforded by that port. The port was used by the defendants in the ordinary course of their shipping business as a port of call on the outward and homeward voyage, and the vessel while there enjoyed the privilege and protection of English law in an English harbour. It does not need a construction of unusual or strained latitude in the circumstances to decide that the goods in question in the defendants' vessel were "carried into an English port" within the meaning of the section which confers jurisdiction on this court. I therefore decide that this court has jurisdiction to arrest the vessel and to entertain this action.

Some point was made that there was no breach of duty or of contract before the goods were carried into Southampton. It does not appear where the breach of duty took place; for aught I know it may have been in Southampton itself. No case has decided that the breach of duty or of contract must take place, and the cause of action must have arisen, before the goods were carried into a port in England, and to say that that must be so would be to place a limitation upon the jurisdiction which the authorities and the section do not justify, and introduce into the section words which are not to be there found.

There remains to be considered clause 14 of the bill of lading, which provides that any disputes concerning the interpretation of this bill of lading are to be decided in Hamburg according to German law. It appears from the affidavit of their solicitor that the defendants contend that they are protected from liability for the claim in this action by the exceptions contained in the bill of lading, and this action involves, in my opinion, a dispute concerning the interpretation of the bill of lading, within the meaning of clause 14.

The authoritities cited—viz.: *Law* v. *Garrett* (38 L. T. Rep. 3; 8 Ch. Div. 26), *Austrian Lloyd Steamship Company* v. *Gresham Life Assurance Society Limited* (88 L. T. Rep. 6; (1903) 1 K. B. 249), *Logan* v. *Bank of Scotland* (94 L. T. Rep. 153; (1906) 1 K. B. 141), and *Kirchner and Co.* v. *Gruban* (99 L. T. Rep. 932; (1909) 1 Ch. 413) —appear to me to establish the proposition that such a clause is to be treated as a submission to arbitration within the meaning of sect. 4 of the Arbitration Act 1889. The tribunal at Hamburg is not specified, but a fair businesslike reading of the contract means that such disputes are to be tried by the competent court in Hamburg, and in accordance with German law. It is conceivable that the parties agreed to that clause in the bill of lading in order expressly to avoid a trial here under the jurisdiction which I decide exists in this court.

In dealing with commercial documents of this kind, effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be dealt with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg court.

Although, therefore, this court is invested with jurisdiction, I order that the proceedings in the action be stayed, in order that the parties may litigate in Germany, as they have agreed to do. The defendants will have the costs of the summons.

The plaintiffs lodged an appeal against that part of the judgment which directed that the action should be stayed.

The appeal was to be heard by the Court of Appeal on the 30th May.

Compston, K.C. and *Mackinnon* for the appellants (plaintiffs).

Laing, K.C. and *Dunlop* for the respondents (defendants).

The appeal was opened and then by leave withdrawn, the appellants agreeing to pay the costs of the appeal and the respondents undertaking not to rely on clause 13 of the bill of lading, which provided that claims for compensation "must be made in Hamburg within two months after the notification at the port of destination, otherwise any claim to compensation lapses," in the proceedings at Hamburg.

Solicitors: for the plaintiffs, *William A. Crump and Son*; for the defendants, *Stokes* and *Stokes*.

Oct. 31, *Nov.* 1, 3, *and* 19, 1913.

Before Sir S. T. EVANS, President, and Elder Brethren.)

THE KING ALFRED. (*a*)

Collision—Crossing ships—Single ships approaching squadrons—Duty to give way—Duty to keep course and speed—Notice to Mariners April 1907 *—Collision Regulations* 1897, 19, 21, 22, 27, 29.

Where in a collision action a foreign steamship was approaching a squadron of British warships and it was her duty under art. 21 *of the Regulations for Preventing Collisions at Sea* (1897) *to keep her course and speed, it was held by the President (Sir Samuel Evans) that it was not bad seamanship or negligence for her to do so in the circumstances, and that she was not to blame for failing to comply with the Board of Trade notice to mariners, dated April* 1897, *with reference to single ships approaching squadrons, about the existence of which notice her officers had no knowledge.*

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

DAMAGE ACTION.

The plaintiffs were the Compagnia Naviera Vascongada, the owners of the Spanish steamship *Umbe*; the defendant was D. G. Jeffery, the officer of the watch on H.M.S. *King Alfred*.

The case made by the plaintiffs was that shortly before 8.10 a.m. on the 31st July 1913 the *Umbe*, a steel screw steamship of the port of Bilbao, of 2210 tons gross and 1328 tons net register and 295ft. in length, was in the North Sea to the northward and eastward of the Spurn Light vessel, in the course of a voyage from Bilbao to Middlesbrough with a cargo of iron ore, manned by a crew of twenty-five hands all told. The weather was fine and clear; the wind about E.N.E., a light breeze; and the tide was ebb, setting to the northward with a force of one to two knots. The *Umbe* was steering a course of N. 21° W. magnetic, and was making about seven and a half knots. A good look-out was being kept on board of her.

In those circumstances those on the *Umbe* particularly noticed three warships in line which had for some time been drawing up on her port quarter. The second of these was the *King Alfred*, in charge of the defendant, and was then distant about a mile and bore about three points abaft the port beam of the *Umbe*. The warships were overtaking the *Umbe*, which kept her course and speed, and the leading vessel of the three safely crossed the bows of the *Umbe*, but H.M.S. *King Alfred*, continuing to overtake the *Umbe*, apparently took no steps to keep out of the way of the *Umbe*, which still kept her course and speed. When the *King Alfred* had drawn up so far on the port side of the *Umbe* that it had become impossible for her by manœuvring to pass astern of the *Umbe* to avoid the collision which she was rendering imminent, the engines of the *Umbe* were put full speed astern, but the *King Alfred*, coming on at high speed, with her starboard bow struck the port bow of the *Umbe* at the break of the forecastle a violent blow, and, afterwards swinging to port, with her starboard quarter and propeller struck the port side of the *Umbe* between Nos. 1 and 2 hold a further heavy blow, doing her such damage that she immediately began to make water rapidly, and, notwithstanding every effort to save her, shortly afterwards sank with everything on board of her, including the effects of her master and crew.

The plaintiffs charged the defendant with neglecting to keep a good look-out; with failing to keep out of the way or to take proper measures to do so; with crossing ahead of the *Umbe*; with not easing, stopping, or reversing the engines of the *King Alfred*; and with not indicating his course by whistle signal.

The case made by the defendant was that shortly before 8.6 a.m. on the 31st July H.M.S. *King Alfred*, a twin-screw cruiser of 500ft. in length, was in his charge. The *King Alfred* was one of a squadron of warships steering N. 27° E. magnetic and was making ten knots. The weather was fine and clear; the wind about E.S.E., light; and the tide was setting to the northward at a force of about one and a half knots. A good look-out was being kept on the *King Alfred*.

In those circumstances the *Umbe* was seen about a mile distant and broad on the starboard bow of the *King Alfred*. The *Umbe* altered her course under starboard helm to pass under the stern of H.M.S. *Amphion*, and then ported and her bearing broadened, but, after altering her heading to port and then to starboard, she finally starboarded as if attempting to pass under the stern of the *King Alfred*, and, although the helm of the *King Alfred* was starboarded and the engines were put full speed ahead, the *Umbe* with her port bow struck the *King Alfred* on the starboard side. The collision took place about twelve miles E. by N. of Withernsea.

The defendant charged those on the *Umbe* with bad look-out; with approaching the squadron so closely as to involve risk of collision or with attempting to pass through or break the line of the squadron; with not adopting timely measures to keep out of the way of the *King Alfred* or to avoid passing through the squadron; with starboarding; with failing to port; with not slackening her speed or stopping or reversing; with not indicating her manœuvres by sound signals; with not keeping her course; and with not taking seamanlike measures to avoid collision.

The defendant further alleged that if there was any negligence in the navigation of the *King Alfred*, which he denied, the plaintiffs could still by the exercise of reasonable skill and care have avoided the collision.

The Collision Regulations referred to were the following:

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.

24. Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel. Every vessel coming up with another vessel from any direction more than two points abaft her beam—*i.e.*, in such a position, with reference to the vessel which she is overtaking, that at night she would be unable to see either of that vessel's side lights—shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear. As by day the overtaking vessel cannot always know with certainty whether she is forward of or abaft this direction from the other vessel, she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.

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 precautions which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

The notice to mariners issued by the Board of Trade in April 1897 is as follows:

Single ships 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.

Bateson, K.C. and *H. C. S. Dumas* for the plaintiffs.—The officer of the watch was so intent on keeping station that he failed to take proper steps to avoid the *Umbe*. It was the duty of the *Umbe* to keep her course and speed, and that she did. Those on the *Umbe* had no knowledge of the notice to mariners on which reliance is placed by the defendants. That notice has no application to a Spanish vessel. The bad look-out on the *King Alfred* was the cause of the collision.

Laing, K.C. and *C. R. Dunlop* for the defendant.—The case made by the plaintiffs is an impossible one. On the distance and bearing spoken to by the plaintiffs to produce this collision the *King Alfred* would have to go four times as fast as she was in fact going; if that was not done the *Umbe* would pass ahead of the *King Alfred*. The evidence is conclusive that the *Umbe* altered her course. Those on the *Umbe* were guilty of negligence even if the notice to mariners has no application to their ship, for it is a breach of art. 27 for a single ship to stand on into a line of warships:

The Sans Pareil, 82 L. T. Rep. 606; 9 Asp. Mar Law Cas. 78; (1900) P. 267;
The Etna, 98 L. T. Rep. 424; 11 Asp. Mar. Law Cas. 30; (1908) P. 269;
The Hero, 106 L. T. Rep. 82; 12 Asp. Mar. Law Cas. 108; (1912) A. C. 300.

The breach of that article did not absolve the *King Alfred* from keeping out of the way when risk of collision arose, but there was no risk till the *Umbe* starboarded just before the collision.

The PRESIDENT.—The collision in this case took place a little after eight o'clock on the last morning in July 1913, in the North Sea, above the mouth of the Humber. The colliding vessels were a Spanish steel screw steamship, the *Umbe*, and a British cruiser, H.M.S. *King Alfred*. The *Umbe* was a vessel of 2210 tons gross register, 295ft. long, with triple-expansion engines of 850 h.p. indicated, and manned by a crew of twenty-five hands all told. She sank as the result of the collision, but all hands were saved. The cruiser was a powerful twin-screw cruiser of 14,000 tons displacement, of 500ft. in length.

At the time of the collision she was in charge of the defendant, Lieutenant Jeffrey, as officer of the watch. He was a master of a merchant ship and a lieutenant of the R.N.R., which he joined in 1912. He had served as lieutenant of the R.N.R. in the *King Alfred* for a fortnight before the accident. The speeds of the steamship and cruiser at all material times were seven and a half and ten knots per hour respectively. The speed of the cruiser was, however, suddenly increased by an order of full steam ahead on both engines just immediately before she struck the steamship. The pleaded courses of the two vessels were N. 21 W. (magnetic) and N. 27 E. (magnetic) respectively. It was accepted that the course of the cruiser was as pleaded, until the helm was starboarded just before the collision. The serious contest between the parties was as to the course of the *Umbe* and the manœuvres which the defendant alleged she executed in the ten or fifteen minutes preceding the accident.

The case for the *Umbe* was that her master regarded the cruiser as the vessel whose duty it was to give way, and that he accordingly kept his course of N. 21 W. and his speed, in accordance with the International Rules, until he put his engines full speed astern when the collision was imminent. Apart from some extraordinary manœuvres which Lieutenant Jeffrey described, the case for the defendant was that the helm of the *Umbe* was starboarded just before the collision, when the two vessels were one cable distant, from a course practically parallel with that of the cruiser till she headed round to W.N.W., which means a turning of about eight points. The plaintiffs' case was a simple one, and was described by the defendant's counsel as a "cast-iron case, difficult to shake by cross-examination." It is therefore necessary to examine the defence carefully to see whether it is more reliable, and whether it is sufficient to dislodge or demolish the plaintiffs' case.

The cruiser was one of a small squadron of ships of the navy, five in all. There were two other heavy cruisers, the *Good Hope* and *Drake*, of the same class as the *King Alfred*, and two light cruisers, the *Amphion* and the *Active*, of a displacement of only 3350 tons each. At the material times the *Good Hope* was the leading cruiser, with the *King Alfred* and the *Drake* following in line—the distance between each being five cables—and on the starboard and port side of the *Good Hope* were the *Amphion* and the *Active*, each also five cables distant. The *Amphion* starboarded for the *Umbe*, and she and the *Good Hope* passed ahead of her. Having regard to the defence raised that the *Umbe* was guilty of bad seamanship in keeping a course which would take her through the squadron—which is dealt with later—it is to be observed that both the defendant on the *King Alfred* and the officers in charge of the *Amphion* said expressly that they regarded their cruisers as the give-way vessels, and the *Umbe* as the crossing ship on the starboard hand, within the meaning of the International Rules. The defendant's case in its essential parts really depended upon the evidence of the defendant himself. No witness except the defendant said that he saw the *Umbe* starboarding at the last, and it was to this starboarding that he attributed the disaster.

I will therefore deal with the defendant's account of the occurrences before examining the evidence of the other witnesses produced on his behalf. The account which he wrote in his log about an hour and a half after the collision is as follows: "7 50 a.m., s.s. *Umbe* (Spanish) steering apparently parallel course outside H.M.S. *Active*. 7.55, starboarded and passed under *Active's* stern. 8 o'clock, straightened up on parallel course at about 1½ cables. 8.3, s.s. *Umbe* swung to port. Ordered helm to starboard and full speed ahead. 8 6, s.s. *Umbe* struck *King Alfred* on starboard side with bluff of bow and scraped fore and aft. From 8 o'clock to 8.6 no one apparently on steamer's bridge."

Lieutenant Jeffrey, in order to explain the variations between this account and his evidence, said he wrote it an hour and a half later, after returning with his boats from the *Amphion*, and "without collecting his thoughts." (The word *Active* in two places in the log was a mistake for *Amphion*). The next account in order is that in par. 3 of the defence. It was contended for the plaintiffs that this account is more like that in the log than that given in evidence; and for the defendant that it is consistent with the evidence and not with the log. If it were necessary to decide between these two contentions, I think the former is better founded.

It is necessary to give a *résumé* of the evidence of Lieutenant Jeffrey. He went to the bridge as the officer of the watch at 7.30 o'clock. He took over the course of N. 27 E. He was to keep station astern of the *Good Hope*, at five cables. He said the *Amphion* then bore four points on his starboard bow about five cables away, and the *Umbe* five points on the starboard bow, seven to ten cables away, and heading approximately parallel with the *Amphion*. The next thing he noticed was the *Amphion* swinging to starboard, and the *Umbe* passing two or three cables off under the cruiser's stern, steering a course between W. and W.N.W. from the course of N. by E. to N.N.E., a change of eight or nine points under a starboard helm. It was the swinging to starboard of the *Amphion* that first called his attention to the *Umbe*. He did not see the *Amphion* go to port under her starboard helm, nor did he observe the manœuvres of the *Umbe* which effected the change of eight or nine points in her heading. The *Umbe* then ported back the eight or nine points and resumed her original course roughly parallel with the cruisers, and she then bore five to six points on the starboard bow, three cables away. Although quite safe in that position, the *Umbe* starboarded again, very nearly back to the W.N.W., again a turn of about eight points. Then she ported back those eight points, and straightened up bearing one point before his beam and three cables away; and finally she starboarded back again, when one cable distant, from practically a parallel course, immediately before the collision, and came round to W.N.W., about eight points. On this starboarding he (Lieutenant Jeffrey) acted at once, ordering "starboard helm 15 degrees—starboard helm 25 degrees. Full ahead both engines"—but while he said the *Umbe* made a turn of about eight points, his cruiser changed less than 4½ points, to a heading of N.N.W. He gave no helm signal of these two starboard helm orders, although he said he had time to do so. The collision then happened, and immediately he gave the order to stop both the port and starboard engines. His own evidence, as well as the log-book, and the engine-room records when the times are synchronised, show that no action was taken by Lieutenant Jeffrey until an extremely short time before the impact. Petty Officer Hill, who was at eight o'clock conning at the wheel, and who jumped to the helm himself when the order to starboard 15 degrees was given, also proved the same thing, establishing that it was not a matter of minutes but of seconds. It is obvious that the defendant's story is an extraordinary one, and one which would require substantial corroboration. He, no doubt, had much to attend to as the only officer in charge, and his first attention was probably given to the cruisers which he was accompanying. He had a signalman told off to keep a look-out. His place of look-out was on the lower bridge, just below, and within speaking hail of the officer in charge. This look-out man made no report of the *Umbe*. He was not called as a witness. No explanation was given of his not being called. As has been stated, H.M.S. *Drake* followed in line the *King Alfred*, five cables away. Her officers, or men, were in about the best place to see the positions and manœuvres of the *King Alfred* and the *Umbe* with relation to each other. No one was called from H.M.S. *Drake*. Again no explanation was offered of this circumstance. These facts tend to throw doubt upon the accuracy and reliability of Lieutenant Jeffrey's observations and story.

It remains to be seen whether the witnesses called for the defendant supported his case, or tended to discredit or weaken it. As to the all-important question of the course of the *Umbe*, Captain Edwards, commander of the *King Alfred*, who came on deck immediately after the crash, gave the heading of the cruiser as from two to three points off her course, and given the agreed angle of the blow at about 30 degrees—or from 30 to 40—the vessels would have been pretty nearly upon their pleaded courses. Lieutenant Lyne, R.N.R., who was relieved at 7.30, as officer of the watch, by Lieutenant Jeffrey, stated that the courses were converging, and that the *Umbe* was heading somewhere in the direction of Flamborough Head, which, broadly speaking, was her course. Captain Blacklock, R.N.R., who was the officer of the watch on the *Good Hope*, stated the course of the *Umbe* about 7.55 o'clock to be N.N.W. (*i.e.*, N. 22½ W.), which is, within a small fraction of a point, the course which was pleaded for the *Umbe*, and to which her witnesses deposed and adhered. He also said that from the time he saw the *Umbe* till then she had not altered her course. His evidence was that the *Amphion* altered her course for the *Umbe* under starboard helm, but he could not say how much, and that afterwards the *Umbe* altered her heading under starboard helm until the two vessels were about at right angles to each other. In my opinion, and according to the advice I have received, it is quite possible that by reason of the alteration of the *Amphion*, which starboarded to within 2½ cables of the *Good Hope*, Captain Blacklock may have thought the two vessels were about at right angles when the *Amphion* ported back to get to her station, and may easily have been mistaken when he thought the *Umbe* changed six points to head to west or south of west; but he

certainly said that whatever alteration the *Umbe* appeared to have made, she came back again on to her course of about N.N.W., which was her pleaded course. Petty Officer Hill, who came on watch on the *King Alfred* at eight o'clock, and who took the wheel himself when the defendant gave the orders to starboard at close quarters, marked the positions of the *King Alfred* and the *Umbe* at about eight o'clock, and assuming the course of the cruisers to be N. 27 E., the course or heading of the *Umbe*, according to his marking, is N. 10 W., or within a point of the pleaded course of the *Umbe*, and 2½ points away from the course attributed to her by the defendant. Lieutenant Ryland, R.N., who was the officer of the watch on the *Amphion*, did say that he saw the *Umbe* when five points on his starboard bow heading between W. and W.N.W., and that he put his helm to starboard to cross her bows. He afterwards ordered "stop both engines" about a minute after starboarding, because he did not think he could cross her bows, but almost immediately after that his captain came on the bridge and cancelled that order, and ordered fifteen knots speed ahead on both engines, and then succeeded in passing ahead of the *Umbe*. Lieutenant Rylands said he never noticed the *Umbe* on any other heading except W. or W.N.W. I think he mistook the heading. It is difficult to believe that he would order his engines to be stopped if the *Umbe* was heading W.N.W. and going to cross him; his stopping the engines is more consistent with a heading of N.N.W. It is to be observed that he did not speak to any of the five helm movements on the *Umbe* which are comprised in the defendant's account. It must also be noticed that his captain, who cancelled his orders and took the *Amphion* clear of the *Umbe*, was not called.

For these reasons, among others not detailed, I have come clearly to the opinion that the defendant did not keep a careful or accurate observation; that his account cannot be accepted; that he failed to do anything until the very last moment to keep out of the way of the *Umbe*, although he regarded himself as bound by the rules to keep clear of the *Umbe;* that he acted too late, and that when he took action it was wrong action to increase his speed and starboard his helm; that he failed without reason to give any helm signals; and that he is to blame for the collision. Having said this, after a careful and anxious consideration of the case, I am confirmed in my opinion that although the witnesses for the plaintiffs were, like most of the other witnesses in the case, mistaken in matters of bearing and distance and times, they are speaking the truth when they say that the course of the *Umbe* was N. 21 W. magnetic, and that they did not alter their course or speed until the engines were put full speed astern when the collision was imminent and when it appeared that the *King Alfred* was not manœuvring for the *Umbe* and could not at that stage have avoided the collision. The statement in the defendant's log that from 8 to 8.6 o'clock there was no one, apparently, on the bridge of the *Umbe*, can only be accounted for by wrong observation on the cruiser, because in fact the master, the chief officer, the second officer, and a seaman at the wheel were on the bridge during that time, and the master ordered the second officer himself to take the wheel and to keep the ship steady on a course when the warships were getting near.

A word remains to be said about the contention made for the defendant that the plaintiffs' master was negligent in keeping his course, if it meant passing through the line of the five ships of the fleet. Some reliance was placed on the notice to mariners issued by the Board of Trade in May 1897 as embodying a rule of good seamanship. The plaintiffs' officers, who are Spaniards, had never heard of it. The defendant knew that the plaintiffs' vessel was a Spanish vessel. He saw her hoist the Spanish ensign as a compliment to the English cruisers. The squadron consisted of two lines, at right angles to each other. Each of the ships was half a nautical mile apart, and the distance between the *Amphion* and the *King Alfred* in station was nearly three-quarters of a mile. It was daylight, and the weather was quite clear. The plaintiffs' master thought he was bound by the International Rule, which is the only regulation he was aware of. The defendant took the same view. I feel a genuine regret that I can find no assistance in the opinions expressed in the House of Lords in the case of *The Hero* (*ubi sup.*) upon the question raised in the courts below in that case, and dealt with in cases like *The Sans Pareil* (*ubi sup.*). But in the circumstances of the collision, the subject-matter of the present action, I am clearly of opinion, and I am fortified in that by the advice of the Elder Brethren, that it was not bad seamanship or negligence on the part of those in charge of the *Umbe* to observe the International Rule to keep her course and speed; and also that the exercise of ordinary care and compliance with the same rules, which the defendant thought applicable, would, without any difficulty, have avoided and averted the accident, which resulted in the sinking of the Spanish steamship. I therefore give judgment for the plaintiffs, and order a reference to the registrar and merchants to assess the damages.

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

Solicitors for the defendant, *Treasury Solicitor.*

Oct. 24 *and Dec.* 16, 1913.

(Before Sir S. T. EVANS, President.)

THE LONDON. (a)

Collision — Measure of damage—Remoteness—Loss of use of vessel—Strike delaying progress of repairs.

Where a vessel is injured in a collision at sea by the negligence of another vessel and it is reasonable to take the damaged vessel to a dock for repair, and where the owner of the innocent vessel acts in a reasonable and businesslike way in all matters connected with the docking and repairing of the vessel up to the time of the vessel being delivered to him in a state of repair, the wrongdoer is liable to make good any loss which the owner of the injured ship can show he suffered by being deprived of the use of his ship during the whole period when she was unavailable for use through being under repair.

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

A collision occurred between two vessels, and the plaintiffs' vessel was so damaged that she had to be dry docked for repairs. Plaintiffs and defendants agreed that a reasonable time for the repairs to take was eighteen days. The contract made between the plaintiffs and the repairers provided that, owing to circumstances that might arise in regard to weather and labour troubles, the repairers should not guarantee a time in which to complete the work, but the repairers undertook to do their very utmost to complete the work in eighteen weather working days. The repairs were begun on the 18th May. On the 31st May a strike began which continued until the 20th July. The repairs were finished on the 10th Aug. But for the strike the repairs would have been finished in eighteen days. At the reference, when the damages were being assessed, the plaintiffs claimed for the loss of the use of the vessel from the date of the collision up to the end of the time taken to repair it. The defendants denied that they were liable for the loss of the use of the vessel when the actual work of repair was suspended by the strike. The registrar held that the defendants were liable for the whole of the time. The defendants appealed to the judge.

Held, confirming the report of the registrar, that the loss of the use of the vessel for the whole period while she was in dry dock, including the period of the strike which occurred while she was in dry dock, flowed directly or immediately and naturally and in the usual or ordinary course of things from the wrongful act of the plaintiffs, and such damage was not too remote and was recoverable.

PETITION in objection to the report of the registrar.

Appeal to the judge from a decision of the registrar by which he held that the plaintiffs were entitled to recover damages for the loss of the use of their vessel due to a strike which delayed the repair of certain collision damage.

About 11.45 on the 11th May 1912 H.M.S *London* collided with the steamship *Don Benito* in the English Channel off Hythe.

At the time of the collision the *Don Benito* was on a voyage from Antwerp to Newport, Monmouth, in water ballast, but in consequence of the damage she sustained she proceeded towards Hythe, and, after anchoring there, she was assisted by tugs into Dover. At Dover the watertight doors in the bulkhead between No. 2 hold and the stokehold were made watertight and No. 1 bulkhead was well shored, and on the morning of the 15th May she left Dover for London under convoy of a tug, and at about midnight she was placed in the Deptford dry dock. She was surveyed by surveyors representing all the parties interested and the damage caused by the collision was noted, and it was agreed by all the surveyors that eighteen working days was a reasonable time for the necessary repairs.

On the 17th May the Deptford Dry Docks Company Limited entered into a contract with the owners of the *Don Benito* by which they agreed to do the repairs in eighteen working days, and the contract contained the following words:

Owing to circumstances that may arise in regard to weather and labour troubles, we cannot guarantee a time to complete the work, but are going to do our very utmost to complete the work in eighteen weather working days.

The repairs were begun on the 18th May, and on the 31st May, before the repairs were completed or the eighteen working days had expired, a strike began in London of workmen necessary for the repairs, and the strike continued till about the 20th July, and as a consequence of the strike the repairs were not completed till the 10th Aug. If there had been no strike the repairs would have been completed in eighteen working days from the 18th May.

The owners of the *Don Benito* brought an action against Captain Sinclair and Lieutenant Scott of H.M S. *London* to recover the damage they had sustained by the collision.

The action was settled on the terms that the defendants were to pay 50 per cent. of the plaintiffs' claim, and that if the claim could not be agreed it was to be referred to the registrar and merchants to be assessed.

The claim was not agreed, and was accordingly referred to the registrar and merchants.

The claim put forward by the plaintiffs amounted to 9474*l.* 4*s.* 11*d.* and included in that sum was an item of 5748*l.* 9*s.* 4*d.* for the loss of the use of the *Don Benito.* The registrar assessed the damage at 6608*l.* 5*s.* 6*d.* and included in that sum a sum for the loss of the use of the vessel, and reported that the defendants should pay 3304*l.* 2*s.* 9*d.* to the plaintiffs, being 50 per cent. of the total amount of the damage.

The material part of the registrar's reasons were as follows:

The defendants contend (1) that they were not liable for the expenses consequent on the *Don Benito* going to the Inner Harbour at Dover as it was not reasonable to go there; (2) that the *Don Benito* should have been taken to a port on the north-east coast for repairs; and (3) that they were not liable for the loss of the time caused by the strike. As regards (1) and (2), I find that under the circumstances the conduct of the plaintiffs was reasonable. As regards (3), I am of opinion that the plaintiffs should recover compensation for the time which was lost through the repairs being delayed by the strike. Plaintiffs are entitled to any losses caused to them by the non-use of their ship owing to the collision, and not arising through their own default. The work of the repairers was at first stopped, and later, when the strike was coming to an end, made much slower by the action of the workmen on the Thames. But for the collision, the *Don Benito* would not have had to be repaired. The cause of the delay in the repairs was not contributed to by the plaintiffs, and the delay was directly connected with the work of the repair. If workmen have to cease work on account of bad weather, or breakdown of machinery, so that the operation of repair is prolonged, the plaintiffs are clearly entitled to recover in respect of such lengthened time. The prolongation of the work caused by a strike seems to me analogous to the above instances. The loss of time was in fact directly connected with the collision. If the case be regarded from the point of view as to what events were within the contemplation of the parties, it is impossible to doubt that in respect of repairs the possibility of delay by strikes would certainly be in the minds of the defendants. It should be stated that as the *Don Benito* had been "stemmed" for dry docking she was in the same position legally as a vessel bound in consequence of a prior collision to go into dry dock, and *The Haversham Grange* (93 L. T. Rep. 733; 10 Asp. Mar. Law Cas. 156; (1905) P. 307) therefore applies. The consequent deduction is small

in comparison with the amount of loss caused by the strike, but it has been duly made.

On the 9th July 1913 the defendants gave notice of objection to the registrar's report.

On the 31st July the defendants delivered a petition in objection to the report of the registrar.

In the petition, after stating the facts, the defendants admitted that it was reasonable for the plaintiffs to take the *Don Benito* to London and repair her there and submitted that they were not liable for the loss of time caused by the strike, and prayed the court not to confirm the report and to direct that the defendants were not liable for the loss of time caused by the strike and to send the report back to the registrar to have the damage assessed on that basis.

The appeal came on for argument before the court on the 24th Oct.

The *Attorney-General* (Sir John Simon, K.C.) and *C. R. Dunlop*, for the appellants, in support of the petition.

Bateson, K.C. and *H. C. S. Dumas*, for the respondents, the owners of the *Don Benito*.

Cur. adv. vult.

Dec. 16.—The PRESIDENT.—The facts in this case are not in dispute. A statement of them has been agreed between the parties, and is to be found in the petition praying for a modification of the registrar's report upon the reference as to damages at pp. 5 and 6 of the record.

The question arising for decision is whether the plaintiffs are entitled as part of their damages resulting from a collision at sea, to a sum for the detention or loss of the use of their vessel during the portion of the time she was in a dry dock undergoing repairs, when the actual work of repair was suspended by reason of a strike. The defendants contended that such damages were too remote to be recoverable in law.

The doctrine of legal causation, in reference both to the creation of liability and to the measurement of damages, has been much discussed by judges and commentators in this country and in America. Vast numbers of learned and acute judgments and disquisitions have been delivered and written upon the subject. It is difficult to reconcile the decisions; and the views of prominent commentators and jurists differ in important respects. It would not be possible or feasible in this judgment to examine them in anything approaching detail. The court is not concerned in the present case with any inquiry as to the chain of causes resulting in the creation of a legal liability from which such damages as the law allows would flow. The tortious act—*i.e.*, the negligence of the defendants which imposes upon them a liability in law for damages—is admitted. This gets rid at once of an element which requires consideration in a chain of causation in testing the question of legal liability—viz, the foresight or anticipation of the reasonable man. In *Smith* v. *London and South-Western Railway Company* (23 L. T. Rep. 678; L. Rep. 6 C. P. 14) Channell, B. said: "Where there is no direct evidence of negligence, the question what a reasonable man might see is of importance in considering the question whether there is evidence for the jury of negligence or not . . . but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." And Blackburn, J., in the same case, said: "What the defendants might reasonably anticipate is only material with reference to the question, whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence." In the present case we start with the admitted tort of the defendants, and have only to consider what are the consequential damages.

It is settled law that the rule as to the remoteness of damage is the same whether the damages are claimed in actions of contract or of tort (*The Notting Hill*, 51 L. T. Rep. 66; 5 Asp. Mar. Law Cas. 241; 9 P. Div., at p. 113); and that the damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law; (*The Argentino*, 59 L. T. Rep. 914; 6 Asp. Mar. Law Cas. 348; 13 P. Div., at p. 200). What I have to consider is (adopting the language of Lord Herschell in *The Argentino*, 61 L. T. Rep. 706; 6 Asp. Mar. Law Cas. 433; 14 App. Cas. 519) whether if this were an action brought in the courts of common law, and tried by a jury, I, as judge, ought to direct the jury that these damages now in dispute could not be recovered, on the ground that they were too remote. The positive equivalent to "not too remote" which has been generally used is "proximate." "Proximate" is not an absolute term; in law it does not mean "nearest"; it means something like "sufficiently near for the courts to give effect to." In law, what is remote is not proximate; and what is proximate is not too remote. No general test of proximateness or remoteness has yet been discovered, and no definition, at once precise and complete, has been given, or can be given. Various phrases have been used to describe the consequences which are not too remote and in which a tortfeasor is liable, such as "direct and natural consequences," "natural and proximate consequences," "normal, likely, or probable consequences," "immediate and natural consequences," "natural and reasonable consequences," "the natural and probable consequences of a proximate cause," "the consequences of a primary and substantial cause," "consequences which flow directly and in the usual course of things from the wrongful act." The easiest descriptions to apply, and perhaps the most authoritative, are those which were used in the Court of Appeal and in the House of Lords in *The Argentino* (*ubi sup.*). A combination of them would seem to be that "such damages as flow directly or immediately, and naturally, or in the usual or ordinary course of things from the wrongful act," are not too remote to be recoverable. In other words, they are the proximate consequences in law. But it must be remembered, to use the words of a well-known American author (Sedgwick), that "the legal distinction between what is proximate and what is remote is not a logical one, nor does it depend upon relations of time and space; it is purely practical, the reason for distinguishing between the proximate and remote causes and consequences being a purely practical one"; and again, to use the words of an eminent English jurist (Sir F. Pollock), "In whatever form we state the rule of 'natural and probable conse-

quences,' we must remember that it is not a logical definition, but only a guide to the exercise of common sense. The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."

Two other general observations may be made. The first is the fundamental principle upon which the law of damages for wrongful acts is founded, that of *restitutio in integrum*, subject to the qualification imposed by the decisions that the damages must not be too remote. The second is that the disposition of the courts has been to extend rather than to narrow the range of proximate causes or natural and probable consequence: (Sir R. Phillimore, in *The George and Richard*, 24 L. T. Rep. 717; 1 Asp. Mar. Law Cas. 50; L. Rep. 3 A. & E., at p. 476; and Sir F. Pollock on Torts, 9th edit., at p. 47). It would seem to me that a loss or damage which is clearly the direct and immediate consequence of a wrongful act is always proximate, and that no further inquiry is really necessary.

In the present case the loss of the use of the vessel for the whole period, while she was in dry dock, including the period of the strike which occurred while she was there, was clearly directly and immediately due to the defendants' negligence which made it necessary for her to go for repair; and damages for the loss of the use of the vessel for that whole period is therefore not too remote. But if it be necessary to inquire and ascertain that the loss or damage flowed not only directly and immediately, but "directly and naturally, or in the usual or ordinary course of things," in order to make the damage recoverable, in my opinion, the loss and the damages claimed which are now in dispute did so flow in this case. There are passages in the joint judgment of Bowen and Lindley, L.JJ. in *The Argentino* (*ubi sup.*), and in the speech of Lord Herschell in the same case in the House of Lords (*ubi sup.*), which appear to justify the opinions which have just been expressed, unless those passages require to be qualified or limited in regard to the special facts of that case. They are as follows:—Per Bowen and Lindley, L.JJ.: "A collision at sea caused by the negligence of an offending vessel is a mere tort, and we have only therefore to consider what has been in the particular case its direct and natural consequence. This consequence (in the case of an innocent ship which is disabled by an accident) is that its owner loses for a time the use which he otherwise would have had of his vessel. There is no difference in principle between such a loss and the loss which the owner of a serviceable threshing-machine suffers from an injury which incapacitates the machine, or the loss which a workman suffers who is prevented from earning money by the wrongful detention of plant which cannot at once be replaced. A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner, but for the accident, would have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principal alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves." And per Lord Herschell: "The loss of the use of a vessel, and of the earnings which would ordinarily be derived from its use, during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision."

The contention for the defendants was that the damages did not flow from the defendants' tort in the direct, natural, or usual or ordinary course of things, by reason of the strike intervening. It has often been urged that the intervention of a third person's act, or of some independent human agency, prevents the application of the rule of proximate cause, and makes the further results and damages remote; but that general proposition is clearly unsound, since as far back as *Scott* v. *Shepherd* (2 Wm. Bl. 892; 1 Smith's Leading Cases, 11th edit., 454), natural (which has been paraphrased as "in the usual or ordinary course of things") as used as a test of proximate consequences, does not mean "in the course of nature." In *The City of Lincoln* (62 L. T. Rep. 49; 6 Asp. Mar. Law Cas. 475; 15 P. Div. 15) Lindley, L.J. said it comprised human conduct. "Reasonable human conduct (he said) is part of the ordinary course of things. So far as I can see my way to any definite proposition, I should say that the ordinary course of things does not exclude all human conduct, but includes at least the reasonable conduct of those who have sustained the damage, and who are seeking to save further loss."

In the present case the plaintiffs who sustained the damage sought to save further loss by taking the ship as soon as they could, after temporary repairs were executed, to a proper dock for the purpose of having her permanently repaired and made fit for use. In what they did the defendants admitted the plaintiffs acted reasonably. No evidence was given that the strike was illegal, or even that it was unexpected. In the ordinary course of business industrial disputes may and do occur, and strikes ensue. Business men in the ordinary course assume this, and in their contracts protect themselves against the results of strikes which may occur. The company which undertook to carry out the vessel's repairs for the plaintiffs in this case did so. It was not suggested that the plaintiffs acted unreasonably in entering into such a contract, or that they could have procured a contract for the execution of the repairs within an absolute time, without reference to any probable or possible strike. Of course, such an independent act of a third person may be interposed as would put an end to the continuity and efficiency of the first alleged proximate cause of the damage, and be itself the active, real and proximate cause. But the strike in this case, in my opinion, was not such an act.

A remarkable illustration of the continuance of the efficiency of a primary and proximate cause so as to retain the liability for the consequential damages as not being too remote, notwithstanding the intervention of an independent act of a third person, is to be found in the case of *De la Bere* v. *Pearson Limited* (96 L. T. Rep. 425; (1907) 1 K. B., at p. 489). The intervening act of the third person in that case was assumed to be a criminal act. Lord Alverstone, C.J., in a considered judgment, and in general words

applicable to contract and tort alike, declared the law as follows: "I think it is unnecessary to consider in detail any of the many authorities in which the question of remoteness of damage has been discussed; and without attempting to distinguish between the expressions *causa causans*, *causa sine quâ non*, and *causa proxima*, the rule of law appears to me to be now well established, that if the defendants' breach of contract or duty is the primary and substantial cause of the damage sustained by the plaintiff, the defendants will be responsible for the whole loss, though it may have been increased by the wrongful conduct of a third person, and although that wrongful conduct may have contributed to the loss."

If this rule be applied in the present case, it seems clear that the negligent act of the defendants which brought about the collision and damaged the plaintiffs' vessel, necessitating her being taken to dry dock to be repaired, was the primary and substantial cause of the damage sustained by the plaintiffs through the loss of her use during the whole time she lay there, unavailable as a trading vessel.

Many illustrations occur to the mind of things which might happen to prolong the period of repair, and of consequent non-use of an innocent vessel damaged in a collision at sea, where it would appear to be quite wrong to exonerate the wrongdoer and impose a pecuniary loss upon the owner of the innocent ship. Suppose, for example, that a great liner were injured in a collision in the Atlantic Ocean, and that no dock were available for her repair before she reached Southampton. She properly, and reasonably, and perhaps inevitably, makes for Southampton. Before she arrives there a strike takes place, and it is impossible for her to be docked; and there is no reasonable probability of the strike coming to an early end. There might be no other dock in this country to accommodate her. She then proceeds, say, to Hamburg, properly and reasonably in the circumstances, in order to be dry-docked there. Before she arrives, difficulties occur there, either through strikes or other causes, which render it impossible for her to enter a dry dock large enough to receive her. She then, properly and reasonably in the circumstances, returns towards Southampton in the expectation of the strike terminating at an early date, and after, say, some days' delay, is able to enter a dry dock and to be put in train to be repaired. Could it be said that the loss of the use of the vessel in the interval by reason of the stated difficulties should fall upon the innocent owner, and that the wrongdoer responsible for the collision should escape free from all liability for such loss? Take one other instance: It is a common occurrence that ship-repairers have to procure from engineering manufacturers elsewhere particular pieces of machinery which may be required for the repair of a damaged vessel. In the delivery of such machinery delay may be caused, not by the owner of the vessel, or by the repairers, but possibly by the engineer having difficulties in his works, or by default or difficulties of a railway company. During such delay the owner of the damaged vessel loses her use. Again, surely, the wrongdoer who injured her ought to make good this loss.

In my judgment it would be just upon general principles, and also in accordance with the true principle deducible from the authorities, to hold in cases where a vessel is injured in a collision at sea by the negligence of another vessel, that where it is reasonable to take the damaged vessel to a dock to be repaired, and where the owner of the innocent vessel acts in a reasonable and businesslike way in all matters connected with the docking and repairing of the vessel up to the time of the vessel being delivered to him in a state of repair, the owner of the vessel at fault—*i.e.*, the wrongdoer who commits the tort—is liable at law to make good any loss which the owner of the injured ship can show he suffered by being deprived of the use of his ship during the whole period when she was unavailable for use through being under repair.

Upon the facts of the present case, I am of opinion that I could not, as judge, direct a jury that the damages suffered by the plaintiffs by the detention of their vessel during the strike period were too remote. Upon a proper direction as to remoteness, any jury could find, and rightly find, that the loss of the use of the vessel during that period flowed directly, naturally, and in the usual or ordinary course of things from the defendants' negligence in running into the plaintiffs' vessel and making it necessary to dry-dock and repair her. In so far as I am exercising the functions appropriate to a jury, that is my finding. In its result, therefore, the report of the learned registrar was right, and is confirmed. The defendants must pay the costs of this petition.

Solicitors for the plaintiffs, *Pritchard and Sons.*

Solicitors for the defendants, *Treasury Solicitor.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, Oct. 15, 1913.

(Before PICKFORD, J.)

ANSTEY *v.* OCEAN MARINE INSURANCE COMPANY LIMITED. (a)

Marine insurance—Captain's effects—Total loss—Captain's clothes and watch not lost—Liability of underwriters.

A policy of marine insurance for the sum of 100*l. was issued by underwriters upon captain's effects, sextant, and chronometer, against risk of total loss of vessel only. During the currency of the policy the vessel was lost while in port through one of the perils insured against, and such of the captain's effects as were on board were destroyed. At the time of the loss the captain was on shore, and the clothes and watch he was wearing were not lost. In an action claiming the full amount of the policy:*

Held, that the policy covered the whole of the captain's effects, including those temporarily removed from the ship, and the value of the goods not lost must be taken into account in estimating the amount for which the underwriters were liable.

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

COMMERCIAL COURT.

Action tried by Pickford, J.

The plaintiff claimed under a policy of marine insurance dated the 15th Jan. 1913 and issued by the defendant company, which provided that in consideration of a premium of 60*s.* per cent. the company agreed to pay and make good all such losses and damages as might happen to the subject-matter of the policy in respect of the sum of 100*l.* thereby insured. The insurance was expressed to be upon "captain's effects, sextant, and chronometer, being against risk of total loss of vessel only, the ship or vessel called the *Alum Chine* . . . during the space of twelve calendar months from the 14th Jan. 1913 to the 13th Jan. 1914, both days inclusive, whilst in port or at sea." It was also provided that "the insurance aforesaid shall commence upon the said ship at and from as above and shall continue until she hath moored at anchor in good safety at her place of destination and upon the freight or goods or merchandise on board thereof." The perils insured against were of the seas, men-of-war, fire, &c." A marginal note in the policy stated that in consideration of an additional premium of 20*s.* per cent. the policy also included "risk of damage or loss caused by fire."

The plaintiff was the captain of the *Alum Chine.* On the 7th March 1913 an explosion of dynamite occurred on the *Alum Chine* at Baltimore, causing her total loss. The captain's effects on board at the time, including his sextant and chronometer, were totally lost. The plaintiff was on shore at the time of the explosion, wearing his clothes and a watch. The value of the captain's effects on board the *Alum Chine* was 191*l.* 0*s.* 6*d.*, and the value of his clothes and watch 10*l.* 2*s.*

The plaintiff claimed the full amount of the policy, but the defendants said the value of the clothes and watch should be deducted. On the 2nd Oct. 1913 the defendants' solicitors wrote to the plaintiff's solicitor as follows: "We make the insured value of the captain's effects to be 204*l.* 2*s.* 6*d.* and the measure of indemnity, including a proportionate part of the premium, 194*l.* 0*s.* 6*d.* This being so, it appears that the defendants' liability under the policy, worked out in accordance with the provisions of the Act, amounts to 95*l.* 1*s.* 1*d.*, and for this amount we inclose our cheque and shall be glad if you will treat it as if paid into court. . . . We should, however, say that the payment is not made on the terms that your client may accept the cheque and be paid his costs of action to date; the question of costs must be left to the court."

Maurice Hill, K.C. and *Dunlop* for the plaintiff.—The plaintiff is entitled to recover the full amount under the policy, as there was a total loss of the subject-matter insured. The only things at risk at the time of the loss were the captain's effects on board at the time. The clothes and watch were not at risk at the time, and could not have been covered until taken back to the ship. Successive or shifting cargoes may be covered by insurance:

Hill v. *Patten,* 8 East, 373;
Arnould on Marine Insurance, sect. 222.

They also referred to

Crowley v. *Cohen,* 3 B. & Ad. 478.

Leslie Scott, K.C. and *Mackinnon* for the defendants.—The policy covered the whole of the captain's effects at the time of the loss, and goods temporarily removed did not cease to be at risk. Effects could not be temporarily taken off the risk.

Maurice Hill, K.C. in reply.

PICKFORD, J.—This action is brought upon a policy of marine insurance issued by the defendant company. A sum of about 5*l.* only is involved, but it is said that the case raises some question of principle which is of importance.

I am, however, unable to discover much importance in it. The policy was for 100*l.*, and the insurance was declared to be "upon captain's effects, sextant, and chronometer, being against risk of total loss of vessel only, the ship or vessel called the *Alum Chine* . . . during the period of twelve calendar months from the 14th Jan. 1913 to the 13th Jan. 1914, both days inclusive, whilst in port or at sea." Whilst the *Alum Chine,* of which the plaintiff was the captain, was at Baltimore, there was an explosion of dynamite on board, which caused the total loss of the ship, and also considerable loss of life. It also caused the loss of the greater part of the captain's effects, but, as the captain happened to have gone on shore, the clothes and watch he was wearing were not destroyed, and therefore the whole of the captain's effects were not destroyed.

The question which I have to decide is whether that part of his effects which the captain had on him at the time of the explosion, and which were consequently not lost, formed part of the subject-matter of the policy. Mr. Maurice Hill on behalf of the plaintiff contends that they were not part of the subject-matter of the policy, and that the policy was an insurance on that portion of the captain's effects only which were on board at the time of the loss, and that anything taken on shore, even for a moment, ceased to be at risk and therefore was not covered by the policy until brought back again to the ship. The defendants said that the insurance was on whatever articles came within the description of the captain's effects from time to time. It is admitted that the policy was not limited to the captain's effects at the time of the execution of the policy. It was, however, contended on behalf of the defendants that the policy covered the whole of the captain's effects at the time of the loss, including the articles the captain had on him at the time of the explosion, and that as the articles which the captain had on him at the time of the loss were at risk, they were covered by the policy, and must be taken into account in estimating the amount of the defendants' liability. I ought to add that the policy contained a marginal note by which in consideration of an additional premium of 20*s.* per cent. the policy included risk of damage or loss by fire.

In my opinion the subject-matter of the policy was the whole of the captain's effects, sextant, and chronometer, and I think the fact that the captain had temporarily removed a portion of his effects from on board at the time of the loss did not affect the subject-matter of the insurance, and therefore the defendants' contention as to the amount of their liability is correct. But that is not what they set up in the first instance. They then said they were

only liable to pay 100*l.*, the amount of the policy, less the value of the effects which were not destroyed. Up to the time of delivering the defence they contended that they were entitled to deduct the full value of the captain's effects that were saved from the amount of the policy. They were clearly wrong in taking up that position. They did not alter the position they had taken up until the 2nd Oct. 1913, when they offered to pay on what I consider to be the proper basis, but at the same time they said it was not to be regarded as a payment into court so as to entitle the plaintiff to be paid his costs. Under these circumstances, having regard to the restriction placed upon the payment, I think there must be judgment for the defendants, but without costs.

Solicitors for the plaintiffs, *A. W. Kingcombe* and *Co.*

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

Tuesday, Nov. 12, 1913.

(Before Bailhache, J.)

Burrell and Sons v. F. Green and Co. (*a*)

Charter-party—Cessation of hire—Damage to ship during voyage owing to shifting of cargo.

A charter-party provided that "in the event of loss of time from deficiency of men or stores, breakdown of machinery, collision, docking, stranding, or other accident or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost shall be allowed to the charterers, including first twenty-four hours, and if such detention shall exceed thirty days charterers to have the option of cancelling this charter; but should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense."

The chartered vessel, which carried, amongst other things, a deck cargo, encountered heavy weather in the course of the voyage and the deck cargo shifted. It was found necessary for safety to put into port, and upon arrival it was necessary to discharge the deck cargo and to examine the ship, which was injured by reason of the combined effect of the stress of weather and the shifting of the cargo, and to execute the necessary repairs to the ship. The vessel was detained in all for thirty three days and seventeen hours, of which period nine days and twelve hours were occupied by the repairs to the ship itself. It was contended by the charterers that, under the terms of the charter-party the vessel was off hire for a period of nine days and twelve hours upon the ground that it was time lost from an accident or damage preventing the working of the vessel. For the shipowners it was contended that the ship was on hire during the period when she was being repaired on the ground that the delay was due to an accident to the cargo.

Held, that the words "such detention" in the clause "should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense" referred only to time actually lost by stress of weather, or by accident to cargo and repairing the results of such accident, but did not include time lost owing to damage to the ship which was caused by the accident to the cargo, such damage coming within the words "or other accident or damage" in the earlier part of the clause, and that consequently, as the delay caused by the repairing of the vessel exceeded twenty-four hours, she was off hire during the nine days and twelve hours occupied in repairing her.

Question for the opinion of the court upon an award and special case stated by an umpire.

The award and special case was as follows:

Whereas by a charter-party dated the 4th July 1912 and made between Messrs. Burrell and Sons (hereinafter called the owners) and Messrs. F. Green and Co. as agents for Messrs. Hind, Rolph, and Co. of San Francisco (hereinafter called the charterers), it was agreed that a "Strath" steamship thereafter to be named was chartered by the owners to the charterers for one trip to Australia upon the terms and conditions therein set out. The charter-party provided that should any dispute arise between the owners and the charterers as to the meaning and intention of the charter-party, or as to any act or thing to be done thereunder, the matter in dispute should be referred to two commercial persons in London, one to be appointed by each of the parties thereto in accordance with the provisions of the Arbitration Act 1889 or any subsequent modification thereof. And whereas, the steamship *Strathdene* was named and provided to fulfil the said charter-party, and disputes did arise between the owners and the charterers as to the deduction by the charterers from the hire claimed by the owners of the following matters:

1. In respect of the time lost at Portland;

2. In respect of the time lost by putting into Victoria.

And whereas the owner duly appointed Mr. Frederick William Temperley, shipbroker, as their arbitrator, and the charterers appointed Mr. Charles Thomas Glanville, shipowner, as their arbitrator. And whereas the said two arbitrators by writing under their hand and dated July 4th 1913 duly appointed me, the undersigned Charles Wood Gordon, of No. 36, Lime-street, shipowner, to be the umpire in relation to the said disputes. And whereas the said two arbitrators failed to agree upon an award, and whereas upon the hearing of the reference the charterers required a case to be stated upon certain points of law with regard to the dispute numbered 2 above. Now I, the undersigned Charles Wood Gordon, having taken upon myself the burden of the said reference and having duly considered the evidence put before me, do find and award as follows:

1. I find and award that apart from the questions arising in connection with the dispute No. 2 above, there is due from the charterers to the owners a balance of 257*l.* 16*s.* 11*d.*, and I award and direct that the charterers do pay the said sum to the owner. This sum is arrived at after giving credit to the charterers for all disbursements or advances paid by them for owner's account and for coals on board at redelivery, and the charterers are to return to the owners the dishonoured acceptance in respect of Calcutta advances.

Special Case.

2. With regard to the dispute No. 2 above, I find the facts are as follows:

3. It was provided by the said charter-party that the vessel was to be placed at the charterers' disposal, with clear holds, taut, staunch, and strong, and in every way fitted for the service and to be employed in such lawful trades as charterers or their agents should direct. The charter-party further provided as follows: That the owner

(*a*) Reported by Philip B. Durnford, Esq., Barrister-at-Law.

should maintain the vessel in a thoroughly efficient state in hull and machinery for the service. That the charterers were to provide and pay for all winchmen and lashings . . . also all charges appertaining to the cargoes that they might put on board . . . That the charterers were to pay hire at the rate mentioned in the charter-party, which hire was to continue from the date of her delivery to the charterers until her redelivery to the owners as therein mentioned. That the charterers had the privilege of loading any usual lawful deck cargo to be carried at charterers' and (or) shippers' risk. That the captain should prosecute his voyages with the utmost dispatch and lend all customary assistance with any cranes and (or) winches the steamer had . . . That the captain should be under the orders and directions of the charterers as regards employment agency or other arrangements. That the owners should not be responsible for damage to or claims on cargo caused by bad stowage, the stevedores being employed by the charterers. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, collision, docking, stranding, or other accident or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost should be allowed to the charterers including first twenty-four hours, and if such detention should exceed thirty days the charterers were to have the option of cancelling the charter, but that *should the vessel be driven into port or anchorage by stress of weather or from accident to the cargo such detention or loss of time should be at the charterers' expense:*

4. The said vessel was loaded by the charterers with a cargo of lumber including a deck cargo to a height of 15ft. 3in. on the forward deck and 13ft. 4in. on the after deck, and she sailed from Portland with the said cargo for Japan at 3 p.m. on the 9th Nov. 1912. The vessel called at Tacoma for coals and left that port on the 11th Nov.

5. On the 13th, 14th, 15th, and 16th Nov. the vessel encountered very bad weather, and in consequence thereof the stowage of the deck cargo shifted, it became insecure, the forward deck cargo was swaying to and fro dangerously, and a quantity of the forward deck cargo was washed overboard. The movement of the deck cargo caused a dangerous list and some damage to the vessel, the wind and sea were falling, and a portion of the deck cargo was jettisoned, but it was impossible adequately to secure the deck cargo. By reason of the shifting of the cargo the ship and the lives of those on board her were seriously imperilled, and it was decided (according to the record in the log book) to return to port to restow it and repair the damage done to the vessel in consequence of the cargo shifting.

6. A complete examination could not then be made because of the deck cargo, but it was ascertained that the foremast and port bulwarks were seriously damaged and that the rigging and stays forward and aft were damaged, strained, and broken, the starboard lifeboat was smashed, and the engine room casing buckled. There was some slight injury to the boat deck planks and the ventilators were smashed, but the vessel made no water.

7. At 3 p.m. on the 10th Nov. the course of the vessel was altered to bear up for Victoria, British Columbia, and at 6.38 p.m. on the 19th Nov. the vessel arrived at Victoria.

8. On the following morning, the 20th, surveys were held; it was found that a portion of the forward deck load was missing and the remainder of the forward deck load was more or less started, and the upper tiers of the deck load aft showed signs of having worked.

9. The surveyors recommended that sufficient lumber should be discharged from the forward deck to allow of an examination of the forward decks and for the purpose of properly restowing the cargo, and also that a sufficient quantity of lumber be discharged from the after deck to admit of an examination of the steering gear leads and pins and blocking in the way of the steering rods. The surveyors also recommended certain repairs to be carried out to the vessel.

10. The master immediately on arrival at Victoria applied to the charterers for advice and instructions with regard to the restowage of the deck cargo. I find, as a fact, that the charterers ought in the ordinary course of business to have given the master instructions with regard to the deck cargo, but they failed to do so for a considerable time, and in consequence of this failure the discharging of the deck cargo which was recommended by the surveyors was not commenced until 6 a.m. on Monday the 25th Nov., and time was lost thereby. The discharging of the after deck cargo continued until noon of Tuesday, the 26th, when the surveyors considered that sufficient of the after deck cargo had been removed, but the discharging of the forward deck cargo occupied until 2 p.m. on the 1st Dec., when the whole of the fore deck cargo was discharged.

11. When the cargo was discharged the extent of the damage to the foremast could be seen and a more thorough examination made of the damage to the vessel.

12. Temporary repairs were carried out to the mast and permanent repairs to the bulwarks, rigging, and steering gear, and some other slight repairs.

13. All these repairs, with the exception of some repairs to the steering engine and caulking of the boat deck (neither of which interfered with the work of reloading), were completed by Wednesday the 11th Dec., at 2 a.m., and at 7 a.m. on this day the reloading commenced, and was continued without interruption, except for bunkering, until 1 p.m. on the 19th Dec., when the cargo was all on board, and the vessel sailed at 8 a.m. on the 20th Dec.

14. It was originally contended by the charterers that the vessel was off hire from 3 p.m. on the 16th Nov., when she was put back, until the 24th Dec., when it was estimated that she would again have been in the neighbourhood of the spot where she was first put about for Victoria, but during the hearing before me it was conceded by the charterers' counsel that the charterers could not claim to deduct hire beyond 8 p.m. on the 20th Dec., making thirty-three days seventeen hours in all.

15. The owners, on the other hand, contended that by reason of the circumstances under which the vessel had to put back, they were entitled to hire for the whole period or, alternatively, the only deduction that could be made was in respect of the time that the vessel was actually undergoing repairs and without any cargo work being carried out, and, in the further alternative, that the time which was lost between the vessel's arrival at Victoria at 6.38 p.m. on the 19th Nov. and the commencement of the discharge on Monday the 25th Nov. was due to the charterers' default in refusing or failing to give instructions with regard to the discharge of the deck cargo, and that in these circumstances the charterers were not entitled to claim a cesser of hire in respect of the time so lost.

16. I find as a fact that the effective cause of the vessel putting back to Victoria was the shifting of the deck cargo, which was in peril of being wholly lost, and which in its insecure condition was a serious danger to the vessel and the lives of those on board her, and that but for the necessity of restowing and securing the deck cargo the vessel could and would (notwithstanding the damage caused to the vessel by the shifting of her cargo) have proceeded to her destination.

17. I further find that the vessel, being in port at Victoria, it was necessary to repair her before she reloaded her deck load and proceeded on her voyage. The repairs could not have been effected without discharge of the deck cargo; but for its own safety, independently of that of the vessel and the under-deck cargo, it was necessary to discharge and restow the deck cargo.

18. I further find that on the vessel's arrival at Victoria there was in fact an unreasonable and improper refusal by the charterers to give instructions to the master, whereby a period of four days twelve hours was lost.

19. In case it may be necessary to apportion the time occupied by the different operations, I divide the thirty-three days seventeen hours approximately as follows: Three days and four hours in actually steaming to Victoria. A reasonable time for surveys and for charterers giving instructions before discharge of deck cargo could begin, say seventeen hours (up to noon the 20th Dec.). Time lost through charterers' delay in giving instructions, four days twelve hours (up to midnight the 24th Nov.). Time occupied in connection with discharge of deck cargo for purpose of restowing distinct from any work of discharging solely for the purpose of repairs, six days fourteen hours (up to 2 p.m. the 1st Dec.). Time occupied in repairing, nine days twelve hours (up to 2 a.m. on the 11th Dec.). Time occupied in reloading (seven days twelve hours) and in bunkering and preparing for sea, one day eighteen hours (sailed 8 a.m. on the 20th Dec.).

20. If and so far as it may be a question of fact for me, and subject to the opinion of the court, on any question of law arising, I find that there was no accident or damage which prevented the working of the vessel for more than twenty-four consecutive hours until the whole of the forward deck cargo was discharged on the 1st Dec. From that time the repair of the damage sustained as aforesaid prevented any work except repairing the damage until 2 a.m. on the 11th Dec.

21. So far as it may be a question of fact for me, I find that consequent upon stress of weather the vessel was driven into port and was detained there until she sailed through an accident to the cargo, and subject to the opinion of the court upon any question of law arising, I find that the whole of the time lost in putting back to Victoria, and whilst there, was lost by reason of such accident to the cargo.

22. I therefore find and award that there is due from the charterers to the owners in respect of dispute No. 2, the sum of two thousand six hundred and sixty-eight pounds nine shillings and nine pence (2668*l.* 9*s.* 9*d.*) representing thirty-three days seventeen hours' hire at the net rate (after deducting six and a quarter per cent. commission as provided by the charter-party), and I direct that the charterers do pay that amount to the owners.

23. If the court, contrary to my award, should upon the above findings of fact hold that the vessel was off hire during the whole or any portion of the time occupied from the putting back on the 16th Nov. up to the 20th Dec., then I find and award that there shall be deducted from the amount above found due from the charterers to the owners under this head 78*l.* 15*s.* for each day, and a proportionate rate for any part of a day for which it was held the vessel was off hire, and in respect of which it is held that the owners are not entitled to recover from the charterers. . . .

Roche, K.C. and *Neilson* for the owners.

M. Hill, K.C. and *Currie* for the charterers.

BAILHACHE, J.—In this case there was a charter of the 4th July 1912 in respect of a a steamer called the *Strathdene*, and the charter was a combination of a voyage and time charter. The *Strathdene* was on a voyage from Portland to Japan, carrying amongst other things a deck cargo, and in the course of the voyage she encountered heavy weather, and the deck cargo shifted. It was found necessary for safety to put into Victoria, and when the vessel got into Victoria it was necessary to discharge the deck cargo and to examine the ship, and to do certain repairs, with the result that the vessel was detained in Victoria for a period of thirty-three days seventeen hours, including the time taken to get her back to Victoria. The charterers claim that during the whole of that period the vessel was off hire. The shipowners, on the other hand, claimed that during the whole of that period she was on hire. In the argument before me, the charterers, in view of the findings in the case, have abandoned their contention except as to two periods of time; one a period of four days and twelve hours, during which there was delay on the charterers' part in giving instructions as to what they wished to be done with this cargo, and as to another period of time—namely, nine days and twelve hours—during which the steamer was being repaired. For the purposes of that second period of time, I have to assume—I think rightly, although perhaps it is not stated as clearly as one might wish in the case—that the repairs which were done and which occupied nine days and twelve hours were repairs which were rendered necessary by reason of the combined effect of the stress of weather and the shifting of the deck cargo.

The question falls to be determined upon the construction of a clause in the charter-party which reads in this way: "That in the event of loss of time from deficiency of men or stores, breakdown of machinery"—I am leaving out the immaterial words—"or other accident, or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost shall be allowed to the charterers, including first twenty-four hours." Then it concludes: "But should the vessel be driven into port or to achorage by stress of weather or from accident to the cargo, such detention or loss of time shall be at the charterers' expense."

The vessel was driven into port by stress of weather and from accident to the cargo, and the question is whether the time occupied—and I will deal with that question first—in repairing the damage which was done to the ship herself is to be calculated as coming within the words "such detention" in that part of the clause. It says "should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense. Mr. Hill contends for the charterers that the words "such detention" mean only the actual loss of time that can be attributed to the vessel being driven into port or to anchorage and to the delay actually occasioned by the accident to the cargo. He says that in this case the other part of the clause is the operative part upon which I must act—namely, that this is time lost during the voyage due to accident or damage preventing the working of the vessel. He points out that if it were not so it would have been very easy for the persons who were responsible for this charter-party to have put in after the word "damage" the words "or damage unless occasioned by accident to the cargo and stress of weather." I am not very much impressed by the fact that it would have been easy in this charter-party to have made the meaning clear, because that is an argument which might be addressed to one on every conceivable question which has ever arisen upon charter-parties since charter-parties began. Mr. Roche says that I must accept his

meaning of the clause, because, if I do not, the words are redundant. That, again, is an argument which does not impress me very much, and for a very similar reason—namely, that in charter-parties one is accustomed to find a great many clauses or words which are redundant. That being so I must do my best with the words as I find them there.

The question is: What have these people bargained about? That has to be determined by what they have in fact said in the clause. I have come, with some hesitation, to the conclusion that, upon the law, Mr. Hill's contention is right. I think the words "should the vessel be driven into port or to anchorage by stress of weather or from accident to the cargo such detention or loss of time shall be at the charterers' expense," refer and must only refer to time which is actually lost by stress of weather or by accident to cargo, and repairing, of course, the accident to the cargo—that is to say, if the cargo requires to be discharged and re-stored, that would be time lost by accident to cargo. But I do not think I can include in such time damage to the ship which is caused by accident to the cargo. I think when damage to the ship is caused by accident to the cargo, it comes within the words "or other accident or damage" in the first part of the clause, and there is no qualification of those words. It does not seem to me that it matters for the purposes of this charter-party what is the cause of the accident or damage to the ship. If the ship has been damaged from any cause, and that damage requires to be repaired, and delay is thereby occasioned, and that delay exceeds a period of twenty-four hours, then it seems to me upon the construction of this clause, that the ship is off hire from that time, and in this respect, Mr. Hill's contention is, I think, right, and I must give effect to it. His other contention is a very much simpler one, and it is this: He says there is no obligation at all on the part of the charterer who was at San Francisco to give instructions to the master of the *Strathdene* who was at Victoria, a long way off, as to what was to be done with the deck cargo which obviously required to be discharged in order to see what damage the ship had sustained. I should have thought, myself, there was great force in that contention, but I think I am precluded from considering it because the arbitrator, who is the judge of fact in this case, and indeed the judge of fact and law as well, except so far as he leaves the question to me, has come to the conclusion which is expressed in clause 10 of the award: "I find as a fact that the charterers ought in the ordinary course of business to have given the master instructions."

Upon that finding, if the charterers ought to have given the master instructions and failed to do so, and by reason of their failure to do so the ship was delayed, it is quite clear that the ship ought not to be off hire for that period. Therefore, upon the findings in the award, I decide against Mr. Hill's contention in that respect. I must vary the award by finding that the *Strathdene* was off hire for nine days twelve hours.

Award varied.

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

Solicitors for the charterers, *Parker*, *Garrett*, and *Co*.

Thursday, Nov. 13, 1913.

(Before PICKFORD, J.)

STOTT (BALTIC) STEAMERS LIMITED v. MARTEN AND OTHERS. (a)

Marine insurance—Policy—Perils of the seas—Institute time clauses.

The plaintiffs took out a policy of marine insurance with the defendants on their ship which covered (inter alia) *perils of the seas. The policy included the conditions of the Institute time clauses as attached, clause* 3 *of which provided as follows: "In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, for all occasions," Clause* 7 *provided: "This insurance also specially to cover . . . loss of or damage to hull or machinery through the negligence of the master, mariners, engineers, or pilots, or through explosions, burstings of boilers, breakage of shafts, or through any latent defect in the machinery or hull. . . ." While the ship was lying in a dock, a boiler which was being lifted by a floating crane in order that it might be loaded into the hold fell and damaged the ship owing to the pin of a shackle breaking. In an action under the policy:*

Held, that the loss was not covered (*i.*) *by the words in the body of the policy, as it was not caused by a peril of the sea;* (*ii.*) *by clause* 3 *of the attached clauses, as that clause did not enlarge the risks covered by the policy;* (*iii.*) *by clause* 7 *of the attached clauses, which ought not to be read into the ordinary Lloyd's perils clause in the policy so as to apply the general words of Lloyd's perils clause to clause* 7; (*iv.*) *that the Marine Insurance Act* 1906 *had not altered the law in this respect.*

Jackson v. Mumford (1902, 8 *Com. Cas.* 61) *followed.*

COMMERCIAL COURT.

Action tried by Pickford, J.

The plaintiffs were the owners of the steamship *Ussa*, and the defendants were underwriters.

The plaintiffs claimed to be interested to the amount of 8250*l.* under a policy on the *Ussa* subscribed by the defendants, the ship being valued in the policy at 22,000*l.*

The policy was dated the 16th March 1911 and was for twelve months from the 16th March. The perils insured against were "of the seas . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the . . . ship. Attached to the policy were Institute time clauses, clause 3 and 7 of which provided as follows:

3. "In port and at sea, in docks and graving docks and in ways, gridirons, and pontoons, at all times and in all places, and on all occasions . . . 7. This insurance also specially to cover (subject to force of average warranty) loss of or damage to hull or machinery through the negligence of masters, mariners, engineers, pilots, or through explosions, burstings 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."

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

By their defence the defendants denied that the damage to the ship was a loss by a peril insured against within the policy.

Leslie Scott K.C. and *Darby* for the plaintiffs.

Roche, K.C. and *Mackinnon* for the defendants.

The facts and arguments are sufficiently stated in the judgment.

Pickford, J.—This case raises an important question, and one on which I am told average adjusters of great eminence have taken different opinions, and I have no doubt that other opinions will be taken upon this case after I have delivered my judgment. Therefore I think it is as well to deliver my judgment at once, as I have formed an opinion on the matter. It is an action for damages which were occasioned to a ship called the *Ussa*, which was insured on a policy against the usual perils beginning with perils of the sea, an enumeration of those perils being followed by the usual general words. It was a time policy, and it had attached to it the Institute time clauses, the note being: "Including the conditions of the Institute time clauses as attached," and the question is whether the loss which happened and the damage that was occasioned come within the meaning of that policy.

The ship was in the Bramley-Moore Dock in Liverpool, and she was taking on board a boiler weighing about 30 tons from the steam crane of the Mersey Docks and Harbour Board called the Atlas, which had brought the boiler from the North Docks to Bramley-Moore Dock, and was at the time of the accident engaged in lowering the boiler into the hold of the ship, the *Ussa*. While the boiler was being lowered it caught upon the coamings of the hatch, and, to a certain extent, that took the strain off the fall of the crane which was on board the Atlas, the Atlas being a floating structure which carried the crane. The Atlas, having the weight of the jib of the crane and its burden counter-balanced by a balance tank, when the weight was taken off, listed over away from the ship, the *Ussa*. That no doubt to a certain extent or to a considerable extent would neutralise the effect of the boiler catching—the effect, that is to say, in causing a slacking of the rope the boiler freed itself from the coaming, and having freed itself from the coaming, it continued to go down. That must have caused some extra strain upon the fall—how much is difficult to calculate. The pin of the shackle by which the boiler was carried then broke, and the boiler fell into the bottom of ship and caused the damage in respect to which this action is brought.

At first the plaintiffs' case was launched on this basis, that that accident was caused by some swell possibly from a tug which was said to be in the dock at the time, causing the Atlas to list and so causing the boiler to catch the coaming which it would not have done but for that list. On the evidence before me I am satisfied that it was not the cause. Mr. Stott, the gentleman who was a director of the plaintiff company and also a consulting engineer, was of opinion that that was the cause, and he describes certain things which he said he saw which would point, perhaps, in the direction of that having been the cause. But having heard the evidence of the men, the man who was in charge of the *Atlas* and the man who was in charge of the crane, I am quite satisfied that no motion of the water or anything of that kind, had anything to do with the accident at all. It was impossible that they could have avoided noticing it if it had taken place, and they are quite clear about it. The mate, Whorrall, said that there was no craft in the dock, it was perfectly smooth water, and there was nothing to interfere with their working; and the man who was working the crane, Frodsham, said substantially the same. Therefore I am quite satisfied that this was not caused by any motion of the water or any list, or anything of that kind of the *Atlas*. It is not necessary to resort to theories of that kind to explain why anything that is being lowered into the hold of a ship or through the traps of a warehouse, or any place of that kind catches on the coamings or the edges of the aperture. The thing is being done every day, and I think that it is quite in the ordinary way. Therefore that part of the plaintiffs' case, I think, fails.

Then there has been another dispute as to whether the pin of the shackle which broke was sufficient or not. I have had evidence both ways, but I do not think that was a fit and proper pin, and I think that the accident was occasioned, to a certain extent at any rate, and in a great measure, in my opinion, by the fact that the pin of the shackle was not what it ought to have been. Whether it would have gone if there had not been the catching on the coamings I do not think it is necessary to inquire, but I think that the insufficiency of the pin was at any rate in great measure the cause of the accident.

Under those circumstances are the plaintiffs entitled to recover? First it is said that this was a peril of the sea, or, if not a peril of the sea, it was at any rate another peril, loss, or misfortune of the same description as a peril of the sea. I do not think it was. I do not think it is necessary to go through all the cases that have been cited to me, but I think the result of them is to show that an accident of this kind is not a peril of the sea. No doubt, as Mr. Leslie Scott said, you cannot catch on the coamings of a ship unless you have a ship to have coamings to catch on. That is quite true, but that does not seem to me to make it a marine peril. If you are lowering a boiler or anything else on the land or anywhere else, there are constantly things against which it may catch which are just of the nature in that respect of the coamings of a ship, and it seems to me that I cannot, within the authority of the *Thames and Mersey Marine Insurance Company* v. *Hamilton Fraser and Co.* (57 L. T. Rep. 695; 6 Asp. Mar. Law Cas. 200; 12 A. C. 484) hold that an accident which, in my opinion, would have happened exactly the same if this crane had been a fixed crane on the quay, an accident which happened by the catching of the boiler on the coamings, and the insufficiency of the pin which carried the boiler, is a peril of the sea or is a peril, loss, or misfortune of the same kind as a peril of the sea. Therefore, on the terms of the body of the policy, I do not think that the plaintiffs can succeed.

But then they say they can succeed, and ought to succeed, by reason of the Institute time clauses which are attached to it, clause 3 and clause 7. Clause 3 is: "In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, and on all

occasions, services and trades, whatsoever and wheresoever, under steam and sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips." The argument is that this is a time policy, and therefore it is not necessary to specify time and place where the peril must occur in order to come within the policy, and also that I must interpret that clause as being an enlargement of the risk, because otherwise no meaning can be given to the words. It has to be admitted that on any construction the words "at sea" must be surplusage. It cannot be necessary that they should be there to enlarge the risk; and I do not think that the proper construction of that is to enlarge the risk at all. It may have been necessary to put it in, possibly in order to say that the policy was to attach in those places and at those times; but, in my opinion, it does not go further than this, to say that the insurance is to be against the perils described in the body of the policy, and it is to extend to all the circumstances which are mentioned in clause 3.

Then the final contention is upon the 7th clause, which is the well-known so-called Inchmaree clause, and that is to this effect: "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 master, mariners, engineers or pilots, or through explosion, 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." And then there is something about part-owners that I need not read. The argument upon that is this, that I must read into that clause the general words which appear in the body of the policy. It is admitted that the judgment of Kennedy, L.J., when a judge of first instance in the case of *Jackson* v. *Mumford* (8 Com. Cas. 61) is against that contention, and what Kennedy, L.J. said was this: "I now come to the second contention of the plaintiff. I think that it may be dealt with very briefly. Mr. Scrutton argued that a connecting-rod is so closely akin to a shaft, or perhaps, rather, that the breakage of a connecting-rod is so closely akin to the breakage of a shaft, that applying the *ejusdem generis* principle and reading the special clause with the ordinary Lloyd's peril clause, so as to incorporate with the former the general or sweeping words 'all other perils, losses and misfortunes,' we ought to treat the breakage of a connecting-rod as a risk which, like the 'breakage of shafts,' is covered by the policy." Then the Lord Justice, as he now is, deals with the argument that the special clause should be incorporated with the general clause in the policy, and he says: "In this state of facts, I should hesitate, at any rate, to apply the *ejusdem generis* principle, as the application of that principle has now been authoritatively settled by the House of Lords in *Thames and Mersey Insurance Company* v. *Hamilton, Fraser, and Co.* (*sup.*) even if I could incorporate the special in the general clause. But I do not think I am entitled, as a matter of construction, to do this. This special clause, the Inchmaree clause, as it is frequently called, is a separate clause, devised for addition to the ordinary Lloyd's policy in consequence of the House of Lords' decision to which I have referred, and as its opening words, 'This insurance also specially to cover loss of,' &c., show, it is a special clause to cover certain particular risks which it proceeds to enumerate. I do not think I should be justified either in treating it simply as part of the ordinary Lloyd's perils clause, which precedes it, or in adding to it from that clause the general and sweeping words. It does not appear to me to affect the question of construction that there is in the policy first, before the ordinary Lloyd's perils clause, a reference to this special clause in the words 'clauses as attached.'" I do not think that it makes any difference, but, as a matter of fact, the clause in the policy before me is not before the ordinary perils, but after them; but I do not think that makes any difference.

Two things are said about that judgment which, although, of course, not technically binding upon me, is a decision of a learned judge of great experience in these matters, which I should certainly not disregard without the strongest possible reason. Two things are said against it, and one is, that it is wrong as the law then stood. I think I should consider myself bound to follow it out of respect to the decision of the learned judge, but I agree with it and, therefore, I do not see any reason for considering whether I am technically bound by it or not. I agree with it. When I say that, I mean as the law then stood. But then the further argument is that, although it might be right as the law then stood, it is not right as the law stands now, and that it is not right as the law stands now because of the 12th rule in the schedule to the Marine Insurance Act of 1906, and that rule is this: "The term 'all other perils' includes only perils similar in kind to the perils specifically mentioned in the policy." That is made under sect. 30, which is in these terms: "Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the first schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them." I think Kennedy, L.J., he had had to decide this case after the Act, would, by the reasoning of his judgment, certainly have said that the context of the policy did "otherwise require," because the Inchmaree clause showed that the general words were not to be attached to that clause at all. I am not quite sure that the section and the rule apply to the reasoning of the case; I think, if it had been put before Kennedy, L.J., that would have been his answer, and, in my opinion, it is a good answer. I do not think that, reading this policy as it should be read, you are to put that clause among the perils in the policy so as to attach the general words to it or attach the general words to that clause, whichever way you like to put it. I think that Kennedy L.J.'s judgment with regard to that matter was right, and I do not think it is altered by the Marine Insurance Act. Therefore I think on each head the plaintiffs' case fails, and there must be judgment for the defendants.

Solicitors: for the plaintiffs, *Lightwood, Owen, and MacIver*; for the defendants, *William A. Crump and Son.*

Friday, Oct. 17, 1913.

(Before Pickford, J.)

British Oil and Cake Mills Limited *v.* Port of London Authority. (*a*)

Docks—Rates—Exemption — Goods imported for transhipment only—Goods imported for conveyance by sea to any other port coastwise—Transhipment of goods in port of London for Rochester—Port of London Act 1908 (8 *Edw.* 7, *c.* 68), *s.* 13—*Port of London* (*Port Rates on Goods*) *Provisional Order Act* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c. c.*), *sched., s.* 9.

Goods were imported from beyond the seas into the port of London for transhipment only, and were duly certified by the owners as being for transhipment. They were conveyed down the Thames to Rochester on the Medway.

Held, under sect. 13 *of the Port of London Act* 1908 *and sect.* 9 *of the Port of London* (*Port Rates on Goods*) *Order* 1910 *that the goods were exempt from payment of port rates as they were goods imported from beyond the seas for the purpose of being conveyed by sea only to another port "coastwise," as the definition of "coastwise" in sub-sect.* 3 *of sect.* 13 *of the Port of London Act* 1908 *is not imported into sect.* 9 *of the Provisional Order* 1910, *and the term "conveyed by sea only" is used to make a distinction between conveyance by land and not by river.*

Commercial Court.

Action tried by Pickford, J.

The plaintiffs' claim was for 1*l.* 13*s.* 4*d.* as money paid to the defendants under duress to obtain the release of 100 tons of linseed, the amount in question being claimed as port dues. They also claimed a declaration that the levying of such port dues was illegal.

The following was the agreed statement of facts:

The steamship *Assyria* from Calcutta and other ports with a general cargo was reported on the 12th June 1912 at the Custom House, London, to have arrived for discharge at Victoria Docks, London. Part of this cargo—namely, 100 tons of linseed—belonged to the plaintiffs, who on the 12th June 1912, as owners of the goods, presented and delivered to the collector of the port authority at the port rates on goods office of the Port of London authority, a certificate under their hands; such certificate was in the form required by the port authority under sect. 9 of the Port of London (Port Rates on Goods) Provisional Order Act 1910, in respect of goods imported into the port of London and intended for transhipment, and was entitled "Inward Port Rates Exemption Certificate." The certificate stated that the goods were intended for transhipment and described the goods as linseed, the quantity being 1364 bags, weighing 100 tons, the destination and route being Rochester in the county of Kent, and the mode of conveyance by sailing craft belonging to the London and Rochester Barge Company Limited. Such certificate was given within the period and in the manner prescribed by the said section.

The port authority declined to accept such exemption certificate, and made a note on the certificate as follows: "Inside line which extends from Colne Point to Reculvers." Thereupon the plaintiffs paid under protest on the 12th June 1912 the sum of 1*l.* 13*s.* 4*d.*, being the amount claimed by the port authority for foreign inwards port rates on the 100 tons of linseed at the rate of 4*d.* per ton. The payment of such rate was made by the deposit account with the port authority of the plaintiffs being debited with 1*l.* 13*s.* 4*d.* as appeared on the debit side.

The 100 tons of linseed were shipped again at the Victoria Docks within the limits of the port of London by being put overside from the steamship *Assyria* into a sailing barge, and the goods were then conveyed by such barge to the port of Rochester (which is on the river Medway) as soon as practicable after the 12th June 1912—namely, on the 2nd July 1912.

The point in dispute between the parties was whether under the above circumstances the foreign inwards port rate was legally chargeable on the 100 tons of linseed.

The following are the material sections of the Port of London Act 1908:

Sect. 13, sub-sect. 1. Subject to the provisions of this section, as from such day as may be fixed by the Board of Trade not being more than thirteen weeks after the Provisional Order embodying the schedule mentioned in sub-sect. 2 of this section has been confirmed by Parliament, all goods imported from ports beyond the seas or coastwise into the port of London or exported to ports beyond the seas or coastwise from that port, shall, subject to any exemptions or rebates which may be contained in a Provisional Order under this section or allowed by the port authority, be liable to such port rates as the port authority may fix, not exceeding such rates as may be specified in any Provisional Order, made by the Board of Trade for the time being in force, but the port rates charged by the port authority shall at all times be charged equally to all persons in respect of the same description of goods under the like circumstances, and shall be charged separately from any other dues payable to the port authority. Provided that: . . . (1) The Provisional Order under this section shall provide for exempting from such rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port, and may determine what goods are for the purposes of such exemptions to be treated as goods imported for transhipment only. (2) Within six months after the appointed day the port authority shall submit to the Board of Trade a schedule of the maximum port rates on goods, and the Board of Trade shall embody the schedule in a Provisional Order made for the purposes of this section. . . . (3) For the purposes of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point, being a line determined by the Treasury in pursuance of the power conferred upon them by section one hundred and forty of the Customs Consolidation Act 1876, or any line that may be substituted therefor by the Treasury in pursuance of such power as aforesaid. . . .

The Port of London (Port Rates on Goods) Order 1910 relating to the maximum port rates on goods which may be levied by the Port of London Authority, set out in the Schedule to the Port of London (Port Rates on Goods) Provisional Order Act 1910, provides, *inter alia*, as follows:

Sect. 9. No port rates shall be charged by the authority on transhipment goods, which expression wherever and in this order means and includes goods imported for transhipment only and also goods which remain aboard the vessel in which they were imported

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

for conveyance therein to another port. For the purposes of this section the expression "goods imported for transhipment only" shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved within the period and in manner hereinafter provided: (1) to have been intended for transhipment at or before the time of the report of the ship at the custom house or within seventy-two hours thereafter excluding Sundays and holidays; and (2) to have been shipped again as soon as practicable within the limits of the port of London for conveyance by sea to such other port. Every such certificate as aforesaid shall be under the hand of the owner of the goods (which expression whenever used in this order shall include the shipper and consignee of the goods and any person shipping or taking delivery of the goods on behalf of the owner, shipper, or consignee), or under the hand of a forwarding agent or of any other agent acting on behalf of the owner of the goods, or under the hand of the owner, master, managers, or agents of the importing or exporting vessel, and shall be in such form as the authority may from time to time require. The certificate stating that the goods have been intended for transhipment shall contain particulars of the description, quantity, destination, route, and mode of conveyance of such goods, and shall be delivered to the collector (which expression as used in this order means any collector or officer for the time being authorised by the authority to collect port rates on goods) within seven days from the arrival of the goods, or such further period as shall from time to time be appointed by the authority. The certificate stating that the goods have been shipped again as soon as practicable, as aforesaid, shall contain such particulars as the authority shall require, and shall be delivered to the collector at, or immediately after, the time of shipment. The owner of any such goods as aforesaid shall at all times give such other information and evidence as may reasonably be required by the authority or their agent in order to prove that such goods were intended for transhipment, or have been shipped again as soon as practicable as aforesaid as the case may be.

Talbot, K.C. and *Martin Smith* for the plaintiffs.—Under sect. 13 of the Port of London Act 1908, and sect. 9 of the Port of London (Port Rates on Goods) Provisional Order 1910, the goods in question are exempted from port rates, being imported from beyond the seas for transhipment only, and to be conveyed by sea only to some port coastwise.

George Wallace, K.C. and *Wootten* for the defendants.—The port rates in question were properly charged. The plaintiffs' goods were not conveyed by sea to a port seaward of the line from Reculvers Towers to Colne Point, and therefore they were not exported "coastwise" within the meaning of the section. The plaintiffs' goods were not goods imported from beyond the seas or coastwise "for the purpose of being conveyed by sea only" to any other port. These goods were conveyed by river and not by sea. They referred to

Mersey Docks and Harbour Board v. *Henderson*, 6 Asp. Mar. Law Cas. 338; 13 App. Cas. 595.

Woolwich Overseers v. *Robertson*, 6 Q. B. Div. 654.

Talbot, K.C. in reply.

PICKFORD, J.—This case raises a somewhat difficult question, and I at one time thought of looking at the cases to which I have been referred, but as I do not think they will throw much light upon it, and as I have formed an opinion upon the question, I think I had better give my decision at once.

The plaintiffs, the British Oil and Cake Mills Limited, claim to recover from the defendants, the Port of London Authority, a sum of 1*l.* 13*s.* 4*d.* which they have paid under protest for port rates in respect of some goods which were conveyed from Rochester. The case was argued on an agreed statement of facts from which it appears that the steamship *Assyria* from Calcutta and other ports with a general cargo, was reported on the 12th June 1912 at the Custom House, London, to have arrived for discharge at Victoria Docks, London. One hundred tons of linseed, part of the cargo, belonged to the plaintiffs, who on the 12th June 1912, as owners of the goods, presented and delivered an inwards port rates exemption certificate in accordance with the Act, stating that the goods were intended for transhipment and describing them as linseed, the quantity being 1364 bags weighing 100 tons, the destination and route being Rochester in the county of Kent, and the mode of conveyance by sailing craft belonging to the London and Rochester Barge Company Limited. The 100 tons of linseed were shipped again at Victoria Docks by being put overside the *Assyria* into a sailing barge, and they were carried to Rochester. The port authority declined to accept the exemption certificate, and made a note on the certificate: "Inside line which extends from Colne Point to Reculvers." That is a reference to a line which is mentioned in sub-sect. 5 of sect. 13 of the Port of London Act 1908. The port authority say that as these goods were to be carried to a place which was inside that line, that is, to the westward of it, and not to the seaward of it, they were not entitled to the exemption.

Whether the plaintiffs were or were not entitled to exemption depends upon the construction of the Port of London Act 1908 and a Provisional Order made under its powers. Sect. 13 of that Act, which is the important section, provides in sub-sect. 1 that: "Subject to the provisions of this section, as from such day as may be fixed by the Board of Trade not being more than thirteen weeks after the Provisional Order embodying the schedule mentioned in sub-sect. 2 of this section has been confirmed by Parliament, all goods imported from ports beyond the seas or coastwise into the port of London or imported to ports beyond the seas or coastwise from that port, shall, subject to any exemptions or rebates which may be contained in a Provisional Order under this section or allowed by the port authority," be liable to port rates. There are two provisos. The first proviso (*a*) is not of importance. The second proviso (*b*) is of importance and is to this effect: " . . . the Provisional Order under this section shall provide for exempting from such rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port, and may determine what goods are for the purposes of such exemption to be treated as goods imported for transhipment only." Sub-sect. 5 of sect. 13 is in these terms: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point." These are the whole of the provisions of sect. 13 which are material.

Sect. 15 provides that there shall not be preferential dock charges."

A Provisional Order was made under the powers of sect. 13 of the Act of 1908, and confirmed by the Port of London (Port Rates and Goods) Provisional Order Act 1910, and it therefore has the force of an Act of Parliament. Sect. 9 of the Provisional Order provides that "no port rates shall be charged by the authority on transhipment goods, which expression wherever used in this order means and includes goods imported for transhipment only, and also goods which remain on board the vessel in which they were imported for conveyance therein to another port." Therefore the first part of that section of the Provisional Order fulfils the terms of the first part of sub-sect. 1 (*b*) of sect. 13 of the Port of London Act 1908—namely, in providing for exemptions from port rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port. Sect. 9 puts these two classes of goods together under the one comprehensive term of "transhipment goods," and there the matter ends so far as the goods which remain on board the vessel in which they were imported for conveyance to another port are concerned. The latter part of sect. 9 of the Provisional Order does not deal with them at all, and therefore they remain exempt from any of the charges or rates fixed by the port authority, whether they come from or go to a place inside or outside the line to which the port authority refer. But the second part of sect. 9 of the Provisional Order goes on to deal with the other class of transhipment goods—namely, goods imported for transhipment only. It says this: "For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved within the period and in manner hereinafter provided (1) to have been intended for transhipment at or before the time of the report of the ship at the Custom House or within seventy-two hours thereafter including Sundays and holidays; and (2) to have been shipped again as soon as practicable within the limits of the port of London for conveyance by sea to such other port. . . ." Reading that part of the section by itself, apart from the question as to the meaning of the expression "by sea only," the matter would seem pretty clear. "Goods imported for transhipment only" would mean goods coming from beyond the seas or coastwise, that is anywhere at all. But the contention of the port authority is that I must read into or take as the definition of "coastwise" sub-sect. 5 of sect. 13 of the Port of London Act 1908, and therefore the expression "goods imported for transhipment only" must be read as meaning goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise, "coastwise" meaning a place seaward of a line drawn from Reculvers Towers to Colne Point. If that contention be right, the goods in question in this case were not taken to a place seaward of that line, the port of Rochester being inside that line, and not to seaward of it. I do not think that is the meaning of sub-sect. 5 of sect. 13 of the Act of 1908. I think it means that goods are not to be considered as imported or exported coastwise for the purpose of the operative part of the section—namely, sub-sect. 1—unless they come from or go to a place seaward of that line. The effect is that unless they are imported from or exported to a place seaward of that line they are not to pay dues. I do not, however, think that sub-sect. 5 of sect. 13 of the Act of 1908 was intended to be a definition of "coastwise," wherever that expression may appear in the Act of 1908, as in the Provisional Order of 1910. Looking at the matter in that light, I think that the word "coastwise" in sect. 9 of the Provisional Order of 1910 must be read in the ordinary sense, and that sub-sect. 5 of sect. 13 of the Act of 1908 was not meant as a limitation upon the exemption part of sect. 9 of the Provisional Order.

Another contention has been raised by Mr. Wallace on behalf of the port authority—namely, that the goods in question were not conveyed by sea, because they were conveyed from the river Thames within the port of London and within the statutory limits of the river Thames. If the expression "sea" is to be distinguished in that way from "river," no doubt these goods never did get out of the river Thames into the sea before they entered the river Medway, and they never were "conveyed by sea" as distinguished from the river Thames. But I do not think that the words "conveyed by sea only" were meant to be confined in that way. I do not think that it was intended by using the words "conveyed by sea only" to make a distinction between conveyance by what is strictly speaking a river and conveyance by what is strictly speaking the sea, but they mean conveyance by sea as distinguished from conveyance by land, for example, by railway. Therefore in the ordinary acceptance of the expression, carriage down the estuary of the Thames to the mouth of the Medway is included. I think, therefore, that the Port of London Authority were wrong in their contention, and there must be judgment for the plaintiffs for the return of the dues charged.

Solicitors for the plaintiffs, *Dollman* and *Pritchard*, for *Hayward, Smith,* and *Challis*, Rochester.

Solicitors for the defendants, *E. F. Turner* and *Sons*.

Monday, Oct. 17, 1913.

(Before Pickford, J.)

Anglo-American Oil Company *v.* Port of London Authority. (*a*).

Port of London—Docks—Port rates—Exemptions "Goods imported for transhipment only"—Oil in bulk—Mixture with other oil—Identification —Goods "shipped again as soon as practicable" —Port of London Act 1908 (8 *Edw.* 7, *c.* 68), *s.* 13 *—Port of London (Port Rates on Goods) Provisional Order Act* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c. c.*), *sched., s.* 9.

By sect. 13 *of the Port of London Act* 1908 *and sect.* 9 *of the Port of London (Port Rates on Goods) Order Act* 1910, *it is provided that goods*

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

imported for transhipment only into the port of London are exempt from port rates.

By sect. 9 *of the Provisional Order* 1910, *the expression "goods imported for transhipment only" is defined as meaning goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port, which are certified and proved within a certain period of the report of the ship at the Custom House to have been intended for transhipment, and which shall have been shipped again as soon as practicable for conveyance by sea to some other port.*

The certificate stating that the goods are intended for transhipment must contain particulars of the description, quantity, destination, route, and mode of conveyance of such goods, and the certificate stating that the goods have been shipped again as soon as practicable must contain such particulars as the Port of London Authority may require.

The plaintiffs were importers of oil in ocean tank steamers. Such oil as was intended for transhipment was discharged into tanks in London, some of the tanks being empty, some containing oil brought by other steamers, and some containing oil intended for distribution in the London district. The plaintiffs delivered to the defendants inwards port rates exemption certificates which stated that the oil was intended for transhipment, and gave the statutory particulars as to the amount of oil intended to be transhipped with its destination. On one of the certificates was given the name of three steamers bracketed together, it not being then known which of the steamers would be available. The plaintiffs also delivered outwards port rates exemption certificates with respect to oil for transhipment for which they claimed exemption. The defendants denied the plaintiffs' right to exemption with respect to the oil intended for transhipment upon four points—viz.: (1) *that the oil lost its identity on being discharged into tanks;* (2) *that it was impossible to identify the oil transhipped with the oil set out in the inwards certificate;* (3) *that the name of the export steamer was not sufficiently stated; and* (4) *that the oil had not been transhipped as soon as practicable.*

Held, that if the plaintiffs could prove that the oil intended for transhipment had in fact been transhipped the oil was exempt from the port rates even though it was discharged into tanks containing other oil or mixed with oil not intended for transhipment, and that it was not necessary to set out the specific name of the export vessel in the exemption certificate.

Held, also, that the words "as soon as practicable" mean that the transhipment must be carried out as soon as practicable having regard to the ordinary course of navigation and the facilities of the port, and not as soon as practicable having regard to the convenience of the merchant's business.

Commercal Court.

Action tried by Pickford, J.

The plaintiffs were importers of oil in bulk from places abroad, the oil being carried in ocean tank steamers. They had storage tanks at Purfleet, within the area of the port of London, and depots at various ports in the United Kingdom, including Sunderland, Lowestoft, Plymouth, and Grangemouth. Some of the oil thus imported was intended for distribution in the London district ex the tanks at Purfleet, while other oil was intended for distribution from tanks at various other ports, but the whole of the oil was discharged into the tanks at Purfleet. The plaintiffs' practice was to reload such part of the oil as was intended for ports other than London into coasting tank steamers kept by them for the purpose of transporting oil to the above-mentioned ports.

By the schedule to a provisional order made by the Board of Trade and confirmed by the Port of London (Port Rates on Goods) Act 1910, the maximum port rates are to be paid on goods, including oil, were specified, and it was provided that no port rates should be charged by the Port of London Authority on "transhipment goods" which were defined as meaning and including "goods imported for transhipment only."

Two printed forms of certificates were issued by the defendants for the use of owners of goods claiming exemption from port rates on transhipment goods under sect. 13 of the Port of London Act 1908 and sect. 9 of the Port of London (Port Rates on Goods) Act 1910.

The plaintiffs' ocean tank steamer *Narragansett* arrived in the port of London on the 27th March 1913, laden with a quantity of oil in bulk belonging to the plaintiffs. At the time of the arrival of the ship at the Custom House the plaintiffs intended to tranship 430 tons to Sunderland and 340 tons to Lowestoft, and they delivered to the defendants a signed inwards port rates exemption certificate dated the 28th March 1913 in the following form:—

Port of London Authority.—Transhipment Goods.

Inward Port Rates Exemption Certificate.

I hereby certify that the undermentioned goods are intended for transhipment, viz.:—

Ship—*Narragansett.* From—New York.

Reported at Custom House—March 27th. Place of Discharge—Purfleet.

Description of Goods and Marks.	No. of Packages.	Weight.				Name of Export Vessel.	Destination and Route.
		Tons.	Cwts.	Qrs.	Lb.		
Petroleum lamp oil in bulk...		430				*Tioga*	Sunderland
Do.		340				*Oneida*	Oulton Broad, Lowestoft.

Signature of owner or agent—Anglo-American Oil Company Limited.
Address—36-38, Queen Anne's-Gate, S.W.
Date—28 March 1913.

The plaintiffs then discharged 430 tons of oil on the *Narragansett* into an empty tank (No. 14) at Purfleet, and 220 tons into the same tank, and 120 tons into another tank which already contained oil intended for distribution in the London district. On the 29th March 1913 421 tons of oil from tank No. 14 were loaded on the coasting tank steamer *Tioga* and conveyed to Sunderland. On the 31st March 1913 220 tons of oil from tank No. 14 were loaded in the coasting tank steamer *Oneida* and conveyed to Lowestoft. The plaintiffs delivered a signed outwards port rates exemption certificate in respect of the oil conveyed to Sunderland and Lowestoft, which was in the following form :—

PORT OF LONDON AUTHORITY.—TRANSHIPMENT GOODS.

Outward Port Rates Exemption Certificate.

I hereby certify that the undermentioned goods imported ex *Narragansett* from New York on the 26th March have been shipped as follows :—

Export ship—*Tioga*. Sailing from—Purfleet.
Destination—Sunderland. Date—29th March 1913.

Description of Goods and Marks.	No. of Packages.	Gross Weight.			
		Tons.	Cwts	Qrs.	Lb.
Petroleum lamp oil in bulk		421	—	—	—

Signature of owners or agents—Anglo-American Oil Company Limited.
Address—36-38, Queen Anne's-gate, S.W.
Date—31st March 1913.

The plaintiffs also intended at the time of the *Narragansett's* report to tranship 650 tons to Plymouth, 680 tons to Dublin, and 300 tons to Grangemouth, and they delivered to the defendants a signed inwards exemption certificate dated the 28th March 1913 in the same form as that set out above, except that three steamers, named *Tioga*, *Oneida*, and *Osceola*, were bracketed together owing to the fact that the plaintiffs did not know at that time which vessel would be available for particular voyages. Three hundred and fifty tons were accordingly put into tank No. 6 and 300 tons into tank No. 14 (destined for Plymouth), 430 tons into tank No. 6 and 250 tons into tank No. 14 (destined for Dublin), and 300 tons into tank No. 14 (destined for Grangemouth). Tank No. 14 at no material time contained any oil save that brought by the *Narragansett.* Tank No. 6 also contained oil discharged on other steamers intended for transhipment by coasting tank steamers to other ports. On the 3rd April 1913 300 tons from tank No. 14 were loaded and carried by the *Oneida* to Grangemouth. On the 10th April 1913 237 tons from tank No. 14 and 380 tons from tank No. 6 were loaded and carried by the *Oneida* to Dublin. On the 13th April the *Tioga* sailed with 244 tons from tank No. 6 for Plymouth and 477 tons from ordinary stock for Avonmouth. On the 21st April the *Tioga* loaded 78 tons of oil from tank No. 14 ex the *Narragansett* stock and 90 tons ex the ordinary stock for Plymouth and 491 tons ex the ordinary stock for Avonmouth. On the 29th April the *Tioga* sailed with 106 tons from tank No. 6 and 222 tons from tank No. 14 ex the *Narragansett* stock and 165 tons ex the ordinary stock for Plymouth. Outwards exemption certificates in respect of these parcels were duly delivered by the plaintiffs to the defendants, but the defendants refused to admit the plaintiffs' right to exemption, and demanded payment of the inwards port rates, which were paid by the plaintiffs under protest, and the plaintiffs now claimed repayment.

Macmorran, K.C. and *Mackinnon* for the plaintiffs.—The plaintiffs should not be deprived of the benefit of exemption merely because the oil was shipped in bulk. Sect. 9 of the Provisional Order does not require that there should be a specific appropriation of the oil mentioned in the certificate, but only that there should be manifested an intention to tranship a certain quantity, which is done when a portion of a larger quantity is transhipped. It is true that a portion of the oil intended for transhipment was mixed with oil intended for distribution in the London area, but it cannot be necessary to identify the particular drops which are imported for transhipment. The plaintiffs have to show that the quantity of oil intended for transhipment has in fact been transhipped.

George Wallace, K.C. and *Wootten* for the defendants.—The identity of the goods imported for transhipment must be certified and proved. The plaintiffs should have appropriated the oil for transhipment and placed it in a separate tank within seventy-two hours of the ship being reported at the Custom House. The identical oil certified for transhipment must be exported and not other oil. The oil in question was not in fact shipped "as soon as practicable" in accordance with the requirements of sect. 9 of the Provisional Order of 1910. Those words refer to the facilities of navigation at the port.

Macmorran, K.C. in reply.

PICKFORD, J.—This case raises quite a different point to the one I decided in *British Oil and Cake Mills Limited* v. *Port of London Authority* (109 L. T. Rep. 859; *ante*, p. 417). In this case the facts, so far as they are agreed, and they are agreed in all material particulars, are as follows : The plaintiffs, the Anglo-American Oil Company, bring into the port of London considerable quantities of different qualities of oil in tank steamers. They have storage tanks at Purfleet, within the port of London, and also storage tanks in different parts of the country, including Sunderland, Lowestoft, Grangemouth, Dublin, and Plymouth. Some of the oil that the plaintiffs bring into the port of London is put into the tanks at Purfleet and is not carried elsewhere, but is distributed in the

London district, and possibly put on rail to be carried inland to other parts of the country. Some of the oil, however, is put into the tanks at Purfleet for the purpose of being taken out of the port again and carried by means of smaller tank steamers to storage places in different parts of the country. In this case, when the *Narragansett* came into the port of London, bringing a considerable quantity of oil, the plaintiffs delivered to the port authority inwards port rates exemption certificates claiming exemption from port rates. One certificate was in respect of 430 tons of oil destined for Sunderland, and 340 tons of oil destined for Lowestoft. The 430 tons were to be carried by the *Tioga*, one of the smaller tank steamers, and the 340 tons were to be carried by the *Oneida*, another of the smaller tank steamers. The other inwards port rates exemption certificate was in respect of 650 tons to be carried to Plymouth, 680 tons to be carried to Dublin, and 300 tons to be carried to Grangemouth, and these quantities were to be carried by the *Tioga*, the *Oneida*, or the *Osceola*, according to whichever steamer was available. Those three steamers were not inserted in the certificate as allocated to any specific cargo, but they were put in a bracket as being the three vessels of which one or other would be employed. I think it is sufficient to satisfy the requirements of the Act which requires the mode of conveyance to be specified. It was certainly no less specific than the description of the export vessel which was given and accepted in the case of the *British Oil and Cake Mills Limited*—namely, "sailing craft belonging to the London and Rochester Barge Company," no name of any barge being given. It does not seem to me that there is anything in the Act which requires that the name of the export steamer should be given in the inwards port rates exemption certificate. It possibly would have been enough to have said "by smaller tank steamer," but if the names of those steamers are given as being the steamers by one of which the oil will be carried, it seems to me that the requirements of the statute will have been sufficiently complied with. Some of the oil brought by the *Narragansett* was put into a tank (No. 14) which was empty, and some of it was put in a tank called an ordinary tank, which contained a certain quantity of oil not intended for transhipment, but intended for distribution in the London district. The plaintiffs claimed exemption for all the oil mentioned in the inwards port rates exemption certificate.

The defendants declined to allow the exemption on any part of the oil, the ground being that it is necessary that the goods which are to be brought into the port for transhipment only should, in order to be exempt, be capable of identification, and should, in fact, be identified with the goods which are afterwards transhipped; and that as the oil was not kept in separate parcels according to the destination of each lot—that is to say, 430 tons for Sunderland, 340 tons for Lowestoft, 650 tons for Plymouth, 680 tons for Dublin, and 300 tons for Grangemouth, in separate tanks, and it could not be ascertained which part of the bulk went to which place, the goods could not be identified, and therefore they were not entitled to exemption. If that contention were right to the fullest extent, it would, in a small measure, do away with the value of this exemption in cases of bulk cargoes. I am told that the question does not arise in the case of any bulk cargoes coming into the port of London except oil cargoes in bulk, because grain, which comes in bulk, is not brought in for transhipment, and therefore the question does not arise. I think, however, that the exemption must have been intended to apply to bulk cargoes if they came within the spirit of the enactment, and I do not think the exemption was intended to be confined to cargoes which are not in bulk, but in bags, or casks, or other packages.

The question may arise in different ways and in different forms. Mr. Wallace admits, and I think he was bound to admit, that if each ocean tank steamer as she came in put each parcel for each place in a different storage tank there would be sufficient identification, although one could not say that the 430 tons declared for Sunderland was any particular 430 tons, as that quantity lay in the ocean steamer. Still, there would be sufficient appropriation and identification. From a business point of view it would be impracticable to have a separate range of tanks for each ocean tank steamer that came into the port, varying in number according to the parcels that they had to deliver to different places. But I do not think it would be commercially impracticable to put the oil which is brought into the port of London for transhipment, whether in one or more ocean tank steamers, separate from the oil that is brought in for distribution in London and not intended for transhipment. The defendants say that even if that were done it would not satisfy the Act, because then there might be in the same tank oil brought in by the *Narragansett* which was going to a certain place, and also oil which was brought in by another steamer which was going to the same place, and it would be impossible to tell when the oil was sent to that place, whether the oil came by the *Narragansett* or by the other steamer, because it had all been mixed up together and nobody could separate it. Mr. Macmorran's answer to that contention is that the defendants cannot say that it did not come from the *Naragansett* cargo. I do not think that is a good answer, for it is for the plaintiffs to bring themselves within the exemption. I think, however, that this question must be looked at as a matter of business. If all the oil which is declared for transhipment is put into one range of tanks and kept quite separate from the oil intended for London distribution, and the plaintiffs can show that that oil has been certified or declared in the proper way as intended for transhipment only, and if they can also show that it has in fact been transhipped as soon as practicable I think they bring themselves within the exemption. I cannot think that it is necessary to be able to identify each particular parcel of oil as having come from a particular ship, if, as a matter of fact, the whole lot has been intended for transhipment, and declared for transhipment, and has been in fact transhipped, and has not been used for any other purpose at all. Therefore, in that case I think that the plaintiffs do bring themselves within the exemption.

The case where the oil which was brought into the port of London for transhipment was mixed with the oil that was intended for transhipment is more difficult. In that case the defendants say they cannot tell whether the oil that has been

sent out is the same oil that was brought in for transhipment, because it has been mixed with a quantity of oil which came in for distribution only, and nobody can tell which oil it is that has been transhipped. I feel considerable difficulty about that case, but on the whole I am inclined to think that in that case also the plaintiffs are entitled to the exemption in respect of the oil intended for transhipment. I think that as a matter of business if the plaintiffs can show that the *Narragansett* brought in 650 tons of oil for transhipment only, and that oil was certified as being for transhipment only, and that 650 tons of oil have been taken for the purposes of transhipment from a tank which contained the *Narragansett* oil and some other oil not intended for transhipment, that that is sufficient proof that the oil has been brought in for transhipment only, and that it has been transhipped. I feel great doubt about this point, and unless there be great commercial difficulties in the way, I think that the plaintiffs would be on much firmer ground if they kept the oil intended for transhipment separate from the oil intended for distribution.

Another question has been raised as to whether some of the oil was transhipped "as soon as practicable"—that is to say, shipped again as soon as practicable. On this point I am not sure that I have the facts quite clearly before me. It seems to me, however, that the expression "as soon as practicable" means that the transhipment must be as soon as practicable in the course of navigation, and that it does not mean as soon as practicable for the convenience of the merchant's business. If the merchant having a steamer available does not use her to carry this oil, but uses her to carry some other oil to some other place, and so delays the transhipment of this particular parcel of oil, it seems to me he is not transhipping this oil as soon as practicable. He is not bringing the oil into the port of London and keeping it for transhipment only, but he is bringing it into the port of London, and is using the appliances of the port for the purpose of storage in order to distribute it not in London but to his other storehouses according to his own convenience, and therefore I think the transhipment must be "as soon as practicable," having regard to the facilities of navigation and the possibilities of getting a ship. There is a case which, on the face of it, looks as though the oil had not been transhipped as soon as practicable. I am not deciding it as I do not know all the facts; I am only taking it as an example. I find that on the 11th April the plaintiffs gave instructions to their superintendent at Purfleet to deliver to the *Tioga* 250 tons of oil ex the *Narragansett* for conveyance to Plymouth, and 430 tons out of the ordinary stock for conveyance to Avonmouth. If the *Tioga* was available to carry the 650 tons of oil ex the *Narragansett* that had to go to Plymouth, and the plaintiffs, instead of using her for that purpose, for their own convenience filled up two thirds of her with ordinary stock for Avonmouth, then I do not think the plaintiffs were reshipping the oil ex the *Narragansett* intended for Plymouth as soon as practicable. On the other hand, if it was a case where there happened to be space on the *Tioga* for 250 tons of oil and no more, and the plaintiffs took advantage of that fact to send off some of the *Narragansett* oil, it would be transhipped as soon as practicable. But it looks to me very much as if the plaintiffs had said: "We want 650 tons of oil for Plymouth, and we also want a considerable quantity at Avonmouth; we could take the 650 tons to Plymouth in the *Tioga*, but we are not going to do that as it is more convenient for us to take some oil in the same ship to Avonmouth, and postpone the delivery of the balance of the *Narragansett* oil at Plymouth until it is convenient to us to take it there." That, to my mind, is not transhipping the oil as soon as practicable. Whether or not it was so transhipped must be a question of fact in each particular case. I can only say that, in my opinion, "as soon as practicable" means as soon as practicable in the course of navigation, having regard to the facilities of the port, and not as soon as practicable with regard to the convenience of the merchant's business. There will, therefore, be judgment for the plaintiffs.

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

Solicitors for the defendants, *E. F. Turner* and *Sons*.

Nov. 11 *and* 14, 1913.

(Before Bailhache, J.)

Mawson Shipping Company Limited v. Beyer. (a)

Charter-party—Dispatch money—Time saved in loading.

Prima facie *the presumption is that the object and intention of dispatch clauses is that the shipowner shall pay to the charterer for all time saved to the ship, calculated in the way in which, in the converse case, demurrage would be calculated—that is, taking no account of the lay day exceptions*: (Laing v. Holloway, infra, *and* Re Royal Mail Steam Packet Company v. River Plate Steamship Company, infra).

This prima facie *presumption may be displaced where either (i.) lay days and time saved by dispatch are dealt with in one clause and demurrage in another clause* (The Glendevon, infra); *(ii.) lay days, time saved by dispatch, and demurrage are dealt with in the same clause, but upon the construction of that clause the court is of opinion, from the collocation of the words, or other reason, that the days saved are referable to and used in the same sense as the lay days as described in the clause, and are not referable to or used in the same sense as days lost by demurrage*: (Nelson v. Nelson Line, infra).

By the terms of a charter-party it was provided that "the entire cargo shall be loaded at the average rate of 500 units per running day of twenty-four consecutive hours (Sundays and non-working holidays excepted)," and the owners agreed to pay the charterers 10l. per day for all time saved in loading. The cargo loaded consisted of 5132 units, and it was agreed that the charterer was entitled to ten and a half days for loading the cargo, and that the lay days began to count at 8 a.m. on Thursday, the 20th March. The 23rd March was a Sunday, and the loading was finished at 8 a.m. on Wednesday, the 26th March, so that, excluding

(a) Reported by Philip B. Durnford, Esq., Barrister-at-Law.

the Sunday, five days had been occupied in loading.

The charterer claimed that, as the remaining five and a half lay days (excluding Sundays), if used, would have expired only at 8 p.m. on Tuesday the 1st of April, he was entitled to be paid six and a half days' dispatch money at the rate of 10l. a day. The owners admitted their liability for five and a half days, but disputed their liability for the remaining day on the ground that it was a Sunday and was excluded from the lay days, and was therefore equally excluded from the dispatch days.

It was contended on behalf of the charterer that the object of the clause was to give dispatch money in respect of time saved to the ship, and that, as owing to the exertions of the charterer the ship was using the Sunday for the purpose of the voyage, he was entitled to be paid dispatch money in respect of that day.

Held, that the Sunday must be taken into account in assessing the dispatch money to which the charterer was entitled.

Award of an arbitrator stated in the form of a special case.

1. Whereas by a charter-party dated the 13th March 1913 it was agreed between the Mawson Shipping Company Limited (hereinafter called "the owners") and Mr. P. Beyer, of Novorossisk (hereinafter called "the charterer") that the steamship *Thirlwall* should proceed to Novorossisk and load a cargo of wheat, and (or) grain, and (or) seed upon the terms and conditions therein mentioned.

2. By clause 6 of the said charter-party it was provided as follows: "The entire cargo shall be loaded at the rate of 500 units per running day of twenty-four consecutive hours (Sundays and non-working holidays excepted). Time for loading to count from 6 a.m. in summer and 8 a.m. in winter, of the morning after steamer's arrival, whether in berth or not, she being then in free pratique, cleared by the customs, and ready to load in all her holds, and notice of readiness given, such notice to be given between the hours of 9 a.m. and 5 p.m. on ordinary working days. A non-working holiday shall be a day upon which all the banks are closed.

Charterers have the right of working during the excepted periods without counting the time, they paying all extra expenses incurred thereby.

3. By clause 9 it was provided that if the steamer should be longer detained than the time stipulated as above mentioned, demurrage should be paid.

4. By clause 24 of the said charter-party it was provided as follows: "Owners agree to pay charterers 10l. (say ten pounds) per day for all time saved in loading."

5. By clause 21 of the said charter-party it was provided that in the event of any dispute arising thereunder it was to be referred to two arbitrators in London with power to such arbitrators in case of disagreement to appoint an umpire whose award shall be final.

6. And whereas disputes did arise between the charterers and the owners with regard to a claim by the owners for ten pounds in respect of one day's dispatch money which the charterer had deducted from their settlement with the owners, and the owners duly appointed Mr. Frederick William Temperley, shipbroker, as their arbitrator, and the charterer duly nominated Mr. Netherton Johnson, shipbroker, as his arbitrator.

7. And whereas the said two arbitrators being unable to agree upon an award, duly appointed me the undersigned William Henry Turner as umpire.

8. On the hearing of the reference both parties applied to me to state a case for the opinion of the court, and I therefore state my award in the form of a special case finding the facts to be as hereinafter set out.

9. Now I the said umpire having taken upon myself the burden of the said reference, and having duly considered the documents and papers laid before me do find the facts to be (and subject to the opinion of the court) do award as follows:

10. The cargo loaded consisted of 5142 units, and it was agreed that the charterer was entitled to ten and a half days for loading the said cargo, and that the lay days began to count at 8 a.m. on Thursday, the 20th March. The 23rd March was a Sunday, and the loading was finished at 8 a.m. on Wednesday, the 26th March, so that, excluding the Sunday, it was agreed between the parties that five days had been occupied in loading.

11. The charterer claimed that as the remaining five and a half lay days (excluding Sundays), if used, would have expired only at 8 p.m. on Tuesday, the 1st April, that he was entitled to be paid six and a half days dispatch money at the rate of 10l. per day. The owners admitted their liability for five and a half days, but disputed their liability for the remaining day, on the ground that that was a Sunday, and was excluded from the lay days, and therefore was equally excluded from the dispatch days.

13. The question for the opinion of the court is whether, on the proper construction of the said charter-party, the charterer or the owners are right in their contentions with regard to the Sunday, the 30th March, counting as a dispatch day so as to entitle the charterer to 10l. in respect thereof.

14. If the court shall be of opinion that the owners are right in their contention, I do award and direct that the owners recover from the charterer the sum of 10l. and my fees and expenses of this reference and of the stating of this special case, and the arbitrators' fees of the reference, amounting in all to 31l. 10s.

15. If the court, on the other hand, should be of opinion that the charterer is right in his contention, then I do award and direct that the owners do recover nothing from the charterers, and that the owners do bear the whole of the fees and expenses as aforesaid.

A. Neilson for the shipowners.

A. H. Chaytor for the charterer.

Bailhache, J. read the following judgment.—This case stated by an umpire raises a question as to how days are to be reckoned for the purpose of paying dispatch money in a case where the charter-party provides for lay days, subject to exceptions such as Sundays and holidays. Is dispatch money payable in respect only of lay days saved or in respect of all time saved to the ship? In other words, is dispatch, for this purpose, on the same footing as demurrage? The question has been decided by the courts both ways.

The dispatch clause itself is usually quite short, and in much the same form, and the words which have caused the difficulty so far as they have been before the courts are "any time saved in loading and (or) discharging," "if sooner discharged"—"each clear day saved in loading" —"each running day saved," and the words in the present case are "all time saved in loading." I do not think that a shipowner or charterer would see any difference between any of these forms of expression except perhaps in the one— "each running day saved." Some of them do not contain the words, "in loading or discharging," but as in practice the only way in which a charterer can save time is in loading or discharging, these words do not seem to me to

add to or detract from the expression "time saved." I reserved judgment in order to see if, in view of the conflicting decisions, I could discover and enunciate any principle which might be of use to owners or charterers having occasion to use or construe dispatch clauses in the future and might serve them as a guide, of course so far only as the opinion of a judge of first instance can serve in that direction. This has involved a critical consideration of the decided cases which I propose to make at the risk of being tedious.

In the present case the matter arises in this way: By a charter-party dated the 13th March 1913, the steamship *Thirlwall* was chartered by her owners to a Mr. Beyer for a voyage; by clause 6 the entire cargo was to be loaded at the rate of 500 units per running day of twenty-four consecutive hours (Sundays and non-working holidays excepted); by clause 9 if the steamship was longer detained, demurrage was to be paid at a certain rate per running day; and clause 24, a written clause at the end of the charter-party, ran: "Owners agree to pay charterers 10*l.* per day for all time saved in loading." The cargo consisted of 5142 units, which gave ten and a half lay days, and they began to count on Thursday the 20th March at 8 a.m. and occupied five lay days expiring on Wednesday the 26th March at 8 a.m.—the intervening Sunday being of course excluded. The remaining five and a half days, if used, would have expired on Tuesday the 1st April because Sunday the 30th March would not have counted. The charterers contended that they were entitled to six and a half days dispatch money: the owners contended that they were only liable for five and a half days dispatch money upon the ground that as Sunday, the 30th March, was not a lay day, it did not count for the purpose of calculating dispatch money. Their contention was that time saved means lay days saved.

The first reported case on the subject is *Laing* v. *Holloway* in 1878 (3 Q. B. Div. 437). In that case demurrage and dispatch were dealt with in one clause, and, omitting unnecessary words, the clause ran: "Demurrage, if any, at the rate of 20*s.* per hour—dispatch money 10*s.* per hour on any time saved in loading and (or) discharging." By an earlier clause the cargo was to be loaded "at the rate of 200 tons per running day (Sundays and holidays excepted) and to be discharged as fast as ship can deliver, not exceeding 200 tons per working day, weather permitting." Four days were saved in loading and five in discharging. The point raised there was not quite the same as here. No one suggested that a Sunday did not count for dispatch, but the shipowner contended that a lay or working day was a day of twelve hours, and that what had been saved was nine working days of twelve hours each, equal to 108 hours. The charterers contended that they in fact saved to the ship nine days of twenty-four hours each, equal to 216 hours. The court held that there was no ground for the suggestion that the length of a lay or working day was twelve hours, and that time saved meant time saved to the ship and gave judgment for the charterers. Bramwell, L.J. said, in delivering the judgment of the court: "It is admitted on both sides, and it 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. Then the question is, by how much time is she sooner ready? The answer is nine times twenty-four hours. Really the reason of the thing is that way. The owner would sail away by what has happened 216 hours sooner than he would have done, but for the defendants' dispatch." And later on he says: "It was admitted by the plaintiff that the demurrage would be payable on this footing; then why not the dispatch money? The court having held against the construction that a working day meant a day of twelve hours, it may be said, as was said by Bray, J. in a later case, that the rest of the judgment is *obiter.* It may be so, but the judgment is a reasoned judgment on the construction and objects of the clause, and purports to lay down a principle.

It is to be observed that Bramwell, L.J. uses language which is hard to distinguish from the words "if sooner dispatched," which are the words in the next case. That case is *The Glendevon*, and it came before the Divisional Court in Admiralty (7 Asp. Mar. Law Cas. 439; 70 L. T. Rep. 416; (1893) P. 269). There the discharging and dispatch were dealt with in one clause which provided: "Steamer to be discharged at the rate of 200 tons per day, weather permitting (Sundays and *fête* days excepted) according to the custom of the port of discharge, and if sooner discharged, to pay at the rate of 8*s.* 4*d.* per hour for every hour saved." In the time saved were a *fête* day and a Sunday, and the charterers claimed dispatch money in respect of them. The court held that they were wrong. The main reason apparently, why the court so held was because the lay days were weather working days, and the argument advanced by the owners was that if before the end of the lay days the weather became too bad to work, the lay days would thereby be indefinitely extended, it might be for weeks, and the charterers would be able to claim dispatch money until the weather became fine again. Fletcher Moulton, L.J. deals with this point in *Nelson* v. *Nelson Line* (*inf.*), and I have nothing to add to what he there says. Another point taken by the president in *The Glendevon* was that the demurrage clause was a separate clause and contained no exceptions, and that as the lay day and dispatch clause were one clause, and that clause contained exceptions to the lay days, those exceptions must be taken as equally applying to dispatch days.

The next case is *Nelson* v. *Nelson Line* (10 Asp. Mar. Law Cas. 544, 581; 96 L. T. Rep. 887; (1907) 2 K. B. 705). There the lay days, demurrage, and dispatch days were all dealt with in one clause which runs: "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading . . . For any time above the periods above provided the charterers shall pay to the owners demurrage at the rate of 40*l.* per day . . . For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l.*" The same question arose. The days saved extended over a Sunday. The charterers claimed in respect of it, and their claim was disallowed by the court, Fletcher Moulton, L.J. dissenting. The judgment of the court was delivered by Buckley, L.J., who held

that *The Glendevon* (*sup.*) was rightly decided, and that *Laing* v. *Holloway* (*sup.*) was also rightly decided, but had no bearing upon the point raised in that case. The reason for his judgment is, I think, to be found in these sentences: "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 on the ship."

The last case is *Re Royal Mail Company and River Plate Steamship Company* (11 Asp. Mar. Law Cas. 372; 102 L. T. Rep. 333; (1910) 1 K. B. 601). There again, as in the last case, loading, demurrage, and dispatch were dealt with in the same clause. The relevant words are: "Fourteen running days . . . shall be allowed the charterers (holidays and time between 1 p.m. Saturdays and 7 a.m. Mondays excepted) for the loading of a cargo, and all days on demurrage and above the said lay days shall be paid for at the rate of 33*l.* per running day." There was a similar provision as to discharging, and the clause went on: "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 question there was as to Sundays and also as to time between 1 p.m. on Saturdays and 7 a.m. on Mondays, the charterers claiming payment and the owners resisting. Bray, J. held the charterers were right. It is to be observed in this case that, although the form of the clause and the collocation of words were the same as in *Nelson's* case, in the last part of the clause for the purpose of *pro rata* payment, demurrage, and dispatch, are treated as on the same footing. Bray, J. held, notwithstanding this fact, that he was not bound to qualify the dispatch words "each running day saved" by importing into them the exceptions to the lay day words, although the lay days were spoken of as running days; and he took occasion to express his concurrence with the dissentient judgment of Fletcher Moulton, L.J. in the *Nelson* case. With that expression of approval I desire to associate myself. I should, I fear, have decided all the four reported cases in favour of the charterer.

It would serve no useful purpose, and would, perhaps, be hardly respectful, to criticise the judgments of the court in the *Glendevon* case and of Buckley, L.J. in the *Nelson* case; but if the test is as Buckley, L.J. says, whether there is to be found in the language used "a trace of saving delay to the ship," I should have thought that in all the cases more than a trace is to be found in that part of the language used which provides that the ship is to pay—and in the *Glendevon* case, in particular, the words "if sooner discharged." I should not have found in that case a trace of anything else. Accepting, however, as I must, and do, the authorities as they stand, I think I may with safety say that the conclusions to be drawn from them are (1) *Primâ facie* the presumption is that the object and intention of these dispatch clauses is that the shipowner shall pay to the charterer for all time saved to the ship, calculated in the way in which, in the converse case, demurrage would be calculated—that is, taking no account of the lay day exceptions: (*Laing* v. *Holloway* (*sup.*) and *Re Royal Mail Steam Packet Company* v. *River Plate Steamship Company* (*sup*). (2) This *primâ facie* presumption may be displaced, and displaced where either (i.) Lay days and time saved by dispatch are dealt with in one clause and demurrage in another clause (*The Glendevon, sup.*); (ii.) Lay days, time saved by dispatch, and demurrage are dealt with in the same clause; but upon the construction of that clause the court is of opinion, from the collocation of the words, or other reason, that the days saved are referable to and used in the same sense as the lay days as described in the clause, and are not referable to or used in the same sense as days lost by demurrage: (*Nelson* v. *Nelson Line, sup.*).

Applying this rule to the present case, it falls within the first class. There is nothing to rebut the *primâ facie* meaning and object of the clause, and I decide in favour of the charterers.

Judgment for charterers.

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

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

Thursday, Dec. 11, 1913.

(Before CHANNELL, ROWLATT, and ATKIN, JJ.)

WILLS AND SONS (apps.) *v.* MCSHERRY AND OTHERS (resps.). (*a*)

Seaman — Wages — Summary Jurisdiction Act 1879 (*42 & 43 Vict. c.* 49), *s.* 33, *sub-s.* 1—*Merchant Shipping Act* 1894 (*57 & 58 Vict. c.* 60), *s.* 164—*Finality of magistrate's decision.*

By sect. 164 *of the Merchant Shipping Act* 1894 (*57 & 58 Vict. c.* 60), *it is provided that "a seaman or apprentice to the sea service, or a person duly authorised on his behalf, may, as soon as any wages due to him, not exceeding fifty pounds, become payable, sue for the same before a court of summary jurisdiction in or near the place at which his service has terminated, or at which he has been discharged, or at which any person on whom the claim is made is or resides, and the order made by the court in the matter shall be final."*

Certain seamen made claims upon the appellants, who were shipowners, for extra wages which had been promised to them by the captain of one of the ships of the appellants during the time that the ship was journeying from a foreign port to Southampton, and the justices of Southampton allowed the claims. Upon the application of the respondents, however, the justices agreed to state a special case for the consideration of the High Court.

Held, following the case of Westminster Corporation *v.* Gordon Hotels (98 *L. T. Rep.* 681; (1908) *A. C.* 142), *that the judgment given by the justices was final, and that there was no power to state a case.*

CASE stated by the justices of Southampton.

The respondents, who were seamen, made claims against the appellants, who were shipowners, for certain extra wages, the amount of the same being less than 50*l.*, which had been promised to them by the captain of one of the ships of the appellants during the time that the ship was on a voyage from Port Said to Southampton, the extra payment having been

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

promised on account of the time occupied on the journey, the ship having been compelled to call at a number of ports *en route*, where it was detained. The claims were heard by the justices of Southampton, and judgment was given in favour of the seamen, but at the request of the appellants the justices agreed to state a special case.

The facts of the case are of no importance for the purpose of this report.

By sect. 33, sub-sect. 1, of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) it is provided:

Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the case may apply to the High Court of Justice for an order requiring the case to be stated.

By sect. 164 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) it is provided:

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

L. F. C. Darby for the appellants.

Rayner Goddard for the respondents.—There is a preliminary objection to this case being heard. Proceedings were taken by the respondents against the appellants before a court of summary jurisdiction under sect. 164 of the Merchant Shipping Act 1894, and it was specially provided by that section that any order made by the court should be final. The justices had no power to state a case. There existed a general right on the part of any person aggrieved by a decision of a court of summary jurisdiction to have a case stated under the provisions of sect. 33 of the Summary Jurisdiction Act 1879. But the Merchant Shipping Act 1894, in sect. 164, made an exception to this general rule. The judgment in connection with any matter touching seamen's wages was to be final. The words "shall be final" had been considered by the House of Lords in the case of the *Westminster Corporation* v. *Gordon Hotels* (98 L. T. Rep. 681; (1908) A. C. 142), affirming the judgment of the Court of Appeal (96 L. T. Rep. 535; (1907) 1 K. B. 910). That was a case under sect. 33, sub-sect. 2, of the Public Health (London) Act 1891 (54 & 55 Vict. c. 76), the last words of which, in referring to proceedings taken under that sub-section before a court of summary jurisdiction, stated that the decision of the court of summary jurisdiction "shall be final." It was there decided that there was no right of appeal from the court of summary jurisdiction to the Divisional Court, and therefore no right to have a case stated. The same thing must apply to a case under the Merchant Shipping Act 1894, which was an Act of later date, and in which the words were identical.

Channell, J.—I am of opinion that the preliminary objection in this case must prevail, and that there was no power on the part of the justices to state a case. The question is one which deals with seamen's wages, and if the proceedings are taken before a summary tribunal sitting at a convenient place, as required by the Act, and if the other conditions are satisfied—namely, that the wages due do not exceed 50*l.* and have become payable—the decision of the justices is final. A dispute of this kind is mainly a question of fact, and it is one which a court of summary jurisdiction is quite capable of dealing with. The words of sect. 164 are quite explicit. They are "the order made by the court in the matter shall be final." These words, to my mind, can only mean "shall be final without appeal." That this must be so appears to be made clearer when sect. 165 is examined, which places a restriction upon suits for wages; for by that section no proceeding for the recovery of seamen's wages not exceeding 50*l.* can be instituted in any court other than a court of summary jurisdiction except in certain specified cases.

The words in the section now under consideration are exactly the same as those used in sub-sect. 33, sub-sect. 2, of the Public Health (London) Act 1891, and it was held by the House of Lords in the case of the *Westminster Corporation* v. *Gordon Hotels* (*ubi sup.*) when proceedings were taken under the Act of 1891, that the court of summary jurisdiction had no power to state a case, but that its decision was final. In the *Gordon Hotels* case (*ubi sup.*) it was argued that the court ought to follow the decision in *Reg.* v. *Bridge* (62 L. T. Rep 297; 24 Q. B. Div. 609), a case in which proceedings had been taken earlier than the date of the passing of the Public Health (London) Act 1891, under sect. 129 of the Metropolis Management Act 1855, which was very similar to, though not quite identical with, sect. 33, sub-sect. 2, of the Public Health (London) Act 1891. But, as the Master of the Rolls said in the *Gordon Hotels* case (*ubi sup.*), in the Court of Appeal, referring to the case of *Reg.* v. *Bridge* (*ubi sup.*): "I think that when that case is examined it is apparent that different considerations apply. At the date when the section corresponding to sect. 33 was first enacted by the Metropolis Management Act 1855, there was no provision whatever in the nature of appeal from a decision by the magistrate; there was a proceeding by *certiorari*, but there was no proceeding in the nature of case stated. Then came the subsequent Act of 1879—the Summary Jurisdiction Act 1879—and the view taken by the court was that when subsequent legislation had enacted in general terms that there should be a right of appeal by way of case stated from any order or decision of magistrates the generality of that provision ought to override the particularity of the former provision." The same considerations apply in the present case. Sect. 164 of the Merchant Shipping Act 1894 reproduces sect. 188 of the Merchant Shipping Act 1854. The proceedings have been taken under the Act of 1894, which speaks from its date. The right to state a case under the Summary Jurisdiction Act 1879 is expressly taken away by the Act of 1894, and when once the justices have given their decision there is an end of the whole matter.

I will only refer to the judgment of Buckley, L.J. in the *Westminster Corporation* v. *Gordon Hotels* (*ubi sup.*), when he says: "I hope that in this decision we are not precluding such matters as this coming up to this court if the exact course be not taken which the special case shows was taken by the magistrate in this case. I hope that it may be possible for the magistrate, instead of first making the order and then stating that, the appellants being dissatisfied with his decision, he has agreed to state a case, to say that his decision is arrived at subject to a case which he states. If that were done, I think the case could be brought before this court." Justices have very useful powers in courts of summary jurisdiction, and it is possible for a decision to be given by them subject to a case being stated. If this course is pursued, this order does not then become final. In the present case the decision was given first, and afterwards the justices agreed to state a case. They had no jurisdiction to do this, and consequently the preliminary objection must prevail.

ROWLATT, J.—I am not very clear upon the matter, but I do not desire to differ from the rest of the court. All that I can say is that I think that it is a matter which is extremely important. There are two sides to be looked at in a question of this kind. Of course, if one of the parties cannot appeal, neither can the other.

ATKIN, J.—I agree.

Appeal dismissed.

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

Solicitors for respondents, *Peacock* and *Goddard*, for *Charles J. Sharp*, Southampton.

Supreme Court of Judicature.

COURT OF APPEAL.

July 28 and 29, 1913.

(Before VAUGHAN WILLIAMS, BUCKLEY, and HAMILTON, L.JJ.)

THE OKEHAMPTON. (a)

Collision—Ship sunk—Ship on time charter—Ship sub-chartered on time—Contract of carriage—Sub-charterers' right to recover bill of lading freight—Right of bailee to recover damage.

An Italian steamship was let on time charter to a firm who sub-chartered the steamship under a time charter, the terms of which, with the exception of the rate of freight, were similar to that of the time charter between the Italian owners and the original charterers. During the currency of the sub-time charter the steamship was sunk, and the Italian owners and the owners of the cargo brought an action against the owners of the wrongdoing vessel and recovered damages. The sub-charterers, then started proceedings as time charterers of the Italian steamship against the owners of the wrongdoing steamship to recover damages—namely, the bill of lading freight which they would have earned if the voyage the Italian steamship was performing when she was sunk had been completed and the value of certain bunker coal owned by them and which would have been on board at the end of the voyage. The action was settled on terms, and, on the reference to the registrar to assess the damage, the registrar allowed the claim for bunker coal, but disallowed the claim for freight on the ground that injury to the property of another which rendered a contract made between the owner of the property and a third party less beneficial to the third party gave no right of action to the third party against the wrongdoer.

On appeal the judge of the Admiralty Court affirmed the decision of the registrar. The sub-charterers appealed to the Court of Appeal. The Court of Appeal having ordered further evidence to be taken before the registrar as to who were the parties to the contract of carriage, and on its being reported by the registrar that the contract of carriage was made between the sub-charterers as carriers and the shippers, the owners of the cargo:

Held, that the plaintiffs, the sub-charterers, had a sufficient possessory interest in ship and cargo as bailees to entitle them to maintain an action for the bill of lading freight lost through the collision.

APPEAL from a decision of Bargrave Deane, J. affirming a decision of the registrar's which held that the sub-charterers of a steamship let on time charter were not entitled to recover certain bill of lading freight from the owners of a steamship which had sunk the chartered vessel.

The appellants were R. MacAndrew and Co., the sub-charterers of the Italian steamship *Ruggiero di Flores*; the respondents were the owners of the steamship *Okehampton*.

On the 28th Nov. 1911 the owners of the *Ruggiero di Flores* handed their steamship over with a crew to Blom and Co., of Newcastle, under the provisions of a time charter.

Blom and Co. by a time charter-party dated the 27th Dec. 1911 handed her over with her crew to the appellants, R. MacAndrew and Co. The provisions of the two charter-parties were in all material respects the same.

The appellants used the steamship in conjunction with a line of steamships owned or managed by them to carry fruit from Spanish ports to places in Europe. While on one of these voyages from Valencia to Hamburg the *Ruggiero di Flores* was run into and sunk by the steamship *Okehampton* on the 12th Jan. 1912.

An action was then brought by the owners of the *Ruggiero di Flores* against the owners of the *Okehampton* to recover the value of the vessel and the loss of freight which they would have earned under the charter made between them and Blom and Co.

The damages were assessed, and on the 2nd Aug. 1912 the owners of the *Ruggiero di Flores* were allowed 7000*l.* for the loss of their ship and 1980*l.* for the loss of the freight under their time charter.

The appellants in an action against the owners of the *Okehampton* claimed as time charterers of the steamship *Ruggiero di Flores* for damages occasioned by and arising out of a collision which took place between the steamship *Ruggiero di*

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

Flores and the steamship *Okehampton* in the North Sea on the 12th Jan. 1912.

The action between the time charterers, MacAndrew and Co., and the owners of the *Okehampton* was settled on the 3rd Oct. 1912 on the following terms :

1. In consideration of the plaintiffs agreeing to the terms of settlement hereinafter set out, we the undersigned solicitors for the defendants hereby admit that the collision in question in this action was caused by the negligent navigation of the steamship *Okehampton*.

2. The defendants agree to pay and the plaintiffs to accept 65 per cent. of such damages as the plaintiffs prove they have sustained and as are recoverable by them at law in view of the aforesaid admission; the defendants maintaining their contention that the plaintiffs, notwithstanding the negligent navigation of the *Okehampton*, have no right of action against them.

3. In the event of its being held that the plaintiffs are entitled to recover damages, the defendants also agree to pay 65 per cent. of the plaintiffs' taxed costs, excluding any payment for detention of witnesses.

4. The solicitors for the plaintiffs and defendants respectively hereby consent to a reference to the registrar and merchants to deal with the questions arising on the above terms of settlement.

The amounts claimed by the time charterers on the hearing of the reference were as follows :—

	£ s. d.	£ s. d.
Item No. 1.		
Bill of lading freight payable at Hamburg,	1506 19 1	
less hire from collision to end of voyage, 80*l*., and expenses which would have been incurred at Hamburg, 223*l*. 19*s*. 11*d*.	303 19 11	1202 19 2
Item No. 2.		
Bunker coal which would have been on board after discharge at Hamburg.		
Quantity on board on leaving Gibraltar ...	193 tons	
Quantity which would have been used if voyage completed ...	134 tons	
	59 tons at 21*s*. per ton ...	61 19 0
		£1264 18 2

At the reference the charter-party entered into between MacAndrew and Blom was put in evidence and a *pro formâ* bill of lading was produced and put in evidence.

The material clauses of the charter-party were as follows :

It is this day mutually agreed between Messrs. C. A. Blom and Co. Limited, Newcastle-on-Tyne, chartered owners of the Italian steamship called the *Ruggiero di Flores*, . . . and Robert MacAndrew and Co. of London, charterers, as follows : That the said owners agree to let and the said charterers agree to hire the said steamship for the voyage from Valencia to final discharging port in east coast of United Kingdom or Continent between Havre and Hamburg inclusive from the time of delivery (not before the 2nd Jan. 1912), she being then placed with clear holds at the disposal of the charterers at Valencia, Spain, in such dock or at such wharf or place where she may always safely lie afloat as charterers may direct immediately on arrival (berth being ready) and being tight, staunch, strong, and in every way fitted for the service, and with a full complement of officers, seamen, engineers, and firemen necessary for a vessel of her tonnage; to be employed in such lawful trades between any port or ports in Spain and (or) Portugal, to one or more ports of discharge in the United Kingdom and (or) continent of Europe between Havre and Hamburg (both inclusive) and back finally to the east coast of the United Kingdom or to a safe port on the Continent between Havre and Hamburg, both inclusive, as charterers or their agents shall direct, on the following conditions :

3. That the charterers shall provide and pay for coals, canal dues, port charges, pilotages, consulages (except such as appertain to the crew), agencies, commissions, expenses of loading and unloading cargoes, and all other charges and expenses whatsoever (except those before stated) connected with the performance of this contract.

4. That the charterers shall pay for the use and hire of the said vessel at the rate of 27*l*. (twenty-seven pounds) sterling per running day, commencing on and from the time of her delivery to charterers as aforesaid, during usual working hours and at and after the same for any time used to complete a voyage; hire to continue from the time specified for commencing the charter until her redelivery to owners (unless lost) at a port in the United Kingdom or on the continent as aforesaid. Should steamer be likely to complete her voyage soon after hire is due charterers can pay a sum estimated to cover remainder of the voyage, any surplus or deficit to be regulated on completion.

5. Payment to be made in cash weekly in advance in Newcastle-on-Tyne to Messrs. C. A. Blom and Co. Limited, and in default of such payment or payments as herein specified the owners shall have the faculty of withdrawing the said steamer from the services of the charterers without prejudice to any claim they (the owners) may otherwise have on the charterers in pursuance of this charter.

13. 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, or in otherwise complying with the same, or from any irregularity in ship's papers committed by charterers or their agents.

18. That should the vessel be lost the hire is to cease and determine on the day of her loss, or, if such should be unknown, then on the day when she was last spoken, and any hire paid in advance and not earned shall be returned to the charterers without delay.

23. Charterers to have the liberty of subletting part or whole of the vessel's capacity, and the captain is to sign bills of lading at any rate of freight without prejudice to this charter-party, but the charterers to remain responsible to the owners for due fulfilment of same.

25. That the owners shall have a lien upon all cargoes and all sub-freights for freight or charter money, or any other sums due under this charter; and charterers to have a lien on the ship for all moneys paid in advance and not earned.

On the 7th Dec. 1912 the registrar made the following report on the claim of the time charterers :

The plaintiffs were the sub-charterers of the *Ruggiero di Flores* under a charter dated the 27th Dec. 1911. The chartered owners of the ship were Messrs. Blom and Co. under a charter of the 28th Nov. 1911. The plaintiffs took delivery of the ship at Valencia. There and at Carthagena she was loaded with fruit under bills

of lading, and it is in respect of the loss of freight payable at Hamburg under these bills of lading that the present claim is made, as also for loss of bunker coals. On the 30th and 31st July 1912 the claim of the *Ruggiero di Flores* and the owners of the cargo came before the merchants and myself, and a report was made by which the plaintiffs in those references were awarded damages, including the loss of hire of the *Ruggiero di Flores* under the first charter and the loss of bunkers belonging to the charterers.

The latter head of claim was, at the first reference, admitted, except as to price, by the defendants. But it has now been proved that the bunker coals were the property of the sub-charterers. They are, therefore, now entitled to recover in respect of them.

As regards the main head of claim, it was contended by counsel for the defendants that it ought not to be allowed because it was too remote. In my opinion this claim cannot be allowed. An action arising out of a collision must be for damage done by a ship (Admiralty Court Act 1861, s. 7)—that is, to a thing or person. The owners of the ship have already recovered the damages due to them for the damage to their ship. A loss arising to persons having only a contract with the charterers of the ship, even though such contract is for the hire of the ship, is too remote as an element of damages in respect of the damage done to a ship the property of other parties. This is the first case so far as I can find, and as counsel also stated, of a claim at a reference by charterers for the loss of freight only. It was said on behalf of the plaintiffs that *The Thyatira* (49 L. T. Rep. 406; 5 Asp. Mar. Law Cas. 147; 8 P. Div. 155) was an authority in their favour, but in that case the plaintiffs were holders of a bill of lading and recovered a sum in respect of the enhanced value of the cargo at the port of destination.

The point, in my opinion, is covered by the decision of Hamilton, L.J. in *Société Anonyme de Remorquage à Hélice* v. *Bennetts* (16 Com. Cas. 24), and this claim is in fact an attempt to override the decision of the House of Lords in *Simpson* v. *Thomson* (38 L. T. Rep. 1; 3 Asp. Mar. Law Cas. 567; 3 App. Cas. 279), in which the proposition was negatived that when damage is done by a wrongdoer to a chattel all those who by contract with the owners of the chattel have bound themselves by obligations which are rendered more onerous or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel have a right of action against the wrongdoer. The case of *The Racine* (95 L. T. Rep. 597; 10 Asp. Mar. Law Cas. 300; (1906) P. 273) and *The Kate* (80 L. T. Rep. 423; 8 Asp. Mar. Cas. 539; (1899) P. 165), which were cited for the defendants, merely decide that if a ship is sunk or damaged through the negligence of another, the owners of the damaged ship can recover, in addition to the value of the ship, the loss of profits through being deprived of the chattel.

The plaintiffs' claim for the bill of lading freight must, therefore, be disallowed. As the plaintiffs have failed on this head, but succeeded as regards the bunker coal, each party should pay their own costs of the reference and a moiety of the reference fees.

On the 18th Dec. 1912 the plaintiffs gave notice of appeal, asking that the report of the registrar should be rejected and not confirmed, and that the sum of 1202*l.* 19*s.* 2*d.* claimed, or such other sum for loss of freight as to the court might seem just, may be allowed on the grounds: (1) That on the facts proved or admitted at the reference the steamship *Ruggiero di Flores* was run into by the steamship *Okehampton* owing to the negligent navigation of the *Okehampton* by the defendants or their servants, and in consequence of the said collision the *Ruggiero di Flores* and her cargo sank and were totally lost, and that in consequence thereof the freight payable on delivery of the said cargo which the ship and the plaintiffs were in process of earning at the time of the collision was lost; and that the freight so lost, after deducting the expenses of earning it which had not already been incurred, amounted to 1202*l.* 19*s.* 2*d.*; (2) that the said freight belonged to or was lost by the plaintiffs; (3) that the plaintiffs were entitled to bring or maintain the action; (4) that the registrar's report was wrong in law.

The plaintiffs also asked for the costs of the reference and the appeal.

The motion asking for the rejection of the report came before the court on the 20th Jan. 1913.

Batten, K.C. and *Dunlop*, in support of the motion, contended that the appellants were entitled to recover the freight. They had a possessory interest in the cargo; they had not merely lost a contractual benefit by the wrong done by the owners of the *Okehampton.* They cited and referred to the following cases:

The Thyatira (*ubi sup.*);
The Kate (*ubi sup.*);
The Racine (*ubi sup.*);
Simpson v. *Thomson* (*ubi sup.*);
Société Anonyme de Remorquage à Hélice v. *Bennetts* (*ubi sup.*);
The Winkfield, 85 L. T. Rep. 668; 9 Asp. Mar. Law Cas. 259; (1902) P. 42;
Bailiffs of Dunwich v. *Sterry*, 1 B. & Ad. 831;
Master of the Trinity House v. *Clark*, 4 M. & S. 288;
Colvin v. *Newberry and Benson*, 1 Cl. & Fin. 283;
Sir John Jackson Limited v. *Owners of Blanches*, 98 L. T. Rep. 464; 11 Asp. Mar. Law Cas. 37; (1908) A. C. 126;
Carver's Carriage by Sea, sect. 114.
Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57), s. 1, sub-s. 1;
Belcher v. *Capper*, 11 L. J. 274, C. P.;

Roche, K.C. and *Noad*, for the respondents, contended that the ship was not in the possession of the sub-charterers, and that what the sub-charterers were seeking to recover was the loss caused by an interference with a contractual right. They cited:

Baumvoll Manufactur von Carl Schiebler v. *Furness*, 68 L. T. Rep. 1; 7 Asp. Mar. Law Cas. 263; (1893) A. C. 9;
Manchester Trust Limited v. *Furness Withy Limited*, 73 L. T. Rep. 110; 8 Asp. Mar. Law Cas. 57; (1895) 2 Q. B. 282;
Weir v. *Union Steamship Company*, 83 L. T. Rep. 91; 9 Asp. Mar. Law Cas. 111; (1900) A. C. 525;
Wehner v. *Dene Steam Shipping Company*, (1905) 2 K. B. 92;
Cattle v. *Stockton Waterworks*, 33 L. T. Rep. 475; L. Rep. 10 Q. B. 453.

Bargrave Deane, J.—In this case the plaintiffs seek to recover from the defendants by action the sum of 1202*l.* 19*s.* 2*d.*, as part of the damages occasioned to them by the sinking of the steamship *Ruggiero di Flores* through collision with the defendants' steamship *Okehampton.*

There is no dispute that the collision was caused by negligence on the part of the *Okehampton.* The amount of the claim is not in dispute, but on a reference to the registrar he has disallowed the claim altogether on the ground that the plaintiffs, though charterers of the *Ruggiero di Flores*, were

not her owners, and that, therefore, their claim being for freight in respect of goods carried by them in that ship and lost by reason of the collision with the *Okehampton*, could not be recovered as damages by them, they not being the owners of the ship which earned the freight.

The real owners of the *Ruggiero di Flores* had on the 28th Nov. 1911 by the provisions of a time charter handed her over with her crew to Messrs. Blom and Co., and they in turn, by a charter-party dated the 27th Dec. 1911, handed her over to the plaintiffs, with her crew.

There can be no doubt that by a charter-party sometimes the ship herself and the control over her working and navigation are transferred to the persons who for the time being use her. Sometimes a charter-party is made for the purpose of securing to the charterer the use merely of a ship for a particular voyage or series of voyages. He does not desire to interfere with the manner in which she is to be navigated, nor is the shipowner willing to part with his control over her. The charterer is content with the owners' undertaking that the vessel's services shall be at his disposal. The whole control and management of the ship are left undisturbed in the hands of the owner, who remains in possession by his servants, the master and crew. In such a case the shipowner is the carrier of the goods for the charterer. It is, therefore, important to look at the terms of the charter-party and to study its terms, so as to ascertain the true position of the charterer in this case.

It is agreed that the original charter-party between the owners and Blom and Co. is identical in its terms with the charter-party between Blom and Co. and the plaintiffs, except as to the dates, which are not material. Blom and Co. agree to let and Robert MacAndrew and Co. agree to hire the said steamship for the voyage from Valencia to final discharging port on east coast of United Kingdom or Continent between Havre and Hamburg inclusive—ship being placed with clear holds at the disposal of the charterers at Valencia, Spain, in such dock, wharf, or place as the charterers may direct, with a full complement of officers, seamen, engineers, and firemen; that the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew, for the insurance of the vessel and for all stores, and maintain her in a thoroughly efficient state in hull, machinery, and equipment during the service; the charterers to pay for the use and hire of the said vessel at the rate of 27*l*. per running day; payment to be made in cash weekly, and in default the owners to have the faculty of withdrawing the vessel from the services of the charterers; steamer to work night and day if required; the captain shall render all customary assistance with the ship's crew; the captain shall be under the orders and directions of the charterers as regards employment, agency, and other arrangements, but the charterers to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or from any irregularity in ship's papers committed by the charterers or their agents; that if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall investigate the same, and, if necessary, make a change in the appointment; all graving-dock charges to be at owners' expense, and time in graving dock not to count on hire.

Can it be said that the provisions of this charter-party show that the owners ceased to be owners in possession, and that the charterers became the owners in possession? In my opinion the owners never intended to part with the control of their vessel, except to permit her to be used by the charterers for the temporary purpose of this defined voyage from Valencia to a port of discharge in the United Kingdom or Continent between Havre and Hamburg inclusive. This voyage was to be conducted by their own servants, the master and crew, and though the arrangements for the cargo carried and the freight to be paid were left in the hands of the charterers, the owners remained the real carriers, and the actual possession of the ship still remained in them.

I have no doubt that this is the true meaning and intention of the charter-party, and that the owners, as carriers, were alone in a position to sue for the freight, and that the charterers were not, in point of law, the real carriers of the cargo and therefore cannot sue for the freight.

I am not aware of any case exactly like this which has been decided. Lord Gorell in *The Amstelstroom* (unreported) had a similar point taken before him, but he did not decide it.

In my opinion the charterers should have placed this claim before the owners after the vessel was lost in the collision, and requested them to include it in their claim for damages in the action which they brought against the owners of the *Okehampton* for the loss of their ship the *Ruggiero di Flores*. Apparently this was not done, and the plaintiffs have no right of action against the defendants.

I therefore confirm the registrar's report.

From this judgment the time charterers appealed to the Court of Appeal.

On the 22nd and 23rd April 1913 the case came before the Court of Appeal consisting of Vaughan Williams, L.J., Hamilton, L.J., and Bray, J.

The appellants, the time charterers, contended that the contract in the bill of lading was entered into between the appellants, the sub-charterers, and the cargo owners, and that they had a possessory interest which entitled them to sue.

It was contended on behalf of the respondents, the owners of the *Okehampton*, that the terms of the sub-charter and the bill of lading produced by the appellants showed that there was no demise of the ship, and that the contract of carriage was between the cargo owner and the shipowner.

The evidence as to who signed the bills of lading and on whose behalf they were signed not being satisfactory, the Court of Appeal sent the case back to the registrar, ordering him to "take evidence and report upon the terms and signatures of the actual bills of lading for the cargo lost, and also upon the circumstances tending to show who were the actual parties to the contracts for the carriage of the goods in question, attaching to his report any original bills of lading proved before him."

On the 1st May the appellants produced four witnesses before the registrar—the manager of R. MacAndrew and Co. at Carthagena, who actually signed the bills of lading at that port; the manager of R. MacAndrew and Co. at Valencia, who actually signed the bills of lading

at that port; a clerk in the firm at Hamburg who acted as agents for R. MacAndrew and Co. at that port; and a member of the firm of R. MacAndrew and Co. of London.

On the 3rd May the registrar made a report in which he stated that:

The cargo of fruit was shipped at Valencia and Carthagena. The proceedings in regard to the cargo at each port were the same. At Carthagena, where the bulk of the cargo was shipped, the fruit arrived by rail; it was taken delivery of by MacAndrew's men on presentation to the railway company of forwarding notes received from the shippers, which were kept by the railway company. MacAndrew's men took the fruit to the quay and then to the ship's side. It was then loaded by the stevedore's men. MacAndrew paid all the expenses incurred from the receipt of the fruit till it was placed in the ship's hold. The mate's receipts for the fruit were handed to MacAndrew's manager, and, on the following day, the bills of lading were made out in triplicate. Two were signed by MacAndrew's representative and given to the shipper, and the third was sent to MacAndrew's agents at Hamburg. The captain had no document showing the names of consignees or the amounts payable. The manager gave the captain orders to go to Hamburg. If the ship had arrived at Hamburg, MacAndrew's agent there would have taken delivery of the fruit, and it would have been deposited in sheds in their names and delivered by them to the consignees on presentation of the bill of lading. If the consignees were not known to the agents, they would have required payment of the freight before delivery of the fruit. Other matters were touched on by the witnesses, but the above statement embodies what appear to be the material facts.

The registrar appended to the report the bills of lading for the cargo, except five which had been lost, and the mate's receipts.

The case again came before the Court of Appeal, consisting of Vaughan Williams, Buckley, and Hamilton, L.JJ., on the 28th and 29th July 1913.

Batten, K.C. and *Dunlop* for the appellants (plaintiffs).—With regard to the navigation of the vessel, the master and crew were, no doubt, agents of the owners; but with regard to the cargo the sub-charterers had a possessory interest in the ship and cargo as bailees, and were entitled to bring this action against the wrongdoer. The evidence now before the court shows clearly that the contract of carriage was made between the sub-charterers and the shippers, and was not made between the shipowners and the sub-charterers. The following cases and authorities were cited by them in addition to those referred to above:

Kruger and Co. v. *Moel Tryvan and Co.*, 97 L. T. Rep. 143; 10 Asp. Mar. Law Cas. 465; (1907) A. C. 272;

Herman v. *Royal Exchange Shipping Company*, 1 Cab. & E. 413;

Harrison v. *Huddersfield Steamship Company*, 19 Times L. Rep. 386;

Reeves v. *Capper*, 5 Bingham N. C. 136;

Samuels v. *West Hartlepool*, 11 Com. Cas. 115;

Pollock and Wright on Possession (1888), p. 166, sect. 4;

Carver's Carriage by Sea, 6th edit., sect. 154.

Roche, K.C. and *Noad* for the respondents (defendants). — The evidence summarised in the report of the registrar does not alter the legal position. There was no demise of the ship to the sub-charterers and the cargo was in the possession of the master, who was the servant of the shipowners, and he had possession of the cargo for their benefit; he held it for the shipowners, for they had a lien on it for unpaid hire: (see clause 25 of the charter-party). [The argument for the respondents on this point is fully stated in the judgment of Hamilton, L.J. (*infra*).] The persons who signed the bills of lading signed on behalf of the master, who was the agent of the shipowner. The respondents cited and referred to the following authorities:

Turner v. *Hagi Goolam Mahomed Azam*, 91 L. T. Rep. 216; 9 Asp. Mar. Law Cas. 588; (1904) A. C. 826;

Lord v. *Price*, 30 L. T. Rep. 271; L. Rep. 9 Ex. 54;

Gordon v. *Harper*, 7 T. R. 9;

Harrowing Steamship Company v. *Thomas and Son*, 108 L. T. Rep. 622; 12 Asp. Mar. Law Cas. 261: (1913) 2 K. B. 171;

Gilkison v. *Middleton*, 2 C. B. N. S. 134;

Tagart, Beaton, and Co. v. *James Fisher and Sons*, 88 L. T. Rep. 451; 9 Asp. Mar. Law Cas. 381; (1903) 1 K. B. 391;

Carver's Carriage by Sea, sect. 166;

Clerk and Lindsell on Torts, 6th edit., p. 282;

Pollock and Maitland on the History of English Law, (1895), vol. 2, p. 168: Bailment.

VAUGHAN WILLIAMS, L.J.—In this case the only bills of lading which were signed were signed by MacAndrews. I at once say that as far as there was a suggestion that there were two firms of MacAndrew here, I have already in the course of the argument stated that we thought on the evidence we had no right to come to that conclusion. It is one firm with two branches.

The question is whether Robert MacAndrew and Co., the plaintiffs, have such an interest here—such a possessory interest in this case—as to enable them to become plaintiffs. We have heard from counsel for the appellants, an account of what the actual arrangement between the shipper and MacAndrew was. I see no reason for saying, my attention having been called to the evidence, that there is not ample evidence that that was the arrangement.

We have to consider what is the meaning of the signature to the bill of lading here; does it mean that MacAndrew was acting as the agent of the shipowner when he signed the bill of lading, or does it mean that when he signed, he signed it on his own behalf? I think it means he was signing it on his own behalf. I think, further, it means he signed it on his own behalf with the full knowledge of the master. Of course, no one would deny that a bill of lading which is signed by the charterer of a ship may be a bill of lading which is signed on behalf of the master. It may be, notwithstanding the fact that it is signed in the charterer's name. In this case we have it in evidence that the goods were received by the mate of the ship, and that he gave a receipt, and *primâ facie* it would have to be assumed, in the absence of circumstances, some of which I have already detailed, that thereupon the master would be regarded as the bailee of this cargo. The master, of course, generally is the servant of the shipowner where there is a charter, and represents the shipowner.

Under these circumstances we have to look and see what the facts are. I take it that on the evidence it is beyond dispute now that the

master knew perfectly well that MacAndrew was signing these bills of lading. Whether or not he knew the exact circumstances as between the shippers and the charterer I do not know. That refers to relations and circumstances of which I have just spoken. But, however that may be, in my opinion the master knew perfectly well about this bill of lading. When one comes to the conclusion in fact that this bill of lading or these bills of lading were signed really by the charterer, not in any sense as agent, still less as servant, of the ship, it seems to me we should be doing very wrong if we were to say in such a case that the signing of the bill of lading by MacAndrew was a signing on behalf of, or as the agent of, the master of the ship. Under those circumstances I do not know that I have to deal with the matter at any greater length.

In my opinion the moment you come to the conclusion that the bill of lading was signed by MacAndrew, the charterer, not on account of the ship, but on his own account, it follows necessarily that he had sufficient interest—really sufficient possession—to enable him to bring this action. The real objection here is that he had no such interest as to enable him to bring the action, but in my opinion he had.

BUCKLEY, L.J.—I agree that this appeal must succeed. I think it unnecessary to take time in delivering any independent judgment of my own.

HAMILTON, L.J.—I agree. The case is entirely transformed now that the facts with regard to the shipment of the goods and the signing of the bills of lading have been exactly ascertained.

It now appears that the plaintiffs' claim is not merely for the loss of contractual advantages which have been defeated by the results of the collision; it is a claim for damage suffered by the loss of the cargo bailed to them in regard to which they had such rights of possession as entitled them to bring the action. I agree that the plaintiffs, Robert MacAndrew and Co., so named on the writ, are upon this evidence identical with the firm of MacAndrew and Co., at Carthagena and Valencia, who signed the bills of lading. It is so stated in terms by one of the witnesses at question 375, and I do not think that the document entered into in compliance with Spanish law on establishing the firm at Barcelona is sufficient to answer that evidence. The goods were received from the growers by the firm of MacAndrew and Co. at both those ports. Full evidence is given as to the course pursued as to loading at Carthagena. The registrar's report states that the same course was pursued in substance at Valencia. This must have been taken on admission; and there is nothing in the evidence to cast any doubt upon it. The goods were in the hands of MacAndrew and Co. until the vessel arrived, and were placed on board by their stevedores.

The *Ruggiero di Flores* was a casual addition to a line of steamers consisting partly of steamers owned by Robert MacAndrew and Co., partly of steamers owned by the Compagnia Maritima of Barcelona, in which Robert MacAndrew and Co. owned 95 per cent. of the stock. The cargo was sent down by the growers pursuant to current shipping arrangements made for the season with MacAndrew and Co. The bills of lading—and it was really for the purpose of getting the original bills of lading and of clearing up the circumstances under which they were signed that the adjournment took place—contain contracts of carriage to which MacAndrew and Co. are parties and the owners of the *Ruggiero di Flores* are not. The latter is the important point. Whether MacAndrew and Co. were agents for the Compagnia Maritima, signing in such a form as to be personally liable, though in fact only agents, or were signing entirely for themselves, matters little, although, having regard to the number of ships which Robert MacAndrew and Co. themselves owned, the evidence warrants the conclusion which I draw, that they were signing for themselves as principals. The shipowners are not parties to these contracts of carriage. The difficulties suggested in construing the bill of lading appear illusory. In a form of bill of lading which is used for the whole line, terms like ship, vessel, shipowner, owner, are used, which in the case of a chartered vessel must be adapted to that case, as if they spoke of the ship as "chartered ship," and so on. I think it is not unimportant to recollect that the ship is an Italian ship, that she is loading in Spanish ports, and that she is loading from a firm which carries on a well-known business in those Spanish ports—circumstances which enhance the probability that the carrying contractor would be the well-known firm and not the unknown owners of a foreign steamer. No doubt it is true that the business of signing bills of lading ashore, when the vessel is loaded, is often carried out rapidly and without much formality, and it is sometimes difficult to tell on whose behalf a person signs the bill of lading unless he is the master himself; but, as was pointed out by Walton, J. in *Samuel* v. *West Hartlepool Steam Navigation Company* (*ubi sup.*), the matter must be determined on the documents and circumstances of each case. For that reason one may put aside *Wehner* v. *Dene Steam Shipping Company* (*ubi sup.*), because, although the course of business described there is very well known, in that case the bill of lading was actually signed by the master of the vessel, but such was not the case here.

The contract for the carriage and delivery of the goods at Hamburg being made with MacAndrew and Co. in form, why is it to be said that in fact it was not so? The argument is that there was an obligation upon Messrs. MacAndrew and Co. to sign for the shipowners, and that it must be presumed that they acted in pursuance of the obligation. I will not ask whether their express evidence that they did not do so was admissible or not, although I do not see why it was not; but all the circumstances seem to me to show that in fact they did not do so; nor do I see that there was such an obligation upon them to do so as would support the argument. It may be that, as pointed out in *Tillmans and Co.* v. *Knutsford* (1908) 2 K. B. 385), they would have authority, by reason of the charter-party, to sign on behalf of the master without any further communication with the owners, but that carries one no further unless it is established that they did sign on behalf of the master. An obligation is suggested to sign on behalf of the master in order to give the shipowner the benefit of the lien mentioned in clause 25 in the time charter, but this suggestion fails because that object could equally well

be attained by reserving in the bill of lading such a consent to the goods being subjected to the ship's lien for time hire as would compel the holder of the bill of lading, if the goods were carried on the faith of that term, to allow the goods to be detained for the benefit of the shipowner and in exercise of his lien. Also it would have been sufficiently attained if at Hamburg in order to exercise a lien on the sub-freights the master or the shipowner had exercised his right either to take possession or to treat his possession as now being a possession on the ship's behalf and not on Messrs. MacAndrew and Co.'s behalf, and so had collected the sub-freights against delivery of the cargo and retained the sub-freights themselves; but there is no express obligation, and I think none implied, in this charter-party that the cargo shall be loaded, in order that the shipowner may have the benefit of the lien. We cannot construe clause 25 as imposing an obligation on Messrs. MacAndrew and Co. to sign the bill of lading on behalf of the shipowner, and in any case that obligation, if it existed, they did not carry out.

There remain two other points. I think it may be inferred as a matter of fact that the goods were in the possession of MacAndrew and Co., the contracting carriers, performing their contract by means of a hired ship, so long as they were discharging their obligation with regard to the payment of hire; but the passage cited from Pollock and Wright on Possession in the Common Law, at p. 166, par. 4, is, I think, quite sufficient authority for saying that, even if the shipowners had possession so as to make them sub-bailees to Messrs. MacAndrew, such bailment was revocable at pleasure, and there was no adverse right in the shipowners, so long as the time hire was paid by Messrs. Blom. Accordingly, there was interest enough in the plaintiffs to entitle them to bring this action.

Then, was that interest determined at the moment of the collision, because there was some sub-charter hire in arrear? I think that point fallacious. So far as appears, and there is no evidence whatever to the contrary, all the hire due to the shipowners was punctually paid in advance by Messrs Blom. The shipowners had no right to convert the possession held at the mandate of Messrs MacAndrew into a possession held adversely to them in the exercise of a possessory lien. They had a right to exercise a lien in a certain event, but that event did not happen. Messrs. Blom had a contractual right of the same kind, because the sub and head charter are in the same form, and although they in their turn, when the sub-charter hire fell for a few days in arrear, had the right to ask the shipowners to exercise a possessory lien on their behalf as soon as they could communicate with the master, they had no possession till that right was exercised. There is no evidence that they ever purported to exercise it or purported to call on the shipowners to exercise it, or that anything whatever was done in the matter. Since the collision they have in fact accepted satisfaction for the arrears of hire in money. I think the plaintiffs could, down to the time of the collision, recall the bailment to the shipowners, if any, at pleasure, and are therefore entitled to maintain the action.

It has been contended, and I think with some truth, that if the person who is liable on the contract of carriage and the bills of lading brings an action for the loss in respect of his bill of lading freight separately from the action which is brought by the shipowners, the result may be to harass the wrongdoing defendant vessel and perhaps to make the defendants pay more than otherwise would be the case; but it seems to me that a way could be found in such a case to prevent the wrongdoing ship from paying in the aggregate more than the actual damages which have been suffered by the various parties interested. I think the appeal should be allowed

Solicitors for the appellants (plaintiffs), *Trinder Capron*, and *Co.*

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

Wednesday, Nov. 5, 1913.

(Before Lord Parker of Waddington, Lord Sumner, and Warrington, J.)

The Ophelia. (*a*)

Damage action — Plea of inevitable accident— Plea of compulsory pilotage — Plea of compulsory pilotage upheld — Action dismissed — Costs.

A steamship at anchor in the Thames was run into and damaged by another steamship which was proceeding down the Thames in charge of a compulsory pilot. In a damage action brought by the owners of the vessel at anchor the defendants alleged that the collision could not have been avoided by the exercise of ordinary and reasonable maritime care and skill; and, further, that if there was any negligence on their steamship, which they denied, it was the negligence of the compulsory pilot.

The action was dismissed on the ground that the sole negligence on the defendants' ship was that of the compulsory pilot, but no order was made as to costs.

The defendants obtained leave from the judge to appeal as to costs.

Held, that no general rule as to whether in such circumstances the action should be dismissed with or without costs could be laid down. That if the defendants had relied solely on the plea of compulsory pilotage and had succeeded on that plea, primâ facie *they would have been entitled to their costs, but that when alternative defences are raised and the defendants lose on one and succeed on the other, the judge is entitled in the exercise of his discretion to make no order as to costs.*

Appeal by leave of the judge from a decision of Bargrave Deane, J. on a question of costs in an action for damage by collision.

The appellants, the owners of the steamship *Ophelia*, were the defendants in the action.

The respondents, the owners of the steamship *Aunis*, were the plaintiffs in the action.

The plaintiffs' case was that on the 30th Jan. 1913, at about 11 a.m., the *Aunis*, a twin-screw steamship of 439 tons gross and 199 tons net register, was, whilst on a voyage from London to Rouen, lying at anchor in Gravesend Reach in foggy

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

weather. The tide was ebb of the force of about three knots. The *Aunis* was heading to the tide, and her bell was being duly rung for the fog. In these circumstances the *Ophelia* was seen 300 to 400 yards away three points on the starboard bow angling, toward the *Aunis*, and, though the bell of the *Aunis* was rung continuously and her anchor chain was paid out and her engines were put astern, the *Ophelia* came on and with her port side struck the stem of the *Aunis*.

Those on the *Aunis* charged those on the *Ophelia* with bad look-out; with failing to keep clear; with excessive speed; with not stopping on hearing a fog signal forward of their beam; and with failing to slacken speed or stop in due time.

The case made by the defendants was that the collision could not have been avoided by the exercise of ordinary and reasonable maritime care and skill on the part of those in charge of the *Ophelia*, and was, so far as the defendants were concerned, an inevitable accident.

They alleged that the *Ophelia*, a steel screw steamship of 1153 tons gross and 710 tons net register, was in Gravesend Reach on a voyage from London to Hamburg. There was a thick fog and the tide was ebb of the force of one to one and a half knots. The *Ophelia*, in charge of a duly licensed Trinity House pilot, was proceeding down river with engines working dead slow and stop, making about a knot, preparing to come to anchor.

In these circumstances those on the *Ophelia* saw a sailing barge under way a little on the starboard bow. The engines of the *Ophelia* were at once stopped and her whistle was sounded two short blasts as a signal that she intended to pass to the northward of the sailing barge, and this signal was shortly afterwards repeated. It was then seen that the head of the barge was coming to the northward, and the helm of the *Ophelia* was immediately ported. Shortly afterwards the *Aunis* came into sight, distant about 300ft. and bearing about ahead. The helm of the *Ophelia* was thereupon immediately put hard-a-port and her engines were put full speed ahead as the best means of averting collision, and the *Aunis* was loudly hailed to slack out chain, but, notwithstanding these measures, the *Ophelia* with her port side a little abaft amidships came against the stem of the *Aunis*, doing the damage complained of.

Alternatively the owners of the *Ophelia* alleged that if the collision and damage were caused or contributed to by any negligence on the part of anyone on board the *Ophelia*, which they denied, such negligence was solely that of her duly licensed pilot, who was in charge of the *Ophelia* within a district in which the employment of the said pilot was compulsory by law.

Batten, K.C. and *R. H. Balloch* for the plaintiffs.

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

The case was tried before Bargrave Deane, J. on the 4th and 7th July, judgment being delivered on the 7th July.

BARGRAVE DEANE, J.—My judgment will be extremely short in this matter. There was a vessel at anchor in the anchorage ground off Gravesend; another vessel coming down the river picks up her pilot at Gravesend, and then proceeds on and comes into collision with this vessel at anchor in the anchorage ground. There was a dense fog all the way. I have been speaking to the Elder Brethren and they are extremely clear that there ought not to have been this collision. Why was it?

Because the pilot did not anchor. It is suggested that it was difficult for the pilot, to anchor the vessel, to find a place in a dense fog, but it appears to me and to the Elder Brethren that it is absurd to say you cannot find an anchorage ground in the river Thames. The fact was the pilot was too careless. He might have tried to find an anchorage ground, but he did not. He is responsible for it.

Therefore I must find that the fault of this vessel which brought about this collision was that of the pilot, whose employment was compulsory.

Batten, K.C.—There should be judgment for the defendants without costs. Two defences are raised here; the defendants first say that no one was to blame; that it was a case of inevitable accident; and, alternatively, that if there was negligence it was that of the pilot. When a defendant raises a defence on the merits and fails, and raises a defence of compulsory pilotage, he should neither get costs nor be ordered to pay them.

Laing, K.C.—The case made against the defendants was that they had been negligent; that case has failed, and the action should be dismissed with costs:

The Burma, 80 L. T. Rep. 808; 8 Asp. Mar. Law Cas. 547.

Batten, K.C.—I am instructed that your Lordship did not follow *The Burma* (*ubi sup.*) in a case called the *Celtic*, reported in the *Shipping Gazette*, the 19th July 1909.

BARGRAVE DEANE, J.—I see in this case of *The Celtic* I did not follow *The Burma* (*ubi sup.*), but I took a line of my own—that I must take the case as I find it. I am rather inclined to take that view to-day. The position is this: This ship at anchor is run into by another ship; *primâ facie* the ship that ran into her is in fault, therefore there was justification for bringing this action; but then there is a plea of compulsory pilotage set up, and the ship has satisfied me that it was not the fault of herself or her own servants, but the fault of the pilot who was in charge. Therefore I think she ought not to pay costs. My opinion is that I shall follow *The Celtic* (*ubi sup.*) in this case and say there shall be no costs.

On the 9th July, on the application of the defendants, Bargrave Deane, J. gave leave to appeal on the question of costs, but stated that he had no doubt in his own mind that the order made was a right order.

The appeal came on for hearing on the 5th Nov.

Laing, K.C. and *H. C. S. Dumas* appeared for the appellants.—The judge below did not exercise his discretion rightly. The respondents, the plaintiffs below, should have been ordered to pay the costs of the action:

The Burma (*ubi sup.*).

Under the old practice the order usually made was that neither party was to get costs:

The Schwan, 30 L. T. Rep. 537; L. Rep. 4 A. & E. 187;

The Daioz, 37 L. T. Rep. 137; 3 Asp. Mar. Law Cas. 477.

The judge has deprived a successful defendant of his costs, and costs should follow the event:

The Monkseaton, 60 L. T. Rep. 662; 6 Asp. Mar. Law Cas. 383; 14 P. Div. 51.

It is said that two issues were raised by the defendants, but no more witnesses were called than would have been called if the plea of compulsory pilotage had alone been raised. It has been decided that there should be one set of rules as to costs in all branches of the High Court:

The Swansea and the Condor, 40 L. T. Rep. 442; 4 Asp. Mar. Law Cas. 115; 4 P. Div. 115.

Unless there are special circumstances the costs should follow the event:

The Batavier, 62 L. T. Rep. 406; 6 Asp. Mar. Law Cas. 500; 15 P. Div. 37.

The discretion has to be exercised on proper materials, and it has to be exercised in accordance with the rules of reason and justice:

Sharp v. *Wakefield*, 64 L. T. Rep. 180; (1891) A. C. 173;

Civil Service Co-operative Society v. *General Steam Navigation Company*, 89 L. T. Rep. 429; 9 Asp. Mar. Law Cas. 477; (1903) 2 K. B. 756.

Batten, K.C. and *R. H. Balloch*, for the respondents, were not called on.

Lord PARKER OF WADDINGTON.—This is an appeal from an order of Bargrave Deane, J. as to costs, which, under the express provisions of the Judicature Act, are within the discretion of the judge who decides the case, and no appeal will lie from the exercise of that discretion except by leave.

In the present case leave has been given by Bargrave Deane, J., not that he has any doubt that the manner in which he exercised his discretion was the right one, but because he was told by counsel for the applicants for leave to appeal that it was desirable the Court of Appeal should lay down some general rule for the guidance of the courts of first instance.

It appears to me to be impossible and wrong for us to try to lay down any rule in a matter where the judge has to exercise his discretion, beyond what has already been done by the Court of Appeal. The Court of Appeal has said that whatever might have been the practice in the Admiralty Division prior to the Judicature Act, a judge, in the exercise of the discretion now given to him, should start from the position that if there be but one issue in the action, the successful party is *primâ facie* entitled to costs—starting from that, he should consider the special circumstances of each case and exercise his discretion accordingly. It is not if he has exercised his discretion in the way another judge would not have done, but only if he has acted upon wrong lines or in an arbitrary manner, or in a manner which is obviously unjust, that the exercise of his discretion is subject to review.

The present case appears to me to be comparatively a simple one. There was a collision between the *Ophelia* and the *Aunis*, the *Ophelia* running into the *Aunis*, which at the time was at rest, and doing damage. The action was an action by the owners of the *Aunis* against the owners of the *Ophelia* for the damage sustained. The circumstances in which the collision occurred were such that there was a presumption of negligence on the part of the persons in charge of the *Ophelia*. The statement of claim alleges various particulars of faulty navigation on the part of the *Ophelia*, and among others that a good look-out was not kept—that being the only one which would affect the owners of the appellants' vessel, provided they could prove that the navigation of the vessel was in charge of a compulsory pilot—the others relating simply to the negligence of persons in charge of the ship, in fact, faulty navigation. It was open to the defendants to put in a defence to that, saying, "We do not intend to dispute the presumption of our negligence or the negligence of those in charge of the ship, but we say that the person in charge of the ship was not ourselves or our servants, but a compulsory pilot." That would be a good defence. In that case there would have been, I think, within the meaning of the expression I have used, a single issue and the costs would follow the decision of that issue; but, as a matter of fact, the defendants took upon themselves by their defence to prove there was no faulty navigation upon the part of anybody whatever, and that was one of the issues raised by the defence. Upon that they have failed, although they have succeeded upon the issue of compulsory pilotage. It was in these circumstances the judge exercised his discretion as to costs, and I think it is clear that he intended to exercise, and did exercise, this discretion. The meaning of what he said is obvious, namely, that you must consider the facts of each particular case, and in exercising your discretion must not necessarily follow other cases where discretion has been exercised by another judge in a way which does not commend itself to your own judgment. Instead of having the costs of particular issues taxed, he takes the short cut, which I think is quite justifiable and a common one, of giving no costs on either side. Counsel for the appellants say that the learned judge has ignored the general rule about the successful party getting his costs. I do not see any evidence of that, and it was not a point put to the judge on the question of costs.

It seems to me that the judge did exercise his discretion, and, as far as I can see, he exercised it wisely and rightly, and therefore no appeal will lie. Certainly it seems impossible for me to suggest any more general rule for the guidance of practitioners than that which has been already laid down by the Court of Appeal.

Lord SUMNER.—I agree. The first question is whether the learned judge exercised his discretion—that is, his judicial discretion. From what he said before making the order as to costs it is quite clear he was intending to exercise his discretion, and concluded he was doing so.

The appellants can only succeed if they show that he exercised his discretion upon some wrong principle, or disregarded some fact which in justice he ought to have given attention to. They have failed in the latter point, nor have I been able to gather what the wrong principle was upon which he is said to have acted, except that he conceived himself to have done upon this occasion what he had done before. That was right,

because what he had done before was to exercise his discretion.

The desire that the Court of Appeal should lay down a rule is one that I can well understand. Practitioners have to advise their clients, and it might be a great convenience to them if there was some hard-and-fast rule that under given conditions such and such a rule as to costs should be followed immutably; but that is not the law, and we have no power to lay down a rule of that kind. All that we can say is that the cases in the Court of Admiralty constantly do fall in very similar classes, and the exercise of discretion in one case, being right in that case, will correspond to the exercise of discretion in other similar cases. In that way the judge has sufficient guidance, and must use his own discretion as to whether there are special circumstances or not.

Warrington, J.—I agree.

Solicitors for the appellants, the owners of the *Ophelia*, *Stokes* and *Stokes*.

Solicitors for the respondents, the owners of the *Aunis*, *William A. Crump* and *Son*.

House of Lords.

June 19, 23, *and July* 18, 1913.

(Before the Lord Chancellor (Viscount Haldane), Earl Loreburn, and Lords Shaw and Moulton.)

Sandeman and Sons v. Tyzack and Branfoot Steamship Company Limited. (a)

on appeal from the second division of the court of session in scotland.

Affreightment — Bill of lading — Exceptions — Liability for unmarked goods—Missing goods —Several consignees — Apportionment of unmarked goods—Condition exempting ship from liability for obliteration or absence of marks— Commixtio.

A vessel loaded a cargo of jute in bales. The bills of lading, which included bales with many different marks, were indorsed to thirty-seven different consignees. All the cargo was discharged at one port, and it was then discovered that thirty-three of the consignees had received their full consignments, but that the consignments to the four others were incomplete. There were eleven bales which could not be identified as belonging to any consignee by reason of defective or obliterated marking. In addition, there was a deficiency of fourteen bales. The bills of lading stated that the bales were received "marked and numbered as per margin"; that the number of packages signed for was to be binding on the shipowners unless errors or fraud were proved; but the ship was not to be liable for "inaccuracies, obliteration or absence of marks." In an action for freight brought by the shipowners against one of the four consignees, an indorsee of one of the bills of lading, he counter-claimed for the value of six bales not delivered to him. The shipowners admitted their liability to make good the shortage of the fourteen bales, but contended that they were not liable at all for the eleven bales which could not be identified, and that the above exception protected them.

Held, that the burden of proving that the exception protected them lay upon the shipowners, and that on the facts found no such protection was available to them; that they had failed to deliver the six bales and had failed to prove that the failure to deliver was due to any obliteration or absence of marks, and were liable for their full value.

Spence *v.* Union Marine Insurance Company (18 *L. T. Rep.* 632; *L. Rep.* 3 *C. P.* 427) *distinguished.*

Dictum of Lord Russell of Killowen in Smurthwaite *v.* Hannay (7 *Asp. Mar. Law. Cas.* 380, 485; 71 *L. T. Rep.* 157, 160; (1894) *A. C.* 494, 505) *considered.*

Decision of the Second Division of the Court of Session (1913, *S. C.* 19) *reversed.*

Appeal from an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Sheriff-Substitute of Forfarshire.

The following statement of the facts is taken from the judgment of the Lord Chancellor:—

The appellants, who are spinners and manufacturers in Dundee, were the indorsees of eleven bills of lading, representing eleven separate parcels of jute, amounting to 2476 bales. As regards nine of these parcels delivery was made in full, but in the case of the remaining two there was a shortage in delivery. The parcels as to which there was a shortage consisted of 246 bales which were shipped under a particular bill of lading, and of 254 bales which were shipped under another.

The cargo was put on board the respondents' steamer *Fulwell*, at Calcutta, in Aug. 1909. Bills of lading for 28,002 bales of jute were given by the master of the vessel, and were indorsed to thirty-seven different consignees.

The *Fulwell* arrived at Dundee, which was the port of destination, in Oct. 1909, and the discharge of the cargo commenced. It was completed before the end of the month, when it was found that on the out-turn of the ship there were missing fourteen bales, and that there also remained in the harbour shed eleven bales, forming part of the vessel's cargo, which none of the consignees would accept as shipped under their respective bills of lading. Besides the appellants there were three other consignees who would not accept delivery, and these claimed against the respondents for four, eight, and seven bales respectively. The appellants claimed for shortage of six bales, the total shortage claimed for being thus twenty-five bales. All the other consignees, being thirty-three out of the thirty-seven referred to, acknowledged receipt of the full quantities consigned to them.

The two bills of lading, indorsed to the appellants, and over which the dispute has arisen, set forth that there had been shipped in good order and condition on board the respondents' steamer a specified number of bales of jute "being marked and numbered as per margin." In both cases the markings in the margin were in the words "J.P.S. Naraingunge, 1909-10, on end in Red R.B." The total number of bales specified in these two bills of lading was 500, but it is admitted that only 494 bales bearing the marks

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

above mentioned were delivered to the appellants. The bills of lading contained two clauses which are material. Clause 4 declared that "the number of packages signed for in this bill of lading to be binding on steamer and owners unless errors or fraud be proved, and any excess of shipper's marks to be delivered." Clause 7 declared: "The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped," &c.

There having been, as above stated, a shortage in delivery at Dundee to the appellants of six bales, they refused to pay freight except on the footing of claiming to set off against the freight the value of the six bales not delivered to them. The respondents then raised an action in the Sheriff Court of Dundee, claiming 175*l.* 1*s.* 6*d.*, being the balance of freight due in respect of the appellants' total consignment. The claim for freight was admitted by the appellants, but they counter-claimed 15*l.* 5*s.* 4*d.*, being the value of the six bales which had not been delivered. The respondents in their pleadings offered to pay to the appellants, and the other consignees who complained of short delivery, the price of the missing fourteen bales already referred to, "in such proportions as they may be found to be entitled to the same," but they maintained that, as the four consignees were, as they alleged, bound to allocate among themselves the eleven bales left in the harbour shed, they could not ascertain what part, if any, of the price of the fourteen bales would fall to the appellants.

The sheriff-substitute decided that the appellants were entitled to deduct the value of the six bales not delivered from the sum sued for, and assessed their value at 15*l.* 5*s.* 4*d.* The respondents appealed to the Court of Session, and the Second Division heard the case. In the course of the argument before that court the respondents expressed their willingness to give the appellants credit for a proportion of the value of the fourteen bales irrespective of whether they would come to an agreement as to the allocation of the eleven bales remaining in the harbour shed.

The Second Division reversed the decision of the sheriff-substitute. They held that the appellants were not entitled to any further deduction than the amount which the respondents were willing to concede, which amounted to 8*l.* 11*s.*, and they gave judgment for the difference.

Scott Dickson (D.F.), *Condie Sandeman*, K.C., and *Arthur R. Brown* (all of the Scottish Bar) for the appellants.—The appellants are entitled to have all the bales included in the bills of lading delivered to them. There is nothing to show that any of the eleven bales form part of the appellants' consignment. The Second Division of the Court of Session decided the case as if all the bales had been shipped by one person. The appellants do not complain of the obliteration of the marks, but they raise a question as to the identity of the goods delivered with those shipped. The identity of the goods was admitted or proved in

Jessel v. *Bath*, L. Rep. 2 Ex. 267;
Cox v. *Bruce*, 6 Asp. Mar. Law Cas. 152; 57 L. T. Rep. 128; 18 Q. B. Div. 47;
Parsons v. *New Zealand Shipping Company*, 9 Asp. Mar. Law Cas. 33, 170; 84 L. T. Rep. 218; (1901) 1 K. B. 548.

The case of *Spence* v. *Union Marine Insurance Company Limited* (*sup.*) is a totally different case from the present. The plaintiff claimed on a policy of marine insurance averring total loss, and the onus was on him to prove the goods were totally lost. Here the onus is on the respondents to show the goods were not shipped, and they have not done so. The principle of *commixtio* was applied there, but here it is impossible to say who was originally the owner of any one of the eleven bales. In *Smurthwaite* v. *Hannay* (*sup.*) Lord Russell of Killowen appears to have thought that *Spence* v. *Union Marine Insurance Company Limited* (*ubi sup.*) applied to a case of non-delivery. But that was a dictum and was not necessary for the decision of the appeal, which was a question of procedure only, and, if it applies to this case, it is wrong and should be overruled. They also referred to

Horsley v. *Grimmond*, 1894, 21 R. 410;
Smith and Co. v. *Bedouin Steam Navigation Company Limited*, 1895, 23 R. (H. L.) 1;
Bell's Principles, sect. 1298, sub-sect. 2, as to *commixtio*.

R. S. Horne, K.C. and Hon. *William Watson* (both of the Scottish Bar), for the respondents.—It was the business of the consignees to take the mass of bales and then separate them among themselves according to the marks. The shipowner was not bound to keep them separate. This case is covered by condition 7 of the bill of lading, and the shipowner is not liable for the absence of marks or any of the consequences which arise from that absence:

Cox v. *Bruce* (*ubi sup.*);
Jessel v. *Bath* (*ubi sup.*);
The Ida, 2 Asp. Mar. Law Cas. 551; 32 L. T. Rep. 541;
Horsley v. *Baxter Brothers and Co.*, 1893, 20 R. 333.

The bill of lading is not an absolute contract to deliver, but is subject to conditions which cover this case. Where it is impossible for any one of the consignees to prove his goods are not amongst those which are unclaimed, he must accept his proportion of them, otherwise these eleven bales would belong to nobody, although it is found they were shipped, and the shipowner would be liable to damages although he has provided that he is not to be reponsible. In *Spence* v. *Union Marine Insurance Company* (*ubi sup.*) and *Smurthwaite* v. *Hannay* (*ubi sup.*) the court had to deal with the same problem as in this case, although the latter case was decided on a question of procedure.

Scott Dickson (D.F.) in reply.

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

July 18.—The Lord Chancellor.—My Lords: In this appeal the House can deal with the questions of law that arise only on the footing that the facts have been conclusively found by the court below. But I think that the facts have been so fully found that we are in a position to dispose of the case without difficulty.

The substance of what has been found is shortly as follows: [His Lordship then stated

the facts set out above.] The sum in dispute is therefore only 6*l.* 14*s.* 4*d.* The question over which the controversy has taken place is, however, one of general importance.

It is, in the view which I take of this case, important to define what was the nature of the claim made on each side. The respondents were suing for freight, and they had to show that they had performed their contract. That contract was to carry and deliver, or tender, at Dundee the bales put on board at Calcutta. Unless they fulfilled this contract they were not entitled to freight on any bales in respect of which they had not fulfilled it.

The appellants, on the other hand, were entitled to have the bales put on board delivered to them as put on board, unless the special stipulations in the bills of lading protected the respondents. As the bales in question had been signed for and no error or fraud was shown within the meaning of clause 4, to which I have referred before, the respondents could not say that the whole twenty-five bales had not been shipped. Nor does clause 7 help them. For it can apply only if the goods are proved to have been delivered. If a number of packages were shipped, and that number was delivered to a single consignee, the shipowners, who would have satisfied clause 4 by delivering the proper number, might be protected from inaccuracy or obliteration of marks by clause 7. In the case before the House the court below has found as a fact that there were eleven bales not marked as described in the bills of lading, and that it is impossible to indentify these bales as forming part of any parcels marked as set forth in the bills of lading, and that there are marks on the ends of these bales which showed that some of them could not have been marked "on end in Red R.B."

Fourteen bales have been lost altogether, and there are four consignees to whom the respondents seek to attribute the eleven bales. Why, then, should the appellants be bound to treat their six bales as included in the eleven which have arrived rather than in the fourteen which did not arrive? It appears to me that a fallacy underlies the reasoning of Mr. Horne in the able argument he addressed to us on behalf of the respondents. He assumed that the six bales missing could be identified as forming part of the eleven which arrived. But they may have been among the fourteen which did not arrive. This being an action for freight, the respondents have to prove that they duly tendered the goods shipped, at the termination of the voyage. But this is just what they cannot do. It follows, not only that they must fail in their action for freight in respect of the six bales, but that the appellants are entitled to say to them that, having failed to prove this delivery, a counter-claim lies for the value of the goods shown to have been shipped but not delivered.

The learned counsel for the respondents relied on the case of *Spence* v. *Union Marine Insurance Company* (*ubi sup.*), where part of a cargo of cotton arrived at Liverpool but could not be identified, and it was held that the property in the part of the cargo which arrived, but of which the marks had been obliterated, had not ceased to belong to the consignees, and that the various consignees had become tenants in common of the mass of cotton according to their respective interests. But that was a case of a claim against an insurance company as for a total loss, and the consignee who claimed in the action had to establish his total loss. He failed for obvious reasons. It is sufficient to say that such a claim presents no real analogy to that which is before us. In *Smurthwaite* v. *Hannay* (*ubi sup.*), which was an action for non-delivery like the present, there is a dictum in the judgment of Lord Russell of Killowen which suggests that the doctrine applied in *Spence* v. *Union Marine Insurance Company* (*ubi sup.*) might be applied in a case resembling the present. But that dictum was unnecessary for the decision of the appeal, which turned on a point of procedure only, and the other noble and learned Lords who were parties to the judgment did not express concurrence in it.

For the reasons I have given, I am of opinion that the judgment of the Second Division must be reversed, and that the decision of the sheriff must be restored, with costs in this House and in the courts below.

Earl Loreburn.—My Lords: The able arguments to which we have listened help to reduce within a narrow compass all the material points in this case. This ship received at Calcutta, and gave bills of lading, of which the appellants are indorsees, for 2476 bales of jute. When she arrived at Dundee she delivered only 2470 bales, and the question is whether or not there is a valid claim by the indorsees for the balance of six bales undelivered.

The answer rests entirely upon the seventh condition or exception in the bill of lading. It is found, as a fact, that a great many other bales of jute were shipped in this vessel. On arrival all was in order except that fourteen bales out of the total shipped, in some unexplained way, were not forthcoming at all, and eleven bales could not be identified as belonging to any consignee, by reason of defective or obliterated marking. Upon this, the shipowners admitted their responsibility to make good the shortage of fourteen bales, but say that they are not liable at all in respect of the eleven bales, because the seventh exception relieves them. Their contention is, that all the consignees of any jute in this cargo to whom short delivery was made must be settled with upon the basis that the fourteen lost bales belonged to them in proportion to their shortage, and that the eleven unidentifiable bales also belonged to them in the same proportion.

The seventh exception runs as follows: "The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped. . . ." The owners bind themselves to deliver the goods subject to the exceptions and conditions. In my opinion, each bill of lading evidenced or constituted a separate contract, by which the owners were bound to deliver the self-same bales that they received, but would be excused from delivery if it was made impossible by obliteration or absence of marks on these particular bales.

Suppose that in this very case all the bales stowed in the ship at Calcutta had been forthcoming at Dundee, but that eleven of them had been found not capable of identification, owing to obliteration or absence of marks, so that no one could say to which bill of lading they belonged. There would have been no difficulty. All the

bales incapable of identification in that case clearly belonged to one or more of the disappointed consignees in definite proportion to the shortage of which each complained, but which particular bale belonged to which particular consignee could not be proved. All the disappointed consignees were disappointed because there had been absence or obliteration of marks on their own bales as well as upon the bales of the others complaining of shortage. And the shipowners could have said, "Our contract to deliver was conditional; the condition which excused us from delivering has arisen. The facts show that every single bale that each one of you shipped is on board, though its identity cannot be made out because of its defect in marking, for which we are not liable."

But on the facts found in the case now before your Lordships no such protection is available to the shipowners, and for this simple reason. Apart from the eleven unidentifiable bales there were fourteen missing bales. It may be that the six which the appellants complain have not been delivered to them were among these fourteen. So the shipowners cannot prove—at least they have not proved—that the failure to deliver these six was due to any absence or obliteration of marking of such six bales. Clearly the burden of proving that the case comes within the exception lies upon the shipowners who set it up. They have failed in the proof, and stand in the position of men who contracted to deliver merchandise admittedly stowed in their vessel and have been unable to establish an excuse, however probable it may be that such an excuse really exists if the whole truth could be known.

I do not say anything in regard to the argument as to *commixtio*, because it seems to me quite beside the facts of this case. Owners of goods which have become so mixed as to be inseparable have rights among themselves, but those rights cannot override their contractual relations with other persons. I think this appeal should be allowed.

Lord Shaw (read by Lord Parker of Waddington).—My Lords: By the two bills of lading founded on, the respondents stood charged with the receipt at Calcutta of 500 bales of jute, and they became responsible for the delivery of the same number to the defenders at Dundee. They have only, however, delivered 494. Unless excused by the conditions of or exceptions in the contract they are liable in respect of the short delivery of six bales.

The defenders' goods had been shipped along with many other consignments of jute also destined for Dundee. Delivery of the cargo was made on the wharf *en masse*. In the reckoning eleven bales could not be identified, other fourteen had disappeared. Four merchants had short delivery—one of these, the defenders' firm to the extent of six bales. These bales have not been identified with any of the eleven whose marks have gone; on the contrary, Lord Salvesen does not doubt that the quality of the jute in the unmarked bales did not correspond with any of the consignments upon which there had been a shortage. The truth accordingly is (1) that the respondents became charged with delivery of six bales; (2) that they have failed to deliver; (3) that no clause as to obliteration of marks applies to this case because the obliteration occurs on parcels of another quality of goods; and (4) that the failure either to deliver or to identify is thus complete.

On these facts I am of opinion that no case arises for the extrication of the rights of parties by applying any rule of distribution amongst co-owners. For the defenders are not co-owners with others of the remnant of this cargo. Their goods are not in it; and no principle of distribution, confusion, *commixtio*, or right in common, can apply to the case of a merchant whose goods have disappeared, and who is asked to accept in lieu of them, and in satisfaction *pro tanto* of his contract rights, a distributive share in something else no part of which ever belonged to him. I cannot read the opinion of Lord Russell in the case of *Smurthwaite* v. *Hannay* (*ubi sup.*) as justifying any such proceeding. If it did, as was argued, I should respectfully disagree with an opinion to that effect.

The respondents have unfortunately to face the total disappearance of fourteen bales. The defenders' six may all be among them. Had the shipowners delivered the cargo in full, and had the qualities not been so disconform to those of the goods shipped, they might well have argued with force that all the shippers of goods (and all of them parties to bills of lading in similar terms) stood together to take the risk of confusion by the loss of indentifying marks. But the cardinal fact of delivery fails, and with it awanting, the doctrine of distribution goes.

Having reached this point I need go no further. For the reasoning and the language of Lord Loreburn are such that I could not presume to add to them, and I venture to adopt in its entirety the judgment of the noble and learned Earl.

Lord Moulton (read by Lord Parker of Waddington).—My Lords: In this case the pursuers, the present respondents, have brought an action against the appellants to recover freight upon 2476 bales of jute delivered to them at Calcutta to be conveyed on the steamer *Fulwell* to the port of Dundee under the terms of certain bills of lading, eleven in number. The defenders admit the contracts, but allege that the pursuers have failed to perform two of them, in that of the 500 bales specified in those two bills of lading, only 494 bales were delivered to them at the end of the voyage. They claim accordingly that the pursuers have not earned the freight on the six bales short-delivered; and, further, that they are entitled to set against the freight of the bales actually carried and delivered to them the value of the bales short-delivered.

The case was originally heard in the Sheriff Court at Dundee. At the hearing the sheriff-substitute found in favour of the contentions of the defenders, and assessed the value of the bales short-delivered at 15*l.* 5*s.* 4*d.*, which was the value claimed by the defenders in their pleadings, and on the basis of which they had made a proper tender for the sum due to the pursuers in respect of freight. Upon certain grounds presently to be noticed, the pursuers had in their pleadings expressed a willingness to allow to the defenders a credit of 8*l.* 11*s.*, and no more, against the full freight due. The difference between these two sums—namely, 6*l.* 14*s.* 4*d.*—was therefore the amount which was really in issue between the parties. The sheriff-substitute found in favour of the appellants in respect of such sum, but on

appeal his decision was reversed by the Second Division of the Court of Session, and it is from their interlocutor that the present appeal is brought.

To appreciate the point in dispute (which is one of considerable commercial importance) it is necessary to state a few facts. The ship *Fulwell* carried on this occasion a general cargo of jute, shipped under a number of separate bills of lading. Of this cargo the defenders shipped eleven parcels, the numbers and marks on which were duly recorded in the margins of the respective bills of lading. The goods shipped under nine of these bills of lading were duly delivered, but of the goods shipped under the remaining two there was a shortage of six bales. It appears from the evidence that three other consignees also complained of short delivery to the extent of four, eight, and seven bales respectively, and the pursuers do not contest the allegation that the number of bales delivered to these consignees fell short of the number specified in the respective bills of lading by these amounts. On the other hand, upon the discharge of the ship eleven bales were found which corresponded to none of the bills of lading. The goods shipped by the defenders under the bills of lading in question purported to be of at least two different qualities, and the eleven bales found on the ship did not correspond in quality with any portion of those goods, and, in short, there is no evidence whatever to show that any of the eleven bales formed part of the parcels shipped by the defenders under the two bills of lading under which there was short delivery.

It will be seen, therefore, that inasmuch as there is no question that the pursuers are bound by the statements as to numbers in the bills of lading signed by the master, they are in the position of having to admit that fourteen bales were lost, and that none of the eleven bales remaining over can be identified by them as forming part of the goods shipped under the two bills of lading which formed the contracts under which they are suing the defenders.

The pursuers are, therefore, in the position of being unable to assert that they have delivered to the defenders the goods which they received on their account for carriage. *Primâ fâcie* this is a condition of their right to demand the payment of freight. It remains, therefore, to consider how they excuse themselves from proving the performance of that condition.

In the first place, they set up that the bill of lading is not an absolute contract to deliver, but a contract subject to conditions, and they contend that those conditions provide them with the requisite excuse. The two conditions to which they refer are numbered 5 and 7 in the bill of lading. No. 5 reads thus: "Weight, measure quality, contents, and value unknown."

I entirely fail to see what application this has to the circumstances of the present case. It in no wise affects the obligation of the shipowner to deliver the identical goods intrusted to him for transport. Its plain object and effect is to guard him from being supposed to warrant the accuracy of the representations as to weight, measure, quality, contents, and value that may be found in the description of the goods or their markings as appearing in the bill of lading, and to let it be known that these appear in the bill of lading only as representations made to the master on behalf of the shipper, for the accuracy of which he is in no wise responsible. It is in strong contrast with No. 4, which provides that: "The number of packages signed for in this bill of lading to be binding on steamer and owners, unless errors or fraud be proved."

Condition No. 7 (so far as material) reads as follows: "The ship is not liable for insufficient packing or reasonable wear and tear of packages, for inaccuracies, obliteration or absence of marks, numbers or description of goods shipped, leakage, breakage, loss, or damage by dust from coaling on the voyage, sweat, rust, or decay, except through improper stowage."

Here again there is no qualification of the absolute obligation to deliver the identical goods consigned to the shipowner for transport. It merely provides that if those goods should be injured in certain ways (one of which is the obliteration of marks), or should have been accepted by the ship without being marked in the way described in the bill of lading, the shipowner shall not be liable for their having been so injured, or for their not corresponding to the marking described in the bill of lading. Considering that bills of lading pass into other hands, such a provision is an important protection to the shipowner. The presence of a mark indicating that the goods are the manufacture of some firm of high repute, or otherwise take high rank in the market by reason of their origin, may greatly influence their value, and but for the presence of such a provision in the bill of lading a ship owner might be involved in liability if the goods on delivery were found to be without the marking stated in the bill of lading. I can see no ground for attributing to Condition No. 7 any other or different effect to this, which is the plain meaning of its words. But for the purposes of this case it suffices to point out that it cannot possibly qualify the obligation to deliver the identical goods consigned for shipment, nor can it refer to the absence or obliteration of marks on any goods other than those to which the bill of lading refers.

But although these points were made the subject of argument on behalf of the respondents, they do not represent the contention upon which they principally relied, and which was the ground of the decision in their favour by the Second Division of the Court of Session. Their main defence was an alleged principle of our law to the effect that, in such a case as the present, where there is a residue of unidentified goods and a shortage in delivery, the shipowner can compel the consignees to take the unidentified goods as a *pro tanto* fulfilment of the contract to deliver. To prove the existence of such a principle they cited the decision of the Court of Common Pleas in *Spence* v. *Union Marine Insurance Company* (*ubi sup.*) and certain expressions appearing in the opinion of Lord Russell of Killowen in the case of *Smurthwaite* v. *Hannay* (*ubi sup.*) in this House. These cases I shall presently examine, but I think it convenient in the first place to submit to an independent examination the doctrines of our law in cases where goods belonging to different owners have become mixed, so as to be incapable either of being distinguished or separated.

If we proceed upon the principles of English law, I do not think it a matter of difficulty to define the legal consequences of the goods of "A" becoming indistinguishably and inseparably mixed with the goods of "B." If the mixing has arisen from the fault of "B," "A" can claim the goods. He is guilty of no wrongful act, and therefore the possession by him of his own goods cannot be interfered with, and if by the wrongful act of "B" that possession necessarily implies the possession of the intruding goods of "B," he is entitled to it: (2 Kent's Commentaries, 10th edit., p. 465). But if the mixing has taken place by accident or other cause, for which neither of the owners is responsible, a different state of things arises. Neither owner has done anything to forfeit his right to the possession of his own property, and if neither party is willing to abandon that right, the only equitable solution of the difficulty, and the one accepted by the law, is that "A" and "B" become owners in common of the mixed property.

Farther than this I do not think that it is safe to go. That the whole matter is far from being within the domain of settled law is shown by the divergence of opinions as to the relative shares of the participating parties in the case of an accidental *commixtio*. Blackburn, J. in *Buckley* v. *Gross* (following Kent's Commentaries) considers (7 L. T. Rep. 743; 3 B. & S. 566, 575) that they would be tenants in common in equal shares. In *Spence* v. *Union Marine Insurance Company* (*ubi sup.*) they were judged to possess the mixed mass in proportion to the probable amounts of their contributions to it. The fact is that the conclusions of the courts in such cases, though influenced by certain fundamental principles, have been little more than instances of cutting the Gordian knot—reasonable adjustments of the rights of parties in cases where complete justice was impracticable of attainment. I doubt whether even the fundamental principles enunciated above would be strictly adhered to in extreme cases where they would lead to substantial injustice. For instance, if a small portion of the goods of "B" became mixed with the goods of "A" by a negligent act for which "A" alone was liable, I think it quite possible that the law would prefer to view it as a conversion by "A" of this small amount of "B's" goods rather than do the substantial injustice of treating "B" as the owner of the whole of the mixed mass.

It is from these propositions of law that the pursuers in this case attempt to spell out a right to compel the defenders to accept a proportion of the unidentified bales as a good delivery under the bills of lading. There are, to my mind, two fatal objections to this—the one of fact and the other of law. In the first place, before any such principles can be applied it is necessary that it should be proved or admitted that the goods of the owners in question have in fact contributed to form the mixed mass. If the goods of "A" and "B" have become mixed, and it is possible, but not proved or admitted, that some of "C's" goods are in the mixture, there cannot possibly be a presumption of law that they are or are not to be found there, and accordingly "C" cannot be compelled to take up the position of being a co-owner with "A" and "B," nor is he entitled to insist on being regarded as such co-owner if "A" or "B" objects thereto. Whether his goods are to be found therein is a question of fact, which must be proved by the party asserting it. Now, in the present case there is not the slightest proof that any of the goods shipped under the bills of lading issued to the defenders are to be found in the unidentifiable bales. Everything, indeed, points the other way, because they are of a wholly different quality to any of the jute purported to be shipped by the defenders. But it is not necessary to discuss this question, or to do more than say that it is admitted that fourteen bales must be taken to have been lost, and there is no evidence, and there can be no presumption of fact, that the six bales belonging to the defenders were not among these missing bales. It follows, therefore, that, accepting to the full the above doctrines as to the effect of a confusion of goods, they afford no ground for requiring the defenders to accept the position of co-owners of the unidentifiable bales.

But there is, in my opinion, an objection of law which is equally serious. The doctrines to which I have referred deal with property, and not with contract. To illustrate my meaning, let me take a case where the circumstances are such as would justify in the strongest manner the application of these doctrines in the case of goods shipped under bills of lading. Let me assume that "A" and "B" were the owners of two separate parcels of cargo which have become inseparably and indistinguishably mixed, without loss and without deterioration. It may well be that they could assert the position of joint owners in the mixed cargo, and as such take action against any person who sought to get possession of it or convert it to his own use. But it does not follow that the shipowners would have performed their contract of carriage. Their duty is to deliver the goods entrusted to them for carriage, and they do not perform that duty if all that the consignee obtains is a right to claim as tenant in common a mixture of those goods with the goods of other people. No doubt, if such a right is of some value, and the consignee avails himself of it, the shipowners are entitled to the benefit of what he receives in reduction of damages for their breach of contract, just in the same way as they would be entitled to credit for whatever value the goods possessed if they were delivered mixed up with some extraneous substance which lessened their value or compelled the consignee to go to expense in separating it out. In the present instance, therefore, the defenders were, under the bills of lading, entitled to the delivery of their goods, and even if the pursuers could compel them to take up the position of co-owners of the mixed mass, it would not be a defence to their claim for breach of contract to deliver, nor would it affect the damages recoverable thereunder, except so far as they had received or could receive payment representing the value of that co-ownership. The pursuers would have no right to claim that the right of the shippers to the proceeds of the goods as co-owners was a fulfilment of their own contract of carriage. They could only claim that any payment so received or receivable would be *pro tanto* a reduction of their liability in damages by reason of the defenders having received, or being in a position to receive, payment to that extent, so that the damages which they would suffer from the breach of contract would be diminished by a

like amount. In the present case the defenders have received no payment of this kind, and for all that appears in the case, the unidentifiable bales may possess no appreciable value, so that (apart from all other grounds) the pursuers are not on this account in a position to claim any reduction of the damages *primâ facie* due from them to the defenders for their breach of contract to deliver.

The nature and consequences of the contention of the pursuers are well illustrated by considering the manner in which they have arrived at the sum of 8*l.* 11*s.* for which they express their willingness to credit the defenders. The number of bales short-delivered was twenty-five, of which fourteen are admitted to have been lost. The value of the six bales short-delivered to the defenders is fixed at 15*l.* 5*s.* 4*d.*, and 8*l.* 11*s.* is arrived at by taking fourteen twenty-fifths of that sum. The pursuers therefore contend that they have specifically performed their contract with respect to the remaining eleven twenty-fifths of the missing six bales (*i.e.*, two and sixteen twenty-fifth bales) by telling the defenders to take their share of eleven unclaimed bales which are not shown to be identical with or to correspond in any particular with the bales which they undertook to deliver.

I now turn to the decisions which it is contended establish doctrines inconsistent with the above conclusions. The chief, and in fact the only decision to which we are referred, is that of *Spence* v. *Union Marine Insurance Company* (*ubi sup.*). The facts of that case were as follows: Cotton belonging to different owners was shipped for Liverpool in bales specifically marked. On her voyage the ship was wrecked, all the cotton was more or less damaged, some of it was lost, and some was so damaged that it had to be sold at an intermediate port. The rest was sent on to Liverpool. By reason of the ship being wrecked the marks on all but a portion of that sent on to Liverpool were obliterated. The plaintiffs were the holders of a bill of lading for forty-three bales, and of these, two only were identifiable at Liverpool, and were duly received by them. They had insured the whole parcel, and the action was an action by them against the underwriters, as for a total loss of the forty-one bales. I should add that the unidentifiable portion of the cargo had all been sold (under an arrangement whereby the sale was to be without prejudice to the rights of the parties), and the proceeds divided among the owners who had not received their goods, in proportion to the number of bales short-delivered.

In these facts there are three matters worthy of special notice. In the first place, it was not disputed that all the goods had been duly shipped, and that the loss had been occasioned entirely by the ship being wrecked. In the second place, the goods appear to have been all of the same character, so that it was only a question of the number of bales belonging to each particular owner. In the third place, the action was one of insurance, and the sole question was whether the plaintiffs were entitled to say that there had been a total loss of the forty-one missing bales. There was no question of breach of contract to deliver. It was, therefore, open to the court to regard the case as one in which, by reason of the perils of the sea and from no other cause, it came about, first, that the goods became indistinguishably mixed, and, secondly, that a portion of this mixed mass was lost. Under those circumstances the owners of the goods were clearly entitled to take up the position of having become co-owners of the mixed mass, and of every part of it, and therefore of the surviving portion of it, and seeing that the goods were all of the same quality, this was the only position they could take up in fairness to the underwriters. Everything had been done consistently with this view, and all that the court decided was that this was the proper view to take of the matter; and if the judgment be carefully read, it will, in my opinion, appear that the court arrived at its decision from the considerations that I have enumerated above, and did not purport or intend to make any addition to the law as to the effect of *commixtio* as previously enunciated by recognised authority.

The case of *Smurthwaite* v. *Hannay* (*ubi sup.*) is of a different character. In that case bales of cotton were shipped by several shippers upon a general ship for carriage to Liverpool, and upon arrival it was found that the number of bales landed fell short of those shipped, and that the marks upon some of the bales so landed had become obliterated, so that identification was impossible. These latter bales were sold and their proceeds distributed proportionately among the several consignees who had received short delivery. It would seem that all the bales were treated as being similar.

Under these circumstances sixteen holders of bills of lading joined in one action against the shipowners, claiming damages for non-delivery of the specified number of bales. The defendants applied to stay the action on the ground that neither Order XVI., r. 1, nor Order XVIII., r. 1, justified the joinder of such causes of action. The sole question before the court, therefore, was as to the construction of these rules. The Court of Appeal had decided in favour of the plaintiffs, and from that judgment the defendants appealed to this House. In the result the appeal was allowed, and it was decided that on the true construction of the rules in question the various holders of the bills of lading could not combine as co-plaintiffs in one and the same action.

In the course of the argument counsel for the appellants suggested that unless holders of bills of lading could thus join in one action, they would be placed in a position of some difficulty, because the defendants might attribute a sufficient number of the unmarked bales to the particular plaintiff suing, and so meet his claim. I have some difficulty in appreciating the legitimacy of such an argument, when the sole point before the court was as to the construction of the language of certain rules. There is certainly no presumption that such rules are sufficient to prevent difficulties arising in practice, and it is evident that Lord Russell did not base his opinion on any such ground, for he says: "The argument of convenience was strongly pressed upon your Lordships. I am by no means certain that that argument has in the facts of this case much weight, but whether it has or has not, it cannot be regarded, if, as I think, the orders and rules do not authorise that joinder of plaintiffs which has here been attempted."

Nevertheless, it is true that he does say in his judgment that the difficulty suggested by the plaintiffs is not a real one, because the defendants

could only attribute to each single owner of a bill of lading a proportion of the unidentified bales in answer to their claim for non-delivery. Under the circumstances of the case this could be nothing other than an *obiter dictum.* It was doubtless justified in that particular case by the fact that it was common ground that all the bales were similar, and that the parties had been acting on the basis of their being owners in common of the unidentifiable bales, seeing that the proceeds of the sale of those bales had been divided amongst them proportionately. Under these circumstances no objection could be made to the statement that they were owners of the unidentifiable bales in proportion to their respective interests. But if the noble and learned Lord intended to go further than the circumstances of that case, and to say that a tender of a proportion of unidentifiable bales is to the extent of that number of bales an answer to a claim of the holder of a bill of lading for short delivery, I am of opinion that the dictum was erroneous and cannot be justified. But I see no reason for thinking that his Lordship intended to lay down any such principle, or that he had before his mind the general case of short delivery under bills of lading.

For these reasons I am of opinion that this appeal ought to be allowed.

Solicitors: *Linklater, Addison,* and *Brown,* for *Johnstone, Simpson,* and *Thomson,* Dundee, and *Elder* and *Aikman,* Edinburgh; *Beveridge, Greig,* and *Co.,* for *J.* and *H. Patullo* and *Donald,* Dundee, and *Alex. Morison* and *Co.,* Edinburgh.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Saturday, Nov. 15, 1913.

(Before PICKFORD, J.)

JOSEPH TRAVERS AND SONS LIMITED *v.* COOPER. (*a*)

Carrier—Lighterman—Contract to lighter goods—Exemption from liability—Negligence.

In a contract made between the plaintiffs and the defendant, it was agreed that the defendant should lighter goods from an import ship to a wharf on the Thames. The goods were lightered by the defendant on the terms (inter alia) *of the following notice: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft, and are made without recourse to lighterman." The plaintiffs suffered a loss which they alleged arose from the negligence by defendant's servants. On the facts:*

Held, that the damage was not caused by the negligence alleged, but

Semble, *the notice given by the defendant did not exempt him from liability for loss by negligence.*

COMMERCIAL COURT.

Action tried by Pickford, J.

The plaintiffs' claim was for loss and damage sustained by them through the alleged negligence by the defendant in connection with the lighterage of the plaintiffs' goods.

The facts and arguments are sufficiently stated in the judgment.

Leck, K.C. and *Mackinnon* for the plaintiffs.

Roche, K.C. and *Cranstoun,* K.C. for the defendant.

PICKFORD, J.—This is an action brought against the defendant by the plaintiffs to recover damages for injury and loss occasioned to some cargo (a quantity of tinned salmon) which was to be lightered by the defendant from the ship in which it came to a certain wharf on the Thames. While the barge was lying at the wharf the cargo got damaged. In some way the barge got under the water, or the water got over the barge (I wish to use a neutral term for the moment), the consequence being that the cargo was washed out and damaged, and the plaintiffs sue the defendant for that. They say that that was occasioned by the negligence of the defendant's servants. Owing to certain terms in the contract of carriage between the parties it is admitted that in order to succeed the plaintiffs must show that the damage was occasioned by the negligence of the defendant's servants. The defendant denies any negligence on the part of his servants. He also relies on the terms of the contract, which is in these words: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft, and are made without recourse to lighterman." The salmon was taken on board this barge, and the barge taken to a wharf called the Aberdeen Wharf. It was not taken to the defendant's own wharf, because, I think, there was not room there, but taken to the Aberdeen Wharf, and no objection was taken to that course. During the night the barge was found to be not rising with the tide as she should have been rising after she had taken the ground, and the water was found to be over her. Eventually, the result was, as I have said, that a lot of the cargo was washed out and damaged.

Two causes, and two only, were suggested why the barge did not rise properly, and why the water got into her and the damage occurred. One was, as the plaintiffs alleged, that she was what was called underpinned—that is to say, that as she rose with the tide she got under a horizontal piece of wood (I forget the exact term for it) on the face of the wharf, and consequently was prevented from rising as she should have done, and was held down there while the water rose and washed over her. There was the same cause of the damage in a case which was very much discussed before me in this case—namely, the well-known case of *Price* v. *Union Lighterage Company* (9 Asp. Mar. Law Cas. 398; 88 L. T. Rep. 428; (1904) 1 K. B. 412). What was alleged by the defendant was that she was what is called "mud-sucked." that is, when the tide rose she did not rise with it because she was held down by the

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

mud, she acting upon it, as was described by one of the witnesses, like one of the suckers that boys are accustomed to play with. At any rate, that is alleged by the defendant to be the cause. That that is possible is also admitted, and the first question I have to decide is which cause was the cause of her not rising in the way she ought to have done with the tide, the water getting into her in consequence.

There are great difficulties in my opinion in the way of both of these theories. There is very great difficulty in the way of her being underpinned, arising first from the difficulty of seeing how at the angle with the wharf at which she is said to have been when she was found, it was possible to get sufficient of her underneath this horizontal piece, looking at the construction of the wharf, to hold her down. If it had been very small indeed the possibilities are that she would have freed herself. If there was to be a very considerable amount of her underneath, she would have to be at a very much larger angle than was spoken to by any of the witnesses. The most reliable evidence that I can get as to the position in which she was found is that her bow was somewhere about 10ft. from the wharf. Mr. Lewis, the surveyor who was called on behalf of the plaintiffs, in showing me roughly on a plan how it could be done, put her at an angle at first which would have been something like forty degrees or very much more out into the stream than in fact she was, and afterwards when that was pointed out to him he corrected it and showed how he said she would have caught at the smaller angle. A very small amount indeed of barge would have been caught at that angle. There is another great difficulty in the way of that theory, and that is that there was not the slightest mark to be found either upon the horizontal piece of timber under which she was said to have caught, or on the barge herself, although she had in fact been quite newly painted. It was common ground that there was no mark whatever to be found either on the one or the other.

On the other hand, there are great difficulties in reconciling the theory of mud-sucking with the evidence of Grimble who was pier-master, I think, at Limehouse, and who was the first to see the barge. According to the description which he gave, if it be accurate, it would be very difficult indeed to come to the conclusion that she was mud-sucked. He did at one time say that he saw she was caught under the horizontal piece, but I think that on investigation his evidence did not show that he saw anything of the sort. It was in the middle of the night or in the early morning that he was there, that consequently there would not be much light, and his evidence varied between being able to see the top of the horizontal piece and being able to see the barge caught under the horizontal piece; but he spoke to a position, which I think, if it were accepted as entirely accurate would be inconsistent with mud-sucking. Therefore, there are the greatest possible difficulties, it seems to me, in favour of either one theory or the other, but on the whole I have come to the conclusion that the difficulties in the way of saying that she was underpinned are greater than those in the way of saying that she was mud-sucked, and to a certain extent, although it is not very clear, I rely upon the evidence of the lighterman, and also of the barge raiser who raised the barge. I think that his evidence is more consistent with mud-sucking than with her being underpinned, although no doubt he did not see her for some hours after the catastrophe had happened. Therefore, on the whole, I come to the conclusion that the evidence leads me to say that this arose from mud-sucking and not from being underpinned. It is admitted that neither mud-sucking nor underpinning, if it did happen, was occasioned by the negligence of the defendant's servants, but it is said that it could have been avoided if they had done their duty as they ought to have done—that is to say, that the barge could have been freed if the man was in charge, the lighterman had been there, and it is said that he was not there, and that it was his duty to be there. I certainly think that there was negligence on the part of the man in not being there. I need not go further than the defendant's own witnesses who say that as it is possible that either of these things may happen, that underpinning or mud-sucking may happen as the barge rises, the man should be in attendance at the turn of the tide, and when the barge is rising. It was contended that even supposing that he ought to have been there, and was not there, that was only a breach of duty towards his employers and not towards the plaintiffs, but I cannot accept that at all. It was the defendant's duty towards the plaintiffs to take proper care, and if they did what they had to do for the plaintiffs by means of their servants they are responsible for their servants' negligence just as much as if they had done it themselves. Then the man himself said that it did not make any difference whether he was on board or not, because if he had been on board he would not have been on deck, but would probably have been asleep, and also that it made no difference because he had not got the hitcher which it was alleged he should have used. It seems to me that those are both of them very bad answers. If it was his duty to be there to look after the barge, he could not have been doing it by being asleep on board here any more than by being asleep on shore, and if he ought to have been there to look after the barge and if a hitcher is a thing which is useful in the contingency to provide against which he ought to have been there, then he ought to have had a hitcher, and it is no answer to say that he had not got one. Therefore it seems to me there clearly was negligence.

Then there comes a very much more difficult question, and that is, whether that negligence was the cause of the accident, and that depends upon whether, if the man had been there, he could have avoided the consequences of the mud-sucking which I think took place—that is to say, could have freed the barge. Mr. Leck argued that, once I find negligence, it is for the defendant to prove conclusively that the negligence could not have been the cause of the accident—that is to say, to prove conclusively that the man could not have done anything to free the barge. I do not think that is the right point of view. I think that in this case, just as in any other, it is for the plaintiffs to prove that the negligence which occurred was the cause of the accident. They must prove that there was negligence which did cause it. I have had considerable difficulty

about that point, but I must say that with some regret I have come to the conclusion that it is not proved to me that if he had been there he could have avoided the accident. I doubt very much whether, with a large barge of this size, a hitcher would have been of any use. A hitcher is supposed to be used if a barge is mud-sucked to steer underneath her, to let air underneath her, and so allow her to rise. I do not think I have any satisfactory evidence that that could be done with a barge of this size at all. I do not think Mr. Lewis, who gave evidence for the plaintiffs, was at all strong upon the point, and I have considerable evidence that it could not have been done. If that could not have been done nothing could have been done, except with the assistance of a tug or something of the kind to pull her off, and I have no evidence before me at all to lead me to conclude that if the man had been there he could have obtained any assistance of that kind, and therefore, as I say, with some regret, because I do not like to free the defendants from the consequences of what I think was negligence, I come to the conclusion that it is not shown that that negligence was the cause of the accident.

That being so, of course it is not really necessary for me to consider the point that was raised under the conditions in the contract, and I do not intend to give any definite decision about it. The clause was as follows: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman." Of course, I am bound by the decision in *Price* v. *Union Lighterage Company* (*sup.*), and bound not only by the decision in its actual words, but by the principles of it. It was held there that these words "We will not be liable for any loss of or damage to goods which can be covered by insurance" did not protect the carrier from the consequences of negligence, because they did not sufficiently clearly show that negligence was included. That these contracts can and very often do contain words sufficiently clear is shown by a case, the name of which I have forgotten, where the words used were "Any loss, however occasioned, even by negligence," or words to that effect. There was a discussion in that case with regard to some other condition which was said to be contradictory, but the words that were used show that negligence can be specifically and properly provided for.

It is very difficult to be certain exactly what view ought to be taken of the particular words of any particular contract. The cases vary greatly, and very often upon what, without disrespect, seem to me to be very minute differences indeed of phraselogy; but my present inclination is to think that no intelligible distinction can be drawn between the words which I have read: "We will not be responsible for any damage to goods which can be covered by insurance," and the words in this case "I will not be responsible for any damage to goods, however caused, which can be covered by insurance." I do not think that any intelligible distinction can be drawn between those words, and my inclination, as I say, although I give no definite judgment upon it, is that if I had to decide that point I should say that the condition did not cover the defendant, and did not protect him from liability; but as I think it is not proved that his negligence caused the accident, it is not necessary for me to decide that. There must be judgment for the defendant with costs.

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

Solicitors for the defendant, *Keene, Marsland Bryden,* and *Besant.*

Thursday, Nov. 20, 1913.

(Before DARLING, ROWLATT, and ATKIN, JJ.)

VICKERSON (app.) *v.* CROWE (resp.). (*a*)

Seaman—Contract of seaman to serve in ship—Persuading seaman not to join ship—Offence —"His ship"—Merchant Shipping Act 1894 (57 & 58 *Vict.* c. 60), *ss.* 113, 236 (1).

By sect. 236, *sub-sect.* 1, *of the Merchant Shipping Act* 1894, *if a person persuades or attempts to persuade a seaman to neglect or refuse to join or proceed to sea in or to desert from "his ship," he shall be liable to a fine.*

The respondent was engaged at Whitby to serve as a seaman on board a British steamship, and the agent who engaged him ordered him to go to Middlesbrough, having advanced his railway fare on orders from the owners. The respondent went on board the ship at Middlesbrough, and his discharge book was taken and kept by an officer of the ship, and on the next day the respondent was ordered by an officer of the ship to go to the Board of Trade offices for the purpose of signing articles, and he left the ship with the object of so doing, but outside the Board of Trade offices he was accosted by the appellant, who attempted to persuade him to refuse to go to sea on board the ship. The respondent afterwards signed articles and received and cashed an advance note, but in consequence of the appellant's conduct he did not proceed to sea. It was not shown that the appellant had any conversation with the respondent after he had signed articles, or that he had attempted to persuade him to refuse to sign articles. The appellant having been convicted under sect. 236:

Held, on appeal, that although the respondent had not signed articles at the time when the appellant attempted to persuade him to refuse to join the ship, the ship was then the respondent's ship within the meaning of the section, and the appellant was rightly convicted of attempting to persuade the respondent to refuse to join "his ship."

CASE stated by the stipendiary magistrate for the borough of Middlesborough.

On the 10th June 1913 the appellant George Vickerson appeared before the magistrate sitting as a court of summary jurisdiction on an information laid by one William Crowe for that the appellant did on the 23rd May 1913 unlawfully attempt to persuade one William Crowe, a seaman to neglect or refuse to join his ship, to wit, a certain British steamship called the *Japanese Prince*, contrary to the provisions of the Merchant Shipping Act 1894, s. 236, sub-s. 1.

Upon hearing the information the magistrate convicted the appellant.

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

By sect. 236, sub-sect. 1, of the Merchant Shipping Act 1894 it is enacted:

If a person by any means whatever persuades or attempts to persuade a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, he shall for each offence in respect of each seaman or apprentice be liable to a fine not exceeding ten pounds.

By sect. 113, sub-sect. 1, of the Act it is enacted:

The master of every ship, except ships of less than eighty tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement (in this Act called the agreement with the crew) in accordance with this Act with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom.

Sects. 113, 114, and 115 of the Act lay down the forms, periods, and conditions of such agreements, and the penalties to which the master is liable for non-compliance therewith. Such agreements are commonly described as "articles," and the master of the *Japanese Prince* was not exempt as a coasting trader from the duty imposed upon him by the aforesaid sect. 113, sub-sect. 1, of the Merchant Shipping Act 1894.

The following facts were proved in evidence before the magistrate:—

William Crowe was engaged at Whitby to serve on board the British steamship *Japanese Prince* by the agent of the steamship, who, having examined his discharge book, expressed himself satisfied therewith, and ordered Crowe to go to Middlesborough, having advanced his railway fare on orders received from the owners of the steamship, and on the 22nd May 1913 Crowe went on board the *Japanese Prince* at Middlesborough, and his discharge book was taken and kept by an officer of that steamer.

On the 23rd May 1913 Crowe, having been ordered by an officer of the steamship to go to the Board of Trade offices for the purpose of signing articles, left the *Japanese Prince* with the object of so doing.

Outside the Board of Trade Offices the appellant accosted Crowe, and having informed him, amongst other things, that he would be a "blackleg" if he proceeded to sea on board the *Japanese Prince*, attempted to persuade him to refuse to go to sea on board the steamship.

Crowe subsequently signed the articles and received and cashed an advance note, but in consequence of the appellant's conduct he did not proceed to sea, but remained on shore, leaving his discharge book and kit on board the *Japanese Prince*.

There was no evidence called to show that the appellant had any conversation with Crowe subsequently to his having signed the articles.

Crowe considered himself engaged as a seaman on board the *Japanese Prince* on the 22nd May, and he was prevented from sailing by the persuasion of the appellant.

Upon these facts the magistrate held that the *Japanese Prince* was Crowe's ship within the meaning of sect. 236, sub-sect. 1, of the Merchant Shipping Act 1894.

It was contended on behalf of the appellant that the *Japanese Prince* could not in law be regarded as Crowe's ship, inasmuch as Crowe had not signed articles at the time when the appellant attempted to persuade him from returning on board the *Japanese Prince*, and that the magistrate's finding that the said ship was Crowe's ship was consequently wrong in law.

Hemmerde, K.C. (*Clement Edwards* with him) for the appellant.—The respondent Crowe had not actually signed the articles at the time the offence was alleged to have been committed by the appellant, and the question is whether the ship could be said to be Crowe's ship at the time in question, as to bring the appellant within the section there must be an attempt by him to persuade the seaman to "desert from his ship." As the articles had not been signed by Crowe, the ship could not be said to be "his ship." The case of *Austin* v. *Olsen* (3 Asp. Law Cas. O. S. 52; 17 L. T. Rep. 537; L. Rep. 3 Q. B. 208) is not the same as this case. That was the case of a substitute as to whom many of the formalities are waived: (see sub-sect. 4 of sect. 115 of the Merchant Shipping Act 1894). *Thomson* v. *Hart* (28 S. L. R. 28) is not in point, as in that case the person persuaded was a storekeeper; and although he had not at the time signed articles, he was really acting in continuation of a former agreement which had been duly signed. The agreement must be in writing and signed, and until that is done the ship cannot be said to be the seaman's ship. [ATKIN, J. referred to *Re Great Eastern Steamship Company* (5 Asp. Mar. Law Cas. 511; 53 L. T. Rep. 594).] A seaman may have an engagement, say, at Whitby, and yet may have no ship; and there may be contractual rights against the employer, and yet he may have no ship. And by sect. 155 his right to wages shall be taken to begin either at the time at which he commences work or at the time specified in the agreement for his commencement of work or presence on board.

W. R. Briggs (*A. Neilson* with him) was not called upon to argue.

DARLING, J.—In this case the whole matter, in my opinion, turns upon the meaning to be given to two words in sect. 236 of the Merchant Shipping Act 1894. That section says that if a person by any means whatever persuades or attempts to persuade a seaman or apprentice to neglect or refuse to join or proceed to sea in his ship, he shall commit an offence for which he is punishable. The contention here is that whereas the appellant did persuade a seaman named Crowe to refuse to join or to proceed to sea in a ship, the *Japanese Prince*, he committed no offence because the *Japanese Prince* was not Crowe's ship, and, therefore, does not come within the words "his ship" in the section. I think it does. I think the *Japanese Prince* had become Crowe's ship, and not in the sense that the *Japanese Prince* belonged to Crowe in any sense or shape or form, but in the sense that Crowe belonged to the ship, and I think that is plain if you look at what is found as a fact and is stated in the case.

The case states that Crowe was engaged at Whitby to serve as a seaman on board the British steamship *Japanese Prince* by an agent of the steamship, who, having examined his discharge book, expressed himself satisfied therewith and ordered Crowe to go to Middlesborough, having

advanced his railway fare on orders received from the owners of the said steamship, and on the 22nd May Crowe went on board the *Japanese Prince* at Middlesbrough, and his discharge book was taken and kept by an officer of that steamer. On the 23rd May Crowe having been ordered by an officer of the steamship to go to the Board of Trade offices for the purpose of signing articles —it is worth while noticing that Crowe is receiving and acting upon orders given him by the officers of the ship, which in itself is very strong evidence to show that he belonged to the ship—left the *Japanese Prince* with the object of so doing. Outside the Board of Trade offices the appellant accosted Crowe, and, having informed him, amongst other things, that he would be a blackleg if he proceeded to sea on board the *Japanese Prince*, attempted to persuade him to refuse to go to sea on the steamship. There is no finding that he attempted to persuade him to refuse to sign articles. The finding is that he attempted to prevent him going to sea on that ship. Whereupon Crowe behaved in this grossly dishonest way. He subsequently signed the articles and received a cash advance, but in consequence of the appellant's conduct he did not proceed to sea. There is nothing to show that the appellant advised him not to sign articles. It is quite consistent with this that he advised him to sign the articles. All that he advised him to do, so far as we can see, is not to proceed to sea, and Crowe, in consequence of the appellant's conduct, did not proceed to sea, but remained on shore, leaving his discharge book on board the *Japanese Prince*. Crowe considered himself engaged as a seaman on board the *Japanese Prince* on the 22nd, and he was prevented from sailing by the persuasion of the appellant.

Then the case says: "Upon these facts the magistrate held that the *Japanese Prince* was Crowe's ship within the meaning of sect. 236, sub-sect. 1, of the Merchant Shipping Act 1894." I think the magistrate was right. I think that Crowe had put himself in a position in which he could have maintained an action for breach of contract against the owners if they refused to allow him to go to sea on board that ship. If they refused to allow him to sign articles; if they had pitched his kit off the ship and thrown his discharge book after him and said: "This is not your ship; you have nothing to do with it," I think he could bring an action against them. If there is an authority for that, I think it is the case that my brother Atkin referred to, and which I dare say he will more fully refer to and explain I think it is not necessary in order for it to be the seaman's ship that he should sign the articles. The signing of the articles is made, it seems to me, a condition precedent to the right of the commander of the ship to require the seaman to go to sea. Sect. 113 of the Act says: "The master of every ship, except ships of less than 80 tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement (in this Act called the agreement with the crew) in accordance with this Act with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom." But it is only if he is going to carry the seaman to sea. He only violates the Act if he carries the seaman to sea without signing the agreement. In this case it appears to me that Crowe would have had a very good cause of action against the steamship company if they had broken their agreement before he had signed the agreement referred to—if they had broken the verbal agreement before he had signed any agreement that is mentioned in sect 113.

For these reasons I am of opinion that this was his ship, that the person who persuaded him to refuse to join the ship committed an offence against sect. 236, and that the conviction was right and should be upheld.

ROWLATT, J.—I am of the same opinion. I should like to make this clear, that I for my own part do not think the conviction should be supported upon the ground that the magistrate has found, that this man incited the seaman before he signed his articles to break his contract after he had signed the articles. I do not think we are justified in assuming that evidence to that effect was given. Certainly I do not think the magistrate convicted the man of that. But it brings us to the legal point, which is: Is a seaman before he has signed his articles, but after he has made a contract to serve in a ship, and has really begun his service, so far as going on board and so on is concerned, in the position in which it can be said of him that that ship is his ship? Now that depends upon whether the relation of ship and seaman, if I may use that expression, for it is a convenient one, can be constituted without articles. In ships that are trading ships, not foreign-going ships, under 80 tons there never are any articles, and therefore clearly in that case the relation can be constituted without them. But it is said that where it is a ship of over 80 tons, and articles are requisite, there is no engagement of the seaman so as to make the ship his ship till the articles are signed. I do not think that is the meaning of the Act of Parliament, because the section which requires the articles to be signed merely says that the master shall cause the articles to be signed before he carries the seaman to sea, and the articles may be signed at the very earliest moment after the seaman has been working to get the ship ready to go out of port. I think that is really decided in the case before Chitty, J. of *Re Great Eastern Steamship Company* (*ubi sup.*), which has been referred to; but whether it was or not, I think it is quite clear from this statute.

ATKIN, J.—I am of the same opinion. It appears to me that on the facts the magistrate has found that this ship was, under the circumstances, Crowe's ship, and I think he has found that he was engaged as a seaman to go on this ship, the *Japanese Prince*, on a foreign-going voyage on the 22nd May. On that day, having been engaged at Whitby, he was provided with money to go to Middlesbrough. He went to Middlesbrough; on that night he went to the ship; he gave over his discharge book to the officer. He remained on the ship till the next day, when he was ordered by the officer to go and sign on with, I suppose, the rest of the crew, and it was then and before he signed the articles that he had the conversation with the appellant, for which the appellant has been convicted. It appears to me that if the appellant then persuaded Crowe not to sign on the *Japanese Prince* he persuaded him not to sign on his ship,

and that the magistrate was therefore entitled in law to convict the appellant.

It appears to me that there can be such an engagement which will make the ship for which the seaman was engaged the seaman's ship before he has signed the articles. The case of *Re Great Eastern Steamship Company* (*sup.*) is a direct authority, as I conceive, for that proposition, for in that case the captain had in December engaged a certain number of men as seamen amongst other things to go on the voyage. That was so found by the learned judge, Chitty, J., before whom the case came on a question of lien. The ship did not sail. The seamen were kept on the ship till February, and then they made a claim for their wages and claimed their lien for wages over the ship in priority to the debenture-holders. The point made against them was that they could not be engaged as seamen because there was no engagement in writing. In other words, they had not signed articles; and the learned judge, after discussing all the sections to which we have been referred from the Act of 1894, says (at p. 596): "I think there is nothing in the statute which avoids the agreement which was come to, as I hold, in point of fact, between the master on the one hand and the seamen on the other; and that it was not necessary for the purpose of the question that I have to decide that the agreement should be in writing." He gave them their wages for at any rate up to the time they were discharged and gave them their lien. It seems to me that that is a direct authority in point which would justify the magistrate in coming to the conclusion that this ship was the ship of Crowe even before he signed the articles, and I think, even if the contention of the appellant were sound, it might turn out very unfortunate for seamen who go to sea without having signed articles of this kind.

On the other point I do not think it is necessary to decide what the position is. Therefore I do not decide it, but I do not wish it to be assumed that we have decided that a man could not be convicted under this section if what he did amounted to this, that he said to a man before he had signed the articles: "Whether you sign the articles or not, I wish to persuade you not to go to sea." I leave open that question. That may or may not be an offence. I am assuming there is no other engagement at all. Nothing that we have said here is to be taken as making any kind of suggestion that the appellant in this case was a party or privy to the actual conduct of the seaman Crowe in this case in signing the articles and drawing the money. There is no ground at all for making that suggestion.

Appeal dismissed.

Solicitor for the appellant, *Alexander Smith.*

Solicitors for the respondent, *Botterell* and *Roche*, for *Botterell, Roche,* and *Temperley*, Newcastle-upon-Tyne.

Monday, Nov. 24, 1913.

(Before Pickford, J.)

Polurrian Steamship Company Limited v. Young. (a)

Marine insurance — Policy—Insurance against risk of seizure and detention—Actual total loss—Constructive total loss—Particular average loss—Captain's letters—Privilege—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 57 (1), 60.

The plaintiffs' steamship P. *was chartered to carry a cargo of coal from Newport to Constantinople. She was insured with the defendant at Lloyd's against capture, seizure, and detention. While on the voyage war broke out between Greece and Turkey, and the* P. *was stopped by the Greeks off Tenedos, who took her to Lemnos and removed the cargo. The plaintiffs gave the defendant notice of abandonment, and six weeks after the Greeks released the ship. In an action by the plaintiffs on the policy for an actual or a constructive total loss, or alternatively, damages for a particular average loss.*

Held, that there was not an actual total loss at the time of notice of abandonment as the plaintiffs were not then "irretrievably deprived" of the ship within the meaning of sect. 57 (1) *of the Marine Insurance Act* 1906, *nor a constructive total loss within the meaning of sect.* 60 (2) *as the words of the sub-section, "unlikely that he can recover the ship," mean within a reasonable time.*

Held, also, that the plaintiffs were entitled to the extraordinary expenses paid to procure the release of the ship, and to damages by reason of her detention, as a particular average loss, but not to damages for depreciation in the earning capacity of the ship by reason of her detention.

Quære, *whether privilege attaches to the letters of a master where he is instructed by her owners to state that they are written for the benefit of the solicitors.*

Commercial Court.

Action tried by Pickford, J.

The plaintiffs, owners of the steamship *Polurrian*, claimed against the defendant, an underwriter at Lloyd's, for loss under a policy of marine insurance against war risks on the *Polurrian* dated the 2nd Oct. 1912.

The defendant by his defence denied that the *Polurrian* was captured, and pleaded that even if she was captured the plaintiffs were not at any material time deprived of the possession of the ship, nor was it at any material time unlikely that they would recover her.

Roche, K.C. and *A. Neilson* for the plaintiffs.

Maurice Hill, K.C. and *R. A. Wright* for the defendant.

The facts and arguments are sufficiently stated in the judgment.

Pickford, J.—This action is brought upon a policy upon hull, materials, &c., machinery, boilers, &c., valued at 26,000*l.*, and it is said to be only against those risks excluded by the following clause in various policies: "Warranted free of capture, seizure, and detention and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

hostilities or warlike operations whether before or after declaration of war. Including risk of mines and (or) torpedoes, and also riots and civil commotions." Those are the perils which are insured against, but it is an insurance on ship and on ship only, hull, materials and machinery, and the question is whether under the circumstances which arose in this case there is first an actual total loss; secondly, if that be not so, a constructive total loss; and thirdly, if neither of those be the case, a particular average loss. It is not disputed that there is a particular average loss, but the dispute arises with regard to that as to what may be recovered under the particular average loss if that be the true view of the case.

The circumstances are short. The *Polurrian* sailed on the 9th Oct. 1912, the day upon which war was declared between Turkey and Montenegro. War was at that time going on between Turkey and Italy. On the 15th Oct. peace was made between Turkey and Italy. On the 16th Oct. the *Polurrian* passed Gibraltar. She only signalled her number, and did not communicate with the shore in any way. On the 18th Oct. war was declared between Turkey and Greece. On the 21st Oct. the Greeks declared all fuel as contraband, and on the 25th Oct. the *Polurrian* arrived off Tenedos. There she was stopped by a destroyer, and she was asked some questions which were described by the master in this way: He said he was first signalled to stop and then told to go on while they reported to the admiral. After that he was followed again; the destroyer signalled to him to stop, and told him to go into Lemnos, and he went into Midros Bay, which is at the south of the Island of Lemnos. He then asked (I suppose it was the commander of the destroyer or an officer from the destroyer) if the captain knew of the war between Turkey and the Balkan States. He said he only knew of the war between Turkey and Italy, and he says that he then asked if coal was contraband, and the officer said he did not know, but if they wanted the cargo they should take it; and he says before he was taken to Lemnos the officer had said he had orders to seize the ship and take her there. At Lemnos a flag lieutenant and an engineer came and asked some questions and examined the papers, and the lieutenant said they would confiscate the cargo; as to the ship, he did not know what they could do, but in the meantime she was to be considered a capture, although personally he did not think it could be maintained. That is what the master says. I have considerable doubts as to whether the word "capture" was used or not. I do not think it matters a bit whether the officer used it or whether he did not, because this case is not to be decided by whether a lieutenant, speaking imperfect English, said "captured" or "arrested," or whatever the word he used was. It is to be decided upon what the state of things was. They remained at Lemnos for some considerable time, rather more than a month, up to the 28th Nov., and they were occupied in discharging the cargo into the Greek warships—in fact, in coaling the Greek fleet; that is what they were wanted for chiefly—that the cargo might be taken for the purposes of coaling the Greek fleet.

On the 28th Oct. they were told to go to Piraeus and they went to Piraeus, the cargo at that time being out. On the 1st Dec. a guard came on board, and they were told to go to the naval arsenal at Salamis, and they went, and they remained at the naval arsenal at Salamis until the 8th Dec., when they were told they could go. They were never brought before a prize court. The Greek authorities apparently by that time at any rate, if they had not done it a good long time before, had satisfied themselves that they had no ground for condemning the ship, and they released her without going before a prize court at all.

The first question upon those facts and the details I shall have to deal with amplifying them, is whether she was a total loss, either actual or constructive. I have had a considerable and interesting argument with regard to the law as existing with regard to capture for the last 150 years. I do not mean any disrespect to counsel when I say that, in my opinion, it has got very little to do with it, because I have to deal with the Act of Parliament which now exists, the Marine Insurance Act of 1906, and, whatever may have been the definitions before, I have to consider the enactments and the definitions which exist in that Act of Parliament now. With regard to actual loss, it is governed by sect. 57: "Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the insured is irretrievably deprived thereof, there is an actual total loss."

No doubt the point of time that I have got to look to is the issue of the writ, or the time which is agreed between the parties to correspond to the issue of the writ, and that was settled, I think, upon the 26th Oct., the day after the vessel was arrested or seized or captured, or whatever may be the proper expression to use, because on the 26th Oct., I think, notice of abandonment was given to the underwriters at Lloyd's and it was declined; but at the bottom there followed the usual thing: "If acceptance be refused, it is requested that you place the owners in the same legal position as if a writ had been served upon you on this date," and that was agreed to by all the underwriters. Therefore the difference which has been suggested, a possible difference, between Scottish and English law as to whether the date of the notice of abandonment or the date of the issue of the writ is to be looked at, seems to me of no importance whatever; and in ordinary underwriting practice it is of no importance, because what was done in this case is the usual thing. Notice of abandonment is sent, and the underwriters are asked to put the assured in the same position as if a writ had been issued, and they refuse the abandonment. In nine cases out of ten, and probably a much larger proportion, they do, and if they did not, the immediate consequence would be that the assured would issue his writ there and then, and therefore the two dates really in ordinary English insurance practice correspond. That is the date at which I have got to look. Was this ship at that date irretrievably lost? I do not know, except in an insurance case, that anybody could seriously argue that she was. You cannot shut your eyes altogether to what took place afterwards. She was within seven weeks back in her owner's hands. But supposing you are to shut your eyes, and I suppose you ought as much as you can, to subsequent events, was there any reason, or would any man in his senses

have said that as soon as ever she fell into the hands of the Greek fleet she was irretrievably lost, and she could never come back again into her owners' hands in any time that could be called in a reasonable or business sense a restitution of her at all? There was no ground for condemning the ship. What reason was there for imputing to the Greek court that they would entirely neglect all the principles of international law? Not only imputing to them that they probably would, but imputing to them that they certainly would, because in order that she must be irretrievably lost it would have to be certain, it seems to me, that she would be condemned as soon as she came before the captor's court. Nobody thought so—not the master, not the British Minister, not the Foreign Office here, not the owners of the ship—nobody had the slightest notion that she never would be returned. Therefore it seems to me it is impossible to say that she was at that time irretrievably lost, or, rather, impossible to say that the assured was irretrievably deprived of her, and, if that cannot be said, she was not an actual total loss.

Now we come to the question whether she was a constructive total loss, and a constructive total loss is stated by sect. 60 of the Marine Insurance Act to be this: "Subject to any express provision in the policy, there is a constructive total loss where the subject-matter is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed the value when the expenditure had been incurred; in particular, there is a constructive total loss where the assured is deprived of the possession of his ship or goods by a peril insured against, and it is unlikely that he can recover the ship or goods, as the case may be." I do not think it is contended that that altered the law as it stood before, because Mr. Hill says that that is what the law was before, but he says that if Mr. Roche's contention is right, that the mere fact of the ship being in the hands of a captor is sufficient to make a constructive total loss, although she might be likely to be released the next day, then this does alter the law, because it says that there must be two conditions fulfilled before there is constructive total loss—first, the assured must be deprived of the possession of his ship, and, secondly, it must be unlikely that he can recover her. I think that certainly that is what the section says, and whether it alters the law or not does not seem to me to be a matter of very great importance. It has been laid down in several cases that where you are dealing with an Act of Parliament, the first thing you have to do is to look and see what the Act of Parliament says. If it is clear and unequivocal, then you have no right to try and interpret it by the law as it stood before the passing of the Act of Parliament, but if it be not clear and not unequivocal, then it may be that the previous law is useful for the purpose of seeing which of the obscure constructions is the one you ought to adopt. It seems to me that this is absolutely clear and unequivocal. It defines constructive total loss, and it says that there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, and in particular there is a constructive total loss where the assured is deprived of the possession of his ship—never mind goods here—by a peril insured against, and it is unlikely that he may recover the ship or goods. I think probably that some limitation has to be put upon the words "unlikely that he should recover," because I do not think it meant it is unlikely that he will ever recover, although I do not know that that would be a wrong construction, because you have to see whether it is unlikely that he shall recover, and not whether it is impossible that he shall recover; but probably what is suggested by the editors of Arnould is not unreasonable, that you should put the limitation that it is unlikely that he should recover within a reasonable time. That, of course, would have to be considered according to all the circumstances.

Firstly, was the owner deprived of the possession of his ship? Mr. Hill says he was not, because he was only deprived of the control of her, and his master, officers, and crew were left on board. It seems to me that where not an enemy's fleet but a belligerent's fleet takes possession of a ship and says, "We are going to keep it; you will have to go to where we tell you to go, or else" (I suppose there is the suppressed condition) "it will be the worse for you"; and when they actually put a guard on board, as they did at Piraeus and at Salamis, it is a stretch of language to say that that ship is still in the possession of her owner. I should have thought that, although the master and crew were there, she was pretty well out of the possession of her owner, and therefore I shall hold here that she was out of the possession of her owner. But then, was it unlikely that the owner would recover the ship? That must be looked at having regard to the state of things at the time of the issue of the writ, but I cannot accept the contention that "unlikely" means "unlikely to be restored before the issue of the writ." In these days it would reduce this section, it seems to me, to an absurdity. The capture is heard of at once; notice of abandonment is given at once, and the writ, if the assured is not put in the position in which he was, is issued at once, and therefore it really means that if possession has not been given back, in ninety-nine cases out of a hundred in these days, I think it means, as the editors of Arnould suggest, that at the time of the issue of the writ you must see whether the owner is deprived of the possession of his ship, as I think he was in this case, and whether at that time it is unlikely that she will be restored to him within a reasonable time.

What was the position here? She was detained for seven weeks altogether. After seven weeks she was restored to him. A detention of seven weeks and then restoration does not seem to me to be such a detention as to make her a total loss. It may be that I ought not to look at the subsequent events, but, looking at the events as they were at the time she was taken possession of by the Greek fleet, would anybody say it was unlikely that she would be restored? As I have said, there was nothing whatever against her. It is true that the Greek admiral contended, though I think rather faintly, that the master had made an admission that he knew of the declaration of hostilities, but when that came to be examined it was dropped at once, and I doubt very much if the admiral ever attached very much importance

to it. The master undoubtedly thought that he was going to be released before very long. He made a statement which I think is probably more accurate than the evidence he gave me yesterday, in which he said that they had told him that they could not do anything with the ship—that they could not condemn her. In the evidence that he gave yesterday he said that all the officials practically that he saw expressed their own personal view that they had no right to touch the ship, that is to say, no right to condemn it, and he certainly did not think that the ship was not going to be restored within a reasonable time. Nor, so far as I can tell, did anybody. If I am to confine myself to the date of the 26th Oct., it seems to me clear that there were no grounds on which any court administering justice in any proper way, any civilised court, could condemn her. The master did not think she could be condemned, and those who arrested her, or seized her, or detained her, or whatever word you like to use, thought that they had not got any right to detain her and keep her permanently. If I have to look at what happened afterwards, it seems to me that the conclusion is the same. All throughout this correspondence (I am not going through it at length) Mr. Henderson, Lloyd's Agent at Athens, was expressing the opinion that the ship would be released very soon; sometimes he says "At once," sometimes he says "Very soon." The master, as I say, seems to have expressed the same opinion, and in my opinion, looking at all the facts, it was not unlikely that she would be restored within quite a reasonable time to the possession of her owner; reasonable, I mean, from the point of view of the section; that is to say, whether it was likely to be so unreasonable that it would make the ship a total loss to her owner. I do not mean reasonable in the sense in which the owner would think a reasonable time for detaining her, but reasonable in the other sense I have expressed.

I think the real fact is that the Greek authorities knew quite well that they had no grounds for condemning this ship; that they meant to keep her as long as it was convenient for them to keep her to coal their fleet. They could have got the cargo out sooner if they had not wanted to coal the fleet; and then they set up this answer—a natural answer—to the representations of the British Minister, who had been communicated with by our Foreign Office, in order to set up a case that they were not doing anything that was illegal, or anything that was contrary to the law of nations. They said they would take her before a Prize Court, in order that whatever the decision of the court might be, they might be said to have acted regularly in first taking possession of her, and then bringing her before the regular tribunal. But when they came to examine into the matter, they found they had not even grounds for going before the tribunal, and, therefore, they released her without any adjudication at all. There was an adjudication afterwards that the owners were not entitled to compensation. What the grounds of that were, I find it rather difficult to understand, because the transcript, which is not official, which I have of the Greek court first finds that the master did not know of the war between Turkey and the Balkan States and Greece, and that what he had said to the Admiral had relation to the Turco-Italian war, and then goes on to say that the seizure was regular, and that the owners are not entitled to compensation because of the admission that he had made that he did know of the war going on. So that in two paragraphs, according to the transcript I have got, there are two diametrically opposite findings of fact; but whatever may be the reason of that, whether it is a wrong transcript, or whatever the reason may be, the fact remains that they did not go before that tribunal in order to attempt to make a case of any right to condemn this ship. Therefore it seems to me that whether you look at the time immediately after she was sent to Lemnos—namely, the date of the 26th Oct., or the date of the actual issue of the writ which I think was either the 4th Nov. or the 7th Nov., or whether you look at what happened afterwards, it was not at any time unlikely that the owner would recover the ship within the meaning of this section. The only thing that would point somewhat in the direction of the Greek Government intending to do more than I have said is the fact that at one time they told the crew to leave the ship, and that one officer is said to have said that he was going to have charge of the engine-room, and they were going to use her. I do not think that those facts are in any way sufficient to counteract what I think is the proper inference to be drawn—namely, that nobody thought that this ship would be condemned and nobody thought it would be very long before she was released or restored to her owners. Therefore, I think, she does not come within sect. 60 as a constructive total loss.

The only point that is left is the question of particular average loss. It is not denied that she was a particular average loss, but the question there is what ought to be recovered. I have not to find the figures; I have only to find the principles of the heads under which compensation is to be given. The broad difference is this: The underwriters say: "This is an insurance on ship, and on an insurance on ship for a detention like this you can only recover such a sum for extraordinary expenses as you had to incur to get her released, and damage to ship by reason of her detention." The assured, on the other hand, say: "You can recover a great deal more than that; you can recover in substance what you recover in an action for demurrage—that is to say, you can recover damages for the loss of the use of the ship"—or, as it was ingeniously put by Mr. Roche, the depreciated value of the ship by reason of her not being able to earn money during those seven weeks. I think the underwriters are right here. I think that the case of *Field Steamship Company* v. *Burr* (80 L. T. Rep. 445; 8 Asp. Mar. Law Cas. 529; (1899) 1 Q. B. 585) is an authority that decides that point. The ship is not depreciated by reason of her detention. She is depreciated because she cannot, if one may say so, be sold for her engagements. I believe that is an expression used generally more with regard to other things than ships, that she cannot be sold for the benefit of her engagements, but that is not because the ship is damaged; it is because the business connection of her is damaged by reason of the detention; and that is not covered by the policy on ship. I think this is exactly within the principle of the case of *Field Steamship Company* v. *Burr* (*sup.*), and that the underwriters are right on that point also; and, there-

fore, as they have admitted that, and I think paid the money into court on the basis of it, there must be judgment, in my opinion, for the defendants.

There is one thing I wanted to say, a matter I omitted. I wish to say something with regard to the captain's letters. There were some letters written by the captain for which privilege was claimed. I did not think the matter of sufficient importance to give a judgment upon it in this case, nor am I quite sure that I had sufficient materials as to what the instructions to the captain were. As I understand them they were general instructions that wherever he got into difficulty out of which any trouble might arise, his letters were to be written stating that they were for the benefit of the solicitors. I do not know whether he had ever done so before this case or not, but I gather that the instructions were not confined to this case, but were general instructions. I did in the course of the argument say that you could not get behind the affidavit. I do not wish that to be taken as a decision. I am by no means sure that you cannot get behind, and ought not to get behind such instructions as those when privilege is claimed in respect of them. I do not think either of the cases which were cited to me on the point are quite conclusive, but I have very great doubts whether general instructions such as those—always to say that your letters are written for the purpose of being shown to the solicitors when you do not know whether the solicitor will ever be consulted, and you do not know whether any litigation will ever arise —I do not wish to be taken as deciding that that is a proper claim of privilege. It has been pointed out to me that if it is, it may very well do away with a great deal of the advantages of the affidavit of ship's papers, and if such instructions are often given and the objection is persisted in, some day or other that will have to be decided. I do not think it is necessary to decide it in this case, but I have very great doubt indeed whether such a claim as that can possibly be sustained as a claim of privilege. I do not decide it here, partly because I do not think it is of sufficient importance in this case, and partly because I am not sure that I am sufficiently or accurately informed as to what actually took place.

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

Solicitors for the defendant, *Parker, Garrett, and Co.*

Thursday, Nov. 27, 1913.

(Before PICKFORD, J.)

DEUTSCH-AUSTRALISCHE DAMPSCHIFFS-GESELLSCHAFT v. STURGE. (a)

Marine insurance—Policy—Transit—Duration of risk—Conclusion of transit.

The plaintiffs effected a policy of marine insurance with the defendant and other underwriters, at Lloyd's, in respect of a new cast-steel frame for a steamer. The policy was expressed to be "against all risks, especially including breakage and damage done and received through loading and discharging, irrespective of percentage." By clauses attached to the policy it was also provided that the insurance should include "all risks of craft and (or) raft and (or) of any special lighterage without recourse against lighterman . . . of fire, transhipment, landing, warehousing, and reshipment if incurred, and whilst waiting shipment and (or) reshipment, and all other risks and losses by land and water from the time of leaving the warehouse at point of departure until safely delivered into warehouse or other place for which the goods have been entered, or in which it is intended they shall be lodged, whether previously discharged or landed elsewhere within the port or place of destination or not." The casting was shipped to Hamburg and discharged on the quay on the 14th June, at which time the steamer into which the steel frame was to be fitted had not arrived. On the 27th June the frame was transported in a lighter to the quay of the V. Company's shipbuilding yard at Hamburg, and while being lifted from the lighter to the quay it struck the quay wall and was thereby rendered useless. In an action by the plaintiffs to recover under the policy:

Held, that the loss was not covered by the policy, as the transit was at an end when the loss occurred.

COMMERCIAL COURT.

Action tried by Pickford, J.

The plaintiffs claimed against the defendant, an underwriter, under a policy of marine insurance dated the 17th June 1912.

The defendant by his defence denied that the loss was covered by the policy.

George Wallace, K.C. and *Mackinnon* for the plaintiffs.

Roche, K.C. and *R. A. Wright* for the defendant.

The facts and arguments are sufficiently stated in the judgment.

PICKFORD, J.—This is an action brought to recover a loss under a policy of insurance upon a stern frame. Several defences are raised. One is that the stern frame was not at risk under the policy at the time it was lost. Another is that there was a concealment of a material fact which avoids the policy; and the third is that the underwriters of a certain shipbuilding firm called the Vulcan Works and the Vulcan Works themselves are really to the extent of a considerable sum the plaintiffs in this action, and that therefore a defence arises because of that, that the loss was occasioned by the negligence of the Vulcan Company, and perhaps there are other defences. The last point has not been argued before me at present. I was asked to decide upon the first two points first. Both of those go to the whole of the claim. If either of them be established the plaintiff has not got any claim at all.

What happened was this: A ship belonging to the plaintiffs, a shipping company in Germany, called the *Offenbach*, had some damage to her stern frame, and it was necessary to procure another stern frame to replace it, and the plaintiffs ordered a stern frame from the firm of Swan, Hunter, and Wigham Richardson Limited in England, and it was to be transferred to Hamburg. It was to be transferred to Hamburg because it was to meet the *Offenbach* steamer there. It was, in all human probability, to be taken to some shipbuilder's yard in Hamburg to be put upon the *Offenbach*,

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

but if anything had happened to send the *Offenbach* somewhere else, or to make it necessary to bring the frame to the *Offenbach* at some other port, it would have been taken from Hamburg and delivered wherever the *Offenbach* happened to be. It was desired, of course, to insure the stern frame, and Messrs. Wigham Richardson and Co.'s London insurance brokers effected an insurance with the defendant and other Lloyd's underwriters. the terms of the slip of which insurance are as follows: "Dresden, West Hartlepool, Hamburg, cast steel stern frame on deck. Against all risks including breakage and damage done and received through loading and discharging irrespective of percentage." Then there follow a number of printed notes referring to the clauses that there are to be in the policy. There are only two, I think, that I need mention; one, the first, deviation, and the other is one lower down, "including risk of craft and (or) raft." That was the slip which came into existence with regard to this insurance. The policy expanded that, of course, to a considerable extent. It was dated the 17th June of last year, and so far as it is material it is to this effect, that Swan, Hunter, and Wigham Richardson Limited have insured or caused to be insured at and from West Hartlepool to Hamburg upon a vessel called the *Dresden* 1400*l.* on cast steel stern frame on deck so valued; and then there follow the ordinary perils "at and after the rate of 7*s.* 6*d.* per cent." Then there is written in "Against all risks, especially including breakage and damage done and received through loading and discharging irrespective of percentage." That was the body of the policy, but there was attached, as is usual in these cases, clauses upon a slip or piece of paper. The first is: "Including all risks of craft and (or) raft and (or) of any special lighterage without recourse against lighterman (each craft, raft, or lighter to be deemed a separate insurance) of fire, transhipment, landing, warehousing, and reshipment if incurred, and while waiting shipment and (or) reshipment and all other risks and losses by land and water from the time of leaving the warehouse at point of departure until safely delivered into warehouse or other place for which the goods have been entered, or in which it is intended they shall be lodged, whether previously discharged or landed elsewhere within the port or place of destination or not." Then lower down: "Agreed to hold the assured covered in case of deviation and (or) change of voyage; premium to be arranged.

The clause with regard to the risk of craft is, it will be observed, a very wide one. The defendant looking at it seemed a little surprised to find that it was so wide, and so did the broker. It is there in the policy which the defendant signed. He does not suggest he is not bound by it. He does say that he did not realise the terms of the clause until afterwards. The broker who had the drawing up of the policy, of course, I should assume, put, or somebody put for him, that clause as what he thought was a proper carrying out of the words on the slip: including risk of craft and (or) raft," and he told me that it was the usual clause employed by his firm in cargo insurance; but he seemed also somewhat suprised, or, at any rate, if not surprised, somewhat struck by the width of the clause when compared with the evidence that he was giving as to what anybody would consider this insurance to be. The explanation he gave to me was that it was probably put on by his office-boy without any consideration. I cannot accept that, I know that things are done very casually very often, and possibly necessarily very casually in insurance matters, but office-boys do not stick on what clauses they like. It was put on by the broker or somebody who acted for him as being his ordinary clause to carry out the terms of the slip, and, however it got there, it is there, and nobody says it is not a clause upon which the rights of the parties have now to be determined.

The first question is whether this frame was still in transit, and, therefore, at risk, under this policy at the time that the accident happened. It is a policy for the transit from West Hartlepool to Hamburg, and I think it should be read, a place in Hamburg where it is intended the goods should be lodged. They were not entered, so I leave out that part of the clause, and it covers it so long as it is in course of that transit and no longer. What is said is it was still in transit, and therefore, at risk under that policy, because it was intended that it should be lodged eventually at some shipbuilder's yard or ship-repairer's yard at Hamburg, and it had not got there. The facts were these. When the *Dresden* arrived she was sent, not to her usual discharging berth, but to another quay or wharf where there was a powerful crane capable of dealing with a heavy lift such as this was, and there it was taken out. It was put upon that quay and remained upon that quay for about a fortnight. The *Dresden* arrived on the 14th, and on the 28th instructions were given to send the stern frame to the Vulcan Works Wharf. Between the 14th and the 28th neither the plaintiffs nor the Vulcan Company, nor anybody else, had any idea—I will not say had any idea, but knew—to what wharf that stern frame was going. There had been communications, at any rate—and, I think, negotiations—with the Vulcan Company before the frame left England at all. They had not come to a head—or come to a contract, perhaps—for reasons which are stated by Mr. Harms, who is senior manager of the plaintiff company, in an affidavit which was put before me. He says: "When the builders were instructed to effect the insurance it was not known to the plaintiffs at which ship-repairing yard in Hamburg the said frame would be fitted to the *Offenbach.* At that time the plaintiffs had already communicated with the Vulcan Company, but nothing definite had been arranged. There are several repairing yards in the free port in Hamburg where the plaintiffs might have arranged to send the *Offenbach* to be fitted, but all they knew at that time was that it would be necessary for the said stern frame to be first discharged at whichever quay the port authorities should direct, and thence transported to the yard where the work was to be done on the *Offenbach.* Moreover, owing to the uncertainty of the times of arrival of vessels making long voyages like the *Offenbach*, the plaintiffs could not make arrangements far ahead, and it was not until the *Offenbach* had reached Port Said on the 18th June 1912, and the plaintiffs knew approximately when she would arrive in Hamburg, that they could or did arrange for the said frame to be fitted at the Vulcan Yard." So that on the 14th June, when the frame arrived

and was discharged from the *Dresden* in Hamburg, the plaintiffs did not know to what wharf the frame was to be delivered. It might, of course, have never been delivered to any wharf in Hamburg at all. The *Offenbach* had been heard of at Port Said. She was expected to arrive in Hamburg at the end of June or the beginning of July. She did in fact arrive somewhere about the middle of July. It is quite possible that she might not have arrived at all. It is quite possible that she might have been delayed by some accident or another for a considerable time, and, therefore, it is quite possible that the frame might never have been delivered to any shipbuilding wharf in Hamburg at all, although no doubt the idea of the plaintiffs was that it would be delivered at some wharf, and possibly the idea was that it would probably be delivered at the Vulcan Wharf.

The question, as it seems to me, is this, whether it comes within the terms of this policy when the frame is delivered at a place where it is to wait for further orders, when the plaintiffs have made up their minds what those orders are going to be —whether when they have made up their minds what those orders are going be, the place which is designated by those orders is a warehouse or place where it is intended that the goods shall be lodged at the time they start upon their transit. It is a question of fact, and also it seems to me, to a certain extent perhaps, a question of law. I do not think that it can be said that because it was contemplated that it should go to some shipbuilder's wharf within the port of Hamburg, but it was not known which, and it was possible that it might never go to any shipbuilder's wharf in the port of Hamburg at all, that the Vulcan Wharf can be said to be the warehouse or place where it was intended it should be lodged at the time a contract was made to carry the frame on the *Dresden*, and at the time when a policy was effected on the transit by the *Dresden* to Hamburg to such place. These words are not there in so many words, but it is what the contract was, to Hamburg to such place as the plaintiffs might wish to have it carried. I do not think that there was any place designated at the time that this policy was effected where it was at that time intended that this stern frame should be lodged. What was intended was that it should be put upon a quay, discharged out of the *Dresden* upon such a quay as the port authorities thought fit to direct, and there it should remain until the plaintiffs had made up their minds what was to be done with it, and until they sent further orders for it to be carried to somewhere else. They did not do that for a fortnight after it arrived. So far as it is a question of fact it seems to me it is quite impossible to say the Vulcan Wharf was designated and intended as the place where the frame should be lodged at the time the contract of carriage and the contract of insurance was entered into. That goes to the root of the case, and it does not seem to me necessary for me to consider the other points that have been raised. I should do so if there were any question of finding facts upon disputed evidence which might be necessrry for the guidance of anybody who might deal with the case hereafter, but there is no question of that sort. Therefore, I do not think it is necessary for me to consider the point of concealment or the other point which was raised with regard to the position of the Vulcan Company and their underwriters. I think there must be judgment for the defendant. I ought to have said that the decision of Channell, J. that was cited to me in *Lewis, Lazarus, and Sons* v. *Marten* (unreported) seems to me in favour of the conclusion to which I have come.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 31, *Nov.* 3 *and* 13, 1913.

(Before Lord Parker, Lord Sumner, and Warrington, J.)

The Cairnbahn. (*a*)

Collision—Joint negligence of two ships causing collision between one of the negligent ships and an innocent third ship—Recovery of damage by owners of innocent ship against the owners of one of the wrong-doing ships—Right of the owners of the wrong-doing ship who had paid to recover a contribution from the owners of the other wrong-doing ship—Division of loss—Maritime Conventions Act (1 & 2 *Geo.* 5, *c.* 57) 1911, *s.* 1—*Construction of statute—Preamble of Act.*

Sect. 1 *of the Maritime Conventions Act* 1911 *must be construed not as apportioning any existing liability, but as providing that the whole of the damage or loss referred to is to be borne in proportion to the degree in which each vessel is in fault; and, if it be impossible to establish different degrees of fault, then equally.*

A tug towing two hoppers brought one of them into collision with a steamship. Both the hopper and steamship were damaged. In a collision action brought by the owners of the hopper against the owners of the steamship and the owners of the tug to recover the damage they had sustained, the steamship and tug were both held to be equally in fault for the collision, and the hopper was held free from blame. The owners of the hopper recovered the whole of their damage against the owners of the steamship. The owners of the steamship then sought to recover half the sum paid by them to the owners of the hopper from the owners of the tug. The President (Sir S. Evans) held that they were entitled to recover that sum. The owners of the tug appealed to the Court of Appeal.

Held, affirming the decision of the President (Sir S. Evans), that the sum recovered by way of damage against the owners of one of the wrong doing ships by the owners of the innocent ship was loss caused to that wrong-doing ship within the meaning of sect. 1 *of the Maritime Conventions Act* 1911, *and that the owners of the wrong-doing ship who had paid it were entitled to recover half the sum so paid from the owners of the other wrong-doing ship.*

Held, further, that where the words of an Act are clear it is not permissible to look at the preamble

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

of the Act as an aid to construe the meaning to be given to the provisions of the Act.

APPEAL by the owners of the tug *Nunthorpe* from a decision of the President (Sir S. Evans) by which he held them liable to pay to the owners of the steamship *Cairnbahn* half the damages paid by the owners of the *Cairnbahn* to the owners of a hopper which was injured by being towed by the *Nunthorpe* into collision with the *Cairnbahn*; the *Cairnbahn* and *Nunthorpe* having been held to be equally in fault for the collision between the *Nunthorpe* and the hopper.

On the 21st Dec. 1911 the tug *Nunthorpe* was proceeding down the Tees with two hoppers in tow, the *Newport No.* 5 immediately astern of her and the *Newport No.* 2 astern of the *Newport No.* 5. The weather was foggy and those on the tug who had charge of the navigation were proceeding down the river on their starboard hand side of the channel, sounding their whistle for the fog.

A prolonged blast was heard from the whistle of the *Cairnbahn*, which was proceeding up the River Tees in charge of a pilot. The *Cairnbahn* was on a voyage from Huelva to Stockton with a cargo of ore, and had one passenger on board. Signals were exchanged between the vessels, and those on the tug then saw the *Cairnbahn* three points on their port bow. The tow-rope was at once slipped and the tug cleared the *Cairnbahn*, but though those on the *Newport No.* 5 hard-a-ported their helm and those on the *Cairnbahn* took steps to avoid the collision by means of manœuvres with their helm and engines, the stem of the *Cairnbahn* struck the port side of the *Newport No.* 5. Both vessels were damaged.

The owners of the *Nunthorpe* instituted proceedings against the owners of the *Cairnbahn*. The *Cairnbahn* put in a defence alleging *inter alia* that the tug *Nunthorpe* was guilty of negligence, which caused or contributed to the collision.

The owners of the *Newport No.* 5 then joined the *Nunthorpe* as a defendant in the action they brought against the *Cairnbahn*, and the tug owners put in a defence denying that the tug was negligently navigated and alternatively alleging that the *Newport No.* 5 was being towed by the *Nunthorpe* under a contract which exempted the owners of the tug from any liability for the damage sustained.

The action was tried by the President (Sir Samuel Evans) assisted by two of the Elder Brethren of the Trinity House on the 6th and 7th May 1912. The learned President held that both the *Cairnbahn* and the *Nunthorpe* were in fault in equal degree for the collision between the *Newport No.* 5 and the *Cairnbahn*, and further held that the *Newport No.* 5 was not to blame at all.

Judgment was reserved on the point as to whether the contract between the owners of the tug and the owners of the hopper absolved the former from liability.

The damage sustained by the owners of the *Newport No.* 5 was paid by the owners of the *Cairnbahn* and no judgment was delivered on the point raised on the contract between the hopper and the tug.

The owners of the *Cairnbahn* who had sued the owners of the *Nunthorpe* for the damage they had sustained then attempted to recover half the sum they had paid to the owners of the *Newport No.* 5, from the owners of the *Nunthorpe*, as well as half the damage the *Cairnbahn* had sustained, on the ground that it was damage or loss caused to their vessel within the meaning of sect. 1 (1) of the Maritime Conventions Act (1 & 2 Geo. 5, c. 57) 1911.

The owners of the tug *Nunthorpe* alleged that the common law rule that there was no right of contribution between two joint tortfeasors applied, and that as the *Nunthorpe* and the *Cairnbahn* were both in fault and guilty of negligence, which caused the loss, the owners of the *Cairnbahn* could recover nothing from them in respect of the damages paid to the owners of the *Newport No.* 5.

The material parts of sect. 1 of the Maritime Conventions Act are as follows:—

1. (1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

Provided that—

(*a*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(*b*) Nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and

(*c*) Nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.

Sect. 25, sub-sect. 9, of the Judicature Act 1873 is as follows:

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.

On the 7th Nov. 1912 the President delivered the following judgment:—

The PRESIDENT.—In this case the proceedings were brought after the passing of the Maritime Conventions Act 1911, and the case is therefore to be determined in accordance with the provisions of that statute. The collision took place between an innocent barge in tow of the tug *Nunthorpe* and a steamship, the *Cairnbahn*, by which both the barge and the steamship were damaged.

The collision was due to the fault of the tug and of the steamship. The tug and steamship were held to be in fault in equal degrees, and accordingly the liability, if any, for the damage or loss was adjudged to be borne equally between their owners. The owners of the steamship *Cairnbahn* claim that the owners of the tug *Nunthorpe* should bear half the loss sustained by the steamship by reason of the collision. The innocent barge recovered the whole of her damage against the steamship. It was admitted in terms by counsel for the owners of the tug *Nunthorpe* that if the owners of the steamship were entitled to claim any damage from them they, the owners of the steamship, were entitled to include in their damage or loss the amount of the judgment against them by the innocent tow; but it was

contended that as both the steamship and the tug were in fault the owners of the steamship were not entitled to call upon the owners of the tug to bear any share of the loss, because the two vessels were in the position of joint tort feasors. It was argued that as the two vessels in fault were not colliding vessels the Admiralty rule, preserved by sub-sect. 9, of sect. 25 of the Judicature Act 1873, would not have applied before the Maritime Conventions Act of 1911 came into operation; that the Act did not alter the law in this respect; and that the common law principle, that there can be no contribution between joint tortfeasors, governed the case.

It is necessary for the decision of the case to determine the construction to be placed upon sect. 1 of the Act of 1911. The Act was passed to amend the law in relation to merchant shipping, to enable effect to be given to certain international conventions, which are referred to in the preamble. Sub-sect. 9 of sect. 25 of the Judicature Act 1873, already referred to, was expressly repealed by the Act (sect. 9, sub-sect. 3). It is therefore wholly unnecessary to decide what the rights of the parties would have been if that repealed enactment were still in force. The wording of sect. 1 (1) of the Act of 1911 is quite different from that of the repealed sub-section. What is the proper construction of the section? Its language appears to me to be quite plain. Reading the words of the section, which are applicable to the circumstances of this case, it enacts that, where by the fault of two vessels damage or loss is caused to one or to both of those vessels, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault (subject, of course, to the proviso). There is nothing in the section about the two vessels in fault being themselves in collision with each other. Translate that into the facts of this case, then the enactment would read thus: Where by the fault of the tug *Nunthorpe* and the steamship *Cairnbahn* damage or loss was caused to the *Cairnbahn*, the liability to make good such damage or loss shall be in proportion to the degree in which the tug *Nunthorpe* and the steamship *Cairnbahn* were in fault —viz., in equal degrees. As has been said, the damage or loss caused to the *Cairnbahn* was admitted to include the sum which the *Cairnbahn* was adjudged to pay to the innocent barge, as well as the damage caused to the steamship herself. Counsel for the tug, however, contended that proviso (*c*) in sect. 1 exempted the tug from liability by some "provision of law" that if the vessels in fault did not themselves collide there is to be no contribution between them. This is rather like contending that, although sect. 1 makes an alteration in the law, the proviso says there is to be no alteration. In my opinion that is not the meaning or effect of the proviso. It is not necessary to enumerate what may be included in the words "provision of law," but an instance of such provision is, I think, to be found in the statutory enactment, providing for the defence of compulsory pilotage (Merchant Shipping Act, 1894, sect. 663). If the words in the section which I have to construe were ambiguous, I think I should be entitled to look at the conventions referred to in the preamble, in order to see whether a reasonable construction could be given to the section which would carry out what was agreed by the high contracting parties to the conventions. It is not necessary to do this, because the words appear to be unambiguous and clear; but it is satisfactory to find on reference to the terms of the conventions that the section in its plain meaning does carry out what was agreed. I therefore decide that the owners of the tug *Nunthorpe* must bear half the loss sustained by the steamship *Cairnbahn*, and give judgment accordingly, with costs, and order the usual reference to ascertain the amount of the damage or loss.

The owners of the *Nunthorpe* appealed against that decision.

The appeal came on for hearing on the 31st Oct. and the 3rd Nov.

Leslie Scott, K.C. and *D. Stephens*, for the appellants, the owners of the steamtug *Nunthorpe*, cited the following cases:

The Drumlanrig, 103 L. T. Rep. 773; 11 Asp. Mar. Law Cas. 520; (1911) A. C. 16;
The Devonshire, 107 L. T. Rep. 179; 12 Asp. Mar. Law Cas. 210; (1912) A. C. 634;
The Westlands, *Times* Newspaper, April 2, 1909;
Vacher and Co. v. *London Society of Compositors*, 107 L. T. Rep. 722; (1913) A. C. 107, at 113;
The Frankland, 84 L. T. Rep. 395; 9 Asp. Mar. Law Cas. 196; (1901) P. 161;
The Milan, 5 L. T. Rep. 590; Lush 388;
Thorogood v. *Bryan*, 8 C. B. 115.

Aspinall, K.C. and *Dawson Miller*, K.C., for the respondents, the owners of the *Cairnbahn*, cited

Palmer v. *Wick*, 71 L. T. Rep. 163; (1894) A. C. 318;
The Englishman and Australia, 70 L. T. Rep. 846; 7 Asp. Mar. Law Cas. 603; (1894) P. 239;
The Niobe, 59 L. T. Rep. 257; 6 Asp. Mar. Law Cas. 300; 13 P. Div. 55;
The Quickstep, 63 L. T. Rep. 713; 6 Asp. Mar. Law Cas. 603; 15 P. Div. 196;
The Morgengry, 81 L. T. Rep; 8 Asp. Mar. Law Cas. 591; (1900) P. 1;
The Harvest Home, 93 L. T. Rep. 395; 10 Asp. Mar. Law Cas. 118; (1905) P. 177;
The Hector, 48 L. T. Rep. 890; 5 Asp. Mar. Law. Cas. 101; 8 P. Div. 218.

Leslie Scott, K.C., in reply, referred to

The American and Syria, 31 L. T. Rep. 42; 2 Asp. Mar. Law Cas. 350; L. Rep. 6 P. C. 127;
The Douglas, 47 L. T. Rep. 502; 5 Asp. Mar. Law Cas. 15: 7 P. Div. 151;
The Crystal, 71 L. T. Rep. 346; 7 Asp. Mar. Law Cas. 513; (1894) A. C. 508;
The Utopia, 70 L. T. Rep. 47; 7 Asp. Mar. Law Cas. 408; (1893) A. C. 492.

At the conclusion of the arguments the court reserved judgment.

On the 13th Nov. the following judgments were delivered:—

Lord PARKER.—By the fault of the *Cairnbahn* and the *Nunthorpe* damage has been caused to the *Cairnbahn*. The case, therefore, falls within the express words of sect. 1, of the Maritime Conventions Act, 1911. It is suggested, however, that the *primâ facie* meaning of these words is controlled by the preamble of the Act and the title of the fasciculus of clauses in which sect. 1 appears. I am unable to adopt this suggestion. I do not think that such preamble or title can,

according to any sound canon of construction, be called in aid to construe the meaning of the words in themselves clear and unambiguous. If, however, the preamble and title could have been so called in aid, I think the court would also have had to look at the conventions referred to in the preamble.

The section, then, being applicable to the present case, we have to consider its true meaning and effect. It provides for the apportionment in a certain way of the "liability for the damage or loss" referred to; that is to say, the damage or loss caused by the fault of two or more vessels to one or more of those vessels, to their cargoes or freights, or to any property on board.

Before the passing of the Act there was at common law no liability on the part of anyone to make good the damage caused to the *Cairnbahn*, both she and the *Nunthorpe* being to blame, and according to the Admiralty rule referred to in sect. 25 (9) of the Judicature Act 1873 (if such rule were applicable), the only liability to make good this damage lay on the *Nunthorpe*, but to the extent only of a moiety. Having regard to the strange results which would otherwise follow, I think that the section must be construed, not as apportioning any existing liability, but as providing that the whole of the damage or loss referred to is to be borne in proportion to the degree in which each vessel is in fault; and, if it be impossible to establish different degrees of fault, then equally.

I do not think there is anything in proviso (*c*) to preclude the adoption of this construction. The fact that the *Nunthorpe* was not by common law under any liability, or if the Admiralty rule would have been applied was liable for a moiety of the damage only, could not, in my opinion, entitle her to say that she was, within the meaning of the proviso, wholly or partially exempted from liability by some provision of law. Further, I think that, though the section refers to damage or loss caused to one or more of the vessels in fault, to their cargo or freight, or any property on board, this is only a figurative way of referring to the damage or loss caused to the persons interested in the vessels, their cargoes or freights, or property on board. Loss cannot, with any propriety of language, be said to be caused to a vessel or other property, though it may well be said to be caused to those interested in the vessel or property in question.

This being so, the only remaining question is whether these sums recovered by way of damages against the owners of the *Cairnbahn* by the owners of the hopper barge, damaged through the fault of the *Cairnbahn* and the *Nunthorpe*, is loss caused to the owners of the *Cairnbahn* within the meaning of the section? In my opinion it is.

It should be remembered that the Act repeals sub-sect. 9 of sect. 25 of the Judicature Act 1873, altogether, and, unless the ambit of the first section of the Act includes all cases within the rule referred to in the repealed sub-section, there might, and possibly would, arise the very confusion and difficulty which the repealed sub-section was designed to prevent. According to *The Frankland* (*sup*), the Admiralty rule was applicable to the loss in question. It is said that this case was wrongly decided, because no case can be found in which the rule was so applied prior to the Judicature Act 1873. Even if this be so, the decision seems to be in accordance with the spirit and within the reason of the rule, and the provisions of the section not being, in my opinion, confined to collision cases—in other words being wider in their application than the Admiralty rule — there would appear to be no reason for imputing to the Legislature an intention to perpetuate an illogical exception from that rule, if that exception now existed. The words of sect. 1 are wide enough to cover the sum recovered against the *Cairnbahn*, and I think that that sum must be apportioned in accordance with the section.

I need only add that the alleged contract between the owners of the *Nunthorpe* and the owners of the hopper barge, to the effect that the former should not be liable for damage done to the hopper barge while under tow, not being in my opinion proved, it is unnecessary to deal with the argument based on such contract. The decision of the President therefore stands.

Lord SUMNER.—The owners of the *Cairnbahn* suffered "damage" because their ship ran into the hopper which was in tow of the tug *Nunthorpe*. They suffered "loss" because the owners of the hopper sued them for her injuries and won. They suffered by the "fault" of the two vessels, the *Cairnbahn* and the *Nunthorpe*, or rather by the faulty navigation of those in command of them. Why does not sect. 1 (1) of the Maritime Conventions Act of 1911 apply to this case? Though damage may be caused to a vessel, loss cannot be, nor is the phrase "Damage is caused to a vessel" apt to express simply that the vessel is damaged. Loss is caused to the owners and charterers of the vessel, and damage is caused to them too when the vessel is damaged. I think the section regulates rights and liabilities between parties in fault and extends to pecuniary prejudice, which may accrue legally and not too remotely, to persons interested in vessels, by reason of the faulty navigation of persons for whom they are responsible. The word "loss" is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose misconduct the party prejudiced must answer. It covers the sum recovered by the owners of the hopper against the owners of the *Cairnbahn*. To say that damage to the hopper is not loss to the *Cairnbahn* so as to be loss or damage caused to one or more of "those vessels" —viz., those vessels which are in fault—is to make this remedial legislation unexpectedly one-sided. Is the jurisdiction to apportion the consequences between the vessels in fault to stop short at the consequences to the vessel and not to extend to the consequences to the owner? I cannot doubt that where the jurisdiction to apportion such consequences applies, it is meant to apply widely.

Then it is said that the section does not apply to the amount recovered by the hopper against the *Cairnbahn*, because it provides for "the" liability to make good the damage or loss, meaning thereby only the liability theretofore existing. I do not accept the contention that sect. 25 (9) of the Judicature Act 1873, had the effect of limiting the half-and-half rule to cases where two ships collide and only injure one another, nor do I think that *The Frankland* (*ubi sup.*) and other cases

which applied that rule to damages other than those injuries, can be questioned; but the short answer to this argument is that sect. 9 (3) of the Maritime Conventions Act 1911 repeals this sub-section of the Judicature Act. To provide for a modification of the liability declared by sect. 25 (9) of the Judicature Act in the first section, and in the last but one to repeal that liability and the sub-section which declares it, is strange legislation. If "the liability" meant "the liability" declared by the Judicature Act, the sub-section would have been preserved, not repealed. In fact the language of sect. 1 is new. In my opinion "the liability to make good" means that the defendant in fault shall be liable, when liable at all, for the faulty navigation which causes loss or damage to vessels, their cargoes or freight, or the property on board, in proportion to the degree in which his vessel participated in the faulty navigation.

Then it is said that proviso (*c*) to sect. 1 prevents the section from being construed as imposing a liability on the *Nunthorpe*, because she is exempted by a provision of law; that proviso (*c*) prevents the tug from being liable at all because she enjoys an exemption from liability under the rule in *Merryweather* v. *Nixon* (8 T. R. 186). I think this is a misuse of terms. That rule does not exempt tort-feasors from liability when they happen to be joint tortfeasors. They are liable, but liable to the tort-sufferers. What it does is to impose a disability on the joint tortfeasors, preventing them from suing one another. It decides that no *assumpsit* to contribute can be implied between such persons. The rule is not a provision of law conferring an exemption. Further, historically, the half-and-half rule was being applied in the Court of Admiralty to cases of collision where both ships were to blame, some years before *Merryweather* v. *Nixon* (*ubi sup.*) was decided, and no reason can be shown why the Legislature should have sought to apply the latter rule in 1911 at the expense of the former. I think that the judgment below was right, and that the appeal must be dismissed.

Warrington, J.—The *dramatis personæ* in this case are:

1. The *Cairnbahn*, a steamer.
2. The *Nunthorpe*, a tug.
3. Some hopper barges, which, at the time of the accident hereafter mentioned, were in tow of the tug.

I use the expression "*dramatis personæ*" advisedly, because the Maritime Conventions Act personifies the vessel, treating it at one time as the actor, at another as suffering damage or loss, and at another as liable to make good such damage or loss. The truth is, of course, that for the purpose of ascertaining the legal effect, the word in one context connotes those responsible for the navigation of the vessel; in another those who are interested in her, her cargo or freight; and in another those who are in law answerable for the conduct of those in charge.

On the 21st Dec. 1911, the *Cairnbahn* came into collision with one of the hoppers, doing damage thereto, and sustaining damage to herself. The *Nunthorpe* was not in collision either with the *Cairnbahn* or with the hopper. Two actions were brought: (1) By the owners of the hopper against the owners of the *Cairnbahn*, to which the owners of the *Nunthorpe* were afterwards added as defendants. (2) By the owners of the *Cairnbahn* against the owners of the *Nunthorpe*. These actions were consolidated, and at the trial it was held that the *Cairnbahn* and the *Nunthorpe* were equally to blame, but the hopper was blameless. The hopper recovered from the *Cairnbahn* alone the whole of her claim for damages, and this judgment has been satisfied. The learned president has ordered the owners of the *Nunthorpe* to pay to the owners of the *Cairnbahn* (1) one-half of the damage to that ship, occasioned by the collision; (2) one-half of the damages paid by her to the owners of the hopper. The owners of the *Nunthorpe* appeal against this order, insisting that they are under no liability to the owners of the *Cairnbahn* under either of the two heads mentioned above.

The question turns on the construction of the Maritime Conventions Act of 1911. The appellants contend that the first section of this Act regulates only the mode of apportioning a liability existing independently of the Act, and that they were under no such liability in the present case. The respondents say that it enforces contribution in all cases in which damage or loss has been caused to one or more of the vessels in fault, whether the other of such vessels would, or would not, but for the Act, have been liable to contribute to such loss. If the true construction of the Act is that contended for by the respondents, it is not necessary to consider whether the order of the learned President would have been justified under the rules previously governing the Admiralty Division, but it may be desirable by way of explanation to state what I understand to be the contention of the appellants on this point. They refer to the Judicature Act 1873, sect. 25 (9), which is in the following terms: "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." And they say it is only in the case mentioned there—viz., of a collision between two ships, both of which two ships are to blame—that any liability to contribution arises; that they are under no such liability, inasmuch as the hopper which alone was in collision with the *Cairnbahn* was not one of the two ships which were to blame, and they are accordingly entitled to rely, as an answer to the claim by the *Cairnbahn* for damage to herself, on the defence of contributory negligence; and as an answer to the claim for the damage to the hopper on the plea that there is no contribution between tort-feasors. They further insist that the Maritime Conventions Act has made no alteration in the law in this respect.

I now proceed to consider the construction of the Act. The first section is in these terms: "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault," and, then after two sub-sections which have no bearing on the question, there is a proviso (*c*) "Nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any

contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law." Then sub-sect. 2 is in these terms: "For the purposes of this Act, the expression 'freight' includes passage money and hire, and references to damage or loss caused by the fault of a vessel shall be construed as including references"—of course, I am omitting anything which is immaterial—"to any salvage or other expenses, consequent upon that fault, recoverable at law by way of damages." Then sect. 9, sub-sect. 3, provides that "sub-sect. 9 of sect. 25 of the Supreme Court of Judicature Act 1873 shall cease to have effect."

The question arises directly on the first sentence of sect. 1, and the other parts of the Act are only material so far as they throw light on the construction of that sentence. Now, the first thing to be noticed is that the damage or loss there referred to is such as is caused by the fault of two or more vessels. It is not confined to damage or loss arising out of collision between two vessels, both of which are found to be in fault, but would include in terms the damage to the *Cairnbahn* caused by collision with the hopper. The damage to the hopper is, of course, not damage to one of the vessels by whose fault it is caused. Whether the payment of compensation by the *Cairnbahn* may properly be treated as loss caused to her by the fault of the *Nunthorpe* and herself, I will consider later. The damage to the *Cairnbahn* is therefore a damage within the opening words of the section. But what is it that is to be in proportion to the degree of fault? It is described as the "liability to make good the damage or loss." This cannot, in my opinion, mean simply the liability in a court of law to be ordered to make it good, for that which is to be made good includes the damage or loss which has to be borne by the injured vessel herself, and she cannot properly be said to make good her own damage or loss. It seems to me that the expression cannot be read as equivalent to "the burden of the damage or loss," or some such expression. If the words are thus read, the argument that they refer to some previously existing legal liability, and only deal with the mode of apportionment of that liability, fails. That which is to be apportioned for the future is the entire damage or loss caused to one or more of the vessels by whose fault it is caused, and each of such vessels is to make good a proportion of that loss. That seems to me to be the meaning of the words, and I can find nothing in any other part of the Act inconsistent with them, as so construed; on the contrary, the provisions contained in sect. 9 (3) that sect. 25 (9) of the Judicature Act 1873, shall cease to have effect, supports that construction, because otherwise the Admiralty rule as to the apportionment between the guilty ships of the damage arising from collision between them would no longer have force in all divisions, and the confusion, the removal of which was the object of the repealed section, would be re-introduced. Moreover, that it was intended by the Act to enlarge the scope of the liability to contribute, and not merely to deal with the proportion of contribution, is shown by the fact that it extends to cases when more than two vessels are involved, the Judicature Act being confined to cases in which two colliding vessels only are in fault.

I am therefore of opinion that, according to the true construction of the Act, all damage or loss to one or more of the vessels in fault, is to be apportioned between those vessels, whether it arises from collision between them or not. The enacting words seem to me free from ambiguity, and it would therefore, in my opinion, be improper to seek to control them by reference to the preamble or the headings of the divisions of the Act.

The *Nunthorpe* fails to bring herself within the protection afforded by sub-sect. (*c*). She has failed to establish any contract of exemption, nor is there any provision of law by reason of which she can properly be said to be exempt. The two principles of law on which she relies, as mentioned above, do not, in my opinion, provide exemptions from some general liability, but prevent any liability from arising at all in the cases to which they apply. The President was, in my opinion, right in holding the *Nunthorpe* liable for her due proportion of the damage to the *Cairnbahn* herself.

There remains the question as to the damages paid to the owners of the hopper by the owners of the *Cairnbahn*. I fail to see why the sum so paid should not be properly held to come within the expression "loss caused to that vessel"—treating the word "vessel" in this part of the Act as used figuratively for the owners of the vessel. They seem to me to come exactly within the definition of loss in sub-sect. 2 as expenses recoverable at law by way of damage. In the present case they were, in fact, so recovered. Even prior to the Act such an expense was included by Sir Francis Jeune in the sum to be apportioned in the case of *The Frankland* (*ubi sup.*), and I am not prepared to say that his decision was wrong. Even if it were so, under the law as it then stood, that fact would not affect the construction of the new Act. In my opinion, therefore, the order of the President was right in this respect, also, and the appeal fails.

In the view I take of the construction of the Act it is unnecessary to consider the cases cited as to the rules of the Admiralty Division prior to the Act, but, as at present advised, I think the enforcing of contribution was not confined within the narrow limits contended for by the appellants.

Something was said as to the possible effect of the Act, if construed, as I think it should be, upon the right of the innocent party to recover the whole of his loss from one of the wrongdoers: (see *The Devonshire, ubi sup.*). In this connection I will only say that the Act appears to me to deal with the question from the point of view of the guilty parties only. The rights of the innocent party, however, are not in issue in this case, and I should have said nothing on the subject but for the doubt suggested in argument, a doubt which I do not desire to encourage.

Solicitors for the appellants, the owners of the *Nunthorpe*, *Stokes* and *Stokes*, for *James Storey and Sons*, Sunderland.

Solicitors for the respondents, the owners of the *Cairnbahn*, *Botterell* and *Roche*.

Nov. 4, 5, *and* 14, 1913.

(Before Lord PARKER OF WADDINGTON, Lord SUMNER, and WARRINGTON, J.)

THE GALILEO. (a)

Contract of carriage — Through bill of lading — Transhipment into lighter—Unseaworthiness of lighter—Liability of shipowner on the through bill of lading—Shipper's risk.

Cargo owners shipped machinery on the defendants' steamship at New York for carriage to Hull to be thence transhipped to Norrköping in Sweden on terms contained in a through bill of lading. The goods arrived safely at Hull, and were placed in a lighter hired by the defendants in order that they might be transhipped into a vessel bound for Norrköping. Owing to the unseaworthiness of the lighter the machinery was damaged. The cargo owners sued the shipowners who had carried the goods to Hull for the damage they had sustained, alleging that the shipowners were the carriers of the machinery from New York to Norrköping, and were liable for the damage sustained by the unseaworthiness of the lighter.

The shipowners contended that they were only carriers to Hull, and that from thence their only duty was to make contracts to forward the goods to Norrköping, and that if they were carriers the terms of the bill of lading exempted them from liability.

Held, that the obligations of the shipowners as carriers subsisted when the goods were shipped into lighter, and that the shipowners were therefore liable for the damage caused by the unseaworthiness of the barge.

Held, further, that the words "shipper's risk" only applied to the carriage after the goods had been placed on the transhipment vessel, and that whatever the words meant they referred to something other than a breach of the fundamental obligation of the shipowner to supply a seaworthy vessel.

APPEAL by the owners of the steamship *Galileo* from a decision of Bargrave Deane, J. by which he held them liable for the damage sustained by the respondents, owners of the cargo, which was injured through the lighter in which it was placed sinking in dock. The cargo at the time was being carried from New York to a port in Sweden on the terms of a through bill of lading.

The cargo consisted of agricultural machinery, and was shipped at New York on board the steamship *Galileo* for carriage to Norrköping in Sweden.

The terms of the through bill of lading which were relied on were as follows.

In the margin the voyage was described "as New York to Norrköping, *viâ* Hull," the words other than Norrköping being printed.

In the body of the bill of lading appeared the following:

Received in apparent good order and condition . . . to be transported by the steamship *Galileo*, now lying in the port of New York, and bound for Hull, . . . or failing shipment by said steamer, in and upon a following steamer, . . . agricultural machinery . . . and to be delivered in like good order and condition at the port of Hull (or so near thereto as she may safely get), and to be thence transhipped at ship's expense and shipper's risk to the port of Norrköping (or so near thereto as vessel may safely get) . . . and there deliver unto . . . or his or their assigns, he or they paying freight . . . at the rate of. . . . The rate of freight is adjusted upon the basis of the following exceptions and agreements.

There then followed a long list of mutual exceptions, among them being

That the carrier shall have liberty to convey goods in craft and (or) lighters to and from the steamer at the risk of the owners of the goods . . . nor for risk of craft, hulk, or transhipment.

And then followed twenty clauses of mutual agreements.

Two of the clauses were relied on as showing that Norrköping and not Hull was the port of delivery:

9. That in the event of claims for short delivery when the steamer reaches her destination, the price shall be the market price at the port of destination on the day of the steamer's entry at the Custom House, less all charges saved.

11. That this bill of lading, duly indorsed, be given up to the steamer's consignee in exchange for delivery order.

Two other clauses were relied on as showing that Norrköping was the intended destination of the cargo:

7. . . . If on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper, and in the event of sale because of damage or otherwise at any point short of their ultimate destination out of the proceeds thereof, *pro rata* freight for that part of the transportation which may have been completed shall be due and payable.

16. In case of ice at port of destination of the goods, the captain has liberty to unload his cargo at any near accessible port, and the expense of discharging there and lighterage of the cargo, &c., as well as the transport to destination to be entirely at consignee's risk and expense (any expense for ice boats to be paid by cargo in proportion to its value), or should the goods arrive at the British port above named too late for transhipment by the last steamer of the season, or too early for the first steamer of the coming steamer, for the final port of destination (whether the port is closed by ice or not), the shipowner has the option of delivering the goods at the nearest port to which there is a regular line of steamers then running, which delivery is to be a completion of this bill of lading, and the goods thence to be forwarded by ship's agents to final destination at consignee's risk and expense, unless consignees have given different orders prior to the landing of the goods at the last-named port—or of warehousing them at consignee's risk and expense.

The defendants also relied on clause 20, which provided:

That the goods are subject to any further clauses in the bills of lading in use by the route beyond Hull, and the liability of each carrier is limited to its own line.

The goods arrived safely at Hull and the defendants placed them in a hired lighter in order that they might be taken to a ship bound for Norrköping.

The goods were damaged by reason of the lighter sinking in the dock at Hull under circumstances set out in the judgment of Bargrave Deane, J.

NOTE.—The House of Lords has since affirmed this decision: (see *Shipping Gazette*, June 27, 1914).

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

The action was tried on the 3rd, 4th, 5th, and 25th Feb., when judgment was reserved.

On the 13th March Bargrave Deane, J. delivered the following judgment:—

BARGRAVE DEANE, J.—This is an action brought by the International Harvester Company, of America, who seek to recover damages from Messrs. Thos. Wilson, Sons and Co., of Hull, for breach of contract to carry and deliver certain parcels of machinery from New York to Norrköping in Sweden.

The machinery was duly delivered on board the defendant's steamer *Galileo* at New York, and bills of lading in respect of the same were signed by Messrs. Sanderson and Son, Messrs. Thomas Wilson and Sons' agents, for the master, and handed to the plaintiffs and dated Sept. 27, 1911. The defendants are the well-known firm of shipowners of Hull, who have a fleet of steamships trading between Hull in this country and various parts of the world. The steamship *Galileo* trades between New York and Hull, and it was recognised by the contracting parties that the goods would be carried in the *Galileo* to Hull, and there transhipped into another steamship of the defendants for carriage from Hull to a port in Sweden. Accordingly, the bills of lading, which were in identical terms (except as to particulars of the goods) contained, among other conditions, the following:

To be delivered in like good order and condition at the port of Hull, to be thence transhipped at ship's expense and shipper's risk to the port of Norrköping.

It is mutually agreed that the carrier shall have liberty to convey goods in craft and (or) lighters to and from the steamer at the risk of the owners of the goods.

That the carrier shall not be liable . . . for risk of craft, hulk, or transhipment.

And by clause 20:

The goods are subject to any further clauses in the bills of lading in use by the route beyond Hull, and the liability of each carrier is limited to its own line.

The *Galileo* safely arrived at Hull with the goods in sound condition, and Messrs. Thos. Wilson and Sons arranged that they should be taken out into a lighter to another of their steamships to carry them from Hull to Norrköping.

The lighter No. 72 was engaged from a firm trading as the Hull Keel and Lighter Company, and was in charge of a lighterman named Albert Wilson, who has stated before me that he took the lighter alongside the *Galileo* in the Alexandra Dock at Hull on Saturday, the 13th Oct., he loaded into her from the *Galileo* 20 tons of the plaintiff's goods; that he left her at noon on that day; that he did not go to her on Sunday, the 14th Oct.; that on Monday, the 15th Oct., he went to her at 6 a.m., tried her pumps and found her free from water, and on that day loaded into her thirty more tons of the goods, making 50 tons in all; that this cargo was all put into the after-part of the lighter, which then had a draught of 8ft. aft. and 3ft. forward; that he then moved her away from the side of the *Galileo* and left her three or four lighters away, among other lighters—he said the basin was full of lighters, "hundreds of them"; that on Tuesday morning, the 16th Oct., he went back to her and found her in the same place, tried her pumps, and found her free from water, made her fast to lighter *W. F. Flowers*, and left her about 6 p.m.; that on Wednesday morning he went to the place where he had left her the night before, but could not find her, found the *W. F. Flowers* 200 yards away from the place where he had left her the night before, and saw the broken moorings of the No. 72 hanging from her; and that after searching in the basin he found, 100 yards from where he had left the No. 72 the night before, wreckage attached by tarpaulin to the No. 72 which was sunk at the bottom of the basin.

A diver named Threadgold proved that he was employed to go down to the sunken lighter and found that some of her cargo was out of her at the bottom of the basin, and it is not disputed that the water and mud which got into this machinery of the plaintiffs seriously damaged it, and that is the damage for which the plaintiffs are claiming compensation in this action.

The No. 72 was subsequently raised and taken out of the basin and beached, and the diver says that by the direction of the salvage contractor he searched for the cause of the sinking and found in her port quarter, 20ft. from her stern post, and 4ft. down from her rail, a hole 6in. long and 2½in. wide, partly in two planks—a jagged hole; that he smoothed this jagged hole with a chisel and plugged it with a piece of wood to make it watertight; that he saw no other hole or injury; that he bored some holes in her bilges to let the water out, then plugged them when it had run out, and that he put a patch over the wound and she was then brought to the premises of Messrs. George Hy. Brown to be examined and repaired in dry dock.

A good deal of evidence was given as to what was found upon this examination. The plaintiffs' counsel called a Mr. Smurthwaite, a surveyor, who stated that he saw an oval hole forward of the hole plugged by the diver, and picked it with a pen-knife and found the plank quite rotten. Other witnesses for the defendants denied this, and said that the hole he spoke to was not there until Mr. Smurthwaite made it with his knife.

In my opinion, the conflict of evidence between these various witnesses as to this oval hole and how it came there is a matter which I need not consider in this case, as it is perfectly clear that the hole found and plugged by the diver was upon the evidence admittedly sufficient to let the water in and sink the lighter, and for the purposes of this case I find that it was owing to that hole that the No. 72 sank and the damage was caused. [His Lordship considered the evidence in detail, and continued:]

The result of this evidence on my mind, and the Elder Brethren agree with me, is this, that lighter No. 72 had planking which in places had decayed, although outside there was a thin hard face on it, and that a little ordinary attention would have shown that the inside of the planking had decayed. Mr. Smurthwaite told me that he asked Mr. Brown, the repairer, to keep the plank in question, and that Mr. Brown promised to do so; but the plank was not produced, and Mr. Brown stated to me that he did not understand that Mr. Smurthwaite wished the plank to be kept.

In my opinion, and in this also the Elder Brethren agree, two causes brought about the sinking of the barge—(1) that she was unseaworthy, and in her decaying condition unfit to stand the knocking about which the evidence

shows happened in the basin on the night in question, when it is admitted that the *Cicero* came in and the barges in the basin were all disturbed; and (2) that she ought not, under such conditions, to have been left unattended. It only required the thrust of a boathook by some lighterman against the deeply-loaded quarter of No. 72 for her decaying plank to give way and let the boathook pierce her, making the jagged hole in her port quarter deposed to by all the witnesses; and I believe that this is what happened. The next question is, who is responsible for the supplying of this unseaworthy lighter for the services in question. Mr. Henry Banks, the lighter foreman of the defendants at the Alexandra Dock, Hull, said that he engaged the lighters for the *Galileo* from Mr. Knott, the foreman at the dock of the Hull Keel and Lighter Company, including No. 72. He said: "I knew No. 72. I saw her before she began to load and saw her from that time up to Tuesday at 5 p.m. I did not examine her. I left that to Knott." Mr. Knott was called, and said she was a good lighter before the accident, and the *Cicero* was the only steamer which moved about the dock that night. He did not say when, or if at any time, he examined her before she was employed on this service.

In my opinion, then, the Hull Keel and Lighter Company are responsible for supplying No. 72 in an unseaworthy condition for the service in question.

But I have further to ask myself who are the Hull Keel and Lighter Company? I have been told by the manager and secretary. He says the company owns twenty-two keels and seventeen lighters; that the company was formed by his father in 1897, but that seven or eight years ago Messrs. Thomas Wilson and Sons took over and now hold all the shares, and their directors are the directors of the Hull Keel and Lighter Company; that Messrs. Thomas Wilson and Sons own about seventy keels and lighters, and that the keels and lighters in the name of the Hull Keel and Lighter Company are numbered in succession after the keels and lighters in the name of Thomas Wilson and Sons, No. 72 being an early number in the numbers of the Hull Keel and Lighter Company; that his office as manager and secretary is part of the office of Thomas Wilson and Sons in Hull.

I have no hesitation in finding as a fact that Thomas Wilson and Sons are the Hull Keel and Lighter Company, and that, though that company retain the original name, the lighter No. 72 was at the time when it sank the property of Thomas Wilson and Sons, and that Mr. Newbald and Mr. Knott were their servants.

The result is that on the facts I find that Messrs. Thomas Wilson and Sons, the defendants, are responsible for supplying an unseaworthy lighter, No. 72, to tranship the goods in question from the *Galileo*, and it follows that, in my opinion, they are responsible for not having a man in charge of her in this congested basin after this valuable cargo was put into her *ex Galileo*.

But these findings of fact do not conclude the case, because it is contended on behalf of the defendants that the conditions in the bills of lading expressly state that the transhipment of the goods was at shipper's — that is, the plaintiffs'—risk. But the bills of lading also state that the transhipment is to be at ship's expense. This involves, in my opinion, the engagement by the shipowner of proper and suitable means of transhipment, and in this case the shipowner transhipped by means of a lighter. As I have already said, I find that he engaged one of his own lighters, but assuming for the sake of argument only that he engaged a lighter from some other owner, he ought, in my opinion, to have been careful to see that the lighter so engaged was seaworthy, and was guilty of negligence if he loaded into an unseaworthy lighter this cargo for transhipment. I mention this in case it should be thought that my judgment upon the facts as to Messrs. Thomas Wilson and Sons being the real owner of lighter No. 72 is wrong; but if I am right as to that finding of fact it follows *à fortiori* that they were guilty of negligence in providing a lighter of their own which was unseaworthy for the purpose of this transhipment.

In my opinion, the condition "at shipper's risk" does not exempt the carrier from responsibility, and he is still bound to exercise due care and diligence and be free from negligence in respect to this cargo. His is the duty and expense of transhipment, and he cannot shelter himself under the words "at shipper's risk" and fold his hands and consider himself relieved from the duty of himself taking every reasonable precaution to protect the property of his shipper. There will be judgment for the plaintiffs with costs.

On the 18th April the defendants, the owners of the *Galileo*, appealed to the Court of Appeal.

The appeal was heard on the 4th and 5th Nov. 1913.

Leck, K.C. and *W. N. Raeburn* for the appellants.—The liability of the shipowners as carriers ended at Hull:

Allan Brothers v. *James Brothers*, 3 Com. Cas. 10.

The transhipment at Hull is at the ship's expense, but at the risk of the owner, and the conveyance in the lighter is at the risk of the owner, the shipowners therefore are not liable for the damage:

McCawley v. *Furness Railway Company*, L. Rep. 8 Q. B. 54;
D'Arc v. *London and North-Western Railway Company*, 30 L. T. Rep. 763; L. Rep. 9 C. P. 325;
Burton v. *English*, 48 L. T. Rep. 730; 5 Asp. Mar. Law. Cas. 187; 12 Q. B. Div. 218;
Wade v. *Cockerline*, 10 Com. Cas. 115;
Carver's Carriage by Sea, s. 103.

The lighter company was quite a distinct body from the shipowners:

Salomon v. *Salomon and Co.*, 75 L. T. Rep. 426; (1897) A. C. 22.

The shipowners are only liable for damage sustained on their own vessel. There was no warranty that the lighter would be seaworthy:

Lane v. *Nixon*, L. Rep. 1 C. P. 412.

Leslie Scott, K.C. and *Roche*, K.C. for the respondents.—The appellants had the control of the lighter and were negligent in leaving it unattended. [Lord SUMNER.—Is there any evidence that the presence of a lighterman could have avoided this damage? Must not you show that they were negligent in making this contract?] If the shipowners want to relieve themselves of

their duty as carriers, they must do so by clear words :

Price v. *Union Lighterage Company*, 89 L. T. Rep. 731 ; (1904) 1 K. B. 412 ;
Nelson v. *Nelson*, 96 L. T. Rep. 402 ; (1908) A. C. 18 ;
Elderslie v. *Borthwick*, 92 L. T. Rep. 274 ; 10 Asp. Mar. Law Cas. 24 ; (1905) A. C. 93 ;
Steel v. *State Line*, 37 L. T. Rep. 333 ; 3 Asp. Mar. Law Cas. 516 ; 3 App. Cas. 72 ;
Insurance Company of North America v. *North German Lloyd*, 106 Fed. Rep. 973.

They are liable as bailees, even if they are not liable as carriers :

Mitchell v. *Lancashire and Yorkshire Railway Company*, 33 L. T. Rep. 161 ; L. Rep. 10 Q. B. 256.

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

The Vortigern, 80 L. T. Rep. 382 ; 8 Asp. Mar. Law Cas. 523 ; (1899) P. 140 ;
The Moorcock, 60 L. T. Rep. 654 ; 6 Asp. Mar. Law Cas. 373 ; 14 P. Div. 64 ;
Hamlyn v. *Wood*, 65 L. T. Rep. 286 ; (1891) 2 Q. B. 488.

The judgment of the Court of Appeal was delivered by Lord Sumner on the 14th Nov.

Lord SUMNER.—This was a claim for loss of cargo shipped at New York on board the defendants' vessel *Galileo*, bound for Hull, under a bill of lading signed on their behalf. The ultimate destination of the goods was Norrköping. When the *Galileo* arrived in Hull the defendants discharged the goods overside into lighter No. 72. They intended to ship them on board one of their steamers bound up the Baltic, and so take them to Norrköping. Whether the lighter was to convey the goods to some other wharf or dock where the succeeding steamer was to load, or was simply to hold the goods afloat till that steamer was ready to load in or near the *Galileo's* discharging berth, we do not know, nor are we told whether or not it would have been practicable to have transferred the goods direct from the one ship to the other, or with a mere intermediate deposit on quay or in transit shed. Probably it does not matter—no doubt the usual course of business in the dock was followed ; but it is worth noting that the bill of lading does not prescribe any one of these courses in particular, but would equally cover all, and the direct transfer from ship to ship certainly as much as any.

Lighter No. 72 did not belong to the defendants. Bargrave Deane, J. held that it did, but this finding was a misapprehension, and is not supported. It belonged to the Hull Keel and Lighter Company Limited, and substantially all that company's share capital belonged to the defendants. Undoubtedly it was under the defendants' control. The manager of the Hull Keel and Lighter Company had a desk in the defendants' office, and having no special letter paper of his own, wrote on theirs. The arrangement for the use of the lighter was made verbally between the defendants' foreman and the foreman of the Hull Keel and Lighter Company. No documents appear to have passed at the time.

Two or three nights after the goods went overside the lighter foundered. Why she did so is clear, though the exact circumstances are to some extent matter of surmise. Another steamer coming into the dock, which was a crowded one, this lighter and others were moved. Bargrave Deane, J. found that in the course of this operation a lighterman in fending off No. 72 with a boathook poked it through her side. It is probable enough ; we see no reason to dissent from this finding.

No one was on board of or in attendance on No. 72. She was in fact unseaworthy. She had a patch of rotten timber on her side, marked by a thin skin of sound wood. She appeared to be in good condition, but this spot was easily vulnerable. It was pierced and down she went. It is said there was negligence because the lighter was unattended—a very common thing. In any case such negligence, if negligence it was, did not cause the loss. Neither the lighterman in attendance nor the lighterman with the boathook could have known or guessed that the lighter must be treated gingerly, and would not stand contact with other craft or with boathooks. Had a lighterman been in attendance the boathook would have been used just the same, and he would not have objected. If she was once holed there is no evidence to show that a man on board could have saved her. The learned judge does not find that this was negligence causing the loss, nor do we. In fact, the goods were lost because the lighter was unseaworthy. The question is, are the defendants liable for that unseaworthiness ?

The bill of lading in described as a "through bill of lading." The voyage is described in the margin as New York to Norrköping, *viâ* Hull, the word "Norrköping" being filled in and the rest being a printed form. The margin states that the Wilson Line (of which the *Galileo* is one) is carrying goods at through rates to and from numerous Baltic ports, among which Norrköping is not named, though it may be swept in by "&c." The freight named is in fact a through freight, and is payable at Norrköping.

The bill of lading contained the following provisions :

Received in apparent good order and condition from . . . to be transported by the steamship *Galileo*, now lying in the port of New York and bound for Hull . . . or failing shipment by said steamer in and upon a following steamer, sundry goods being marked and numbered as per margin, . . . and to be delivered in like good order and condition at the port of Hull or so near thereto as she may safely get, and to be thence transhipped at ship's expense and shipper's risk to the port of Norrköping (or so near thereto as vessel may safely get), . . . and there deliver unto order or to his or their assigns, he or they paying freight and charges immediately on discharge of the goods . . . at the rate as and per margin. Freight and charges payable at current rates of exchange per banker's sight bills on London at date of entry at Custom House of transhipment vessel. The rate of freight is adjusted upon the basis of the following exceptions and agreements.

And then follow a long excepted perils clause and twenty clauses of mutual agreements.

The short question is—Did the defendants under the bill of lading warrant the seaworthiness of the barge, or, in other words, (*a*) are they carriers through from New York to Norrköping, performing the carriage either by vessels of their own or by others in which they sub-contract for the carriage of the goods or which they charter for themselves, or (*b*) are they carriers only to

Hull, accomplishing their obligations as carriers on discharge overside at Hull, aud thereafter being authorised and bound to act as agents for the shippers and in making contracts by way of bill of lading and otherwise for the purpose of getting others to carry the goods on to Norrköping? The plaintiffs contend for the former and the defendants for the latter alternative.

The defendants say that under this contract they could, had they chosen, have employed their own lighter and have transferred the goods to their own steamer to be carried to their ultimate destination, and they admit that if they had done so they would have impliedly warranted the seaworthiness of the lighter and the second steamer, equally as of the *Galileo*, at the commencement of each stage of this continuous operation. This at once places them in a difficulty. If they can elect whether they will deliver to another party's lighter and so end the carriage or transfer to their own and so continue the carriage, it will be a question of fact whether they did the one or the other. The ownership of the lighter is not conclusive or even very significant. They could have carried in the *Galileo* or, "failing shipment by said steamer, by and upon the following steamer," chartered or otherwise. They would have carried on to the Baltic in their own steamer or one chartered for the purpose. Equally if they elected to be the carriers of the goods during the craft stage of the transit, they might have used their own lighter or have substituted a hired one. In this case a lighter was hired, but the verbal arrangements made between the foreman of the defendants and the foreman of the lighter owners are quite colourless. No doubt some entry was made in books and some sum was credited to the lighter owners; but this would in any event be due from the defendants, since transhipment is at their expense. There is no finding of fact on the point. If it is in the option of the defendants to determine their carriage at the *Galileo's* rail on arrival at Hull, or to continue it on their own or their hired lighter, they have not proved, and on this evidence cannot prove, that they exercised this option.

It is said that the contract determines the matter and shows that the defendants' obligation as carriers ends at Hull. Thereafter their obligation is that of forwarding agents. No doubt such an arrangement may be made by apt words. *Allan Brothers* v. *James Brothers* (*ubi sup.*) is such a case, but there, first, the one and only bill of lading voyage ended at London, and, secondly, the transit beyond London was covered by the express word "forward." There was no question of a through voyage or of a through bill of lading. The application of such a view to the present case bristles with difficulties. If the defendants contract with the lighterman as agents for the cargo owners, the lighterman holds possession of the goods for the latter; yet it is quite certain that the former do not give up their lien for the through freight, so the lighterman also holds possession for the defendants as against the cargo owners to preserve the possessory lien for freight. Unless the lighterman has such notice of the through bill of lading as evidences a term in his contract with the goods owner not to look to the latter for payment, and evidences also a contractual obligation on the defendants to pay him, the goods owner is liable for lighter hire, and must seek indemnity from the defendants if he can, under the words "at ship's expense." How if the defendants had a set-off against the lighterman? Clearly it is not intended that the goods owner can, claim possession from the lighterman till the full freight due to the defendants is paid. Could the defendants require redelivery from the lighterman? Could the lighterman force the goods owner to take back his goods in Hull in case the defendants failed to arrange for their shipment to Norrköping? If the goods are reshipped for Norrköping and a new bill of lading is given, who is the shipper under it, and against whom has the Baltic ship its lien for freight? If the goods owner is the shipper, which is the bill of lading, by indorsement of which he can transfer the property in the goods? Is he to be liable for the entire Baltic freight, and, if so, how is his advance freight, if any, under the through bill of lading, to be adjusted? If the defendants do not pay the Baltic freight under the words "at ship's expense," is the goods owner to pay and recover it from the defendants, if he can? Equally in law and in business this view of the contract seems devised to invest the simplicity of a "through bill of lading" with every complexity that existed before through bills of lading were devised.

Nor does this construction fit the words of the document. True the goods are "to be delivered . . . at the port of Hull," but there is also an obligation to deliver at Norrköping or so near thereto as vessel may safely get. It is quite certain that the first delivery is not intended to be to the consignee or indorsee, and the second is expressly to be "unto order or his or their assigns." True, the goods on the first delivery are to be "in like good order and condition," and this is not repeated as to the second; but since, if the defendants are under the liabilities of common carriers at all, they are bound, subject to excepted perils, to deliver "in like good order and condition" at the port to which they carry, whether the words are expressed or not makes little difference. It is at Norrköping, and not at Hull, that the consignee is to pay freight. He could not be called on to pay at Hull, nor could he get his goods at Hull without paying the price for their carriage to Norrköping. Between Hull and Norrköping the goods, so far as freight is concerned, are at the defendants' risk. If they perform their contract of carriage by bringing the goods to Hull they must still insure their Atlantic freight against loss on the Baltic voyage by loss of the goods themselves. If the bill of lading is scrutinised, it will in any case be doubtful whether the defendants' obligation to carry terminated on delivery overside *ex Galileo* at Hull. There is no provision for a "lighter" stage between the import and the export ship at Hull. The transhipment, to which alone "at shipper's risk" applies, is "thence," that is, from Hull to Norrköping, and the Baltic steamer is subsequently called "the transhipment vessel." Hence at least until the goods are loaded on board the "transhipment vessel" the term of this bill of lading, other than "at shipper's risk," apply, unless, indeed, it is suggested that the *Galileo* carries subject to bill of lading exceptions, but the lighter subject to no exceptions at all, not even of perils of the seas.

Upon the construction of the instrument so far we entertain no doubt that the obligations of

the defendants as carriers subsisted when the goods were shipped into lighter, and therefore that, subject to the construction of the words "at shipper's risk," if they apply to goods in lighter, as we think they do not, the defendants warranted the lighter's seaworthiness:

Does the remainder of the bill of lading assist the defendants? The excepted perils modify their obligations as to the steamer's seaworthiness and are silent as to those of the lighter; but this does not show that they are not liable for the lighter at all. It may be that in their own port, with one fleet of lighters which they own, and another which they control, they are not afraid of their full obligations as to the seaworthiness of lighters. They expressly exempt themselves from risk of craft, which is inconsistent with their obligations of carriage ending at the *Galileo's* rail and with their obligation *ultra* being merely to use diligence to make a reasonable contract for the goods owner with some lighterman. There are twenty agreement clauses. Nos. 9 and 11 clearly show that Norrköping is the place of delivery of the goods, Nos. 7 and 16 that Norrköping is equally the destination and the ultimate destination, and No. 16 is wholly inconsistent with the through bill of lading being accomplished, as a contract of carriage, by delivery *ex Galileo* at Hull. No. 18 shows how loosely this document is drawn, for "the shipowners or any of them" is unintelligible. There is no transhipment port but Hull, and on the voyage to Hull there are no shipowners but the defendants. Clause 20 has been much relied on by the appellants, or rather its concluding words "the liability of each carrier is limited to its own line." The first part of this clause does not negative the defendants' responsibility as carriers through to Norrköping; it only ensures to them the benefit, in addition to the provisions of their own bill of lading, of any extra protection that the bills of lading in use by the route beyond Hull may provide, if such bills of lading come into existence. The remaining words are certainly not enough to negative the whole tenor of the through bill of lading; whether they have any real effect is doubtful, but need not be decided. They do not apply here. There was no second line intended or arranged for. The goods had not got beyond the defendants' own line. The Hull Lighter Company's fleet of lighters is not a line, and has not any bill of lading and is no part of the route beyond Hull, and this clause does not assist the appellants.

The whole question is one of construction, and it is clear that the defendants were answerable under their through bill of lading for the lighter's unseaworthiness. This being so, no clause in it relieves them. Without defining exactly what the words "at shipper's risk" mean, we think that they are clearly referable to other risks than that of a breach of this fundamental obligation of the shipowner. It is not suggested that any other clause could give the defendants relief, and, therefore, their appeal must be dismissed with costs.

Solicitors for the appellants, the owners of the *Galileo*, *Botterell* and *Roche*, for *Hearfields* and *Lambert*, Hull.

Solicitors for the respondents, the owners of the cargo, *Waltons* and *Co.*, for *A. M. Jackson* and *Co.*, Hull.

Nov. 13, 14, 17, 18, 19, 20, 21, 25, 26, 27, 1913, *and Feb.* 9, 1914.

(Before Vaughan Williams, Buckley, and Kennedy, L.JJ.)

RYAN v. OCEANIC STEAM NAVIGATION COMPANY LIMITED; O'CONNELL v. SAME; SCANLON v. SAME; O'BRIEN v. SAME; THE TITANIC. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Negligence—Steerage passenger—Contract ticket—Form of—"Form approved by the Board of Trade"—Exceptions—Exception of negligence on back of ticket—Exception not approved by Board of Trade—Validity—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 320*—Misdirection.*

The several plaintiffs sued the defendants under the Fatal Accidents Act 1846 *to recover damages for negligence in respect of the deaths of the members of their respective families who were drowned while emigrant passengers on the* Titanic.

The defendants denied negligence, and alternatively claimed exemption from liability by reason of clause 3 *of the "Notice to Passengers" printed upon the back of the contract ticket, which by sect.* 320 (1) *of the Merchant Shipping Act* 1894 *the shipowner is bound to give to the person who pays for the steerage passage, which notice included a condition that the shipowner should not be liable to any passenger carried under the contract, even though the loss or damage was caused or contributed to by the neglect or default of the shipowner's servants. This condition was referred to on the face of the ticket by the words "See Back."*

The plaintiffs contended that (1) *the words constituting the exemption clause were not part of the contract set forth on the contract ticket;* (2) *If they were, the operation of the exemption was excluded by sect.* 320 (2) *of the Merchant Shipping Act* 1894 *which provides that the contract ticket shall be in a form approved by the Board of Trade.*

Held, that there was evidence upon which the jury were entitled to find that the defendants were negligent.

Held, further (*Buckley, L.J., dissenting*), *that clause* 3 *not being in the form approved by the Board of Trade under sect.* 320 *of the Merchant Shipping Act* 1894, *was invalid.*

Held, also, by Vaughan Williams, L.J., that clause 3 *was not part of the contract between the passenger and the defendants.*

Decision of Bailhache, J., affirmed.

APPLICATION by the defendants, the Oceanic Steam Navigation Company Limited, for judgment or a new trial in four actions tried before Bailhache, J., with a jury.

In *O'Brien's* case the plaintiff's claim was brought under the Fatal Accidents Act 1846, to recover damages for the loss sustained by her by the death of her son, Denis O'Brien, whilst a steerage passenger on board the defendants' ship *Titanic*, owing to the alleged negligence of the defendants.

The *Titanic* collided with an iceberg and foundered in the North Atlantic Ocean on the 15th April 1912. The *Titanic* carried 2201 persons

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

Note.—This case is now on appeal to the House of Lords. —Ed.

in all, and of these 499 passengers and 212 of the crew were saved.

The plaintiff gave the following particulars of negligence:

On the 15th April 1912 and until the time of the collision the defendants' servants navigated the ship at an excessive or improper speed in view of the conditions then prevailing, namely, the unusual darkness of the night, the hazy condition of the atmosphere, the absence of wind and of movement of the sea at and for some time prior to the collision, and the presence of icebergs and icefields in the course of and in proximity to the ship; that several hours prior to the collision they had been warned of and knew of the presence of the icebergs and icefields, yet either they did not alter their course at all or did not alter it to a reasonable extent, neither did they diminish their speed so as to avoid the same, nor provide a sufficient, proper, or adequately equipped look-out therefor; that no adequate boat or raft accommodation was provided on the ship, having regard to the number of persons then on board and the length of the voyage; that although the boats on the ship were despatched from her unfilled, and although there was and appeared to be at the time of the collision ample time between such collision and the foundering in which the boats could with safety have been filled, yet the said Denis O'Brien was prevented by the defendants' servants from going either to such boats or the boat deck or to any of the upper decks; and that the defendants failed to have the crew sufficiently drilled and organised to man, fill, and launch such boats and rafts as were provided.

As further particulars of negligence the plaintiff said *inter alia:*

The speed of the *Titanic* at the time of the collision was 22 knots per hour, and in the circumstances mentioned it should have been considerably less. The defendants knew of the presence of icebergs and fields of ice by wireless messages or marconigrams sent to the *Titanic* by various other ships and received on board by members of the crew, viz., the wireless operators, and which were or should have been brought to the knowledge of the officers responsible for the navigation of the ship.

The plaintiff gave particulars of messages received by marconigram on the day of the collision.

The defendants by their defence denied each and every accusation of negligence, and that the wireless operators were their servants or members of the crew of the *Titanic.*

Alternatively, they said, if O'Brien was being carried on board the *Titanic,* and if the collision and drowning of O'Brien was caused or contributed to by any negligence on the part of the defendants or their servants, the defendants were not responsible or liable therefore by reason of the terms of the contract under which O'Brien was being carried, viz, the prepaid certificate issued in his favour on prepayment by him or on his behalf of his fare and for the contract ticket issued to him in exchange for the said prepaid certificate. It was a term of the contract contained in each of the aforesaid documents that neither the shipowner, agent, nor passage broker should be liable to any passenger carried under the contract for loss, damage, or delay to the passenger, arising from collision, perils of the seas, rivers, or of navigation of any kind, or from causes of any kind beyond the carriers' control, even though the loss, damage, or delay might have been caused or contributed to by the neglect or default of the shipowner's servants, or of other persons for whose acts he would otherwise be responsible.

The plaintiff replied that if the terms of the contract were as alleged then (*a*) O'Brien did not know that the contract contained the said terms or any conditions relating to the terms of the contract of carriage, and the defendants failed to take reasonably sufficient steps to bring the existence of such terms or conditions to the knowledge of O'Brien, alternatively (*b*) that the acts and omissions constituting negligence amounted to wilful negligence or misconduct not coming within the scope of the contract, and alternatively (*c*) that the terms of the contract were illegal and not binding on O'Brien by virtue of the Merchant Shipping Act 1894, sect. 320, and the statutory rules and directions issued thereunder by the Board of Trade. He gave as particulars that the contract ticket of it containing the terms alleged in the defence was not in the form approved by the Board of Trade in the statutory rules and directions dated the 15th Feb. 1908 and numbered 180 (notice whereof was published in the *London Gazette* of the 18th Feb. 1908) and the contract ticket was issued in disobedience of the direction therein contained, that is to say, direction No. 7 applicable to the contract ticket of steerage passengers.

The pleadings in the other three actions were substantially the same as those in O'Brien's action.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) by sect. 320 (which is under the heading "Passengers' Contract") provides that:

(1) If any person, except the Board of Trade and persons acting for them and under their direct authority, receives money from any person for or in respect of a passage as a steerage passenger in any ship proceeding from the British Islands to any part out of Europe and not within the Mediterranean Sea, he shall give to the person paying the same a contract ticket signed by or on behalf of the owner, charterer, or master of the ship, and printed in plain and legible characters.

(2) The contract ticket shall be in a form approved by the Board of Trade and published in the *London Gazette*, and any directions contained in that form of contract ticket not being inconsistent with this Act shall be obeyed as if set forth in this section.

(3) If any person fails to comply with any requirement of this section, he shall for each offence be liable to a fine not exceeding fifty pounds.

(4) Contract tickets under this section shall not be liable to stamp duty.

The contract ticket issued to O'Brien (and those issued to Ryan, O'Connell, and Scanlon were similar) was (omitting immaterial parts) on the front thereof as follows:

Oceanic Steam Navigation Company Limited of Great Britain.

Third Class (Steerage) Passengers' Contract Ticket.
(Not Transferable.)

(1) A contract ticket in this form must be given to every person engaging a passage as a steerage passenger in any ship proceeding from the British Islands to any port out of Europe and not within the Mediterranean Sea, immediately on the payment or deposit by such steerage passenger of the whole or any part of the passage money, for or in respect of the passage engaged.

(2) The Victualling Scale for the voyage must be printed in the body of the ticket.

(3) All the blanks must be correctly filled in, and the ticket must be printed in plain and legible characters

and legibly signed with the Christian names and surname and address in full of the person who issues it.

(4) The day of the month on which the steerage passengers are to embark must be inserted in words and not in figures.

(5) When once issued this ticket must not be withdrawn from the passenger, nor any alteration, addition, or erasure made in it.

(6) This ticket is not transferable.

(7) A contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form.

Ship *Titanic*, to take in Passengers at Queenstown for New York, on the 11th day of April, 1912. I engage that the person named on the margin (on the margin was the name of the passenger with his age, and below was printed "Paid in America") shall be provided with a Third Class (Steerage) Passage to, and shall be landed at the port of New York in the ship *Titanic* with not less than Ten Cubic Feet for Luggage for each Statute Adult, and shall be victualled during the Voyage, and the time of detention at any place before its termination, according to the Subjoined Scale, for the sum Paid In America including Government Dues before Embarkation, and Head Money, (if any) at the place of Landing, and every other charge, except Freight for excess of Luggage beyond the quantity above specified; and I hereby acknowledge to have received the sum Paid In America. The Luggage carried under this engagement, whether in excess of Ten cubic feet or not, shall be deemed to be of a value not exceeding £10, unless the value in excess of that sum be declared and paid for. The following quantities, at least, of Water and Provisions will be supplied by the Master of the Ship as required by law, viz.: (Here followed the quantities for adults, children, and certain substitutions. Then followed the Bill of Fare.)

Mess Utensils and Bedding provided by the Ship.

For on behalf of the Oceanic Steam Navigation Company Limited, of Great Britain,

Harold Arthur Sanderson.
Southampton.

SEE BACK.

At the side margin of the ticket was the following:

Notice to Steerage Passengers. — 1—If Steerage Passengers, through no default of their own, are not received on board on the day named on their Contract Tickets, or fail to obtain a Passage on the ship, they should apply to the Emigration Officer at the port, who will assist in obtaining redress, under the Merchant Shipping Acts.—2—Third Class (Steerage) Passengers should carefully keep this part of their Contract Ticket till after the end of the Voyage. This Contract Ticket is exempt from Stamp Duty.

On the front of the counterpart of the steerage passengers' contract ticket, which was detachable from the contract ticket, was this note:

This part of Contract Ticket is to be separated from the other, and to be delivered by the Passenger to the Emigration Officer at the Port of Embarkation, or in the absence of such Officer, to the Officer of Customs, or to any one appointed by him to receive it, under a Penalty not exceeding Ten Pounds.

To the front of the contract tickets there was attached a slip printed in red to the following effect:

NOTICE. Your attention is specially directed to the conditions of transportation in the annexed contract. The company's liability for baggage is strictly limited, but passengers can protect themselves by insurance, which may be effected at this or any of the company's offices or agencies.

On the back of the ticket there was printed a "Notice to Passengers" which contained seven clauses (which had not been approved by the Board of Trade), of which clause 3 was as follows:

Neither the shipowner, agent or passage broker shall be liable to any passenger under this contract for loss, damage or delay to the passenger or his baggage arising from the act of God, public enemies, arrests or restraints of princes, rulers or people, fire, collision, stranding, perils of the sea, rivers or navigation of any kind, accidents to or from machinery, boilers, steam, latent defects, even though existing at the beginning of the voyage, or from causes of any kind beyond the carrier's control, even though the loss or damage or delay may have been caused or contributed to by the neglect or default of the shipowner's servants, or of other persons for whose acts he would otherwise be responsible, and whether occurring on board this or any other vessel on which the passenger may be forwarded under this contract.

Then followed a space for information required by the United States authorities under the United States Immigration Act, in effect the 1st April 1891.

At the trial before Bailhache, J. the jury found answers to the following questions on the question of negligence:—

1. Was the navigation of the *Titanic* negligent in respect of (*a*) Look-out?—Answer: No. (*b*) Speed?—Answer: Yes.

2. Was the marconigram from the *Mesaba* communicated in due course to some responsible officer of the *Titanic*?—Answer: Not sufficient evidence.

On the question of contract the jury found answers to the following questions:

1. Did the defendants do what was reasonably sufficient to give O'Brien notice of the conditions, having regard to O'Brien's condition in life?—Answer: Yes. [In Ryan's, O'Connell's, and Scanlon's actions, the answer to this question was: No.]

By consent the jury assessed the damages in the actions, other than O'Brien's, at 100*l*.

In O'Brien's case it became necessary to consider the further question whether, having regard to sect. 320 of the Merchant Shipping Act, the contract contained in the ticket issued to the passenger was binding on him. Bailhache, J., held that the ticket was not in a form approved by the Board of Trade within that section, and that the defendants therefore could not rely on the conditions in question; and he directed that judgment should be entered for the plaintiffs in this case also.

June 30.—Bailhache, J. delivered the following written judgment:—

A point of great general importance was taken for the plaintiff, and it arises in this way. By sect. 320, sub-sect. 2 of the Merchant Shipping Act the contract referred to in sub-sect. 1 "shall be in a form approved by the Board of Trade, and published in the *London Gazette*." The ticket is, so far as the terms appear upon its face, approved; but the conditions upon the back of the ticket have not been approved by or submitted to the Board of Trade. The ticket on its face, that is, on its approved part, contains seven numbered clauses or directions, of which the seventh is: "A contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form." The

question for decision is, Is this ticket in a form approved by the Board of Trade?

It is upon clause 7 that Mr. Duke mainly relies. He says that that is the provision the Board of Trade has made for the shipowner, and made by a series of steps showing the course of legislation by the department over a period of thirty years. In this connection I was referred to sect. 71 of the Passengers Act 1855 (18 & 19 Vict. c. 119), and to the various forms of contract ticket published in the *London Gazette* since that Act. The Passengers Act 1855 contains a form in its schedule L. That form has upon its face five numbered clauses, which in substance correspond with the first five clauses on the present ticket, but no clause similar to clause 7. Long afterwards, in the year 1888, a form of ticket was published in the *London Gazette* of Aug. 24 with a clause to the effect that a contract ticket should not contain either on the face or on the back thereof, or have annexed thereto, any condition, stipulation, or exception not contained in this form. Then, in February 1889, a form was published in the *London Gazette* which is substantially the form now in use.

Mr. Duke for the defendants naturally called attention to the striking difference between this form and that of August 1888. It was further urged for the defendants that if a shipowner may not print upon the back of the ticket such conditions as he pleases, subject to the reservation that they do not vary or conflict with the express terms upon the face of the ticket, and, of course, provided he can get steerage passengers to accept them, clause 7 is meaningless. Mr. Duke says clause 7 is a direction, and he referred to the Merchant Shipping Act, which provides that directions on the ticket not inconsistent with the Act are to be obeyed as if set forth in sect. 320.

In considering the points raised, and the answers I have to give to the questions in debate, it seems desirable to point out the difference between the passenger's position in law under the contract without the conditions and under the contract with the conditions. For this purpose I may confine myself to condition 3. Under the contract without the condition the passenger's legal position is that he is entitled to damages for loss or injury of or to himself and ten cubic feet of luggage, limited in the latter case to 10*l*. He is also entitled to have himself and that quantity of luggage carried in a seaworthy ship. Under the contract with the conditions he has no remedy for negligence, and the shipowner's duty to provide a seaworthy ship is very materially modified. One or two other considerations must be borne in mind. The Board of Trade is brought into the matter for the obvious purpose of safeguarding the passenger's interest—to exercise what Mr. Duke calls a species of guardianship. This is the more important as few steerage passengers read their tickets. Fewer still can understand them, and their assent to the conditions upon them is not the assent of a mind consciously exercised upon the question, but that assent which the law implies from the acceptance of a ticket which contains conditions of which they have had reasonable notice. Moreover, the steerage passenger has little or no option in the matter. These conditions are practically common to all the lines by which in ordinary course he can travel. But, after all, when these various matters have been discussed and investigated I must come to the construction of the statute itself, and in so doing I remind myself that if the words of the statute are plain and unambiguous, it is to them, and them alone, I must look in deciding the question now before me.

I ask myself first of all, What is meant by a contract ticket? I take it to be quite plain that that means the whole document, both front and back. It is the document which, when read in the light of the law applicable to the document, regulates the rights and liabilities of shipowner and passenger upon the voyage to which the ticket refers. Next I ask, What is meant by the form of the contract ticket, and does the word "form" mean the shape and size and appearance of the ticket only, or does it cover the contents of the ticket, the matters for which it makes provision, and the manner in which it deals with those matters? I think it clearly means the latter. This is certainly the ordinary acceptation of the term, and I see no reason, and, indeed, have, I think, no right, to reject it in this case. I ask myself one further question. What is meant by approval? Accepting for the moment Mr. Duke's argument as to clause or direction 7, can the Board of Trade be said to have approved of conditions which they, without seeing them, have left it to the shipowner to introduce? Can they give under the statute such liberty to the shipowner as a man may be said to approve beforehand of the figures filled into a blank cheque, signed by him and handed to the holder to deal with? I think not.

I find myself, therefore, with the provisions of a statute which seems to me unambiguous, and my only duty is to give effect to them. So doing, I can only answer the question whether this ticket was in a form approved by the Board of Trade in one way; it was not. I may add that, as at present advised, I am not convinced that clause or direction 7 gives power to print on the back of the ticket unapproved conditions. It certainly does not expressly say so. It is just possible under that direction there would be no objection to conditions on the back even though unapproved, provided those conditions related to matters other than the carriage of the passengers and ten cubic feet of luggage, as, for example, conditions dealing with excess luggage, as condition 6 in the present case does. It is not quite easy to reconcile clauses 1 and 7, and I am not sure about the effect of the words "See back" on the face of the ticket. I am not certain that the legal effect of those words is not to make the conditions printed on the back part of the face of the ticket and to abolish any distinction between face and back. I, however, do not decide the case on these grounds. I decide it upon the broad ground that condition 3 never having been seen by the Board of Trade, this ticket, as it stands, is not in a form approved by the Board of Trade within the meaning of the statute. There will therefore be judgment for the plaintiff in this case also.

The defendants appealed.

On the appeal, arguments were heard at length from both sides, and judgments were delivered on the question of negligence. This report, however, deals with the question of the validity of the contract ticket.

Duke, K.C., *Maurice Hill*, K.C. and *Raeburn*, for the defendants.—In each case the contract ticket issued was in the customary form of emigrants' passenger tickets, with conditions printed upon the back. In O'Brien's case the ticket was delivered pursuant to a requisition from the United States on a form which embodied the conditions of the ticket. The jury found that in O'Brien's case the defendants had done what was necessary to bring the condition of the ticket to the notice of O'Brien, but in the other cases they found to the contrary. There was no evidence in these three cases on which the jury could come to that conclusion. On the face of the ticket were printed in large type the words "See Back" which referred the holder to the conditions printed on the back, clause 3 of which clearly rendered the defendants not liable for negligence, and the holders had notice of the conditions on which they were carried. The onus is upon the passenger to show that he did not assent to the terms of the ticket which he received. They referred to

> *Henderson* v. *Stevenson*, 32 L. T. Rep. 709; L. Rep. 2 H. L. Sc. 470;
> *Harris* v. *Great Western Railway Company*, 34 L. T. Rep. 647; 1 Q. B. Div. 515;
> *Parker* v. *South-Eastern Railway Company*, 36 L. T. Rep. 540; 2 C. P. Div. 416;
> *Watkins* v. *Rymill*, 48 L. T. Rep. 426; 10 Q. B. Div. 178;
> *Richardson, Spencer, and Co* 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; 73 L. T. Rep. 158;
> *Marriott* v. *Yeoward Brothers*, 11 Asp Mar. Law Cas. 306; 101 L. T. Rep. 394; (1909) 2 K. B. 987.

Secondly, the defendants are not precluded from relying on the clause printed on the back of the contract ticket, which clause exempts them from liability for the negligence of their servants. Sect. 320, sub-sect. 2, of the Merchant Shipping Act 1894 provides that "The contract ticket shall be in a form approved by the Board of Trade and published in the *London Gazette*, and any directions contained in that form of contract ticket not being inconsistent with the Act shall be obeyed as if set forth in this section." Here the 7th direction on the face of the ticket, which has been approved by the Board of Trade, says that "a contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form." The words "the face of the ticket" mean "the front of the ticket," and the face of the ticket here is in the form approved by the Board of Trade. The object of clause 7 is that the holder of the ticket should be supplied with a ticket which is plain and simple on the face of it, and any additional matter must be put on the back or on a separate document. Clause 7 appeared in a Board of Trade form made, under the Passengers Act 1855, on the 19th Aug. 1888, and there the words were "a contract ticket shall not contain either on the face or on the back thereof or have annexed thereto any condition, stipulation, or exception not contained in or required by this form." In Feb. 1889 the words "or on the back thereof or have annexed thereto" were dropped, and the dropping of these words is significant. There is nothing in the Merchant Shipping Act 1894 which deprives the company of the right to protect themselves from the consequences of negligence, and if the words of the Board of Trade forms were intended to provide that the parties could not make any collateral agreement, excluding negligence, the Board of Trade forms would be *ultra vires*. It was competent here for the parties to make a collateral agreement, and an analogy is to be found where there is a registered mortgage of a ship and a collateral agreement containing clauses not embodied in the mortgage:

> *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade*, 10 Asp. Mar. Law Cas. 41; 92 L. T. Rep. 435; (1905) 1 K. B. 815.

The object of sect. 320 was to prevent passenger agents from obtaining the money for the passage without providing the passengers with what they bargained for, and to ensure that the passenger should be provided with proper accommodation and food.

Campbell, K.C., *Scanlan*, *Jackson Wolfe*, and *Caswell* for the plaintiffs.—The question whether the defendants had given the passengers sufficient notice of the conditions of the tickets was a question of fact for the jury, and there was evidence to support their finding. As to the validity of the conditions on the back of the ticket, sect. 320, sub-sect. 2, provided that the contract should be on a form approved by the Board of Trade, and the Board of Trade had not approved the conditions on the back, which consequently were invalid. The meaning of the section was that there was to be nothing of substance in the contract that had not been approved by the Board of Trade. It would be no protection for the passenger if the section were only meant to provide a frame for the ticket and not to fill in the contracts between the parties. It would be idle that the face of the ticket should have to be approved by the Board of Trade if the parties were allowed to make a collateral contract entirely in the favour of the defendants, taking away all protection from the passenger. There was on the face of the ticket a contract implied by law that the defendants would be liable for negligence, and this being approved by the Board of Trade cannot be contradicted by words on the back of the ticket which had not been approved by the Board. The contention of the defendants is that the words in sect. 320 were only used to provide a frame and not to fill in the contracts, but it is submitted that the Board of Trade were under an obligation to fill in the substance and contents of the form.

Duke, K.C. in reply.—The arguments on behalf of the plaintiffs involve the contention that the Board of Trade possess a kind of legislative power, but that is not the case. There is nothing in sect. 320 which empowers the Board of Trade to do anything not otherwise provided for by the Act, and if the Board of Trade purported to do so they were acting *ultra vires*.

Feb. 9.—Vaughan Williams, L.J.—This is an appeal in the cases of four judgments obtained by relatives of four steerage passengers respectively against the Oceanic Steam Navigation Company for loss of lives brought about by the collision of the *Titanic* with an iceberg. The names of the four passengers were: Ryan, O'Connell, Scanlon, and O'Brien. There was one question common

to all these cases—namely, whether the loss of the *Titanic* was due to negligent navigation, and the jury found it was.

The defendant company, notwithstanding the finding of negligence, claim exemption from liability by reason of clause 3 of the "Notice to Passengers" printed upon the back of the contract ticket, which by sect. 320 (1) of the Merchant Shipping Act 1894 the shipowner is bound to give to the person who pays for the steerage passage, which notices include a so-called condition that the shipowner *inter alia* shall not be liable to any passenger carried under this contract, even though the loss or damage may have been caused or contributed to by the neglect or default of the shipowner. This condition is printed on the back of the contract ticket, and is referred to on the face of the ticket by the words "See Back," and is headed on the back of the ticket with the words "Notice to Passengers."

The answers put forward by the plaintiffs to this exception are: (1) That the words constituting what has been called the exemption clause are not in fact part and parcel of the contract set forth in the contract ticket. (2) That even if the exemption clause is part and parcel of the contract under which the passenger is to be carried, yet the operation of such exemption clause is excluded by sect. 320 of the Merchant Shipping Act 1894. (3) That even if the exemption clause is in fact part and parcel of the contract set forth in the contract ticket, no sufficient notice of this exemption clause, which appears only at the back of the ticket, was given to the respective steerage passengers.

In the respective cases of Ryan, O'Connell, and Scanlon the jury found that no sufficient notice had been given by the plaintiffs. In the case of O'Brien they found that sufficient notice had been given.

In the view which I take of the case it is unnecessary to consider further the finding of the jury as to the insufficiency of the notice, which is only material in case the exemption clause is valid and part and parcel of the contract.

I will first consider answer (1) to the claim on the exemption clause—namely, that the words constituting what has been called the exemption clause are not in fact part and parcel of the contract.

The exemption clause, which appears only under the heading "Notice to Passengers," runs in these words: [His Lordship here read the exemption clause, which is set out above.]

On the face of the ticket appear certain "directions" which, in the form of contract issued by the Board of Trade in Feb. 1908, are stated to "form part of and must appear on each contract ticket." The words, it is to be observed, are "form part of and must appear on each contract ticket," and not "must form part of the contract."

In my judgment, neither the directions which precede the contract nor the notices to passengers which follow the contract are part and parcel of the contract in the statutory form contained. The contract on the face of the ticket between the respective positions of "the directions" and "the notice to passengers," with the position of the words of the contract itself placed as it is between the words "I engage" and the signature of "Joseph Bruce Ismay" for and "on behalf of the Oceanic Steam Navigation Company Limited of Great Britain" is itself indicative of the limit of the words in the contract ticket constituting the contract. The words "See Back" appear lower down than the signature of Joseph Bruce Ismay, in a position detached from the words of the contract, and in quite a different type.

The intention and meaning of "Notice to Passengers" is elucidated by consideration of the forms issued. First, under the Passengers Act 1842, s. 19, and then under the Passengers Act 1849 one finds in sched. H appended to that Act under the head "Notice to Passengers" these words, appearing below the contract on the passenger's contract ticket: (1) "If the ship do not proceed to sea on the day specified above, passengers if ready to go on board and proceed in the vessel are entitled to subsistence money at the rate of one shilling a day." The money may be recovered by summary "process before two magistrates." This notice is clearly not the subject of contract, but of legislation contained in sects. 33 and 52 of the Passengers Act (12 & 13 Vict. c. 33.) Notices dealing with penalties for not complying with the provisions for the protection of passengers first appear in sect. 47 of the Act of 1849, and are always printed below the contract and not in it. This form is continued throughout the forms of ticket, whether issued by the Emigration Commissioners or by the Board of Trade, and spoken of as appearing on the face of the form of ticket, and in the form issued in 1908 by the Board of Trade the notice to passengers appears, as it always had under the form of ticket prescribed and sanctioned by previous orders, below the contract and not in it. All this shows that the notices refer not to matters contractual but to matters outside the contract. It is remarkable that in the steerage passenger's contract ticket form dated Feb. 1908, the notices to steerage passengers are still printed below the contract, but in the actual ticket issued to steerage passengers on board the *Titanic* the clause referring to penalties is no longer printed with the other clauses now appearing at the back of the ticket, but is transferred to the side margin of the ticket. It seems to me that this disassociation of the penalty clause from the group under the heading "Notice to Passengers" at the back of the ticket, and the printing of the penalty notice by itself on the face of the ticket, is a departure from the form prescribed and sanctioned in Feb. 1908. So long as the heading "Notice to Passengers" comprised notice of a statutory right, there was ground for saying that the matters included under this heading were not intended to be part of the actual contract between the passenger and the ship. It is this consideration which makes the departure from the contract form by placing the penalty clause for the first time in the margin a material alteration. It is not easy to say with what object this notice was transferred to the margin of the face of the ticket. So far as the directions preceding the contract are concerned, I do not think it was seriously argued that these were part of the contract. The result is, in my judgment, that the exemption clause is not part and parcel of the contract.

I may here point out, as Kennedy, L.J. does in his judgment, which he has allowed me to read, that the so-called contract contained in the exemption

clause is inconsistent with that part of the contract sanctioned by the Board of Trade, which included an unqualified engagement, signed by the defendants' representative, to carry the passenger to his destination, to the legal effect of which I have already referred, and an agreement that his luggage shall be deemed to be of a value not exceeding 10*l.* unless the value in excess of that sum be declared and paid for. It cannot be open to the shipowner to qualify these terms by added terms such as the defendants have sought to annex by the conditions on the back of this ticket, which take away from the passenger all right of remedy for damage caused by the negligence of the defendants' servants, alike in respect of life and property unless that which the Board of Trade have included in the approved form is *ultra vires.*

I will now deal with the case upon the basis that the exemption clause in the "Notice to Passengers" is part and parcel of the contract between the passenger and the ship, but that its operation is excluded by the terms of sect. 320 (2) which runs as follows: "The contract ticket shall be in a form approved by the Board of Trade and published in the *London Gazette*, and any directions contained in that form of contract ticket not being inconsistent with this Act shall be obeyed as if set forth in this section." When I first read the section I was of opinion that the form prescribed by these words was a general form, and not the form applicable to a particular passenger contract ticket of a particular ship tendered to the Board of Trade for approval. The publication in the *London Gazette* certainly, *prima facie*, looks as if the form of contract was not to be applied to the particular contract tickets of individual ships, and I will deal with the form prescribed by sect. 320 on this basis.

The words "in a form approved by the Board of Trade" may, in my opinion, be interpreted in the light of the provisions that follow in the approved form. Now the approved form contains, beyond a doubt, substantive provisions, and it seems to me that these substantive provisions are of such a character that if nothing is added to them certain implied conditions follow as a matter of course, as, for instance, the contract to use all reasonable skill and care in the carriage in the ship of the passenger or his luggage. It is true that this implied condition may be excluded at common law by express words, but inasmuch as that exclusion would be the exclusion of a condition contained by implication in the form of contract requiring the approval of the Board of Trade, the exclusion could only be made by the addition of a clause approved by the Board of Trade. Such an exclusion would, though not inconsistent with the approved statutory form, be absolutely inconsistent with the contracts to be implied by common law from the approved form as it stands. I do not go the length of saying that the form of contract cannot be added to in respect of matters of substance, but I do say that this can only be done with the express particular approval of the Board of Trade. It is clear that in the present case there has been no such particular approval. I see nothing *ultra vires* in the general form prescribed and sanctioned by the Board of Trade on the 15th Feb. 1908, if one ascribes to it the meaning that I ascribe to it, namely, that the form of contract cannot be added to in respect of matters of substance without the express particular approval of the Board of Trade, at all events, in cases where the addition is inconsistent with the contract which though not expressed would be implied from the words of the contracts as they stand.

[His Lordship here dealt with the question of negligence, and held that there was evidence to go to the jury of negligence in continuing course and speed of 22 knots an hour notwithstanding the information received by marconigram. He also dealt with the question of misdirection.]

As, therefore, I have come to the conclusion that there was evidence of negligence to go to the jury, I think that these appeals fail; for, as I have already stated, I think that the clause exempting the defendants from liability for negligent navigation is invalid, for the reasons I have given. Consequently, it is unnecessary to consider the question whether the defendants did all that was reasonable to bring that clause to the notice of the passengers.

For these reasons I think that these appeals must be dismissed.

Buckley, L.J.—In O'Brien's action the jury found that the defendants did what was reasonably sufficient to give O'Brien notice of the conditions having regard to his condition in life. Those conditions included a stipulation found in article 3 on the back of the ticket, that the shipowner should not be liable to the passenger for negligence. The learned judge has held that that condition not having been approved by the Board of Trade is not binding upon O'Brien upon the ground that by virtue of sect. 320 of the Merchant Shipping Act 1894 the passenger could not so contract that the condition was invalid. The question is whether this is right.

Sect. 320 is a section which provides by sub-sect. 1 that there shall be given to the passengers a contract ticket. Sub-sect. 2 then provides two things, namely, first, that the contract ticket shall be in a form approved by the Board of Trade and published in the *London Gazette*, and, secondly, that any directions contained in that form of contract ticket not being inconsistent with the Act shall be obeyed as if set forth in that section. I shall deal with these two provisions separately.

The statute contains a number of provisions which are to have effect as between the shipowner and the passenger. The latter is by the statute protected in numerous detailed particulars, but, except as thus provided by the statute, the Act contains nothing fettering the liberty of the parties to make such contract as shall be satisfactory to them. The argument presented to us, and which has succeeded below, is addressed to show that this sub-section remits it to the Board of Trade to determine, not the form, but all the terms and conditions of the contract, that the parties have no power to make additional or different terms. In my opinion it has not that effect. For instance, the Board of Trade might think it desirable to throw upon the shipowner the same liability as if he were an insurer of the passenger and his goods and might in their approved form introduce a contractual term to that effect. In my opinion they have no power to do so and impose that term upon the parties if the parties are minded to contract to some other

effect. The words of the statute which authorise the Board of Trade to approve the form give them, I think, no power to determine the substance of the contract so far as the substance is not dictated by the Act itself. By way of illustration on the question of construction, suppose that upon an intended marriage heads of settlement are prepared indicating briefly the nature of the trusts and the outline of the intended provisions, and that they contain a clause that the settlement to be executed shall be in such form as shall be approved by a named member of the Bar. The person thus authorised to determine the form of the settlement has no power to vary or add to the trusts and provisions indicated in the heads. His province is to give effect to them by provisions apt for that purpose. The same is in my opinion, true of sect. 320 (2). The Board of Trade may demand that the terms which by virtue of the statute are to be obeyed shall be expressed in such form as to them seems right and can no doubt deal with such matters as the configuration of the document as regards containing tabular statements, or numbered clauses, or being printed in some defined type, or any matters of that description. But in my judgment they have no power to affect the substance. It is unnecessary to consider whether the parties could by contract affect, modify, or alter those rights which are created by the statute. The argument is that they cannot affect, modify, or alter any conditions or terms not found in the statute but introduced by the Board of Trade into their approved form. The contention is that from the fact that the Board of Trade have statutory power to approve the form it results that the contract ticket must contain such terms, conditions, and stipulations as the Board of Trade approve and none others. In my opinion the Act has not so provided. The function of the Board of Trade is not to legislate but to formulate.

Then as to the "directions" being the word employed in the second provision of this subsection. That word "directions" was first used in sect. 47 of the Passengers Act 1849, a section which provided that the person receiving passage money shall give a contract ticket in plain and legible characters, and made out upon a printed form which shall be in all respects according to a form scheduled to the Act, or according to such other form as may from time to time be prescribed as there mentioned, and shall also comply with all the directions contained on the face of such form. The form scheduled to that Act contained words which have appeared in every subsequent statutory form and Board of Trade form down to and including the latest Board of Trade form, viz., that approved on the 26th Feb. 1912. The words are: "These directions and the 'Notices to passengers' below form part of and must appear on each contract ticket." The "directions" in the statutory form of 1849 are (1) That a ticket in this form must be given to every passenger; (2) that the blanks must be correctly filled in, &c.; (3) that the day of sailing must be inserted in words; and (4) that when once issued the ticket must not be withdrawn from the passenger nor any alteration or erasure made in it. There are further directions, viz., that if mess utensils and bedding are to be provided by the shipowner the stipulations must be inserted, and that if the ticket is signed by a broker or agent it is to be stated on whose behalf. The point to be noted is that none of these are contractual terms. They are all notifications either of something for which the Act has provided or of details to which attention is to be given. Upon the construction of the Act of 1849 I think it plain that the word "directions" was confined to notifications such as above described and had no reference to contractual terms as between the parties. The same is in my judgment true of the word "directions" as used in each subsequent Act, and as used in the present Act of 1894.

The "directions" have been varied from time to time, both in the statutory forms as long as statutory forms were continued and in the Board of Trade forms after Board of Trade forms approved under the power in the statute came into use. The clause numbered 7 in the contract ticket in the present case was never contained in any statutory form. It appeared for the first time in a Board of Trade form made on the 19th Aug. 1888, under the Passengers Act 1855, in the words "A contract ticket shall not contain either on the face or on the back thereof or have annexed thereto any condition, stipulation or exception not contained in or required by this form." If those words were intended to provide that the parties should not make any contractual terms other than those contained in or required by the Board of Trade form it was a clause which, whether it is called a direction or not, was, in my judgment, *ultra vires* the power given to the Board of Trade by the statute under which they derived authority at that date. However this may be, it is a fact that on the 19th Feb. 1889, six months later, another Board of Trade form was substituted in which the words were: "A contract ticket shall not contain on the face thereof any condition, stipulation or exception not contained in this form," dropping the words "or on the back thereof or annexed thereto." From that time to the present this clause has been expressed in these last-mentioned words. We have had much discussion as to what is meant by the words "on the face thereof." The appellants contend that those words mean on the face as distinguished from the back, that the purpose of the words is to provide that the simplicity and plainness of the ticket to the ordinary reader shall not be impaired by putting any additional matter on the face of the document, but that if you want to add anything you must do it elsewhere either on the back or by a separate document. If anything turns upon the view which the Board of Trade took as to their own powers there would be much in favour of this view in the fact that the modification was made which I have already stated of striking out the words "or on the back thereof or have annexed thereto." But the question to be determined turns, I think, upon much broader considerations. The respondents contend that the words mean that a contract ticket shall not contain in any part thereof any condition, &c. They say condition 7 does not leave it open to the parties to put an additional condition on the back or to add a condition by a separate document, but forbids them to impose an additional condition in any manner whatsoever. So to read the clause amounts to striking out the words "on the face thereof" altogether. Strike them out and the words will convey exactly the meaning which

the parties say is to be attributed to them when the words are inserted. This is not a proper principle of construction. But further and beyond these considerations if the words as such had the effect for which the respondents contend they would in my judgment by reason of the considerations on which I have already dwelt be *ultra vires* the Board of Trade and would not be binding.

In O'Brien's case, therefore, the passenger has, in my opinion, become bound by a condition which was not invalid, which is binding upon him, and which relieves the defendants from liability. It follows that in this action the defendants are in my opinion entitled to judgment.

In each of the other three actions the jury have found that the defendants did not do what was reasonably sufficient to give the passenger notice of the conditions, having regard to his condition in life. The appellants contend that this verdict was against the weight of evidence and perverse. The appellants agree that upon this issue the onus is upon them to prove the contract which they allege. They put in the contract containing as it does the third condition on the back, and they say that the only other evidence relevant to this issue is evidence which goes to show that the passenger had reasonably sufficient notice of the conditions. This evidence consisted in Ryan's case of certain correspondence between one Moran and the defendants' agents, between the 28th March and the 5th April 1912, and the fact that on the 5th April the steamer ticket for three berths for passengers, of whom Ryan was one, was sent to Moran, and evidence that Moran was agent for Ryan in making the contract. There was no evidence similar to this in the cases of O'Connell and Scanlon. In each of the three cases the passenger received his ticket, and there was affixed to it a red slip calling special attention to "the conditions of transportation in the annexed tickets." There was also evidence that the passenger would not be allowed to go on board unless he produced his ticket with that red ink slip upon it. The question is whether upon these materials there was evidence upon which the jury could find as they did first in Ryan's case that the defendants did not do what was reasonably sufficient to give Moran notice or to give Ryan notice, and in O'Connell's and Scanlon's cases that the defendants did not do what was reasonably necessary to give the passenger in each of those cases notice of the conditions having regard to his condition of life.

The appellants' contention upon this part of the case is that when they have put in the document containing the written terms the onus is shifted and that it lies, not upon the defendants to adduce evidence to show that the passenger assented to those terms, but upon the passenger to show that he did not do so. This contention is, I think, contrary to authority. The case is the second case put by Mellish, L.J. in *Parker* v. *South-Eastern Railway Company* (36 L. T. Rep. 540; 2 C. P. Div., 417, at p. 421), where the agreement has been reduced into writing but the passenger has not signed it. Mellish, L.J. said: "In that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it." The onus of proof in this respect lies upon those who proffer the document as containing the agreed terms. The three questions proper to be left to the jury were pointed out by the judgment in that case, and are to be found detailed in *Richardson Spence and Co.* v. *Rowntree* (7 Asp. Mar. Law Cas. 482; 70 L. T. Rep. 817; (1894) A. C. 217-219). In the present case the jury may well have thought that the passenger knew there was writing or printing on the ticket, and, having regard to the red ink slip, knew that it contained conditions, but there remained the question whether the defendants did what was reasonably sufficient to give the plaintiff notice of the conditions. The onus of establishing that was on the defendants. Upon the evidence in this case the jury might, I think, well find, as they did, that the defendants did not do what was reasonably sufficient. I see no grounds for disturbing the verdict in this respect.

[His Lordship then dealt at length with the questions of negligence and misdirection, and concluded his judgment as follows:]

Had this case been for my decision alone, I should have thought that it was one which ought to be submitted to another jury. But it is the fact that the learned Judge, at the commencement of his judgment, told the jury that they and not he were the judges of fact, and that they were not in the least degree bound to follow his opinion in case he pronounced or indicated any opinion, and it is the fact that the jury had heard the whole of the evidence. I am told by those who sit with me that under such circumstances, where no misdirection in point of law can be shown, it is not according to the course of the courts to direct a new trial.

I bow to their experience in this matter, which is much greater than my own, and under those circumstances, in the case of the three actions other than O'Brien's action, I concur in the order which to them seems right.

Kennedy, L.J.—The joint trial in these four actions was divided, and I think conveniently divided, into three separate parts. The issues in the first and second parts were issues of fact to be decided by the special jury. The question in the third part was a question to be decided, as it was, by the learned judge. I shall deal with the points raised by the appeal in accordance with the order in which these three parts were dealt with at the trial.

The claim of the plaintiff in each of the four actions is a claim in damages against the defendants, the owners of the steamship *Titanic*, for negligence in the navigation of that steamship, causing the death by drowning of relatives of the respective plaintiffs when she was lost on the 15th April 1912 through collision with an iceberg in the Atlantic Ocean.

The jury were asked, in the first instance, to decide whether the loss of the *Titanic* was or was not caused by the negligence of the defendants' servants engaged in her navigation. This issue was presented to them by Bailhache, J. in the following form: (1) Was the navigation of the *Titanic* negligent in respect of (*a*) look-out, (*b*) speed?

There was a second question relating to a particular and subordinate point, whether a certain marconigram from the steamship *Mesaba* was communicated to a responsible officer of the *Titanic*. As to this the jury returned no verdict, and

stated that the evidence was not sufficient for them to come to a conclusion. But they answered the first and principal question by finding in regard to (a) that there was no negligence in respect of look-out, and in regard to (b) that there was negligence in respect of speed.

The defendants, in their notice of appeal and by their counsel, on the hearing of the appeal, have contended that the verdict on (b) was against the weight of evidence, and also that on various points the learned judge misdirected the jury, and that the defendants therefore are entitled to a new trial.

In my opinion, there was evidence sufficient to justify the jury in finding that the collision was due to negligence of the defendants in respect of the speed of the *Titanic*, whilst finding, at the same time, that there was no negligence in respect of look-out, that is, as I interpret the latter finding, that there was no fault to be found with the look-out either in respect of the number, competency, and position of the seamen who were engaged in that duty, or in respect of the manner in which they discharged their duty. [His Lordship here dealt with the questions of negligence and misdirection.]

The second of the three parts in which this action was tried relates to a defence raised by the defendants upon certain terms, exempting them from liability, which are contained upon the back of the contract ticket for the voyage. Those terms were printed in small type, such as is commonly used in bills of lading, upon the back of the contract ticket, with a reference to them on its face in the words "See back" printed in different and in much larger type. Each of the steerage passengers in respect of whose death the four plaintiffs respectively sue had one of these contract tickets. The defendants contended that the terms printed on the back of these tickets bound the steerage passenger, because, as they alleged, the contract ticket, back and front together, contained the contract for his carriage to America. The plaintiffs challenge this allegation upon the ground, first, of fact—namely, that the defendants did not do what was reasonably sufficient to give the steerage passengers in respect of whose death the plaintiffs are suing notice of the conditions upon the back of the ticket; secondly, upon the ground of law, that the provisions on the back of the ticket, by reason of certain enactments of the Merchant Shipping Act 1894, cannot be treated as forming part of the contract of carriage in the case of these passengers. The question of fact was separately submitted to the decision of the jury after they had given their verdict, as I have said, upon the issue of negligence, and the trial of this question forms that which at the commencement of this judgment I have called the second part of this case.

The jury, after hearing evidence, gave a verdict in favour of the first three plaintiffs, Ryan, O'Connell, and Scanlon, but in favour of the defendants as against the fourth plaintiff, O'Brien. The result of this verdict, if it stands, is that, in regard to the first three plaintiffs, whatever be the true view of law as to the validity of the exemption clause upon the body of the contract ticket, they succeed in the action; and that, in regard to the fourth plaintiff, O'Brien, he fails in his action if the exempting clause printed upon the back of the contract ticket is in point of law good and binding. The defendants have contended in this court that the learned judge ought to have directed the jury that it was their duty to find a verdict in every one of the four cases in favour of the defendants, or, to put the same contention in a slightly different form, that he ought to have told them that there was no evidence upon which they could rightly find a verdict for any of the plaintiffs; and, of course, also that in the first three cases the verdict was against the weight of evidence. It appears to me that in view of the judgments of the House of Lords in *Stevenson* v. *Henderson* (32 L. T. Rep. 709; L. Rep. 2 Sc. & I. App. 470) and *Richardson* v. *Rowntree* (7 Asp. Mar. Law Cas. 482; 70 L. T. Rep. 817; (1894) App. Cas. 217), in the latter of which the judgment of Mellish, L.J. in *Parker* v. *South-Eastern Railway Company* (36 L. T. Rep. 540; 2 C. P. Div. 416) was expressly approved, the learned judge in the present case was right in leaving to the jury the question whether the defendants had given the recipient sufficient notice of the condition upon the back of the ticket, and that there was evidence in the facts before them which justified the conclusion which the verdict of the jury expressed in each of the three cases in which the jury gave a negative answer to that question. It is not un-undeserving of notice that Lord Ashbourne in his judgment in *Richardson* v. *Rowntree* (at p. 221 of (1894) A. C. and at p. 483 of 7 Asp. Mar. Law Cas.) made a remark which is on the facts applicable to the present case: "The ticket in question in this case was for a steerage passenger —a class of people of the humblest description, many of whom have little education, and some of them none."

We come now to that which I have called the third part of this case.

The result of the verdict of the jury in regard to the plaintiff O'Brien, in whose case they found that the defendants had done what was reasonably sufficient to give the passenger notice of the condition upon the back of the contract ticket, which protected the defendants from any consequence resulting from negligence in the navigation of the *Titanic*, was, as I have already said, that if that condition is valid in law as a part of the passenger's contract of carriage, the defendants are by reason of that condition entitled in O'Brien's case to judgment in their favour notwithstanding the verdict of the jury on the first question submitted to them, that the death of the passenger was due to the negligence of the defendants' servants in the navigation of the *Titanic*. Mr. Justice Bailhache has held that the condition upon the contract ticket which exempted the defendants from liability was not binding upon the passenger, and upon this appeal we have to give our judgment as to the correctness of that decision. The subject is a novel one, and also one, I think, of difficulty. The circumstances are these: The passenger, Denis O'Brien, was received by the defendants as a third-class or steerage passenger to be carried in the *Titanic* from Queenstown to New York. A contract ticket for the voyage was given him. All such contract tickets are regulated by sects. 320 to 323 (inclusive) of the Merchant Shipping Act 1894. Those sections form a distinct group under the heading "Passengers' contracts." I shall have to refer to

other sections in this group, but, in the first instance, it is sufficient to quote sect. 320 (1), (2), (3), and (4). [His Lordship read the sub-sections, which are set out above.]

In the present case the steerage passenger's contract ticket, so far as it was in a form approved by the Board of Trade, was in a form which was published by the Board of Trade in the *Gazette* of the 26th Feb. 1912. Besides merely formal parts, such as, for example, the entries in certain columns of the names and ages of passengers and the statement of the amount and place (or places) of the payment of the fare, this ticket sets forth upon its front (I purposely use this word) the following substantial matters. [His Lordship read the seven numbered sections, which are set out above.]

The contract ticket given by the defendants to Denis O'Brien contained all that there is prescribed in the "approved form," but it also contained in print the following additions, which have never been approved by the Board of Trade. Just below the place designated by the approved form for the signature by the defendants' representative, the defendants printed upon the ticket "See Back," and on the back were printed under the heading "Notice to Passengers" ten conditions in favour of the defendants upon one of which, namely, the clause exempting the defendants from liability from loss or damage, although occasioned by the negligence of the defendants' servants, the defendants rely in this action. I need not, I think, set out these conditions at length. It will be sufficient for the purpose of this judgment to refer to the main portion of the third of them: [His Lordship read it, and continued:]

It is obvious, first, that the contract ticket as approved by the Board of Trade contains in itself that which is sufficient in point of law to constitute a complete contract of carriage; secondly, that this condition which was added by the defendants upon the back of the ticket, and which exempts the defendants from liability alike in regard to the death or injury of the steerage passenger himself or in respect of the loss of or damage to his baggage, although such loss or damage has been occasioned by the negligence of the defendants' servants, most materially alters to his prejudice the contract between the steerage passenger and the defendants as it stands in the approved form. In regard to the passenger, the contract of carriage in the approved form, which I have already quoted, is in its express terms an absolute engagement on the part of the defendants to carry the passenger to his destination and would be modified only by the implication imported into it by the common law relating to such carriage, whereunder the duty of the carrier is to use reasonable care in the performance of the contract. The same third condition also—although this is a minor point—renders practically worthless the stipulation as to the 10*l.* valuation of the steerage passenger's luggage, for it exempts the defendants from all liability, although the luggage is lost by the negligence of the defendants' servants. The result—assuming the validity of the provisions which the defendants have added to the approved form—is that, in the present case, the plaintiff Denis O'Brien, and every person who sues in respect of the loss of life or loss of property caused to a steerage passenger by the sinking of the *Titanic* and is in the same position as that in which he has been placed by the verdict of the jury on the second part of this case, is deprived of any legal remedy. The question to be considered is whether the defendants are entitled to treat this third condition, or any other of the conditions, in their favour, which they have indorsed upon the "approved contract ticket," so far, at any rate, as those conditions alter the contract contained in that ticket as it was approved by the Board of Trade, as forming part of the contract of carriage. Bailhache, J. has decided that the defendants are not entitled to do so, and has accordingly given judgment for the plaintiff. I have come to the conclusion that the learned judge's decision was right.

The defendants' contentions are that when sect. 320 of the Merchant Shipping Act enacted that "the contract ticket shall be in a form approved by the Board of Trade and published in the *London Gazette*" it is to be understood as referring to merely formal matters, such as the shape of the ticket, the arrangement of contents, the insertion of the statutory requirements as to dietary, and such like matters; and that, when it sanctioned the insertion of "directions," which, if not inconsistent with the Act, are to be obeyed as if they were set forth in the section, it did not thereby empower the Board of Trade to insert any provision affecting the contractual position of the passenger in regard to the carrier. Therefore, say the defendants, we were entitled to make and insert in the ticket qualifying or inconsistent terms, provided always that the passenger was given a ticket which also set forth the terms of the approved "form"; and if the approved form, either in the "directions," or elsewhere, contains any denial of this right, it is so far *ultra vires*, and may be disregarded, and effect must be given to any contractual provisions we may have chosen to insert in the ticket as it is accepted by the passenger. I use the word "accepted," because a person in the position of Denis O'Brien is held by the law to have accepted when he receives without objection. In fact I do not suppose that one such steerage passenger in a thousand reads such provisions, and few if they did would appreciate their legal import.

Further, say the defendants, the seventh of the "directions" in the form approved by the Board of Trade in the present case contemplates, and indeed impliedly reserves to us, a right to annex exceptions and conditions, as we have annexed them in the present case, upon the back of the ticket, for it states: "A contract ticket shall not contain on the face thereof any condition, stipulation or exception not contained in this form." The conditions and exceptions upon which we rely are not on the face but on the back of the ticket; *ergo*, they are good and valid. In support of this last contention, which lays stress upon the word "face," the defendants refer to the fact that in the direction contained in the form of contract ticket issued in 1888 under the Passengers Act 1855, there was a direction that: "A contract ticket shall not contain either on the face or on the back thereof or have annexed thereto any condition, stipulation or exception not contained in or required by this form," and that in the form issued in 1889 under the same Act, as well as in the form of 1908, the corre-

sponding direction is: "A contract ticket shall not contain on the face thereof any addition, stipulation or exception not contained in this form." The purpose, argue the defendants, of the direction as it first was published in 1889 and as it now stands in the form approved by the Board of Trade in 1908 is simply to keep the face of the ticket, containing the form approved by the Board of Trade, as distinguished from the back of the ticket, free from the risk of confusing the steerage passengers, many of whom are illiterate, by mixing up contractual conditions imposed by the shipowner with the formal requirments as to dietary, fares, and other like minutiæ, with which alone, as the defendants contend, the statute of 1894 authorised the Board of Trade to deal. After very careful consideration, I find myself unable to accept the defendants' view.

Leaving out of sight for the moment the argument founded on the seventh of the directions contained in the form of 1908—the form with which we have to deal—let us see first what is the true import of sect. 320 of the Act of Parliament. It is true that, as the defendants assert, when that section enacts in (1) that there shall be given to the steerage passenger "a contract ticket signed by or on behalf of the owner, charterer or master of the ship, and printed in plain and legible characters," and in (2) "that the contract ticket shall be in a form approved by the Board of Trade and published in the *London Gazette*, and any directions contained in that form of contract ticket not being inconsistent with this Act shall be obeyed as if set forth in this section," it does not mean that the approved contract ticket shall contain the terms of the contract, but it means only that it shall contain and in its directions prescribe purely formal matters, or, at most, in addition to such formal matters, rules as to diet and other matters of comfort and accommodation, leaving the contract in its essentials to be regulated by the parties. I do not think that this is sound. In the first place, is it reasonable to suppose that Parliament would take the trouble to make these enactments for the protection of the steerage passenger for the purpose merely of securing that he has a contract ticket which conforms to a prescribed model in formal matters, and sets forth statutory provisions such as the provisions as to diet, which would be binding whether expressed or not upon the contract ticket. Does not the very expression "contract ticket" naturally import a ticket which contains the contract between the parties? What is the protection to the steerage passenger in the approval of the Board of Trade if the shipowner may make a contract with the steerage passenger on the same piece of paper which vitally affects, to the prejudice of the steerage passenger, the value of the engagement to carry which the Board of Trade has approved. Stress is laid by the defendants upon the words "form approved by the Board of Trade" as indicating that only matters of "form," as contrasted with substance, were to be dealt with by the Board of Trade in framing the document. I agree with Bailhache, J. that this is a non-natural interpretation. He says in the course of his judgment: "Next, I ask, what is meant by the form of the contract ticket, and does the word 'form' mean the shape and size and appearance of the ticket only, or does it cover the contents of the ticket, the matters for which it makes provision, and the manner in which it deals with those matters. I think it clearly means the latter. This is certainly the ordinary acceptation of the term, and I see no reason, and indeed have, I think, no right to reject it in this case." In regard to the effect to be given to the word "form," an opposite reference was made by the plaintiffs' counsel to the language of sect. 9 of the Bills of Sale Act (1878) Amendment Act 1882, as interpreted by the House of Lords in *Thomas* v. *Kelly* (60 L. T. Rep. 114; 13 App. Cas. 506). The "form" in the schedule of that Act deals with matters of essence; and it is, I think, noteworthy that Lord Halsbury, L.C. in regard to the words "in accordance with the form in the schedule to this Act annexed" held (p. 511), as to these words, which are somewhat less stringent than "in a form," that the effect was "to enact not merely what a bill of sale must contain, but also what it must not contain." It appears to me that when we look at other portions of this part of the statute of 1894 dealing with "Passengers' Contracts" there is in them some indication that what the Act means is not a "form" to which the shipowner may annex most important terms which the Board of Trade has no opportunity of approving, but a contract which is to be in itself complete in regulating the relations of carrier and passenger. What otherwise is the use of authorising the Board of Trade in the approved form to give "directions" which are to have statutory force with the limitation only that they are not inconsistent with the Act itself? What is the "stipulation" in any such contract ticket for the breach of which the passenger may under sect. 321 (1) obtain a summary remedy? And if we pass on to sect. 323 we find the contract of carriage spoken of as "the contract of which that ticket is evidence." The view of the Board of Trade is clear enough. They have not deemed this statutory duty to be limited, as the defendants would limit it, to matters of form and the statement of a dietary already prescribed by the law. The approved form of contract ticket speaks for itself on this point. We find there a complete contract, an unqualified engagement to be signed by the defendants' representative to carry the passenger to his destination, and an agreement that his luggage shall be deemed to be of a value not exceeding 10*l.*, unless the value in excess of that sum be declared and paid for. It cannot be open to the shipowner to qualify these terms by added terms, such as the defendants have sought to annex by the exceptions on the back of this ticket, which take away from the passenger all right of remedy for damage caused by the negligence of the defendants' servants, alike in respect of life and property, unless, indeed, that which the Board of Trade has included in the approved form is *ultra vires*. For the reasons I have already stated, I see no ground for holding any of the provisions in the approved contract ticket are, in view of sect. 320, *ultra vires*; and, if they are not, the ticket, as the defendants have given it to the steerage passenger, is, in regard to the added part upon which they rely, not a contract ticket approved by the Board of Trade, and that part cannot be held to afford the defendants an answer to the claim of the plaintiff Denis O'Brien in this action.

I turn now to the seventh direction, which, argue the defendants, must be interpreted as

contemplating the propriety of conditions, stipulations, or exceptions not contained in the approved contract ticket, provided that they are not contained "on the face thereof." I share the doubt expressed by my brother Bailhache, whether, if the shipowner chooses, as the defendants have chosen in this case, to write "See Back" on the "face" of the paper, he does not thereby incorporate with that which is written on the face that which is written on the back, and so in effect abolish any distinction between "face" and "back." But, putting aside this consideration, I feel so strongly the unreasonableness, to use no stronger term, of holding that the Board of Trade, when they approved the form of contract ticket, which contains in itself, as approved, a complete contract, intended by this seventh "direction" inferentially to give the shipowner *carte blanche* to add, provided only that he prints them on the other side of the paper, conditions which essentially alter this contract, that I prefer to give to the direction a construction which seems to me to be a perfectly possible construction, and one which would be in harmony with the 320th section. We may, I think, construe the words "on the face thereof" in a wider sense than is given to them if "face" is read as contrasted with "back," and treat them as being used here in the sense in which, I think, they are properly used when you say that such and such a thing does not appear on the face of a written or printed instrument, meaning thereby anywhere in the instrument, without regard to one side or the other of the sheet or sheets of paper on which the instrument is written or printed; so that the meaning of the seventh direction, in exact accordance with the interpretation which I place upon sect. 320 of the Merchant Shipping Act, is a notification by the Board of Trade that there must not by any express addition to the document be imported into this contract ticket which we, the Board of Trade, have approved any new condition, stipulation, or exception. The implications of the common law relating to carriers of passengers remain.

I will only add that such an indirect and inferential authority to alter the approved form and the legal effect of that approved form, as the defendants assert the seventh direction to be, would be a curious method for the Board of Trade to adopt in so important a matter. If the Board of Trade intended the contract in the approved form not to be complete as it stands, but to be subject to essential alterations, the natural and obvious course would have been after the first words of contract in the form to be signed by the shipowner, "I engage," to have proceeded either to add "subject to the conditions and exceptions indorsed herein" or to have inserted in the same place a direction "(Here insert conditions and exceptions if any)" with a blank space for the insertion of such conditions and exceptions. If the shipowners can persuade the Board of Trade that it is right in some such way to change the approved form, well and good. Until they have done so the contract ticket with the addition of the terms in their own form and to the prejudice of the steerage passenger upon which the defendants rely in their action is, in my judgment, not a contract in a form approved by the Board of Trade, and such added terms are not in law binding upon such passenger.

In my opinion, this appeal fails in the case of all four actions, and should be dismissed with costs.

Appeal dismissed.

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

Solicitor for the plaintiffs, *H. Z. Deane.*

HIGH COURT OF JUSTICE.

PROBATE DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 24, 25, 27, *and Dec.* 18, 1913.

(Before Sir S. T. EVANS, President.)

THE AMERIKA. (*a*)

Collision—Warship—Value of vessel—Depreciation—Allowance for degradation of type—Expense of searching for wreck—Cause of action for loss of life of seamen apart from statute—Right to recover pensions and gratuities paid by the Admiralty as an act of grace—Remoteness of damage.

A submarine having been sunk through the negligent navigation of a steamship and all but one of her crew drowned, the Commissioners of the Admiralty brought an action against the steamship owners to recover the damage they had sustained. They included in their claim the following among other items: 35.000*l.*, *the value of the submarine;* 1286*l.* 3*s.* 8*d.*, *the expenses for searching for her;* 5140*l.* 18*s.* 6*d.*, *the capitalised amount of the pensions and gratuities paid or payable by the plaintiffs to the relatives of the crew who were drowned. At the reference the assistant registrar allowed the value of the submarine at* 26,500*l.*; *the expenses for searching for the wreck,* 1286*l.* 3*s.* 8*d.*; *and he disallowed the sum claimed for pensions, but stated that if he was wrong in disallowing it the sum recoverable was* 4100*l.*

The Admiralty Commissioners appealed seeking to recover the capitalised value of the pensions, which they agreed to accept at 4100*l.*; *the shipowners appealed seeking to get the amounts allowed for the value of the vessel and the expenses of searching for her reduced.*

On the hearing of the appeal by Sir S. T. Evans, President:

Held, that on the evidence a sufficient deduction had not been made for depreciation and degradation of type, and that the sum of 26,500*l.* *should be reduced to* 23,850*l.*

NOTE.—The Court of Appeal (Buckley and Kennedy, LL.J. and Scrutton, J.) have since varied the above decision and restored the finding of the Assistant Registrar as to the item of £26,500, the amount which he had allowed at the reference for the value of the submarine, thus reversing the decision of the President, who had reduced that item to £23,850. Apparently the ground upon which the Court of Appeal reversed the President was that such a figure should only be reviewed if the Registrar has erred in principle or the sum allowed is either grossly too large or grossly too small. It may be doubted whether the Court of Appeal sufficiently considered what hitherto has been the practice of the Admiralty Court—namely, that the report of the Registrar is not a final judgment, but it must be confirmed by the court to give it validity: (see Roscoe's Admiralty Practice, 3rd edit., p. 385, note to Order LVI., r. 10; see also the judgment of Deane, J. in *The Wallsend*, 10 Asp. Mar. Law Cas. 476; 96 L. T. Rep. 851; (1907) P. 302).

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

Held, further, that on the evidence 1286*l.* 3*s.* 8*d.* *was a proper sum to allow for searching for the vessel.*

Held, further, that as apart from statute the negligent killing of a person gave rise to no cause of action, the Admiralty Commissioners could not recover damages for the loss of the crew; that as the pensions and gratuities were given as an act of grace and were not recoverable from the Admiralty as of right, the Admiralty Commissioners could not recover the sums paid as they were too speculative and remote to be recovered as damages.

APPEAL by motions in objection to the report of the assistant registrar.

The first motion was by the Commissioners of the Admiralty objecting to the disallowance by the assistant registrar of a sum of 5140*l.* 18*s.* 6*d.* claimed by them in respect of pensions and grants paid to the relatives of the crew of the submarine *B*2 who had lost their lives by reason of a collision between the submarine and the Hamburg American liner *Amerika.*

The second motion was by the Hamburg American line, the owners of the *Amerika* objecting to the allowance made by the assistant registrar of a sum of 26,500*l.* in respect of the value of the submarine and of a sum of 1286*l.* 3*s.* 10*d.* in respect of the expenses of searching for, finding, and examining the wreck of the submarine.

About 6 a.m. on the 4th Oct. 1912 the Hamburg American liner the *Amerika* ran into and sank the submarine *B*2 off Dover, all but one of her crew being drowned.

Efforts were at once made by the Admiralty to find the wreck of the submarine, and to examine it in order to discover if it was possible to salve it.

The search was made by destroyers and tugs, and it began on the 4th Oct. and continued to the 7th Oct., when the position of the wreck was located. Divers were at once sent down, and on the 8th Oct. all hope of salving the submarine was abandoned owing to the serious nature of the damage she had sustained.

The Commissioners of the Admiralty instituted proceedings against the *Amerika* to recover the damage they had sustained, and on the 10th Dec. 1912 the action was settled on the terms that the owners of the *Amerika* should pay 95 per cent. of the damage sustained by the Admiralty, such damage to be assessed by the registrar and merchants, and that the claims for loss of life should be settled on the basis that none of those on board the submarine were to blame for the collision.

The Admiralty put forward a claim in the registry which included the following three items:—

	£	s.	d.
1. Value of the hull, machinery, and electric fittings, and batteries of the *B*2 at the time of her loss ...	35,000	0	0
2. Expenses of searching for finding and examining the wreck	1286	3	10
9. Capitalised amount of pensions and grants paid or payable by the plaintiffs to the relatives of the crew who were drowned	5140	18	6

The reference was heard by the assistant registrar, who made his report on the 28th July 1913; the following were the assistant registrar's reasons:

The only items about which there was any real contest, and with reference to which any comment is necessary, were items 1, 2, and 9. As to item 1, the plaintiffs relied upon the evidence of Mr. Webb, who estimated the value of the submarine at 35,000*l.*, the amount claimed. Her original cost was approximately 48,000*l.*, and his conclusion was arrived at by deducting from the original cost a percentage per annum under two separate heads: (1) Depreciation of material; and (2) degradation of type, or as it was sometimes called, obsoleteness, but he declined to say how he apportioned the total percentage between 1 and 2 on the ground that it would or might be disclosing departmental secrets if he did so. Evidence was also adduced on behalf of the defendants. On the whole of the evidence produced before us we came to the conclusion that under the first head depreciation would be at least as rapid in the case of a submarine as in the case of a merchant vessel, and that a very substantial further allowance for depreciation must be made under the second head. As regards the latter head it is to be observed that the submarine *B*2 was seven years old, she was one of the earliest type of submarines still in commission in the navy, and, taking all the available evidence into consideration, we were of opinion that her period of useful service had not many years to run. We came to the conclusion that the sum of 26,500*l.* fairly represents the value of *B*2 at the time of her loss. This figure was arrived at by adding to the original cost 15 per cent. as representing the increased cost at the present day of labour and material, and deducting from the figure so arrived at 10 per cent. per annum under the two heads mentioned by Mr. Webb.

Item 2. The defendants objected on three grounds to this item. (1) That having recovered as for a total loss, the plaintiffs were not entitled to recover anything further in respect of unsuccessful attempts to salve the sunken vessel. I was of opinion that this contention could not be sustained, but that the plaintiffs were entitled to recover the expenses reasonably incurred in ascertaining whether or no the vessel could be raised and repaired with a view of minimising the loss. (2) That having found the wreck, the plaintiffs should have proceeded to raise and repair her. I was unable to agree to this objection in the absence of any evidence as to what would have been the cost of raising and repairing her. I felt bound to assume, in the absence of any such evidence, that the Admiralty exercised a wise discretion when they decided to abandon the wreck. (3) That the operations carried out by the plaintiffs were altogether on a too extravagent scale, and that the charges made for the use of the different craft engaged were too high. With regard to the question of the extravagance of the scale of the operations, it is to be observed that no charge is made by the plaintiffs for the use of the destroyers by means of which the greater part of the sweeping operations were performed, and I think Mr. Aspinall admitted that—assuming his first objection to be untenable—the plaintiff would be entitled to charge as if the sweeping had been done by the tugs. At all events, I am of that opinion. On this question I asked the merchants whether or no—assuming that they were entitled to be treated as if the tugs had been employed in sweeping — the plaintiffs employed more vessels or incurred greater expense than would have been employed or incurred by a prudent uninsured owner who knew that he would have to defray the cost out of his own pocket and not out of public funds? They answered this question in the negative. They further advised me that the rates charged for the different vessels were reasonable. Upon these answers I have allowed item 2 as claimed.

Item 9. I was of opinion that this claim should be disallowed. It was contended on behalf of the plaintiffs

that the payment of these pensions was part of the damages sustained by them and was recoverable as one of the natural consequences of the collision. On the other hand, it was argued that it was not a consequence of the collision, but of the contract of service under which the deceased men were serving. I think the latter is the right view. If I am wrong in this, I am still of opinion that the claim must fail. It is said that once it is granted that this item of damage is consequent upon the collision, it follows that it is recoverable although it may be a claim to recover damages for a pecuniary loss occasioned by the death of another person. I find it difficult to distinguish between this and a claim by an insurance company which has insured a person against death by accident, and has paid the amount insured. At common law—which is the only law the plaintiffs can rely upon—an action to recover such damages is a personal action, and the right to bring it expires with the deceased person. In other words, in the eye of the law no one other than the person killed can by the latter's death suffer damage which is capable of being compensated by means of an action against the wrong doer. I am of opinion that the right to recover damages, consequential or otherwise, is limited to those damages which in their essential nature are recognised by the law and that these are not so recognised. The case of *The Annie* (11 Asp. Mar. Law Cas. 213; (1909) P. 176) was relied on by Mr. Laing, but I do not think it assists the plaintiffs. In that case, the learned judge found that the death was the natural consequence of the collision, and, that being so, the liability of the defendants followed by virtue of the provisions of sect. 6 of the Workmen's Compensation Act 1906, read in conjunction with the third paragraph of sect. 13. The plaintiffs, however, cannot take advantage of that statute, as they are expressly excluded from its benefits by sect. 9. I am of opinion, therefore, that this item must be disallowed, but as I have been asked to assess it with a view to saving expense in the case of a successful appeal, I have with the assistance of the merchants considered the amount which should be allowed. We accept Mr. Mackenzie's evidence as to the right method of calculation by which the capital amount should be ascertained, but considered the 3 per cent. basis adopted by the plaintiffs as the correct basis. As regards the contingencies mentioned by Mr. Mackenzie, we have deducted 10 per cent., being of opinion that the percentage suggested by him was too great. The sum which (if any) the plaintiffs are entitled to recover we assess at 4100*l*. I think the plaintiffs are entitled to their costs except those incurred in preparing and putting forward the claim under item 9, and that the defendants are entitled to the costs incurred by them by reason of that item having been included in the claim.

On the 6th Sept. the plaintiffs delivered a notice of motion asking that the report should not be confirmed and asking for an order that item 9 should be allowed at the sum assessed by the assistant registrar—4100*l*.

On the 16th Sept. the defendants delivered a notice of motion asking that the report should not be confirmed in so far as it related to items 1 and 2 of the claim, on the grounds that 26,500*l*. allowed in respect of item 1 was excessive, and that the amount charged and recovered in respect of item 2 was unreasonable, the number of tugs employed being unreasonable, and the charges made for them too high.

The *Attorney-General* (Sir *John Simon*, K.C), *Laing*, K.C., and *C. R. Dunlop* for the plaintiffs. —In disallowing the item in respect of pensions and grants the assistant registrar was wrong. The defendants' contention that the payment of the pension was optional on the part of the plaintiffs is immaterial, and the fact that the relatives of the deceased sailors have been paid by the defendants under Lord Campbell's Act does not affect the present claim. These pensions are always granted by the Admiralty, for although they cannot be claimed as of right, when the men lose their lives on what is considered to be active service, the pensions are in fact always paid. The Admiralty are not being generous at the expense of the defendants, and the claim should not be disallowed merely because it arises out of a debt of honour. The maxim *actio personalis moritur cum persona* does not apply to a claim of this sort, for although at common law a claim in respect of tort *qua* the deceased dies with him this claim is made not as standing in the shoes of the deceased, but as an independent matter altogether. It is a claim for damages for negligence, not based on the loss of service, but because owing to the defendants' negligence it follows, as the natural consequence, that the dependents of the deceased sailors have to be compensated. It has been held that a husband can recover damages because through the defendants' negligence his wife has died from eating unwholesome food, the death being merely an element in ascertaining the damages and not an essential part of the cause of action, which was for breach of warranty:

Jackson v. *Watson and Sons*, 100 L. T. Rep. 799; (1909) 2 K. B. 193.

This distinguishes the claim from cases in which expenses, occasioned solely by reason of the death —*e.g.*, funeral expenses—have been disallowed:

Osborn v. *Gillett*, 28 L. T. Rep. 197; L. Rep. 8 Ex. 88;
Clark v. *London General Omnibus Company*, 95 L. T. Rep. 435; (1906) 2 K. B. 648.

This is not a claim under Lord Campbell's Act, but it is based on the common law which, it is submitted, supports it. As regards the point that this is a claim which cannot be brought in an Admiralty action *in rem*, sect. 5 of the Maritime Conventions Act 1911 directly confers jurisdiction *in rem* over claims for loss of life and abolishes the technicalities which existed under the former law as to such claims not being damage "done by a ship"; (see Admiralty Court Act 1861, s. 7). They also referred to

The Annie, 100 L. T. Rep. 415; 11 Asp. Mar. Law Cas. 213; (1909) P. 176;
The Circe, 93 L. T. Rep. 640; 10 Asp. Mar. Law Cas. 149; (1906) P. 1.

Aspinall, K.C., *Bateson*, K.C., and *Arthur Pritchard* for the defendants.—The plaintiffs have no cause of action in respect of these pensions and grants, for no loss or liability due to the killing of a person is recoverable in a case of tort. The death may cause a loss, but it is not an *injuria* which *per se* gives a right of action either at common law or under Lord Campbell's Act:

Baker v. *Bolton*, 1 Camp. 493;
Osborn v. *Gillett* (*ubi sup.*);
Clark v. *London General Omnibus Company* (*ubi sup.*).

Assuming there is a cause of action owing to the death of these persons, there was no legal liability attaching to the Admiralty to grant the pensions, and therefore they cannot recover from the defendants the amounts thus gratuitously paid:

Dixon v. *Bell*, 1 Stark. 287; 5 M. & S. 198.

No such claim as the present has ever come before the court, and there are numerous cases in which various expenses have been incurred which have been held not to be recoverable: (see *Simpson* v. *Thomson*, 38 L. T. Rep. 1; 3 App. Cas. 279, and the instances there cited). The claim is bad also on the ground that the damage is too remote :

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

In any event this claim cannot be brought as an Admiralty action *in rem.* Sect. 5 of the Maritime Conventions Act 1911 deals with claims in respect of loss of life, and this is not, on the plaintiffs' own argument, a claim in respect of loss of life, but an independent claim altogether over which the court would have no jurisdiction *in rem* apart from the Maritime Conventions Act

The Vera Cruz, 52 L. T. 474; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. 59.

The *Attorney-General* in reply.

The cross-appeal by the defendants as to items 1 and 2 merely raised questions of fact, and the arguments were directed solely to the evidence given in support of them on the hearing before the assistant registrar.

Dec. 18, 1913.—The PRESIDENT.—These are motions to vary the report of the assistant registrar upon an inquiry as to damages arising out of a collision between the steamer *Amerika* and the British submarine *B*2. The collision took place in the early morning of the 4th Oct. 1912, some few miles off Dover. Shortly after the collision an action was brought by the commissioners for executing the office of Lord High Admiral of the United Kingdom, as plaintiffs, against the owners of the steamship *Amerika*, as defendants.

Before the date fixed for the hearing was reached, the defendants, by agreement dated the 10th Dec. 1912, admitted that their steamship *Amerika* was alone to blame for the collision; acknowledged in express terms that those on board the submarine were not to blame; and submitted to judgments being entered against them, and agreed to pay 95 per cent. of the plaintiffs' claim, which was referred to the registrar and merchants for assessment. The reference was duly held, and the assistant registrar has reported his finding to the court.

The motions are made by plaintiffs and defendants to vary his report in respect of three items. The defendants ask for variation in respect of items 1 and 2; and the plaintiffs in respect of item 9. The items are: Item 1. Value of the hull, machinery, and electric fittings and batteries of the *B*2 at the time of her loss, which was claimed at 35,000*l.*, and allowed at 26,500*l.* Item 2. Expenses of searching for, finding and examining the wreck, which was claimed at 1286*l.* 3*s.* 10*d.*, and allowed as claimed; and Item 9. Capitalised amount of pensions and grants paid or payable by the plaintiffs to the relatives of the crew who were drowned, which was claimed at 5140*l.* 18*s.* 6*d.*, and which was totally disallowed.

As to items 1 and 2, no question of principle arises; the sole question is as to the amounts.

As to item 1, the assistant registrar reports as follows: [His Lordship read the report (*sup.*), and continued:] I am of opinion that on the evidence, and upon the conclusions stated by the assistant registrar to have been arrived at by him and the merchants, a sufficient deduction has not been made, and that the sum allowed should be reduced from 26,500*l.* to 23,850*l.* As to item No. 2, the only part of the 1286*l* 3*s.* 10*d.* which was disputed by the defendants was a sum of about 840*l.* claimed and allowed for the use of some Admiralty tugs. Upon the evidence, and having regard to the fact that the assistant registrar had the advantage of the assistance of experienced merchants as assessors, I see no reason why this sum should be altered, and, accordingly, the total amount of 1286*l.* 3*s.* 10*d.* allowed on item No. 2 will stand.

The only conflict upon a matter of principle arising between the parties is on item 9, and the principle in question is one of public interest and importance. The claim was, as stated, for a sum of 5140*l.* 18*s.* 6*d.*, said to represent the "capitalised amount of pensions and grants paid or payable by the plaintiffs to the relatives of the crew of the submarine who were drowned." The assistant registrar disallowed the whole of this claim, on the ground that it was not recoverable in law; but in case it should be held that the plaintiffs were entitled to recover something, he assessed the proper amount at 4100*l.*

It is essential at the outset to ascertain the exact position in which the plaintiffs (whom for the sake of brevity I shall now designate as the Admiralty) stand with reference to these "pensions and grants," or as they ought to be called, "pensions to widows and compassionate allowances to children or relatives." They are granted under statutory authority according to scales authorised by the Privy Council and prescribed by the King's Regulations. The King's Regulations produced to me as applicable were those of 1911. Chapter LIIIA. (at page 496) contains various sections, some of which are as follows:—Sect. I.—Widows of naval officers. Sect. IV.—Children of officers: Compassionate allowances. Sect. V.—Mothers and sisters of officers. Sect. VII.—Pensions, &c., to relatives of men killed on duty.

In these sections will be found, amongst others, these clauses:—Section I.—"1974A.—Widows of officers of the Royal Navy, and of the Royal Marines, subject to the regulations contained in this chapter, may be allowed pensions, and their children compassionate allowances, at the rate specified in appendix XVIIIA." "1975A.—The pensions authorised by these regulations cannot be claimed as a right. They are granted as rewards for good and faithful service rendered by deceased officers; they will only be conferred on persons deserving the public bounty; the ordinary pension will not be granted to widows whose private incomes exceed the confidential scale which may from time to time be fixed by the Admiralty as the limit for each rank of officer; and the pensions are liable to be discontinued altogether, in case of any misconduct rendering the individuals receiving them unworthy of the public bounty." "1982A.—The pensions of widows whose private incomes, after their pensions have been awarded, may increase beyond the limit fixed from time to time by the Admiralty for the rank last held by their husbands, shall be suspended so long as their private incomes exceed such limit, but may

be restored again in the event of their private incomes decreasing within the limit." "1984A.—In all cases of a widow re-marrying, her pension shall be suspended from the date of her re-marriage; but, in the event of her again becoming a widow, her pension may be restored upon proof being adduced to the Admiralty that her private income does not exceed the limit fixed from time to time by the Admiralty for the rank last held by her husband, and that she is otherwise deserving the public bounty, but it will be again liable to suspension during future re-marriage." 1985A: If a widow should, in consequence of re-marriage with a naval or marine officer, become again eligible for a pension from naval funds, she may either revert to her first pension, or be granted the pension for which her second marriage rendered her eligible, whichever is most to her advantage." "Section IV.—1996A — 1. Allowances on the compassionate list to the legitimate children of deceased commissioned officers and commissioned warrant officers may be given in those cases in which the rank of the officer would render his widow eligible to be placed on the pension list, provided it be shown that the children have no other allowance, pension, or provision from the Government, except in the case of boys under the age of eighteen who may be serving as subordinate officers in the Navy, and that their pecuniary circumstances and those of their family are so limited that they actually require assistance from the compassionate fund. 2. The scale of compassionate allowances for children of officers is laid down in appendix XVIIIA., but motherless children who are not in receipt of more than 30*l*. a year from other sources may be granted allowances within a maximum of double the ordinary rates." "1997A.—All persons alluded to in art. 1998A who are in receipt of 30*l*. a year from other sources, or whose mothers have been refused pensions on account of private income, are considered ineligible for compassionate allowances in ordinary circumstances. In the case of motherless children, however, the private income limit is 45*l*." "1998A.—1. The allowances granted to the sons of officers may be continued until they attain the age of eighteen, or are otherwise previously provided for; and those to the daughters may be continued until they marry or attain the age of twenty-one whichever shall first happen, and no longer, except in very special cases in which, it shall be shown that sons or daughters are afflicted with any mental or bodily infirmity rendering them incapable of making any exertion for their own support, and that they are still in distressed circumstances, the allowances may be continued, or revived should any break of continuity have occurred. 2 These allowances may also be awarded to those special cases where the sons and daughters of officers, who were not in receipt of allowances when under age, are rendered incapable of making adequate exertion for their own support through infirmity dating from a period before the father's death, and before the sons and daughters reached the age at which, in ordinary circumstances, compassionate allowances would cease." "2011A.—Under the second section of Act 46 & 47 Vict. c. 32, pensions and allowances are granted by the Admiralty out of the funds of Greenwich Hospital to widows and children of: (*a*) Non-commissioned officers and petty officers and men of the Royal Navy and marines killed or drowned in the service of the Crown, or on lifeboat service." "5. If a widow re-marry, her pension will cease, and she will be eligible to receive a gratuity equal to one year's pension in full discharge of all claims upon the public bounty. Allowances to children may be continued." "6. Pensions and allowances are tenable subject to good behaviour, and are granted at the discretion of the Admiralty. They cannot be claimed as a right. Any assignment, sale, or contract relating to a pension or allowance is void." "13. Widows of petty officers and seamen of the Royal Navy and non-commissioned officers and privates of the Royal Marines specified in clauses 1 and 2, at the discretion of the Admiralty, may be allowed a gratuity equal to one year's full pay, according to the rating of their late husbands at the time of death, exclusive of any badges or other extra or additional pay, in lieu of the pensions to which they might be eligible under these regulations." "2012A.—In the event of men specified in clause 1 and 2 of art. 2011A not leaving widows or children, but leaving parents or other relatives dependent upon them, gratuities not exceeding one year's full wages may be given at the discretion of the Admiralty to such parents or relatives, provided the total expenditure in such gratuities shall not exceed in any one year the sum of 500*l*." The whole of the regulations can, of course, be referred to, but the above portions have been set out in order to exhibit the character of the pensions and allowances which may be awarded.

A list of pensions and allowances awarded by the Admiralty after the deaths of the officers and men killed on the submarine was produced before the assistant registrar, and a copy of it was shown to me. It can be shortly summarised. It shows that pensions were paid or payable to widows of officers and seamen for varying amounts; and that allowances were paid or payable to their children for varying amounts for periods of years varying from nine to sixteen years. One of such children was born after his father's death. It also shows that "lump sum allowances" for varying sums were given to fathers and mothers of some of the deceased.

Many questions arise as to whether the capitalised sums of such pensions and allowances can be recovered at law by the Admiralty against the defendants as part of the damages caused by the collision—*e.g.*: (1) Can the Admiralty recover any damages alleged to have been sustained by the Admiralty which were caused by, or which resulted from, the death of the deceased persons? (2) Can the Admiralty recover as damages any sums which could not be claimed against them by representatives or relatives of the deceased legally as of right, but which they pay gratuitously and in their discretion? (3) Are the capitalised amounts of the pensions and allowances damages which flow from the defendants' negligence in such a way as to render them recoverable in law? The answers to these questions, or some of them, will render it unnecessary to decide other minor questions which were raised as to the proceedings being *in rem*, or as to the payments already made by defendants to some representatives of the deceased under Lord Campbell's Act, and so forth.

It was contended for the defendants that none of these pensions or allowances or the capitalised sums said to represent them could be recovered by the Admiralty, on the ground that the claim was made in respect of the death of human beings, there being no statutory authority giving the plaintiffs any right of action in such a case. The ruling of Lord Ellenborough in *Baker* v. *Bolton* (*ubi sup.*) was relied upon in support of this contention. That ruling was that "In a civil court, the death of a human being cannot be complained of as an injury"—*i.e.*, as a legal or actionable injury. Unfavourable comments have been made upon this ruling, but after the decisions in *Osborn* v. *Gillett* (*ubi sup.*), the *Vera Cruz* (*ubi sup.*), *Clark* v. *London General Omnibus Company* (*ubi sup.*), and *Jackson* v. *Watson* (*ubi sup.*), that ruling, in its application to actions of tort, cannot be questioned unless and until those decisions are reviewed and reversed by the final judicial tribunal of this country. That rule of law has been adopted as part of the common law by the Supreme Court of the United States (whose decisions are treated with the greatest respect by our courts) in the *Harrisburg* (119 U. S. Rep. [12 Davis] 199), and in the Supreme Court of the Dominion of Canada, in *Monaghan* v. *Horn* (7 Can. S.C.R. 409).

The Harrisburg (*ubi sup.*) was a case of a suit in Admiralty; the authorities upon the subject up to that time in America, and in this country, were there fully dealt with, and the decision of the Supreme Court of the United States was that "in the absence of any statute giving the right, a suit in Admiralty" (which was dealt with on the same principles as an action at common law) "cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or in waters navigable from the sea, which is caused by negligence."

In the case of *Jackson* v. *Watson* (*ubi sup.*) this ruling was encroached upon, where the cause of action was under a contract, and where the action was in contract, the death being treated only as an element in the damages; but by that very decision the validity of the rule of law in cases of tort for negligence was emphasised. Vaughan Williams, L.J., in the concluding sentence of his judgment, says that the rule "only applies to cases where the cause of action is the wrong which caused the death, and does not apply to cases where there is a cause of action independently of such wrong."

The Attorney-General relied upon the passage in Vaughan Williams, L.J.'s judgment at the foot of p. 201 of (1909) 2 K. B. as showing that there is a difference between the cases where the death of a human being is part of the cause of action, and the cases where the death is only an element in the damages; and argued that the deaths in the case now before the court only constituted an element in the damages. But the death of the officers and men of the submarine is not only a part of the cause of action, but is the cause of action upon which the Admiralty must rely to found their claim for damages in respect of the pensions and allowances which they are paying or may pay. In an action for breach of contract, although there is no actual loss, a plaintiff is entitled to some damages, if only nominal. But, as is pointed out by Farwell, L.J. in *Jackson* v. *Watson* (*ubi sup.*): "In an action in tort for negligence the damages are of the essence of the action. Negligence *per se* gives no cause of action; the cause of action arises when the negligent act has resulted in damage to the plaintiff." Bowen, L.J. states the law concisely in *The Vera Cruz* (*ubi sup.*): "The killing of the deceased *per se* gives no right of action at all, either at law or under Lord Campbell's Act."

The Attorney-General put forward in his argument in the present case, but not with much emphasis or elaboration, that the cause of action accruing to the Admiralty as plaintiffs was the negligence in striking the submarine, and not in directly causing the deaths of the deceased.

But upon the present head of damages the negligence alleged is and must be, causing the death of deceased, and thereby inflicting damage upon the Admiralty by reason of the death. It makes no difference that the tort also caused other injury to the plaintiffs by the destruction of their property and otherwise. The case is the same as if the Admiralty claimed only these damages in the action. It might have happened that by reason of the negligent navigation of the *Amerika*, officers or seamen on the submarine might have been killed without the submarine itself being touched, *e.g.*, by their being struck by the bowsprit or some other projecting part of the steamer. The cause of action must be the negligence (whatever form it may take) plus the death; and where negligence causes death, no one, except under some statute, like Lord Campbell's Act, suffers an actionable wrong by the death. In the case of some of the deceased, their relatives, no doubt, could, if within the category specified in Lord Campbell's Act, have brought actions against the defendants. Some of such relatives made claims against the defendants, which the defendants discharged. But it may very well have been that there were other relatives not within the category who may have suffered loss by the deaths, and it is clear they would have no right of action. Moreover, other persons entirely unconnected with the submarine, but connected by contract or otherwise with the deceased persons, might show a pecuniary loss through their death, but they would be devoid of any legal remedy.

There was an action in this court a few years ago in which the facts were in some respects similar to those in the present case—viz., the *Circe* (*ubi sup.*). There the plaintiffs had paid sums to representatives of seamen who were killed in a collision, which they were compelled to pay by Spanish law, and they claimed to include them in their damages against the owners of the delinquent vessel. The decision is not an authority upon the question now raised; but there are certain passages in the judgment of the President, Sir Gorell Barnes, which may be referred to. At p. 8 of (1906) P. and p. 151 of 10 Asp Mar. Law. Cas. he said: "The class of claim which apparently has been paid by the owners of the Spanish ship is not a class of claim which could be made or recognised by English law. If the claim had been made against an English ship by the representatives of persons drowned in consequence of a collision in which the ship they were on was concerned, and there was no fault on the part of the ship, then they would have no claim against the owners; but if there was fault

for which the persons drowned were not individually responsible, still, according to the doctrine of common employment, their representatives would have no remedy against the owners of that ship. Therefore the position of persons who could make a claim at all would be this—they could only make a claim against the owners of the vessel which came into collision with the vessel on which the parties drowned were. Now, if a claim could be made against the other vessel it would be made by virtue of Lord Campbell's Act." And at p. 13 of (1906) P. and p. 152 of 10 Asp. Mar. Law Cas. he said: "If one, therefore, turns to the present claim, in the first place it is a claim which is not for damages in the true sense. It is merely a claim under a foreign statute by the owners of the ship, which appears to be made independently of any question of negligence. It appears to be made because by an Act, which is somewhat analogous to the Workmen's Compensation Act, certain obligations are imposed upon the owners of the ship, which obligations are independent, it seems to me, of the question whether there was any blame or not on the part of those in charge of that ship. Then, again, if one passed from that point and were to treat the claim as damages, which could be recovered against any ship in fault, possibly they might make a claim out against their own ship, if the master was in fault, according to foreign law, and perhaps in this country; but then that would still not be a claim for damages such as could be made in the Admiralty Court, to which the division of loss rule applies." But if the claim now being considered is a good one, the plaintiffs in *The Circe* (*ubi sup.*) would have been entitled to recover as damages the sum they had paid, and no one in that case put the claim forward in this form. I may observe that Sir Gorell Barnes, who decided *The Circe* (*ubi sup.*), was also a party to the decision in the Court of Appeal of *Clark* v. *London General Omnibus Company* (*ubi sup.*).

Before leaving this branch of the case, I may call attention to the fact that if this were a case where an owner of a merchant ship has paid, under compulsion of law in accordance with the Workmen's Compensation Act 1907, compensation to dependents of seamen in his employ who were killed in a collision caused by negligence for which another ship was to blame, it seems to have been thought necessary by the Legislature to provide expressly by sect. 6 of the Act, that he should have a right over against the owners of the negligent ship in respect of the compensation so paid. In my judgment, according to our law as it now stands, the plaintiffs have no legal right to recover under this head any of the damages which they claim and which they allege they sustained by reason of the negligence of the defendants and the deaths of the deceased.

Upon the second main question there is no clear authority and only one was cited—viz, *Dixon* v. *Bell* (*ubi sup.*). The King's Regulations show clearly that the pensions and allowances and gratuities are not granted as of right, and could not be legally demanded. No doubt the Admiralty are in every sense, except the strictly legal sense, bound to pay, but still they have a wide discretion in various respects. A private employer might be under an equally solemn promise to provide for widow or children of a faithful servant, but if the servant were killed by the tort of another, even if by law he could sue (which he cannot), in my opinion the employer could not recover against the tortfeasor sums which he only paid, or intended to pay, gratuitously. The law does not permit a person to be generous at the expense of another. In my judgment these pensions and allowances awarded by the Admiralty by express terms as of grace, cannot in any event be claimed as damages against a third person.

As to the last main point—viz, whether if any damages could be recovered in respect of the death of deceased the pensions, &c., and their capitalised sums are too remote—I will only say a few words. I have dealt somewhat fully in a recent case, *H.M.S. London* (12 Asp. Mar. Law Cas. 405; 109 L. T. Rep. 960; (1914) P. 72), with questions relating to remoteness of damage, and I will not repeat what I then said. I have here pointed out that there was no legal obligation upon the Admiralty to pay the pensions and allowances, but even if there were, in my opinion there would be a great difficulty in the way of the Admiralty's recovering, because there was no duty owed by the defendants to them with regard to any contract entered into by them with persons in their employment, which contract was entirely unconnected with the particular property of the plaintiffs which was injured by the defendants, and upon which the employees for the time being happened to be. What I mean by this was the contract with the Admiralty was not a contract in respect of submarine *B2*, because they could be transferred at any time from that vessel to some other vessel: (see *Insurance Company* v. *Brame*, 95 U. S., at p. 758; and cf. *Cattle* v. *Stockton Waterworks Company*, 33 L. T. Rep. 475; L. Rep. 10 Q. B. 453).

Moreover, the King's regulations show in how many ways pensions and allowances might be suspended, reduced, forfeited, and so forth; and having regard to that fact, I should hold if it were necessary that the damages are altogether too speculative and uncertain. And on this ground, and on the ground that the payments depend upon separate arrangements, not contractual made between the plaintiffs and other persons towards whom the defendants have no duty in respect of such arrangements that the damages are in any event too remote to be recovered at law. I am of opinion, therefore, that the Admiralty have failed to make out this part of their claim. Upon the motions the order I make is that, as to item No. 1, the report of the learned assistant registrar be varied by reducing the sum allowed from 26,500*l.* to 23,850*l.*, and subject to this variation, his order be confirmed. The plaintiffs must pay to the defendants the the costs of these motions.

Solicitors for the Admiralty, *Treasury Solicitor.*

Solicitors for the Hamburg-Amerika Line, *Pritchard* and *Sons.*

Tuesday, Dec. 2, 1913.

(Before Sir S. T. EVANS, President, and BARGRAVE DEANE, J., and Elder Brethren.)

THE LLANELLY. (a)

Collision—Steamship entering the river Mersey from dock—Duty to steamships in the river—Crossing vessels — Good seamanship—Mersey Rules. art. 1 — *Collision Regulations* 1897, *arts.* 19, 27, 29.

Art. 19 *of the Collision Regulations applies in the Mersey in all fit and proper cases, but there may be circumstances in which the rules of good seamanship may displace its application.*

A steamship leaving dock and entering the Mersey sighted another on the port bow coming up the river. The steamship coming up the river had her starboard side open to the steamship entering the river. The steamship coming up the river sounded two short blasts and starboarded until shortly before the collision, when she reversed. The vessel entering the river kept her course and speed and then ported.

In an action for damage brought in the County Court, it was held that the steamship entering the river from dock was alone to blame as art. 19 *of the collision regulations did not apply, and that instead of keeping her course and speed she should have waited in the dock entrance until the upcoming steamship had passed. On appeal to the Divisional Court:*

Held, that art. 19 *did not apply in the circumstances and that both vessels were to blame, the steamship coming up the river for continuing to starboard when she knew the vessel entering the river was porting, and for not reversing sooner; and the vessel entering the river for not waiting in the dock mouth till the steamship coming up had passed.*

The Sunlight (90 *L. T. Rep.* 32; 9 *Asp. Mar. Law Cas.* 509; (1904) *P.* 100) *considered.*

DAMAGE ACTION.

Appeal from a decision of the County Court judge, at Liverpool, holding the appellants' vessel, the *Llanelly*, alone to blame for a collision with the *Deloraine.*

The collision occurred between the vessels while the *Deloraine* was proceeding up the river Mersey on a southerly course and the *Llanelly* was entering the river from the Alfred Dock, Birkenhead, heading to the east; the *Deloraine* thus had the *Llanelly* on her starboard side, while the *Llanelly* had the *Deloraine* on her port side.

The case made by the *Deloraine* in the court below was that about 5.45 p.m. on Feb. 13, 1913, the *Deloraine* was proceeding up the river Mersey, about 700ft. outside the Seacombe landing stage, making four to five knots over the ground, the tide being ebb of the force of three to four knots. When the *Deloraine* was a little to the southward of the Seacombe landing stage the *Llanelly* was observed on the starboard bow, about 350 yards off, leaving the Alfred Dock entrance proceeding into the river. Two short blasts were sounded on the whistle of the *Deloraine*, and her helm was starboarded. As the *Llanelly* appeared to be swinging under a port helm, two blasts were again sounded on the *Deloraine's* whistle, but the *Llanelly* fell to the northward under the influence of the ebb tide.

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

Accordingly, the engines of the *Deloraine* were put full astern and three short blasts were sounded on her whistle, but the *Llanelly* coming on struck with her port quarter the stem and starboard bow of the *Deloraine*, doing considerable damage.

Those on the *Deloraine* charged those on the *Llanelly* with bad look-out, with proceeding from the dock at an improper time, and with not starboarding when the *Deloraine* gave the two blast signals.

The case made by the *Llanelly* was that about 5.45 p.m. the *Llanelly* left the Alfred Dock in accordance with orders from the dock official in charge. The tide was ebb, of the force of three to four knots. A long blast was blown on the *Llanelly's* whistle on leaving the dock. The *Llanelly*, heading about E. ½ N., with her engines at full speed, making about five to six knots, got clear of the pier heads, when those on board her saw the masthead and green lights of the *Deloraine* about abreast of Seacombe stage, about 2000ft. off, and about five points on the port bow. The whistle of the *Llanelly* was again blown a long warning blast, which was answered by two short blasts from the *Deloraine.* The *Llanelly* replied with another long blast, and, keeping her course and speed, would have passed well clear ahead of the *Deloraine*, but that vessel coming on at undiminished speed and under starboard helm altered her course to port, causing the collision. When close to the *Llanelly*, the *Deloraine* blew three short blasts and reduced her headway, but immediately afterwards struck the port quarter of the *Llanelly* with her stem, doing damage.

Those on the *Llanelly* charged those on the *Deloraine* with improperly starboarding, failing to port, failing to stop, trying to cross ahead of the *Llanelly*, and failing to keep a good look-out, and counter-claimed for the damage done to the *Llanelly*.

The case was tried on Oct. 30 when the following judgment was delivered.

The court finds that when the *Deloraine* was proceeding up the river at a speed of three to four knots over the ground, the tide being ebb, running three to four knots, and having arrived at a position half-way between Seacombe stage and the Alfred Dock entrance, having passed the stage at a distance of about 500 ft., she observed the *Llanelly* with her port light showing, coming out of one of the Alfred Dock locks. Other vessels the *Helge* and *Sphene* were coming up the river to the east of the *Deloraine* slightly astern of her. Upon seeing the *Llanelly*, the *Helge* blew two short blasts, and immediately this was followed by two short blasts from the *Deloraine* who in accordance therewith starboarded her helm. The *Llanelly* answered with one short blast, indicating that she was directing her course to starboard. These signals were replied to by the *Helge* and the *Deloraine*, and were followed, when the *Llanelly* continued to approach the *Deloraine*, by three short blasts from the *Deloraine*, indicating that her engines were going astern. The collision occurred almost immediately, the *Deloraine's* stem coming in contact with the port quarter or the *Llanelly*. The two vessels were then about 1000ft. out from the Alfred Dock entrance, but abreast of the north side of the entrance. The court is of opinion that rule 19 of the collision regulations does not apply. The master of the *Llanelly* when he observed, as he was able to do and did do, the *Deloraine* and the other two vessels proceeding up the river off Seacombe stage was negligent in proceeding into the river and in attempting to cross the bows of

the *Deloraine*. There was nothing to prevent him from remaining in the bell mouth until the *Deloraine* had passed. The court finds that the *Deloraine* was navigated in a seamanlike manner. The court finds the *Llanelly* alone to blame.

On the 5th Nov. the owners of the *Llanelly* gave notice of appeal.

The appeal came on for hearing on the 2nd Dec.

Bateson, K.C. and *Noad* for the appellants, the owners of the *Llanelly*.—The Mersey Rules apply the sea regulations to vessels navigating the Mersey, so art. 19 of the collision regulations is applicable and the duty of the *Deloraine* was to keep clear and not to cross ahead, and the duty of the *Llanelly* was to keep her course and speed. There was no risk of collision when the vessels sighted one another. If the *Deloraine* had not starboarded there would have been no collision. The facts in *The Sunlight* (*ubi sup.*) are distinguishable and that case is not an authority for the principle contended for that art. 19 does not apply to a vessel coming out of dock.

Laing K.C. and *Maxwell* for the respondents, the owners of the *Deloraine*.—Art. 19 has no application to this case; it is governed by the rules of good seamanship. The vessel coming up the river cannot know what the vessel coming out of dock is going to do and cannot manœuvre for her. The vessels coming out of dock should therefore stop. Art. 19 only applies when the vessel coming out of dock has got on to her course. Even if art. 19 does apply there are special circumstances in this case and art. 27 therefore authorises a departure from the rule, the circumstances rendered a departure from the rules necessary, the case is governed by art. 29 and the judgment below is right.

Art. 1 of the Mersey Rules is as follows:

1. Every vessel, of whatever description, used in navigation, when in any part of the river Mersey, or in the sea channels, or approaches thereto as above defined shall, on and after the 17th day of September 1900, observe and obey the "regulations for preventing collisions at sea" made in pursuance of the Merchant Shipping Act 1894, hereinafter called the "General Regulations" which may from time to time be in force, with the exceptions and additions mentioned in the following rules.

The material collision regulations are as follows:

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.

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 PRESIDENT.—This case was very carefully tried by the learned County Court judge, and he gave an admirably clear judgment—and it is none the less clear because it is brief. I see no reason at all to differ from the findings of fact arrived at by the learned judge in the court below. He had all the witnesses before him, and this court, although it has the power to arrive at different conclusions of fact upon the evidence, is very slow to do so. In this case I see no reason at all to differ from the learned judge in the conclusions at which he has arrived on the facts.

The question is whether the learned judge has properly applied the law. I am not going to detail the facts. They are fairly simple. He has found the *Llanelly* to blame for negligence in proceeding into the river and attempting to cross the bows of the *Deloraine*, when there was nothing to prevent those in charge of the former vessel "from remaining in the bell mouth until the *Deloraine* had passed." With those findings I entirely agree, and therefore the learned judge, in my opinion, was perfectly right in holding that blame was attachable to the *Llanelly*.

In order to consider the conduct of the other vessel I will just state quite briefly what risks the *Llanelly* was causing. She was coming out from dock, and according to her own evidence and upon the undisputed facts she had seen lower down the river three vessels, one being the *Deloraine* the nearest of the three. In coming out of dock a vessel ought to navigate with the greatest possible caution. So far from being cautious, this vessel proceeded, at such speed as she could attain in the circumstances, to cross ahead not only of the *Deloraine* but of the *Helge* and of the *Sphene*, the vessels further away. In these circumstances these three vessels had to do something, they were driven to do something, and did do something, and the question is, so far as the *Deloraine* is concerned, whether she did that which was right. The first thing done on these three vessels, the starboard-helm signal having been given, was to starboard. I do not think—and the Elder Brethren who are assisting us agree in this—that at that stage the order to starboard given by the *Deloraine* was a wrong order. I think her master might very well have said to himself that the *Llanelly* must be going to do something to avoid the risks caused by conduct so faulty, and that he would give her more room by starboarding; and it is to be observed that the same thing was done by the other two vessels. At this stage the *Helge* and the *Sphene* fall out of the story.

Now comes the further question whether the *Deloraine* was in fault for anything which she did or for anything which she omitted to do afterwards. The finding of the learned judge is clear that the two-blast signal was repeated from the *Deloraine* after the port-helm signal of the *Llanelly* was given. That is contrary to the evidence of the master, but it is in accordance with the evidence af the pilot called from the *Helge*, and therefore the learned County Court judge was amply justified in finding that the repetition of the two-blast signal was after the port-helm signal was heard from the *Llanelly*. That means that the *Deloraine* determined upon a course which might bring her into collision. Certainly, before determining to continue on her starboard helm she ought, in my opinion, to have reversed her engines. That she reversed her engines pretty late follows from the findings as stated in the judgment:—"These signals were replied to by the *Helge* and *Deloraine*, and were followed, when the *Llanelly* continued to approach

the *Deloraine*"—translated, that means they were getting into pretty close quarters—"by three short blasts from the *Deloraine*, indicating that her engines were going astern. The collision occurred almost immediately."

I have come to the conclusion, therefore, that there was some blame to be attached to the *Deloraine* for continuing to starboard and for not easing her engines as the other vessels did, and not reversing earlier than she did.

I only want to say one word more with regard to the argument that art. 19 of the Regulations for Preventing Collisions at Sea does not apply in the Mersey. I want it to be clearly understood that the rule does apply in the Mersey in all fit and proper cases. There comes a time in the manœuvres of a vessel coming out of dock when that rule would attach. There is a time, also, in my opinion, up to which, in the course of these manœuvres, it is impossible to apply the rule. Some instances have been given in argument by counsel for the respondents to-day; but it is sufficient for me to say, for the purposes of this case, without the slightest desire to weaken or undermine the force, authority, and efficiency of the rule in the Mersey, it is not rule 19 we have to apply in this case, but the rules of good seamanship. Our decision is that in part this appeal succeeds.

We find that the main portion of the blame lies with the *Llanelly*, the vessel coming out of dock; but blame in some degree also rests upon the other vessel—not in an equal degree because she was put in the position in which she was by the initial bad seamanship of the *Llanelly*. We hold the *Llanelly* three-fourths to blame and the *Deloraine* one-fourth.

BARGRAVE DEANE, J.—I am entirely of the same opinion. I am particularly anxious not to displace the judgment of Bucknill, J. in *The Sunlight* (*ubi sup.*), but at the same time not to allow it to be thought of universal application that art. 19 is never to apply to vessels coming out of dock. As my lord has said, perhaps initially when a vessel is seen coming out of dock, and if the vessels are very close, the rule cannot be made to apply; but it is to be taken to apply unless the circumstances displace its application.

The appeal will be allowed without costs here or below.

Solicitors for the appellants, *Batesons, Warr, and Wimshurst*, Liverpool.

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

Jan. 28, 29, *and* 30, 1914.

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

THE APE. (a)

Collision—Compulsory pilot—Duty of crew to assist pilot—Liability of owners for damage.

The plea of compulsory pilotage will not be upheld if the pilot does not receive proper support and assistance from the crew.

In a collision action where both vessels were to blame for speed in fog, it was held by Bargrave Deane, J. that where reports in a foreign tongue were made from forward to the bridge to which a pilot paid no attention, it was the duty of the crew to see that the pilot understood the reports, and to point out to him that by continuing at speed he was committing a breach of the collision regulations.

DAMAGE ACTION.

The plaintiffs were the owners of the Swedish steamship *Falka*; the defendants and counter-claimants were the owners of the steamship *Ape*.

The case made by the plaintiffs was that shortly before 7.2 a.m. on the 9th Oct. 1912 the *Falka*, a steel screw steamship of 1704 tons net register, 260ft. in length, belonging to the port of Malmo, in Sweden, whilst on a voyage from Riga to Grimsby laden with timber, was in the river Humber in charge of a duly licensed compulsory pilot about two miles above the Bull Light vessel on a course of N.W. ¼ W. magnetic, just keeping steerage way. The weather at such time was thick with fog, there was no wind, and the tide was about half ebb of unknown force. The whistle of the *Falka* was being duly sounded for fog, and a good look-out was being kept on board her. In these circumstances, several whistles having been heard further up the river, a long blast was distinguished on the starboard bow, a long blast was at once sounded in reply, and the engines of the *Falka* were stopped. Shortly afterwards a vessel loomed up through the fog, about quarter of a mile distant, bearing about a point on the starboard bow; two short blasts were at once sounded on the whistle of the *Falka*, but the vessel, which proved to be the *Ape*, blew a short blast and, porting her helm, attempted to cross the bows of the *Falka*. The engines of the *Falka* were immediately put full speed astern and three short blasts were blown on her whistle, but the *Ape* came on at considerable speed and with her port side struck the stem of the *Falka* doing so much damage that the *Falka* had to be beached to prevent her sinking.

Those on the *Falka* charged those on the *Ape* with bad look-out, excessive speed in the fog, porting when the vessels were starboard to starboard, failing to slacken their speed or stop and reverse, and failing to keep to their own starboard side of the channel.

The case made by the defendants and counter-claimants was that shortly before 7 a.m. on the 9th Oct. 1912 the *Ape*, a steel screw steamship of the port of Yarmouth, of 466 tons gross, 194 tons net register, 175ft. in length, manned by a crew of eleven hands all told was proceeding down the river Humber between the Middle and Bull Lightships in the course of a voyage from Hull to Yarmouth with a cargo of general goods. The weather was hazy, the wind south-easterly light, and the tide half ebb of the force of about two knots. The *Ape* keeping on her starboard side of the channel was steering a course of S.E. ¼ E. magnetic and making about eight and a half knots. Her regulation masthead, additional masthead, side, and stern lights were duly exhibited and were burning brightly, and a good look-out was being kept on board her. In these circumstances those on the *Ape* saw a little over a mile off and bearing about half a point on the port bow the masthead light of the *Falka*, and directly after she was sighted she was heard to sound a long blast on her whistle, which signal she quickly

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

repeated on two occasions. The whistle of the *Ape* was sounded a long blast in answer to each of the said signals, and directly afterwards the red light of the *Falka* was seen, and about the same time a signal which was taken to be a short blast was heard from that steamship. The helm of the *Ape* was thereupon ported a little and her whistle was sounded a short blast, and about the same time her engines were stopped on account of the smoke which was coming from several steam drifters proceeding down the river, the nearest of which was slightly on the starboard bow of the *Ape*. The *Falka* then sounded another short blast on her whistle which was immediately answered by a short blast on the whistle of the *Ape*, and the vessels approached each other in direction to pass clear port side to port side until the *Falka* at a short distance from the *Ape* sounded two short blasts, on her whistle, and commenced to swing as if under starboard helm. The whistle of the *Ape* was at once sounded one short blast, and her engines were put full speed astern, but the *Falka* came on at great speed, and with her stem and port bow struck the port side of the *Ape* in the way of the fore hatch a severe blow causing her so much damage that she began to make water rapidly, and would have sunk in deep water if she had not been run ashore on the Lincolnshire side of the river where she became submerged at high water. Just before the collision three short blasts were heard from the *Falka*.

Those on the *Ape* charged those on the *Falka* with bad look out, neglecting to pass port side to port side, improperly starboarding, neglecting to keep on their starboard side of the channel, and neglecting to ease, stop, or reverse their engines, and they counter-claimed for the damage they had sustained.

The plaintiffs in their reply and defence to the counter-claim joined issue, denied all the allegations of fact contained in the defence, and alleged that if the collision or damage to the *Ape* was caused by any negligence on the part of anyone on the *Falka*, it was the negligence of the pilot alone who was in charge by compulsion of law.

The following are the material collision regulations :

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.

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. This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other. The only cases to which it does apply are, when each of the two vessels is end on, or nearly end on, to the other ; in other words, to cases in which, by day, each vessel sees the masts of the other in a line or nearly in a line, with her own ; and by night, to cases in which each vessel is in such a position as to see both the side lights of the other. It does not apply, by day, to cases in which a vessel sees another ahead crossing her own course ; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

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.

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 mean, "My engines are going full speed astern."

29. Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Aspinall, K.C. and *Noad* for the plaintiffs.

Bateson, K.C. and *D. Stephens* for the defendants.

BARGRAVE DEANE, J.—This is a very disagreeable case, and it has given the court a great deal of anxiety. I may say we are all agreed on the questions which I have thought right to submit to the Elder Brethren. A foreign ship, a Swede, proceeds up the Humber, past the Bull Light, and then, according to her own account, encounters hazy and then thick weather. She proceeds on, she hears whistles ahead of her; at least two vessels pass on her port side, and she hears one whistle on the starboard side, and she blows two short blasts and an order is given to the helmsman to starboard. The helmsman says he did not starboard, but the other vessel, the *Ape*, comes into sight according to the foreign vessel, slightly on her starboard bow, and the two vessels came into collision, one starboarding and the other porting.

The *Ape's* story is that she left Hull at 5.20 in the morning; that the weather was clear; that she came down at full speed, and she did not slacken speed until very shortly before the collision; that the foreign vessel was on the port side and not on the starboard side; and that the foreign vessel starboarded into her and she hardly ported at all.

The odd part of the case, and the strong part of the case in my judgment, is the evidence of the master and the helmsman of the *Ape*. They say they saw the masthead light of the *Falka* at a distance of a mile, and that when they got closer to her they saw her port light, and that her lights were burning. On the other side, the evidence from the *Falka* is that her lights were

extinguished at least half an hour before the collision, and were not burning at all, and that it is an absolute invention on the part of the master and helmsman of the *Ape*—in fact, a conspiracy between them to say that they saw these lights. That is the first question I ask myself: Were these lights burning or not? On one side, on the part of the *Ape*, there is the sworn statement that they were burning. On the other side there is the evidence of the mate of the *Falka*, the evidence of the look-out man on the *Falka*, and the evidence of the master of the *Alice*, a vessel which passed the *Falka* on her port side shortly before the collision, that those lights were not burning. The boatswain says: "I went up on the bridge somewhere about six o'clock, when Benner, who subsequently went on the look-out, was at the wheel, and having got on the bridge the mate told me to go and take the lights in; and I went and took them in, and having taken them in and put them in the lamp-locker, I returned to the bridge and took the wheel." Benner corroborates that statement. That is direct positive evidence of a positive fact. I have no reason to believe that that is all an invention by these four people—certainly, as far as the master of the *Alice*, the passing vessel, is concerned, there can be no conspiracy—and I have come to the conclusion, which I say at once affects the whole of my judgment, that the story told by the master and helmsman of the *Ape* is in that respect untrue. If these two men come here and tell a story which is untrue, of course it prejudices one with regard to the rest of their case.

There is a dispute between the *Ape* and the *Falka* as to which side these vessels were approaching each other—port to port or starboard to starboard, and the whole of the evidence from the *Falka* is that it was starboard to starboard. The evidence of the two witnesses from the *Ape* was that it was port to port. Well, I am inclined to think that these vessels were very nearly end on to each other—if anything, a trifle starboard to starboard—but that does not matter much. One vessel blew a starboard-helm signal and starboarded, and it was answered by a port-helm signal from the other, which ported. The collision happened as a result of those two manœuvres. It is a narrow channel, and the vessels ought to keep on their starboard side of this channel, in order to pass port to port. What on earth did the *Falka* starboard for? Why did not she port? The *Falka* should not have starboarded, and the *Ape* should not have answered that starboard helm with a port helm because that is the best way to bring about a collision. Therefore both these vessels did wrong manœuvres, whichever way you look at it.

Then there is another question to be discussed. What was the weather? Again there is contradiction all round. The master of the *Ape* says: "I did not see any fog at all. There was no fog at Hull, and there was no fog going down, but only a little smoke in the neighbourhood of this collision, which came from the drifters or something going out." It is in evidence—he was cross-examined to it by Mr. Aspinall—that there had been very serious fog at Hull, and it was clear for a vessel coming in till she got a little beyond the *Bull* lightship. It was clear according to the *Ape*, till she got down near the place of collision, where it was hazy, with smoke. In the face of these contradictions what am I to say with regard to the evidence from the *Alice?* The master of the *Alice* says it was patchy with fog all the way. He also says he kept on at full speed, and when I asked him why he did so he shrugged his shoulder. Then he says: "It got quite thick about the place I met the *Falka*. I was then blowing my whistle for fog and had been blowing it for fog, and I heard the *Falka* blowing for fog." The conclusion I have come to about the matter is this, that it was clear weather out at sea, and that it was thickish weather inside the *Bull* lightship, and got quite thick at the place of collision. The smoke aggravated it—low lying smoke—and it may be that the *Ape* was able to see the masts of this bigger steamer, although I do not think she saw her lights. She could not see her hull. That being the state of the weather—thick weather and at the place of the collision very thick—dense, I think, was the expression used by the master of the *Alice*—both vessels were going full speed in fog. They both heard whistles ahead of them, forward of their beam, but they continued to go at full speed—both of them, and in fact the *Alice* also. I cannot excuse either of these vessels for going full speed ahead in such weather, and certainly, with regard to the *Ape*, she had no pilot on board and she must be held responsible for it.

With regard to the *Falka*, she had a compulsory pilot. He, of course, was in charge of the ship. He it was who gave the orders, and he it was who was responsible for the navigation, unless I come to the conclusion that he was not properly supported by those on board the ship. Now, was he properly supported? This is one of the questions we have been considering. Here is a pilot on a foreign ship. She has a foreign master, whom we have seen. I do not want to say anything unkind, but he is a rather unusual kind of master, and when in court was anything but a bright and intelligent man. He had a foreign crew, and a chief officer who spoke English. The master and the chief officer were on the bridge. There was a man on the look-out who could not speak English. He reported in Swedish, and when in the box he was asked to say what it was he reported, in Swedish. Unless the pilot speaks Swedish I am sure he could not understand what the young man reported, although the fact he reported would call attention to there being something to report. The chief officer and the captain heard what was said, and I have asked the Elder Brethren what, in such a state of things, is the duty of the officers of a ship, when a report in a foreign tongue comes from forward, to which the pilot pays no attention. It is true they have no right to take the control out of the hands of the pilot, but it is their duty to point out to him that there are international rules, that a vessel must not go full speed ahead in fog, and that if a vessel is going full speed ahead and hears whistles forward of the beam it is her duty to stop. The pilot says he heard no whistle, and the look-out man says he reported a whistle, and no information, no interpretation, was given to the pilot when the look-out man reported the ship.

I can only say I have to the best of my ability to lay down what I think is the true principle as to the duty of ship's officers and crew towards the

pilot, and as I have said, although, unless the man is incompetent in the sense of being ill or the worse for drink, or something of that sort, which justifies *force majeure*, the officers of the vessel have no right to take the control of the navigation out of the hands of the pilot, yet he is entitled to every assistance which can be rendered him by those on board the ship. Although they may not compel him to do what they think he ought to do, they should call his attention that there is a breach of international rules which he and they have both got to obey. I think in this case I am justified in saying, and I do say, that I do not think the officers of this ship gave the pilot all the assistance he was entitled to. I must not altogether excuse the pilot. He did not give his evidence to my satisfaction at all; but the law says that unless the pilot is solely to blame the ship cannot be relieved of liability. I cannot say in this case that the pilot was solely to blame. I think he did not get proper support. In my view the *Ape* is to blame, but so also is the *Falka*, and the vessels must be held to blame in equal proportions.

Solicitors for the plaintiffs, *Stokes* and *Stokes*, for *Bramwell, Bell*, and *Clayton*.

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

Wednesday, Jan. 28, 1914.

(Before BARGRAVE DEANE, J.)

THE BURNOCK. (*a*)

Practice—Salvage—Actions by co-salvors—Tender of lump sum by owners of salved property—Duty to apportion among the different salvors.

A steamship broke down and had to take the assistance of a tug. The tug ran short of coal and had to leave her. A steam trawler and a lifeboat then came up and rendered assistance, and she was brought into safety. Actions for salvage were instituted by the trawler and the lifeboat, and the actions were consolidated. The owners of the salved steamship then tendered a lump sum of 350l. to the salvors. The salvors took out a summons asking for an order that the defendants should apportion the sum tendered between them. The assistant registrar made an order directing the apportionment. The defendants appealed to the judge.

Held, that it was impossible to lay down any hard-and-fast rule as to when or by whom a salvage tender ought to be apportioned, but that it was desirable, where the owners of the salved ship had full information as to the merits of the services of the various salvors, that they should save the expense of further litigation by themselves apportioning the amount which they tendered, and that in the circumstances of this case the defendants should apportion.

SALVAGE SUITS.

The plaintiffs were the owners, master, and crew of the steam trawler *Lord Kitchener* and the crew of the Seaham Harbour lifeboat *Elliot Galer.*

The defendants were the owners of the steamship *Burnock.*

In Sept. 1913 the *Burnock*, a steamship of Glasgow, while on a voyage from Middlesborough to Hull, broke down off the mouth of the river Tees. A tug came up and attempted to render assistance, but the tug ran short of coal and had to leave her.

The steam trawler *Lord Kitchener* and the Seaham Harbour lifeboat *Elliot Galer* then came up and rendered assistance, and the *Burnock* was taken into a place of safety.

The owners of the *Lord Kitchener* and the crew of the lifeboat issued separate writs claiming salvage for services rendered to the *Burnock.*

The actions were consolidated, and the defendants then tendered a lump sum of 350*l.* to both defendants, saying it was sufficient for the services rendered.

The salvors then took out a summons in the action asking for an order that the defendants should apportion the sum of 350*l.* between the salvors.

The summons came on before the assistant registrar, and he made an order directing the defendants to apportion the sum tendered between the two sets of salvors.

The defendants appealed to the judge in chambers.

The arguments were heard in chambers, but, as the summons raised an important point of practice, the judge delivered judgment in court.

H. C. S. Dumas for the appellants, the owners of the steamship *Burnock.*

E. A. Digby for the respondents, the owners of the steam trawler and the lifeboat crew.

BARGRAVE DEANE, J.—In this case two actions which were brought against the *Burnock* for salvage were consolidated. The defendants then tendered a lump sum in the consolidated action. A summons was taken out before me in chambers to direct that the defendants should apportion that lump sum among the two salvors, and I expressed my opinion that in this case they should do so; but the counsel who appeared before me on both sides asked that I would give my judgment in court, because there seems to be a conflict of decision in regard to this matter.

I have been looking into the cases to see if I could extract some principle from the various decisions. It is impossible to lay down any hard-and-fast rule. There are some cases—the salvage of a derelict, for instance—where the persons whose property has been salved cannot know the circumstances of the salvage, and it is impossible for them, having nobody they can call to deal with the merits of the salvage, to come to a conclusion as to what apportionment they should make among the various salvors. On the other hand, there are cases where a ship goes ashore. Her crew are on board her. Her crew are present during the whole of the salvage services, and they know, as well as anybody, what the merits may be of the services of the various salvors. The value of the property salved is, of course, known to the owners of the salved property, but the merits of the services may or may not be. In the case of a derelict the owners may say, "Our ship, in her derelict condition, was worth so much, and we tender so much because that which was practically lost to us has been saved." In such a case the salvors must either agree or they must ask the court to apportion. Though that

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

expense should be saved wherever it is possible to do so.

It seems to me that the fair way to look at this matter is this: Where the defendants' servants are present and able to give full information to the defendants as to the nature of the services and the particular services rendered by each set of salvors, the defendants in making their tender must have inquired into all the circumstances in order to arrive at the tender; and it stands to reason they must have inquired as to the merits of the various salvors in arriving at the lump sum which they have tendered. In such a case as that I think the defendants should apportion. They must have gone into the matter, and they know what was in their minds in making the tender. I do not think it is advisable, if it is possible to avoid it, to treat the sum tendered as a bone thrown among a lot of dogs, who are left to fight it out.

In my view the proper aspect of this question is that the defendants should apportion the sum tendered among the various salvors whenever it is possible. In that way a good deal of litigation and expense will be saved. Where it is impossible to do that, the salvors must agree among themselves or else come to the court to get an apportionment. It is impossible to lay down a hard-and-fast rule. The circumstances must differ in the various cases in which this question may arise. In this case I am of opinion that the defendants should apportion.

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

Solicitors for the respondents, *Downing, Handcock*, and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 31 *and April* 7, 1914.

(Before COZENS-HARDY, M.R., BUCKLEY, L.J., and CHANNELL, J.)

THAMES AND MERSEY MARINE INSURANCE COMPANY *v.* SOCIETA DI NAVIGAZIONE A VAPORE DEL LLOYD AUSTRIACO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Writ—Service—Foreign corporation—Residence within jurisdiction — Carrying on business—Firm of agents in England—Service on one member of firm—Authority of agents to contract—Order IX., r. 8.

A foreign corporation may be served within the jurisdiction if it is carrying on business in this country. And it does so if contracts have been habitually made for a reasonably substantial period of time at a fixed place of business within the jurisdiction by a firm or a person there, without referring each time to the foreign corporation for instructions, and with the result that the foreign corporation has become bound to another party.

The test in each case is to ascertain whether the agent, in carrying on the foreign corporation's business, makes a contract for the foreign corporation, or, in carrying on the agent's own business, sells a contract with the foreign corporation. In the former case the foreign corporation is, and in the latter it is not, carrying on business at the agent's place.

If a firm are carrying on the foreign corporation's business in this country they are the proper persons to be served, and service upon one member of the firm is service upon the firm, for each member is agent for every other. In such a case there is no question of "head officer," as referred to in rule 8 of Order IX., as distinguished from subordinate officer. The foreign corporation is served by service on the firm or some member of the firm.

Decision of Coleridge, J. affirmed.

FOR ten years, at a fixed place in the City of London, Marcus Samuel and Co. had acted as the general agents of the defendants in this country.

They issued tickets and made contracts for the carriage of passengers and their luggage and goods, and booked freight for goods in the defendants' steamships.

Besides receiving a commission for freight arranged and steamer tickets supplied, they received a small sum per quarter for postage, telegrams, and stationery, and a substantial salary per annum for rent, clerks, and sundry office expenses.

There was a notice outside the premises that they were agents for the defendants, and there were two special desks on the ground floor of these premises allotted to the defendants' business.

The defendants had a telephone number and telegraphic address of their own there.

In practice the agents were often allotted a limited number of berths on a steamer, but apart from this they could not allot berths and book any freight without telegraphing to the defendants.

Special notepaper and forms were used by the agents, when transacting the defendants' business, appropriately headed. And in a booklet supplied to them by the defendants for use in this country, containing a list of "General agencies," there appeared an entry of the London agency.

The plaintiffs, having an alleged cause of action against the defendants, effected service on them by serving the writ in the action at the place of business of the London agents on a member of their firm. They contended that the defendants were in fact carrying on business at that address. The defendants, on the other hand, contended that the London agents were simply their agents and that they were a foreign corporation not carrying on business at a place of business within the jurisdiction; and that in any case service had not been effected on the right person.

Accordingly they applied to have the service set aside.

Master Chitty acceded to that application; but it was decided by Coleridge, J. sitting at chambers that the defendants were carrying on business at the premises of the London agents, and that service of the writ had been properly effected by service on one of the firm's partners.

From that decision the defendants now appealed.

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

Leck, K.C. and *Alexander Neilson*, for the appellants, referred to

Okura and Co. Limited v. *Fosbacka Jernverks Aktiebolag*, 110 L. T. Rep. 464; (1914) 1 K. B. 715;
Saccharin Corporation Limited v. *Chemische Fabrik Von Heyden Actiengesellschaft*, 104 L. T. Rep. 886; (1911) 2 K. B. 516;
Compagnie Générale Transatlantique v. *Law and Co.; La Bourgogne*, 8 Asp. Mar. Law Cas. 550; 80 L. T. Rep. 845; (1899) A. C. 431;
The Princesse Clémentine, 8 Asp. Mar. Law. Cas. 222; 75 L. T. Rep. 695; (1897) P. 18;
Actiesselskabet Dampskib Hercules v. *Grand Trunk Pacific Railway Company*, 105 L. T. Rep. 695; (1912) 1 K. B. 222;
Nutter v. *Compagnie de Messageries Maritimes de France*, 54 L. J. 527, Q. B.;
Russell v. *Cambefort*, 61 L. T. Rep. 751; 23 Q. B. Div. 526;
Dunlop Pneumatic Tyre Company v. *Actiengesellschaft für Motorfahrzenbau vorm. Cudell and Co.*, 86 L. T. Rep. 472; (1902) 1 K. B. 342.

Leslie Scott, K.C. and *Dunlop*, for the respondents, referred to

Werle and Co. v. *Colquhoun*, 58 L. T. Rep. 756; 20 Q. B. Div. 753;
Newby v. *Von Oppen*, 26 L. T. Rep. 164; L. Rep. 7 Q. B. 293;
Haggin v. *Comptoir d'Escompte de Paris*, 61 L. T. Rep. 748; 23 Q. B. Div. 519.

Leck, K.C. replied.

Cur. adv. vult.

April 7.—The following written judgment was delivered :—

Buckley, L.J.—If contracts have been habitually made for a reasonably substantial period of time at a fixed place of business within the jurisdiction by a firm or a person there, without referring each time to the foreign corporation for instructions, and with the result that the foreign corporation has become bound to another party, then the foreign corporation for the present purpose carries on business at that place. This, in my opinion, is the result of the decisions, of which most have been cited in this case. A foreign corporation can be served within the jurisdiction if it is found here. It is found here if it is carrying on business here.

The difficult question in all these cases is to say whether the corporation is carrying on business here or not. I expressed my opinion upon this matter so recently in *Okura and Company Limited* v. *Fosbacka Jernverks Aktiebolag* (110 L. T. Rep. 464; (1914) 1 K. B. 715) that I shall not repeat that which I there said. I think it unnecessary to deal with the cases again.

The facts here are that for ten years (which is a substantial time) at a defined place (namely, Nos. 25 and 27, Bishopsgate-street) Messrs. Marcus Samuel and Co. in a separate part of the building, by a separate staff of clerks, and with the use of special notepaper bearing the name of the Austrian Lloyd Company, have issued tickets and made contracts for the carriage of passengers and their luggage and goods by steamers belonging to the Austrian Lloyd Company, and have on behalf of and in the name of the Austrian Lloyd Company insured luggage or goods, and have advertised in England the sailings of the Austrian Lloyd steamers.

In the defendants' handbook, under the head of "General Agencies, London," the address of 25 and 27, Bishopsgate-street is given, not mentioning Marcus Samuel and Co.'s name. That address is there treated as the address of the general agency of the company in London. By way of contrast there will be found at p. 38, under the head of "Ticket Agencies," the names of Thos. Cook and Son, Hickie, Borman, and Co., and the International Sleeping Car Company, who, upon the face of the document, appear to have a limited authority as agents to issue tickets as distinguished from the general agency, which is in Marcus Samuel and Co.

The letter of appointment of the 29th Oct. 1904 constituted the firm agents general for the company at a 5 per cent. commission on tickets sold in Marcus Samuel and Co.'s office, and 2 per cent. on tickets sold by other passenger agencies in England, and a lump sum of 480*l.* a year was payable for rent, clerks, and office expenses. Messrs. Hickie, Borman, and Co. are in that letter mentioned as persons who are to continue as passenger agents, and it is provided that their accounts shall be rendered and settled monthly with Marcus Samuel and Co. Under the relations between Marcus Samuel and Co. and the company a very large business has for ten years past been carried on at Nos. 25 and 27, Bishopsgate-street in making contracts between passengers and merchants on the one hand, and the Austrian Lloyd Company on the other.

Under these circumstances I hold as a matter of fact that this business, as carried on at Nos. 25 and 27, Bishopsgate-street, has been not the business of Marcus Samuel and Co., but the business of the Austrian Lloyd Company, conducted by that firm as their agents. If this is right, it follows that the foreign corporation carry on business here.

There are cases, no doubt, in which a railway company or a shipping company, or a theatre or other place of entertainment may sell tickets at numerous places without its resulting that they carry on their business at those places. Each case must be judged upon its own facts.

The test in each case is to find the answer to the following question: Does the agent in carrying on the foreign corporation's business make a contract for the foreign corporation, or does the agent, in carrying on the agent's own business, sell a contract with the foreign corporation? In the former case the corporation is and in the latter it is not carrying on business at that place. Marcus Samuel and Co. do the former; Thomas Cook and Son do the latter.

As a second point it was argued that, assuming that the foreign corporation were carrying on business in Bishopsgate-street, the person served was not the "head officer" within Order IX., r. 8. There seems to me here to be a misapprehension. If Marcus Samuel and Co. were the agents carrying on the business they were the proper persons to be served. The service upon one member of the firm is service upon the firm, for each member is agent for every other. In such a case there is no question of "head officer" as distinguished from subordinate officer. The foreign corporation is served by service on the

firm or some member of the firm. The firm, or rather the members of the firm, are for this purpose the natural persons who in this country represent the foreign corporation. The service upon Mr. Levy, I think, was right.

The result therefore is that this appeal must be dismissed.

Cozens-Hardy, M.R.—I agree. The appeal will be dismissed with costs.

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

Solicitors for the appellants, *Waltons* and *Co.*

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

Thursday, April 23, 1914.

(Before Lord Reading, C.J., Phillimore, L.J., and Lush, J.)

Western Steamship Company Limited *v.* Amaral, Sutherland, and Co. Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Demurrage — Agreed rate — Damages for detention.

Appeal by the plaintiffs from a decision of Bray, J. reported 12 Asp. Mar. Law Cas. 358; 109 L. T. Rep. 217; (1913) 3 K.B. 366

Trial of a preliminary point of law directed by Pickford, J.

A charter party provided that a cargo was to be taken from alongside the ship at the port of discharge at the average rate of 500 tons per day, and "if longer detained, consignees to pay steamer demurrage at the rate of 4*d.* per net register ton per running day."

At the trial of the preliminary point of law Bray, J. held that no provision could be implied that the agreed rate of demurrage should only apply to a reasonable number of days over and above the lay days.

The plaintiffs, the shipowners, appealed.

D. C. Leck, K.C. and *W. N. Raeburn* for the plaintiffs.

T. W. H. Inskip and *F. de F. England* for the defendants.

Their Lordships held that the order of Pickford, J. should be reversed, as it would be unsatisfactory to decide the preliminary point of law without ascertaining what were the facts which caused the delay in unloading the cargo. The judgment of Bray, J., about which their Lordships expressed no opinion, would also be necessarily discharged. The plaintiffs would have to amend their statement of claim so as to state the basis of their claim for detention.

Appeal allowed.

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

Solicitors for the defendants, *Rubinstein, Nash*, and *Co.*, for *Vachell* and *Co.*, Cardiff.

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

Monday, March 30, 1914.

(Before Swinfen Eady and Phillimore, L.JJ.)

Ingram and Royle Limited *v.* Services Maritimes du Tréport. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Costs—Non-jury action—Issues in fact and law—Judgment for plaintiff on both with costs at trial—Appeal by defendant on issue of law only—Judgment wholly set aside on appeal, and judgment entered for defendant with costs — Taxation — Costs of issue of fact on which plaintiff succeeded at trial—Order LXV., rr. 1, 2.

An issue in fact and an issue in law were raised upon a claim. The plaintiffs succeeded on both issues before a judge sitting without a jury, and he ordered judgment to be entered for the plaintiffs with costs.

The defendants appealed on the issue in law only. The Court of Appeal ordered that the appeal be allowed, and that the judgment in favour of the plaintiffs be wholly set aside, and that judgment be entered for the defendants with costs, including the costs of the appeal. No special application was made by either side as to the costs of the issue of fact.

On a summons to review taxation, Bailhache, J. held that the taxing master was not debarred by the order of the Court of Appeal from taxing the plaintiffs' costs of the issue of fact.

Held, by the Court of Appeal, that the taxing master was bound by the order of the Court of Appeal, and the plaintiffs were therefore not entitled to the costs of the issue of fact.

Slatford *v.* Erlebach (106 *L. T. Rep.* 61; (1912) 3 *K. B.* 155) *distinguished.*

Defendants' appeal from an order of Bailhache, J. on a summons to review taxation.

The plaintiffs in an action intituled *Ingram and Royle Limited* v. *Services Maritimes du Tréport* (reported 12 Asp. Mar. Law Cas. 295; 108 L. T. Rep. 304; (1913) 1 K. B. 538) shipped on the defendants' vessel certain goods for carriage from Tréport to London on the terms of a bill of lading which contained the following exemptions from liability:

(1) Fire on board . . . and all accidents, loss, and damage whatsoever from . . . perils of the seas, or from any act, neglect, or default whatsoever of the master, officers, crew, stevedores, servants, or agents of the owners, . . . in the management, loading, stowing, or otherwise.

The defendants also took on board at Tréport certain cases of metallic sodium saturated with petrol, which were insufficiently packed and stowed with insufficient care. The cases broke loose, and, coming into contact with water, caused a series of explosions which set the ship on fire, and the ship went down, and the plaintiffs' goods were lost.

Sect. 502 of the Merchant Shipping Act 1894 provides that the owner of a British sea-going ship is not liable to make good any loss or damage happening without his actual default or privity where any goods, merchandise, or other things taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

Scrutton, J., sitting without a jury, held that the goods were lost by reason of fire within the

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

meaning of sect. 502 of the Merchant Shipping Act 1894; that the operation of that section was excluded by the terms of the exemptions from liability; that the exemptions in clause 1 of the bill of lading did not relieve the defendants from liability unless the ship was seaworthy at the commencement of the voyage, and that the ship was not seaworthy at the commencement of the voyage owing to bad stowage, and that the defendants were therefore liable for the loss of the plaintiffs' goods; and he ordered judgment to be entered for the plaintiffs with costs.

The defendants appealed on the point of law that sect. 502 of the Merchant Shipping Act 1894 was excluded by the terms of the exemptions from liability, but they gave notice to the plaintiffs that they did not appeal against any of the findings of facts in Scrutton, J.'s judgment.

The Court of Appeal reversed the decision of Scrutton, J., holding that there was no contract between the parties excluding the protection afforded to the shipowners by sect. 502 of the Merchant Shipping Act 1894, and substituting in its place a contractual liability of the shipowners, and therefore the shipowners were not liable: (12 Asp. Mar. Law Cas. 387; 109 L. T. Rep. 733; (1914) 1 K. B. 541). They ordered that "the appeal be allowed, that the judgment of Scrutton, J. be wholly set aside, and that judgment in the action be entered for the defendants with costs, including the costs of this appeal." No special direction was given or applied for as to the costs of the issue of unseaworthiness.

On a party and party taxation the plaintiffs claimed to be allowed the costs of the issue as to unseaworthiness, which had been decided in their favour by Scrutton, J., and as to which there has been no appeal. In his answer to the objection carried in by the plaintiffs the taxing master submitted that he was not governed by any findings of Scrutton, J., as that judgment had been "wholly set aside" by the Court of Appeal, and that he was taxing under the judgment of the Court of Appeal alone.

The plaintiffs took out a summons to review the taxation, and on that summons Bailhache, J., on the authority of *Slatford* v. *Erlebach* (*sup.*) made an order that the taxing master was not debarred by the order of the Court of Appeal from taxing the plaintiffs' costs of the issue of unseaworthiness.

From this order the plaintiffs appealed.

F. D. Mackinnon for the defendants.—The taxing master was bound by the order of the Court of Appeal which ordered that the plaintiffs' judgment should be wholly set aside, and that judgment be entered for the defendants. If the plaintiffs wanted the costs of the issue of unseaworthiness, a special application should have been made to the Court of Appeal for the costs of that issue, but no such application was made, and it is impossible to disturb the order of the Court of Appeal. The order of Bailhache, J. was therefore wrong. [He was stopped.]

W. N. Raeburn for the plaintiffs.—There were separate issues of fact and law before Scrutton, J., who decided the issue of fact, as well as that of law, in favour of the plaintiffs. If it is ever necessary to ask specially for the costs of an issue of fact, there was no need to ask Scrutton, J. for the costs of the issue of fact, for he gave judgment for the plaintiffs with costs. No application was made in the Court of Appeal for the costs of the issue of fact, for the defendants did not appeal on that issue, the finding of fact of Scrutton, J. remains undisturbed, and it was taken for granted by the plaintiffs that the costs of that issue would remain theirs in any event. The order of the Court of Appeal was a mere formal order allowing the appeal with costs and not purporting to deal with the costs of the issue of fact, on which there was no appeal. It is submitted that this case is governed by *Slatford* v. *Erlebach* (*sup.*) on the authority of which Bailhache, J. made his order. There it was held that, the plaintiff having established that there was a debt due to him, that was an event within the meaning of Order LXV., r. 1, which had been found in his favour, and he was therefore entitled to the costs of that issue; and that the fact that the official referee's judgment was silent as to the plaintiff's costs was not sufficient to deprive him of those costs. It may be said that that case arose under rule 1 of the order, while the present case may be under rule 2, and that the finding of the official referee, which was equivalent to that of a jury, is in a different position from the judgment of a judge, or of the Court of Appeal, but that is not sufficient to distinguish this case from *Slatford* v. *Erlebache*, on which the plaintiffs rely.

Hoyes v. *Tate*, 96 L. T. Rep. 419; (1907) 1 K. B. 656;

Haskell Golf Ball Company v. *Hutchinson*. 94 L. T. Rep. 731; (1906) 1 Ch. 518

were also referred to.

No reply was called for.

SWINFEN EADY, L.J.—This is an appeal from an order of Bailhache, J. in chambers, dated the 13th March.

The order was made upon an application to review taxation. The portion of the order that is complained of on this appeal is this: "It is ordered that the taxing master is not debarred by the order of the Court of Appeal from taxing the plaintiff's costs of the issue of unseaworthiness, otherwise no order."

Upon that the defendants, who succeeded in the action, appeal, and their contention is that having regard to the form of the order of the Court of Appeal, there are no costs given to the plaintiffs of the issue of unseaworthiness, and therefore there are no costs of the plaintiffs in respect of that matter which the master is to tax.

The action was brought by the shippers of goods, which were mineral waters, on board the defendants' steamer. The action was brought for the loss or damage of the goods. In the Court of Appeal the action is reported in 12 Asp. Mar. Law Cas. 387; 109 L. T. Rep. 733; (1914) 1 K. B. 541; the short result of the action on appeal was that the plaintiffs failed. It was held that the exemptions in the bill of lading did not exclude the operation of sect. 502 of the Merchant Shipping Act—that is, that the goods were lost by fire without the actual fault or privity of the shipowners, and therefore, as the section was not excluded, the defendants were entitled to rely

upon the protection of the section, and were not liable for the loss.

The result of the appeal was that the defendants succeeded, the form of the order of the Court of Appeal being this: "It is ordered that the appeal be allowed, and that the judgment"—that was the judgment of Scrutton, J. at the trial—"in favour of the plaintiffs be wholly set aside, and that judgment be entered for the defendants with costs, including the costs of the appeal."

Upon that form of judgment there are no costs given to the plaintiffs; the original judgment is wholly set aside, and the defendants are entitled to judgment with costs—that is, judgment in the action for the general costs of the action and of the appeal, not, of course, disturbing the costs directed by any separate interlocutory orders to be otherwise dealt with.

Then the plaintiffs in the action claim that an issue was raised of unseaworthiness; that they alleged that the ship was unseaworthy and that the defendants denied it; and that in the court below, before Scrutton, J., it was found that the ship was unseaworthy within the meaning of the authorities; and that the plaintiffs succeeded, therefore, upon the issue of unseaworthiness, and that, as there is no order to the contrary, their costs of the issue ought now to be taxed and, I assume, set off against the costs of the defendants.

The claim is based upon the provisions of Order LXV., r. 2: "When issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively both in law and fact shall, unless otherwise ordered, follow the event."

In my opinion, the practice which is to be followed, where it is intended to make a provision for the costs of different issues, is that laid down by the Court of Appeal in *Hoyes* v. *Tate* (96 L. T. Rep. 419; (1907) 1 K. B. 656). In that case there were separate issues raised. It was an action for trespass for damage to the plaintiff's fence, and cutting down and removing a tree which the plaintiff alleged was his tree; the defendants by their defence denied the trespass and damage, and said that the tree was upon the defendants' land and not the plaintiff's, and that the tree belonged to the defendants and not to the plaintiff. The action was tried with a jury, and the jury found first, that there was damage to the plaintiff's fence, and that damage was assessed, and then the jury found that the tree was upon the first defendant's land, so that upon the issue of damage the plaintiff succeeded, and upon the issue of ownership of the tree the plaintiff failed. Then when the matter came before the Court of Appeal, that court inquired into the practice in the matter. It stood over, and then, after an interval, Collins, M.R. said (at p. 659 of (1907) 1 K. B.): "We have had the very best advice upon this matter from those who are most competent to give it"—no doubt the officers of the court familiar with the practice—"and we are told that when the certificate of the associate is taken to the proper office with a request that the judgment be entered upon it, inasmuch as the learned judge has made no order interfering with the incidence of the costs as prescribed by Order LXV., r. 1, the judgment will be drawn up in such a form as to give the defendants the costs of the issue as to the ownership of the tree upon which they have succeeded," that is to say, the appeal was before the actual formal order was prepared, and then the Court of Appeal, after inquiry, laid down the form in which the judgment should be drawn up. "The result is that the defendants upon this certificate are entitled to have the order drawn in the form now before us." The form of the judgment is given a little later in the report; "therefore it is this day adjudged that the plaintiffs recover against the defendants 10*l.* 10*s.* and (except as herein otherwise adjudged) the general costs of the action on the High Court scale. . . . And the jury having found that the tree referred to in the pleadings was in the grounds of the first defendant, and the judge having made no order as to the costs of the issue as to the ownership of the said tree, it is further adjudged that on taxation the defendants do have their costs of the said issue as to the ownership of the said tree"; in other words, that where the cost of issues are to be taxed separately and where one party succeeds and obtains the general costs and the other party obtains the costs of one or more separate issues or issue, there ought to be in the judgment, as drawn up, a direction stating who is to have the costs of the issue so separately dealt with.

That case settled the practice. In the present case there is no direction at all that the plaintiffs are to have the costs of any separate issue, as they succeeded in the court below, and it would not be for them to apply there—they obtained the general costs. But there was no application by the plaintiffs in the Court of Appeal, where they failed, asking that they should have the costs of any issue. The result was that the order of the Court of Appeal wholly set aside the original judgment and gave judgment for the defendants in the action with costs.

In my opinion, under those circumstances, it is not open now for the taxing master to look into the reason given by the learned judge in the court below, and to consider whether any, and what costs ought to be allowed to the plaintiffs in respect of the unseaworthiness. By the judgment they are not given those. It is not open to him to tax any costs of the plaintiffs in respect of that matter.

We were referred to the recent case in the Court of Appeal of *Slatford* v. *Erlebach* (106 L. T. Rep. 61; (1912) 3 K. B. 155). It really was that case upon which the learned judge at chambers proceeded, and it was the only case that the respondents really relied upon. They had to endeavour to bring themselves within that authority. I think that it will be sufficient to say that that case has really no bearing upon the case before us. The Court of Appeal were not there considering the language of the judgment whether by consent of the parties or otherwise, they were considering the way in which the judgment ought to go, having regard to the report or certificate of the official referee. That is what they were dealing with. Buckley, L.J. says (at p. 161 of (1912) 3 K. B.): "In order to see whether the official referee has, for good causes shown, otherwise ordered, it is only necessary to read the certificate; it is quite plain that he has done nothing of the kind." So they were pro-

ceeding behind the judgment and considering what the official referee had done. Here we have nothing of the kind. The judgment in itself is clear, and under this judgment I am of opinion that the plaintiffs are not entitled to any costs.

Phillimore, L.J.—I agree.

The judgment of the Court of Appeal was that judgment should be entered for the defendants with costs—that is a judgment that we, sitting as a Court of Appeal, cannot touch. We have only to enforce it, and no special order having been made as to any "matter at issue" (I prefer using that expression for the moment to using the word "issue") or the costs of proving any matters at issue, we cannot now import that into the judgment.

The practice, as Swinfen Eady, L.J. has observed, is clearly settled by the case of *Hoyes* v. *Tate* (*sup.*).

I am by no means saying that the Court of Appeal could not have made an order which would have given the present respondents, the plaintiffs in the action, the costs which they are now seeking to get. I am not expressing any opinion as to whether, if an application had been made to the Court of Appeal, they would or would not have made such an order as is sought for. All that I have to do is to see that they have not done it.

The difficulty in the case (and I admit that it is a serious difficulty, and I quite understand the hesitation, at any rate, of Bailhache, J. in deciding adversely to the claim) arises from the case of *Slatford* v. *Erlebach* (*sup.*). Even after the explanation which has been given to us, *Slatford* v. *Erlebach* (*sup.*) remains a peculiar case. No doubt it was decided by the Court of Appeal upon a different ground from that taken by the taxing master, on the ground that the case was regulated by Order XLV., r. 1, and not, as the taxing master thought, by rule 2 of the same order; and no doubt the second sub-section of sect. 15 of the Arbitration Act makes the report of the official referee equivalent to the finding of a jury. The written report of the official referee is, therefore, rightly taken as equivalent to the certificate of the associate at a trial at Nisi Prius, upon which judgment ought to be entered strictly according to law following the certificate; so judgment ought to have been entered strictly according to law following the report.

I think that the only way in which to look at *Slatford* v. *Erlebank* (*sup.*) is this: it was not the Court of Appeal dealing with the decision of the Court of Appeal, but the Court of Appeal dealing with a decision of the court below (the official referee being, for this purpose, equivalent to the court below) and having power to alter the judgment of the court below if it thought it should be altered, and having power to direct formal judgment to be drawn up in accordance with the report of the official referee, as in *Hoyes* v. *Tate* (*sup.*), they might, if necessary, have directed formal judgment to be drawn up in accordance with the certificate. Taking that view and looking at the substance of the thing, which was the report, and having before them the rule which said that the findings of an official referee are equivalent to the finding of a jury, they thought that the justice of the case would be met by giving costs in accordance with the report, and they either disregarded the formal judgment or they treated it, as they could, as for this purpose overruled. With that explanation one can quite follow *Slatford* v. *Erlebach* (*sup.*). It was a decision of this court. It is a decision which rests on very special circumstances, and it does not prevent our applying the general rule, which may, in this case, operate somewhat harshly for the plaintiffs, for whom I am sorry, but which would be very mischievously set at large if we gave any other decision; the expense and the applications which would arise would be endless.

Therefore I thoroughly agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *William A. Crump* and *Sons*; *Ballantyne, Clifford*, and *Hett*.

Friday, April 24, 1914.

(Before Lord Reading, C.J., Phillimore, L.J., and Lush, J.)

Street v. Royal Exchange Assurance. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Reinsurance against total or constructive total loss only—Provision "to follow hull underwriters in the event of a compromised or arranged loss being settled"—Claim for constructive total loss or alternatively for partial loss compromised by hull underwriters — Liability of reinsurers.

The plaintiff took out a policy of reinsurance with the defendants which contained the following clause: "Being a reinsurance and to pay as per original policy or policies, but the insurance is against the risk of the total or constructive total loss of the steamer only, but to follow hull underwriters in the event of a compromised or arranged loss being settled."

The owner of the insured ship brought an action against the hull underwriters claiming for a constructive total loss and alternatively for a partial loss. This action was compromised without anything being said as to whether the settlement was as for a constructive total loss or as for a partial loss. In an action on the reinsurance policy:

Held, that as a claim had been made by the shipowner in respect of a constructive total loss and had been persisted in down to the settlement of the action which had been compromised, there was within the meaning of the clause in question "a compromised or arranged loss" notwithstanding that there was at the same time a claim for a partial loss.

Decision of Bray, J. (12 *Asp. Mar. Law Cas.* 356; 109 *L. T. Rep.* 215) *affirmed.*

Appeal from a decision of Bray, J. in the Commercial Court.

The plaintiff's claim was for 229*l.* 9*s.* 6*d.* on a policy of reinsurance in respect of the steamship *Ivy*, dated the 29th Nov. 1910 issued to him by the defendants.

The policy contained (*inter alia*) the following clause: "Being a reinsurance and to pay as per original policy or policies, but the insurance is against the risk of the total or constructive total

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

loss of the steamer only, but to follow hull underwriters in the event of a compromised or arranged loss being settled."

The steamship *Ivy*, which was insured against total or partial loss, was seriously damaged during the currency of the policy. The owner gave notice of abandonment to the underwriters, and made a claim in an action on the policy for constructive total loss, or, alternatively, for a partial loss.

The action was compromised on the following terms: "Defendants to pay plaintiff on basis of settlement at 6250*l.* with interest at five per cent. (on the sums payable) for twelve months. Plaintiff to keep proceeds of sale of wreck. Defendants to pay plaintiff his taxed costs and 200*l.* in addition. Brief fees to be allowed as marked." The following additional terms were endorsed upon the briefs of counsel: "Judge's order. M. H. for defendants. L. S. for plaintiff. Maritime" (this referred to some of the defendants) "guarantee plaintiff recovery from Newcastle Club on agreed basis of settlement, and plaintiff keeps his claims against cargo for general average expenditure."

The plaintiff in the present case alleged that a claim for a constructive total loss under the original policy was compromised or arranged, and that he was therefore entitled to recover from the defendants under the clause in the reinsurance policy above set out.

The defendants by their defence pleaded that the *Ivy* was not in fact a constructive total loss, and that there was no "compromised or arranged loss settled" within the meaning of the reinsurance policy. They also pleaded that the claim on the original policy was in substance only a claim for partial loss.

Bray, J. held that the plaintiff was entitled to recover as, there having been a claim for a constructive total loss and that claim having been compromised, there was, within the meaning of the clause in question, "a compromised or arranged loss," notwithstanding that there was at the same time a claim for partial loss.

The defendants appealed.

G. Wallace, K.C. and *A. H. Chaytor* for the defendants.

Leslie Scott, K.C. and *L. F. C. Darby* for the plaintiff.

LORD READING, C. J.—The plaintiff's claim in this case was brought under a policy of marine insurance.

I will read the exact words in the policy, as they become of importance: "Being a reinsurance and to pay as per original policy or policies but this insurance is against the risk of the total or constructive loss of the steamer only but to follow hull underwriters in event of a compromised or arranged loss being settled."

The history, so far as it is material, is that the owner of the steamship *Ivy* insured the hull, machinery, and boilers with certain underwriters. The ship was valued in the policy at 9000*l.*, and the premium to be paid was twelve guineas. The policy sued upon in this action is a reinsurance, but only against the risk of a total or constructive total loss; and the premium payable, instead of twelve guineas was only 4*l.*; the risk being very much limited by the limitation in the words which I have just read. It is perfectly plain, from the terms of the reinsurance policy, that it is only a reinsurance against the risk of total or constructive total loss.

The vessel, the *Ivy*, ran aground at the entrance of the Manchester Ship Canal. In any event, there is no doubt that she sustained very considerable damage. The owner gave notice of abandonment, and claimed to treat the vessel as a constructive total loss; and, after a considerable amount of correspondence, brought his action against one of the underwriters, who had underwritten to the extent of 1000*l.* out of the total sum in respect of which he had insured the hull, machinery, and boilers of his vessel: that is, 1000*l.* out of 9000*l.*

The action was begun in December of 1910; that is, the writ was issued, but not served. A body of correspondence has been placed before us, out of which several letters have been read, which show that on the one hand the owner, Mr. Coker, was asserting that the vessel was a constructive total loss, and that he was entitled to recover upon that basis from the underwriters. The underwriters, on the other hand, were saying that the vessel was not a constructive total loss, and that Mr. Coker, the owner, could only recover as for a partial loss. The parties failed to come to terms, although they got very near to terms; and eventually the action proceeded.

The plaintiff claimed on his policy; and although he stated in the pleadings that he was claiming on a constructive total loss, or, as appears from the prayer at the end of the claim, alternatively for a partial loss, that is the position in which any person claiming on a constructive total loss would be, whether he added the alternative claim or not. If there is a claim made upon constructive total loss, supposing the Court came to the conclusion that that was not established, but nevertheless a partial loss insured against had been proved, the Court would then pronounce in respect of the amount of partial loss which it found. To that the defence set up, *inter alia*, was a payment into court of 6000*l.*; and in that state of things the action proceeded. The learned judge has found, and certainly I see no reason to dissent from his view, more especially having regard to the correspondence, that the defendants in that case were paying in that 6000*l.* in respect of a partial loss; and really in their minds were treating it as if the plaintiff would not succeed in his claim for a constructive total loss.

When the action was coming on for trial, as I understand, when it was in the list, the result of discussion between counsel was that it was settled; and the terms of the settlement as drawn up have really, to a large extent at least, led to the present litigation and discussion. In the terms there is no statement that the settlement was in respect of a claim for a constructive total loss; neither is there any statement that it was a settlement in respect of a claim for a partial loss: it neither mentions the one nor the other. But it does state that the defendants are to pay to plaintiff "on basis of a settlement at 6250*l.*," that is as compared with 9000*l.*, the value in the policy, "with interest at 5 per cent. for twelve months. Plaintiff to keep proceeds of sale of wreck." Then the taxed costs are to be paid by the defendants to the plaintiff, and 200*l.* in addition; and there are some further provisions as to costs which I need not read. Then "Maritime guarantee"; that

was the defendants in that case guaranteed "plaintiffs recover from Newcastle Club on an agreed basis of settlement"—to my mind no special importance attaches to these words; and I do not myself find any assistance in deciding this point from considering them—"and plaintiff keeps his claims against cargo for general average expenditure." That, it is said on both sides, would amount to about 300*l.*

The result of the settlement was that the plaintiff, in respect of the vessel, the value of which was stated in the policy at 9000*l.*, recovered 6250*l.* 1350*l.*, which represented the proceeds of the sale of the wreck, which had been ascertained by the 26th March 1912, which was the date of the settlement with which I am now dealing, brought the amount recovered by him to 7600*l.* In addition he received interest; I attach no importance to the interest for the purpose of this case. It does not seem to me to make any difference whichever was right. Therefore I pay no attention to it. The other provision, that the plaintiff keeps his claims against cargo for general average expenditure, would, according to the view put before us, have given the plaintiff in that action another 300*l.* That would be what he would recover out of the total sum of 9000*l.* if he had succeeded on his claim for constructive total loss. At first sight it would seem as if that pointed to the compromise being a compromise in respect of a claim for constructive total loss; but I do not think, on consideration, and with the assistance of the very able argument that was addressed to us by Mr. Chaytor upon this point, that we can attribute any importance to that; because even if there had been a partial loss, say, of 8500*l.*, it would be sufficient to prevent the plaintiff recovering on a constructive total loss; and in addition to that 8500*l.*, if he recovered it, he would be entitled to keep the proceeds of the sale of the wreck, which would give him more, as it would mean 8500*l.* plus 1350*l.*, than if he recovered on a constructive total loss, which would be 9000*l.* Therefore I do not think that we derive any assistance in this case from the consideration of the very large proportion of the total claim which was recovered. That is the result of the figures upon the settlement.

The plaintiff in this action says, being one of the underwriters in respect of the original action which was compromised on the terms which I have stated, that he is entitled to recover against the Royal Exchange Insurance, which had subscribed this reinsurance policy, because he says: This sum which I have had to pay, whatever it may be, which was my proportion of the compromise of 6250*l.*, plus the other matters to which I have referred, represents a compromised or arranged loss which has been settled. Although it is quite true that it is not disputed before us at any rate that this reinsurance policy subscribed by the Royal Exchange Assurance Corporation is only in respect of the risk of the total or constructive total loss, and does not attach at all to a partial loss, yet the plaintiff in this action says: This amount which I have paid is part of an amount paid in respect of a constructive total loss; and, therefore, I am within the terms of the policy.

First, we must ascertain what is meant by the words to which I have referred. Our attention has been called to two cases, *Chippendale* v. *Holt* (8 Asp. Mar. Law Cas. 78; 73 L. T. Rep. 472; 1 Com. Cas. 197) and *Martin* v. *Steamship Owners' Underwriting Association Limited* (7 Com. Cas. 195), for the purpose of explaining to the court how it was that this clause came to be inserted; that is, that the words to which I have referred came to be used. It may be very useful, and I think it is, to look to those cases for the purpose of informing one's mind of the history of these policies. It does help one to see that it was necessary to insert some words in order to get over the difficulty which was pointed out by Mathew, J. in the case of *Chippendale* v. *Holt*, but to my mind we derive no assistance in the interpretation of the rights under this document from reference to those cases. We must look to the words that are used. It may be that the words have failed to supply the defect or omission in the policies as they were hitherto written; but all we are concerned with is to deal with the words as we find them in this policy. It is for that reason that I do not examine any further the cases to which our attention has been directed. It is quite right to say, as was pointed out by Bigham, J. in the case of *Western Assurance Company of Toronto* v. *Poole* (9 Asp. Mar. Law Cas 390; 88 L. T. Rep. 362; (1903) 1 K. B. 376) that a common practice had sprung up for an insurer against a total and partial loss to reinsure the risk of the total loss while keeping himself uncovered as to the partial loss. That is the explanation of why, in the original policy, the premium is twelve guineas, and in this reinsurance policy, limited as it is, it is only 4*l.*

The difficulty in the case before us arises from the omission of words in the document of compromise enabling us to say with certainty, from the terms of the document itself, that this compromise was in respect of a claim for constructive total loss. If those words had been there inserted this litigation would never have taken place, because it is quite clear upon that the Royal Exchange Insurance would have paid. They could not have resisted the words of the policy, to which I have already called attention. But those words are not there.

On the one hand, it is said by Mr. Wallace and Mr. Chaytor, representing the defendants, "There was a claim, it is true, for a constructive total loss and partial loss, and there was a settlement of that claim," and whether they admit it or not—I think it was admitted, but that is immaterial—it is quite plain, upon a compromise of an action in which both claims appear, that both claims were compromised. I entertain no doubt that if there is a claim, or if there are two claims, in an action, and the action is compromised upon terms as to the payment of money, and no specific reference is made either to one or the other claim, it must be taken, apart from further evidence, that that is a compromise of both claims, and I do not think that any dispute arises in this case with regard to that.

But it is contended by counsel for the appellants that the burden is upon the plaintiff in this case to bring himself within the words of the reinsurance policy, and that it is for him to establish that this payment under this compromise was the event of a compromised or arranged loss being settled.

We have had a good deal of discussion as to the meaning of the word "settled." In my judgment, no importance attaches to that

particular word, because, taking it, as was argued, or at least contended, as established by reference to the case of *Beauchamp* v. *Faber*, 3 Com. Cas. (the particular passage to which our attention was called is in the judgment, at p. 310, but I do not refer further to it, because to my mind it assists us in no way in this case), I am prepared to accept the view that "settled" means adjustment of the loss, or accepting liability for the loss. It does not go so far as to mean payment of the loss, but it means that the loss has been arranged, and that the underwriter is prepared to pay, unless something happens in the meanwhile which will entitle him to refuse; for example, the discovery that it was a fraudulent claim. In any event, that is the view that I take; and I read the word "settled" just as if it were "adjusted," or as if it were "liability being accepted." To my mind, it carries us no further, because the loss which was settled is the compromised or arranged loss, and that means the loss which the underwriters have to pay as the result of the agreement arrived at between the owner of the vessel *Ivy*—that is, Mr. Coker—and the defendant in that action and those who were associated with him as underwriters under the original policies. Once it is clear that a claim was made and persisted in up to the time of the settlement of the action, for payment from the defendants in respect of a constructive total loss, and that that claim, with an alternative claim for partial loss, has been compromised, it is contended by the plaintiff that that establishes that there has been a compromised loss within the meaning of the policy, in respect of which there has been an adjustment by the underwriter within the meaning of the policy. If he is right in that, then he would be entitled to recover, unless the appellants here, the defendants in the action, have rebutted the presumption which would arise from the consideration of the documents and the facts and circumstances to which I have adverted.

It appears to me that the plaintiff's contention is right in this respect. There is a claim. The claim has been persisted in, and always for constructive total loss right up to the end, up to the time of compromise; and when the compromise was made it was, in my judgment, a compromise of the claim or claims made in the action. If so, it would include a claim in respect of a constructive total loss, notwithstanding that there was added to that claim an alternative claim in respect of a partial loss.

Once that conclusion is reached, the next step is to see whether there is any evidence in this case which would displace that view. I am far from saying that where you have not any words in a document expressing the result of the compromise arrangement, it may not be possible to establish that this compromise was, notwithstanding, only made in respect of the one claim—in this particular case, as it would be contended, the claim for partial loss. But, in my opinion, it is for the defendants by evidence to establish that proposition; and, although I may say that my mind has fluctuated during the course of the argument upon it, I have come to the conclusion that they have failed to establish that, and that they have, therefore, not removed the conclusion to which I come upon the other documents referred to in the action, and the evidence to which our attention has been called. It seems to me that once the claim is made, and that claim can never be made again, for the reason that it has disappeared in consequence of the agreement of compromise, or, in other words, that in consideration of the plaintiff in that case giving up his claim to a constructive total loss, and the defendants paying a certain amount in settlement, the litigation will come to an end, it cannot be said that there has been no settlement of a compromised loss within the meaning of the reinsurance policy.

We have had the advantage, during the course of the case, of a very interesting and elaborate argument, which in my judgment has not been too long or too elaborate; but I think in the end that the matter resolves itself into the answer to the two questions which I have just stated, and upon which I give an answer in favour of the plaintiff. In that I am agreeing with the view expressed by Bray, J. when he considered the matter.

I will only add one word with reference to the evidence, because that becomes very material in this case, in the view I am taking of it. It was said before the judge, and found by him, that, according to the evidence given at the trial, the cost of the repairs would only have come to some 5000*l.*, and that, therefore, there could not have been a constructive total loss; but as against that we must bear in mind that there were before him documents which had been in the possession of the plaintiff, Mr. Coker, and were prepared for him in the original action which was compromised, which show that he had witnesses, surveyors, who were prepared to say that the repairs would cost 9300*l.*, and would, therefore, exceed the 9000*l.*; and, therefore, if that evidence were believed, would have established that there was a constructive total loss. But at the trial of this case Mr. Leslie Scott elected not to call evidence upon the facts, that is, not to seek to establish by evidence in fact the vessel was a constructive total loss; but to rely merely upon the fact that there had been the compromise of a claim in respect of a constructive total loss. I mention that because it is obvious that no conclusion of fact as to whether or not the vessel was a constructive total loss has ever been arrived at in this case. In view of what happened at the trial, and the terms arrived at, and the terms of the reinsurance policy, it became unnecessary, and the plaintiff in this action proceeded merely upon that compromise. Although I am by no means saying that this case is free from difficulty, I am of opinion that he is right; and that, therefore, this appeal must be dismissed.

PHILLIMORE, L.J.—I agree with the Lord Chief Justice, both in his conclusions, and in his appraisement of the value of the arguments which have been addressed to us.

We have to construe a clause in this policy of reinsurance, and then we have to apply the facts to it. I accept the history of the introduction of this clause submitted to us by counsel for the appellants, and I think it is a help in construing it, but I do not know that it goes much further than that. I begin by the words "loss being settled." The word "settled" is used instead of the word "paid," I think, because underwriters do not pay at once. If I remember aright, if they are Lloyd's underwriters, they only bring money into account, or may only bring the money into account,

between themselves and the insurance broker. "Settled" means "ascertained," and ascertained by entering it for payment, treating it as good as paid. Then the words of this clause, as it seems to me, mean: "Though we, the reinsurers, or we, the reinsurance company, are only liable for the total loss, actual or constructive, and though you, the underwriters who were reinsuring, cannot come to us and say 'We have paid for a total loss,' yet if you do come to us and say you have compromised or arranged the claim for a total loss at such and such figures, we will pay you what you have paid." How can there be a discussion which can lead to a compromise of a claim for a total loss? There might be a discussion as to what the value of the ship lost was. But it is rare nowadays that the value of the ship is not put into the policy; it is rare that it is in dispute. Taking the case of a valued policy, what room is there for compromise? Either the ship is lost or she is not lost. Any compromise means one side or the other loses something of his strict rights. It means that it is a compromise of a class with which we are very familiar in litigation, whereby one side takes less than his rights by reason of the chance that he may recover nothing, and the other side gives something which, if he is right, he ought not to give by reason of the chance that he may have to give a great deal more. It is a pure monetary valuation of the probabilities of success. Being that, it must always result in the underwriters coming to the reinsurers with a demand for a less sum than that which would be applicable if it was a total loss.

Well, then, have the underwriters compromised a claim for a total loss, actual or constructive? They have compromised in an action for a constructive total loss, and that action is none the less an action for constructive total loss because the plaintiff puts into his points of claim what he need not have expressed—a claim for a partial loss. I am inclined to think that the principle *omne majus continet in se minus* applies to this case, and that we are not to regard this as two claims, A and B, but as claim A and claim A minus X. It would be possible to say in such a claim, and with such a compromise, that the compromise had been on the footing of a claim for partial loss only. For instance, it might be shown that the claim for total loss had been abandoned before the date of the compromise, in which case it would be as if it had never been preferred. It may be that there are other circumstances, or other cases, in which it could be shown that the compromise, though a compromise in an action launched for constructive total loss, was nevertheless not a compromise of a claim for a total loss. But *primâ facie* it is a compromise of a claim for a total loss, and the burden is upon the defendant company to show that it is not such a compromise. That being so, it seems to me clear that the defendant company have not discharged that burden, and we must take it that the underwriters here have compromised a claim for a total loss. It may well be that, as so constantly happens, the balance has a little swayed too much one way. The old form of policy of reinsurance was shown not to apply to a class of cases where in business it was meant to apply by the decisions which have been quoted, and thereupon this clause, which has been called a rubber clause, which is a common form clause, has been added to the old policies. It may be, as so often happens, it goes a little too far, and it may require some modification; but, of course, throughout this matter good faith is presumed, and, good faith being presumed, it may well be that the rare case where some mishap might happen in the form of compromise may be neglected. However that may be, that is a matter for those who are concerned with the drafting of insurance policies, and not a matter for this court.

Upon the policy as it appears before us, and on the evidence in the case, I think Bray, J. was right, and that this appeal fails.

Lush, J.—I have come, I confess with very considerable hesitation, to the same conclusion.

I will state my reasons very briefly. The defendants seek to set up, as an answer to a claim against them, upon a contract of re-insurance, that there has been in fact no constructive total loss, their risk being so limited, in the contract of re-insurance. The plaintiff replies that they are not at liberty to set up that defence, because, in the events which have happened, the defendants have undertaken by contract not to set it up. Whether they have contracted not to set it up depends partly upon the true construction to be placed upon a clause in the contract of re-insurance, and partly upon the facts.

With regard to the clause, it does not appear to me to present any real difficulty, so far as its construction is concerned. I think the clause is fairly plain, and means this: that the re-insurers undertook that if the hull underwriters have been parties to a compromise of a claim for constructive total loss, and have undertaken the responsibility of paying what they agreed to pay under that compromise, the defendants will do the same and also compromise it, and not raise this question.

The words "being settled," which Mr. Chaytor relied upon, appear to me to mean nothing more than this. The hull underwriters have been parties to a compromise, and have accepted responsibility; they have not accepted liability on the footing that there has been a constructive total loss, but have accepted responsibility under the compromise, and have agreed to pay the sum that they compromised for. That is what I think the clause perfectly plainly means.

Therefore the question is: Has the plaintiff proved in the events that have happened, that the hull underwriters have compromised a claim for constructive total loss? That is the question. That the onus of proof is on the plaintiff is perfectly manifest. In the first instance, the defendants, in the absence of proof that they have contracted not to do so, are entitled to put the plaintiff in this action to proof that there was a constructive total loss. The onus, therefore, is upon the plaintiff.

The plaintiff contends this. He says: "Here was an action brought with a claim based upon a constructive total loss." He says, and says perfectly truly, that that action has been compromised; and he puts in a document signed by counsel, which document says that that action, with those claims or that claim in it, has been compromised as between the underwriters and the then plaintiff. *Primâ facie*, it seems to me, assuming, as was perfectly plain here was the case, that the claim made by the plaintiff in the first action upon constructive total loss was a

bonâ fide claim, a substantial claim, not a mere colourable claim, but a real claim, the fact that that action, with that claim in it, has been compromised does show that there has been a compromise of a claim based upon a constructive total loss.

If the matter stood there, and if that were all we knew with regard to the compromise, I should have thought that the plaintiff would have discharged the burden that was upon him of establishing that the hull underwriters had been a party to a compromise of a claim of this nature; but where my doubt and difficulty have arisen is this: that the matter does not stand there. We know that before the writ was issued—or after it was issued, but before it was served—there was correspondence between the then plaintiff and the underwriters, in which, on the one hand, the plaintiff was insisting upon his claim to recover as upon a constructive total loss, and the underwriters were equally persistent in saying: "We will not recognise your claim for a constructive total loss. We will offer you a certain sum" —which they ultimately increased to 6000*l*.—"upon the footing that there has been a partial loss and nothing more." I confess that in my view, if the matter had come to an end there, and if that offer had been accepted in that state of facts, I should have thought that the plaintiff would have failed to establish that there had been a compromise by the underwriters of this claim for a constructive total loss; because it seems to me that it is essential, in order that the plaintiff should prove that, and shut out this defence, which the defendants seek to put forward, not only that the plaintiff was making a claim, but that the underwriters were compromising that claim, because the whole object of this clause in the contract of insurance is that the parties to the reinsurance are really agreeing to substitute the judgment of the underwriters in the earlier action for their own; and are saying in effect this: "If the underwriters in the earlier action have treated this as a *bona fide* claim, and have compromised it, we will do the same." Therefore, I think that if the matter had stood where it did stand upon that correspondence, the only reasonable inference to draw from the facts would be that the underwriters in that earlier action were declining to enter into any contract of compromise upon the basis of constructive total loss; and were insisting upon compromising, if they compromised at all, upon the basis of a partial loss.

But the matter did not stop there, because inasmuch as no arrangement could be come to, the writ that had already been issued was served, and the action proceeded. Now, what happened afterwards? The action came on for trial, but it was not in fact tried out; it was compromised, and that document was signed by counsel to which my Lord has referred. That document does not appear to me to throw any light whatever upon what claim it was that was compromised. I do not attach importance to that to which Mr. Leslie Scott asked us to attach importance, to those two terms in it with regard to general average and the other clause, but I think we ought to draw this conclusion from the compromise. The underwriters increased their offer; and there is no evidence before us that when the compromise was arrived at the underwriters were persisting in the attitude that they had taken up in the correspondence and were declining to compromise upon the basis of constructive total loss. I think that the burden had shifted from the plaintiff on to the defendants. The plaintiff discharged his burden by showing that there had been a compromise of an action in which this claim was involved. The defendants had failed to show that although that was the *primâ facie* compromise that was made, in point of fact the underwriters compromised only in respect of a claim for a partial loss.

That being so, I think here that there was evidence which would lead to the conclusion that the hull underwriters were parties to a compromise in respect of a claim for a constructive total loss. That being so and the defendants having contracted to compromise it also, and not having established their contention that the compromise was in respect of a partial loss only, I think the judgment of Bray, J. was right, and that the appeal fails.

Appeal dismissed.

Solicitors for the defendants, *Coward* and *Hawksley, Sons*, and *Chance*.

Solicitors for the plaintiffs, *Lightbound, Owen*, and *MacIver*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 2 and 3, 1914.

(Before PICKFORD, J.)

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900) LIMITED *v.* ASHTON. (a)

Charter-party — Master co-owner — Loss of cargo through unseaworthiness — Liability of co-owner other than master.

A ketch was owned by two co-owners, and worked on the basis that the master took two-thirds of the gross freights, out of which he paid the mate and the crew, the provisions, and expenses of the voyage. The owners took one-third of the gross freight, subject to deductions for port dues. The owners provided for the upkeep and insurance of the vessel. The ketch loaded a cargo of cement under a charter-party made by the master, which was lost through the unseaworthiness of the vessel. In an action by the owners of the cargo against one of the co-owners of the ketch:

Held, that the contract of charter-party was made by the master personally, and that the defendant was therefore not liable.

Steel *v.* Lester (37 *L. T. Rep.* 642; 3 *Asp. Mar. Law Cas.* 537; 3 *C. P. Div.* 131) *and* Bernard *v.* Aaron (9 *Jur. N. S.* 470) *followed.*

COMMERCIAL COURT.

Action tried by Pickford, J.

The plaintiffs' claim was to recover damages for the loss of a cargo of cement shipped on board the ketch *Myrtle*.

The facts and arguments are sufficiently stated in the judgment.

Leck, K.C. and *Raeburn* for the plaintiffs.

Dunlop for the defendant.

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

PICKFORD, J.—This action is brought to recover the amount of the loss of a certain cargo of cement shipped at the wharf of the plaintiffs, the Associated Portland Cement Manufacturers Limited, and sold by them to the other plaintiff who was added during the progress of the case, a Mr. Ainsworth. It was shipped on board a ketch called the *Myrtle*, which belonged to the defendant and another co-owner, a Mr. Smith, and was worked by the master under an arrangement that I shall deal with directly. The ketch went and loaded, and during the time that she was loading she had to take the ground. After taking the ground and being completely loaded she left on the 17th June. On the 21st June, having got part of the way on her voyage to Fowey, where she was bound with cement, she sank, and she sank in fine weather. There never was any weather that was such as to endanger a vessel that was in a proper and seaworthy condition. That is stated by both the master and mate, and, I am satisfied, stated quite correctly. In those circumstances the question is whether the defendant is liable for that loss. He says it was a peril of the sea that caused it. To that the plaintiffs say that that peril of the sea was made fatal by unseaworthiness, or, rather, the ship was unseaworthy, and was lost by reason of the unseaworthiness, and therefore the exceptions of peril do not arise. The defendant denies that she was unseaworthy on leaving the Thames on starting on her voyage, and says, if she was, she was unseaworthy because of the wrongful act of the plaintiffs, the Associated Portland Cement Manufacturers Limited, in giving her a bad berth. The ketch was bought by Mr. Ashton and Mr. Smith. She was worked upon what is called the system of thirds—that is to say, the master takes two-thirds of the gross freights; out of that he pays the mate and the rest of the crew and the provisions and expenses of the voyage. He hands over to the owner one-third of the gross freight, subject to some small deductions, which have no materiality for port dues. The owner provides the ship and keeps her up. He pays for her upkeep and he insures her. Those are the terms on which she is worked. The master has to pay over the one-third of the gross profits, whether the two-thirds which he retains for himself are or are not enough to pay the expenses of the voyage, and therefore the owner is not involved in any question of whether the voyage is profitable so long as there is a gross freight. What the effect of that may be is a matter I shall have to consider.

The first thing, it seems to me, is that there is no doubt that this ship was not in a fit condition to carry the cargo when she sailed from the river Thames, her loading place. I do not think there is any doubt about that. Nobody suggests that she was, indeed. The master and the mate both say that she encountered no weather that should have caused any injury to a well-found seaworthy ship. [His Lordship, having dealt with the condition of the ship, continued:] It was the fact that she was not seaworthy for the voyage on which she started, and if it was not caused by the plaintiffs' act, as I think it was not, then they are entitled to recover, subject to the other point of whether the master was the servant, partner, or agent of the defendant for the purposes of making this contract.

I find it impossible to distinguish the facts of the employment in this case from the facts of the employment in *Bernard* v. *Aaron* (*sup.*). The facts seem to be really identical, the only difference being that it is said here in so many words that the owner paid for the upkeep of his vessel, whereas it is not said so in so many words in *Bernard* v. *Aaron* (*sup.*), but I should think that that was the case in *Bernard* v. *Aaron* (*sup.*). I cannot draw any distinction between the facts of the cases. I find it very difficult to draw any distinction between this case and the case of *Steel* v. *Lester* (*sup.*), because, although it is a fact that there the participation was in net profits, which, of course, is *primâ facie* evidence of a partnership, whereas participation in gross profits is not, the learned judges do not seem to me to have laid any stress on that in delivering their judgment, and the only thing to distinguish this case from *Bernard* v. *Aaron* (*sup.*) is that that was an action of tort and that this is an action of contract. It is said that the owners hold out the master as being authorised to contract for the owners. That does not seem to me to be consistent with the judgment in *Bernard* v. *Aaron* (*sup.*). No doubt Byles, J. did say that he reserved the question as to whether the defendant was responsible in an action *ex contractu*; but the real basis of the judgment is the one stated very shortly by Keating, J., that the result of the facts in the case is that Aaron was not the agent of Sharpley but the hirer of the vessel, and Willes, J., I think, uses the same expression. He says he is not the agent of the owner, but the person who works the vessel on his own account. Byles, J. also says: "I think Aaron is the hirer of the ship, paying for the hire of it by uncertain amounts."

Now, if he is the hirer of the ship, I do not see that there is any holding out of him as the agent of the owner. I do not express any opinion as to whether the principle of *Bernard* v. *Aaron* (*sup.*) is right or is reconcilable with the other authorities that have been cited. I think it is an authority so much on all fours with the present case that I am bound to act upon it. It is not mentioned at all by Scrutton, J. in his book, and it is only mentioned very casually in Mr. Carver's book, and mentioned in a way that leads me to think that Mr. Carver thought that it was in conflict with the current authorities. But I find it so on all fours with this case that I do not feel myself justified in considering what should I decide apart from it, and upon that ground I think the defendant is entitled to judgment. It would be very satisfactory, I think, if the matter is cleared up by some court which can disregard *Bernard* v. *Aaron* (*sup.*) if it thinks fit. I do not say it ought to do so. I do not think that I am at liberty to do so, and therefore I say there must be judgment for the defendant on that ground.

Solicitors for the plaintiffs, *Ballantyne*, *Clifford*, and *Hett*.

Solicitors for the defendant, *W.* and *W. Stocken*.

Thursday, March 5, 1914.

(Before CHANNELL, SCRUTTON, and BAILHACHE, JJ.)

HARRISON AND ANOTHER (apps.) v. DODD (resp.). (a)

Seaman—Wages — Overtime — Seaman required to work overtime—Claim for extra wages.

When a seaman enters into articles with a shipowner for a voyage, the seaman is as a general rule bound to give his full services for the wages specified in the articles, and he is not entitled to any payment in respect of overtime merely because he is called upon to work for longer hours than was contemplated when the articles were entered into, even though an express promise was made to him by an officer of the ship to pay overtime.

A seaman signed articles as a fireman and trimmer on a steamship; he had four-hour watches until the ship reached L., when one fireman was left behind having fallen ill. The remaining firemen were asked by the chief engineer to do six-hour watches, which they did for about a week, the chief engineer promising to pay overtime and saying that if the shipowners did not pay it he would pay it himself. Upon a claim by a fireman against the shipowners in respect of such overtime :

Held, on the authority of Harris v. Carter (3 *E. & B.* 559), *that there was no consideration for the promise made by the chief engineer even if he had authority to make it, which he had not, and that the seaman was not entitled to claim any overtime payment.*

CASE stated by the Lord Mayor of the City of London sitting as a court of summary jurisdiction at the Mansion House.

At the court of summary jurisdiction on the 11th Sept. 1913 before the Lord Mayor, Thomas and James Harrison (the appellants) were summoned by William George Dodd (the respondent) under the Employers' and Workmen Act 1875, the respondent claiming from the appellants the sum of 1*l*. 4*s*., being thirty-two hours at 9*d*. per hour overtime worked by him between the dates of the 21st June and the 28th June 1913 whilst on a voyage from Las Palmas to Durban on board the steamship *Insiswa*. On hearing the complaint the magistrate made an order for the appellants to pay the sum of 1*l*. 4*s*., with the sum of 23*s*. for costs.

At the hearing of the summons the following facts were proved or admitted before the magistrate: (*a*) The respondent William George Dodd was a fireman and trimmer. (*b*) He signed articles as such on the steamship *Insiswa*, of which ship the appellants were owners, on the 25th May 1913 at 5*l*. 10*s*. a month. [A copy of the articles was appended to the case.] (*c*) There were eleven other firemen. (*d*) The respondent had four-hour watches until the ship reached Las Palmas. (*e*) There one of the firemen was left behind, having fallen ill. (*f*) The ship left Las Palmas with one fireman short. (*g*) Between the 21st and the 28th June 1913 the remaining firemen were asked by the chief engineer to do six-hour watches, the chief engineer promising the respondent to pay overtime, stating that if the firm did not pay he would pay out of his own pocket. (*h*) The respondent accordingly did six-hour watches between the 21st and the 28th June, being thirty-two hours more than if he had served four-hour watches. (*i*) No overtime was paid. (*j*) The respondent on the 9th Aug. 1913 signed off the ship on form M, excepting from his release a claim of 1*l*. 4*s*. for thirty-two hours overtime at 9*d*. per hour. [A certified copy of form M was appended to the case.]

On behalf of the appellants it was contended that the respondent was not entitled to overtime for the reason that the only contract between the parties was contained in the articles, and that there was no term therein as to the amount of time for which the respondent would be required to work in each day, nor was there any term that the respondent should be paid overtime or any rate therefor. It was further contended that there was no evidence of any custom to pay overtime at sea such as would vary the contract. Furthermore, it was contended that the respondent signed on as fireman and trimmer, and evidence was given to prove that trimmers usually work in six-hour watches. It was further contended that the chief engineer had no authority to make a contract for the payment of overtime on behalf of the owners, and, alternatively, that there was no consideration for the contract.

On behalf of the respondent it was contended that the promise of the chief engineer to pay overtime formed a binding contract between the respondent and the appellants.

The magistrate was of opinion that the respondent was entitled to 1*l*. 4*s*. for thirty-two hours overtime at 9*d*. per hour, and made an order to that effect, with 1*l*. 3*s*. costs.

The question for the opinion of the court was whether upon the above statement of facts the magistrate came to a correct determination in point of law, and, if not, that the matter should be remitted to him with directions as to what should be done in the premises.

Alexander Neilson for the appellants.—The case raises an extremely important question as to seamen's wages. From the earliest times all agreements with seamen as to wages, duration of voyage, and as to places must be in writing, and it has always been an accepted principle that seamen's wages cannot be varied during the voyage except in the case where the ship is in such danger that the seamen are not bound to proceed at the risk of their lives, and are, in fact, free men and at liberty to make a fresh bargain. The present case is really covered by authority. One of the earliest cases was *Harris* v. *Watson* (Peake, N. P. C. 102), decided in 1791, and there it was held that a seaman could not maintain an action on a promise made by the master of the ship to pay him extra wages in consideration of his doing more than the ordinary share of duty in navigating the ship. In that case the ship was in danger, and the master, in order to induce the seamen to exert themselves, promised the plaintiff, in consideration of his performing some extra work in navigating the ship, that he would pay him five guineas over and above his wages, but Lord Kenyon said that the action could not be maintained, and that if such an action were maintainable it would materially affect the navigation of the kingdom. The ground of public

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

policy on which that case was decided was followed in 1854 in *Harris* v. *Carter* (23 L. T. Rep. O. S. 66; 3 E. & B. 559), in which during a voyage several of the crew deserted, and the captain, to induce the rest to remain, signed fresh articles with the seamen at a higher rate of wages for the home voyage. One of the seamen sued the shipowners for the higher rate of wages, and it was held that he could not recover. Lord Campbell, C.J. said that if the plaintiff had been relieved from the obligation which he had contracted towards the shipowners, he might have entered into a fresh contract, and, under some circumstances, the captain might have had authority to bind the owners by entering into a fresh agreement on their behalf with him, but that there were no circumstances of that kind in the case, and he added that "it would be most mischievous to commerce if it were supposed that captains had power, under such circumstances, to bind their owners by a promise to pay more than was agreed for." Then in *Hopkins* v. *M'Bride* (50 W. R. 255) Lord Alverstone, C.J. said that where no sufficient reason is given to justify the seaman in breaking his articles, he is bound by them, and his contract for extra remuneration comes under the class of contracts which have over and over again been held not binding; and he stated that for upwards of one hundred years there has been a principle of law that in the case of contracts made by seamen, who were not entitled to break their articles, even if there might apparently have been some consideration, there was not enough to justify the making of a fresh agreement if in fact the circumstances were not such as to justify the crew in thinking that the contract under the articles was at an end. In the present case all that had happened was that there was one fireman short, but to justify the making of a new contract the character of the voyage must be essentially changed, which was not so here. The seaman by his contract is bound to do his best and to work his hardest for the master without asking for anything extra as wages. The case is really concluded by the abovementioned authorities, which establish, first, that on the legal ground there is no reason why the seaman was not bound by his articles, and the promise made to him was without any consideration; secondly, that no alteration can be made in the articles except in writing and they cannot be altered by a verbal arrangement; and, thirdly, that the person who purported to make the alteration, namely, the chief engineer, had no authority to pledge the credit of the shipowners for that purpose.

F. C. Wynn Werninck for the respondent.—The respondent was called upon to do work in overtime and he is entitled to be paid a reasonable extra sum for his overtime work. A seaman cannot be called upon to work out of his own watch except in case of sudden emergency and there was no such sudden emergency here. If it were otherwise, he might have no time off work. When there is cast upon the seamen an additional amount of work they are entitled to an additional sum in respect of that work, and it is competent to the chief engineer to promise that a resonable sum shall be paid. That promise is made for a sufficient consideration and binds the owners. The respondent was working overtime and he was entitled to an extra sum, and 9*d*. an hour was a reasonable sum. The decision of the magistrate was therefore right and ought to be affirmed.

CHANNELL, J.—In this case we are all of opinion that the law is perfectly well settled by the various cases to which counsel for the appellants has referred. I should think perhaps that the case of *Harris* v. *Carter* (*ubi sup.*) is as near the facts of the present case as any; it was a very much stronger case in favour of the seaman than this case, and yet it was held that the seaman was not entitled to recover the extra wages. For the wages contracted for in the articles the seaman is bound to give his full services, and there is no such thing recognised as overtime or payment in respect of overtime merely because the seaman is called upon to work for longer hours than are expected by the parties when they enter into the contract. It is a contract as to which one cannot foresee all that will happen upon the voyage, and all the points that arise in this case as to the consideration for the contract, as to the authority of the master to make it, and so on, have arisen and been considered in the various cases.

Referring to the case of *Harris* v. *Carter* (*ubi sup.*), the headnote (3 E. & B. 559) is this: "Plaintiff, a sailor, signed articles for a voyage out to M. and home, at 3*l*. per month. On the arrival of the ship at M. several of the crew deserted." (In this case, it was only one seaman who became ill, and it is therefore much less strong than that case.) "The captain, to induce the rest to remain, signed fresh articles with plaintiff and others at the rate of 6*l*. per month for the home voyage. Plaintiff continued in the vessel till her arrival home, and then sued the shipowner for work and labour. Defendant paid money into court at the rate of 3*l*. per month" (that being the amount under the first articles). "Plaintiff claimed to be paid at the rate of 6*l*. for the home voyage. On the trial there was some evidence that at M. the captain had consented to the discharge of some of the crew. The judge asked the jury if the plaintiff himself had been discharged before entering into the fresh articles. On their answering that he had not, the judge directed a non-suit. Held, on a motion for a rule for a new trial that the non-suit was right; for that there was no evidence of any circumstances to free the plaintiff from his original contract, so as to enable him to give consideration for the fresh promise to him, or to authorise the captain to bind the owners by such a contract." That seems to deal with all the points in the present case, and to be a clear authority, so long ago as 1854, and an authority which has been distinctly recognised in several cases since.

I am of opinion upon all the points in the case that the plaintiff fails. This seaman was bound to work for such time as might be required, and the fact that one of the firemen—it was only one out of twelve—became ill, so that the work of each fireman was somewhat increased, in no way relieved this seaman from his contract. He was still bound to serve, and to serve for such time as might be necessary in doing his work as a fireman and trimmer. There was, therefore, no consideration for the express promise, which I assume was satisfactorily proved in this case, to pay this seaman additional money, and, even if

there had been consideration, there was no authority to make it. It was made by the chief engineer, who may be a superior officer over the engine room, but who certainly has not the authority of the master, and, therefore, in that respect, it is an *à fortiori* case. I am of opinion that there was no authority for him to make the promise. The appeal, therefore, must be allowed.

SCRUTTON, J.—I agree.

BAILHACHE, J.—I agree.

Appeal allowed.

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

Solicitor for the respondent, *Alexander Smith.*

March 3 and 4, 1914.

(Before LUSH and ATKIN, JJ.)

MAYHEW *v.* TRIPP. (a)

Seaman—Dispute with employer—Reference to superintendent of a mercantile marine office— — Adjudication by deputy superintendent — Jurisdiction to adjudicate — Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 247, 263, 387 *:*

The Merchant Shipping Act 1894, *s.* 387 (1), *provides that a superintendent of a mercantile marine office shall inquire into, hear, and determine any dispute either between the owner of a fishing boat and the skipper or a seaman of the boat, or between the skipper of a fishing-boat and any seaman of the boat concerning* (ii.) *the skipper or seaman's engagement, service, or discharge . . . if any party to the dispute calls on him to decide it, and his decision thereon shall be final and binding on all persons.*

Sect. 247 (2) *provides that " any act done by, to, or before a deputy duly appointed shall have the same effect as if done by, to, or before a superintendent.*

A deputy superintendent having adjudicated upon a dispute in relation to the discharge of a seaman under sect. 387,

Held (*on appeal from a County Court judge*), *that he had jurisdiction to adjudicate.*

APPEAL from the decision of His Honour Judge Eardley Wilmot, sitting at the Lowestoft County Court.

The plaintiff, a fisherman, was shipped on the 17th Aug. 1913 as whaleman on board a steam drifter belonging to the defendant for a fishing voyage which was to end in Dec. 1913, his remuneration to be by a share of the profits. He became temporarily ill, and on the 28th Sept. returned to his home.

On the 11th Oct., the plaintiff, having recovered, presented himself to the skipper of the boat to be taken on board again, but the skipper, acting on the instructions of the defendant, refused to allow him to go on board and continue the voyage. The plaintiff submitted the dispute to the deputy superintendent of the marine office at Lowestoft, under sect. 387 of the Merchant Shipping Act 1894.

That section provides that:

A superintendent shall inquire into, hear, and determine any dispute, either between the owner of a fishing boat and the skipper or a seaman of the boat, or between the skipper of a fishing boat and any seaman of the boat, concerning . . . (ii.) The skipper's or seaman's engagement, service, or discharge. . . ."

Sect. 247 (2) of the Act provides that:

Any act done by, to, or before a deputy duly appointed shall have the same effect as if done by, to, or before a superintendent.

The deputy superintendent adjudicated upon the matter and decided against the plaintiff. The plaintiff subsequently sued the defendant in the County Court to recover damages for wrongfully discharging him from his employment. The defendant set up the defence that the matter, having been adjudicated upon by the deputy superintendent, was *res judicata.* It was contended on behalf of the plaintiff that the deputy superintendent had no jurisdiction to adjudicate upon the dispute. The learned judge held that the deputy superintendent in adjudicating on the dispute was acting *ultra vires*, the powers conferred upon a superintendent to adjudicate under sect. 387 of the Merchant Shipping Act not being extended to a deputy superintendent by sect. 247 of the Act.

The defendant appealed.

Gerald Dodson for the defendant.—The learned judge was wrong in holding that the deputy superintendent had no jurisdiction to adjudicate on the dispute between the parties, since by sect. 247 (2) of the Merchant Shipping Act 1894 any act done by him has the same effect as if done by the superintendent. This includes the hearing of a dispute under sect. 387.

W. P. Eversley for the plaintiff.—The decision of the learned judge was right. The deputy superintendent had no jurisdiction to adjudicate upon a dispute under sect. 387. Sect. 247 only authorises him to deal with such of the duties of a superintendent as are specified in sub-sect. 1 of that section which do not include the adjudicating upon a dispute under sect. 387. In addition sect. 247 is in Part II. of the Act and sect. 387 in Part IV., and sect. 263 provides that the provision of Part II. of the Act in reference "to the decision of questions by the superintendent when referred to him" shall not apply to any fishing boats, the result being that the powers of the deputy are limited to the matters concerned with in Part II. and do not include those dealt with in sect. 387.

LUSH, J.—This case raises a question which we are told is of considerable importance in relation to the jurisdiction of a deputy superintendent of Merchantile Marine under the Merchant Shipping Act 1894 to do what the superintendent himself undoubtedly can do, namely, to hear and adjudicate upon disputes between seamen and the owners or skippers of fishing boats. The question arises in this way: The plaintiff brought an action in the County Court of Lowestoft claiming a declaration that he was wrongfully discharged from his employment; a share of the profits of the boat upon which he had served as a whaleman and compensation for the damage caused to him for his wrongful discharge as wages duly earned by him. He was met by the answer that the matter was *res judicata*, having been already enquired into as between the plaintiff and the defendant by the deputy

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

superintendent of the port who had given a decision against the plaintiff which was final and binding. He was also met with an answer upon the merits if the other defence failed. With regard to the point taken that the matter was *res judicata* the plaintiff's answer apparently was (1) that there had been no adjudication of the dispute at all by the deputy superintendent, and (2) that if there had been the deputy superintendent had no jurisdiction to adjudicate upon the matter. The learned judge came to the conclusion, as I think, that there had been a dispute and an adjudication, and with regard to the other point taken, he held that the deputy superintendent had no jurisdiction to adjudicate at all. He went into the merits, therefore, on the footing that the matter was not *res judicata*, and decided in the plaintiff's favour. In his judgment he said: "I hold on the question of fact that plaintiff had never abandoned his intention of returning to the vessel as soon as his health permitted, and I find that the circumstances did not justify the skipper in coming to that conclusion, or that he could reasonably conclude that the plaintiff's illness was of such a nature that he was justified in filling up his place and revoking the contract for the voyage." The defendant appealed, and we have first of all to see whether the learned judge was right or wrong in holding that the deputy superintendent had no right to adjudicate upon the matter. That question depends upon the construction of two or three sections of the Merchant Shipping Act 1894. The section under which power is given to hear and determine disputes is 387 in Part IV. of the Act. [His Lordship read the section.]

That does not conclude the matter, because the section only refers to a superintendent, and the dispute in the present case was not adjudicated upon by a superintendent, but if it was adjudicated upon at all it was by a deputy superintendent. One has to turn, therefore, to other sections of the Act in order to see whether a deputy superintendent has the same jurisdiction in such matters as the superintendent himself. Provision as to what a deputy superintendent may do is made in sect. 247 in Part II. of the Act. That section says that "any act done by, to, or before a deputy duly appointed shall have the same effect as if done by, to, or before a superintendent. That the deputy in the present case was duly appointed was never disputed, and the question we have to decide is whether sect. 247 (2) does not give to a deputy superintendent the same jurisdiction which the Act gives to a superintendent either in Part II. or Part IV. of the statute. I can see nothing to suggest the contrary. One would naturally suppose that a deputy is appointed to act for the superintendent when the latter by reason of circumstances cannot act himself, and one finds in this section that so far from there being anything to qualify or limit the jurisdiction of the deputy there are plain words giving to the deputy the right to do any act which the superintendent may do. It seems to me to be reasonably clear, unless there is some other section which cuts down the provisions of sect. 247 that the deputy superintendent has just the same right to hear and determine a dispute as the superintendent himself. It would be highly inconvenient if he had not because the objects of these provisions, and particularly those of sect. 387, is to give to the seamen an expeditious and inexpensive method of settling a dispute which may have arisen between him and the owner or skipper of a boat and to give him the power to get his rights enforced which, but for the provisions of the section, the circumstances of the case might prevent him from enforcing. Among other disputes upon which the superintendent may adjudicate is the question of the quantity and the quality of the food supplied to the seamen. Those are matters which can be very rapidly determined by a person who has an opportunity of enquiring into them. They do not require anything like a formal hearing such as is provided by an action in the County Court or other investigation of that nature. It would be highly inconvenient if we were to hold that the deputy superintendent, who might be the only person who could act, had no power to give the seamen the benefits which the provisions of the statute have conferred on him. In my opinion sect. 247, sub-sect. 2, gives the deputy power to adjudicate unless some other section of the Act has deprived him of it. Mr. Eversley contended that there was another section which cuts down the effect of sect. 247, and he referred us to sect. 263 which is also in Part II. of the Act. That section enacts by sub-sect. 2 that the provisions of Part II. relating to certain matters including "(*g*) the decision of questions by the superintendent when referred to him" shall not apply to any fishing boats, or to the owners, shippers, and crews thereof. Mr. Eversley says that the effect of sect. 263 is that with respect to fishing boats, which is the case with which we are concerned, the jurisdiction of the superintendent is ousted altogether. If that is correct the jurisdiction of the deputy would be equally ousted. It seems to me, however, clear that if you look at sect. 263 it does not touch the provisions of sect. 247, because sect. 263 is expressly confined to the provisions contained in Part II. of the Act. The jurisdiction in question in the present case is not conferred by Part II. but by Part IV., and I find nothing in sect. 263 which in the least degree qualifies, limits, or cuts down the powers of a superintendent conferred by sect. 387 to inquire into a dispute between a seaman and the owner or skipper of a fishing boat. That being so, I think there was jurisdiction in the deputy superintendent to adjudicate upon the dispute in question, and consequently, in my opinion, the decision of the learned judge was wrong. The result is that this appeal must be allowed and judgment entered for the defendant.

Atkin, J.—I am of the same opinion. In this case the plaintiff claimed against the defendant damages upon the footing that he had been engaged in Aug. 1913 as a fisherman on share terms on the defendant's steam drifter. He became temporarily ill on the 28th Sept., and on the 9th Oct. the skipper refused to allow him to go on board the vessel for the voyage. In the action the plaintiff claimed that he was wrongfully discharged by the defendant, and sought to recover a share of the profits of the voyage and damages. In answer to the plaintiff's claim the defendant gave notice of the statutory defence that he intended to rely upon the provisions of the Merchant Shipping Act 1894. Those provisions are contained in 748 sections, and consequently

the notice of defence was informal in that it did not specify the particular sections relied upon. No point, however, was made as to this by the plaintiff. The statutory defence relied on was that the matter had been adjudicated upon by the deputy superintendent under sect. 387 of the Merchant Shipping Act. In order that that should be an effective defence it was necessary to show that the deputy superintendent had inquired into and heard and determined the dispute before the action was brought in the County Court, and also, of course, that he had jurisdiction to determine it. Upon the question of jurisdiction the learned judge held that there was no jurisdiction in the person who had determined the dispute because he was a deputy superintendent and not the superintendent himself. It was contended by Mr. Eversley that the learned judge was right in so holding because he submitted that sect. 387 does not even give to the superintendent the right to decide the question whether the man has been wrongfully discharged or not. I think the words of the section clearly show that the superintendent has the right to determine such a dispute, and also the amount of compensation a person wrongfully discharged is entitled to. Therefore it was within the jurisdiction of a superintendent to adjudicate upon this dispute. The deputy superintendent receives his powers from sect. 247 (2) of the Act, which provides that "any act done by, to, or before a deputy duly appointed shall have the same effect as if done by, to, or before a superintendent." To my mind the determination of a dispute by a deputy duly appointed comes within that sub-section and is validated by that section.

It has been contended, however, that the effect of sect. 263 is to prevent the application of Part II. of the Act to fishing boats, and that as sect. 247 is in Part II., the powers given to a deputy superintendent given by sub-sect. 2 of that section cannot be exercised with regard to a matter arising under sect. 387 which is in Part IV., and that the only persons who can act under sect. 387 are superintendents who are expressly authorised to do so by the section. In my opinion that contention is not well founded. Sects. 246 to 250 are a bundle of sections which deal generally with the powers and duties of superintendents, and they contain no provisions which relate to the special matters referred to in sub-sect. 2 of sect. 263. In my opinion there is nothing in that section which restricts the powers given to a deputy superintendent by sect. 247 of doing anything that a superintendent may do.

Appeal allowed.

Solicitors for the plaintiff, *Gibson* and *Weldon*. for *Atkins*, Lowestoft.

Solicitors for the defendant, *Botterell* and *Roche*, for *Chamberlin*, *Talbot*, and *Bracey*, Lowestoft.

Friday, March 6, 1914.

(Before Pickford, J.)

New Zealand Shipping Company Limited v. Duke. (a)

Marine insurance — Policy — Passage money — Pooling agreement—Loss—Merchant Shipping Act 1894 (57 & 58 *Vict.* c. 60), s. 331.

The plaintiffs took out a policy of marine insurance with the defendant on the steamship W. for a voyage from the United Kingdom to Australia and New Zealand. The policy covered the risk of loss of passage money, and was also expressed to cover any reasonable disbursements arising from accident or loss on account of passengers, whether for maintenance or conveyance to destination in accordance with the requirements of the Merchant Shipping Act 1894. *The plaintiffs had a "pooling" agreement with two other shipping companies for sharing profits. The W., having a number of emigrant passengers on board, dragged her anchors at the outset of the voyage, returned to port, and was detained for repairs. The passengers in question were sent on in another ship belonging to the "pool," and the W. eventually proceeded on her voyage carrying other passengers who had paid their passage money, the number exceeding that which had originally started in her. The plaintiffs made disbursements in respect of the maintenance of the original passengers, and also in respect of carriage to their destination. In an action on the policy :*

Held, that the plaintiffs were entitled to recover, as the insurance was made by the plaintiffs for their own benefit, and not for that of the pool, and that the passage money paid by the other passengers was not in the nature of a salvage.

Commercial Court.

Action tried by Pickford, J.

The plaintiffs' claim was for a loss under a policy of insurance underwritten by the defendant and other underwriters at Lloyd's. The facts and arguments are sufficiently stated in the judgment.

Roche, K.C. and *Mackinnon* for the plaintiffs.

Maurice Hill, K.C. and *R. A. Wright* for the defendant.

Pickford, J.—In this case the plaintiffs are suing the defendant upon a policy on a vessel called the *Westmeath*. The *Westmeath* was carrying emigrants, and was subject to the provisions of the Merchant Shipping Act 1894 with regard to passenger and emigrant ships. She had a number of passengers on board under contracts which had been made by shipping agents, and she was sailing as one of what is called a "pool"—that is to say, her owner and two other owners had entered into a pooling agreement with regard to sharing the freights, passage money, and so on. The *Westmeath* embarked her passengers and started from Liverpool, but, unfortunately, while she was in the Mersey at anchor, she dragged her anchors, went ashore, and was very seriously injured, the result being that she was detained for seventy or eighty days, and the passengers did not go on in her because she was not able to take them, but went on in other ships belonging to

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

other members of the pool. The *Westmeath* at the expiration of the seventy or eighty days was in a position to proceed upon her voyage, and sailed for the same destination carrying other passengers under other contracts, and the passage money of that second lot of passengers equalled, or exceeded to some slight extent, the amount of the passage money of the first lot of passengers, who were not carried. In order to deal with the passengers who were first embarked, a certain amount of money was paid in respect of their carriage upon the other ships, upon which they were forwarded to their destinations. The question before me arises upon four items: (1) 2532*l.* 2*s.* which was paid to the *Shropshire*, which carried part of the passengers; (2) 129*l.* 5*s.* 6*d.* passenger money on the *Ayrshire*; 423*l.* 10*s.* 9*d.* on the *Nairnshire*; and 139*l.* 7*s.* 6*d.* also passenger money on the *Nairnshire.* The objection to the plaintiffs' right to recover is two-fold. First, it is said that this was an insurance on passage money for a voyage, and that the insurance would cover any passage money in respect of that voyage; that the voyage upon which the vessel eventually proceeded to Australia was in fact the same voyage as the one in which she started when she received damage; and therefore that the passage money in respect of the first lot of passengers was either not lost at all, because the passage money of the second lot must be taken to be substituted for it, or, if lost, there was a salvage in respect of that loss of the passage money of the second lot of passengers, and that, therefore, whichever way you look at it, there was no general loss upon the policy. That is a point which is of general application on policies of this description. The second point is peculiar to this particular case, because it arises in this way: It is said that this was not a policy effected for the benefit of the plaintiffs, but for the benefit of the pool; that the passage money was money paid for the benefit of the pool, but that when the *Westmeath* was unable to proceed the passengers were carried upon other ships belonging to the pool, and that therefore the pool never lost at all; that it merely amounted to taking money out of one pocket and putting it into another. That depends upon the agreement, and the point is one which, in my opinion, is of very considerable difficulty.

The first thing to do is to see what the policy was, and what was the risk insured by the policy. The only provisions of the Merchant Shipping Act which can apply to this are sects. 328 and 331. Sect. 328 provides as follows:

Where a contract has been made by or on behalf of any steerage passenger for a passage in a ship proceeding on a voyage from the British Islands to any port out of Europe and not within the Mediterranean Sea, or proceeding on any colonial voyage as defined by this part of this Act, and (i.) the steerage passenger is at the place of embarkation before the hour appointed in his contract, or, if no hour is appointed in the contract, before any hour fixed for the embarkation of which he has received not less than twenty-four hours' notice; and (ii.) the stipulated passage money has, if required, been paid, then if the steerage passenger from any cause whatever (other than his own refusal, neglect, or default, or the prohibition under this Act of an emigration officer, or the requirement of an Order in Council), (*a*) is not received on board the ship before the said hour, or, (*b*) having been received on board, does not either obtain a passage in the ship to the port at which he has contracted to land or, together with all the immediate members of his family who are included in the contract, obtain a passage to the same port in some other equally eligible ship to sail within ten days from the expiration of the said day of embarkation, and is not paid subsistence money from the time and at the rate hereinafter provided, the steerage passenger or any emigration officer on his behalf may recover summarily all money paid by or on account of the steerage passenger for his passage, together with such further sum not exceeding ten pounds in respect of each such steerage passenger as is in the opinion of the court a reasonable compensation for the loss or inconvenience occasioned to the steerage passenger by the loss of his passage, and such money and sum may be recovered, either from any person to whom or on whose account any money has been paid under the contract, or if the contract has been made with the owner, charterer, or master of the ship, or with any person acting on behalf or by the authority of any of them, then, at the option of the steerage passenger or emigration officer, from the owner, charterer, or master, or any of them.

The 329th section only provides for the amount of the subsistence money to be paid in case of detention. Sect. 330 provides a penalty for landing at the wrong port, and does not affect this case. Sect. 331 says:

(1) When any emigrant ship (*a*) has, while in any port of the British Islands, or after the commencement of the voyage, been wrecked or otherwise rendered unfit to proceed on her intended voyage, and any steerage passengers have been brought back to any port in the British Islands; or (*b*) has put into any port in the British Islands in a damaged state; the master, charterer, or owner of that ship shall, within forty-eight hours thereafter, give to the nearest emigrant officer a written undertaking to the following effect; (that is to say) (i.) If the ship has been wrecked or rendered unfit to proceed on her voyage, that the owner, charterer, or master thereof will embark and convey the steerage passengers in some other eligible ship, to sail within six weeks from the date of the undertaking, to the port for which their passage had been taken. (ii.) If the ship has put into port in a damaged state, that she will be made seaworthy and fit in all respects for her intended voyage, and will within six weeks from the date of the undertaking sail again with the steerage passengers. (2) In either of the above cases, the owner, charterer, or master shall, until the steerage passengers proceed on their voyage, either lodge and maintain them on board in the same manner as if they were at sea, or pay either to the steerage passengers, or (if they are lodged and maintained in any hulk or establishment under the superintendence of the Board of Trade) to the emigration officer at the port, subsistence money at the rate of one shilling and sixpence a day for each statute adult. (3) If the substituted ship, or the damaged ship, as the case may be, does not sail within the above-mentioned time, or if default is made in compliance with any requirement of this section, any steerage passenger or any emigration officer on his behalf may recover summarily all money paid by or on account of the passenger for the passage from the person to whom or on whose account the same was paid, or from the owner, charterer, or master of the ship, at the option of the passenger or emigration officer.

Now, under these provisions, what was done was that the subsistence money was paid until the passengers could be embarked upon other ships. They were then embarked on the other ships which I have mentioned, and the passage money was paid to the owners of those ships.

The policy is dated the 25th Oct. 1912, and is to this effect: The New Zealand Shipping Company Limited make assurance "at and from any ports

or places in the United Kingdom to any ports or places in Australia and (or) New Zealand upon any kind of goods and merchandises. . . ." Then: "The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at 4758*l.* on passage money plus 50 per cent. (United Kingdom bookings to Australia) so valued 992*l.* 13*s.* 3*d.* passage money plus 50 per cent. (United Kingdom bookings to New Zealand) so valued. . . . Against Passenger Act as per clause attached." The clause attached is this: "Policy for 5750*l.* 13*s.* 3*d.* per ss. *Westmeath*, dated the 25th Oct. 1912. This policy to be held to cover any disbursements, &c., that may be made by the assured arising from accident or loss on account of passengers or from any outbreak of sickness among passengers on board or booked to join at intermediate ports whether for maintenance or conveyance or intended destination and for replenishing provisions, &c., lost or destroyed, and whether such disbursements, &c., be compulsory or voluntary (provided same be reasonably incurred)." Now, the question is, What is that policy? It is said to be a policy upon passage money, passage money upon the specified voyage, and to cover any passage money in respect of that specified voyage. Undoubtedly, passage money is in a sense the subject-matter of the insurance. If there was no passage money this insurance could not exist, but to my mind it is not an insurance of passage money in the ordinary sense of the word. It is not an insurance of passage money being lost by any sea perils, or for any of the ordinary risks, for the very good reason that the passage money in this case was all prepaid, and therefore, in that sense, it was not at risk. But it is a policy to cover one particular risk, and that particular risk is the disbursement that has to be made under the provisions of the Merchant Shipping Act. That is the risk, and the only risk, as it seems to me, which is covered by this policy. It is also an insurance against the disbursements to be made, not only in respect of passage money, but in respect of certain specific passage money which is mentioned in the policy. It is stated to be "4758*l.* on passage money plus 50 per cent. (United Kingdom bookings to Australia)," and a smaller sum of about 1000*l.* on the United Kingdom bookings to New Zealand. These were the bookings in respect of these particular passengers. The bookings in respect of the subsequent passengers, the passengers who were afterwards taken, are different figures. I think this is an insurance upon the risk of disbursements with regard to those particular passengers.

I assume that, if this were an insurance of freight or passage money, the voyage or the trip (to use an equivocal word) upon which the *Westmeath* eventually went would be the same voyage as the one upon which she started when she was damaged. I do not think that is so with regard to this policy. I think this policy contemplates those particular passengers, and the voyage upon which those particular passengers were intending to go; and if that be the true construction of the policy, then I do not think the fact that other passengers were eventually carried upon different contracts is a matter which is either a substitution of the passage money which was eaten up by the disbursements made in respect of it, nor do I think that it was a salvage in respect of the subject-matter which was insured. Although it is, to my mind, a very difficult question, about which it is hardly possible to be quite certain, I think the passage money in respect of the second lot of passengers is not to be taken into account, and the plaintiffs would be entitled to recover subject to the question with regard to the pool.

The question with regard to the pool is to my mind almost more difficult than the other. The trouble arises from the difficulty that there always is in translating into legal language and legal principles the language used in these policy agreements. The pool is personified as if it were an entity throughout, and it is a very convenient way of dealing with it for ordinary considerations, but of course the pool is not an entity by itself. There is no such thing as the pool, but three companies who have agreed to pool their earnings for certain purposes. I do not think it is necessary to read a very great deal of this agreement, but there are some parts of it to which I must refer. The first thing is that in clause 5 it says: "The earnings of the steamers worked under this agreement are to be pooled in manner hereinafter provided." The seventh clause says that the "net earnings of the steamer's voyages, including any recoveries for salvage services, and after deducting charges payable by the pool, are to be pooled." Then clause 8 says: "The pool pays for coal" (and a variety of other things there mentioned), "also premiums for certain insurances for pool's account," and "the owners bear cost of insurance on hull, &c.; also all upkeeps, renewals, and repairs, also depreciations, and management commissions and expenses; also all claims; also, subject to the allowances mentioned above, all wages," and so on. Then, "the owners are responsible to keep their steamers in efficient and seaworthy order in every respect, and must indemnify the pool in respect of all insurances, whether for owners or pool purposes." Then clause 9 provides: "Passenger earnings will belong to the pool, but the owners are allowed a daily victualling rate for all passengers carried, and a sum for steerage passengers for providing the outfit. Saloon and second class accommodation not being measured in the pool tonnage, the owners are allowed a capitation of 25 per cent. on the passage money of any saloon or second class passenger carried. (10) The steamers entered in the pool are accepted with their existing fittings, insulation, &c., but when from time to time alterations are made by mutual consent at the request of the pool in regard to fittings for steerage passengers, extension of insulation, &c., the pool contributes to the cost in accordance with certain schedules and regulations, and such contributions are charged in the voyage account. (11) The pooling accounts are adjusted in six-monthly periods, and the voyage accounts having been made up as above, and the portions of each voyage covered by the six-monthly periods having been credited to that period, the total profit of the six months, less the pool's establishment charges, is distributed amongst the steamers. . . ." It is in substance this: The net earnings are not really

all put into the pool and divided, but the number of tonnage days of all the steamers is calculated, and the number of tonnage days of the contributing steamer, and she contributes in the proportion that her tonnage days bear to the total tonnage days. Then, "steamers losing time through accidents, or while undergoing repairs, leave the pool during the time so lost, which is computed in accordance with detailed regulations," and then they re-enter the pool on completion of repairs. These are all the clauses of the agreement which I need read, and then follow a great number of regulations, and some of these are of importance. "Fittings erected and alterations made by request of the pool are chargeable to the pool, and should be charged to the voyage in which they occur. Up to the end of the said voyage the owners are responsible to the pool for the full cost of such fittings and alterations (if exceeding 250*l.* in all), whether the steamer be lost or withdrawn from the pool." Then follows a way in which they are eventually to become owners of the property. "Owners are to effect all insurance of whatever description, and must also see that their respective vessels are fully entered in protection and indemnity clubs. The responsibility of effecting every insurance rests with the owners absolutely, whether the premium is payable by the pool or not, or whether the insurance is for pool's benefit or not, and the owners must indemnify the pool against any liabilities in this respect. In no case can owners have any claim against the pool owing to want of insurance cover or protection or by reason of any lack of notice of insurance that may be necessary." Then, "the owners are responsible to the pool for collection of freight on all cargo on board due and payable on discharge both outward and homeward, and must insure same for benefit of the pool at pool's expense. (c) In the case of a steamer with a definite charter outside the ordinary pool loading berths, the estimated amount of profit on such charter is to be covered from the discharge of her previous cargo to the completion of her loading against total loss, constructive total loss, agreed or arranged total loss, and contributions to average and salvage, for the benefit of the pool at the pool's expense. This insurance shall be taken into computation in computing the excess of disbursements over earnings under section A. (D) The owners shall insure at their own expense for the benefit of the pool their liabilities to the pool for any fittings (passenger, chilled meat, Manchester Canal, &c.). (E) Risks under the Passenger Act shall be covered by the owners for benefit of the pool at pool's expense for the actual amount of passage money collected and booked plus 50 per cent. on the current outward or homeward passage on the full conditions of the 'Anderson' clause." Then, "if from any cause whatever the steamer shall cease to be in first-class sea-going order and condition and fully equipped and fitted, or be under repair or disabled from pursuing her voyage, she shall cease to be entitled to participate in the pool in respect of the period she is out of commission, and until she is again in first-class sea-going order and condition and fully equipped and fitted or completely repaired or restored. Such period to be computed in accordance with the following regulations: Provided always that if the vessel shall be lost or disabled under such circumstances that the pool does not suffer any loss of earnings in the business on which she is engaged, this clause shall not operate nor exclude her from participation in the pool until the time when she would in the ordinary course have completed such business." There are a number of other provisions, but I do not think they are of importance.

To my mind, that is a very difficult agreement to construe. It speaks of insurance if effected by the pool for the pool's benefit in the regulations, and it speaks of contributions to the pool, and then, in what I think is the governing clause it says that the net earnings of the steamer's voyages, including any recoveries for salvage services, after deducting wages are to be pooled. So that what is to be contributed is the net earnings. In many places it speaks of the insurance effected by the pool, and at the pool's expense. As a matter of fact, according to the evidence before me, that is never done. The pool has no funds except such as are sufficient for management, and what is done is that the owners effect, and they are bound under one of their regulations to do so, insurance of every kind themselves in their own name; but with respect to insurances on hull and perhaps other things, they do that at their own expense, and are not allowed to charge that against the gross earnings when they are arriving at the net earnings. With respect to insurances which are called for pool benefit, in arriving at the net earnings they are allowed to charge the expenses against the gross earnings in order to arrive at the net, and they have to account, and, supposing they receive any money from the insurance company, that has to be put to the credit of the voyage account in arriving at the net earnings. Indeed, it is more than that, because they have to put in that amount whether they have insured or not, and thus put the members of the pool in the same position as if they had insured.

The question is, What is the effect of all this? Is it that these insurances are really made, not for the benefit of the one individual shipowner, but for the benefit of the whole three, and that there is no such entity as the pool, or is it a matter simply of the way of arriving at the net earnings that have eventually to be divided? I have the greatest difficulty in understanding what it is, but, on the whole, I think the true view is that it is a method of arriving at what are the net earnings, and that, in order to arrive at the net earnings, the shipowner makes these insurances of passage money, and so on, and is entitled to charge them against the gross earnings, to debit them in the voyage account, and, on the other hand, he has to credit what he has received, or what should have been received, in the voyage account, and I take it that the result of that is that it is really an insurance made by the shipowner for himself so far as the underwriter is concerned, but the expense of which he is entitled to debit, and the credits in respect of which he has to credit in the voyage account in ascertaining the net earnings. Therefore I think this was an insurance upon which the plaintiffs were entitled to sue, and the fact that the disbursements were paid to other members of the pool and form an element in arriving at the net earnings, which these owners would eventually have to contribute, does not make it a payment to the pool so

as to show there is no loss. I think the plaintiffs are right on that point a so, although I feel they are both very difficult points, and I do not profess to have any great certainty with regard to the matter.

There was another point raised by Mr. Roche that, even assuming this was an insurance by the pool for the pool, and assuming, therefore, that you must take into account the amount paid for the passage money for the first lot of passengers upon the other ships, there was really no advantage and no salvage, because the expenses of fitting up the other ships for the carriage of the passengers was greater than the benefit that was received. That was a point which Mr. Hill very fairly and reasonably said he was not in a position to deal with, and I do not think I can deal with it either. It would need investigation, if I am wrong upon the other points, and if it be considered a matter which ought to be inquired into, it will have to be done at some later date. There must be judgment for the plaintiffs with costs.

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

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

March 17 *and* 26, 1914.

(Before BAILHACHE, J.)

PYMAN STEAMSHIP COMPANY LIMITED *v.* HULL AND BARNSLEY RAILWAY COMPANY LIMITED; THE MARMION. (*a*)

Contract—Graving dock—Railway company—Regulations—Negligence—Liability for damages.

The plaintiffs, owners of the steamship Marmion, *claimed against the defendants, owners of a graving dock at Hull, damages for the defendants' alleged breach of contract in and about the dry-docking of the steamship. She suffered damage by reason of the unevenness of the block caps on which she rested, which were provided by the defendants for reward, and the unevenness was alleged to be due to the defendants' want of care. There were no statutory provisions relating to the defendants' rights and liabilities as dry-dock owners. The* Marmion *required painting, and the defendants let the dock for that purpose and did not do the painting themselves.*

The ship entered the dock under a contract with the defendants, by virtue of which dock dues were charged, and there were also charges for pumping, and the use of blocks, shores, &c., which the defendants contracted to supply, the blocks being of the usual kind. Clause 9 of the defendants' regulations was as follows: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into, or out of, or whilst in the graving dock, whatever may be the nature of such accident or damage, or howsoever arising."

Held, that clause 9 applied; that it covered negligence, and rendered the defendants immune from liability for the condition of the blocks.

COMMERCIAL COURT.

Action tried by Bailhache, J.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

The plaintiffs, owners of the steamship *Marmion*, claimed against the defendants, who were owners of a graving dock at Hull, damages for alleged breach of contract and duty in and about the dry-docking of the steamship *Marmion.*

The facts and arguments are sufficiently stated in the judgment.

Roche, K.C. and *Raeburn* for the plaintiffs.

Maurice Hill, K.C. and *Moss-Blundell* for the defendants.

BAILHACHE, J.—The plaintiffs' steamship *Marmion* suffered bottom damage in the defendants' No. 1 dry dock in Feb. 1913 by reason of the unevenness of the block caps upon which she rested. The block caps were provided by the defendants for reward, and I find as a fact that their unevenness was due to want of due care upon the defendants' part. The plaintiffs seek to recover damages in respect of this injury to their steamer, and I assess the damages at 284*l*.

The defendants are a railway company, but they have no statutory provisions affecting their rights or liabilities as dry-dock owners. The *Marmion* went into dock for painting. The defendants did not do the painting, but merely let the use of this dock for the purpose. The *Marmion* entered the dock and remained there under a contract with the defendants dated the 30th Jan. 1913. Under this contract dock dues were charged. There were also pumping charges and charges for the use of the blocks, shores, and the like, which the defendants contracted to supply. The blocks are of the usual description. Iron, then hard wood, then soft wood caps upon which the keel rests. These last are purposely of soft wood to give to the weight of the vessel, and they require inspection and renewal from time to time.

There was little dispute as the facts, and the defence was based upon clause 9 of the defendants' regulations which were by reference made part of the contract. The material part of clause 9 runs thus: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into or out of or while in the graving dock, whatever may be the nature of such accident or damage, or howsoever arising." On the facts as stated it is, of course, clear that the accident or damage to the *Marmion* was sustained by her when in dock, and is thus within the words of the clause, read in their ordinary significance.

It was urged for the plaintiffs that the clause did not excuse the defendants for three reasons. One which I notice first—it is the shortest to dispose of—was the position of the clause in the regulations 9th out of 21—the regulation as to the provision of blocks being No. 11—and it was said that I ought to infer from this that clause 9 was not intended to apply to or qualify the defendants' liability under clause 11. I cannot accede to this argument. The clause is perfectly general in its terms. It has no special relation to the clauses which precede it, and I regard its number and position as accidental. The next point raised was that the clause does not in terms refer to negligence of the defendants' servants, and that the words ought to be

construed in some narrower sense than they bear on the face of them, and I was referred to that long line of cases of which *Price* v. *Union Lighterage Company* (88 L. T. Rep. 428; 9 Asp. Mar. Law Cas. 398; (1904) 1 K. B. 412) is the one now most often cited on this point. Those cases show that where words are capable of two constructions, one of which excludes and the other includes negligence, the meaning which excludes negligence is to be preferred. Here the word seems to me capable of only one construction, and to offer no alternative, and unless there is, as was suggested by the plaintiffs, some other reason why they do not cover this case, I must give them their full effect, as has been done in a series of cases not less authoritative than the *Price* v. *Union Lighterage* case. I may mention as illustrations such cases as *Manchester, Sheffield, and Lincolnshire Railway* v. *Brown* (50 L. T. Rep. 281; 8 App. Cas. 703) and *The Stella* (82 L. T. Rep. 390; 9 Asp. Mar. Law Cas. 66; (1900) P. 161).

The third point taken by the plaintiffs was that this clause 9 cannot be applied to this case at all. As to this, I was referred to the unseaworthiness cases. It was said that this was an analogous case, and I was asked to apply to it the well-known rule which prevails in cases of carriage by sea, that general words, however wide, do not cover damage due to the failure to provide a seaworthy ship unless they are express upon the point. The defendants, on the other hand, while agreeing that in a shipping case unseaworthiness would not be covered by clause 9, argued that the unseaworthiness cases are a class apart, and that the doctrine which applies in unseaworthiness cases ought not to be applied to any other class of case. I am not at all sure that the unseaworthiness cases are a class apart. I incline to think that the doctrine that general words do not excuse unseaworthiness is not founded upon any law peculiar to a ship, but depends upon the nature and force of a shipowner's obligation, if unqualified by his contract, and that the same doctrine would apply to a dry dock if a dry-dock owner was under the same obligation to supply a ship-worthy dock as a shipowner is under to supply a seaworthy ship. The obligation of a shipowner in this regard has been described by Lord Sumner, dealing with the words "at shipper's risk" in *The Galileo* (12 Asp. Mar. Law Cas. 461; 110 L. T. Rep. 614; (1914) P. 9), as fundamental. It is a convenient and, needless to say, apt word, and I am glad to borrow it. But in so doing I had better, perhaps, define what I mean by it. By fundamental I mean an obligation the fulfilment of which is the basis of the contract, and in regard to the fulfilment of which considerations of due care or the want of due care are immaterial and irrelevant. I am disposed to think that wherever such a fundamental duty is imposed or undertaken, whether in respect of a ship or a dock, general words of immunity from liability for damage would not cover damage resulting from breach of that duty unless they did so in express terms, however wide the exonerating clause might otherwise be.

This distinction between the applicability or non-applicability of general words of exemption, according to whether the loss is due to the breach of a fundamental duty as defined, or of a duty to use due care, is recognised in shipping cases, and is well illustrated by the two following. In *Tattersall* v. *National Steamship Company* (50 L. T. Rep. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297), the obligation to provide a seaworthy ship was fundamental. The contract was for the carriage of cattle. The holds had been insufficiently cleaned, and the cattle caught foot and mouth disease. The bill of lading contained this clause: "It is hereby expressly agreed that the shipowners are as respects these animals in no way responsible . . . 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." It was held there was no protection, and that the shipowner must pay the full value of the cattle.

On the other hand, in *Morris* v. *Oceanic Steam Navigation Company* (16 Times L. Rep. 553), the obligation to provide a seaworthy ship was qualified by a provision that the owner should not be liable for unseaworthiness, provided he had exercised due diligence to make the vessel seaworthy. There was also a clause limiting his liability to 100 dollars a package unless otherwise declared. He had failed to take due care to make his ship seaworthy, and the goods (cigars) suffered damage in consequence. His liability was none the less held to be limited to the 100 dollars a package. In other words, the clause which would have been no protection against the fundamental obligation of seaworthiness was a protection against failure to exercise due care to provide a seaworthy ship. I need not pursue the matter further in the view I take of the dock owner's duty as to the blocks in this case, and which I will express in a few moments. I have considered the point in deference to the arguments addressed to me upon it, but it does not fall for actual decision. I should have needed to decide it in this case if the accident had been due to some error in the dimensions of the dock. Those dimensions are set out at the top of the regulations, and the duty to provide a dock of those dimensions is, I think, fundamental.

Here, however, the question is as to the blocks. The general safety and equipment of the dock, and in particular of the blocks, is not a matter of special contract in this case, and the dock owners' obligation in regard to the blocks depends upon the general law on the subject. Is his duty fundamental—that is, is his duty to provide blocks reasonably fit for this purpose, or is it to use due care to see that the blocks are fit? I think it is the latter. This was the view taken by Blackburn, J. in advising the House of Lords in *Mersey Docks and Harbour Board* v. *Gibbs* (2 Mar. Law Cas. O. S. 353; 14 L. T. Rep. 677; L. Rep. 11 H. L. C. 93), where, on p. 107, he says of a person using and paying for the use of a dock or warehouse: "He pays the rates for the dock accommodation or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid."

It only remains to refer to two cases specially referred to by the plaintiffs. One was *The Westcock* (12 Asp. Mar. Law Cas. 57; 104 L. T. Rep. 736; (1911) P. 208). That was a towage case, and the towing gear was defective, but it is of little assistance because upon the special words of the exemption clause the Court of Appeal held that, whether the defendants' duty was to provide a

seaworthy tug or to use due care, in either case the clause was no protection, as by its terms it was limited in its operation to circumstances occurring after the commencement and during the continuance of the towage.

The other case was *The Forfarshire* (99 L. T. Rep. 587; 11 Asp. Mar. Law Cas. 158; (1908) P. 339). That was a case in which the defendants, the London Graving Dock Company, undertook to repair the plaintiffs' vessel, the *Forfarshire*, and to transport her to dry dock, finding all tugs, men, and boats, sufficient hands for managing the ship, and all items of transportation to loading berth. By a marginal clause, "All transporting was to be at owner's risk." The defendants failed to provide an additional tug which proved to be necessary, and it was held that the marginal clause did not protect them. The plaintiffs in this case say that the learned judge treated the failure to provide an additional tug as negligence, and yet held that the words "at owner's risk" did not exonerate the dock company. I am not sure that the learned judge did so treat the case, but if he did I think it is my duty, with all respect to him, to adhere to the principle which I have indicated, and which is, I think, in accord with the general current of the authorities. I may add that the words with which I have to deal are, if not wider than those in the *Forfarshire* case, at any rate more emphatic. I hold that clause 9 applies, that it covers negligence, and renders the defendants immune from liability for the condition of the blocks, and I give judgment for them with costs.

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Botterell, Roche*, and *Temperley*, West Hartlepool.

Solicitors for the defendants, *Davenport, Cunliffe*, and *Blake*, for *Moss, Lowe*, and *Co*, Hull.

March 30, 31, *and April* 4, 1914.

(Before SCRUTTON, J.)

EMBIRICOS *v.* REID AND CO. (a)

Charter-party—Exceptions—Restraint of princes —Right to cancel.

The defendants chartered a Greek steamer from the plaintiff to sail from Leghorn and load a cargo at a port in the Sea of Azof under a charter-party which contained an exception of restraints of princes. The steamer passed through the Dardanelles on the 28th Sept., and on the 30th, in view of the imminent probability of war, the Turkish Government arrested and detained all Greek vessels arriving in the Dardanelles. The steamer arrived at her loading port on the 1st Oct., and received delivery of part of her cargo, after which the charterers stopped the loading. On the 18th Oct. war was declared between Greece and Turkey. From the 16th to the 20th Oct. the Turkish Government unexpectedly allowed Greek vessels to pass through the Dardanelles for certain short periods. The steamer's lay days did not expire until the 22nd Oct., and on the 21st Oct. the defendants cancelled the charter.

In an action by the plaintiff for damages for alleged breach of charter:

Held, that at the time of the breach alleged an excepted peril, namely, restraint of princes, prevented the charter from being carried out by the vessel proceeding on her voyage, and that the restraint was likely to continue so long as to defeat the object of the adventure, and that therefore the defendants were not liable.

COMMERCIAL COURT.

Action tried by Scrutton, J.

The plaintiff's claim was on behalf of himself and the other owners of the Greek steamer *Andriana* for damages for breach of a charter-party dated the 11th Sept. 1911.

The facts and arguments are sufficiently stated in the judgment.

Leck, K.C. and *Raeburn* for the plaintiff.

Roche, K.C. and *Mackinnon* for the defendants.

SCRUTTON, J.—One Embiricos, the owner of the Greek steamer *Andriana*, sues Sydney Reid and Co., the charterers of that vessel, for 11,500*l*. damages for failing to load a cargo in the steamer whereby she was detained in the Black Sea by the Graeco-Turkish War, and a Turkish embargo in the Dardanelles preceding that war. The defendants reply in substance that the war and embargo prevented the performance of the charter within any time in contemplation of the parties as reasonable. The facts were as follows: By charter-party dated the 11th Sept. 1912, the *Andriana* was to sail from Leghorn to Kertch and then to a loading place in the Sea of Azof as ordered and there load again; ten working days to be allowed the charterers for bringing the cargo alongside, with liberty to detain the steamer on demurrage fifteen running days. Arrests and restraints of princes, rulers, and peoples were excepted. Clause 10 of the charter-party ran thus: "If the nation under whose flag the steamer sails shall be at war, whereby the free navigation of the steamers is endangered, or in case of blockade or prohibition of export of grain and seed from the loading port, this contract shall be null and void at the last outward port of delivery or at any subsequent period when the difficulty may arise, previous to cargo being shipped." The marginal clause ran thus: "Should the Dardanelles be closed on steamer's arrival with no immediate prospect of opening, this contract to be mutually cancelled."

The vessel passed through the Dardanelles into the Black Sea on the 28th Sept. 1912, and on the 30th Sept. and onwards, in view of the imminent probability of war, the Turkish Government arrested and detained all Greek vessels arriving at the Dardanelles. The *Andriana* arrived at her loading port, Temriuk, on the 1st Oct., and on the 2nd Oct. received some cargo, 110 tons; on that day the loading stopped; on the same day the plaintiff telegraphed to the captain: "Owing to probable war you must not leave Azof before receiving my orders." On the 7th Oct the charterers wrote a letter to the captain of the steamer: "We beg to notify you that owing to subsequent events having occurred, steamer is not in a position to carry charter, besides being uninsurable; shippers meantime cannot continue loading, and decline responsibility."

War was declared between Turkey and Greece on the 18th Oct. Meanwhile, on the

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

16th Oct., the Turkish Government allowed Greek vessels laden to pass through the Dardanelles till the 20th Oct. and then till the 24th Oct. As the *Andriana's* lay days did not expire till the 22nd Oct., up to which date the charterers could bring cargo alongside, and Temriuk was three to four days from Constantinople, the *Andriana* could not have availed herself of this permission if the charterers had insisted in their rights under the charter to bring cargo up to and including the 22nd Oct. On the 21st Oct. the charterers purported to cancel the charter, and the shipowner refused to accept the cancellation. Somewhat unexpectedly the Turkish Government allowed another seven days from the 12th to the 19th Nov. for Greek-laden vessels to pass the Dardanelles; and if the *Andriana* had been loaded in her lay days, or in her fifteen demurrage days, which expired on the 6th Nov, she could have passed the Dardanelles then. There was, however, no reason to believe up to the 16th Oct. that the Turkish Government would let Greek vessels pass through the Dardanelles, or, after the 24th Oct. up to the 11th Nov., that they would let them pass again. In fact, the *Andriana* was detained in the Black Sea till the close of the war. Her proposed cargo of grain was perishable, and would have been seriously injured by prolonged detention in a hold.

It was not really argued before me that either clause 10 or the marginal clause excused the charterers. Clause 10 did not, for cargo had been shipped before the war. The marginal clause did not, for the Dardenelles were not closed on steamer's arrival on the 28th Sept. Arguments were addressed to me on the point whether the exception clause was available to protect the charterers. If this were the only point, I think I should be bound, as a judge of first instance, by the decisions of Mathew, J. in *Barrie v. Peruvian Corporation* (2 Com. Cas. 50) and of Bigham J. in *Re Newman and Dale Steamship Company* (87 L. T. Rep. 649; 9 Asp. Mar. Law Cas. 351; (1903) 1 K. B. 262). The clause in the latter charter is, I think, indistinguishable from this charter with the exception "fire from any cause on land" in this charter seems to point to charterers' obligations rather than shipowners' duties. But I do not think the point is whether the exceptions apply to the charterer. It is probably true that "restraints of princes" did not prevent the doing of anything the charterer had to perform; but did they prevent the shipowner carrying out his part of the contract for such a time that the charterer need not be called upon to do his part, because, even if he did it, there was no reasonable probability of the adventure proceeding? Was the charterer bound to put a valuable cargo into a ship's hold subject to the shipowners' claim for full freight, if the state of things was such that there was no reasonable probability of the shipowners being able to proceed on the voyage and overcome the restraints of princes then existing? The breach alleged in the statement of claim was the purported cancellation of the charter on the 21st Oct. At that time there was war existing between Greece and Turkey, and, in my opinion, there was no reasonable probability that Turkey would allow Greek ships to pass through the Dardenelles again during the war.

This view, in my opinion, is supported by the decision and reasons in *Geipel v. Smith* (26 L T. Rep. 361; 1 Asp Mar. Law Cas 268; L. Rep. 7 Q. B. 404) and *Nobel's Explosives Company v. Jenkins* (75 L T. Rep. 163; 8 Asp Mar. Law Cas. 181; (1896) 2 Q. B 326). In the former case the blockade of Hamburg in the Franco-German war was held to excuse a shipowner from loading coal at Newcastle in order to proceed to Hamburg if the blockade was raised. Cockburn, C.J. said: "It is contended by the plaintiffs that the contract is divisible into two parts, and that the defendants ought to have performed the first part, which was practicable, in order to be in a position to perform the second, which was not. But the answer of the defendants is that the contract is one entire contract, and that the impossibility of performing the whole within a reasonable time dispensed with the necessity of taking any steps towards its performance. And it is perfectly obvious that this is so; for what good would it have been to the shipper that the shipowner should go to the spout and take in the coals if he could not proceed with the cargo to Hamburg? None whatever. It is an entire contract, and anything that applies to make the performance of one part impossible must be taken to apply to the whole; and it is admitted that the defendants could not have got to their port of destination. The true way of looking at this case, as it appears to me, is this: It was an entire contract, and there was an insuperable obstacle in the performance of it *in toto;* and the defendants were therefore justified in not performing that part of it which was possible, but which, without the possibility of performing the other part of it was useless." So in *Nobel v. Jenkins* (*sup*), the probability of capture of the cargo somewhere on the thousand miles of sea between Hong Kong and Yokohama was held by Mathew, J. to justify the shipowner in refusing altogether to proceed beyond Hong Kong.

Mr. Leck, for the shipowner, argued that the well known doctrine of frustration of the commercial adventure by unreasonable delay laid down in *Jackson v. Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; L. R. p. 10 C P 125) did not apply if the shipowner had cargo on board, so that the contract was part executed. This, which was a favourite argument of the late Walton, J and based by him on some expressions of Lord Blackburn in *Dahl v. Nelson* (44 L. T. Rep. 381; 4 Asp. Mar. Cas. 392; 6 App. Cas. 53), was addressed by him unsuccessfully to Mathew, J. in *Nobel v. Jenkins.* It seemed to me to fail to recognise that in *Jackson v. Union Marine Insurance Company* (*sup.*), the charter was not executory but part executed, as the ship was proceeding under the charter to her port of loading; and it received its deathblow in *Bensaude v. Thames and Mersey Insurance Company* (8 Asp. Mar Law Cas. 179, 204, 315; 77 L. T. Rep 282; (1897) A C. 609,, where the vessel had a cargo on board and yet the charter was held by the House of Lords avoided and the freight lost by such delay as frustrated the adventure. I hold, therefore, that at the time of the breach alleged, Oct. 21, an excepted peril, restraint of princes, prevented the charters being carried out by the vessel proceeding on her voyage, and was, in the language of Lush, J. in *Geipel v. Smith* (*sup.*), "likely to continue so long, and so to disturb the

commerce of merchants as to defeat and destroy object of a commercial adventure like this."

If there is such a likelihood and probability the fact that unexpectedly the restraint is removed for a short time does not involve that the parties should have foreseen this unexpected event, and proceeded in the performance of an adventure which at the time seemed hopelessly destroyed. As Lord Gorell said in *The Savona* (1900) P. 252): "I do not think this case can be decided by what happened afterwards, except as a test of what was the true state of things at the time when the question of breach had to be considered," and the whole of his subsequent remarks are valuable on this point. Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds. For these reasons I have come to the conclusion that there was no breach of contract by the charterers in not loading their cargo in this Greek ship; and there must, therefore, be judgment for the defendants on the question of liability.

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

Solicitors for the defendants, *W. and W. Stocken.*

Friday, May 15, 1914.

(Before BAILHACHE, J.

MEADE-KING, ROBINSON, AND CO. v. JACOBS AND CO. AND OTHERS. (a)

Charter-party — Loss of time — Prevention of efficient working—Cesser of hire.

A charter-party contained the following clause: "In the event of loss of time through deficiency of men or stores, repairs, breakdown of machinery, pumps, pipes, or boilers (whether partial or otherwise), collision or stranding, or damage preventing the efficient working of the vessel for more than forty-eight running hours, the payment of hire shall cease until she be again in an efficient state to resume her service." On the construction of the clause:

Held, that for losses of time of less than forty-eight hours no claim for cesser of hire could be made, but where from any of the causes named in the charter-party there were losses of time exceeding forty-eight hours the charterer was entitled to cesser of hire for the whole of the time so lost.

COMMERCIAL COURT.

Action tried by Bailhache, J.

The plaintiffs' claim was for a declaration that they were entitled to a deduction of hire in respect of time lost under a charter-party dated the 29th Aug. 1910.

The facts and arguments are sufficiently stated in the judgment.

Greer, K.C and *Mackinnon* for the plaintiffs.

Roche, K C. and *Raeburn* for the defendants.

BAILHACHE, J.—This is an action which was brought in respect of certain alleged breaches of a time charter dated the 29th Aug. 1910.

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

The parties have left for me an agreed question of construction upon clause 25 of the charter-party. The charter-party was a time charter for three years and some odd months, and it provided, as they usually do, for the hire to be paid monthly in advance. There are thirty-four clauses of the charter-party, and I need not refer to any of them until I come to clause 25. When they came to clause 25 the parties were minded to make provision as to what should happen when there was loss of time, and they deal with that loss of time in clause 25 under five different heads. They deal with the time lost "through deficiency of men or stores, repairs, breakdown of machinery," and so on, "preventing the efficient working of the vessel for more than forty-eight running hours." What that particular clause means is what I have to interpret. They deal, secondly, with the time lost by putting into any port other than that instructed by the charterers, and they provide that in respect of that the owner shall pay—that is to say, hire shall cease. They also provide, thirdly, for time lost by putting back on a voyage when there has been an accident to the steamer, and there again the hire ceases. Fourthly, they provide for time lost by stress of weather, and the time lost by stress of weather falls upon the charterers. They, fifthly, provide for time lost by hostilities, and there hire ceases. In clause 26 they have a sixth case of loss of time under the charter-party. This steamer was to go into dry dock at the expiration of every nine months, and during the whole of the time she was in dry dock she was to be off hire. They have, therefore, provided, as far as one can see, for every imaginable case of loss of time, and the question for me to decide is: What provision have they made under clause 25 in respect of the first class of loss of time, time lost through deficiency of men or stores, repairs, breakdown of machinery, pumps, pipes, or boilers, and the like. Now that part of clause 25 reads in these words: "In the event of loss of time through deficiency of men or stores, repairs, breakdown of machinery, pumps, pipes, or boilers (whether partial or otherwise), collision or stranding, or damage preventing the efficient working of the vessel for more than forty-eight running hours, the payment of hire shall cease until she be again in an efficient state to resume her service" Upon the reading of that clause it is quite obvious that there are two possible things that it may mean. It may mean that in the event of loss of time for more than forty-eight hours hire shall cease at the expiration of forty-eight hours, or it may mean that given loss of time from any of those causes for a period of forty-eight running hours hire ceases from the time at which the loss of time began. To put it in a concrete form, given a loss of fifty running hours, it may mean that hire shall cease for two hours, or it may mean that hire shall cease for fifty hours.

It seems to me quite clear that the object of this clause is to prevent the owner having claims made against him by the charterers in respect of cesser of hire for short periods. The loss of time which is here dealt with is loss of time through a variety of causes: Deficiency of men or stores, repairs, breakdown of machinery, pumps, and the like, and it is quite clear that in the ordinary working of a vessel, particularly on a time charter, and on a time charter as long as

this, that there are a number of causes of this description which from time to time cause loss of time. In this particular case, for instance, there was some time lost, some few hours were lost, because some few of the crew were short, and they had to wait until they could get someone else to take their place. It is obvious that these various things, repairs, breakdown of machinery, pumps, pipes, or boilers, are things that constantly happen in the course of a voyage, and particularly in a time charter of this kind, where there are many voyages to be made which do in fact cause short losses of time, and the primary object of the clause is to prevent the shipowner being bothered by having all sorts of claims made against him for short losses of time due to this variety of causes. Then it becomes necessary to define what is a short loss of time, or what is a little loss of time. That is to be treated as between the parties as giving no claim to cesser of hire. That has to be defined in somo way, and it is defined in this clause as being a period of less than forty-eight hours. If from any of these causes there is a loss of time which does not involve the delay of the steamer for more than forty-eight running hours no claim for cesser of hire is to be made.

Having got as far as this, because up till now there is no difference of opinion between the learned counsel as to the meaning of the clause, we come to the crux of the matter: What is to happen if there is a loss of time for over forty-eight hours? I think that the true meaning of the clause is this: That for short losses of time, that is to say, losses less than forty-eight hours running time, no claim for cesser of hire shall be made, but if you get from any of these causes loss of time which exceeds forty-eight hours, that is a loss of time of sufficient importance to justify the charterer in claiming, and the owner in allowing, a cesser of hire, and in my view the clause means that in such a case the charterer is entitled to a cesser of hire for the whole of the time so lost, not for the difference between forty-eight hours and the time actually lost, not that the cesser begins at the expiration of forty-eight hours, but that once you get a loss of time owing to these various causes which extends over forty-eight hours, then that is a loss of time in respect of which the owner is disentitled to hire and the charterer is entitled to an exemption and cesser of hire. It would be easy to paraphrase this clause, and to put it into similar words which would make it mean what I think it means without any doubt, but I do not know that any useful purpose will be served by that, because, of course, that would only be to say that the clause might be more clearly expressed, and certainly it might. But I think I might perhaps put it in a sentence in this way, that this clause deals with the kind of loss of time which is to count, and this clause says: Given a loss of time which exceeds forty-eight hours that time counts, and when you have a loss of time of that description and that length, then hire ceases and the charterer is entitled to a cesser of hire, and I think it must mean that he is entitled to a cesser of hire from the time when the cause, the deficiency of men or stores, or whatever it may be that caused the loss of time, commenced to operate, and not only from forty-eight hours after. The result is, therefore, that on the only point which the parties in this case have left to me my judgment must be for the plaintiffs, and I think it has been arranged that under those circumstance the plaintiffs will get the costs of the action.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

April 23, 24, *and* 27, 1914.

(Before COZENS-HARDY, M.R., SWINFEN EADY and PICKFORD, L.JJ.)

MANCHESTER SHIP CANAL *v.* HORLOCK. (a)

APPEAL FROM THE CHANCERY DIVISION.

Constructive total loss—Removal by canal authority—Contract of sale—Delivery order—Transfer of possession—Closing of register—Bill of sale—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 21, 24, 530—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 52 (1)—*Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 60.

On the 22nd March a registered ship was sunk in the fairway of the Manchester Ship Canal and became an obstruction to navigation. The plaintiffs, the owners of the Manchester Ship Canal, gave notice to the owners of their intention to remove the vessel, and exercise their powers under sect. 530 *of the Merchant Shipping Act* 1894. *As the expense of raising and repairing the ship was greater than her value when raised, she was abandoned by the owners, and accordingly sold by public auction on the 1st May, described as a "register ship." The defendant Horlock became the purchaser, the contract providing that on completion of the purchase the seller would deliver to the purchaser a delivery order (these latter words being written in over the words "legal bill of sale" which had been erased) for the vessel. The defendant paid a deposit on signing the contract, and on the 8th May, the day fixed for completion, was prepared to pay the balance of the purchase money and demanded a bill of sale transferring the ship to him. The plaintiffs, however, refused to execute a bill of sale and offered a delivery order in pursuance of the contract, which the defendant declined to accept, or to complete the contract. At this time the ship's register had not been closed, but this was done shortly afterwards by the owners giving notice to the registrar. On the 22nd May the plaintiffs offered a bill of sale, which the defendant refused to accept, the register then being closed. In an action by the plaintiffs for specific performance of the contract and the balance of the purchase money, the defendant contended that the contract was for the sale of a registered ship, and that, notwithstanding anything in the contract to the contrary, he was entitled to transfer by bill of sale under sect.* 24 *of the Merchant Shipping Act* 1894.

(a) Reported by W. GRIST HAWTIN and R. C. CARRINGTON, Esqrs., Barristers-at-Law.

Held, reversing the decision of Eve, J., that the ship had been constructively lost on the 22nd March 1913, *within the meaning of sect.* 21 *of the Act of* 1894, *and then ceased to be a registered ship, so that the register was properly closed; that there was no representation in the contract that she was a registered ship at the date of the sale; that no bill of sale was necessary for her transfer or would have been effective if granted; and that the action succeeded.*

Witness action.

On the 22nd March 1913, the *Solway Prince*, a steamship of 350 tons gross measurement, was sunk in the Manchester Ship Canal, after colliding with another steamship, and became an obstruction. The plaintiff company, the owners of the canal, thereupon gave notice to the owners of the sunken vessel that it was an obstruction and danger to navigation, and that it was their intention forthwith to take possession of, raise, remove, and destroy it, or otherwise to exercise their powers under sect. 530 of the Merchant Shipping Act 1894. In pursuance of the notice, the plaintiff company, with the assistance of the Liverpool Salvage Association, and at an expense of 3600*l.*, raised the vessel, pumped her out, patched her up, and removed her to a pontoon at Manchester. On the 1st May 1913 the plaintiff company, after duly advertising the vessel for sale, sold her at a public auction to the defendant for 1675*l.* under a contract of sale. This contract, a printed form, after referring to the gross and net tonnage of the vessel, described her as a "register ship" and contained the clause: "On completion of the purchase the seller will deliver to the purchaser a delivery order for the vessel." (The words "legal bill of sale of," part of the printed form, had been struck out and the words "delivery order for" in writing substituted therefor). The defendant paid, on signing the contract at the auction sale, a deposit of 167*l.* 10*s.* on the purchase price.

At the time of the sale by auction no notice had been given and no steps taken for closing the registry of the vessel, but shipbuilders, ship repairers, and others were invited by the advertisements announcing the sale by public auction to attend the same. The vessel was sold with a view to her being repaired and used as a ship, and her value for breaking-up purposes was less than half the sum of money for which she was sold to the defendant. The contract fixed the 8th May as the date of completion, and the defendant attended on that day at Liverpool with the balance of the price for the purpose of completing the purchase, but he contended that on payment he was entitled to have the vessel transferred to him by a bill of sale in order that he might have his name entered in the register as being the owner, and he required a proper bill of sale executed by the plaintiff company. They, on the other hand, insisted that he was bound to complete on receiving a delivery order in accordance with the contract; and that it would be for him to get his name on the register and for that purpose to procure the registry of the vessel to be closed and the ship to be re-registered. The defendant said that this course would involve remeasurement of the vessel, with the result that her net tonnage might be increased from 99 tons (her then existing tonnage as described in the contract) to something over 100 tons, thus increasing her working expenses. He accordingly refused to complete. Pending the difficulty which had arisen, the balance of the purchase money was on the 9th May 1913 deposited in joint names, and an arrangement made, under which the defendant took possession of the vessel for the purpose of executing the repairs necessary to make her seaworthy. An attempt was, however, made to solve the difficulty by the plaintiffs' ship brokers, who offered to execute a bill of sale in their name, and the matter was submitted to the registrar for the purpose of ascertaining whether such a bill of sale would be accepted for the purpose of having the defendant's name registered as owner. This, however, could not be done, and on the 22nd May the plaintiff company for the first time offered the defendant a bill of sale executed by themselves, but previously thereto the register had been closed at their instigation by a notice from the owner of the vessel under sect. 21 of the Merchant Shipping Act 1894. Under these circumstances the defendant refused to accept the bill of sale as offered or to release the balance of the purchase price.

The plaintiffs commenced this action on the 2nd June 1913 claiming specific performance of the contract with interest on the balance of the purchase money at 5 per cent. per annum from the 8th May, or alternatively for a declaration that they were entitled to resell the vessel. By his defence the defendant pleaded that when he bought the ship she was a registered ship and so described; that it was an implied term of the contract that she should be transferred to him by a bill of sale; that the vendors would deliver to him her certificate of registry, and would do all things necessary to enable him to be entered on the register as owner of the ship, on production to the registrar of a duly executed bill of sale; and also that, until completion of the contract, she should continue to exist as a registered ship. He also counter-claimed damages for the refusal to execute a proper bill of sale at the date of completion

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

Sect. 21 (1). In the event of a registered ship being either actually or constructively lost, taken by the enemy, burnt or broken up, or ceasing by reason of a transfer to persons not qualified to be owners of British ships, or otherwise, to be a British ship, every owner of the ship or any share in the ship shall, immediately on obtaining knowledge of the event, if no notice thereof has been given to the registrar, give notice thereof to the registrar at her port of registry, and that registrar shall make an entry thereof in the register book.

Sect. 24 (1). A registered ship or a share therein . . . shall be transferred by bill of sale.

Sect. 26 (1). 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 at 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.

Sects. 51, 52, 53, and 54 deal with procedure for registry on change of ownership, transfer of registry, and restrictions on re-registration of abandoned ships.

Sect. 530. Where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the control of a harbour or conservancy authority, or in or near any approach thereto, in such manner as in the opinion of the authority to be, or be likely to become, an obstruction or danger to navigation or to lifeboats engaged in lifeboat service in that harbour or water or in any approach thereto, that authority may (*a*) take possession of, and raise, remove, or destroy the whole or any part of the vessel; and . . . (*b*) sell, in such manner as they think fit, any vessel or part so raised or removed . . . and out of the proceeds of the sale reimburse themselves for the expenses incurred by them in relation thereto under the section, and the authority shall hold the surplus, if any, of the proceeds in trust for the persons entitled thereto. . . .

The Merchant Shipping Act 1906 (6 Edw. 7, c. 48) provides:

Sect. 52 (1). Sub-section one of section twenty-one of the principal Act [*i.e.*, the Merchant Shipping Act 1894] shall be read as if the following words were inserted at the end of that sub-section, and the registry of the ship in that book shall be considered as closed except so far as relates to any unsatisfied mortgages or existing certificates of mortgage entered therein.

The Marine Insurance Act 1906 (6 Edw. 7, c. 41), provides:

Sect. 60 (2). In particular there is a constructive total loss—(ii.) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship.

R. B. Lawrence, K.C and *F. D. Mackinnon*, for the plaintiffs.—The plaintiffs are entitled to payment of the balance of the purchase money. They duly sold the vessel under the power contained in sect. 530 of the Merchant Shipping Act 1894. The register was properly closed in accordance with sect. 21 of the Act, as amended by sect. 52 of the Merchant Shipping Act 1906. The ship was constructively lost on the 22nd March 1913, and was abandoned by the owners as a total loss. It was treated as constructively lost for insurance purposes. The plaintiffs sold, not a registered ship, but a wreck, and a delivery order was the proper method of transfer. The defendant was only entitled under the contract of sale to have a delivery order, because the words "bill of sale" were expressly struck out, and the words "delivery order" substituted. The defendant depends for the success of his case upon implied terms in the contract. The question is: What was the presumed intention of the parties? If there was an implied intention, it rests on the statement that the vessel was 99 tons register, but that statement was only a description of the ship before she was damaged. It was a sale under statutory powers of a damaged ship by persons who were not the owners. These facts were known to the parties to the contract, and it is impossible to read into the contract the implied term upon which the defendant relies. There was on the register of the ship an unsatisfied mortgage, and for this reason the plaintiffs could not give a bill of sale. Assuming that they were bound to do so, they have now executed one, and are entitled to the balance of the purchase money. The purchaser has been in possession of the vessel since the 8th May 1913.

Clayton, K.C. and *C. Robertson Dunlop* for the defendant.—There seems to be a great deal of confusion of thought as to the powers of the plaintiff company; if they have a statutory power of sale, they have also a statutory power of assurance. The power of sale given by sect. 530 of the Merchant Shipping Act 1894 is not confined to cases of actual or constructive loss, where merely materials are being sold; it applies also where a vessel has been abandoned, as, *e.g.*, being left in the Manchester Canal. It extends to all cases of ships which are registered. The vendee has no power of assurance until his name is on the register; his title is not complete:

The Spirit of the Ocean, 12 L. T. Rep. 39; 34 L. J. 74, 76, P. M. & A.

The property passes by bill of sale. Where there is a statutory power of sale, the donee of the power may assure without having the property in him. The contract was for the sale of a registered ship, not for a wreck. That is shown by the description in the contract of 99 tons register, and therefore the only way to transfer it was by bill of sale under the Merchant Shipping Act. As regards the alteration in the contract, where there is an ambiguity and words in print have been struck out and others written in, the court can look at both—namely, the printed words struck out and the written words substituted:

Rowland and Maswoods Steamship Company v. *Wilson*, 2 Com. Cas. 198;
Baumvoll Manufactur Von Scheibler v. *Gilchrest*, 68 L. T. Rep. 1; (1892) 1 Q. B. 253, 256; affirmed (1893) A. C. 8.

But where there is no ambiguity in the contract as altered, for the purposes of construction, there is no necessity for looking at, nor will the court look at, the deleted words:

Inglis v. *Buttery*, 3 App. Cas. 552, 558, 571;
Sailing Ship Lyderhorn Company v. *Duncan, Fox, and Co.*, 11 Asp. Mar. Law Cas 237, 291; 101 L. T. Rep. 295, 298; (1909) 2 K. B. 929, 941.

The deletion does not amount to a term express or implied that the seller shall not give a bill of sale, but it is an implied term of the contract that the vendor shall execute a bill of sale in the form required by sect. 24 of the Merchant Shipping Act 1894, and the section is imperative. No doubt a delivery order is the proper form of transfer of a wreck, but this was a registered ship, sold as such, and capable of being repaired, and a bill of sale is the proper mode of transferring it. The plaintiffs could not complete the sale of the vessel without a bill of sale. From the earliest times the Legislature has always required that mode of transfer for British ships:

The Sisters, 5 Chr. Rob. 155, 159.

To profess to sell without a bill of sale is a contradiction in terms. The statutory power of sale is in the nature of a common law authority:

Sugden on Powers, 8th edit., p. 45;
Farwell on Powers, 2nd edit., p. 548.

It is the duty of the registrar, on receiving a bill of sale in the required form, and a declaration of ownership, to register. By reason of the power, absolute in its terms, which is given by sect. 530 of the statute, the donee has the right to convey in his own name the legal estate, even though the legal estate is not vested in him. A person not registered as owner may convey or transfer a ship —*e.g.* in the case of an unregistered mortgagee, who has no power to sell and invokes the assist-

ance of the Admiralty Courts, the sale is by the marshal of the courts, who conveys by bill of sale. The Act requires that the bill of sale shall be executed by the transferor; nothing is said in the section about the registered owner. The defendant, therefore, was entitled to have a bill of sale, whether it would have been of use to him or not. It has been held, under sect. 56 of the Harbours Docks and Piers Clauses Act, 1847, that a ship which had been in collision and abandoned by the owners had become *res nullius*, and that the owners, by reason of the abandonment, had ceased to be owners:

> *Arrow Shipping Company* v. *Tyne Improvement Commissioners; The Crystal*, 7 Asp. Mar. Law Cas. 513; 71 L. T. Rep. 346; (1894) A. C. 508.

But the power to sell includes the right to transfer the property as well as the possession; otherwise it would be of little use to the tranferee. It must be to sell in such a way as to enable the highest market value to be obtained for the thing sold. If the power is to sell the mere possession so long as the owner does not choose to interfere, then the transferee is unable to give this highest market value. Further, the plaintiffs were bound to transfer free from incumbrances; this they could only do by getting rid of the mortgage, which they did not do before the 8th May. A registered owner has an absolute right to convey.

> *Burgis* v. *Constantine*, 99 L. T. Rep. 490; (1908) 2 K.B. 484.

A delivery order would not enable the defendant to take the ship away, as by sect. 2, sub-sect. 3, unless the certificate of registration is produced, the ship may be detained; the defendant, not being the registered owner, would not be in possession of the certificate. Where there is a contract between two business parties, the court will draw the implications necessary to give effect to the transaction. On the 8th May, when the defendant attended to complete, the plaintiffs were not able and willing to give a bill of sale. On the 22nd March, when the vessel became an obstruction, it was not a loss either actual or constructive under sect. 21 of the Act; the owner therefore did not give notice to the registrar. For the purpose of the insurance policy she was a constructive loss, because the cost of raising and repairing her would be more than her value, but she was not a loss, either actual or constructive within the meaning of sect. 21. On the 1st May she was taken to the pontoon, and the plaintiffs were selling, not a wreck, but a ship. She had therefore ceased to be a loss and on the 1st May, the date of sale, she was a registered ship. The cost of repairing her when raised was less than her value when repaired. For the purposes of insurance a ship may be a constructive loss without being a constructive loss under sect. 21.

The notice to the registrar was not given by the registered owner. It was not given at the date fixed for completion, nor by the right party. If the defendant had received a bill of sale on the 8th May, the registrar would have been bound, subject to the production of a declaration of transfer, to enter his name as owner, and in that case the register would never have been closed and the defendant would have been in a position to sell. As it is he cannot do so. The register ought never to have been closed as it was, under a mistaken view of law and fact by the plaintiffs' solicitors.

R. B. Lawrence, K.C. in reply.—Sects. 21 and 530 should be read together. The power given by sect. 530 is only to be exercised, probably where sect. 21 will come into force. Sect 35 of the Trustee Act 1893 deals with the vesting of stock and choses in action, and sub-sect. 6 thereof provides that the provisions of the section as to vesting orders shall apply to shares in ships registered under the Merchant Shipping Acts as if they were stock. That section, therefore, supplies the machinery if there is any *lacuna* in the Merchant Shipping Acts in giving a power to sell without the right to convey. The case of *Scottish Marine Insurance Company, Glasgow* v. *Turner* (1 Macq. H. L. 334 342) is an instance in which a vesting order under the Trustee Act might be required. But the point is not what might happen, but what is to happen in this particular case This was a case of "constructive loss," and constructive total loss is defined by sect. 60, sub-sect. 2, of the Marine Insurance Act 1906 The defendant has spent for repairs to the vessel more than the difference between the cost of raising her and her value when repaired. Under sect. 21 of the Merchant Shipping Act 1894, sect. 52 of the Merchant Shipping Act 1896, and sect. 60 of the Marine Insurance Act 1906, where the condition of a ship is such that the owner abandons her, the register must be closed and there must be a new survey and re-registration before there can be a new owner. It does not matter who gives the notice to the registrar. Abandonment having happened on the 22nd March, the register ought to have been closed on, or as soon as possible after, that date. As soon as the registrar knows, whether from the owner or any other person, that the event has happened, it is his duty to close the register. In the case of a constructive loss the register must be closed by virtue of sect. 21 of the Act as amended by sect. 52 of the Merchant Shipping Act 1906. This was a case of a constructive loss, being something between a wreck and a registered ship A bill of sale is therefore not required:

> Chitty's Statutes, 6th edit., vol. 13, p. 382, note (*l*).

The effect is brought about by operation of law, for which the plaintiffs cannot be liable. It is admitted by the defendant that a sale by the plaintiffs gave them a right paramount to a registered mortgage, and even to a maritime lien, the highest of all mortgages. Supposing that the plaintiffs had given a bill of sale on the 8th May, the date fixed for completion, the register must eventually have been closed, because there was a duty on the registered owner to give notice, and there was a duty on the registrar to close the register as soon as he received notice, whether from the owner or any other person. But on the 22nd May, after the register was closed, the plaintiffs executed and offered a bill of sale, and the matter could then have been put right.

Eve, J. dismissed the action, and directed an inquiry as to the damages sustained by the defendant.

The plaintiff company appealed.

Leslie Scott, K C and *F. D. Mackinnon* (*R. B. Lawrence*, K C. with them) for the appellants —The case turns upon the proper construction of sect. 21 of the Merchant Shipping Act 1894, and whether

upon the true construction of that section this vessel was "constructively lost" so that she ceased to be a registered ship. The definition of a "constructive total loss" is to be found in sect. 60 of the Marine Insurance Act 1906, which definition is applicable to the Merchant Shipping Act. This vessel was undoubtedly constructively lost for insurance purposes, and cannot be regarded as constructively lost for some purposes and not for others. If that be correct, there is no answer to the appellants' contention that no bill of sale was required or could be effective if granted. If the ship was not a registered ship, there was no reason for executing a bill of sale, and no implied term requiring one could be read into the contract by virtue of sect. 24 of the 1894 Act or any other enactment, for that deals expressly with a "registered ship," which this at the time of the sale and delivery was not. The judgment of Eve, J. is wrong in that he has not correctly construed the words "constructively lost" in sect. 21.

C. Robertson Dunlop for the respondent.—Eve, J. was correct in holding that the same rules as are applied for insurance purposes are not necessarily to be applied in determining whether a ship is "constructively lost" under sect. 21, for the reasons given in the judgment. With regard to marine insurance different considerations arise, and the words of sect. 60 of the Marine Insurance Act 1906 are not to be read into sect. 21. Here, even if the ship was constructively lost within the meaning of sect. 21 on the 22nd March, at the material date—viz., the date of the contract, the 1st May—she was not a constructive total loss, and was sold as a ship, not as a wreck. She was described as a register ship, which, if it means anything, means that her register was not closed, as in fact it was not closed at that date, so that under sect. 24 of the 1894 Act a bill of sale was essential for a transfer. If the respondent's construction of sect. 21 is correct, then, in virtue of sect. 24, he is entitled to a transfer by bill of sale notwithstanding the provisions of the contract.

No reply was called for.

April 27.—COZENS-HARDY, M.R.—I have had an opportunity of reading the judgment of Swinfen Eady, L J. and I concur therein.

SWINFEN EADY, L.J.—On the 1st May 1913 the plaintiffs sold by auction to the defendant under their statutory powers for the sum of 1675*l* a vessel named the *Solway Prince*, which shortly before had sunk in the fairway of the Manchester Ship Canal after being in collision with another vessel, and, being an obstruction to the navigation, had been raised by the canal company at an expense of about 3600*l*., being a sum considerably in excess of the value of the vessel. The vessel was described in the particulars of sale as lying on the pontoon at Manchester in a damaged condition, and it was a condition of the sale that the vessel was not to be removed from its then position until she had been made tight and safe for removal to the satisfaction of the surveyor of the Manchester Ship Canal Company. The plaintiffs brought this action for specific performance of the contract, which was dismissed at the trial on the ground that the defendant was entitled to a transfer by bill of sale, which the plaintiffs had refused to give. The plaintiffs considered that the vessel was "constructively lost" within the meaning of sect. 21, sub-sect. 1, of the Merchant Shipping Act 1894, as amended by the Merchant Shipping Act 1906, s. 52, sub-s. 1, and that the register was or ought to have been closed, and that any bill of sale executed by them would have been simply nugatory and on that ground declined to execute a bill of sale. They did offer before action brought to execute a bill of sale *quantum valeat*, but the register had then been actually closed, and in those circumstances the defendant refused to accept the bill of sale. The plaintiffs now appeal.

Upon the facts, as to which there is no dispute, I am of opinion that the vessel was "constructively lost" within the meaning of sect. 21 of the Merchant Shipping Act 1894. Where a ship is damaged by a peril insured against, if the cost of repairing the damage, including the cost of raising, would exceed the value of the ship when repaired, she is constructively lost within the meaning of sect. 21. It is clear that in the present case the cost of raising and repairing would greatly exceed the value of the ship when repaired The assured gave to the insurers notice of abandonment, and treated the loss as if it were an actual total loss. It was the duty of the owner of the ship to give notice to the registrar of the ship having been constructively lost, if no notice of the event had previously been given to the registrar, and the registry of the ship is to be considered as closed. The master ought also to have delivered up the ship's certificate of registry. The register was actually closed previously to the 22nd May, when the facts came to the knowledge of the registrar, The purchaser was not entitled to refuse to complete because the plaintiffs would not execute a bill of sale; the ship had ceased to be a registered ship, and the registry was to be considered as closed.

It was urged by the respondent that although this might have been the position, if the vessel had been sold on the 22nd March when she had been abandoned and was lying at the bottom of the Ship Canal, the position had become altered by the 1st May, when she had been raised and was lying on the pontoon. The answer is that this alteration does not make any legal difference. When a ship has ceased to be registered as a British ship, by reason of having been abandoned, she must be re-registered, and by sect 54 of the Act this cannot be done until she has been re-surveyed and a fresh certificate of seaworthiness obtained.

It was further urged that the ship was sold as "a registered ship." This was not so. There was no representation that the ship remained a registered ship at the date of sale. The particulars given in the contract are merely descriptive of the ship, length, depth, gross and net tonnage, and when registered. Moreover, the purchase has in fact now been completed, and no complaint is made of any error of description, or indeed could be made as the purchaser bought with full knowledge of all the facts, and the contract contains a provision that no allowance is to be made for any error of description. By sect. 530 the plaintiffs had full authority to sell the vessel and give a good title to the purchaser. No bill of sale was necessary or could have been effective. The register was closed, and by the

contract and delivery order the purchaser obtained the property in and possession of the vessel.

The learned judge below decided that for insurance purposes the ship was undoubtedly "constructively lost" on the 22nd March (see Marine Insurance Act 1900, s. 60), but that it did not follow that the same rules as are applied for insurance purposes were necessarily to be applied in determining whether a ship is "constructively lost" under sect. 21. In my opinion the judgment is erroneous on this point. The expression "constructively lost" has no meaning as applied to a ship except in connection with marine insurance, and a vessel which is a constructive total loss within the meaning of the term in marine insurance is "constructively lost" within the meaning of sect. 21 of the Merchant Shipping Act 1894.

The respondent further contended that even if the register were closed, such closure made no difference to his right to have a bill of sale as evidence of title, even though it could not have been registered, but the answer to this argument, even if it were well founded, is that before action brought he was offered a bill of sale for what it was worth, but refused it, and declined to complete the purchase then. This alone shows that the respondent had no answer to this action. The closing of the register could not affect the right of the plaintiffs to dispose of the vessel under sect. 530. They had an absolute statutory right to dispose of her, whether the register was closed or not, and as before action brought they were willing to give a bill of sale for what it was worth, the respondent was in any case bound to complete his contract.

In my opinion, the appeal should be allowed, and judgment entered for the plaintiffs for specific performance with costs here and below, and the counter-claim should be dismissed with costs.

Pickford, L.J.—I am of the same opinion. I do not propose to go through all the facts of the case—they have been clearly expressed by Swinfen Eady, L.J.—but I do wish to say a word with regard to the question of whether this ship was constructively lost. I find myself quite unable to attach a different meaning to the words "constructively lost" from that which applies to the words "constructively totally lost" in insurance matters. There is, so far as I know, no other way in which that collocation of words arises except in regard to marine insurance. I cannot understand the difference attempted to be drawn between a ship being "constructively lost" and "constructively totally lost"; it seems to me that if she is "constructively lost" she must be "constructively totally lost," and *vice versâ*. It may perhaps appear odd that a ship which is lying safely on a pontoon is to be considered a constructive total loss, but there is no question that she was a constructive total loss to her owners at that time, and the apparent inconsistency probably, I think, arises from this, that the words "constructively lost" may have been used at a time when the test of constructive total loss had not so clearly been reduced to a question of mercantile profit or loss as it has been at this present time. At present the question of whether a ship is lost, when you are considering constructive total loss, has almost arrived at this, whether commercially it is profitable to repair her, and, that being adopted now as the test of constructive total loss, it may make the circumstances of the ship at the time appear inconsistent with the expression "constructively lost."

However, I find it impossible to give any other meaning which will apply to the phrase "constructively lost" as opposed to actual loss in this section, and I am rather confirmed in that view by the fact that although more than one member of this court put the question to Mr. Dunlop, "What is the meaning of it if it means something different from the meaning in marine insurance?"—and nobody who has ability and experience in these matters is more able than Mr. Dunlop to give an answer to that question—he was, I think, quite unable to give an answer. That confirms me in the impression I have formed that there is no answer to it, and that the two expressions must mean the same thing. The only doubt I have is this, whether, the ship being actually on the register, the register not being in fact closed by the registrar, at the date of completion a bill of sale ought to have been given as in fact a ship registered. On the whole, I do not think that is correct. The specific obligation in the contract was to give a delivery order as against cash upon the day of completion, but, of course, in addition to that there was an obligation on the seller to do what was necessary to complete the title of his purchaser.

At the time of completion the seller had notice from the registrar that he wished to know all the matters with regard to this sale, and that he wished to know them for the purpose of seeing whether the register should be closed or not, and the seller, being a person or a body of the experience of the Manchester Ship Canal Company, knew also quite well that when those facts came to the knowlege of the registrar, the register would be closed, and that therefore to give a bill of sale at that time was entirely inoperative. I cannot find that the Ship Canal Company, although they did not give the bill of sale at that time for those reasons, did anything, or rather failed to do anything, afterwards which was necessary for the completion of the purchaser's title. They supplied the proper information, as they were bound to, to the registrar, and they co-operated as far as they could in obtaining the re-registering of the vessel and the purchaser as registered owner, and, as has been pointed out, they did in fact afterwards say they would give a bill of sale for what it was worth. It does not seem to me that they have failed in any obligation which was cast upon them of doing what was necessary for the purpose of completing the purchaser's title. I agree, therefore, that this appeal should be allowed, and that judgment should be entered for the plaintiffs.

Appeal allowed.

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

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

Friday, May 1, 1914.

(Before Lord Reading, C J., Phillimore, L.J., and Lush, J.)

Bennett Steamship Company Limited v. Hull Mutual Steamship Protecting Society Limited. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Lloyd's policy — Collision clause—Construction—Collision with nets of fishing vessel.

A collision with nets attached to a fishing vessel is not a "collision with any other ship or vessel" so as to bring it within the terms of the usual collision clause of a Lloyd's policy.

Decision of Pickford, J. (12 *Asp. Mar. Law Cas.* 355; 109 *L. T. Rep.* 213; (1913) 3 *K. B.* 371) *affirmed.*

Defendants' appeal from a decision of Pickford, J. in the Commercial Court.

The plaintiffs' claim was, as members of the defendant association, to recover the sum of 509*l.* 14*s.* due to them under the rules of the association as an indemnity in respect of a claim for damages done by the plaintiffs' steamship *Burma*.

The following case was stated by agreement of the parties for the opinion of the court:—

1. On the evening of the 11th Oct 1912 the plaintiffs' steamship *Burma* came to anchor about two miles off Boulogne, being prevented by fog from going into the roadstead. At about 8.45 p.m., the fog clearing, the anchor was lifted, but shortly afterwards the fog came down again and the anchor was let go, it being impossible to see more than about a ship's length. At 9.30 p.m., in a clearing interval, the anchor was hove on, but it was found to be foul of the nets of a fishing vessel, which nets apparently enveloped the steamer and were also foul of the propeller. When the fishing vessel to which the nets were attached was sighted she was about a mile away or more with the nets extending from her to the *Burma*. The hull of the *Burma* did not at any time come into contact with the hull of the fishing vessel.

2. The damage done by the steamship *Burma* to the nets and the costs and expenses in connection therewith amounted to the sum of 509*l.* 14*s.*, which had been paid by the plaintiffs to the owners of the nets with the consent of all the plaintiffs' underwriters, including the defendants, given without prejudice to the denial of each underwriter that such loss was covered by the insurance granted by him.

3. The plaintiffs were members of the defendant association, and claimed payment of the 509*l.* 14*s.* from the defendants under the rules of the defendant association which provided protection in respect of (*a*) the sums which the member might become liable to pay, and should pay in respect of: By collision, &c.: (*c*) Claims for losses, damages, or expenses arising from or consequent upon collision, and for losses, damages, or expenses arising from or consequent upon damage caused by the interested steamship to other ships or property without actual contact or collision so far as such claims are not recoverable under the usual forms of Lloyd's or Mutual Insurance Association's policy with collision clause attached; and (*e*) loss or damage caused by such steamship to any harbour, dock, or pier, or the quays or works connected therewith, or to any jetty, erection, or other fixed or movable things whatsoever, other than ships or vessels, whether caused by negligence or otherwise.

4. The collision clause attached to the usual form of Lloyd's policy is as follows:

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damage to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship herein insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured.

5. The defendants contended that the proportion of three-fourths of the damages in question was recoverable by the plaintiffs under the collision clause attached to the usual form of Lloyd's policy, and that their liability extended only to the one-quarter or the sum of 127*l.* 8*s.* 6*d.* not recoverable under such Lloyd's policy with collision clause attached.

6. The defendants paid to the plaintiffs the sum of 127*l.* 8*s.* 6*d.* prior to the commencement of these proceedings.

The question for the opinion of the court was whether, in the circumstances set forth in par. 1, there was a collision within the collision clause of a Lloyd's policy. If the court should be of opinion in the negative, judgment was to be entered for the plaintiffs for the sum of 382*l.* 5*s.* 6*d.* and costs of the action. If the court should be of opinion in the affirmative, judgment was to be entered for the defendants with the costs of action.

Pickford, J. held that there had been no collision with a ship or vessel within the meaning of the collision clause attached to the usual form of Lloyd's policy, and therefore the insurance society were liable under the indemnity to repay to the plaintiffs the amount the plaintiffs had paid to the owners of the nets.

The defendants appealed.

F. D. Mackinnon for the defendants.—The question is whether, in view of the authorities, the plaintiffs' vessel "collided" with a ship or vessel. To say that there was in the circumstances of the present case a collision with another ship might perhaps be going further than any of the previous decisions, but that does not show that this case is not within the principle on which those decisions were based. In *The Niobe* (65 L. T. Rep. 502; (1891) A. C. 401; 6 Asp. Mar. Law Cas. 300) it was held that colliding with a tug was colliding with the tow. In *Re Margetts and Ocean Accident and Guarantee Corporation* (85 L. T. Rep. 94; (1901) 2 K. B. 792; 9 Asp. Mar. Law Cas. 217), where a tug was damaged by striking upon a vessel's anchor, to which the vessel was attached by a chain, it was held that the tug had come into collision with a "vessel" within the meaning of an insurance policy. The term "ship" includes the ship and her appurtenances, which include fishing nets (*Gale* v. *Laurie*, 5 B. & C. 156), and collision with a ship includes collision with the nets of the ship; the

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

fact that the hull of the ship was a mile distant does not affect the principle. He referred also to

The Warwick, 63 L. T. Rep. 561; 15 P. Div. 189; 6 Asp. Mar. Law Cas. 545;
The Cockatrice, 11 Asp. Mar. Law Cas 50; 98 L. T. Rep. 728; (1908) P. 182.

H. M. Robertson, for the plaintiffs, was not called upon to argue.

Lord READING, C.J.—This is an appeal by the defendants from a decision of Pickford, J. given upon a special case.

The question which arises is whether upon the facts as proved the ship insured, the *Burma*, came into collision with any other ship or vessel. That with reference to the facts proved resolves itself into a question whether the *Burma* came into collision with a fishing vessel.

The facts are set out in par. 1 of the case. [His Lordship read it.] The substance of the statement is that the *Burma* came to an anchor about two miles off Boulogne because of a fog which prevented her from entering the harbour. Some short time afterwards the fog cleared, and the anchor was again lifted, but the fog came down again, and the anchor was again let go. At that time it was impossible to see more than a ship's length around the vessel. Later on the anchor was hove up during a lifting of the fog, when it was discovered that the ship was foul of the nets of a fishing vessel, which seemed to envelop the steamer, and were foul of her propeller. When the fishing vessel was sighted she was a mile away or more with her nets attached to her and extending from her to the *Burma*. It is clear that the hull of the *Burma* did not at any time come into contact with the hull of the fishing vessel.

In these facts it is said that the *Burma* came into collision with the fishing vessel. Stated apart from authority, I agree with Pickford, J. that no one could say, merely attempting to find a reasonable meaning to language, that a vessel coming into collision with the nets of a fishing vessel a mile distant was coming into collision with that vessel, and, if we had to decide the meaning of coming into collision with a vessel, I should have no doubt that this was not such a collision. But counsel for the appellants has said that this case cannot be decided in that offhand way, because there are certain authorities which in principle have decided that, although there may not be actual contact with the vessel itself, there may still be a collision with it. He referred us in the first place to the case of *The Niobe* (*sup.*). Without examining precisely into the facts of that case, it is sufficient to say that the decision rested upon the tug and tow being for this purpose one vessel, the tug being part of the tow. Therefore it was held that the tow was to blame, when in fact there had been no contact between her hull and that of the other vessel in collision, but only between the hulls of the tug and the other vessel. *The Niobe* (*sup.*) goes as far as any case has gone in this direction, and, of course, we are bound by it; but, speaking for myself, without criticising that decision in any way, I cannot see my way to extend its principle to make it cover the facts of the present case, and I may add that I have no inclination to extend the principle.

Our attention was further called to *Re Margetts and Ocean Accident and Guarantee Corporation* (*sup.*), in which under a policy of marine insurance the insurers had undertaken to pay to the insured damages caused by "actual collision" with any vessel. A tug when coming up the Thames was damaged by striking an anchor to which another vessel was riding; it was held that the tug had come into collision with that vessel, and no doubt the decision proceeded upon this view of the facts —namely, that when a vessel is riding at anchor to which the vessel is attached by a chain, the anchor and chain are part of the vessel. The decision is perfectly clear in its terms, and in substance it amounts to this, that in the words of Phillimore, J., as he then was, at p. 796 of (1901) 2 K. B., and at p. 220 of 9 Asp. Mar. Law Cas., "it may fairly be said that a vessel comes into collision with another vessel if it comes into contact with any portion of that other vessel." *The Warwick* (*sup.*) was another authority cited. Upon examination of the report of that case in 6 Asp. Mar. Law Cas. 545, it becomes apparent that there the collision was between the warp of one trawl which had cut across the warp of another. There again one sees that a question of jurisdiction under the County Courts Admiralty Jurisdiction Acts 1868 and 1869 was involved, but I think counsel for the appellants was right in saying that the court did not dissent from the decision of the County Court judge that he had jurisdiction, whether or not that involved a decision that there had been a collision between ship and ship. The point, however, was not taken before them. I think Pickford, J. decided this case correctly, and I cannot improve on the reasons he has given, and I do not feel compelled to decide in favour of the appellants by any case cited to us. The appeal must be dismissed.

PHILLIMORE, L.J.—I am of the same opinion. Whenever there is damage caused by collision to part of the hull of a vessel or to any part of its apparel, which is outside the ambit of the hull, but which is still in connection with the vessel, such as the anchor or the ship's boat towing astern or working ahead to warp the vessel, it may still be said that a collision with that part of the apparel is a collision with the vessel itself, just as if the boat was suspended at the davits or the anchor in the bows. But nets are not part of a ship which it is necessary she should have and which it would not be prudent to send a ship to sea without, to use the language of Wills, J. in *Re Salmon and Woods* (2 Morrell, 137). I think it would be a straining of language to hold that a collision with the fishing vessel took place in this case.

LUSH, J.—It does not seem to me possible, without distorting language, to say that to collide with the nets of a fishing vessel is the same thing as to collide with the vessel itself, merely because the nets are attached to it, and I do not think there is anything in the authorities which would justify us in holding that it is. I therefore agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the defendants, *Botterell* and *Roche*, for *Hearfields* and *Lambert*, Hull.

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

May 14 and 15, 1914.

(Before Lord READING, C.J., PHILLIMORE, L.J., and LUSH, J.)

KACIANOFF AND CO. v. CHINA TRADERS' INSURANCE COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Total loss—War risk—Cargo not sent forward for fear of capture—Whether constructive total loss.

In Dec. 1903 *the plaintiffs took out a marine policy with the defendants to insure a cargo against war risk only, at and from San Francisco to Vladivostok* viâ *Nagasaki.*

In Feb. 1904, *when some of the cargo had been loaded, war having broken out between Russia and Japan, the Japanese fleet was blockading Vladivostok, and stopping and capturing vessels. Under these circumstances the underwriters telegraphed to the plaintiffs that, if the cargo was sent to Vladivostok* viâ *Nagasaki, they would take up the position that the plaintiffs had deliberately caused the loss. The plaintiffs then gave notice of abandonment to the underwriters, which the underwriters refused to accept, and the plaintiffs discharged the cargo and sold it. In an action by the plaintiffs to recover on the policy :*

Held, that the loss was not caused by the peril insured against, namely, capture, for the discharge of the cargo had prevented the peril from operating ; the vessel never was in risk of capture, for the plaintiffs determined not to undergo the risk.

Decision of Pickford, J. (12 *Asp. Mar. Law Cas.* 395; 109 *L. T. Rep.* 365; (1913) 3 *K. B.* 407) *affirmed.*

PLAINTIFFS' appeal from a decision of Pickford, J. in the Commercial Court (12 Asp. Mar. Law Cas. 395; 109 L. T. Rep. 365; (1913) 3 K. B. 407).

The plaintiffs, who were merchants, took out in Dec. 1903 a policy with the defendants to cover the shipment of a cargo at and from San Francisco to Vladivostok *viâ* Nagasaki. The policy was expressed to be against war risk only, being against the risk excepted by the clause "warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war."

The steamer was to have left San Francisco on the 26th Feb. 1904, but at the time she was about to sail, and when some of the cargo was on board, it was known that the Japanese fleet was in the Pacific and was stopping and capturing vessels. Under these circumstances the underwriters telegraphed to the plaintiffs that if the cargo was sent to Vladivostok *viâ* Nagasaki they would take up the position that the plaintiffs had deliberately caused the loss.

The plaintiffs proposed that the cargo should be discharged at San Francisco and sold elsewhere. Notice of abandonment was given to the underwriters, who refused to accept it, but agreed that the plaintiffs should be placed in the same position as if a writ had been issued and an action commenced immediately after the refusal of notice of abandonment.. The cargo was discharged at San Francisco for sale and delivery at Shanghai. The plaintiffs brought the action for the value of the cargo, giving credit for the salvage realised by the sale at Shanghai.

Pickford, J. held that it was impossible to say that the cargo was in fact constructively totally lost on the ground that, if it had been sent forward, there was every reason to think that it would be lost by the perils insured against, and that there was not, therefore, a constructive total loss at the time of abandonment, and he gave judgment for the defendants.

The plaintiffs appealed.

Maurice Hill, K.C. (*F. D. Mackinnon* with him) for the plaintiffs.—There was a constructive total loss of the cargo by the perils insured against. The cargo had been put on board and a bill of lading issued. This was equivalent to starting on the insured voyage, and there was a practical certainty of capture if the cargo had gone forward. The fact that the underwriters telegraphed to the plaintiffs to the effect that, if the cargo were sent to Vladivostok *viâ* Nagasaki, they would take up the position that the plaintiffs deliberately caused any loss occasioned by the perils insured against is very strong evidence to show that the defendants regarded the capture of the ship as certain, and the case is governed by

The Knight of St. Michael, 78 L. T. Rep. 90; (1898) P. 30; 8 Asp. Mar. Law Cas. 360.

In that case a cargo of coals was in danger of spontaneous combustion, and although no part of it was ever actually on fire, it was held that inasmuch as there was an actual existing peril, a loss of freight due to the necessary discharge and sale of the cargo at an intermediate port was either a loss by fire or was covered by the general words of the policy. This view was in the opinion of Gorell Barnes, J. supported by the case of (1820) *Butler* v. *Wildman* (3 B. & Ald. 398). There the master of a vessel, in order to prevent a quantity of dollars falling into the hands of an enemy by whom he was about to be attacked, threw the dollars into the sea, and was immediately afterwards captured, and it was held that it was a loss by jettison or by enemies, and, if not strictly a loss by either peril, it was a loss within the general words. It is admitted that if the insured abandons a voyage by reason of a mere apprehension that the ship may be captured, he cannot recover, but here there was much more than a mere apprehension, for there was a practical certainty of capture; the voyage was reasonably abandoned, and there was a loss by the perils insured against. The case of *Hadkinson* v. *Robinson* (3 Bos. & P. 388) is perhaps the strongest case in favour of the defendants, but that is contrary to *The Knight of St. Michael* (*sup.*), and is distinguishable from the present case, for there had been no communication between the parties, nor were the insured placed in a difficult position by the action of the underwriters. He referred also to

Rodocanachi v. *Elliott*, 2 Asp. Mar. Law Cas. 21, 399; 28 L. T. Rep. 841; L. Rep. 9 C. P. 518;
Miller v. *Law Accident Insurance Company*, 9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370; (1903) 1 K. B. 712;
Lubbock v. *Rowcroft*, 5 Espinasse, 49;
Thompson v. *Hopper*, 6 E. & B. 937;
Fawcus v. *Sarsfield*, 6 E. & B. 192;

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

Nobel's Explosives Company Limited v. *Jenkins and Co.*, 8 Asp. Mar. Law Cas. 181; 75 L. T. Rep. 163; 1 Com. Cas. 436; (1896) 2 Q. B. 326; *Barker* v. *Blake*, 9 East, 283.

Leslie Scott, K.C. (*Leck*, K.C. with him) for the defendants. — There was no constructive total loss by the perils insured against, for the peril of capture had not come into active operation. Here there was loss caused by an intervening act of volition on the part of the assured, and that distinguishes this case from *The Knight of St. Michael* (*sup.*) and *Butler* v. *Wildman* (*sup.*), where there were not acts of volition free and independent, but automatic acts dictated as a result of the peril coming into active operation. The decision in *Nickels* v. *London and Provincial Insurance Company Limited* (6 Com. Cas. 15) is directly applicable here. What is the basis of constructive total loss is shown by sect. 60, sub-sect. 1, of the Marine Insurance Act 1906. The plaintiffs could have totally disregarded the communication of the defendants, and if they had sent forward the cargo, and it had been captured, the underwriters would have had no defence to an action on the policy. [He was stopped.]

Lord Reading, C.J.—This case, which comes before us on appeal from Pickford, J., who tried it without a jury, arises out of incidents dating so far back as the end of the year 1903 and the beginning of the year 1904.

It is an action upon a policy of insurance in in respect of a cargo of 4000 barrels of mess beef, which were shipped by the plaintiffs from San Francisco to Vladivostok *viâ* Nagasaki, and the policy of insurance is against loss arising from capture. It is a policy against total loss based upon the exception clause. Substantially it is a clause known as the f.c.s. clause, and in this case all that it is necessary to say is that the insurance is against loss arising from the peril of capture.

The facts in the case may be stated quite shortly so far as they are material. It seems to have been somewhat difficult to ascertain all the material facts, but for this point—which is the only one with which we are now concerned, and upon which Pickford, J. gave judgment—they seem to be substantially ascertained.

It appears that the plaintiffs, who were merchants carrying on business at various places in Russia and in Siberia, and whose business consisted largely of importing goods into Russia and Siberia, bought three shipments or made contracts for three shipments, of mess beef from San Francisco with a firm of Getz Brothers of San Francisco, with whom they frequently had transactions. On the 16th Dec. 1903 this policy of insurance was effected and issued by the defendants to the plaintiffs. The cargo in question consisting of these 4000 barrels of mess beef, began to be shipped in Feb. 1904 in San Francisco. There had been two previous cargoes shipped, one in the *Coptic* and the other in the *Corea*, by the same firm, the one cargo to proceed to Vladivostok and the other to Port Arthur.

These two vessels, the *Coptic* and the *Corea* were seized, and their cargoes condemned in consequence of the outbreak of war between Russia and Japan, but neither of those events had happened at the time that this policy was effected. The shipment in the *China* was loaded —that is to say, the loading had been completed on the 26th Feb. 1904. War had been declared on the 8th Feb. 1904. Before the declaration of war there was every anticipation that war would be declared. This vessel, the *China*, instead of setting out for Vladivostok *viâ* Nagasaki according to contract, on the 27th Feb. discharged, it appears, these 4000 barrels of mess beef; she did not set out on this voyage, and this cargo when discharged was resold and realised only approximately some 25 per cent. of the amount for which it was insured. In any event the claim made against the defendants is for some 73·76 per cent. of the loss, and the cargo is insured for 3000*l.* under this policy out of 9000*l.*

The claim is made against the defendants upon the policy of insurance, and the question that has to be answered before the defendants can be made liable is this: Has the peril insured against operated to cause that loss? In other words, I think it might be put, What is the proximate cause of the loss which actually happened?

In order to answer that, one must ascertain exactly what the facts were.

The plaintiffs anticipated—and had, apparently, every reasonable ground for anticipating—that if this vessel set out on that voyage she would be captured by the Japanese, and her cargo would be condemned, and would be lost. It is true the cargo was to be carried by a British ship, but in the circumstances, particularly having regard to what had happened with reference to the other two vessels, which had been seized, the fear was entertained that the cargo would be condemned. It is said that not only was there a fear—that, it is admitted, would be not sufficient (apprehension would not be enough, in his view, Mr. Maurice Hill quite candidly tells us)—but the contention was that it was reasonably certain, having regard to the uncertainty of human affairs, that if this vessel did get to Nagasaki, and if she did tranship that cargo of 4000 barrels of mess beef at Nagasaki for Vladivostok, the cargo would be lost; that was as certain as a thing can possibly be that is to happen in the future. But I will assume for the purposes of this case, as I think Pickford, J. intended to find, that it might be said that it was reasonably certain, and not that there was some apprehension that this cargo would be seized, condemned, and therefore lost; but the vessel never did leave the port.

Having come to that conclusion, some inquiry was made in this country from the underwriters, and the underwriters were consulted, and on the 23rd Feb. some of the underwriters protested against further shipments under the then present circumstances, and other underwriters denied liability; and subsequently when they were asked on the 27th Feb. what they would do if the plaintiffs discharged this cargo, sold it, and gave notice of abandonment as a constructive total loss to the defendants, they declined to give any instructions. Without reading the other documents in the case, it is perfectly plain that the defendants took the attitude that they would decline responsibility in the then present circumstances, which meant: As it is sure that this vessel will be captured as the other two, we shall decline to accept the liability, and you, the plaintiffs, will have to bear the loss yourselves. I think it is very

unfortunate that the defendants should have taken that course. No doubt they were entitled to say that they had reasonable ground for anticipating capture, and, if they had to maintain that, that would be a good ground for a defence and repudiating liability; but it seems to have been admitted in the argument before us that what was done was not done with a real belief that they had a defence, but merely with the object of preventing this cargo being sent and the risk thus operating. It is not for this court —we are not trying the case in the first instance— to exercise any discretion with regard to the costs of the action, as the learned judge did who had the facts before him, and who made the order that the defendants should reap the fruits of their victory and have their costs. Speaking for myself, if I had been trying the case, in the absence of other circumstances of which I have no knowledge, but which no doubt were before the learned judge, I should, I think, have come to the conclusion that as the defendants had contributed so much to this position I should not have given them the costs of the litigation. However, that is not now material, except for the purpose of stating what actually happened. The plaintiffs thereupon, having given their notice of abandonment on the 27th Feb., being placed as they were in a very awkward position by reason of what had happened, the defendants refused to accept that notice of abandonment of the cargo; and the real question which we have to answer in this court is this: This vessel never having set out to sea with this cargo, can it be said that the loss was occasioned by the peril insured against— that is, capture? In my opinion the question has only to be stated to be answered quite clearly in the negative; I entertain no shadow of doubt about this matter. It seems to me that the peril insured against had never begun to operate. The fact of remaining in port, and discharging the cargo there and then, was preventing the peril operating; it was making it impossible that the peril should operate. It would have been a totally different state of things if the vessel had left and then, quite outside, had been met and threatened by a Japanese vessel, or if approaching Nagasaki she had been in some such danger. No doubt there may be circumstances in which courts or different judges may take a different view of the facts as to when the particular peril did begin to operate, but there must be the beginning before the judge can exercise his judgment upon it. In my judgment it is that which fails the plaintiffs in this case.

Notwithstanding the very ingenious argument of Mr. Maurice Hill, in my opinion, there can be no doubt that the plaintiffs cannot make out their claim in this action. Reliance was placed in the main upon the case of *The Knight of St. Michael* (*sup.*). That case illustrated the difficulty, no doubt, of deciding the precise point at which one can say that the peril has begun to operate, but it is not, in my view, a case which decides any novel principle; it is one of those cases in which there is the application of a principle to somewhat difficult facts. There the court came to the conclusion that, notwitstanding that a fire had not actually broken out, nevertheless the fire was one of the perils insured against. It began to operate as a peril because the heat was then being engendered in the cargo of coals which was being carried. There was a very imminent danger of the temperature rising from that heat, which was being engendered, causing in the ordinary and natural course of things spontaneous combustion and fire, and if that had happened to the vessel when she was out at sea there would be an imminent loss, ar at any rate a grave danger both to the ship and to the rest of the cargo. Thereupon the commander of the vessel put back to Sydney—I think the vessel was on a voyage from Newcastle, New South Wales, to Valparaiso with this cargo of coals—and upon the advice of the surveyors discharged a large portion of the cargo of coals. There was an insurance on the freight, and, of course, when the vessel arrived she could only discharge part of the cargo, as part of it had been discharged by her at Sydney, and the claim was upon this insurance for freight. It was held that the assured was entitled to recover, because the peril had begun to operate; it was a common form policy, and there was no difficulty as to that. If the loss had been occasioned by fire, there was no doubt about it. But the case made was that the fire had not originated, and had not really happened, and then the whole question which the court had to determine, and which Lord Gorell, examining the circumstances, determined with great precision and care, was this: Was there at the time a condition of things which was such that there was an actually existing state of peril of fire, and not merely a fear. The danger was present, and, if nothing were done, spontaneous combustion and fire would follow in the natural course. That means that the peril had begun to operate. In my view that case is no authority for the proposition which is put forward, although it is of course quite obvious that it affords some foundation for the argument put forward by Mr. Maurice Hill when some of the sentences or some of the words used in the judgment are taken without any examination into the actual facts of the case.

Another case cited to us was that of *Butler* v. *Wildman* (3 B. & Ald. 398), and there again it seems perfectly plain what the decision of the court was, and that that decision does not assist us here. In that case there was a policy of insurance in common form upon dollars which were being carried by a Spanish ship at a time when Spain was at war with certain parts of South America. Whilst the Spanish ship was carrying the dollars, the hostile vessel prepared to attack her, and the commander of the Spanish ship, seeing that he was in imminent danger of capture by the hostile vessel, proceeded to throw a great part of the dollars which he was carrying into the sea in order to prevent them falling into the possession of the enemy when the latter captured the vessel, as eventually happened. In those circumstances the action was brought upon the policy, which described the perils insured against to be "of the seas, men-of-war, fire, enemies, pirates, rovers, jettisons, letters of mart and counter-mart, surprisals, taking at sea, arrests, restraints, and detainments of all kings, princes, and people, . . . and all other perils, losses, and misfortunes." The court came to the conclusion that it was a loss by jettison, but that even assuming it was not, strictly speaking, a loss by jettison, it was something *ejusdem generis*, and therefore came within the general words "all other losses and misfortunes." But that is

immaterial for the purposes of the present case. What is material in this case is that the court—or at any rate a majority of the judges—were there of opinion that there was a loss by enemies, and that, therefore, the assured could recover on that ground as well as on the other two grounds.

The case which is more in point is that of *Hadkinson* v. *Robinson* (3 B. & P. p. 388), in which the court came to the conclusion that the doctrine of constructive total loss is only applicable to those cases in which it can be proved that the loss is occasioned by one of the perils insured against. These are the words of Lord Alvanley, C.J. (at p. 392): "It must be a peril acting upon the subject insured immediately, and not circuitously as in the present case." I put it in another way, following out the principle laid down by these decisions, and I put to myself this question: Having regard to the authorities and the law, was this loss occasioned by a risk within the policy, that is, was it a loss occasioned by capture? The answer which I give is: Certainly not. The vessel never was in risk of capture, because she determined not to undergo the risk, and the cargo carried in the vessel never underwent the risk, because it was determined to discharge the cargo so as to avoid the risk. Therefore, as the ship and cargo never came under the risk, and as the risk never began to operate, no claim can be made on this policy.

In my judgment this appeal fails, and must be dismissed.

PHILLIMORE, L.J.—I am of the same opinion, and, as the Lord Chief Justice has so exactly expressed my own view of the case, I have nothing to add.

LUSH, J.—I am of the same opinion, and I fully agree with all that the Lord Chief Justice has said as to the action of the underwriters in this matter, which, to say the least of it, was unfortunate. Mr. Maurice Hill has not contended that anything they did or wrote gave him a cause of action, or contributed to his cause of action, except in this sense, that it showed, he said, that the risk of capture was not only probable, but certain.

We have, therefore, to see whether the loss of the cargo was really caused by the risk insured against—whether it was really caused by the capture. It certainly is not necessary to prove that there was actually a capture, but it is necessary to show, if there was not a capture, that the loss was caused by that peril, and to do that, it must be shown that the peril was the proximate cause of the loss.

It seems to me, on these facts, impossible to say that this ship ever was in peril of capture. What was done in discharging the cargo was really done to prevent the ship ever coming into the peril, it was not done to avert the consequences of any peril in which the ship actually was. That being so it seems to me quite impossible to say that the one was the consequence of the other.

For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

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

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

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 14, 17, 21, 26, *Dec.* 8, 1913, *and April* 23, 1914.

(Before the President, Sir S. T. EVANS, and Elder Brethren.)

THE UMONA. (a)

Collision between a steamship and a barge in tow of a tug—Steamship and tug to blame—Damage to cargo on barge—Claim by owners of cargo—Right to recover total damage against either steamship or tug—Division of loss—Maritime Conventions Act 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1; *s.* 9, *sub-s.* 4.

A dumb barge in tow of a tug came into collision with a steamship. The cargo on the barge was damaged. The servants of the tug owners controlled the navigation of the barge, and the barge was under hire to the tug owners, who were in the position of owners of the barge.

The tug owners and the cargo owners brought an action against the owners of the steamship to recover the amount of the damage done to the barge and to the cargo on the barge. The owners of the steamship counter-claimed against the tug owners for the damage done to the steamship.

The court held that the collision was due to the fault of the steamship and the tug, and that the steamship was to blame to the extent of three-fourths and the tug was to blame to the extent of one-fourth.

The owners of the cargo on the barge claimed as innocent parties to recover the whole of their damage against the owners of the steamship.

Held, that as the tug and barge were controlled by the servants of the tug, by whose fault the collision was partly caused, the principle laid down in The Milan (5 *L. T. Rep.* 590; *Lush.* 388) *was applicable, and that the cargo owners could only recover three-fourths of their damage from the owners of the steamship.*

The Drumlanrig (103 *L. T. Rep.* 773; 11 *Asp. Mar. Law Cas.* 520; (1911) *A. C.* 16) *followed.*

The Devonshire (107 *L. T. Rep.* 179; 12 *Asp. Mar. Law Cas.* 210; (1912) *A. C.* 634) *distinguished.*

DAMAGE ACTION.

The plaintiffs were the Union Lighterage Company, who were the owners of the tug *Dido* and the bailees of the barge *Ellen*, and the Balijan Tea Company Limited, the owners of the cargo on the *Ellen*.

The defendants and counter-claimants were the owners of the steamship *Umona*.

The case made by the plaintiffs was that about 11.55 p.m. on the 21st Nov. 1912 the dumb barge *Ellen* was in the lower part of Erith Rands in the River Thames in the course of a voyage from Tilbury Docks to London with a cargo of tea on board, manned by one hand. The weather was fine and clear, the wind calm, and the tide was ebb of the force of about two knots. The *Ellen* with five other barges, arranged in three ranks of two each, being herself the port side barge of the second rank, was in tow of the steam tug *Dido*

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

and was proceeding straight up Erith Rands well over to the south shore, making about three knots. The regulation lights were being exhibited on the *Dido*, and a stern light was being exhibited on the aftermost port side craft in tow of the tug. A good look-out was being kept on the tug and the barge.

In these circumstances those on the *Dido* saw, distant about half a mile and bearing a little on the starboard bow, the two masthead and the red lights of the *Umona*. Two short blasts were sounded on the whistle of the *Dido*, and her helm was starboarded a little and then steadied, and when the *Dido* and her craft had straightened up the engines of the *Dido* were stopped. When the way of the *Dido* was off her engines were put easy ahead to keep her tows under control. Shortly afterwards the whistle of the *Dido* was again sounded two short blasts and her helm was again starboarded a little and then steadied. When shortly afterwards the *Umona*, which appeared to maintain her speed, sounded one short blast on her whistle, the whistle of the *Dido* was at once sounded one short blast in reply, her helm was put hard-a-port, and her engines were put full speed ahead. When the *Umona*, after getting red to red with the *Dido*, suddenly and without giving any signal opened her green and shut in her red light, causing danger of collision, the helm of the *Dido* was at once put hard-a-starboard in order, if possible, to slew her craft away from the *Umona*, but the *Umona* sounded three short blasts on her whistle and with her stern struck the port side of the *Ellen*, doing damage to her and her cargo and damaging some of the other barges which the *Dido* had in tow.

The case made by the defendants and counter-claimants was that the *Umona*, a steel screw steamship of 356ft. long and 3735 tons gross and 2388 tons net register, manned by a crew of seventy-six hands all told, was proceeding down Erith Rands on a voyage from the East India Docks to Natal with passengers and a general cargo. The *Umona*, in charge of duly licensed Trinity House pilot, was keeping slightly to the southward of mid-channel and was making between seven and eight knots. Her regulation lights were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

In these circumstances, as the *Umona* approached Crayfordness, those on board her sighted, about half a mile off and bearing about one and a half to two points on the starboard bow, the two white towing lights and the red light of the *Dido*. The whistle of the *Umona* was sounded one short blast and her helm was ported; when the *Dido* was brought all clear on the port bow the helm was steadied. When the string of barges in tow of the *Dido* were seen angling across the bow of the *Umona* the engines of the *Umona* were stopped and put full speed astern, her whistle was sounded three short blasts, and her helm was put hard-a-port, but the port side of the *Ellen* struck the stem of the *Umona*, doing damage.

Alternatively, those on the *Umona* alleged that if there was any fault in the navigation of the *Umona*, which they denied, it was solely that of the pilot who was in charge of her by compulsion of law.

The plaintiffs in their defence to the counter claim denied that there was any negligence on the *Dido*, and alternatively alleged that if there was any negligence on the *Dido* it did not cause or contribute to the collision, and the consequences of such negligence, if any, could have been avoided by the exercise of ordinary and reasonable care and maritime skill on the part of those on the *Umona*.

The action was before the President on the 14th, 17th, and 21st Nov., and on the 26th Nov. 1913 judgment was delivered.

The President held that the look-out on the *Umona* was bad, and that the navigation of the *Umona* was also faulty in that she was allowed to come to port just before the collision; he also held that the *Dido* was to blame for bad look-out, and for persisting in keeping over to the south side of the river when she saw the *Umona*, which she knew to be a passenger steamer, heading to the south side of the river, and held that the proportion of blame should be attributable as to three-fourths to the steamer and as to one-fourth to the tug.

Laing, K.C. and *H. C. S. Dumas* for the plaintiffs, the owners of the tug and the owners of her cargo, submitted that the owners of the cargo were entitled to recover the whole of their damage against the *Umona*.

Bateson, K.C. and *Stephens* for the owners of the *Umona*, submitted that the cargo owners could only recover three-fourths of their loss from the *Umona*.

The question stood over for further argument.

On the 8th Dec. 1913 the question came before the court for further argument.

The following sections of the Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57) were referred to:

Sect. 1 (1). Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.

Sect. 9 (4). This Act shall apply to any persons other than the owners responsible for the fault of the vessel as though the expression "owners" included such persons, and in any case where, by virtue of any charter or demise, or for any other reason, the owners are not responsible for the navigation and management of the vessel, this Act shall be read as though for references to the owners there were substituted references to the charterers or other persons for the time being so responsible.

C. R. Dunlop for the plaintiffs, the Balijan Tea Company Limited, the owners of the cargo laden on the barge *Ellen*.—These plaintiffs are entitled to judgment for the full amount of their loss against the *Umona*. The owners of the cargo on the *Ellen* have not been guilty of any negligence. They have been injured by the action of two wrongdoers, the *Umona* and the tug *Dido*, and are in the same position as the owners of the barge in the case of *The Devonshire* (*ubi sup.*). The man on the barge was not guilty of any negligence. The only thing the barge could do was to follow the tug and the barges ahead of her.

Laing, K.C. and *H. C. S. Dumas* for the owners of the *Dido*, the bailees of the barge *Ellen*.—The man on the barge *Ellen* was guilty of no negligence,

and if the court should take the view that the *Ellen* is in the same position as she would have been in if she had been in tow of a tug whose owners had not hired her, the hirers would be entitled to recover from the *Umona* the damage done to her in full. It is a question of fact in each case whether the tug is the servant of the tow:

The Quickstep, 63 L. T. Rep. 713; 6 Asp. Mar. Law Cas. 603; 15 P. Div. 196;
The American and the Syria, 31 L. T. Rep. 42; 2 Asp. Mar. Law Cas. 350; L. Rep. 6 P. C. 127.

If the negligence on the tug is to prevent the hirers of the barge from recovering the damage to the barge, the facts bring the barge within the provisions of the Maritime Conventions Act 1911, and the barge can only recover three-fourths of her damage from the *Umona*.

Bateson, K.C. and *D. Stephens* for the owners of the *Umona*.—The barge *Ellen* was demised to the owners of the tug *Dido*. The registered owners of the *Ellen* were not responsible for her navigation, and the owners of the tug who were the charterers of the barge were responsible. The tug owners' servants were guilty of negligence, and the barge cannot be regarded as an innocent barge injured by the fault of two wrongdoers. The Maritime Conventions Act 1911 applies to both the barge and the cargo on board her. If that Act does not apply, the cargo owners on the barge can only recover half their loss:

The Milan (*ubi sup.*);
The Drumlanrig (*ubi sup.*).

In the course of the argument the following cases were also referred to:

The Englishman and the Australia, 7 Asp. Mar. Law Cas. 603; 70 L. T. Rep. 846; (1894) P. 239.
The Bernina, 6 Asp. Mar. Law Cas. 257; 58 L. T. Rep. 423; (1888) 13 App. Cas. 1.

April 23, 1914.—The PRESIDENT.—By the Maritime Conventions Act 1911 vessels are personified in language which has been commonly used in shipping affairs and Admiralty cases. Such phrases as "the fault of vessels" and "loss to vessels, cargoes, freight or property on board" mean, of course, the fault of the owners of the vessels or their servants, or persons for whom they are responsible, and loss to the owners of, or persons interested in, vessels, cargoes, freight, or property on board.

Upon the facts of this case I decided that the collision between the steamship *Umona* and the dumb barge *Ellen* was due to the fault of the *Umona* and of the tug *Dido*, which towed the barge *Ellen* with five other barges; and I found the degrees of fault to be, as to three-fourths on the part of the *Umona* and as to one-fourth on the part of the tug *Dido*.

The first-named plaintiffs, the Union Lighterage Company, were the owners of the tug *Dido*, and also, as bailees for hire, the owners of the barge *Ellen*. They were also the owners of some, if not all, of the other barges, either absolutely or as bailees. The tug directed and controlled the navigation of the barges. It was admitted that the tug and all the six barges were in charge of servants of the Union Lighterage Company at the time of the collision. The second named plaintiffs, the Balijan Tea Company, were the owners of the cargo carried in the *Ellen*.

The questions now to be decided are: (1) What damages (if any) are the Union Lighterage Company entitled to recover against the defendants in respect of the injury caused to the barge *Ellen*; and (2) what damages (if any) are the tea company entitled to recover against the defendants in respect of the injury to or loss of the cargo laden in that barge. In either case, do the plaintiffs respectively recover all or nothing, or a proportion?

In my opinion the case falls to be decided under, and in accordance with, sect. 1 of the Maritime Conventions Act 1911, read with sect. 9, sub-sect. 4. The extent, width, and effect of this section have recently been described by the Court of Appeal in *The Cairnbahn* (110 L. T. Rep. 230; 12 Asp. Mar. Law Cas. 455; (1914) P. 25).

The facts proved, establish that the servants of the owners of the *Ellen* were to blame for the collision. That they navigated from the tug does not affect the liability of the owners of the tug and barge, any more than the liability on land would be affected if a driver of a steam traction engine drawing waggons belonging to the same owner negligently caused one of his waggons to come into collision with and injure a passer by or a carriage.

The result of my findings is that the *Ellen* was damaged partly by the fault of the servants of her owners. These owners, therefore, in accordance with sect. 1 of the Maritime Conventions Act 1911, are entitled to recover in proportion to the degree of fault found and to be applied, namely, three-fourths of this damage, from the defendants. As to the tea company, their cargo was carried in the *Ellen*, which must be deemed to be in fault by reason of the negligence of her owners' servants. I was asked to hold that the *Ellen* was "an innocent barge" within the meaning of the decision in the *Devonshire* (*ubi sup.*). I cannot so hold. The facts in that case were quite different, and the decision does not apply to the present case. It is to be observed that neither of the two sets of plaintiffs raise any such point in their defence to the counter-claim in answer to the allegation that "the collision was caused by the negligent navigation of the tug *Dido* and her craft by the plaintiffs and their servants." The tea company, therefore, in accordance with the section referred to—which incorporates the doctrine of the *Milan* (*ubi sup.*) and the *Drumlanrig* (*ubi sup.*) upon this point, save as to the proportions of the division of loss—are entitled to recover from the defendants only three-fourths of the damage to their cargo. Judgment must be entered accordingly, and the amount of the damage to be paid or suffered by the parties is to be ascertained by reference to the registrar and merchants in the usual way.

Solicitors for the plaintiffs, the Union Lighterage Company, *Keene, Marsland, Bryden*, and *Besant*.

Solicitors for the plaintiffs, the Balijan Tea Company, *Waltons* and *Co.*

Solicitors for the defendants, the owners of the *Umona*, *Thomas Cooper* and *Co.*

April 30 *and May* 1, 1914.

(Before the President, Sir S. T. EVANS, and Elder Brethren.)

THE BEDEBURN. (*a*)

Salvage — Compulsory pilot — Risk necessary to entitle a pilot to salvage.

A steamship on a voyage from the Tyne to Marseilles when off the Royal Sovereign Lightship lost her propeller and drifted up Channel. She anchored off Rye and then touched the ground several times. Those on the steamship burnt flares for assistance and a lifeboat and tugs came out to the vessel and she was taken in tow for London. When the steamship entered the compulsory pilotage district she was boarded by a pilot off Dungeness, who took charge of her to Gravesend. Salvage suits were instituted by the tugs, the pilot, and the lifeboat crew.

Held, that the tugs and the lifeboat crew were entitled to salvage, and that the pilot was not entitled to salvage, for though the vessel while in his charge sheered and the anchor of the vessel had fouled the hawser of one of the tugs, and there was some apprehension that the steamship might leak, the pilot had not done more work or run any greater risk than he would have been called upon to do in the performance of an ordinary pilotage contract.

CONSOLIDATED SALVAGE SUITS.

The plaintiffs were the owners, masters, and crews of the steam tugs *Conqueror* and *Champion*; William Peverley, a Trinity House pilot; the Dover Harbour Board, who were the owners of the steam tug *Lady Crundall*, her master and crew, and the crew of the lifeboat *John William Dudley*.

The defendants were the owners of the steamship *Bedeburn*, her cargo and freight.

The *Bedeburn*, a steamship of 3499 tons gross and 2177 tons net register, when the services were rendered to her was on a voyage from the Tyne to Marseilles laden with a cargo of coals.

The value of the *Bedeburn* was agreed to be 19,000*l*., the value of her cargo was about 3,400*l*., and of her freight 1235*l*.

The material facts are fully stated in the judgment of the President.

Laing, K.C. and *C. R. Dunlop*, for the owners masters, and crews of the steam tugs *Conqueror* and *Champion* and for the pilot, William Peverley, on behalf of the latter cited *The Santiago* (83 L. T. Rep. 439; 9 Asp. Mar. Law Cas. 147).

Bateson, K.C. and *H. C. S. Dumas* for the owners, master, and crew of the *Lady Crundall*.

Batten, K.C. and *Lewis Noad* for the plaintiffs, the crew of the lifeboat *John William Dudley*.

Dawson Miller, K.C. and *R. H. Balloch* for the defendants, the owners of the *Bedeburn*, her cargo, and freight, in opposing the claim of the pilot, cited:

Akerblom v. *Price*, 44 L. T. Rep. 837; 4 Asp. Mar. Law Cas. 441, 7 Q. B. Div. 129;
Kennedy on the Law of Civil Salvage, 2nd edit., pp. 92 to 96.

The PRESIDENT.—In this case the defendant vessel started from the Tyne and encountered very bad weather on her voyage down until she got somewhere in the neighbourhood off Hastings. There she lost her propeller. It was observed about four o'clock or thereabouts on the 26th Dec. that the engines were racing heavily, and in the result it was ascertained that the propeller had entirely disappeared. She drifted before the wind, controlled to some extent, as far as she could be controlled in the circumstances, by the action of the helm, and she got to the place described, in Rye Bay, about two miles from Rye Harbour. There is no doubt she was in some difficulty.

There are five sets of plaintiffs. The lifeboat, with a crew of thirteen hands, was first upon the scene, and then there appeared the tug *Conqueror*, which was afterwards sent to obtain other assistance. By her means the assistance of the *Lady Crundall* was obtained, and they together were able to tow the vessel from the position in which she then was towards any harbour where she could be put into dry dock. They towed her as far as Dungeness, and there the pilot came on board, who claims not merely for pilotage but also for salvage services. With the assistance and by the guidance of the pilot, and with the motive power of the two tugs, the vessel was towed in ordinary course up as far as the Nore, and there, some further difficulty having arisen by reason of the parting of the hawser of the *Conqueror*, the services of the *Champion* were requisitioned. From the Nore up to Gravesend the three tugs were jointly towing the vessel.

The question arises, in respect of four of these claimants, what the amount ought to be which they should have as remuneration for the salvage services which it is admitted they rendered; and with regard to the fifth claimant, the pilot, the first matter to be determined is whether it has been shown in this case whether he is entitled to any salvage award at all, or whether he should only receive the ordinary pilotage remuneration; and if he is entitled to any salvage award what the amount of that remuneration ought to be.

The vessel was in command of a master who had been on duty from the time he started from the Tyne until the vessel lost her propeller, and, indeed, for many hours afterwards, in fact until she arrived at Gravesend.

From the time he started on the voyage until the difficulties first began he had been on active duty, doing active service for about fifty hours. Notwithstanding that, he not only sustained his physical energy, but he was fully alive mentally to the difficulties in which he was placed, and he acted with great courage and in a very seamanlike way in getting the vessel into the position in which she was at the time the lifeboat came up. It now appears, and is admitted by the master, that the vessel had bumped upon two or three occasions before she had got into that position. It was feared—a not unreasonable apprehension—that the vessel was leaking as a result of the bumping, but as it turned out there was no leaking at all.

The position has been approximately fixed in which the vessel was when the flares attracted the attention of the coastguard, who took prompt steps to send out the lifeboat. It was not the best or the safest position for the vessel, but, notwithstanding that there was no very great danger, if she could be got away, as she was got away, before the falling of the tide, of any further

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

damage occurring to her. Nothing has been said by counsel for the defendants to detract from the useful and valuable services of the crew of the lifeboat, and I think if I allow them a sum of 140*l.*, to include, of course, whatever expenses they have to pay out—and I agree they come to about 36*l.*—I shall be allowing a sum not more than is fair to call upon the owners of the salved vessel to pay, and which I trust will be considered a fairly ample award for the salvage services of the lifeboat's crew.

The *Conqueror* was the first tug upon the scene. She was dispatched by the master of the vessel, already in some distress, to endeavour to get the services of another tug. It was felt by the master, no doubt, that if he was to be towed to London or any intermediate port like Dover for the purpose of putting the vessel into dry dock, it would not be safe to entrust a vessel in that condition to the *Conqueror* alone. The fact that he sent the *Conqueror* away, coupled with the fact that he refused the services, in her absence, of the Dutch tug which proffered assistance, shows the master himself did not think he was in a position of very great danger. He was content, having been there some time, to wait longer until the *Conqueror* returned. The *Conqueror* did return, and some few hours later the *Lady Crundall* came to the assistance of the vessel. She is a valuable and powerful tug. With the assistance of the lifeboatmen the two tugs got fast, and they towed the vessel as far as Dungeness before the pilot came on board, and I doubt whether, if this had not been a compulsory pilotage district, the pilot would have been taken. However, this being a compulsory pilotage district, the master took him. From that point the pilot, no doubt, had to give orders not only to those upon the vessel itself, but also to the two tugs. That was by reason of the vessel, whose pilot he was, having lost her controlling power. The weather had moderated very much between the midnight on the 26th and the early morning of the 27th, and when the pilot came on board he thought there was nothing unusual. He came on board in the ordinary course of his duties as the next pilot in turn, and the pilot, therefore, who must go on board and take the vessel up to Gravesend if she required to go there.

The serious question in this case is whether the pilot is entitled to salvage remuneration. I feel strongly that it would be a very undesirable thing, and a dangerous thing, to allow the character of the pilot to be changed from that of a man entitled to be paid for his services as a pilot into the position of a man who is a salvor. In nothing I am going to say in this case do I make any reflection upon the conduct of the pilot in this particular case, either in the work he did or arising from the fact that he has claimed here for salvage services; but, speaking in the abstract, I think it is very desirable to keep pilots to their duties as pilots so far as one reasonably can. That is proper, I think, not only in the interests of navigation, the owners of vessels and their servants, but also necessary in the interests of the pilots themselves. It would be most undesirable to give any countenance to the idea that it is easy for a pilot to convert himself, by reason of some increased risk, from being a pilot into being a salvor. It would be undesirable for the shipping community at large, and for the respectable body of men constituting the pilots of the country, that any encouragement should be given to them to become searchers after salvage. I have asked the Elder Brethren a question similar to that asked by Barnes, J. in the *Santiago* (*ubi sup.*), but I wish to say this, first of all, that if I had to deal with this case alone I should have come to the same conclusion as the conclusion embodied in the advice which the Elder Brethren have given to me. I do not think anything was required to be done or was, in fact, done in this case more than ought to be done by a pilot in the course of his ordinary duty as pilot. The vessel to some extent was disabled, but it is not enough to show that a vessel has been disabled to give a right to the pilot to salvage reward. There must be something more. A pilot may be entitled to a salvage award where the vessel is not disabled. On the other hand, it does not follow because a vessel is disabled, more or less, that any salvage award must be given. There was nothing in the weather in this case after the pilot came on board to increase the risk. There was some sheering, no doubt, but that is not extraordinary risk; and what is relied upon here chiefly by the pilot in support of his claim is this: He says, "I was told the vessel bumped badly, and I was afraid there would be a leakage of water, and I advised there should be constant soundings." That, no doubt, increased the apprehension of risk, and involved the requisite precaution and care on the part of the pilot in the circumstances; but the bumping had taken place for the best part of twelve hours before the pilot came on board, and the master had taken prompt steps to ascertain whether or not there was any water leaking into the vessel, and there was none. That is the main matter put forward by the pilot himself. It is also said that grave difficulty was caused by reason of the fouling of the anchor and the rope of the *Lady Crundall* when the vessel arrived at Gravesend. I am not going to allocate blame to anyone with reference to that, but it is a thing obviously which might occur on any voyage which was conducted by a pilot with the assistance of two or more tugs; and whatever discomfort or delay was caused in these circumstances I am of opinion, and am so advised by the Elder Brethren, that the risk which was incurred by the pilot is not a risk outside that which ought reasonably to be contemplated by a pilot who undertook to do the work.

In the result, the conclusion to which I have come independently, and the answer which I have received from the Elder Brethren to the question I put to them, is that, having regard to the facts, the pilot in this case did not run more risk than any reasonable person ought to consider was covered by his contract of pilotage. In order to emphasise what I said earlier in my judgment with reference to the conduct of the pilot in this case, while I am going to disallow the claim of the pilot to salvage I am not going to order him to pay the costs of the proceedings.

The amounts which I award to the three tugs are as follows: *Conqueror*, 800*l.*; *Lady Crundall*, 700*l.*; and *Champion*, 120*l.*; which sums make, with the amount (140*l.*) awarded to the lifeboatmen, a total award of 1760*l.*

Solicitors for the tugs *Conqueror* and *Champion* and the pilot, William Peverley, *Thomas Cooper and Co.*

Solicitors for the tug *Lady Crundall*, *Mowll and Mowll.*

Solicitors for the lifeboatmen, *A. W. Kingcombe and Co.*

Solicitors for the defendants, *Botterell and Roche.*

House of Lords.

June 25 and 26, 1914.

(Before the LORD CHANCELLOR (Viscount Haldane), Lords SHAW, MOULTON, and PARMOOR.)

THOMAS AND SONS v. HARROWING STEAMSHIP COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Loss by excepted peril—Delivery of part of cargo—Lump sum freight—Right of shipowner to recover.

By a charter-party, which contained an exception of "perils of the seas," a ship was to proceed to a named port and there load a full and complete cargo of pit props, and then proceed to a port in the United Kingdom and there deliver the same on payment of a lump sum for freight, to be paid in cash on the unloading and right delivery of the cargo. The ship loaded the cargo and proceeded to the port of discharge, but was wrecked outside that port by perils of the seas, and became a total loss. About three-quarters of the cargo was saved and was delivered to the charterers.

Held, that the shipowners were entitled to the full freight.

Judgment of the Court of Appeal (12 Asp. Mar. Law Cas. 344; 108 L. T. Rep. 622) affirmed.

APPEAL from a judgment of the Court of Appeal (Vaughan Williams, Farwell, and Kennedy, L.JJ.), reported 12 Asp. Mar. Law Cas. 344; 108 L. T. Rep. 622; (1913) 2 K. B. 171, affirming a judgment of Pickford, J., reported 12 Asp. Mar. Law Cas. 261; 107 L. T. Rep. 459; (1912) 3 K. B. 321, in favour of the respondents, the plaintiffs below.

By a charter-party dated the 1st Sept. 1911, made between the appellants as charterers and the respondents as the owners of the steamship *Ethelwalda*, it was agreed that the *Ethelwalda* should load at a place in the Uleaborg district in Finland a full and complete cargo of pit props, and, being so loaded, should therewith proceed to Port Talbot or so near as she might safely get, and there deliver the same on being paid freight as follows:

> A lump sum of 1600*l.* in consideration of which owners place at charterers' disposal the full reach of steamer, on and under decks, including spare bunkers, if any.

The charter-party also provided that the freight should be paid (less freight advance, if any) on unloading and right delivery of the cargo, and contained a clause of exceptions which excepted, *inter alia*, perils of the seas.

The *Ethelwalda*, after loading, duly proceeded to Port Talbot, and arrived off the port on the 29th Oct. 1911, but she was unable to get into dock on that day and accordingly she anchored in the usual anchorage of the port, to wait until she could get into dock. On the next morning, however, her anchors dragged, and her cables parted owing to perils of the sea, and in consequence she drove ashore on the north side of the breakwater at Port Talbot and there she remained and became a total loss. To effect delivery of the cargo a contract was made on behalf of the shipowners with certain contractors that they should save as much of the cargo as they could, and place it in the custody of the Port Talbot Dock Company pending delivery to the appellants on payment of freight, and in pursuance of this contract the contractors saved and placed in the custody of the dock company about three-quarters of the cargo. The remainder of the cargo was lost by perils of the sea. To assist in getting the cargo out of the steamer's holds holes were cut or blasted in her side. The charterers claimed delivery of the cargo, while refusing to pay any freight.

The shipowners (the respondents) claimed a right to exercise a lien on the props taken to the docks for the lump sum freight and expenses, and by their directions the Port Talbot Railway and Docks Company held the props subject to the alleged lien, and refused to deliver them to the appellants. The appellants brought an action against the dock company, and obtained possession of the props under an order of Scrutton, J. dated the 22nd Jan. 1912. The respondents now claimed 1347*l.* 9*s.*, being the balance of the lump sum freight after deducting an advance of 252*l.* 11*s.* made at the port of loading. Both Pickford, J. and the Court of Appeal held that in the circumstances the respondents had performed their contract and were entitled to the lump sum freight under the charter-party.

The shipowners appealed.

Sir *R. Finlay*, K.C. and *Leck*, K.C. (*Maurice Hill*, K.C. with them) for the appellants.—The shipowners are not entitled to the full freight as they have not performed the contract upon which the freight became payable. The consideration was the completion of the voyage to Port Talbot, which was never completed, as the ship was lost before she reached the port. The cargo did not arrive at Port Talbot, and was not unloaded and delivered there, but was saved out of the wreck of the ship, which is not a delivery within the contract. The full freight is payable for the use of the ship for the whole of the voyage contracted for, and nothing but a complete performance of the contract entitles the shipowner to be paid in full. Here the ship was disabled and abandoned before the completion of the voyage, and the contract was brought to an end. It was not a case of transhipment, and the cases on that point have no application. There is no case in which a lump sum for freight has been held to be payable when the ship has not arrived, They referred to

Cutter v. *Powell*, 6 T. R. 320; 2 Smith's L. C. (11th edit.), 1;
Williams v. *Canton Insurance Office*, 85 L. T. Rep. 317; (1901) A. C. 462;
Appleby v. *Myers*, 16 L. T. Rep. 669; L. Rep. 2 C. P. 651;
Forman and Co. v. *The Liddesdale*, 82 L. T. Rep. 331; (1900) A. C. 190;
Cook v. *Jennings*, 7 T. R. 381;
Hunter v. *Prinsep*, 10 East. 378;

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

Metcalfe v. *Britannia Ironworks Company*, 36 L. T. Rep. 451; 2 Q. B. Div., 423;
The Norway, 13 L. T. Rep. 50; 3 Moo. P. C. N. S. 245;
Robinson v. *Knights*, 28 L. T. Rep. 820; L. Rep. 8 C. P. 465;
Merchant Shipping Company v. *Armitage*, 29 L. T. Rep. 97; 9 Q. B. 99;
Mitchell v. *Darthez*, 2 Bing. N. C. 555.

Adair Roche, K.C. and *Robertson Dunlop*, for the respondents, were not called on.

Their Lordships gave judgment as follows:—

The Lord Chancellor (Viscount Haldane).—If I entertained any doubt about this case I should ask your Lordships to take time to consider it, but it seems to me both on the facts and on the law to be a very plain case.

It arises between the owners of the ship *Ethelwalda*, who are the respondents, which ship was chartered to the appellants. The charter-party was made on the 1st Sept. 1911, and its bearing is this. The steamer was to carry a full and complete cargo and a full and safe deckload at the charterers' risk not exceeding what she could reasonably stow and carry, and being so loaded proceed to Port Talbot, or as near thereto as she could safely get, and deliver the same on being paid a lump sum freight of 1600*l.*, in consideration of which the owners placed the steamer at the charterers' disposal. There was the usual clause as to perils of the seas, and so on, and the final clause that the freight should be paid in cash less freight advanced, on unloading and right delivery of the cargo.

What happened was this: The steamer sailed from the port of loading and proceeded to Port Talbot, where she arrived on the 29th Oct. She could not get into the dock on that day, and before she got into the dock her anchors dragged and the cables parted owing to perils of the seas, and she went ashore. For the rest of what happened I turn to Pickford, J.'s account of the facts as agreed with by the Court of Appeal. Pickford, J. said that the cargo consisted partly of deck cargo which was swept off. Some of the cargo drifted on to the beach and some was not recovered, but the rest which was partly washed out of the ship—and washed out because it was assisted by holes cut in the sides of the ship to enable the cargo to get out—was saved. There was a man named Jenkins who appears to have acted first at the instigation of the Salvage Association and afterwards by arrangement with the captain of the vessel. Pickford, J. has found as a fact that the master of the ship promised that in consideration of Jenkins going on to perform the services he, the master, on behalf of the owners, would pay for the whole of what had been done and what would be done. The fact of it was that with the assistance of Jenkins it became possible for the shipowners to see that the cargo got into the hands of the cargo owners, who obtained delivery to the extent of of two-thirds or three-fourths of the whole cargo.

The question which was argued, and the main question, is this: It was said that this was what is called a lump sum contract, and that as the ship did not arrive at Port Talbot and deliver in the ordinary way, the freight is not payable. The shipowners, who were the plaintiffs in the Court of Appeal, sued for the freight, and the answer was, "No, you have not performed your contract, which is an entire contract. You were to proceed to Port Talbot, and your ship never got there, so that you never really performed your contract, and are not entitled to the consideration stipulated for." I do not think that the question whether the freight is a lump sum freight is in the least decisive of the character of the contract. There may be contracts, as the learned judge said, in which the stipulation is simply for the use of the ship which is to proceed to a certain port for a lump sum, and in that case it may be as was argued in this instance, but we have not to deal with such a contract but with this contract, and in regard to this contract I entirely concur with what the learned judge says, that the meaning of the contract in this case is that it is an ordinary and regular charter for the services of the ship to carry a particular cargo to a particular port. The substance of the contract is to deliver the cargo, and the ship is the instrument in which the cargo is to be carried. In that state of facts the law which seems to me to apply is that laid down by Lord Ellenborough in the case of *Hunter* v. *Prinsep* (*ubi sup.*), which is to this effect: The shipowners undertake that they will carry the goods to the place of destination unless prevented by dangers of the seas or other inevitable casualty, and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight, but it is only in that event that he, the freighter, engages to pay anything. If the ship is disabled from completing her voyage the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination. The judge has held here that what took place was equivalent to that transhipment of which Lord Ellenborough speaks. It does not matter that it was not done in lighters, it was done by cutting holes in the vessel and floating the cargo on to the beach. The point is that the cargo arrived there, and that the master was doing his best to secure that this took place. Under these circumstances the judge has found that the facts are facts which amount to transhipment, that there was delivery of three-quarters of the cargo, and that the rest was lost by perils of the seas.

I entirely agree with that judgment of Pickford, J. confirmed as it was by the Court of Appeal, and therefore move that this appeal be dismissed with costs.

Lord Shaw.—By a contract of affreightment certain shipowners for a lump sum undertook to convey a full cargo of pit props from Uleaborg to Port Talbot. The charter-party is in no unfamiliar terms, and contains the usual exception as to perils of the seas. The ship performed the voyage almost to the harbour of Port Talbot. She anchored outside, where her cable parted owing to stress of weather and she foundered. She never, as a ship, did arrive at the port of delivery. I am of opinion that the dominant idea of this contract is delivery of the pit prop cargo. I agree with the manner in which that idea is expressed by Farwell, L J., who said that the gist of the contract was that the shipowner should convey and deliver to the charterer or his consignee the goods included in the charter. It is proved that the shipowner in the circumstances

collected all the available cargo (for I hold that the action of the underwriters and others while the ship was in that position and subsequently to that position was action with the shipowners' authority), and they blew in the side of the vessel to facilitate discharge, and delivered all the goods except those which were lost by perils of the seas.

I am of opinion that, under these circumstances, the freight agreed upon was earned, and that there has been right and true delivery, taking into account that exception of perils of the seas which the contract itself contains. This appears to me to be in complete accord with the principles laid down by Lord Ellenborough. The dominant idea of the contract was delivery, and I venture to use the language of Pickford, J.: "I think, if the whole of the cargo had been collected and delivered, it is exactly as if the whole of the cargo had been transhipped and delivered in another ship." That being the principle as regards the whole cargo, I think that the same principle should apply if there is, as here, a delivery of a substantial part of the cargo, the balance being undelivered owing to an excepted peril. In this instance we have a contract which covers the situation which has arisen. I have no doubt that the courts below have reached a conclusion not only in accord with shipping law, but in accordance with mercantile practice and precedent.

Lords MOULTON and PARMOOR concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors: for the appellants, *Trinder, Capron, and Co.*; for the respondents, *Holman, Birdwood and Co.*

Friday, June 26, 1914.

(Before the LORD CHANCELLOR (Viscount Haldane), Lords SHAW and MOULTON)

WILSON AND SONS v. OWNERS OF CARGO ex GALILEO; THE GALILEO. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading—Transhipment of goods at ship's expense and shipper's risk—Damage during transhipment—Negligence—Liability of shipowner.

Goods were shipped under a through bill of lading at New York for conveyance to a port in Sweden via Hull. By the terms of the bill of lading the goods were to be delivered at Hull "to be thence transhipped at ship's expense and shipper's risk to the port of N.," the carrier to "have liberty to convey goods in craft and (or) lighters to and from the steamer, at the risk of the owner of the goods. The goods arrived at Hull in good order and condition, and were there transhipped into a lighter, to be conveyed to a vessel bound for N. in Sweden. The lighter was not seaworthy, and was left unattended in the dock, and sank, and the goods were damaged.

Held, that there was negligence on the part of the shipowners, and that they were not protected by the clause in the bill of lading.

Judgment of the Court of Appeal (12 *Asp. Mar. Law Cas.* 461; 110 *L. T. Rep.* 614; (1914) P. 9) *affirmed.*

APPEAL from a judgment of the Court of Appeal (Lord Parker, Lord Sumner, and Warrington, J.) who had affirmed a judgment of Bargrave Deane, J. in favour of the respondents, the plaintiffs below.

The case is reported 12 Asp. Mar. Law Cas. 461; 110 L. T. Rep. 614; (1914) P. 9.

The action was brought by the International Harvester Company of America, to recover damages from Messrs. Thomas Wilson and Sons Limited, of Hull, for breach of contract to carry and deliver certain parcels of machinery from New York to Norrköping, in Sweden. The machinery was duly delivered on board the defendants' steamer *Galileo* at New York, and bills of lading in respect of it were signed by Messrs. Sanderson and Sons, Messrs. Thomas Wilson and Sons' agents, for the master, and handed to the plaintiffs. It was understood by the contracting parties that the goods would be carried in the *Galileo* to Hull, and there transhipped into another steamship of the defendants for carriage from Hull to a port in Sweden. Accordingly the bills of lading contained, among other conditions, the following:

> To be delivered in like good order and condition at the port of Hull, to be then transhipped at ship's expense and shippers' risk to the port of Norrköping. It is mutually agreed that the carrier shall have liberty to convey goods in craft and (or) lighters to and from the steamer at the risk of the owners of the goods That the carrier shall not be liable . . . for risk of craft, hulk, or transhipment.

The *Galileo* arrived safely at Hull with the goods in sound condition, and the defendants arranged that they should be taken out into a lighter and be transhipped by the lighter to another of their steamships to carry them from Hull to Norrköping. The lighter No. 72 was engaged from a firm trading as the Hull Keel and Lighter Company. After some of the goods had been put into the lighter, the lighter, while unattended, sank, and it was not disputed that the water and mud which got into the plaintiffs' machinery damaged it seriously.

Bargrave Deane, J. held that two causes brought about the sinking of the lighter: (1) She was unseaworthy; (2) she ought not under such conditions to have been left unattended. He also found as a fact that Messrs. Thomas Wilson and Sons were the Hull Keel and Lighter Company and were responsible as the owners of the lighter. He further held that if he was wrong on that point it was the duty of Messrs. Thomas Wilson and Sons to see that the lighter was seaworthy, and that they were guilty of negligence if they transhipped the cargo into an unseaworthy lighter. In his opinion the condition "at shippers' risk" did not exempt the carrier from responsibility, and he gave judgment for the plaintiffs with costs.

The Court of Appeal affirmed this decision upon the ground that the bill of lading did not exempt the defendants from the obligation of seeing that the goods were placed in a seaworthy lighter, but they dissented from the finding as to the ownership of the lighter.

The defendants appealed.

Leck, K.C. and *W. N. Raeburn* for the appellants.—The liability of the shipowners ceased on the delivery of the goods from the *Galileo* at Hull.

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

The voyage of the *Galileo* came to an end when the goods were transhipped into the lighter. The process of transhipment was proceeding, and by the terms of the bill of lading the goods were at the owner's risk. The shipowners did not warrant the seaworthiness of the lighter apart from negligence in the transhipment, which is not found. They referred to

Houlder Brothers v. *Merchants' Marine Insurance Company*, 55 L. T. Rep. 244; 17 Q. B. Div. 354;
Lane v. *Nixon*, L. Rep. 1 C. P. 412;
Steel v. *State Line Steamship Company*, 37 L. T. Rep. 333; 3 App. Cas. 72;
The Vortigern, 80 L. T. Rep. 382; (1899) P. 140;
Allan Brothers v. *James Brothers*, 3 Com. Cas. 10.

Leslie Scott, K.C. and *Adair Roche*, K C., for the respondents, were not called upon on the question of transhipment. There was negligence on the part of the appellants in using an unseaworthy lighter and in leaving it in the dock unattended. They are not protected by the clause in the bill of lading under the circumstances of the case. [They were stopped by the House.]

Leck, K.C. in reply.—The negligence was not the negligence of the appellants but of the lighter company in supplying an unseaworthy lighter.

Their Lordships gave judgment as follows:

The Lord Chancellor (Viscount Haldane). This case is in a large measure one of construction and of fact, and I do not think that any new question of law arises in it.

The defendants are the owners of the steamer *Galileo*, and the respondents are an American company who were the consignors of goods which the defendants carried from New York to Norrköping, in Sweden. The appellants are well-known shipowners having quarters in Hull, and they entered into a contract contained in bills of lading which are in the same form. The form is this: "Received in good order and condition from the consignors to be transported by the steamship *Galileo*, now lying in the port of New York bound for Hull, such and such goods to be delivered in like good order and condition at the port of Hull or as near thereto as she may safely get, and to be thence transhipped at ship's expense and shippers' risk to the port of Norrköping." That is the contract. Then there are clauses in the bill of lading according to which there is power to convey goods, in craft, lighters, &c., at the risk of the owners of the goods, and there are clauses making the shipowners not liable for the risk of craft or lighter or transhipment, and other stipulations of the kind protecting the shipowner in the ordinary way.

The point is this: The *Galileo* got to Hull, and then there was no steamer ready to take on the goods which had been consigned immediately, and accordingly the appellants took this course: they got the goods out of the *Galileo* into a lighter at the port of Hull, which lighter was in charge of nobody and had a defective part in its side which was covered over by a thin skin, but really consisted of rotten timber. The result was that somebody, apparently pushing off the lighter with a boathook—though there is no evidence bearing on this point—made a hole in the lighter, and she sank, part of her cargo being lost. The question is whether the defendants are liable. Bargrave Deane, J. has held that they are liable, and this having been confirmed by the Court of Appeal the question comes before us whether that conclusion is a conclusion with which we agree.

The main and first question turns upon the construction of the bill of lading and the words "to be thence transhipped at ship's expense and shippers' risk to the port of Norrköping." As I interpret these words, "thence" refers to "from the port of Hull," and the "transhipment" is a process which commences when the goods are put on board the ship at Hull which is to take them to Norrköping. That is the view which I take, and the Court of Appeal takes, of the contract. If that is so, the goods were not transhipped when they were put on board the lighter, and they remained in the custody of the shipowners and subject to such duties as the shipowners were under. The lighter being in that condition, I think that it is not a proper or natural incident of the voyage to put the goods into it, and I am of opinion that none of the clauses of the bills of lading protect the shipowner in so doing. I am further of opinion that it is very doubtful whether under such circumstances, the shipowner is not liable throughout for the seaworthiness both of the ship and of the lighter until transhipment has actually taken place. It is part of the voyage—he has chosen to shift the goods from his steamer into the lighter out of the ordinary circumstances, and it may well be that he is liable for that. It is not necessary to go into that point, because, if I am right, what was done was something outside what the shipowner was at liberty to do under the terms of his contract, and was a breach of his contract, and that is the only reason why I do not enter into that point. If these views are well founded, the judgment of the court below was right, and I accordingly move that the appeal be dismissed with costs.

Lord Shaw.—I agree with the conclusion, but I desire to rest my judgment upon this fact. This contract was one divisible into two parts. It was a slump or through contract at a slump or through rate, extending from the other side of the Atlantic to the Baltic. At Hull the situation of parties to some extent changed. The obligation of the shipper was to deliver at Hull. He was obliged to tranship at Hull into another vessel. The question at what stage transhipment begins may raise serious issues, but upon that I do not now desire to commit myself. According to the view presented by the shipowner there was an interregnum, some period during which the voyage to Hull had ended and the shipment to Sweden had not begun. That may be so. I do not wish on that point to express dissent from what was said by the Lord Chancellor. But my opinion is that whatever be the view of the contract, at all events it is not disputed that the duty resting upon the shipowners was to tranship, and it has not been maintained in argument that the ordinary duty of transhipment should be not accompanied by the ordinary duty of avoiding negligence. I find that the course of transhipment adopted was to put these valuable goods into a lighter. Upon the evidence it was demonstrated that they might as well have been put into an eggshell. It was an unseaworthy

craft, liable to be probed by a boathook, to be penetrated through and through, and liable to sink. Intrinsically there is no difference between a man pretending to fulfil his obligation of transhipment by putting goods into an unseaworthy lighter and the case of a man who fulfils his obligation of transhipment by putting the goods into the sea. These goods, for all purposes of law and of fact, are just the same as if dropped by negligence in the course of what they are pleased to call transhipment into the bottom of the dock. That being so, I do not think that there was any duty of transhipment performed here. Upon that ground I hold that liability attaches to the shipowners.

Lord Moulton.—I prefer to base my judgment upon the facts rather than discuss and decide questions of law which are really not necessary for the case. In this instance I think that the shipowners are liable on the plain ground of negligence in the performance of the duty which every one admits that they undertook. They allege that they had a right to put these goods into lighters for the purpose of their being transhipped and forwarded to the place of destination. No one can contest that they must do that with all due care. What are the facts? It is not denied that the lighters in this port are frequently left unattended, are pushed about, drift up against each other, are left without charge or control during the night and for long periods. If a person is aware of what happens and puts goods into these lighters it is his duty to see that he puts the goods into lighters which can stand such work. There is no evidence that the slighest care was taken in the selection of the lighter. The shipowners think that they are exonerated from negligence by the fact that these things are common. That is no answer to the charge of negligence. We know that in many trades there is a standard of care far less than is required. On the decided facts of this case the shipowners knew that the lighters are used in this rough way, and yet they used this lighter as the depository for these goods without taking the slightest care that the lighter was fit for the purpose. For these reasons I think that the appeal should be dismissed with costs.

Judgment appealed from affirmed and appeal dismissed with costs.

Solicitors for the appellants, *Botterell* and *Roche*, for *Hearfields* and *Lambert*, Hull.

Solicitors for the respondents, *Waltons* and *Co.*, for *A. M. Jackson* and *Co.*, Hull.

Supreme Court of Judicature.

COURT OF APPEAL.

May 18 and 27, 1914.

(Before Buckley and Kennedy, L.JJ. and Scrutton, J.)

The Amerika. (a)

Collision — Warship — Value of vessel — Depreciation — Allowance for degradation of type — Circumstances justifying an alteration of the amount assessed by the registrar — Cause of action for loss of life of seamen apart from statute — Right to recover pensions and gratuities paid by the Admiralty as an act of grace — Remoteness of damage.

A submarine having been sunk through the negligent navigation of a steamship and all but one of her crew drowned, the Commissioners of the Admiralty brought an action against the steamship owners to recover the damage they had sustained. They included in their claim the following among other items: 35,000l., the value of the submarine; 5140l. 18s. 6d., the capitalised amount of the pensions and gratuities paid or payable by the plaintiffs to the relatives of the crew who were drowned. At the reference the assistant registrar allowed the value of the submarine at 26,500l., and he disallowed the sum claimed for pensions, but stated that, if he was wrong in disallowing it, the sum recoverable was 4100l. The Admiralty Commissioners appealed, seeking to recover the capitalised value of the pensions, which they agreed to accept at 4100l.; the shipowners appealed, seeking to get the amounts allowed for the value of the vessel reduced.

On the hearing of the appeal, the President (Sir S. T. Evans)

Held, that on the evidence a sufficient deduction had not been made for depreciation and degradation of type, and that the sum of 26,500l. should be reduced to 23,850l.

Held, further, that, as apart from statute, the negligent killing of a person gave rise to no cause of action, the Admiralty Commissioners could not recover damages for the loss of the crew, and that, as the pensions and gratuities were given as an act of grace and were not recoverable from the Admiralty as of right, the Admiralty Commissioners could not recover them as damages; and that the sums paid were too speculative and remote to be recovered as damages.

The Admiralty Commissioners appealed to the Court of Appeal, seeking to get the above decisions reversed.

Held, by the Court of Appeal, that, as the appeal with regard to the value of the submarine was a question of quantum only, and as the assistant registrar and merchants had made no error in principle or calculation and had not misunderstood the evidence given when they assessed the value of the sunken submarine at 26,500l., that figure would be restored, and the decision of the

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

learned President would be reversed and the appeal on that point would be allowed.

NOTE.—Apparently the ground upon which the Court of Appeal reversed the President was that a figure arrived at by the registrar should only be reviewed if the registrar has erred in principle or the sum allowed is either grossly too large or grossly too small. It may be doubted whether the Court of Appeal has sufficiently considered what hitherto has been the practice of the Admiralty Court—namely, that the report of the registrar is not a final judgment, but it must be confirmed by the Court to give it validity: (see Roscoe's Admiralty Practice, 3rd edit., p. 885. note to Order LVI., r. 10; see also the judgment of Bargrave Deane, J. in *The Wallsend*, 10 Asp. Mar. Law Cas. 476; 96 L. T. Rep. 851; (1907) P. 302).

Held, further, by the Court of Appeal, that the Admiralty Commissioners had sustained no injury by the deaths of the seamen; that the amounts paid to their dependants by the Admiralty Commissioners were not recoverable as damage resulting from the collision; and that the decision of the learned President would be affirmed on this point.

Held, further, by Kennedy, L.J., that the amounts paid by the Admiralty Commissioners were not recoverable as they were paid gratuitously and were not paid because the wrongful act of the defendants had imposed a duty on the Admiralty Commissioners to make the payments.

APPEAL from the decision of the President (Sir S. T. Evans) by which he varied the report of the assistant registrar as to the amount to be allowed as the value of a submarine sunk by a collision with the Hamburg-American liner *Amerika*, and confirmed the report in so far as it held that amounts paid to the dependants of the seamen who were drowned were not recoverable from the owners of the *Amerika* as damage resulting from the collision.

The material facts and King's Regulations are set out in the report of the case in the court below: (*The Amerika*, 110 L. T. Rep. 428; 12 Asp. Mar. Law Cas. 478).

The *Attorney-General* (Sir J. A. Simon, K.C.), *F. Laing*, K.C., and *Dunlop* for the appellants, the Admiralty Commissioners.—The learned President should not have disturbed the finding of the assistant registrar on a mere question of *quantum*:

The Sir George Seymour, 1 Spinks, 67.

Butler Aspinall, K.C., *Bateson*, K.C., and *Pritchard* for the respondents, the owners of the *Amerika*.—The evidence before the assistant registrar and merchants which was given on behalf of the Admiralty was not satisfactory, and the assistant registrar did not give any weight to the fact that there was no method of testing it; the evidence given by the respondents was more satisfactory and more conclusive.

BUCKLEY, L.J.—Upon an inquiry as to the damages arising out of a collision between the Hamburg-American liner *Amerika* and the submarine *B*2, the matter was referred to the assistant registrar, assisted by merchants to report. The first item was "the value of the hull, machinery, and electric fittings and batteries of the *B*2 at the time of her loss." In respect of that item the Crown claimed a sum of 35,000*l*. The matter was heard before the assistant registrar and merchants, with the result that the assistant registrar reported that the proper amount to be allowed was 26,500*l*.

The matter then came before the President of the Admiralty Division, Sir Samuel Evans, on a motion to vary that report, and upon this item he said: "As to item 1, no question of principle arises; the sole question is as to the amount. . . . I am of opinion that, upon the evidence and upon the conclusions stated by the assistant registrar to have been arrived at by him and the merchants, a sufficient deduction has not been made, and that the sum allowed should be reduced from 26,500*l*. to 23,850*l*." So that the matter is one in which, there being no question of principle, the learned President has reviewed the report and varied the report of the assistant registrar upon the mere question of *quantum*.

The court refuses to interfere with *quantum* except in exceptional circumstances. More than one instance may be put. The first which occurs to my mind is in respect of salvage. The court does not interfere unless the case is so strong that the court thinks a wrong sum has been arrived at as a matter of principle, or the award is so unfair, either to the salvor or the salved, that the conscience of the court is shocked.

A second case is the taxation of costs, when there arises a question as to the proper sum to be allowed. The court never interferes there in the absence of some question of principle. The present case is another instance. I do not propose to go into details of the matter, because I do not think I ought to review them. There was evidence before the assistant registrar and merchants on the one side by Mr. Webb, who gave evidence for the Admiralty, and who in the public interest showed reserve, to some extent, as to the principle upon which he arrived at his reduced figure. On the other side was evidence given by gentlemen experienced in this matter, who did go into figures. Upon that evidence it was for the assistant registrar and merchants to determine, to the best of their ability, what was the proper figure. Whether they took 6 per cent. depreciation on the original value, or 6 per cent. upon the diminishing value, or what rate they allowed for degradation of type, upon this evidence, I do not know. It was for them to consider, and they have arrived at a figure, and it appears to me that unless it is shown that some question of principle is involved, or that the sum allowed is so grossly too large or so grossly too small, according to the view of the court, that it ought to be reviewed—in which case, no doubt, it would be competent for the court to review it—but again, I say, assisted by assessors in the matter—the court, I apprehend, ought not to interfere. Now, if this were a salvage case no court would think of interfering between 26,500*l*. and 23,850*l*. Upon similar principles I think the court would refuse to interfere as to a question of damages. The appeal must be allowed and the original figure restored.

KENNEDY, L.J.—I am of the same opinion. In this case the question of the assessment of damages was referred to the registrar and merchants. They had before them evidence, and a considerable body of evidence. They had before them Mr. Webb, on behalf of the Admiralty, who gave results in figures showing what in his judgment ought to be the sum at which the assessment should be fixed. They had before them a quantity of skilled evidence on behalf of the *Amerika*, showing a different figure. It is quite true Mr. Webb's evidence was evidence which was necessarily qualified by a proper reserve in regard to the disclosure of the basis of his figure. The

registrar and merchants had before them, however, the results of that evidence, and they had before them the evidence of the other side. They did not accept the evidence of either side, but came to a figure to the best of their calculation for the assessment. The merchants, of course, in this particular case, had to consider materials of a nature which they do not have to in the case of an ordinary ship, but on the other hand they are certainly more qualified than the ordinary layman to form what I may call a business view in regard to the assessment of figures connected with the life of ships, and of the material of a ship which contains a great deal of valuable machinery.

The learned President of the Admiralty Division has taken a figure different from the assistant registrar—a lower figure—and in so doing, of course, says that he has looked at the evidence and at the conclusions arrived at by the assistant registrar and merchants, but then does not give any reason why he differed from their conclusions as he did to the extent of the difference between 26 500*l* and 23,850*l*. He gives no reasons for the difference, and we have no opportunity, therefore, of considering whether there was any particular sort of mistake, in his opinion, made in the calculation of the tribunal below. I apprehend that in a general way where the assessment of damages takes place before a specially constituted tribunal, and I may add a tribunal so constituted as to include both skilled and legal elements—the element of skill in business and mercantile affairs, as well as a trained lawyer with special Admiralty knowledge, the court above ought not, therefore, except in very exceptional circumstances, to interfere with the decision of the assessing tribunal, unless some error in principle is pointed out or there is an obvious error in the calculations regarding figures, or a plain misunderstanding of some material portion of the evidence before the assessing tribunal. I can think of no other reason upon which the court above ought to interfere with the assessment, and it is not suggested here that there is any error in principle, or error in calculation, or plain misunderstanding of evidence, which lay at the root of the assessment to which the learned assistant registrar and his assessors came. In the absence of any reason given by the learned President it seems to me our plain duty is to restore the judgment of the assessing tribunal

Scrutton, J.—I agree.

The arguments put forward by counsel as to the right to recover the sums paid to the dependants of the seamen were the same as in the court below.

In addition to the cases cited below, the following cases were referred to as to what damage was recoverable as the natural consequences of a wrongful act:

Simpson v. *London and North-Western Railway*, 33 L. T. Rep. 805; 1 Q. B. Div. 274;
Sneesby v. *Lancashire and Yorkshire Railway*, 33 L. T. Rep. 372; 1 Q. B. Div. 42;
Hobbs v. *London and South-Western Railway*, 32 L. T. Rep. 352; L. Rep. 10 Q. B. 111;
MacMahon v. *Field*, 45 L. T. Rep. 381; 7 Q. B. Div. 591;
Le Blanche v. *London and North-Western Railway*, 34 L. T. Rep. 667; 1 C. P. Div. 286;
The Argentino, 61 L. T. Rep. 706; 6 Asp. Mar. Law Cas. 433; 14 App. Cas. 519.

Buckley, L.J.—The question is whether the Lords of the Admiralty can recover against the *Amerika*, as forming part of their damages for negligence by the latter in collision, the capitalised amount of pensions and grants paid or payable by the Admiralty to the relatives of the crew who were drowned.

Lord Ellenborough's ruling in *Baker* v. *Bolton* (1 Camp. 493) that "in a civil court the death of a human being could not be complained of as an injury" must, notwithstanding the great weight of Bramwell, B.'s minority judgment in *Osborn* v. *Gillett* (L. Rep. 8 Ex. 88), be regarded as binding upon us. It has been so treated in previous decisions in this court. In *Clark* v. *London General Omnibus Company* (95 L. T. Rep. 435; (1906) 2 K. B. 648) the Court of Appeal approved *Osborn* v. *Gillett*, and in *Jackson* v. *Watson and Sons* (100 L. T. Rep. 799; (1909) 2 K. B. 193) treated *Osborn* v. *Gillett* and *Clark* v. *London General Omnibus Company* as governing them, "so that it is not open to us, even if we thought the ruling in *Baker* v. *Bolton* wrong, to differ from it." It is true that in *Clark* v. *London General Omnibus Company* the appeal was only from so much of the judgment as directed judgment for the plaintiff for the funeral expenses, and it is true that some different considerations arise in the case of liability incurred for funeral expenses consequent upon the death from those that are relevant in the case of benefit lost or damage sustained by reason of the death. Sir Gorell Barnes called attention to this by an interlocutory observation at 95 L. T. Rep. 436; (1906) 2 K. B. 652. But the court gave judgment upon the views expressed upon the one side and the other by the learned judge in *Osborn* v. *Gillett* (*sup.*), and upheld the view of the majority as against the minority judgment of Bramwell, B. *Clark* v. *London General Omnibus Company* (*sup.*), although not strictly a decision upon anything other than the funeral expenses, was the considered judgment of the Court of Appeal, and we must follow it. In *Jackson* v. *Watson and Sons* (*sup.*) the Court of Appeal have already expressed themselves to be bound by it. The last-mentioned case is the stronger because the court in an action for breach of contract there found themselves at liberty to hold that where the death was not an essential part of the cause of action, but only an element in ascertaining the damages, there was no rule of law which rendered the damages irrecoverable, and in doing so expressly distinguished the case in which the action is in tort, holding that in an action of tort the fact would have been no ground for letting in the damages.

In this court we are, I think, bound by authority to say that even if the appellants have suffered pecuniary damage flowing from the deaths caused by the negligence of the respondents, that damage is not recoverable, for the deaths of the men by drowning "cannot in a civil court be complained of as an injury." "The killing of the deceased *per se* gives no right of action": (per Bowen, L.J. in *The Vera Cruz*, 5 Asp. Mar. Law Cas. 254, 270, 386; 9 P. Div. 96, 101). Sir Frederick Pollock, in his Law of Torts (9th edit., 65, 66), while advancing cogent reasons for attacking Lord Ellenborough's ruling, concludes with a hope that, while the question is not open in the Court of Appeal, the House of Lords may some day consider it with greater freedom

and Bevan on Negligence (3rd edit., vol. 1, 182) treats the matter as set at rest by the decision in *Clark* v. *London General Omnibus Company*. These text-books of authority, therefore, take the view which I take, namely, that we, sitting here, are bound to hold that the damages are not recoverable, and that the law must be reviewed, if at all, in the House of Lords.

A second question argued was whether, inasmuch as the payments to the surviving dependants of the deceased are not legally demandable, the Crown can recover payments made not in satisfaction of liability. Upon this question I express no opinion. I think it inexpedient to express an opinion upon a point which does not arise for decision. The appeal as to item 9 must be dismissed.

The appeal as to item 1 has been already allowed. There should, I think, be no costs of the appeal.

KENNEDY, L.J.—The questions now argued before us relate to item 9, which the registrar and merchants provisionally assessed at 4100*l.* if on principle the plaintiffs were entitled to claim anything at all, which both the registrar and the learned President have held they were not.

The plaintiffs' right to recover in respect of this item depends upon the decision of two points: first, Does the death by drowning of officers and seamen on board the *B*2 submarine caused by the negligent navigation of the *Amerika* constitute a ground of claim enforceable by the Admiralty in the present action against the owners of the *Amerika*, if it is shown that pecuniary loss has been caused to the Admiralty thereby? Secondly, is the pecuniary loss which consists in payments made or to be made by the Admiralty to relatives of the deceased officers and seamen in accordance with the King's regulations under the head of "Pensions to widows and compassionate allowances to children or relatives," but not legally enforceable by those persons, a head of damage which the law will recognise? If the first of these two questions must be answered in the negative, the consideration of the second becomes unnecessary.

In regard to that first question, I am of opinion that this court is bound, by the authority of previous judgments in this court which are cited by the learned President in his judgment in the present case and which, therefore, it is quite unnecessary to particularise here, to give an answer in the negative. I think that Sir Frederick Pollock correctly states the conclusion that the Court of Appeal has declared the question not open. "One can only," adds the learned author of The Law of Torts, "indulge a faint hope that it may be more freely considered some day by the House of Lords." I will only add, in regard to this particular case before us, that I do not see how the position of the plaintiffs in regard to this head of claim can be rightly treated as strengthened by the fact that the negligence of the navigation of the *Amerika* injured at the same time the property of the plaintiffs by the sinking of the submarine itself.

If the view I have stated as to the first question be the true view, it becomes, as I have said, unnecessary for this court to pronounce decisively upon that which I have set forth as the second question. But we have heard very full and careful arguments in regard to it, and, speaking for myself, I am, after considering these arguments, obliged to come to the conclusion that sums of money which are paid, as these pensions and compassionate allowances are, gratuitously and in the discretion of the person paying, could not rightly be held to constitute a head of damage recoverable from the negligent defendant. They do not, I think, come within the ambit of damages claimable in an action of tort, wherein a party liable for a breach of some duty imposed upon him, in the language of Sir Richard Henn Collins, M.R., *Dunham* v. *Clare* (81 L. T. Rep. 751; (1902) 2 K. B. 296), "probably, and in some cases certainly, comes under a somewhat larger liability than would be the case if it were contract, but still the liability is measured by what are the reasonable and probable consequences of his breach of duty."

In my judgment, the decision of the learned President in regard to item 9 ought to be affirmed.

SCRUTTON, J.—This is an appeal by the Lords of the Admiralty, as owners of the submarine *B*2, which was sunk by the negligence of those on board the steamship *Amerika*, against a decision of the President, affirming a decision of the assistant registrar, that the Admiralty were not entitled to recover as part of their damages the capitalised value of certain pensions and allowances which they paid to the widows and children of the officers and crew lost in the submarine. These latter had also been directly paid damages by the owners of the *Amerika* on their claims under Lord Campbell's Act.

The regulations under which the Admiralty paid these allowances are set out in the judgment of the President, and it was admitted by the Attorney-General that the payments were a matter of grace, and not made under any legal liability, though it was expected in the navy that, as a matter of grace, such payments should be made.

The first reason for the disallowal of this item of damages was that it was the common law of England that no civil claim for damages could be brought for the death of a human being. Why this should be so, if the matter were open to us to consider, is a matter of great doubt; but I think it is determined by authority binding us in the Court of Appeal that the common law of England is so. The majority of the Court of Exchequer so decided in 1873, in *Osborn* v. *Gillett*, following a decision of Lord Ellenborough's in *Baker* v. *Bolton* in 1808. The Court of Appeal in *Clark* v *London General Omnibus Company*, in 1906, a case of tort, approved the reasoning of the majority in *Osborn* v. *Gillett*. The Court of Appeal again, in *Jackson* v. *Watson and Sons*, in 1909, a case of contract, recognised the same principle in cases of tort, where the cause of action is the wrong which caused the death, while holding the principle not to apply to cases of contract where there is a cause of action independent of such damage or death.

I understood the Attorney-General to admit that if the dead man, while in the submarine, had been struck by the bowsprit of a yacht, without damage to the submarine, the Admiralty could not have recovered the pension, though paid, as damages, because no property of theirs had been injured, but only an act done which imposed a liability on them under a contract, or

honourable engagement. On this the language of Lord Penzance in *Simpson* v. *Thomson* (3 App. Cas., at p. 289) justifies the view of the Attorney-General. But the Attorney-General said that the *Amerika* tortiously damaged the property of the Admiralty, the submarine, and that the death and payment were the natural result of this damage. This point must have arisen every time a man was killed, not by a direct blow, but by collision with his carriage in which he was riding; but it has never been considered sufficient to found a claim at common law. Considering, as I do, that this court is bound by the decisions I have referred to, I abstain from referring to the numerous arguments and difficulties which require consideration in a court which can review the authorities from the beginning. This ground of objection, so far as this court is concerned, prevents the Admiralty from recovering this item of damage.

It becomes unnecessary, therefore, finally to determine the other objection, namely, that as these pensions are paid as of grace, not under legal obligation, they are not recoverable as damages. I am disposed to think that a payment which a plaintiff need not legally make or continue to make is too remote to be treated as a recoverable consequence of a tort. It follows not from a legal obligation to pay, but from the determination of the plaintiff to pay as an act of grace. Voluntary subscriptions to hospitals are never claimed or recovered in accident cases. It is said that medical expenses and expenses of holidays in accident cases need not legally be incurred, but are recovered. These appear to me to follow as consequences of the legal obligation to minimise damages, if you claim them; and the resort to medical skill or a holiday to repair damage and restore health is a legal duty to minimise the damage the plaintiff claims though its expense must be borne by the wrongdoer. But I regard the point as of some difficulty, and do not think it necessary to express a final opinion on it.

Solicitor for the appellants, *Treasury Solicitor*.

Solicitors for the respondents, *Pritchard and Sons*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, May 20, 1914.

(Before BAILHACHE, J.)

JOSEPH MERRYWEATHER AND CO LIMITED v. WILLIAM PEARSON AND CO. (a)

Charter-party — Timber—Freight — Measurement of cargo — Alternative methods—Remeasurement—Liability for cost of.

By the terms of a charter-party it was provided (inter alia) *that a steamship should load from the agents of the charterers a cargo of pit props, freight to be payable at a specified rate "per intaken piled fathom of 216 cubic feet." Pit props are measured by alternative methods: either by lengths and tops, or lengths alone, the former method giving more timber per fathom than the latter. The terms of the charter-party served to indicate that the measurement of the cargo was to be by lengths alone, but in fact, at the port of loading, the shippers measured by lengths and tops, giving 683 cubic fathoms, a bill of lading being tendered accordingly to the owners and signed by them under protest. The bill of lading contained the words "measure unknown," in accordance with the terms of the charter-party. When the ship arrived at the port of discharge the shipowners alleged that the bill of lading was inaccurate, and had the cargo remeasured by length only, on which basis the cargo was found to consist of 784 cubic fathoms. In an action by the shipowners to recover the expense of re-measuring the cargo:*

Held, that the charterers were liable to pay to the shipowners the expenses incurred by having the cargo measured at the port of discharge, as the charter-party created a contractual obligation on the part of the charterers to procure the measurement of the cargo at the port of loading in accordance with the method indicated by the charter-party.

COMMERCIAL COURT.

Action tried by Bailhache, J.

By the terms of a charter-party dated the 15th Aug. 1913, and made between the plaintiffs as time chartered owners and the defendants as charterers, it was agreed (*inter alia*) that the steamship *Ragna* should proceed to "one or two places in the Skelleftea district, and there load from the agents of the charterers a full and complete cargo of pit props, and being so loaded should proceed to Tyne, West Hartlepool, or Hull, as ordered on signing bills of lading, and deliver the cargo on being paid freight at the rate of 35s. per intaken piled fathom of 216 cubic feet." The charter-party, which was in the printed form of the Chamber of Shipping Wood Charter (Scandinavia and Finland) to the United Kingdom 1899, also contained the following clause:

6. The bills of lading to be prepared on the form indorsed on this charter, and shall be signed by the master, quality, condition, and measure unknown, freight and all other conditions, clauses, and exceptions as per this charter. The owners shall not be responsible for the number of pieces signed for by the master or his duly authorised agents, fire and fraud excepted.

. . .

The defendants nominated Burea in accordance with the terms of the charter-party, to which port the *Ragna* proceeded, and was there loaded with a cargo of pit props for the defendants' account by a company called the Burea Aktiebolag, with which company the defendants had entered into a contract for the supply of timber. A bill of lading in accordance with the form indorsed on the charter-party was prepared by the shippers, which contained the words "quality, condition, and measure unknown," and stated that "683 cubic fathoms pit props" had been shipped on the *Ragna*. The captain, however, formed the opinion that more than 683 cubic fathoms had been landed, and accordingly he signed the bill of lading under protest, informing the plaintiffs by telegram that he had done so. The *Ragna* sailed from Burea to West Hartlepool, but by agreement proceeded to Immingham where the cargo was discharged. The plaintiffs had the cargo measured in order to ascertain the number of fathoms upon which freight was to be

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

paid, the result being that the cargo measured "per piled fathom" 784 cubic fathoms. The difference between the two sets of figures was accounted for by the fact that the shippers at Burea had measured the cargo on the "length and top" system.

The plaintiffs' claim was to recover from the defendants 269*l*., being the expenses in connection with the remeasuring at Immingham. The plaintiffs alleged that it was the duty of the defendants to measure by themselves or their agents, the shippers, per piled fathom, and to state such measure correctly on the bill of lading. They also alleged that in presenting the bill of lading the defendants, or their said agents, impliedly warranted that the measure represented on the bill of lading was correct.

By their defence, the defendants denied the alleged duty and implied warranty, and that the shippers were their agents for the purposes alleged. They paid 176*l*. into court with a denial of liability.

Leslie Scott, K.C. and *R. A. Wright* for the plaintiffs.—The provision in the charter-party providing that freight is to be paid "per intaken piled fathom" assumes a measurement at the port of loading, and involves an obligation on the part of the charterers to arrange for a proper measurement at the port of loading, which, according to the charter-party, was to be a measurement of lengths only, and not of lengths and tops. A further obligation rested upon the charterers to tender a bill of lading containing a correct measurement of the cargo. It was necessary to have the cargo remeasured at the port of discharge as the measurement at the port of loading was not made on a proper basis. The charterers were therefore liable for the expenses incurred in remeasuring the cargo at the port of discharge. They referred to

London Transport Company v. *Trechmann*, 90 L. T. Rep. 132; 9 Asp. Mar. Law Cas. 518; (1904) 1 K. B. 635;
Spaight v. *Farnworth*, 42 L. T. Rep. 296; 4 Asp. Mar. Law. Cas. 251; 5 Q. B. Div. 115;
Moller v. *Living*, 4 Taunt. 102;
New Line Steamship Company v. *Bryson and Co.*, 1910, S. C. 409;
Krüger and Co. v. *Moel Tryvan Shipping Company*, 97 L. T. Rep. 143; 10 Asp. Mar. Law. Cas. 465; (1907) A. C. 272;
Elder, Dempster, and Co. v. *Dunn*, 101 L. T. Rep. 578.

Roche, K.C. and *Dunlop* for the defendants.—There is no express or implied term in the charter-party which imposes upon the defendants an obligation to guarantee that the measurements shall be correctly stated in the bill of lading. The bill of lading contains the words "measure unknown." They referred to

Coulthurst v. *Sweet*, L. Rep. 1 C. P. 649;
The Skandinav, 51 L. J. 93, Ad.

Leslie Scott, K.C. in reply.—The purpose of inserting the words "measure unknown" in the bill of lading is to protect the shipowner in the case of short delivery:

Jessel v. *Bath*, L. Rep. 2 Ex. 267;
Tully v. *Terry*, 29 L. T. Rep. 36; 2 Asp. Mar. Law Cas. 61; L. Rep. 8 C. P. 679.

Bailhache, J.—This is an action in which an interesting point is raised under a charter-party dated the 15th Aug. last year, made between Messrs. Merryweather and Co., the owners, and Messrs. Pearson and Co. as the charterers. It was an action for balance of freight, and one or two things which have now dropped out of it. So far as the action has been tried before me, it is brought to recover the expense which the owners were at in measuring a certain cargo of timber on its arrival in this country, the owners saying that that was an expense which ought to be borne by the charterers, and the charterers saying, first, that it was an expense which ought to have been borne by the owners. That turns upon the facts of the case, and more immediately upon the construction of the charter-party, perhaps a little of the bill of lading, but principally of the charter-party. By this charter-party the *Ragna*, which is the steamer, was to proceed to a port in the Skelleftea district, and there load a cargo of props. The cargo was to be taken from alongside and brought to the steamer's side as customary, and the freight was to be paid at so much per "intaken piled fathom of 216 cubic feet." There are two methods of measuring these pit props. One is to pile them or stack them and cube them up according to their lengths alone. Another method is to pile them and stack them according to their lengths and according to their diameters. The second method is called the lengths and tops method. The first is by lengths alone. If you measure according to lengths and tops, you get more timber to the fathom than if you take the measurement by lengths alone. The lengths and tops method is more favourable to the purchaser of the cargo and less favourable to the shipper. In this particular instance of the contract between Messrs. Pearson and their shippers on the other side, whose names I do not know, as I have not seen the contract, and it is not necessary that I should, all that is necessary to know about it is that that contract provided for the measurement as between those parties being by the lengths and tops method—that is to say, a method more favourable to the purchaser and less favourable to the shipper.

The cargo was measured, as these cargoes always are measured in this district, on land, and the measurements had been taken and the cargo was ready for the steamer in this particular case some little time before she arrived, and I make no doubt that it is in the contemplation of the parties and is the practice, to measure these cargoes on land and to measure them generally some little time before the steamer arrives. There is a method sometimes adopted at St. Petersburg and one or two ports by which this measurement can be checked alongside the ship, but that does not seem to be the practice at this port. It was not adopted in this case, and I do not think that it was in the contemplation of anybody that it should in fact be adopted. By clause 6 of the charter-party bills of lading are to be "prepared on the form indorsed on this charter and shall be signed by the master, quality, condition, and measure unknown, freight and all conditions, clauses, and exceptions as per this charter." There is an indorsement on the back of the charter-party of the form of the bill of lading which does not, as far as I can see, specify in express terms that the measurement of the cargo shall be inserted in the bill of lading. It refers to

"pieces" and "specification" and not in express terms to measurement. When this cargo was loaded and bills of lading were tendered to the master, the bills of lading were for a number of 683 cubic fathoms. This staggered the master, he knowing the carrying capacity of the *Ragna*. He knew that she carried a considerably larger number of fathoms than that, and he made this protest. I thought at one time that he was not aware, when he made the protest, of the method in which the timber had been measured on shore; but that was a mistake of mine. He was aware of the fact, and he refers to it in his protest.

The result of it was that the vessel came over to this side and the owners declined to take freight according to the number of standards inserted in the bill of lading, and claimed to have the cargo remeasured on this side according to the charter-party, on the intaken piled measure, that is to say, stacked and piled and measured according to lengths, irrespective of the diameter of the props. The charterers, the defendants in this case, were perfectly willing that that should be done, and they were willing that it should be done at their expense; but a difficulty arose in this way. The shipowners said: "We want it done by some independent person, or, at any rate, we want it checked by some independent person, and we want it checked by the Customs Fund authorities." The charterers were unwilling that this should be done, not unwilling, I think, that there should be this checking, but unwilling that the checking should be done at their expense. That was the point upon which they differed from the shipowners. Under those circumstances the shipowners, not, I think, quite appreciating the true position which was taken up by the charterers, and thinking that charterers themselves went further than they did, took the matter entirely out of the charterers' hands, and they, in fact, employed their own people, the people whom they engaged for the purpose, to pile and stack this timber, and they got it measured by the Customs Fund authorities. In so doing they expended a very considerable sum of money, somewhere in the neighbourhood of 300*l*., and they seek to recover that sum from the defendants, the charterers in this action.

The point of law which falls to be decided on the construction of the charter-party may, I think, be stated very shortly indeed. It seems to me that it is this: Did the charterers come under a contractual obligation with the shipowners in this case that this timber should be measured according to the standard of measurement required by the charter-party? Or is this the true state of affairs—that it was within the contemplation of both parties that a measurement of that description should be taken; but the charterers no more contracted that it should be taken than the shipowners contracted that it should be taken? I have come to the conclusion that, on the true construction of the charter-pary, the charterers did come under an implied contract, at any rate, if not an express contract, that this measurement should be taken and should be taken in the form which is called for by the charter-party. I come to that conclusion for the reason that, apart from it being in the contemplation of everybody that it should be done, as a matter of practice the only persons who were able to measure the timber in this way were the charterers or the shippers. It was contemplated that it should be done on land, it was intended by everybody that it should be done on land, and it was done on land, and it had to be done before the arrival of the ship. In my view, under those circumstances, that was a part of the obligation which the charterers undertook. Just as much as they undertook to furnish a cargo, so they undertook in this particular case that that cargo, when furnished, should also be furnished with the necessary measurements to enable the freight to be calculated according to the intaken piled fathom.

I think that that conclusion is strictly in accordance with the well-known case of *The Moorcock* (60 L. T. Rep. 654; 6 Asp Mar. Law Cas. 373; 14 P. Div. 64), and in accordance with the case of *Hamlyn* v. *Wood* (65 L. T. Rep. 286; (1891) 2 Q. B. 488). It seems to me that, from the business point of view, it was the only thing which could be done; and I think that I shall be quite right—I hope that I shall be right—in implying that term as an implied contractual term of this charter-party. I do not rely so much upon clause 6 which relates to the bill of lading; but clause 6, in my opinion, rather strengthens the conclusion to which I have arrived, because it is clearly contemplated by the charter-party that bills of lading shall be prepared by the charterers or by the persons who for this purpose are their agents, and shall be presented for signature, and it is quite clearly contemplated that when these bills of lading are presented they shall contain a measurement of the cargo—not, perhaps, in the form of the indorsement on the back of the charter-party, but for practical purposes and for convenience they would contain a statement of the measurement of the cargo. In fact, in this case the bills of lading presented did contain such a measurement, and the only trouble in this case arises because the standards of measurement called for by the contract of sale and by the charter-party differ. That is the whole trouble in the case. In my judgment the charterers under this charter-party came under a contractual obligation to have the cargo measured in the method required by the charter-party. Then, if they came under that contractual obligation, the rest of the case is quite easy. They failed to perform it, and, as a result of their failure to perform it, expense was incurred, and, of course, if the expense was incurred as the result of their breach of contract, it follows, as the night follows the day, that they must, for that breach, pay the expenses which follow upon it.

So far, then, I think the charterers in this action are wrong. But they have paid into court the sum of 176*l*., and they say that, if they are wrong, the 176*l*. paid into court is quite enough to cover all the reasonable expenses, the necessary expenses, at which the shipowners were, by reason of this remeasuring; and in that I think the charterers are right. I think that the sum of 176*l*. paid into court is sufficient to cover all the reasonable expenses to which the shipowners were put. In those reasonable expenses I include the cost of having this timber checked, as to its stacking, and as to its measurement by the Customs Fund authorities. I think that the shipowners were quite reasonable in making that requirement, and the charterers must pay for

that; but in the sum of 176*l.* they have paid, in my judgment, a sufficient sum into court to cover the expenses of measurement. Under the circumstances, therefore, I think that the shipowners, the plaintiffs, are right in law, and I give judgment for them; but the charterers have paid sufficient into court to satisfy the shipowners' claim, and I think that they must have the costs of the action from the date of payment in,

Solicitors: for the plaintiffs, *Lawrence Jones* and *Co*, for *J. B. Strover*, West Hartlepool; for the defendants, *William A. Crump* and *Son*, for *Turnbull* and *Tilly*, West Hartlepoool.

Tuesday, June 16, 1914.

(Before Sankey, J.)

Hall Brothers Steamship Company Limited v. R. and W. Paul Limited. (*a*)

Charter-party—Port—King's Lynn—"Safe port"—Meaning of.

The term "port" in a charter-party is to be taken in its commercial sense, and is not to be defined by the meaning given to it by the Legislature in Acts passed for such entirely different objects such as pilotage or revenue.

Where by a charter-party a vessel was to call for orders "to discharge at a safe port in the United Kingdom . . . or so near thereto as she can safely get always afloat and deliver such cargo in accordance with the custom of the port for steamers," and the vessel was ordered to King's Lynn, but could not enter the dock there without being lightened, and therefore lightened at another place and completed her discharge in King's Lynn Dock, and the owners of the ship brought an action to recover the extra expense incurred by them in lightening the ship:

Held, the owners were entitled to the extra expense of lightening, as King's Lynn was a safe port within the meaning of the charter-party.

A "safe port" means a port to which a vessel can get laden as she is, and at which she can lay and discharge, always afloat.

The Alhambra (4 *Asp. Mar. Law Cas.* 410; 44 *L. T. Rep.* 637; 6 *P. Div.* 68) *followed.*

Commercial Court.

Action tried by Sankey, J.

The plaintiffs, owners of the steamship *Peerless*, claimed 48*l.* 12*s.* 9*d.* against the defendants, receivers of a cargo of maize.

Mackinnon for the plaintiffs.

Inskip for the defendants.

The facts and arguments are sufficiently stated in the judgment.

Sankey, J.—In this case, the plaintiffs, as owners of the steamship *Peerless*, claim the sum of 48*l.* 12*s.* 9*d.* against the defendants as receivers of a cargo of maize shipped at Rosario-San Nicolas, on the said vessel, under a bill of lading dated the 16th Dec. 1913, and incorporating the terms and conditions of a charter-party of the 11th Nov. 1913. By the said charter-party the vessel was "to call at Teneriffe for orders to discharge at a safe port in the United Kingdom, or so near thereto as she can safely get, always afloat, and deliver such cargo in accordance with the custom of the port for steamers." The *Peerless* duly called at Teneriffe and received orders to discharge at King's Lynn. She proceeded on her voyage, but her draught was such that it was impossible for her at any time, on any tide, to enter the dock at King's Lynn, and she accordingly lightened at a spot known as the Bar Flat Light Buoy, which is about eleven miles off down the Wash. She then went on and discharged the remainder of the cargo in the dock. The extra expense incurred by the owners in lightening the vessel amounted to 48*l.* 12*s.* 9*d.*, and, the items not being challenged, the question which falls for decision is whether the plaintiffs are entitled to recover the sum claimed.

For them it was contended that King's Lynn was not a safe port within the meaning of the charter-party, that the defendants had committed a breach of their contract in ordering the vessel to proceed there, and were, therefore, liable in damages. The defendants, in reply, took three points: (1) That the plaintiffs were estopped from alleging that King's Lynn was not a safe port, because their master had accepted the order to proceed there; (2) that King's Lynn was in fact a safe port within the meaning of the charter-party: (3) that King's Lynn included (*a*) the dock; (*b*) the place where the vessel was lightened, and, therefore, that the vessel was obliged to discharge at each of such places. As to the first of these points—namely, that the plaintiffs were estopped by the action of their master from asserting that King's Lynn was not a safe port, I am unable to accept the defendants' contention. It will be observed that King's Lynn was not inserted either in the charter-party or the bill of lading as the port of discharge. It was the duty of the defendants on arrival of the vessel at Teneriffe to order her to proceed for discharge to a safe port, or so near thereto as she could safely get, always afloat. The fact that the master went to King's Lynn caused no prejudice to the defendants, but rather the reverse. It was the place to which they directed him to go, and there was no evidence that his acceptance of their order had in any way induced them to alter their position so as to preclude the plaintiffs from averring that King's Lynn was not a safe port. Even assuming the master to have known at Teneriffe the true facts about King's Lynn, I cannot think his proceeding as he did would have estopped his owners from contending it was not a safe port. In such circumstances he would have had the right to get as near thereto as he safely could and there discharge afloat: (see *The Alhambra*, 44 L. T. Rep. 637; 4 Asp. Mar. Law Cas. 410; 6 P. Div. 68). And his conduct at Teneriffe and after not only was reasonable and in the interests of the defendants, but minimised the loss or damage they would have sustained or incurred by the captain proceeding elsewhere. Further, there was no evidence that the master had any authority to take his vessel to a port which was not safe.

Before discussing the other two points, which may be dealt with together, it is necessary to ascertain the facts. I am satisfied that at no time, on any tide, could the *Peerless* have got into King's Lynn dock without being lightened. All vessels situated as she was lighten at Bar Flat Light Buoy. By the King's Lynn Conservancy Act 1897 the limits of the port of King's Lynn are defined, and it was proved that the Bar Flat Light Buoy was not only within such limits, but

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

ten miles within them from a seaward direction. It was, therefore, contended that the port of King's Lynn within the meaning of the charter-party included (*a*) the dock, (*b*) the place where the vessel lightened, and that the vessel was obliged to go to each of such places. In so far as it is a question of fact I find that the port of King's Lynn is the dock at King's Lynn itself, and not the Bar Flat Light Buoy eleven miles down the Wash, or, indeed, if the defendants' contention is correct, any place even ten miles further out at sea.

In my opinion the term "port" in a charter-party is to be taken in its commercial sense, and is not to be defined by the meaning given to it by the Legislature in Acts passed for such entirely different objects as pilotage or revenue. Any doubt or controversy on the point must now be taken as settled in *Leonis Steamship Company Limited* v. *Rank Limited* (1908) 1 K. B. 499), where Buckley and Kennedy, L.JJ. discuss all the cases. Founding myself on their judgments, I come to the conclusion that the port of King's Lynn in a commercial sense is the dock at that place. This brings me to the final point, Was King's Lynn a safe port within the meaning of the charter-party? In my view it was not. A safe port means a port to which a vessel can get laden as she is and at which she can lay and discharge, always afloat. I am aware that there are decisions on the point which appear to conflict, but I think *The Alhambra* (*sup.*) is correct, and that it governs this case.

There are three decisions which appear to conflict: (1) *Hillstrom* v. *Gibson* (1870, 8 Sess. Cas. 3rd series, 463) was a decision of the majority of the Scotch Court of Appeal, and is entitled to the greatest respect, but I am unable to distinguish its facts from those in *The Alhambra*, which I am bound to follow, and it appears to me from the report that Brett, L.J. did not agree with the Scottish judges; (2) the decision by a Divisional Court in *Capper* v. *Wallace* (42 L. T. Rep. 130; 4 Asp. Mar. Law Cas. 220; L. Rep. 5 Q. B. Div. 163) really supports the contention of the present plaintiffs, and such dicta as are founded on *Hillstrom* v. *Gibson* (*sup.*) must be now taken subject to the remarks in *The Alhambra* (*sup.*) where it was cited; (3) in *Neilson* v. *Wait* (5 Asp. Mar. Law Cas. 553; 16 Q. B. Div. 67) there was a finding that Sharpness was in the port of Gloucester, and that there was a custom to lighten at Sharpness. The present point was not discussed nor was *The Alhambra* cited: (see the report 16 Q. B. Div. 67; 54 L. T. Rep. 344). See further the remarks of Day, J. in *Reynolds and Co.* v. *Tomlinson* (74 L. T. Rep. 591; 8 Asp. Mar. Law Cas. 150; (1896) 1 Q. B. 586). Further, Mathew, J. in *Erasmo Treglia* v. *Smith's Timber Company Limited* (1 C. C. 361) approved *The Alhambra* (*sup.*).

To sum up, we have on the one hand in 1881 the decision of James, Brett, and Cotton, L.JJ. in *The Alhambra* (*sup.*), which is directly in point, followed in 1896 by Day and Lawrance, JJ. in *Reynolds* v. *Tomlinson* (*sup.*), and also in 1896 by Mathew, J. in *Erasmo Treglia* v. *Smith's Timber Company* (*sup.*). On the other hand, we only have the decision in *Nielson* v. *Wait* (*sup.*) where different considerations arose, and *The Alhambra* (*sup.*) was not cited. Under these circumstances I prefer to follow *The Alhambra* (*sup.*), and I give judgment for the plaintiffs for the amount claimed.

Solicitors: for the plaintiffs, *Williamson, Hill, and Co.*, for *Ingledew* and *Fenwick*, Newcastle-upon-Tyne; for the defendants, *Lowless* and *Co.*

Thursday, June 25, 1914.

(Before BAILHACHE, J.)

WILLIAM FRANCE, FENWICK, AND CO. LIMITED *v.* MERCHANTS' MARINE INSURANCE COMPANY LIMITED (*a*).

Marine insurance—Policy — Collision— Damage —Collision caused to their ship by back-wash—Liability.

By a policy of marine insurance underwritten by the defendants on the plaintiff's steamer C., *it was provided that "if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured," the defendants would pay a certain proportion of such sum or sums.*

A collision occurring between the steamship C. *and the steamship* R., *the impetus thus given to the* R. *plus the back-wash from the* C.*'s propeller drove the* R. *into the steamship* G., *causing damage which the owners of the* C. *were held liable to pay to the owners of the* R. *In an action on the policy:*

Held, that as the forces set in operation by the C. *caused the collision, the defendants were liable.*

COMMERCIAL COURT.

Action tried by Bailhache, J.

The plaintiffs' claim was for a loss under a policy of marine insurance dated the 8th Sept. 1911.

Roche, K.C. and *Balloch* for the plaintiffs.

Leslie Scott, K.C. and *MacKinnon* for the defendants.

The facts and arguments are sufficiently stated in the judgment.

BAILHACHE, J.—In this case the plaintiffs are the owners of a steamer called the *Cornwood*, and they are suing their underwriters under a policy of insurance dated the 8th Sept. 1911. It was an insurance upon the *Cornwood* on a valuation of hull and machinery of 19,000*l*. The defendants underwrote her in the sum of 1300*l*. The question turns really not upon anything on the face of the policy, but upon the construction of the running-down clause in the Institute Time Clauses which were attached by a slip to the policy. The particular part of the running-down clause which requires to be construed is this: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured" certain sums of money.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

The circumstances under which the claim arises are these. On the 4th Oct. 1911, two vessels, the *Rouen* and the *Cornwood* were proceeding up the river Seine. The *Rouen* was ahead, and the *Cornwood* was astern. The *Rouen* was the slower vessel of the two, and at a particular part of the river the *Cornwood* desired to pass her. She gave the necessary signals for that purpose, and received answering signals from the *Rouen*. The *Cornwood* then proceeded to draw up and to pass the *Rouen*. It so happened that while she was in process of executing this passing manœuvre the lights of another steamer, the *Galatee*, came into view coming down the river in the opposite direction. The presence of the *Galatee* was at this particular juncture somewhat embarrassing. The result was that the *Cornwood*, no doubt desiring to avoid the *Galatee*, and of course desiring to avoid the *Rouen* too, did by some negligent manœuvre draw too near to the *Rouen* as she passed, with the result that the stem of the *Rouen* was drawn to the starboard side of the *Cornwood* and the *Rouen* and the *Cornwood* were in collision; there was a glancing blow about 30ft. or so from the *Cornwood's* stern, the side of the *Cornwood* coming into collision with the bows of the *Rouen*. The blow was a slight one. Very little damage was done to either vessel, and if matters had ended there there would have been no importance in the case at all. But unfortunately after the collision between these two vessels the *Rouen* got across the river and ran into the *Galatee*, which was coming down on the other side. That collision did cause very serious damage, and a large sum of money has had to be paid in consequence of that collision. After the *Rouen* and the *Cornwood* had got clear of each other the *Cornwood*, somehow or other, got a cant, or a sheer to starboard, and ran into the starboard bank. The result of her doing so was that the back-wash from her propeller operated strongly upon the the starboard bow of the *Rouen*, and it was that, more than anything else, that pushed the *Rouen* across the river into the *Galatee*. The sums falling upon the owners of the *Cornwood* have been large; they limited their liability, but even so, the sum so limited was somewhere about 17,000*l*. I am not going to deal at the moment with the question of the damage. I do not think there is any doubt about what the damage is in respect of the injury done, and damages paid to the *Galatee*.

Under those circumstances the owners of the *Cornwood* say that the collision between the *Rouen* and the *Galatee* was, within the meaning of the running-down clause a consequence of the collision between the *Rouen* and the *Cornwood*. "It is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay." The owners say that the *Rouen* and the *Cornwood* came into collision, and that as the result of that the *Rouen* came into collision with the *Galatee*, and they became liable to pay these heavy damages both to the *Galatee* and the *Rouen*. There has been a good deal of interesting scientific evidence in this case as to how these two vessels, the *Rouen* and the *Cornwood*, came actually into contact, but I do not think I need critically examine that scientific evidence because I think that the way in which these two vessels came into contact is described with quite sufficient accuracy in the judgment of Bargrave Deane, J. in the Admiralty Court in an action between the owners of the *Cornwood* and the owners of the *Rouen*. The way in which these two vessels came into collision is thus described by the learned judge. He says: "As the *Cornwood* got ahead of the *Rouen*, there undoubtedly was some sort of attraction between the vessels, and it is extremely likely, as the *Cornwood* went ahead, that there was an attraction by means of the displacement of the *Cornwood*, which may have deflected the head of the *Rouen*. I believe it did. I believe that her head was drawn towards the *Cornwood* as the *Cornwood* went by. The *Cornwood* attributes that to a sheer—bad steering on the part of the *Rouen*." Then he dismisses that and goes on to say: "The collision was a slight one, the starboard quarter of the *Cornwood* coming into contact with the port anchor of the *Rouen*. It was a very slight collision indeed, a very slight contact, but directly the *Cornwood* got ahead, across on to the starboard bow, as she undoubtedly did, of the *Rouen*, then the full wash of her propellor came against the starboard bow of the *Rouen*, and with her already having an impetus to port, owing to this displacement, the wash further emphasised that movement to port, with the result that she proceeded out into the middle of the river, where unfortunately another vessel, the *Galatee*, was coming down." I think for my purpose that that is a sufficient description of how this particular collision between the *Rouen* and the *Cornwood* happened, and how the *Rouen* came to be driven across the river into the *Galatee*.

The contention on the part of the defendants in this case is that, although a person carefully describing, and with precision describing, incidents that happened in the Seine on this particular afternoon would, among other incidents, no doubt refer to the collision between the *Rouen* and the *Cornwood*, yet the collision between the *Rouen* and the *Cornwood*, although it was historically a part of the events which led to the collision between the *Rouen* and the *Galatee*, was in no way a cause of the collision between the *Rouen* and the *Galatee*; and they say, that being so, although the collision between the *Rouen* and the *Galatee* was after the collision between the *Rouen* and the *Cornwood*, and followed immediately afterwards, and was part of the same series of events, yet the collision between the *Rouen* and the *Galatee* was not a consequence of the collision between the *Rouen* and the *Cornwood*.

In order to see how that stands, one must go a little more closely into the way in which the collision between the *Rouen* and the *Cornwood* happened. The evidence has satisfied me that when two vessels like this are passing each other in narrow waters, and close together, a very considerable influence is exerted by the passing vessel upon the slower vessel that is being passed. I am quite satisfied that that influence is very much greater as the two vessels come nearer and nearer together. In this case as the *Cornwood* was passing the *Rouen* she had to get as near to the *Rouen* as she could, because of the *Galatee* on the other side, and she got too close. The result of that was that the bows of

the *Rouen* were drawn towards the side of the *Cornwood*, and they were drawn to the side to such an extent that they actually came into contact with the side. Of course, that is essential for the bringing of this clause into operation at all, because mere proximity without collision will not do. The result of this drawing of the bows of the *Rouen* towards the *Cornwood* was that the *Cornwood* was causing the *Rouen* to swing to port. The effect of the blow, I think, was, so far as altering that swing, or affecting that swing was concerned, almost negligble. If it had any effect at all it checked it, but I think it had practically no effect at all. As the *Cornwood* got clear of the bows of the *Rouen*, the *Rouen* continuing to swing to port, the *Cornwood* took a sharp sheer to starboard with the result that the wash from her propeller impinged upon the bows of the *Rouen* almost at right angles, and the sheer to port which the *Rouen* already had was very much increased by this wash from the propeller. In one sense it is quite true to say that the collision between the *Rouen* and the *Galatee* was not due to the collision between the *Rouen* and the *Cornwood*; that is to say, it was not due to the actual impact between the two vessels. I do not think it was. The impact so far as it had any effect at all, was to drive the *Rouen* away from the *Galatee*. But I do not think that is at all conclusive of the case. The force of the water coming from the bows of the *Cornwood*, which has an attraction which draws a passing vessel towards her, operates very much more heavily as the vessels get nearer to each other. I am not at all satisfied that if the *Cornwood* had kept a little further from the *Rouen* than she did that there would have been any collision at all between the *Rouen* and the *Galatee*. I think the collision between the *Rouen* and the *Galatee* was due to the fact that the *Cornwood* got so near to the *Rouen* as that the force of the water operating from her bows, together with the suction operating from her stern, drew the *Rouen* into the *Cornwood* and gave her such a swinging impetus as sent her, after the *Cornwood* got free, with the addition of the wash from the *Cornwood's* propeller, into the *Galatee*; and I am not all satisfied that those forces would have operated to anything like that extent if, instead of being in collision, the two vessels had only been in close proximity. It does not seem to me to be necessary at all, granted that there is a collision, to find that the actual impact of the two vessels drove the *Rouen* into the *Galatee*. I think it is sufficient to find that the forces put into operation by the negligent navigation of the *Cornwood* did in fact not only cause a collision between herself and the *Rouen*, but, having done that, afterwards sent the *Rouen* into the *Galatee*. Of course, there must be collision between the two vessels, but in this case there was a collision, and in my judgment the collision between the *Rouen* and the *Galatee* was such a consequence of the collision btween the *Rouen* and the *Cornwood* as brings this running-down clause into play, and makes the underwriters liable.

In the course of his argument to me, Mr. Leslie Scott cited a case of *McCowan* v. *Baine* (63 L. T. Rep. 502; 7 Asp. Mar. Law Cas. 89; (1891) A. C. 401). There is a passage from the opinion of Lord Selborne that I should like for a moment to refer to. He begins his speech in the House of Lords by saying: "I cannot help thinking that in construing such a mercantile contract as this, there is as much danger of error in extreme literalism as in too much latitude." I do not desire, if I can help it, to fall into either of those extremes." It does seem to me that in a case like this where you have a collision between two vessels, followed immediately afterwards by a collision with a third, it would be, to use Lord Selborne's words, construing this mercantile contract with "extreme literalism" if I were to hold that the collision in this case between the *Rouen* and the *Galatee* was not a consequence of the collision between the *Rouen* and the *Cornwood*. In my judgment it was a consequence within the meaning of the clause, and the defendants are liable.

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

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

June 18, 19, *and* 29, 1914.

(Before BAILHACHE, J.)

HEWITT BROTHERS *v.* WILSON. (*a*)

Marine insurance — Material fact — Innocent mistake as to materiality — Second-hand machinery—Concealment.

Where a policy of marine insurance contained the following clause: "In the event of any incorrect definition of the interest insured, it is agreed to hold the assured covered at a premium (if any) to be arranged," and the subject-matter of the insurance was new and second-hand machinery, but the assured honestly thought that to define it as "machinery" simply was a sufficient and correct definition of the interest insured:

Held, that in the circumstances the failure to disclose to the underwriters that some of the machinery was second-hand, though a concealment of a material fact, was an innocent non-disclosure, and that the assured were entitled to rely on the "held covered" clause.

COMMERCIAL COURT.

Action tried by Bailhache, J.

A policy of marine insurance dated the 23rd July 1912 was subscribed by the defendants by which the plaintiffs insured four cases of printing machinery on the steamships *Gulf of Suez* and *Orchis* against ordinary marine perils, including risk of breakage, on a voyage from London to Malta. The policy contained the following clauses:

> In the event of claim for particular average or loss or injury to interest, underwriters only to be liable for cost of replacing the parts lost or injured and all charges incidental thereto;

and

> In the event of deviation being made from the voyage hereby insured or of any incorrect definition of the interest insured, it is agreed to hold the assured covered at a premium (if any) to be arranged.

A portion of the machinery was damaged by breakage during the voyage, and the plaintiffs brought the present action to recover the amount of the loss sustained.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

By their defence the defendants pleaded that the plaintiffs had omitted to disclose that the machinery was second-hand.

Evidence was called to the effect that the difficulty and cost of replacing lost and injured parts of machinery was greater in the case of second-hand machinery; and evidence was called on behalf of the plaintiffs that it was unusual in such cases to disclose whether the machinery was new or old, and that the defendants were accustomed to insure different classes of machinery at one uniform rate.

Langdon, K.C. and *Dobb* for the plaintiffs.—The fact that the machinery was second-hand was not a material fact which ought to have been disclosed. In any event, the defendants had, by their method of business, led the plaintiffs to believe that they did not regard it as material, and thus waived the necessity for information on the point. The "held covered" clause protects the plaintiffs from liability. The non-disclosure was innocent.

Leck, K.C. and *MacKinnon* for the defendants.—The description given by the plaintiffs was incorrect, and the "held covered" clause is no answer to the non-disclosure.

Cur. adv. vult.

June 29.—Bailhache, J.—This is a claim under a policy of marine insurance dated the 23rd July 1912. The policy was on a voyage from London to Malta by the steamers *Gulf of Suez* and *Orchis*, and the interest insured was four cases of machinery. Of these cases three were new and one was second-hand. The case of second-hand machinery contained a printer's folding machine. On arrival at its destination this machine was found to be damaged, and it is in respect of this damage that the present action is brought. The policy covered risk of breakage, and on a slip attached to the policy there is a replacement clause. The point taken by the underwriters is that they have a right to avoid the policy for concealment of a material fact. The four cases were all described as machinery. It is said that as this particular case was second-hand it ought to have been so described, and that the failure so to do was a concealment of a material fact. Evidence was given by underwriters of the materiality of the fact, especially where the policy contains a replacement clause. The materiality consists in this, that the insurable value of second-hand machinery is comparatively small, while the cost of replacement where machinery is second-hand bears a much higher ratio to the insured value of the machinery than in the case where the machinery is new. One of the witnesses said he never insured second-hand machinery except on f.p.a. terms, and the defendants' underwriter said he would not have insured it at all.

The fact is certainly material, and it was not disclosed, and the contention of the defendants would prevail as a matter of course but for the fact that the slip attached to the policy contained what is known as the "held covered" clause. The terms of the clause in this particular case are: "In the event of deviation being made from the voyage hereby insured or of any incorrect definition of the interest insured, it is agreed to hold the assured covered at a premium (if any) to be arranged."

It is to be observed that this clause does not protect an assured from every concealment of a material fact, but only if and so far as the fact concealed affects the definition of the interest of the assured and renders it incorrect. I think the concealment in this case is a concealment of that kind. The description of this case of machinery as machinery merely, without the addition of the word "second-hand," was a concealment of a material fact, but it was also an incorrect definition of the interest insured. So far, therefore, the "held covered" clause would seem expressly to apply to this case.

I think, however, one must look a little more closely into the clause and its object, and on so doing it appears to me that the clause is not intended to protect an assured who has intentionally misdescribed the interest insured. The clause deals first with deviation, and I am satisfied that an assured who at the time he insured knew that the carrying vessel intended to deviate from the insured voyage could not claim protection. I think by parity of reasoning the same must be true of an assured who intentionally misdescribed the interest insured. There must be something in the nature of mistake or misapprehension on the part of the assured to bring the clause into play, and the question is what sort of mistake. A mistake of fact will clearly do. If, for instance, in this case the assured did not know that the machinery was second-hand he would, in my judgment, be protected, true at a premium to be arranged, but still protected. Now the assured here were under no such mistake of fact. They were, however, under a misapprehension as to the necessity of describing this machinery as second-hand, and the mistake arose in this way: First, it is a common practice in this trade to ship all machinery, new or old, as machinery *simpliciter*. The proportion of second-hand machinery shipped is comparatively small. Secondly, they themselves had done so for years, and had on many previous occasions so insured with these same defendants. Thirdly, although machinery differs largely in its liability to breakage in transit, some kinds being more delicate than others, these underwriters had never inquired, as many underwriters do, as to the class of machinery they were insuring, but had taken it all at a uniform or flat rate of 12*s.* 6*d.* per cent., and that, too, irrespective of the length or nature of the insured voyage.

Under these circumstances the plaintiffs say—and I believe them—that they thought these defendants were indifferent on the subject, and were, to use a popular expression, willing to take the rough with the smooth. In short, the plaintiffs, though knowing this machinery was second-hand, honestly thought that to describe it as machinery was a sufficient and correct definition of the interest insured. Is this such a mistake or misapprehension as entitles them to rely on the "held covered" clause? I think upon the facts of this case it is. I ought to say that it was not suggested that there was in this case any waiver or estoppel. Taking the view I do of the "held covered" clause, I give judgment for the plaintiffs.

Solicitors for the plaintiffs, *Ashley*, *Tee*, and *Sons*.

Solicitors for the defendants, *Ballantyne*, *Clifford*, and *Hett*.

Supreme Court of Judicature.

COURT OF APPEAL.

June 17 *and July* 18, 1914.

(Before BUCKLEY, KENNEDY, and PHILLIMORE, L.JJ.)

BRITISH OIL AND CAKE MILLS LIMITED *v.* PORT OF LONDON AUTHORITY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

London—Port rates—Exemption—Goods imported for transhipment only—Goods imported for conveyance by sea to any other port coastwise—Transhipment of goods in port of London for Rochester—Port of London Act 1908 (8 *Edw.* 7, *c.* 68), *s.* 13—*Port of London (Port Rates on Goods) Provisional Order Act* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c. c.*), *schedule, s.* 9.

By sect. 13, *sub-sect.* 1, *of the Port of London Act* 1908, "*all goods imported from parts beyond the sea or coastwise into the port of London or exported to parts beyond the seas or coastwise from that port*" *shall be liable to port rates.*

By sect. 13, *sub sect.* 5: "*For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point.*"

By sect. 9 *of the Provisional Order confirmed by the Port of London (Port Rates on Goods) Provisional Order Act* 1910, "*No port rates shall be charged by the authority on transhipment goods, which expression wherever used in this order means and includes goods imported for transhipment only,*" *and* "*for the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise.*"

Goods were imported from beyond the seas into the port of London for transhipment only, and were duly certified by the owners as being for transhipment. They were conveyed by a sailing barge down the Thames to Rochester on the Medway.

Held (Buckley, L.J. dissenting), that the word "*coastwise*" *in the expression* "*beyond the seas or coastwise*" *in sect.* 9 *of the above Provisional Order has its ordinary meaning, having reference to a voyage between places on the coast of the United Kingdom, when used, as in the context, in contrast to* "*beyond the seas,*" *and that its ordinary meaning was not displaced by the definition of the words* "*goods imported or exported coastwise*" *in sect.* 13, *sub-sect.* 5, *of the Act of* 1908; *that the conveyance from London to Rochester by the Thames and Medway was a conveyance* "*by sea only*" *to another port* "*coastwise*" *within the meaning of sect.* 9; *and that therefore the goods, having been imported for the purpose of being so conveyed, were exempt from port rates.*

Judgment of Pickford, J. (12 *Asp. Mar. Law Cas.* 417; 109 *L. T. Rep.* 859; (1914) 1 *K. B.* 5) *affirmed.*

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

DEFENDANTS' appeal from a decision of Pickford, J. at the trial of an action in the Commercial Court without a jury, reported 12 Asp. Mar. Law Cas. 417; 109 L. T. Rep. 859; (1914) 1 K. B. 5.

The plaintiffs' claim was for 1*l.* 13*s.* 4*d.* as money paid to the defendants under duress to obtain the release of 100 tons of linseed, the amount in question being claimed as port dues. They also claimed a declaration that the levying of such port dues was illegal. The following was the agreed statement of facts:—

The steamship *Assyria*, from Calcutta and other ports, with a general cargo was reported on the 12th June 1912 at the Custom House, London, to have arrived for discharge at Victoria Docks, London. Part of this cargo—namely, 100 tons of linseed—belonged to the plaintiffs, who on the 12th June 1912, as owners of the goods, presented and delivered to the collector of the port authority, at the port rates on goods office at the Port of London Authority, a certificate under their hands. Such certificate was in the form required by the port authority under sect. 9 of the Port of London (Port Rates on Goods) Provisional Order Act 1910 in respect of goods imported into the port of London and intended for transhipment, and was entitled "Inward Port Rates Exemption Certificate." The certificate stated that the goods were intended for transhipment, and described the goods as linseed, the quantity being 1364 bags, weighing 100 tons, the destination and route being Rochester in the county of Kent, and the mode of conveyance by sailing craft belonging to the London and Rochester Barge Company Limited. Such certificate was given within the period and within the manner prescribed by the said section.

The port authority declined to accept such exemption certificate and made a note on the certificate as follows: "Inside line which extends from Colne Point to Reculvers." Thereupon the plaintiffs paid under protest on the 12th June 1912 the sum of 1*l.* 13*s.* 4*d.*, being the amount claimed by the port authority for foreign inwards port rates on the 100 tons of linseed at the rate of 4*d.* per ton. The payment of such rate was made by the deposit account with the port authority of the plaintiffs being debited with 1*l.* 13*s.* 4*d.* as appeared on the debit side.

The 100 tons of linseed were shipped again at the Victoria Docks within the limits of the port of London by being put overside from the steamship *Assyria* into a sailing barge, and the goods were then conveyed by such barge to the port of Rochester (which is on the river Medway) as soon as practicable after the 12th June 1912—namely, on the 2nd July 1912.

The point in dispute between the parties was whether under the above circumstances the foreign inwards port rate was legally chargeable on the 100 tons of linseed.

The Port of London Act 1908, s. 13, sub-s. 1, provides as follows:

Subject to the provisions of this section, as from such day as may be fixed by the Board of Trade, not being more than thirteen weeks after the Provisional Order embodying the schedule mentioned in sub-sect. 2 of this section has been confirmed by Parliament, all goods imported from parts beyond the seas or coastwise into the port of London or exported to parts beyond the seas or coastwise from that port shall, subject to any

exemptions or rebates which may be contained in a Provisional Order made under this section or allowed by the port authority, be liable to such port rates as the port authority may fix, not exceeding such rates as may be specified in any Provisional Order made by the Board of Trade for the time being in force, but the port rates charged by the port authority shall at all times be charged equally to all persons in respect of the same descriptions of goods under the like circumstances and shall be charged separately from any other dues payable to the port authority. Provided that (b) The Provisional Order under this section shall provide for exempting from such rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port, and may determine what goods are for the purposes of such exemptions to be treated as goods imported for transhipment only. (2) Within six months after the appointed day the port authority shall submit to the Board of Trade a schedule of the maximum port rates on goods and the Board of Trade shall embody the schedule in a Provisional Order made for the purposes of this section. Sub-sect. 5. For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point, being a line determined by the Treasury in pursuance of the power conferred upon them by sect. 140 of the Customs Consolidation Act 1876, or any line that may be substituted therefor by the Treasury in pursuance of such power as aforesaid. . . .

Sect. 15 prohibits preferential dock charges.

Sect. 43. Nothing in this Act shall be construed as imposing any dues on any vessel or on any goods carried therein by reason only that the vessel passes through any part of the port of London on a voyage between places situate on the river Medway or the river Swale and not within the port of London and any other places not within that port, or as imposing any duties of tonnage on any vessel for passengers only plying between places situate on those rivers and places within the port of London situate eastward of the said line draw from Yantlet Creek to the City Stone opposite Canvey Island.

The Port of London (Port Rates on Goods) Order 1910, relating to the maximum port rates on and goods which may be levied by the Port of London Authority set out in the schedule to the Port of London (Port Rates on Goods) Provisional Order Act 1910, s. 9, provides (*inter alia*) as follows:

No port rates shall be charged by the authority on transhipment goods, which expression, wherever used in this order, means and includes goods imported for transhipment only and also goods which remain on board the vessel in which they were imported for conveyance therein to another port. For the purposes of this section the expression "goods imported for transhipment only" shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port, whether beyond the seas or coastwise, which are certified and proved within the period and in manner hereinafter provided (1) to have been intended for transhipment at or before the time of the report of the ship at the Custom House or within seventy-two hours thereafter, excluding Sundays and holidays, and (2) to have been shipped again as soon as practicable within the limits of the port of London for conveyance by sea to such other port. Every such certificate as aforesaid shall be under the hand of the owner of the goods (which expression whenever used in this order shall include the shipper and consignee of the goods and any person shipping or taking delivery of the goods on behalf of the owner, shipper, or consignee) or under the hand of a forwarding agent or of any other agent acting on behalf of the owner of the goods or under the hand of the owner, master, managers, or agents of the importing or exporting vessel, and shall be in such form as the authority may from time to time require. The certificate stating that the goods have been intended for transhipment shall contain particulars of the description, quantity, destination, route, and mode of conveyance of such goods, and shall be delivered to the collector, which expression as used in this order means any collector or officer for the time being authorised by the authority to collect port rates on goods, within seven days from the arrival of the goods or such further period as shall from time to time be appointed by the authority. The certificate stating that the goods have been shipped again as soon as practicable as aforesaid shall contain such particulars as the authority shall require, and shall be delivered to the collector at or immediately after the time of shipment. The owner of any such goods as aforesaid shall at all times give such other information and evidence as may reasonably be required by the authority or their agent in order to prove that such goods were intended for transhipment or have been shipped again as soon as practicable as aforesaid as the case may be.

Pickford, J. held that under sect. 13 of the Port of London Act 1908 and sect. 9 of the Port of London (Port Rates on Goods) Order 1910 the goods were exempt from payment of port rates as they were goods imported from beyond the seas for the purpose of being conveyed by sea only to another port "coastwise" as the definition of "coastwise" in sub-sect. 5 of sect. 13 of the Port of London Act 1908 is not imported into sect. 9 of the Provisional Order 1910, and the term "conveyed by sea only" is used to make a distinction between conveyance by land and not by river.

The defendants appealed.

Upjohn K.C. and *George Wallace*, K.C. (*A. F. Wootten* with them) for the defendants.—Sect. 13, sub-sect. 1, of the Port of London Act 1908 imposes on "goods imported from parts beyond the seas or coastwise into the port of London or exported to parts beyond the seas or coastwise from that port" such port rates as may be contained in a Provisional Order, and by the proviso in sub-sect. (b) the Provisional Order shall provide for exempting from such rates "goods imported for transhipment only." Sub-sect. 5 provides that, for the purposes of the section, goods are not to be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point (which line is beyond the eastern limit of the port). By sect. 9 of the schedule to the Port of London (Port Rates on Goods) Provisional Order Act 1910 no port rates shall be levied on "transhipment goods," which expression means "goods imported for transhipment only," and also goods which remain on board the vessel for conveyance to another port, and, for the purposes of the section, the expression "goods imported for transhipment only" means "goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise." The word "coastwise" there has the same meaning as in sect. 13, sub-sect. 5, and therefore the goods in the present case were not imported for transhipment only, for they

were not imported for the purpose of being conveyed to a placed seaward of the Colne Point line, for Rochester is landwards of that line. By sect. 3 of the Provisional Order "expressions defined in the Port of London Act 1908 shall, unless the context otherwise requires, have the same meanings in this order." In sect. 4 of the Provisional Order the word "coastwise" must have the same meaning as in sect. 13, sub-sect. 1, of the Act of 1908, for it follows the language of that section. In sects. 7, 13, 14, and 30 of the Act of 1908 it must have the meaning given to it in sect. 13, sub-sect. 5. Further, by sect. 31 of the Interpretation Act 1889, where any Act confers power to make any instrument, such as an order, expressions used in the instrument shall, unless the contrary intention appears, have the same respective meaning as in the Act, and statutes dealing with the same subject should be read as one:

M'William v. *Adams*, 1 Macq. H. L. 141.

Therefore the word "coastwise" in the order must have the same meaning as in sect. 13, sub-sect. 5, of the Act of 1908. Sect. 43 of the Act of 1908 has no application here, for the defendants are claiming not on the ground that the goods were carried by barge to Rochester, but solely because they were imported into London. Secondly, the goods were not imported "for the purpose of being conveyed by sea only" to any other port whether beyond the seas or coastwise within the meaning of sect. 9 of the order, for the expression "conveyed by sea" was not meant to draw a distinction between conveyance by land and conveyance by water, otherwise goods could be conveyed in many directions by canal free from port rates. Nor is the Thames from London to Rochester the sea, for a navigable tidal river is not the sea:

Woolwich Overseers v. *Robertson*, 44 L. T. Rep. 747; 6 Q. B. Div. 654.

In order to escape the port rates, goods must be imported from beyond the seas, or coastwise—that is, from somewhere beyond the Colne Point line—for the purpose of being conveyed by sea to another port beyond the Colne Point line, and that was not the case here.

E. M. Pollock, K.C. and *Morion Smith* (*Talbot*, K.C. with them) for the plaintiffs.—The policy of the Port of London Act 1908, as shown by sched. 5; sect. 7, sub-sect. 2 (*c*); sect. 13, sub-sect. 5; and sect. 43, is to protect the Medway trade. The Provisional Order Act of 1910 is not merely supplementary to the Act of 1908, but is an independent enactment. Sect. 13, sub-sect. 5, of the Act of 1908 is not to be read into the Provisional Order Act, and the word "coastwise" in sect. 9 of the Provisional Order has its natural meaning, and is wholly unaffected by the definition in sect. 13, sub-sect. 5, of the Act of 1908, and goods conveyed to any port along the coast are conveyed "coastwise." If the defendants are right, goods transhipped in the port of London for conveyance to Rochester would be liable to port rates, while if they were carried on in the same bottom they would not. That cannot have been the intention of the Legislature, nor could the Legislature, while desiring to protect the Medway trade, have intended to put the Medway ports in a position less favourable than ports seaward of the Colne Point line, such as Ramsgate and Harwich. Secondly, the words "by sea only" were inserted in the Provisional Order to distinguish the carriage from a carriage partly by sea and partly by land. The carriage must not be in any part by land, but must be wholly by water, and that partly by sea. It may be by sea, or by sea and canal, or by sea and river. The voyage down the Thames from London to Rochester is partly "by sea" in the ordinary acceptation of those words.

Upjohn, K.C. in reply.—It is by sect. 13, sub-sect. 1, of the Act of 1908 and sect. 4 of the Provisional Order that port rates are imposed on these goods, and the defendants do not need to have recourse to sect. 9 of the Provisional Order. The defendants' case is that sect. 9 of the Provisional Order does not extend the benefit of the exemption to these goods. The Acts of 1908 and 1910, even if independent, are, at any rate, *in pari materiâ*, and the same expression should be construed in the same way in each Act:

Waterlow v. *Dobson*, 27 L. J. 55, Q. B.

Cur. adv. vult.

The following judgments were read:—

July 18.—BUCKLEY, L.J.—The point for decision is a neat point of law—namely, the true construction of the Port of London Act 1908 and the Provisional Order of 1910.

The facts are the simplest possible. A ship arrived from Calcutta for discharge at the Victoria Docks in the port of London. She discharged certain linseed, part of her cargo, by way of transhipment into a sailing barge, which took the linseed to Rochester and there delivered it. The proper certificate required by sect. 9 of the Provisional Order of 1910 was given.

The plaintiffs say that these being transhipment goods were by virtue of sect. 9 of the Provisional Order of 1910 free of port rates. The defendants charged port rates. The plaintiffs paid the amount under protest and now sue to recover it. The defendants say that these were not transhipment goods, for that when conveyed from the Victoria Docks to Rochester they were not "conveyed by sea only to another port whether beyond the sea or coastwise" within sect. 9 of the Provisional Order. The whole question is as to the meaning of sect. 9, and in particular of the words "by sea" and "coastwise" in that section.

The Act of 1908 contains (sect. 13) a charging section. Under that section all goods imported from or exported to ports beyond the seas or coastwise into or from the port of London are subjected to port rates subject to exemptions there referred to.

Sect. 13 is not complete in itself. The rates are to be specified in a Provisional Order (sect. 13), and that order is to be confirmed by Parliament (sched. 4 (4). The Act contains in sect. 13 (*b*) provisions as to something which this Provisional Order is to do and as to something which it may do. The Provisional Order was made in 1910 and confirmed by the Act of 1910. For all material purposes that order is, I think, to be read as taking effect under the Act of 1908, and is to be read with the Act of 1908.

One thing seems plain—namely, that goods which are brought into the port of London on

board ship, and remain on board that ship for conveyance therein to another port, are to be exempt. Sect. 13 (b) so provides, and sect. 9 of the order of 1910 gives effect to that provision. That port may be any other port wheresoever it be. If these goods had gone from the Victoria Docks to Rochester in the ship in which they arrived in the port of London, no port dues, so far as I see, could have been charged. I am not deciding the point; it does not arise for decision. But that is at present my view. Under these circumstances it is highly improbable that port dues should become chargeable by reason of the fact that the goods have been put into a barge, and carried in a barge to Rochester. The Act of 1908 intended, I think, to protect such a port as Rochester, and did so under some circumstances by sect. 43. Although, having regard to the words "by reason only" in that section, the protection is not so expressed as to infer an intention to give protection under all circumstances. I start, however, upon the consideration of the true construction of those portions of the Act which are relevant to the present question, with a leaning in favour of holding that the Act cannot have intended to charge rates upon these goods merely because they were not carried in the same bottom to Rochester.

The Act of 1908, sect. 13 (b), remits it to the Provisional Order to determine what goods are to be treated as "goods imported for transhipment only," and are consequently to be exempt. The Provisional Order 1910, sect. 9, contains a determination upon the question. The question to be answered is whether the goods put into the barge at the Victoria Docks and taken to Rochester were transhipment goods within sect. 9. The words are "'Goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise," and they must be goods "which are certified and proved . . . (2) to have been shipped . . . for conveyance by sea to such other port." The words "whether beyond the seas or coastwise" in that sentence qualify in my opinion not the noun substantive "port" which immediately precedes them, but the verb "conveyed." "Coastwise" is an adverb expressive of motion. A port cannot be "coastwise." Goods can be conveyed coastwise. I therefore read the sentence thus: "For the purpose of being conveyed whether beyond the seas or coastwise by sea only to any other port." The conveyance must be a conveyance (whether beyond the seas or coastwise) by sea, and it must be certified that the goods have been shipped again for conveyance by sea. Then, what is the meaning of the word "only" in the context "for the purpose of being conveyed by sea only to any other port"? If the conveyance is partly by river is that excluded? I answer no. Many ports are reached by river after leaving the sea. In leaving the port of London the voyage is partly by river. The word "only," I think, qualifies the word "purpose," or possibly is to be read with the next words "to any other port." The purpose of conveyance to another port must be the only or real purpose, and not an illusory purpose. Another possible, and, I think, probable, meaning is that the word "only" qualifies the words "by sea" and means that the conveyance must be by sea to the exclusion of conveyance not by sea. It need not be conveyance wholly by sea The condition is satisfied if there is a conveyance wholly or partly by sea, but not if there is no conveyance by sea. The words are thus equivalent to "provided that there must be conveyance by sea." Whichever of these meanings is attributed to the word "only," it remains that it is an essential condition that there shall be conveyance by sea, and that conveyance by sea must be either from beyond the seas or coastwise.

The expresssion "transhipment goods" does not include goods conveyed to any other port without qualification. It is confined to certain goods—namely, goods conveyed to another port—of which it can be predicated that the conveyance to it involves conveyance either beyond the seas or coastwise. Transhipment, therefore, for conveyance to another port is not sufficient, although conveyance to another port in the same bottom is. If the conveyance is not in the same bottom it must (where conveyance beyond the seas is not in question) be conveyance by sea to another port coastwise, if the exemption is to prevail. The Act of 1908 contains in sect. 13 (5) an explanation of the meaning of the phrase "imported or exported coastwise." It is not a definition clause. It is a clause negative, and not affirmative, in form. But it is a clause which, in speaking of motion coastwise, explains that such motion must be a motion of coming from or going to a place beyond the Reculvers line. It is not necessary to rely upon sect. 3 of the Provisional Order as introducing into the Provisional Order a definition of the word "coastwise" found in the Act of 1908. I doubt whether "coastwise" is defined at all by the Act of 1908. I doubt whether "conveyance coastwise" is defined by the Act of 1908. But goods imported or exported coastwise are, by the Act of 1908, restricted to goods of which it can be predicated that they have been imported from or exported to a place seaward of the Reculvers line, and when coastwise conveyance forms a part of the qualification of goods entitled to exemption, I think the same meaning must be given to the word "coastwise" in that context.

The subject-matter to be dealt with by the Provisional Order required by sect. 13 of the Act of 1908 is goods imported from or to parts beyond the seas or coastwise. That subject-matter is taken up in the same words (as it ought to be) by sect. 4 of the Provisional Order. The second paragraph of sect. 9 takes up the same subject-matter so far as imported goods are concerned, and where the word "coastwise" is first used in that paragraph it plainly bears the same meaning as in sect. 13 (5) of the Act of 1908. When the word "coastwise" occurs for the second time in that paragraph, it ought upon true principles of construction, in the absence of some context or some plain inference to the contrary, to bear the same meaning as when used in the last preceding line. Its meaning when it is first used is beyond dispute. It is that given to it by subsect. 5 of sect. 13 of the Act of 1908. The same meaning is, I think, to be given to it when next it is used. Throughout the Provisional Order, as, for instance, in sect. 7 (1) (2) and (4); in the preliminary paragraph of sect. 13, and in clauses (a), (b), and (c) of sect. 13; in sect. 14 (a) and (b),

and elsewhere, I believe, in the order the word is used. The order further invents a phrase not found in the Act of 1908—namely, "coastwise goods." "Coastwise" is a word which cannot be said to have an ordinary meaning. It is in this connection a technical expression. As used throughout the order it must, I think, be used in the sense attributed to it in sect. 13 (5) of the Act of 1908, and goods conveyed coastwise must mean goods conveyed to seaward of that certain line. In such a context, I cannot see my way to say that the word "coastwise," when secondly used in sect. 9, bears a meaning different to that which it bears when first used, or, in other words, is not to bear the same meaning as is attributed to it in sect. 13 (5). If this is so, these goods were not conveyed coastwise and they were not, I think, conveyed by sea. In that context the word "sea" imports, I think, a sea voyage such as would be involved in a conveyance beyond the seas or coastwise. It is not my duty, or my right, to say whether the language of the order was intended to be something different to that which it is. I can see no reason for saying that goods taken to Rochester in another bottom ought, upon any reasonable ground, to be differently treated from goods which go on in the same ship. But the fact remains that the Act of 1908 remitted it to the Provisional Order to determine what goods should for the purpose of exemption be goods imported for transhipment only, and I find myself unable to say that carriage from the Victoria Docks to Rochester is conveyance "by sea," or that it is conveyance "whether beyond the seas or coastwise." For these reasons, while I agree that the judgments of my brethren give effect to what I cannot help thinking it must have been intended to provide, I think that is matter for amendment; I am unable to find as matter of construction that the order has so provided. For these reasons I must hold that the defendants are right, and that judgment should be entered for them.

Kennedy, L.J.—The material facts in this case are that the steamship *Assyria*, from Calcutta and other foreign ports, arrived at the Victoria Docks, London, with a cargo of which part consisted of 100 tons of linseed intended for transhipment to the port of Rochester on the Medway, and that the linseed was at the Victoria Docks transhipped into a sailing barge and conveyed to Rochester.

The question is whether in these circumstances the Port of London Authority was, or was not, entitled to charge the owners of the linseed with port rates.

The answer depends upon the interpretation to be placed upon certain sections of two statutes —the Port of London Act 1908 and the Port of London (Port Rates on Goods) Provisional Order Act 1910.

The earlier of these two statutes created the Port of London Authority, and under the head "Financial Provisions," by the 13th and following sections, provided for the levying of rates on imported and exported goods, according to a scheme to be fixed by the Board of Trade and embodied in a Provisional Order, to be confirmed by Parliament, and for the exemptions therefrom.

The material portions, so far as this appeal is concerned, of sect. 13 are as follows: [His Lordship read sub-sects. 1 and 5 of sect. 13 which are set out above.]

The result and the purpose of the last-quoted enactment are plain. Whereas under sect. 13 (1) there is a general provision for the imposition of port rates upon all goods imported from or exported to parts beyond the seas or coastwise (*i.e.*, from ports in the United Kingdom or from ports outside the United Kingdom), subject only to certain exemptions to be specified in the Provisional Order, which must under sub-sect. 3 (*b*) include an exemption for goods imported for transhipment only or which remain on board the importing ship for conveyance therein to another port, this sub-sect. 5 excludes from any liability to port rates, as goods imported or exported coastwise, goods which are imported to or exported from places landward (*i.e.*, roughly westward) of a line drawn from Reculvers Towers to Colne Point. It was obviously intended, for reasons, I presume, of policy, to grant a favour by way of exemption from port rates to places with a shipping trade, of which there are several (such, *e.g.*, as Whitstable, or Rochester, or Colchester (in the neighbourhood of the port of London. A similar policy is shown by sect. 43. [His Lordship read the section which is set out above.]

The important thing to note is that sect. 13 (5) does not enact any definition of "coastwise." All that it says is that when the expression "imported or exported coastwise" is used in the section, it does not include goods imported from or exported to places—of which, as I have just observed, Whitstable, Rochester, and Colchester are samples—landward of the line drawn from Reculvers Towers to Colne Point.

We have now to consider the Port of London (Port Rates on Goods) Provisional Order Act 1910. Between the years 1908 and 1910 the Board of Trade had made a Provisional Order, as contemplated by the Act of 1908. The Act of 1910 amends and confirms that order, which is set out in the schedule to the Act, and in sect. 9 of the order as appearing in the schedule are the provisions which carry out the enactment of sect. 13 (*b*) of the Act of 1908 in regard to exemption from port rates. So far as they affect the present case, those provisions are as follows: [His Lordship read the Port of London (Port Rates on Goods) Provisional Order Act 1910 schedule, sect. 9, which is set out above, down to the words "hereinafter provided."]

Now, in the present case it is not disputed by the appellants that the linseed was imported from beyond the seas for transhipment only, and was carried in a sailing barge proceeding down the Thames and up the Medway to the port of Rochester, and that the conditions of certification and proof mentioned later in the 9th section have been fulfilled. But, say the appellants, the Port of London Authority is nevertheless entitled to charge port rates upon these goods, because the words "any other port whether beyond the seas or coastwise" is to be understood and interpreted as meaning and including only a port which is either beyond the seas or a port seaward of the line drawn from Reculvers Towers to Colne Point, and in the present case Rochester is not seaward, but landward, of that line; and, further, the transport to Rochester is not "by sea only," but by river—*i.e.*, down the Thames and up the Medway.

I agree with Pickford, L.J. (then Pickford, J.) in holding that this contention of the appellants cannot be sustained.

As I have already pointed out, the statement in sect. 13 (5) of the Act of 1908 does not purport to be a definition of "coastwise." It means just what it says upon its face—viz, that when the import and export of goods coastwise is spoken of in that section (and I shall assume that the same meaning is to be given to the same expression in the Act of 1910, as, for example, in sects. 4, 7, 9, 13, and 14) the references as to goods imported or exported coastwise are always to be understood to apply to goods imported from or exported to places seaward of the line from Reculvers Towers to Colne Point. But I see no ground of justification for giving "coastwise" any special meaning when it occurs apart from the special context in which it is used in sect. 13 (5) of the Act of 1908. Sect. 13 (5) of the Act of 1908 is no authority for giving a special meaning to the use of the word "coastwise" either in any other connection or by itself. The phrase in sect. 9 of the schedule to the Act of 1910 which we have here to construe is goods "imported from beyond the seas or coastwise"—as these goods unquestionably have been imported—"for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise."

In the part of sect. 9 which we are considering, as well as in sect. 13 (*b*), the thing which is being dealt with is not export or import coastwise, but the "conveyance" to another port of goods which have been imported in accordance with the definition in sect. 13 (5) of the Act of 1908, and are afterwards transhipped for "conveyance" to another port "whether beyond the seas or coastwise." In my humble judgment the introduction in this place of the words "whether beyond the seas or coastwise" is not a happy piece of draftsmanship, because, on a cursory perusal of this section by itself, those words might appear to lend colour to such a view as that for which the appellants contend. But, grammatically, the words "whether—or" cannot properly be read as words of limitation; and, even if they could, there is, as it appears to me, and as I have already said, no definition of the word "coastwise" in sect. 13 (5) of the Act of 1908, but, purely and plainly, a statement of what in that section is to be the meaning of the expression "imported or exported coastwise" as a whole. That is not the expression here; the context is, in reference to transhipped goods, "to be conveyed by sea only to any other port whether beyond the seas or coastwise."

So far, I have dealt only with the unsoundness of the appellants' contention, as a matter of legal construction, in basing upon the language of sect. 13 (5) of the Act of 1908 when it states, for the purpose of the imposition of rates, that the particular expression "imported or exported coastwise" is for the purpose of that section to be taken not to mean or to include the inference which the appellants' case requires, that the word "coastwise" has by itself the same particular meaning wherever and in whatever context it occurs. But there are, it seems to me, at least three additional arguments of considerable cogency against such a proceeding to which these two statutes themselves give rise.

In the first place, the result would be, in regard to this question of transhipment, not, as is the plain intention of sect. 13 (5) and also of sect. 43 of the Act of 1908, to put the places to the landward of the line from Reculvers Towers to Colne Point in a more favourable position, but to put them in a less favourable position, than places to the seaward of that line.

In the next place, the purpose of the Act of 1910 being to carry out sect. 13 of the earlier Act in the matter of transhipment, the effect of the appellants' contention would be narrow, to the prejudice of the places to the landward of the line, the proviso (*b*) in sect. 13 as to exemption for transhipped goods. That proviso enacted in general and unlimited terms that the Provisional Order "shall provide for exempting from such rates goods imported for transhipment only, or which remain on board the ship on which they were imported for conveyance therein to another port." The appellants' contention as to sect. 9 of the schedule to the Act of 1910 would have the effect of limiting the transhipment to a port (not being a port beyond the seas) to the seaward of the line from Reculvers Towers to Colne Point.

Thirdly, whether we look at sect. 13 (1) (*b*) of the Act of 1908, or at sect. 9 of the schedule to the Act of 1910, there seems to be a clear intention to treat the transhipment of goods and the carriage of goods which remain on board the vessel in which they were imported for conveyance therein to another port exactly on the same level in regard to exemption from port rates. If the appellants' view in regard to the meaning of the language in sect. 9 as to transhipped goods is right, there would be in regard to this linseed an exemption if the *Assyria* herself carried on the goods to Rochester, but no exemption if the same goods were transhipped to Rochester, as in fact they have been.

In my judgment, the word "coastwise" in the expression "beyond the seas or coastwise" has, as Pickford, L.J. has said in his judgment, its ordinary meaning; its ordinary meaning being a voyage between places on the coasts of the United Kingdom when used, as it is in this context, in contrast to "beyond the seas." The adverb is to be found in the Customs Laws Consolidation Act (39 & 40 Vict. c. 36), ss. 142 and 143, in regard to goods ("to be carried coastwise, carriage coastwise"), and in regard to a ship ("arriving coastwise"). In the Pilotage Act 1913 (2 & 3 Geo. 5, c. 31), s. 11 (5), we have the phrase "a ship . . . trading coastwise." And by sect. 140 of the former of the two last-mentioned Acts it was enacted that "all trade by sea from any one part of the United Kingdom to any other part thereof shall be deemed to be a coasting trade." It may be noted that in regard to the import and export of goods sect. 7 (4) of the schedule which we are considering expressly treats, but for the purpose of that section only, reference to coastwise import or export as including references to import and export from and to the Isle of Man and the Channel Islands, indicating that, but for this express provision, those localities would not come within the term.

One other point upon which the appellants laid some stress remains to be mentioned. The

words are "for the purpose of being conveyed by sea only." It is objected by the appellants that this linseed, being imported for the purpose of being conveyed by transhipment to the port of Rochester, which is reached by traversing the rivers Thames and Medway, is not within this description. But I think that "by sea only" in this context must be read generally as intended to exclude any substantially inland or overland transit, whether by canal or river or rail or road. It cannot bear its literal and obvious meaning, for the simple reason that it would practically preclude all transhipment. Many ports which it could not be intended to exclude, such, for example, as Bristol and Newcastle in the United Kingdom, and as Antwerp, Rouen, and Bordeaux on the Continent, can be reached only by river for several miles of a vessel's voyage. New York and Quebec, to go further afield, come into the same class of destination. But the impossibility of a literal construction is, if possible, even more plain when you consider that in truth no vessel, great or small. can carry transhipped goods from London to any other port without passing on its voyage, at the start, along some portion of the river Thames before reaching the sea. It appears to me to be not merely reasonable, but necessary, in these circumstances to treat the expression "by sea only" as a rather careless piece of drafting, and as meaning a transit which is substantially a transit by water outwards, and not inland or overland carriage. It is not, I think, unworthy of notice that the possibility of controversy as to the meaning of the expression "by sea" which is used in the first line of sect. 140 of the Customs Regulation Act 1876, seems to have occured to the framer of the section. For in the latter part of that section it is provided "if any doubt shall at any time arise as to what or to or from what parts of the coast of the United Kingdom shall be deemed a passage by sea, the Commissioners of the Treasury may determine and direct in what cases the trade by water from one port or place in the United Kingdom to another of the same shall or shall not be deemed a trade by sea within the meaning of this or any Act relating to the Customs."

In my opinion the judgment of Pickford, J. was right and must be affirmed.

PHILLIMORE, L.J.—Certain goods were brought by sea from Calcutta to the Victoria Docks in the port of London. There they were put over the ship's side into a sailing barge bound for the port of Rochester, to which port they were ultimately taken.

The Port of London Authority claimed dues upon these goods as being reshipped for a place inside the line Reculvers to Colne Point. Pickford, J. (as he then was) decided that no dues were payable, and from this decision the present appeal is brought.

Primâ facie the goods were liable to pay dues. The Port of London (Port Rates on Goods) Provisional Order Act 1910 (7 Edw. 7 & 1 Geo. 5, c. c.) gives statutory force to the Provisional Order which forms the schedule to this Act. By clause 4 of this schedule: "Subject to the provisions of this order and to any exemptions or rebates allowed by the Port of London Authority . . . under sect. 13 of the Port of London Act 1908, the authority may demand and take in respect of all goods imported from parts beyond the seas or coastwise into the port of London or exported to parts beyond the seas or coastwise from that port, port rates not exceeding the rates specified in the schedule to this order," and these were "goods imported from parts beyond the seas."

But in clause 9 there is an exemption for transhipped goods, and this exemption is in the following language: [His Lordship read clause 9, which is set out above, down to the words "hereinafter provided."] It is contended for the Port of London Authority that the exemption does not apply, for two reasons: first, it cannot be said that these goods were transhipped "for the purpose of being conveyed by sea only"; and, secondly, that Rochester is not "any other port whether beyond the seas or coastwise."

It is convenient to take the second point first. Rochester is a port, a separate and independent port, to which, before the passing of the Port of London Act 1908, access could be had from the open sea without passing through the limits of any other port or conservancy district.

Now that the Act of 1908 has placed the limit of the port of London further seaward, vessels approaching the port of Rochester have to pass through what I may call the vestibule of the port of London. It is the same for any port to which access may be had by the West Swale.

In order to protect those ports on the Medway and on the Swale there are special clauses—sect. 43—in the Act of 1908, and sect. 37 of the schedule to the Act of 1910. The words "any other port" would therefore include Rochester. But it is said that the exemption is not given to every other port, but only to any port so situated that it can be described as being beyond the seas or coastwise; that Rochester is not beyond the seas (which is true) and the conveyance to it cannot be described as coastwise, the reason being that a peculiar meaning is given to that word in sub-sect. 5 of sect. 13 of the Act of 1908. This argument seems to me illegitimate. The words "whether—or" are not words of limitation. "Whether—or" may be words of extension or of demonstration making it clear that each limb or part is in the whole, or mere words giving force to the affirmation. Sometimes they may have a further use. To be accurate, they imply a complete dichotomy, and therefore they form an assertion by implication that there are and there are only the two limbs or parts. In other words, of every other port to which conveyance can be made by sea it may be predicated that the conveyance is either beyond the seas or coastwise. If it is necessary to hold that no words in an Act of Parliament can be otiose, this seems to me to give a sufficient value to the phrase "whether—or." On the other hand, the contrary construction seems to me not to give full force to the words "any other." But for argument's sake assuming otherwise, I go to clause 13, sub-sect. 5, of the Act of 1908. The general scheme of this clause is as follows: The Act has created a new authority—the Port of London Authority. It has extended the limits of the port. It does not itself impose port dues. But it proceeds to sketch the outlines or principles on which port dues should be imposed and to require the Port of London Authority to prepare scales of dues to fill up those outlines and to be thereafter enacted. Generally speaking, the outlines are as follows: Goods

brought from or to be sent to other ports are to pay dues on varying scales according as they are from overseas or carried coastwise. But goods brought in only for transhipment are not to pay, and goods moved about in the port from one place in the port to another are not to pay.

To this last principle an extension is given by sub-sect. 5. Goods brought from or sent to certain ports in the near neighbourhood are to be treated as if they were only being moved about inside the port. They are not to be conceived of as carried coastwise—overseas is out of the question. This object is carried into effect in the following way, sub-sect. 1 having provided as follows: "Subject to the provisions of this section, as from such day as may be fixed . . . all goods imported from parts beyond the seas or coastwise into the port of London or exported to parts beyond the seas or coastwise from that port shall, subject to any exemptions or rebates which may be contained in a Provisional Order under this section or allowed by the port authority, be liable to such port rates as the port authority may fix." Sub-sect. 5 then provides: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point, being a line determined by the Treasury. . . ."

Because this object is expressed in language of quasi definition, it is said that a special and non-natural meaning is given to word "coastwise" in the Act of 1908, and therefore in the later Act of 1910, whch no doubt is *in pari materiâ*. I do not think this force should be given to a clause put in *alio intuitu*. I have used the word "non-natural." The natural meaning of "coastwise" is that put to it in the Customs Consolidation Act, sects. 142 and 143. The line from Reculvers to Colne Point which bounds the area within which goods moved about are to be treated as moved about within the port covers, as is shown in the map, the mouths of the rivers Blackwater and Colne and the ports of Maldon and Colchester, if not others.

I should have been glad if counsel appearing for the Port of London Authority could have supplied some business explanation or suggestion for their contention. Failing this, it seems to me a somewhat fanciful contention that goods should pay dues if transhipped for Rochester or Colchester, but not if transhipped for Ramsgate or Harwich.

There is another point which seems to me worthy of some consideration. Ships coming to the port of London with a part cargo for other ports may either tranship this cargo, or may after breaking bulk and discharging their London cargo proceed with the rest (possibly the more easily because the ship has been lightened) to another port. I think the contention that the goods so carried on in the same bottom would not pay port of London dues is sound. If so, again we have had no business reason furnished for a discrimination between those goods and goods actually transhipped.

Now, as to the first matter, whether the goods can be said to have been transhipped for the purpose of being conveyed by sea only to any other port, &c. These words are confessedly difficulty to construe, and may well give rise to difference of opinion. They cannot mean conveyance wholly by sea. Because, to begin with, the conveyance outward is for miles down the river; and, secondly, the majority of ports in Great Britain, Ireland, and the Atlantic seaboard of the Continent are approached by rivers. In three cases—Gloucester, Manchester, and Amsterdam—they are approached by canals. Probably the words mean "only when conveyed by sea." This, however, leaves it difficult to say what is meant by the being conveyed by sea.

Perhaps it will be well to consider what are the mischiefs to be prevented. Goods might be unladen in London, put on rail and sent by rail to another port—viz., Dover or Southampton—or by rail, with only a trifling sea passage at the end, to Cowes or Ryde. Goods so treated are not, and are not to be deemed to be, transhipped. Neither would the putting of goods into non-seagoing craft for conveyance by inland water be transhipment. This is perhaps hardly a practical question, for transhipment has to be for another port, and there is no port on the Upper Thames or on the Lea, or on the lesser tributaries. Birmingham could be reached by canal, but is not a port. Theoretically Manchester and even seaports can be reached by canal, but with the present state of our canal navigation this is not likely to be done. However, practical or not, this is ruled by the definition not to be transhipment.

The words "conveyance by sea" therefore exclude land carriage and exclude carriage on inland waters. They admit of conveyance seaward in seagoing craft, and that is, I think, their meaning. I may add that I think a vessel rounding the Nore is at sea.

Upon the whole, I think the judgment is right and should be affirmed. *Appeal dismissed.*

Solicitors for the plaintiffs, *Dollman* and *Pritchard*, for *Hayward, Smith*, and *Challis*, Rochester.

Solicitors for the defendants, *E. F. Turner* and *Sons*.

July 23 *and* 24, 1914.

(Before Buckley, Kennedy, and Phillimore, L.JJ.)

Stott (Baltic) Steamers Limited v. Marten and others. (a)

Appeal from King's Bench Division.

Marine insurance—Time policy—"Perils of the sea"—Institute time clauses—"Inchmaree" clause—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 30; *sched.* 1, *r.* 12.

The expression "a peril of the sea" means a peril to which the assured is exposed by reason of the fact that his adventure is a marine adventure, or, expressed in the negative, a peril to which the assured would not be exposed if his adventure were not a marine adventure—that is to say, the peril must be in some sense attributable to the fact that an adventure is marine.

The plaintiffs took out a policy of marine insurance with the defendants on their ship, which covered (inter alia) *perils of the seas. The policy included the conditions of the Insti-*

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

tute time clauses as attached, clause 3 of which provided as follows: "In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, and on all occasions." Clause 7 provided: "This insurance also specially to cover . . . loss of or damage to hull or machinery through the negligence of the master, mariners, engineers, or pilots, or through explosions, burstings of boilers, breakage of shafts, or through any latent defect in the machinery or hull. . . ."

While the ship was lying in the dock a boiler, which was being lifted by a floating crane in order that it might be loaded into a hold, fell, owing to the pin of a shackle breaking, and damaged the ship.

In an action under the policy:

Held, (1) *that the loss was not caused by a peril of the sea;* (2) *that clause* 3 *of the Institute time clauses did not enlarge the risks insured by the policy; and* (3) *that the risks specifically mentioned in clause* 7 *were not extended to matters* ejusdem generis *by the general words in the body of the policy.*

Decision of Pickford, J. (12 *Asp. Mar. Law Cas.* 414; 109 *L. T. Rep.* 899; (1914) 1 *K. B.* 442) *affirmed.*

PLAINTIFFS' appeal from a decision of Pickford, J. sitting in the Commercial Court.

The plaintiffs were the owners of the steamship *Ussa*, and the defendants were underwriters. The plaintiffs claimed to be interested to the amount of 8250*l.* under a policy on the *Ussa* subscribed by the defendants, the ship being valued in the policy at 22,000*l.* The policy was dated the 16th March 1911, and was for twelve months from the 16th March. The perils insured against were "of the seas . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the . . . ship." Attached to the policy were Institute time clauses, clauses 3 and 7 of which provided as follows:

(3) In port and at sea, in docks and graving docks, and in ways, gridirons, and pontoons, at all times, in all places, and on all occasions. . . . (7) This insurance also specially to cover (subject to force of average warranty) loss of or damage to hull or machinery through the negligence of masters, mariners, engineers, pilots, or through explosions, burstings 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.

By their defence the defendants denied that the damage to the ship was a loss by a peril insured against within the policy.

The following facts were found by Pickford, J.:—

The *Ussa* was in the Bramley-Moore Dock in Liverpool, and was taking on board a boiler weighing about 30 tons from the steam crane of the Mersey Docks and Harbour Board, called the Atlas, which had brought the boiler from the North Docks to Bramley-Moore Dock, and was at the time of the accident engaged in lowering the boiler into the hold of the *Ussa.* While the boiler was being lowered, it caught upon the coamings of the hatch, and, to a certain extent, that took the strain off the fall of the crane which was on board the Atlas, the Atlas being a floating structure which carried the crane. The Atlas, having the weight of the jib of the crane and its burden counter-balanced by a balance tank, when the weight was taken off, listed away over the *Ussa.* The boiler freed itself from the coaming, and, having freed itself, continued to go down. That caused some extra strain upon the fall. The pin of the shackle, by which the boiler was carried, then broke and the boiler fell into the bottom of the ship and caused the damage in respect of which the action was brought. Pickford, J. found that the accident was not caused by a swell, possibly from a tug which was said to be in the dock at the time, causing the Atlas to list, and so causing the boiler to catch the coaming, which it would not have done but for the list. He found that the pin of the shackle was not a fit and proper pin, and that the accident was occasioned in a great measure by the fact that the pin of the shackle was not what it ought to have been. He held that the plaintiffs could not recover under the policy as the loss was not caused by a peril of the sea; secondly, that clause 3 of the Institute time clauses did not enlarge the risks insured by the policy; and, thirdly, that the risks specifically mentioned in clause 7 were not extended to matters *ejusdem generis* by the general words in the body of the policy.

The plaintiffs appealed.

The Marine Insurance Act 1906 (6 Edw. 7, c. 41) provides by sect. 30:

(1) A policy may be in the form in the first schedule to this Act. (2) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the first schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

First Schedule.—Rules for construction of policy.—The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require. . . . 12. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

Leslie Scott, K.C. and *L. F. C. Darby* for the plaintiffs.—The loss was due to a peril of the sea, or to a peril akin to a peril of the sea within the meaning of the policy. The accident was of a marine character; it could only have occurred on a ship; it was peculiar to a ship as such, and it happened while preparing the ship for a marine adventure. Perils of the sea include "all damage of a character to which a marine adventure is subject" (per Lord Herschell in *Thames and Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser, and Co.*, 57 L. T. Rep. 695; 6 Asp. Mar. Law Cas. 200; 12 A. C. 484), provided that the damage is due to an accident. It is to be noted that the words of the policy are "adventures and perils," and not perils only. Secondly, clause 3 of the Institute time clauses, being designed for insertion in a time policy and settled by underwriters, would be futile unless it were given some kind of operative effect, and it surely must add something. The clause enlarges the class of perils mentioned in the body of the policy. Thirdly, the general words which appear in the body of the policy must be read into clause 7, the

"Inchmaree" clause. It is true that the judgment of Kennedy, J. in *Jackson* v. *Mumford* (8 Com. Cas. 61) is against this contention, but it is submitted that that decision was wrong as the law stood then, and that in any case it is not right as the law stands now because of the 12th rule in the schedule to the Marine Insurance Act 1906. The object and effect of that rule is to meet the interpretation of Kennedy, J. in *Jackson* v. *Mumford* (*sup.*). Clause 7 applies the general words to every peril named in the policy, and puts the perils mentioned in that clause before the list in the body of the policy, and not after. They referred also to

The Niobe, 65 L. T. Rep. 502; (1891) A. C. 401; 6 Asp. Mar. Law Cas. 300;
Davidson v. *Burnand*, 19 L. T. Rep. 782; L. Rep. 4 C. P. 117;
Phillips v. *Barber*, 5 B. & Ad. 518;
Wilson, Sons, and Co. v. *Owners of Cargo per the Xantho*, 57 L. T. Rep. 701; 6 Asp. Mar. Law Cas. 207; 12 App. Cas. 503;
Thames and Mersey Marine Insurance Company Limited v. *Hamilton, Fraser, and Co.* (*sup.*);
West India Telegraph Company v. *Home and Colonial Insurance Company*, 43 L. T. Rep. 420; 6 Q. B. Div. 51.

F. D. MacKinnon for the defendants (*Roche*, K.C. with him).—The accident was not due to a peril of the sea, but was caused, at any rate in part, by a defect in the tackle of the crane, which had nothing to do with the ship insured. The accident might have equally well happened if the crane had been fixed on the quay instead of being water-borne. Secondly, clause 3 names no perils, and does not enlarge the class of perils. Thirdly, clause 7 is a special and limited addition to the perils named in the body of the policy, and cannot be read with them. The decision in *Jackson* v. *Mumford* (*sup.*) was right, and the Marine Insurance Act 1906 has no bearing on that decision. In any case it would be impossible to say that the defect in tackle of the ship insured is in any way akin to a defect in the machinery of the ship. He referred to

Hamilton, Fraser, and Co. v. *Pandorf and Co.*, 57 L. T. Rep. 726; 12 A. C. 518; 6 Asp. Mar. Law Cas. 212;
West India Telegraph Company v. *Home and Colonial Insurance Company* (*sup.*).

Leslie Scott, K.C. in reply,

Buckley, L.J.—An important question, and it may be the most important question in this case, is whether this injury was due to a peril of the sea.

The facts are quite simple. The vessel was in the Bramley-Moore Dock, Liverpool, and moored there, and she was taking on board a boiler, and the boiler was being lowered into her from a steam crane on the Atlas, a floating structure carrying a crane, which had brought the boiler from the place where it was, and was putting it into the ship. What happened was that, whilst the boiler was being so lowered, the pin broke, and the boiler fell upon the hold, and damaged the hull.

Having read the three cases—namely, *Thames and Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser, and Co.* (*sup.*), *Wilson, Sons, and Co.* v. *Owners of Cargo per the Xantho* (*sup.*), and *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*sup.*)—and having endeavoured, so far as I can, to see what is the proper definition of a "peril of the sea" in such a policy as this, I am unable, I confess, to see that this was in any sense a peril of the sea.

It may be dangerous, but I am going to endeavour to express in my own words what it seems to me consistently with authority a "peril of the sea" means. I suggest it means this: a peril to which the assured would not be exposed if his adventure were not a marine adventure; or to express it affirmatively, instead of negatively, a peril to which the assured is exposed by reason of the fact that his adventure is a marine adventure. Of these two I prefer the former; I think the latter, perhaps, is rather too narrow. But I think when you speak of a peril of the sea, or a peril akin to or like a peril of the sea, whether it is the one or the other, the peril must in some sense be attributable to the fact that the adventure is marine.

In the present case I do not see that the peril is within that description. This accident might equally well have happened if the crane had been a crane on the quay side. The mere fact that the crane was water-borne had, I think, little or nothing to do with the accident. As regards the *Ussa*, the ship herself, she was a vessel injured by the fall of something which was being put on board her. If that is to be the test, it would result in this, that, merely because the recipient of goods is a thing which is going to engage, or, if you please, is at the moment engaged, in a marine adventure, the fact that she is injured by putting goods on board is a peril of the sea or akin to a peril of the sea. I do not think that it is; and it seems to me that this peril was not within that at all.

The next point which was put was this: What is the effect of clause 3 of the Institute time clauses which were by reference introduced into this policy?

When you look at that clause you will find that it names no perils at all. It cannot enlarge the class of perils, for it names none; all it does is this, accepting the fact that there are certain classes of perils, that it mentions places and times and occasions and conditions which are to be relevant for the purpose of determining whether the particular risk which is being sued upon is a risk within the policy or not. It is said that, if you take that view of it, the clause does nothing at all. I do not for a moment say it does nothing at all, but if I am to assume that it does nothing at all—I do not shrink from the alternative—I cannot say that it provides for something, for which by its language it does not provide, by reason of the fact that, unless it has that effect, it does nothing. If that be so, I accept the alternative that it does nothing. But at the same time, as I agree that it does nothing at all, I am quite clear that it does not in any way enlarge the class of risk.

The last point is upon clause 7, which is commonly called the Inchmaree clause. It seems to me that clause 7 is a special and a separate clause. It is not an addition to the ordinary Lloyd's perils clause to be added before the general words in that clause so that the general words apply to the subject-matter of clause 7. Neither is it to be read as if it contains the words "and all other perils" like those mentioned in this 7th clause. It seems to me that it stands

apart, and that, as I understand it, was really the decision of my brother Kennedy in *Jackson* v. *Mumford* (*sup.*).

Under these circumstances it seems to me this appeal fails, and must be dismissed with costs.

I have given this judgment in this exceedingly brief form, because my brother Kennedy is much more conversant with this class of case than I am, and perhaps he will dealt with it more at large.

KENNEDY, L J.—I do not propose to deal with this case at any considerable length, great as the temptation is to discuss these matters fully, as they are of considerable business importance.

To my mind this is a case with which one may deal shortly, because it appears to me, I confess, to be a plain case, or, at any rate, a reasonably plain case.

The facts are described in the judgment of my brother Pickford, and they are undisputed, and were undisputed at the trial apparently, except in one respect. While the boiler was being lowered by a crane into the ship's hold, the crane itself being on another floating body, the Atlas, it caught on the coamings of the hatch, and the consequence of that was there was an accident, partly due to the improper condition of the pin and shackle, and partly to the strain, which resulted from the catching of the boiler. The boiler freed itself from the coamings where it had caught, continued to descend, the pin broke, and the boiler fell into the bottom of the hold, and did damage to the ship.

It appears to me that the facts are reasonably plain, because it is unquestionable that this accident is one which might just as well have happened if the crane itself had been on the quay, and not on another vessel, and it might just as well have happened to any object upon it, for the reason that the crane was not working properly, as the result of which the weight held by the crane tumbled into the object, be it house, or ship, into which the article attached to the crane was being delivered.

There was an attempt to say that there was some swell which caused the vessel, on which the crane was, to list, and that caused the accident. That would have presented a different kind of case.

But upon the facts Pickford, J. found there was no truth in that allegation of the plaintiffs that there was no swell which caused the accident and that no motion of the water had anything to do with the accident.

I am not going to attempt to give a new definition, or attempt a definition at all, of what is or is not within the general words—they are called "the sweeping words"—of the clause which adds to the express words in a policy of this kind to the perils of the sea as enumerated "all other perils, losses, and misfortunes that should come to her detriment or damage the subject-matter of the insurance." Seeing that the House of Lords in *Thames and Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser, and Co.* (*sup.*) has not attempted to give any definition, I certainly shall not attempt to do so. Each case must be looked at on its own particular facts, and no doubt the lines which separate a case which comes within the sweeping words as *ejusdem generis* may vary greatly according to the comparatively minute facts. But in some way or other I think that one must bring the case within the principle of the application of the sweeping clause. I rather agree that Mr. MacKinnon has got somewhere near it when he said that it must be, in some way or other, either violence of the wind or waves, or the entry of water into the hull, or that class of case which includes collision when the ships are navigated, or other perils of a kind such as he suggested, which are peculiar to the use of the ship as a ship. But I do not pretend to give that which the highest tribunal has not given. All I can say is that when you have the case of a vessel being loaded, or a vessel having a boiler loaded into her hold, as in this particular case, or other machinery of a like kind, and there is nothing connected with what may be called perils of a ship as a ship, or of navigation connected with it, it appears to me to lie outside the case.

Some cases have been very naturally cited to us by Mr. Leslie Scott, and *Phillips* v. *Barber* (*sup.*) was one, and then there was the case, which I have referred to, of *Cullen* v. *Butler* (5 M. & S. 461; 4 Camp. 289). That is a case which, since the language, I think it is, of Lord Herschell in the *Xantho* case (12 App. Cas. 503), may be open to question in the future as an authority. As regards the other case, *Phillips* v. *Barber* (*sup.*), which is, I think, the nearest case in favour of the plaintiffs here, it is one of those cases in which unquestionably the vessel was blown over on her side and damaged by the action of the wind at a time when an operation proper to a ship, and to a ship only, was going on. It may be said that wind might blow down a chimney. So it might, but you must have some distinctive mark, as it seems to me, which is referable to the cause or to the use of the ship which occasions the operation which does her damage to bring it within the words of the sweeping clause. It seems to my mind, it being always difficult no doubt to feel sure that you are laying stress upon the most important facts, that it is obvious from the judgments which have been given in the *Thames and Mersey Marine Insurance Company's* case (*sup.*) and the earlier case from which they differed, the *West India Telegraph Company* v. *Home and Colonial Insurance Company* (*sup.*), as to which great judges expressed different opinions, that there is no sort of authority for saying that when the operation of putting by a crane something into a ship results in an accident by dropping something from the crane and injuring the ship that that is within the perils of the sea as enumerated in the clause, or within the sweeping words which add analogous perils which would justify us in holding that this came within the category.

Then we have, of course, clause 3 referred to here. I will add nothing as regards that to that which Buckley, L.J. has said. It is an addition of certain named places within which the earlier clause as to the exemption from perils is to apply; whether it was inserted, as Mr. MacKinnon suggests, in order to prevent a question arising as to concealment of the place where the vessel was in regard to which the policy is taken out, or not, I have not the least idea. It may be, but, whatever may be the origin of the clause, we have simply to construe it as it stands, and, as it stands, it does not add to the list of possible perils against which the policy protects, but does

specify, needlessly or properly, it matters not which, the places in which the ship may be, and certain conditions as well, as, for example, whether she is with or without a pilot.

I do not propose to say anything about clause 7, or the application of the Marine Insurance Act, because they have not been much insisted upon here. I venture to think that the reasons given by my brother Pickford for treating them as arguments which could not prevail is well founded, and I have therefore really nothing to add to what he said there. The only difficulty in the case arises on what I may call the alleged application of this case to the sweeping clause added to that which follows as to the enumerated perils, and, upon the whole, certainly I think, when all the facts are taken together, there is nothing here to bring it, either on principle or authority, within the class of case which has been insisted upon.

PHILLIMORE, L.J.—I agree that clause 3 of these Institute time clauses has no material effect here. It merely provides that a loss which comes within the description of the perils insured against will be covered by the insurance if it occurs in dock. I also agree that clause 7 does not cover this loss. If this loss could possibly be treated as being due to a peril *ejusdem generis* with the perils enumerated in clause 7, I should be of opinion that the decision in *Jackson* v. *Mumford* (*sup.*) rightly, as the law then was, prevented the general words that appear in the body of the policy from being read into that clause. I am not quite certain that I should not require further consideration if it became necessary to determine the effect of the question whether the Marine Insurance Act 1906 has affected the decision in *Jackson* v. *Mumford* (*sup.*). But it is quite unnecessary to do that, because clause 7 seems to me to be so far away from this case, and I cannot consider this particular peril as *ejusdem generis* with clause 7.

With regard to the rest of the case, I confess I have some little doubt; it is doubt only, but after Pickford, L.J. (Pickford, J. as he then was) and my colleagues have seen their way clearly, I do not see my way to dissent. But it is a matter of great weight, and I confess to a feeling of uneasiness that it has not been thoroughly investigated, and, notwithstanding the very able arguments of the learned counsel here at the Bar, I am not quite certain that this matter has been considered in all its bearings. It is that which leads me to express my doubt rather than anything else. I accept *ex animo* the wider definitions given by Buckley, L.J. It is the application of them as to which I have doubt. The wider of those two definitions would make collision which did not let in sea water, but did damage only to the upper works, either a peril of the sea or a peril *ejusdem generis*; that I think is what the House of Lords intended to decide in the *Xantho* case (*sup.*), although upon re-reading the case carefully I see it could not be supported upon the grounds that the consequence of that particular collision was the incursion of sea water. If a collision which only does damage to the upper works and does not let in sea water is within perils of the sea by reason of the words *ejusdem generis*, I have doubt as to whether this particular injury might not be of the same nature; and, putting it in another way, taking again Buckley, L.J.'s definition, as ships are made to plough the sea, and not to lie by the wall, and as they plough the sea with cargoes or seeking cargoes, anything in the nature of preparing ships for adventures by putting cargo upon them might be considered to be the same thing as preparing the ship for her adventure by putting her in a dry-dock or on the gridiron for repair. Therefore I have my doubts, but, as I have said, I do not think them sufficient to cause me to dissent.

Appeal dismissed.

Solicitors for the plaintiffs, *Lightbound, Owen, and MacIver.*

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

Saturday, July 25, 1914.

(Before BUCKLEY, KENNEDY, and PHILLIMORE, L.JJ).

ADAM STEAMSHIP COMPANY LIMITED v. LONDON ASSURANCE CORPORATION. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice — Discovery — Privilege—Marine insurance — Commercial list — Inspection of documents—Communications from agent after commencement of litigation for the purpose of conducting defence.

The plaintiffs sued the defendants upon a policy of marine insurance upon the plaintiffs' ship. On the 28th Oct. 1913 *the ship went ashore, and on the 30th Oct. the plaintiffs gave the defendants notice of abandonment, which was refused. In Jan.* 1914 *the writ was issued, and the defendants agreed to treat the writ as issued on the 30th Oct.* 1913. *The plaintiffs applied for discovery of part 2 of the defendants' list of documents, which was as follows: "Cables and correspondence which passed between the Salvage Association and their agent . . . and other persons and came into existence on and after the 30th Oct.* 1913 *. . . such cables and correspondence being with regard to the subject-matter of this litigation and expressing or for the purpose of obtaining advice or evidence to be used in it or for the purpose of leading to the obtaining of evidence to enable the defendants' solicitors properly to conduct the action on their behalf."*

The defendants having claimed privilege :

Held, that the claim of privilege came within the decision in Birmingham and Midland Motor Omnibus Company Limited *v.* London and North-Western Railway Company (109 *L. T. Rep.* 64; (1913) 3 *K. B.* 850), *and was good, the correspondence having taken place after the parties became at arm's length, and having been obtained for use by the defendants' solicitors in the prospective litigation between the parties.*

Decision of Bailhache, J. reversed.

DEFENDANTS' appeal from a decision of Bailhache, J. at chambers.

The plaintiffs' claim was for a loss under a policy of marine insurance upon the plaintiffs' steamship *Aberlour.*

The writ of summons was dated the 26th Jan. 1914, and the action was in the Commercial list.

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

The points of claim were as follows:—

1. The plaintiffs are fully interested in a policy of marine insurance dated the 23rd Sept. 1913 and issued by the defendants for 2725*l*. upon the steamship *Aberlour* valued at 35,000*l*.

2. On the 28th Oct. 1913, during the currency of the said policy, the *Aberlour* was stranded near Perim Island, and thereby became and was a constructive total loss by perils of the seas. On the 30th Oct. 1913 the plaintiffs caused notice of abandonment to be duly given to the defendants [which the defendants refused to accept.]

3. On the 19th Feb. 1914 the defendants agreed in writing that the claim of the plaintiffs herein should be decided on the footing that the writ herein had been issued on the 30th Oct. 1913.

4. The *Aberlour* on the 30th Oct. 1913, or alternatively on the 26th Jan. 1914, was a constructive total loss by perils of the seas, being hard and fast where stranded as aforesaid and very seriously damaged.

5. The plaintiffs claim 2725*l*. with interest thereon from the 30th Oct. 1913.

The *Aberlour* was got off the shore in April 1914.

The plaintiffs applied by summons that the defendants "do allow the plaintiffs to inspect and take copies of all cables and correspondence which passed between the Salvage Association and their agent in Perim and other persons referred to in part 2 of the defendants' list of documents delivered on the 15th June 1914."

Part 1 of the defendants' list of documents consisted of copies of cables and letters between the Salvage Association and their agents at Perim from the 28th Oct. to the 30th Oct. inclusive, which the defendants did not claim to be privileged from production.

Part 2 was as follows:

Cables and correspondence which passed between the Salvage Association and their agent in Perim and other persons and came into existence on and after the 30th Oct. 1913, the day on which notice of abandonment was given, and which is treated at the plaintiffs' request as the day on which the writ was issued, such cables and correspondence being with regard to the subject-matter of this litigation and expressing or for the purpose of obtaining advice or evidence to be used in it or for the purpose of leading to the obtaining of evidence to enable the defendants' solicitors properly to conduct the action.

Bailhache, J. made an order in the terms of the summons, but gave leave to appeal.

The defendants appealed.

A. H. Chaytor for the defendants.—The documents in part 2 of the list of documents are privileged, and the order for inspection was wrongly made. The learned judge did not pay sufficient attention to the decision in *Birmingham and Midland Motor Omnibus Company Limited* v. *London and North-Western Railway Company* (*sup.*), and was apparently affected by the argument that it was the practice, in dealing with cases in the Commercial list, to allow inspection in the circumstances of the present case, nor did he look at the documents for which privilege was claimed. The case comes clearly within the decision in the *Birmingham Motor Omnibus* case and is governed by it, for as litigation was contemplated on the 30th Oct. 1913, and the documents were procured with a view to that litigation and for the purpose of being placed before the defendants' solicitors, the documents were privileged.

E. J. Macgillivray (*F. D. MacKinnon* with him).—The operations of the Salvage Association were not conducted wholly for the underwriters, but in part for the assured, being "on behalf of whom it may concern," and were not necessarily confidential, and there is nothing to show that they were of a confidential nature. There is nothing in the letters written before the 30th Oct., the demarcating date, to show that the letters written subsequently were confidential. He referred to

Anderson v. *Bank of British Columbia*, 35 L. T. Rep. 76; 2 Ch. Div. 648;
Jones v. *Great Central Railway Company*, 100 L. T. Rep. 710; (1910) A. C. 4.

BUCKLEY, L.J.—The vessel, the *Aberlour*, went ashore on the 28th Oct. 1913. On the 30th Oct. notice of abandonment was given, and refused. The writ in the action was not issued till the 26th Jan. in the following year; but nothing turns on that. The 30th Oct. 1913 is to be taken as the date on which the parties became at arm's length.

Under these circumstances the question is whether documents which came into existence from the 30th Oct. onwards, of the class I shall mention later, ought to be produced. The learned judge has held they ought to be produced, and the appeal is brought from his order.

The case being an action in the Commercial Court, there is no affidavit of documents, but a list of documents only, and I will read what is contained in part 2 of the list, which is to be taken as if it were in an affidavit. The documents in part 2 of the list are: "Cables and correspondence which passed between the Salvage Association and their agent in Perim and other persons, and came into existence on and after the 30th Oct. 1913, the day on which notice of abandonment was given, and is treated at the plaintiffs' request as the day on which the writ was issued." Now these are the relevant words, "such cables and correspondence being with regard to the subject-matter of this litigation, and expressing, or for the purpose of obtaining advice on evidence to be used in it, or for the purpose of leading to the obtaining of evidence to enable the defendants' solicitors properly to conduct the action on their behalf."

To my mind, that is a complete and satisfactory claim of privilege based upon the grounds recognised in *Birmingham and Midland Motor Omnibus Company Limited* v. *London and North-Western Railway Campany* (109 L. T. Rep. 64; (1913) 3 K. B. 850).

The question to be answered is this: Is the judge satisfied, the parties acting in good faith, that the documents sought to be protected were really obtained, though not by the solicitors, yet for the solicitors? Were they obtained for the purpose of being used not necessarily in an existing litigation, but in an anticipated litigation? Were they documents intended to be used, even if there should be no litigation, for the purpose of ascertaining whether or not it should be necessary to go to a solicitor to see whether, upon those documents, he would advise litigation, or would not?

Here the documents, upon the terms which are here expressed, were clearly obtained or passed between the Salvage Association, repre-

senting the underwriters, and persons on the spot, their agent at Perim, and other persons, for the purpose of obtaining information to be used in the litigation, which was then in contemplation between the parties.

In my opinion those documents are privileged. I do not find anything to the contrary of that in *Jones* v. *Great Central Railway Company* (100 L. T. Rep. 710; (1910) A. C. 4); we considered that case in the *Birmingham Motor Omnibus* case. The decision in *Jones* v. *Great Central Railway Company* was only this, that if the information obtained from someone else, as, for instance, if it be obtained by the person expecting to be engaged in litigation to be laid before a person who may under the circumstances be willing to help him in the litigation by paying the solicitor's bill, and taking up the case on his behalf, if the document be prepared under such circumstances, the House of Lords held it was not protected because subsequently it would be used as being the most convenient way of conveying to the solicitor, if, and when, one was employed, the facts as to the litigation.

I think this case falls entirely within the *Birmingham and Midland Motor Omnibus Company Limited* v. *London and North-Western Railway Company* case, and the production ought not to be given.

The appeal will be allowed.

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

It seems to me that the *Birmingham Motor Omnibus* case is directly in point.

I do not myself, in regard to the particular circumstances of this case, lay stress upon the fact that at a long subsequent date, for a reason that is perfectly intelligible, it was agreed that it should be taken that the writ was issued on the 30th Oct., and therefore at an earlier date, I think some three months earlier, than the date at which it was actually issued. I think one ought to look at this case according to the dates as they stood for all purposes.

If the letters were written between Oct. 1913 and the time of the actual commencement of the action, if the letters were written without being in their purpose such as those for which privilege was allowed in the *Birmingham Motor Omnibus* case, then I do not myself think that the fact that they *nunc pro tunc* were in fact written at a later date would either one way or the other affect the right of the other party, the respondents here, to discovery of them. I think that one ought to look at the facts, as they really were, and not at the facts affected by the special agreement as to the date of the writ.

Assuming that to be so, these are letters written after, in fact, the first step had been taken which puts the parties, as it has been said, at arm's length; and I of course assume that as between such bodies as are litigants here there will be the utmost good faith, without which, in fact, the substitution of a list of documents for an affidavit could not be allowed to continue. The list of documents is to be taken as a sworn statement, and treated as such. Are the words used here not merely sufficient as a formula to cover those letters and protect them from discovery, but, looking at the nature of the case, were these letters in substance written to or by or for the agents of the Salvage Association for the purpose of being used by one side in litigation which is, if not actually in form, yet obviously threatened and impending? I think myself they clearly were so written, because, as Mr. Chaytor tells us, the only letters for which this privilege is claimed are letters substantially of advice, either taking advice or a request to that end.

It seems to me in principle, as well as upon authority, these are privileged documents, and therefore this appeal ought to be allowed.

PHILLIMORE, L J.—I agree.

There is no question of good faith in the matter. I take it, whenever one party wishes to impugn good faith in a case of this kind, his course is to require an affidavit for which this list is substituted.

That being the case, we have merely to determine if this case comes within the *Birmingham Motor Omnibus* case, and it seems to me a sound and sensible rule that the moment notice of abandonment is given and refused, the parties are sufficiently at arm's length to make the *Birmingham Motor Omnibus* case applicable.

Appeal allowed.

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

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

July 1, 2, 3, *and* 31, 1914.

(Before BUCKLEY, KENNEDY, and PHILLIMORE, L.JJ.)

JOSEPH TRAVERS AND SONS LIMITED v. COOPER. (a)

APPEAL FROM THE KING'S BENCH DIVISION

Carrier—Lighterman—Contract to lighter goods —Exemption from liability—Negligence.

When a bailee of goods has to admit that goods have been damaged while in his custody, and in the absence of his custodian, and it is found that the absence was improper and negligent, and that the absence makes it difficult to determine what was the cause of the damage, and the owner of the goods can suggest a probable cause which the presence of the custodian might have prevented, the burden of proof is imposed on the bailee to show that it was not the negligent absence of his custodian which was the cause of the damage.

Where goods were laden on a barge under a contract by which the barge owner sought to relieve himself from liability for negligence by the insertion of the following clause, "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any loss of or damage to goods, however caused, which can be covered by insurance . . ." and the barge owner's servant was in fact negligent in that he left the barge unattended, in consequence of which during his absence the barge began to fill and later sank, the Court of Appeal held that the onus lay upon the barge owner to show that he had taken proper and reasonable care of the goods, and that the negligence of his servant was not the cause of the loss.

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

Decision of the House of Lords in Morison, Pollexfen, and Blair v. Walton (*unreported*), *decided on the* 10*th May* 1909, *followed.* (*a*)

Held, further (*Buckley, L.J. dissenting*), *that the terms of the notice given by the defendant were wide enough to exempt him from liability for loss by negligence.*

PLAINTIFFS' appeal from a decision of Pickford, J. in the Commercial Court, reported 12 Asp. Mar. Law Cas. p. 444; and, on appeal, 20 Com. Cas. 44; 110 L. T. Rep. 159.

The plaintiffs' claim was for loss and damage sustained by them through the alleged negligence of the defendant's servant.

The defendant was a wharfinger and warehouseman, and also undertook lighterage for reward. On the 2nd Jan. 1913 the plaintiffs instructed the defendant to collect certain cases of tinned salmon from the Royal Albert Dock, and lighter them to the defendant's wharf. The following clause was printed on all the defendant's letters and invoices: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft, and are made without recourse to lighterman," and it was admitted that the lighterage was upon these terms. The cases were put on the barge *Mabel*, and on the 9th Jan. were taken by the defendant's lighterman to a wharf, where the barge was made fast about 4 p.m. The lighterman left the barge unattended at about 9 p.m., when she was about to take the ground, low water being at 10.27 p.m. On returning about midnight he found the water flowing into her hold, she became submerged, and her cargo was damaged.

By his points of defence the defendant denied negligence, and that the negligence (if any) caused the loss, and further pleaded that he was exempted from liability by the terms of the contract.

At the trial the plaintiffs contended that the barge was underpinned, and that that would not have happened if the defendant's servant had remained at his post. The defendant contended, on the other hand, that the barge was mud-sucked and that the presence of his servant would not have prevented the loss.

Pickford, J., with great doubt, came to the conclusion that the submersion was due to mud-sucking rather than to underpinning. He found that the defendant's servant was negligent in leaving the barge unattended, but he held that the plaintiffs had not proved that the loss sustained was attributable to the negligence of the defendant's servant, and that the burden of proving this was on the plaintiffs, and he ordered judgment to be entered for the defendant. He further stated that, if he had had to decide whether the condition in the contract exonerated the defendant from liability for negligence, his inclination would be to hold that the condition did not cover the defendant, and did not protect him from liability.

The plaintiffs appealed.

Leck, K.C. and *F. D. MacKinnon* for the plaintiffs.—The learned judge, having found that the defendant's servant was negligent in going away from the barge and leaving it unattended, should have held that the onus was on the defendant to prove that the negligence was not the cause of the loss, and not that it was for the plaintiffs to prove in those circumstances that the negligence caused the loss. In the words of Lord Loreburn in *Morison, Pollexfen, and Blair* v. *Walton* (unreported), decided on the 10th May 1909 in the House of Lords, which case was *in pari materiâ*, "it is for him (the defendant) to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his own wrongdoing, he must make the loss good." Here the onus was on the defendant to show that the negligence did not cause the loss:

Phipps v. *New Claridge's Hotel*, 22 Times L. Rep. 49;
Dollar v. *Greenfield*, *Times*, May 19, 1905;
Scott v. *London and St. Katherine's Docks Company*, 13 L. T. Rep. 148; 3 H. & C. 596.

Here the defendant has not shown that the negligence did not cause the loss. Assuming that the learned judge was right in finding that the barge was mud-sucked, and not underpinned, still the defendant has not shown that the presence of his servant would not have prevented the loss. It is submitted that the true effect of the evidence is that the barge was underpinned, which could easily have been prevented if the defendant's servant had not deserted his post.

Adair Roche, K.C. and *J. Cranstoun*, K.C. for the defendant.—Negligence which causes no damage is not actionable. It lies upon the plaintiffs to show that the negligence led to the loss:

Giblin v. *McMullen*, L. Rep. 2 P. C. 317;
Medawar v. *Grand Hotel Company*, 64 L. T. Rep. 851; (1891) 2 Q. B. 15;
Brind v. *Dale*, 8 C. & P. 212;
Finucane v. *Small*, 1 Esp. 315.

The mere fact that a loss has occurred does not prove that the negligence here led to the loss. In *Barnabas* v. *Bersham Colliery Company* (102 L. T. Rep. 621; 4 B. W. C. C. 119) the House of Lords held that where the facts were equally consistent with the workman having died from natural causes and from an accident, the applicants for compensation had not discharged the onus upon them. The learned judge found that the submersion here was due to mud-sucking, and the lighterman could not have prevented that result if he had been present. The defendant on this finding, which should not be disturbed, has shown that the negligence did

(*a*) The material words of the decision in *Morison, Pollexfen, and Blair* v. *Walton* (unreported), decided on the 10th May 1909, were, per Lord Loreburn, L.C., "Here is a bailee, who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision and difficult to discover at all what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his own wrongdoing, he must make that loss good"; and, per Lord Halsbury, "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him." If the shorthand notes of this case can be obtained it will be reported in these Reports at a later date.—ED.

not cause the loss, or at the least he has shown there was great doubt whether the loss could have been prevented. The plaintiffs, therefore, have failed to show that the loss was due to the negligence. Secondly, assuming that the negligence caused the loss, and that the defendant is a common carrier, he is exempted by the terms of the contract, which relieves him from liability "for any damage to goods, however caused, which can be covered by insurance." The words "however caused" include loss occasioned by the negligence of the defendant, and the inclusion of those words distinguishes this case from *Price* v. *Union Lighterage Company* (9 Asp. Mar. Law Cas. 398; 89 L. T. Rep. 731; (1904) 1 K. B. 412). The effect of the inclusion of these and equivalent words is shown by the decisions in

Austin v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 16 Q. B. 600; 20 L. J. 440, Q. B.;
Great Northern Railway Company v. *Morville*, 21 L. J. 319, Q. B.;
Peek v. *North Staffordshire Railway Company*, 8 L. T. Rep. 768; 10 H. L. Cas. 473;
Taubman v. *Pacific Steam Navigation Company*, 26 L. T. Rep. 704; 1 Asp. Mar. Law Cas. 336;
Ashenden v. *London, Brighton, and South Coast Railway Company*, 42 L. T. Rep. 586; 5 Ex. Div. 190;
Manchester, Sheffield and Lincolnshire Railway Company v. *Brown*, 50 L. T. Rep. 281; 8 A. C. 710;
Pyman Steamship Company v. *Hull and Barnsley Railway Company*, 111 L. T. Rep. 41; (1914) 2 K. B. 788.

These authorities show that the terms of the contract protected the defendant from liability for negligence even if it occasioned the loss. [They referred also to *Finucane* v. *Small* (1 Esp. 315), *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), *The Glendarrock* (7 Asp. Mar. Law Cas. 420; 70 L. T. Rep. 344; (1894) P. 226), *Tamvaco* v. *Timothy* (Cab. & E. 1), *Chattock* v. *Bellamy* (64 L. J. 250, Q. B.), *Consolidated Tea and Lands Company* v. *Oliver's Wharf* (102 L. T. Rep. 648; (1910) 2 K. B. 395), *Liver Alkali Company* v. *Johnson* (31 L. T. Rep. 95; 9 Ex. 338), *The Pearlmoor* (9 Asp. Mar. Law Cas. 540; 90 L. T. Rep. 319; (1904) P. 286), and *The Stella* (9 Asp. Mar. Law Cas. 66; 82 L. T. Rep. 390; (1900) P. 161).]

Leck, K.C. in reply.—The words of the exemption clause do not protect the defendant from the consequences of negligence, for they are, for all practical purposes, indistinguishable from those used in *Price* v. *Union Lighterage Company* (*sup.*), and in both cases the exemption clause deals only with a limited class of risks—namely, those which can be covered by insurance. *Sutton* v. *Ciceri* (63 L. T. 742; 15 A. C. 144) decided that an exemption of "insurance risks" does not discharge the defendant from the ordinary liability of a carrier to exercise due care. The railway cases have little application, for they do not deal with the exemption in terms of risks which can be covered by insurance. The words "however caused" add nothing to the risks exempted by the clause. This case comes within the decision in *Price* v. *Union Lighterage Company* (*sup.*), which was followed in the Court of Appeal in *Nelson and Sons* v. *Nelson Line* (10 Asp. Mar. Law Cas. 544, 581; 96 L. T. Rep. 402; (1907) 1 K. B. 769), and is governed by that decision.

Cur. adv. vult.

The following judgments were read:—

July 31.—Buckley, L J.—In this action the plaintiffs sue for damages sustained by the defendant's negligence in relation to the lighterage of goods by the lighter *Mabel*. The lighter was lying at night at the Aberdeen Wharf. The defendant left her unattended. The tide fell so that she took the ground; when the tide rose again she was either underpinned or mud sucked, and failed to rise. The water got in, the barge was submerged, and the goods were damaged.

The defendant was guilty of negligence in leaving her unattended, but he says that, assuming negligence, and assuming that the negligence caused the loss, he is not liable by reason of certain words in the contract. These words are: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any loss of or damage to goods, however caused, which can be covered by insurance.'

Before coming to any authorities, let me examine these words and see what they import. It is not every loss which is excluded by the words in question. The losses are confined to "any loss or damage which can be covered by insurance." This infers that there may be losses which cannot be covered by insurance. It may be that practically every loss can be covered by insurance, but this document evidently contemplates that within its meaning some cannot. The clause of immunity therefore is confined to certain losses —namely, losses which can be covered by insurance.

The next step is to consider what are the losses or damages which this contractor would be under if he were not protected against them. For it is to such that the words must be addressed. For this purpose it is necessary to ascertain what the defendant's business was.

Was he a common carrier or was he a person who came under the same liability as if he were a common carrier? It seems to me unnecessary to consider whether this defendant was a common carrier. If he has undertaken the liability of a common carrier, he stands in the same position as regards liability.

The question whether he has undertaken such liability or not is, according to *Tamvaco* v. *Timothy* (*sup.*), one of fact. He was a person who did not hold himself out as ready to carry goods for everyone, but he did, I think, hold himself out as a person ready to carry goods for reward for anyone who resorted to his wharf as a customer of himself as a wharfinger. All his billheads and stationery were headed with these words: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman."

According to the *Liver Alkali Company* v. *Johnson* (*sup.*), such person may incur the liability of a common carrier. As a lighterman he was, I think, a person who incurred the liability of a common carrier in respect of the goods he carried. *Chattock* v. *Bellamy* (*sup.*) and *Consolidated Tea Company* v. *Oliver* (*sup.*) are no doubt cases in

which the question of fact was resolved the other way. In the last-mentioned case Hamilton, J. (as he then was) thought that the wharfinger only occasionally rendered to the customer of the wharf the subsidiary service of collecting and carrying his goods from the import steamer, and on that ground held that he was not subject to the liability of a common carrier. The question is one of fact, and, looking at the business in the present case, it is to be resolved, I think, in favour of holding that the defendant undertook the liability of a common carrier.

This being so, the defendant's liability was not confined to the liability to take proper care of the goods and not to be negligent, but extended to a liability to carry the goods safe against all events except the act of God and the King's enemies.

He was, therefore, under two liabilities—the one a liability for negligence and the other a liability, as it is commonly expressed, as an insurer. His position is similar to that of the shipowner who is under two liabilities—the one as insurer, arising from the fact that he is a carrier, and the latter a liability arising from the implied warranty of seaworthiness. This was much discussed recently in *Ingram and Royle Limited* v. *Services Maritimes du Trêport Limited* (12 Asp. Mar. Law Cas. 295, 493; 109 L. T. Rep. 733; (1914) 1 K. B. 541).

In this position of affairs an intelligible meaning is at once given to the words of exemption, "loss or damage which can be covered by insurance." To the extent of his liability as insurer the contract relieved him from liability, but the contract leaves him liable for negligence.

In this state of things the decision in *Price* v. *Union Lighterage Company* (*sup.*) is, I think, exactly in point. That decision may be summarised by saying that the contract is to be read as if it contained the words "I will use reasonable care and skill, and will be liable for negligence, but as to losses which can be covered by insurance and for which, but for contract to the contrary, I should be responsible to you as insurer, I am not to be liable for those. If you want to provide for them you must cover them by insurance." If the carrier, says Walton, J. (9 Asp. Mar. Law Cas. 398; (1903) 1 K. B. 752), desires to exempt himself he must do so in express, plain, and unambiguous terms. The parties are to be taken as contracting with reference to losses which are the common misfortune of both to the exclusion of losses which are due to the fault of one, unless the contrary be so expressed. The decision in that case was approved and followed in *Nelson* v. *Nelson Line* (96 L. T. Rep. 402; (1907) 1 K. B. 769; 97 L. T. Rep. 812; (1908) A. C. 16), where Lord Collins, at (1907) K. B., p. 778, pointed to the same considerations as I have mentioned with reference to the use of the word "insurance." Again in *Sutton* v. *Ciceri and Co.* (*sup.*) Lord Herschell deals in the same way with the words "insurance risks," as to which he says that where spoken of in contradistinction to freight, the words cannot have so extensive a meaning as to exempt the party from liability as an ordinary carrier. *The Pearlmoor* (*sup.*) is to the same effect.

We have, however, been referred to cases earlier in date than *Price* v. *Union Lighterage Company* (*sup.*), in which a larger exemption has been allowed in cases in which there have occurred words such as "in any case" or "under any circumstances" or "however caused," words which did not occur in *Price* v. *Union Lighterage Company*. They are mostly railway cases. The first, in 1851, *Austen* v. *Manchester and Sheffield Railway* (*sup.*), is not, I think, of general application. In that case the owner of the horses accepted under the contract an obligation to see to the efficiency of the carriage before he allowed his horses to be placed therein. There was a special contract in the matter again in a second action between the same parties which is reported in 21 L. J. 17, C. P. In *Great Northern Railway Company* v. *Morville* (*sup.*) the words were "for any damage, however caused," but again the contract contained the terms of a special agreement in the matter. In *Taubman* v. *Pacific Steam Navigation Company* (*sup.*) the words were "under any circumstances whatsoever." It was held that this covered a case of wilful default and misfeasance. In *The Stella* (*sup.*) the words were "however caused." In that case Gorell Barnes, J. says the condition is clearly one which excludes the company from liability for the accident in this case. But the point does not seem to have been argued.

I doubt whether the decisions in *Taubman* v. *Pacific Steam Navigation Company* (*sup.*) and *The Stella* (*sup.*) can stand with the decision in *Price* v. *Union Lighterage Company* (*sup.*). The case which creates most difficulty is that of *Manchester and Sheffield Railway Company* v. *Brown* (*sup.*). The words there were "liability for loss or damage by delay in transit or from whatsoever cause arising." These were the words contained in the offer as made by the company. The document signed by Brown ran "free and relieve the railway company from all claim or liability for loss or damage," not adding "from whatsoever cause arising." But the case proceeded upon the footing that the words in the offer and not the more limited words in the acceptance were the words to be considered. The language of Lord Blackburn at 8 A. C., p. 709, is this: "Custom and ordinary usage says, in bills of lading, when the goods are going by sea, 'perils of the seas excepted.' Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, 'I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage.' And so of leakage, and many other things of that sort. But that does not in the slightest degree show that when a man says he will not be responsible for damage however caused that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants."

These words, it will be noticed, contrast the liability as an insurer with the liability for negligence, and contrast them in a case in which there was not, as in the present case, a limited class of loss contemplated by the exemption clause in question. Had the words been, as in the present case, "I will not be responsible for insurance risks," inferring "I will be responsible

for other risks," Lord Blackburn's words would not, I think, apply. It is, moreover, to be borne in mind as regards all the railway cases, that they are cases in which a company enjoying a monopoly but compellable to carry and covered by such a provision as is contained in sect. 7 of the Act of 1854 (17 & 18 Vict. c. 31) is the defendant in an action.

The effect of sect. 7 is that the company is liable for negligence notwithstanding notice to the contrary subject to a proviso that the company may make such conditions as the court shall find to be just and reasonable. Negligence, therefore, is within the subject-matter dealt with, and a condition which is found to be just and reasonable may possibly be imposed even in the matter of negligence. The railway cases are to be treated, I think, as being a class of their own.

The conclusion at which I arrive with regard to this clause is that it relieves the defendant from liability for loss falling within a certain class, and that the class is that of insurance risks in the ordinary meaning of that word as distinguished from liability for negligence. For these reasons I think that the defendant is not protected by the clause in question.

There arises, therefore, the question whether the plaintiffs have proved their case. They have proved negligence, but the learned judge has held that they fail because they have not proved that the negligence caused the loss. If the learned judge had enjoyed the assistance which we have of the decision of the House of Lords in *Morison, Pollexfen, and Blair Limited* v. *Walton* (unreported), decided on the 10th May 1909, I doubt whether he would have decided this point as he did.

The language of Lord Loreburn in that case seems to me to be directly in point. It was a case in which a fire float which was being towed was lost, and the reason why she sank was unknown because there was no one on board her as there ought to have been. Lord Loreburn said: "Here is a bailee, who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision and difficult to discover at all what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his own wrongdoing, he must make that loss good." And Lord Halsbury said: "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him." That is, I think, precisely applicable to the present case.

Upon the evidence there is the greatest difficulty in saying what happened, whether the barge was underpinned or whether she was mud-sucked. The learned judge thought that the evidence was more consistent with the latter than the former, and said: "I come to the conclusion that the evidence leads me to say that this arose from mud sucking and not from being underpinned." But having to choose between two theories, the judge said no more than that he was led to the one rather than to the other. What did take place it was impossible to prove, and the impossibility arose from the fact that the defendant neglected his obligation to keep a man in charge. The defendant, as bailee of the goods, is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and that the loss would still have resulted. He has not discharged himself of that onus. *Phipps* v. *New Claridge's Hotel* (22 Times L. Rep. 49), *Scott* v. *London and St. Katherine Docks Company* (*sup.*) are in point except that the question there was whether there was negligence or not, not whether the negligence caused the loss, and *Barnabas* v. *Bersham Colliery Company* (*sup.*) contained, I think, nothing to the contrary. Lord Loreburn, who gave judgment in the last-mentioned case, is the learned Lord from whom I have already cited in *Morison, Pollexfen, and Blair Limited* v. *Walton* (*sup*).

Upon this ground I think that the decision under appeal should be reversed, and judgment given for the plaintiffs.

KENNEDY, L.J.—In this case there is no doubt that the defendant's servant, who ought to have been in attendance upon the lighter during the night in the course of which, through some cause or other, it became submerged with the valuable cargo of the plaintiffs' on board, improperly absented himself, and that through this misconduct the defendant must be held guilty of negligence in regard to the property of the plaintiffs of which the defendant was bailee. Pickford, J. (as he then was) has so found, and upon the hearing of this appeal the defendant's counsel did not dispute the propriety of this finding of fact. The learned judge, notwithstanding, gave judgment for the defendant, because he held that it was not proved by the plaintiffs that the submersion of the lighter with her cargo was attributable to this negligence.

Two causes of submersion were suggested, "mud-sucking" and "underpinning." There were, said the learned judge, "the greatest possible difficulties in preferring one of these theories to the other," but he came to the conclusion that the difficulties in the way in regard to underpinning were greater than those which were involved in the "mud-sucking" solution.

Thereupon, if it be assumed that the cause of the submersion was "mud-sucking," came the further question: Might the submersion have been prevented if the defendant's lighterman had not absented himself? The learned judge held that it was not proved to him that if the defendant's servant had been there he could have prevented the accident; and therefore, although, as he says, he did not like to free the defendant from the consequence of what he thought was negligence, he came to the conclusion that it was not shown that the defendant's negligence was the cause of the accident. It is clear that the propriety of this result depends upon a view as to

the burden of proof that in such a case that burden lies upon the plaintiff.

"Mr. Leck argued," said the learned judge, "that once I find negligence it is for the defendant to prove conclusively that the man could not have done anything to free the barge. I do not think that is the right point of view. I think that in this case, just as in any other, it is for the plaintiffs to prove that the negligence which occurred was the cause of the accident. . . . I have no evidence before me at all to lead me to conclude that if the man had been there he would have obtained assistance of any kind, and therefore, as I say with some regret, because I do not like to free the defendant from the consequences of what I think was negligence, I come to the conclusion that it is not shown that negligence was the cause of the accident."

With due deference I must say that I am unable to concur in this treatment of the burden of proof in such circumstances. I agree with Mr. Leck that the burden of disproof rested upon the defendant.

We have properly been referred by the plaintiffs' counsel to the opinions expressed in the House of Lords by Loreburn, L.C. and Lord Halsbury in the unreported case of *Morison, Pollexfen, and Blair Limited* v. *Walton,* which was heard on the 10th May 1909. A copy of the shorthand notes of the proceedings has been supplied to us. There, as here, the claim was by a bailor against a bailee. "Here is a bailee," said Lord Loreburn, "who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him, and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision, and difficult to discern at all, what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his wrongdoing, he must make that loss good." And so Lord Halsbury: "It appears to me that here there was a bailment made to a particular person—a bailment for hire and reward—and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment. The proof of that rested upon him."

If the decision in this appeal depended simply upon this question of the burden of proof, this court would have to consider whether it could properly, upon the evidence already taken, give judgment for the plaintiffs, or should order a new trial. But, independently and outside of it, there is an important question of law in regard to the terms of the contract of carriage which the defendant's counsel have very fully argued in this court, as they were entitled to do, although it is clear that it was not much discussed before my brother Pickford in the court below. He states the view which he was inclined to prefer; but he did not give any definite judgment upon the point.

The defendant relies upon a certain condition in the contract as exonerating him from liability for negligence. The learned judge, while, as I have said, expressly stating that it was unnecessary for him to decide it, because he held it was not proved that the defendant's negligence caused the loss and damage sued for, stated also, adversely to the defendant, that if he had to decide the point his inclination would be to hold that the condition in the contract did not cover the defendant and did not protect him from liability.

This point of contractual liability arises in the following way: The defendant, who is a warehouseman, also undertakes for reward lighterage for his customers. He performs this lighterage sometimes in barges of his own and sometimes in hired barges. He undertook such lighterage in the case of the plaintiffs' goods on this occasion upon the terms of a written notice in the following words: "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft, and are made without recourse to lighterman."

The question is whether the terms of this condition are such as to protect the defendant from liability for the loss of or damage to the plaintiffs' goods, if such loss or damage was caused by the negligence of the defendant's servant in charge of the lighter and of the plaintiffs' goods on board of it.

In dealing with this question, it is not necessary to decide whether, apart from the special condition, the liability of the defendant as a lighterman would or would not have been analogous to that of a common carrier according to the doctrine laid down by the Exchequer Chamber in 1874 in the case of *Liver Alkali Company* v. *Johnson* (*sup.*). I incline to think that it was. The decision of Hamilton, J. (as he then was), in *Consolidated Tea and Lands Company* v. *Oliver's Wharf* (*sup.*), which was cited to us in support of a different view, may, I think, be distinguished on the facts. The warehousing firm in that case owned no lighters, and while in some cases conveying a customer's goods in a hired lighter from ship to wharf, made no charge for that, but had a uniform rate, called a management rate, from which no abatement was made in cases in which the customer did his own lightering.

In the present case the defendant, though it appears from the evidence that he lighters only for customers who employ his services as a warehouseman, also appears from the terms of the notice which I have quoted to undertake lighterage and to make a charge for that particular service. In the absence of an express contract between the parties, the measure of the liability of a warehouseman who undertakes the lighterage of a customer's goods must, I think, depend upon the inference to be drawn from the particular facts in each case. In the case of *Tamvaco* v. *Timothy and Green; Union Lighterage Company, Third Parties* (*sup.*), in the year 1882, tried before Cave, J., sitting with a London special jury in the Guildhall, the facts were that the defendants, who were wharfingers in the Thames, carried in a lighter

for the plaintiffs, their customers, certain rice in a barge, which stuck in the mud, whereby the rice was injured. They made one common charge for carrying and warehousing. Cave, J. left the question of the terms of the contract of carriage, which were not the subject of any express agreement, but had to be inferred from these arrangements, to the jury, and they, after hearing the matter argued by very eminent counsel, found by their verdict that it was understood between the plaintiffs and the defendants when the agreement was made as to these goods that the defendants should undertake the liability of common carriers.

In the present case, whether he had the larger liability of a common carrier or not, there can be no doubt that the defendant had at least the duty not to be negligent in regard to the carriage of the goods in his lighter, and he was negligent. Is he protected by the terms of the special contract from the consequences of that negligence to the owner of the goods? But for the words "however caused," I am of opinion that he would not be, and that the decision of this court in *Price and Co.* v. *Union Lighterage Company* (*sup*), affirming the judgment of Walton, J., which is referred to by Pickford, J. in his judgment in the present case, would bind us so to hold. In that case, however, there were no such words as "however caused." The contract of carriage exempted from liability only "for any loss or damage to goods which can be covered by insurance."

There were no words referring to causation. Mr. Roche, in his full and able argument, has satisfied me that the presence of such words creates an essential difference; and that, while it is settled law that a contractual exemption, whether from loss or damage generally or from certain enumerated forms of loss or damage (such, *e.g.*, as collisions, stranding and other perils), will not be read as protecting the carrier from liability for loss or damage if the loss or damage is proved to arise from the carrier's negligence and words "for any loss or damage to goods which can be covered by insurance" do not operate to enlarge the exemption as appears from the case to which I have just referred, a different position in regard to the carrier's liability is created if the exemption clause is so worded as, according to the natural and plain interpretation of its language, clearly to comprehend all loss or damage, however that loss or damage may originate.

The general principle was laid down by Lord Blackburn in *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown*, at pp. 709 and 710 of 8 A. C. "When an exception is made, the question is, What is excepted? Custom and ordinary usage says, in bills of lading when the goods are going by sea, 'perils of the seas excepted.' Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, 'I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage.' And so of leakage, and many other things of that sort. But that does not in the slighest degree show that when a man says he will not be responsible for damage, however caused, that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants."

So a protective effect against the consequence of the carrier's negligence has been given to an exemption clause in 1872 in *Taubman* v. *Pacific Steam Navigation Company* (*sup.*), where the words were "under any circumstances whatever"; in 1875, in *Thompson* v. *Royal Mail Steam Packet Company*, quoted in the note to 5 Asp. M. L. C. 189, where the words were "under any circumstances"; in 1883, in *Haigh* v. *Royal Mail Steam Packet Company* (48 L. T. Rep. 267; 5 Asp. M. L. C. 189), "in any circumstances"; in *The Stella* (*sup.*), where the words were "any injury howsoever caused"; and quite recently by Bailhache, J. in *Pyman Steamship Company* v. *Hill* (*sup.*), where the words were "whatever be the nature of such accident and damage or howsoever arising."

In the present case the condition which we have to consider uses the very words of exemption referred to by Lord Blackburn (*ubi sup.*), "damage however caused"; and I see no sufficient reason not to treat them as sufficient to protect the defendant from liability for the negligence of his servant in regard to the carriage of the plaintiffs' goods.

On this ground, therefore, while, for the reasons which I have stated, I respectfully differ from my brother Pickford in regard to the view which he has taken as to the burden of proof upon the question of negligence, I think that in the result the defendant is entitled to retain the judgment in his favour, and that this appeal should be dismissed.

Phillimore, L J.—The plaintiff company was the owner of a cargo of tinned salmon in cases which was shipped on board the defendant's lighter, and which was damaged owing to the submergence of the lighter on a rising tide in the river Thames off Aberdeen Wharf about midnight between the 9th and 10th Jan. 1913. The lighter was in charge of a lighterman who was absent from his post for a period beginning at 8.45 or 9 p.m. till about 12.30 a.m., by which time the mischief had been done. This absence was without justification, and has been rightly found by the learned judge who tried the case, Pickford, J. (now Pickford, L.J.), to have been an act of negligence. According to the terms of the contract of carriage, the defendant was not liable as an insurer, but he may be liable for the negligence of his servants.

The first question, therefore, to be determined is whether the loss can be imputed to the negligent absence of the lighterman from his post. It was low water at 10.27 p.m., and the barge in the ordinary course took the ground some time before low water. As the tide made she did not rise with it, and the water flowed over her and the cargo was spoilt. It was common ground that the inability of the barge to rise with the tide must have been due to one of two causes: Either the round of her quarter was caught under a horizontal beam which ran along the face of the wharf, and so pinned her down, or the barge was held by the suction of the mud. Either of those causes was possible, but the circum-

stances made both improbable, and it was very difficult to choose between them. If the cause was the underpinning, it seems to me clear that the negligent absence of the lighterman was an important factor of the loss. If the awkward position of the barge, no longer true with the side of the wharf, but so swung that her counter was under the beam, was a position taken by the barge before she grounded, the leaving her to rise in a similar position without attendance, without being there to use such means as he could, or procuring additional assistance, if desirable, would be a gross act of negligence.

Putting the matter in a way to press less hardly on the lighterman, and assuming that the barge took the ground in a true parallel with the wharf, then, if he had been on board or on the wharf as she rose, and had seen her, owing to some action of the current, beginning to swing under the beam, he could, by use of a hitcher, or pulling on or slackening of the ropes with or without assistance, which could have been obtained, have prevented her getting into danger or could have easily freed her. If the loss was due to suction, it is not so clear that the personal attendance of the lighterman could have prevented it, but it is not by any means impossible. If the loss were due to suction, it is a necessary part of the defendant's case that the barge took the ground as she was found when she was raised—*i.e.*, lying with her head out from the wharf about 10ft., her stern out 5ft. or 6ft. If the lighterman was, as he says, there when she took the ground, and, as he says, noticed her position so that he could not get on board her from the wharf, that of itself was some warning. If she was to be tended at all he would require to be put on board her either by the boat or by the tug which was to tow her away between one and two in the morning. If he had been there, it is possible that he either by himself or with help might have let in air, and taken away the force of suction by the use of a hitcher or hitchers put under the barge, or the tug might have been fetched earlier, or possibly some jerk, applied to the mooring ropes by him, with or without help, might have freed the barge from suction. If the burden was on the defendant of showing that the negligent absence of the lighterman could not have been the cause of the loss, he did not discharge it, even supposing the more favourable view of the circumstance is taken—viz , that the loss was due to suction instead of underpinning.

Pickford, J. seems to have thought that the burden of proving that the negligent absence of the lighterman was a cause of the loss lay upon the plaintiff company. Taking first the two causes of loss, he was inclined upon the whole to think that suction was the more probable one.

Taking the evidence, as it is before us on paper, I should rather incline to the other view, but so much depends upon the way in which it came out that I should not be disposed to put my view in this respect against his. But I think we may fairly say that there is no certainty, and even no high degree of probability, that one view is more likely than the other, and that upon whichever of the two parties the burden lies of showing which was the cause that party has not discharged it. If, however, as the defendant contends, we were to assume suction as the cause, again it is not certain whether or not the presence of the lighterman would have prevented the loss.

Pickford, J. has held that it was not proved that the presence of the lighterman would have prevented the loss, and, so holding, he has given judgment for the defendant. If the test be as he has put it, I should again not be prepared to disagree with him. In fact I think it is a matter of speculation as to which nobody could pronounce with a reasonable degree of certainty. It is possible that it might, and it is possible that it might not. And this gives rise to the question: On whom was the burden of proof? It is here that I differ from the learned judge. I think he has imposed the burden of proof on the wrong party. I think that, when the bailee of goods has to admit that the goods have been damaged while in his custody, and in the absence of the custodian, and it is found that the absence was improper and negligent, and that that very absence makes it difficult to determine what was the cause of the damage, and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage. As was said by Lord Loreburn when Lord Chancellor in *Morison* v. *Walton* (*sup.*): "It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his own wrongdoing, he must make that loss good." I think I should have come to the same conclusion rather as a matter of business and common sense than of law, if I had been unaided by this decision in the House of Lords. If, therefore, there were no point upon the contract, I should think that the plaintiff company were entitled to recover; but there is a point upon the contract, on which provisionally Pickford, J. took a view unfavourable to the defendant, but which it was unnecessary for him to determine. This now becomes of importance.

The defendant is a wharfinger as well as a lighterman, and his business as a lighterman is subordinate or ancillary to his business as a wharfinger, and he received these goods to carry them for storage at his wharf, and upon terms which are contained in a printed notice appended to all his letters and invoices, of which the plaintiff company had notice, and which must be deemed to form part of the contract. These terms are thus expressed: "The rates charged by us (me) for lighterage are for conveyance only. I will not be liable (responsible) for any loss of or damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman."

Thereupon the question arises whether by this language he has stipulated that he shall not be liable for a loss which may be due to the negligence of his servants. The words "any loss, however caused," are large enough to include a loss due to negligence, but it is said that a series of decisions have put a limited construction upon these general words.

Before proceeding to determine the question of construction, it is desirable to see what would have been the defendant's position had there been no such clause. The plaintiff company contends that without such a clause the defendant would have been in the ordinary position of a barge owner who

carries by water, or, at any rate, on the sea or tidal waters, which is that he has the liabilities of a common carrier, and is responsible for the safe delivery of the goods, being allowed to set up no excuses except those called "the act of God" and "the King's enemies." The defendant contends on the authority of *Consolidated Sea and Lands Company* v. *Oliver's Wharf* (*sup.*) and *Chattock* v. *Bellamy* (*sup.*) that he is not under this liability.

In the two cases on which he relies the circumstances were very special. In *Chattock* v. *Bellamy* (*sup.*) there were other grounds for deciding in favour of the defendant. And it does not appear to me that either of them is a sufficient authority for the present case. The general rule is that the barge owner is liable. This was well established by *Liver Alkali Company* v. *Johnson* (*sup.*). If there were sufficient circumstances in either of the two cases relied upon to take the particular contract of carriage out of the general rule, there are no sufficient circumstances in this case. If it be said that the difference between the circumstances in this case and the circumstances in those cases is slight, I reply that either it is sufficient or those decisions must be wrong.

I approach, therefore, the construction of the contract from the position that, without it, the barge owner would be liable for all losses except those occasioned by the "act of God" and the "King's enemies"; so that the clause protecting him from liability for loss is wanted for protection in other cases besides those of negligence.

Thus far I am in favour of the plaintiff company. But it remains that the words are wide enough to protect from loss by negligence.

There have been two lines of decision as to general words of this nature. One line is conveniently represented by the decision in *Price and Co.* v. *Union Lighterage Company* (*sup.*), to the effect that by such an exemption in general terms, not expressly relating to negligence, the barge owner is not exempt from liability for a loss caused by the negligence of his servants. This is well established for the words "any loss of or damage to goods," whether with or without the words "which can be covered by insurance." On the other hand, there is the decision in *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown* (*sup.*), where the words "all liability for loss or damage by delay in transit or from whatever cause arising" were held to protect the railway company from liability for the negligence of their servants in accepting for carriage fish which they could not carry in time. Lord Blackburn in that case says, at p. 709 of 8 A. C.: "Such a contract as this was meant to protect, and did in effect protect, the company from the negligence of their servants." And again, "When a man says that he will not be responsible for damage, however caused, that is not to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants." In the case of *The Stella* (*sup.*) the same construction was given to a pass for a journey partly by railway and partly by sea, where the words were "the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused." In that case the claim was twofold: for loss of life, but also for loss of luggage. An earlier decision—*Taubman* v. *Pacific Steam Navigation Company* (*sup.*)—held that a stipulation that a shipowner would not be answerable for loss of baggage under any circumstances whatsoever covered wilful default or misfeasance by the defendants' servants.

How are these two lines of decision to be reconciled, and what principle is to be extracted from a comparison of them?

It would be a good broad principle if one could say that, wherever the bailee has the liability of a common carrier, this clause would be satisfied by giving it the effect of relieving him from that liability, but making him still responsible for the absence of due care, while, on the other hand, where his only liability in the absence of written terms would be to take due care, then the words must be given a wider effect, on which principle the recent decision of Bailhache, J. in *Pyman Steamship Company* v. *Hull and Barnsley Railway Company* (*sup.*) appears to rest. But railway companies have, in the absence of express contract, the liability of common carriers, and yet *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown* (*sup.*) gives what I may call the double effect to this clause, and shipowners have the same liability, and yet in *Taubman* v. *Pacific Steam Navigation Company* (*sup.*) and in *The Stella* (*sup.*) the clause received a similar construction, so this broad principle will not hold.

It was suggested that, where the clause takes the form that the barge owner will not be responsible for any loss which can be covered by insurance, the words "covered by insurance" point to a restriction, and mean any loss which the barge owner would be liable for as an insurer. I cannot take this view. It is true that by a metaphor the carrier, in the absence of special contract, is called an insurer. He is not really an insurer. There is no contract of insurance. His liability omits two of the primary losses for which an ordinary underwriter makes himself liable, the "act of God" and the "King's enemies." The word "insurer" is borrowed as a convenient word for expressing his liability. Even if it were otherwise, the expression is not "I will not be responsible for any loss or damage for which I should be liable as an insurer," but "for any loss or damage which you can cover by insurance." Now the goods owner by insuring in the ordinary way covers himself against loss by perils of the seas howsoever caused, whether by negligence of the carrier's servants or otherwise. It seems to me that if these words "which can be covered by insurance" are to lend any colour, they intensify the force of the words "any" and "however," "mind you, any and every loss, however caused, against which you can protect yourself by an ordinary insurance, so that if you lose you need not come upon me for recoupment."

This, then, is the distinction; it is a fine one, and I am sorry to think that it is so fine, but it seems to be this: If you say "any loss," you are directing attention to the kinds of losses and not to their cause or origin, and you have not sufficiently made it plain that you mean "any and every loss" irrespective of the cause, and therefore, you have not brought home to the person who is intrusting the goods to you that you are not going to be responsible for your servants on your behalf exercising due care for them, or even possibly for your own personal

want of care. But if you direct attention to the causes of any loss; if you say "any loss," "however caused," or "under any circumstances," you give sufficient warning, and it is not necessary to say in express terms "whether caused by my servants' negligence," or, in the bill of lading phrase, "neglect or default or otherwise." This seems to be indicated by the decision in *Haigh* v. *Royal Mail Steam Packet Company* (*sup.*).

The case itself is a decision upon a claim for loss of life, and, as shipowners may be said not to have the liabilities of common carriers in respect of passengers, it may not so far be to the point. It is true also that the case was mainly argued upon the question whether the words "loss or damage" could be applied to human beings. But the analysis of the argument is as follows: To a claim by an executor for the loss of life of a passenger by reason of negligent navigation the defence was a clause in the ticket to the effect that the company would not be responsible for any loss or damage arising from any act, neglect or default whatsoever of the pilot, master, or mariners; to this it was replied that these were not apt words to cover loss of life. The defendant company rejoined that they could have no other meaning, for loss of luggage was covered by an earlier clause—viz., "The company will not be responsible for any loss, damage, or detention of luggage under any circumstances"; to this the plaintiff surrejoined, as it were, that these words were not large enough to cover loss or damage by any act, neglect, or default of servants. The Court of Appeal held that they were large enough, and that therefore the company was already protected against loss of luggage even by negligence, and that accordingly the words in the later clause must apply to loss of life or they would have no application. Further, the court gave its approval to the decision of the Court of Exchequer in an action by one Thompson against the same company, and dwelt upon the circumstance that the words "any loss" in an earlier form of the same company's ticket had been held to be insufficient, but the addition of the words "under any circumstances" made it sufficient.

This is a direct approval of the view that, if the clause directs attention to the cause of loss, and excludes all causes, it gives sufficient protection. I think this must be our guiding line, and that the judgment for the defendant was therefore right, and this appeal must be dismissed.

Appeal dismissed.

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

Solicitors for the defendant, *Keene*, *Marsland*, *Bryden*, and *Besant*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

May 11, 12, 16, *and* 19, 1914.

(Before AVORY, ROWLATT, and SHEARMAN, JJ.)

OLYMPIA OIL AND CAKE COMPANY LIMITED (apps.) *v.* PRODUCE BROKERS COMPANY LIMITED (resps.). (*a*)

Sale of goods—Performance of contract—Resale—Appropriation—Loss of cargo on voyage—Sellers aware of loss at time of tender of appropriation—Validity of tender.

In May 1912 *the P. Company sold to the O. Company a certain quantity of goods to be shipped from an Oriental port to an English port in the month of Dec.* 1912 *or of Jan.* 1913.

By two of the clauses of the contract it was provided that: (3) "*Particulars of shipment . . . to be declared by original sellers not later than forty days from the date of the last bill of lading. . . . In case of resales, copy of original appropriation shall be accepted by buyers and passed on without delay. . . .*"; *and* (10) "*This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract.*"

In Sept. 1912 *the P. Company purchased the same amount of the same kind of goods for shipment from V. to England under a similar contract from a third company, the date of the shipment to be Dec.* 1912 *or Jan.* 1913.

The goods were duly shipped, and the vessel in which they were carried sailed from V. towards the end of Jan. 1913. *A few days later the vessel was wrecked and the cargo was totally lost.*

On the date of the loss the P. Company received a declaration and appropriation of the cargo carried in the vessel, but, at the time of such declaration and appropriation, neither the P. Company nor the third company had any knowledge of the vessel except that she had sailed from the port of V.

Later on the same day the P. Company, having in the meantime become aware of the loss of the vessel and its cargo, declared and appropriated the shipment to their contract with the O. Company.

The O. company refused to accept the tender.

Held, that as the P. Company knew of the loss of the vessel and its cargo at the time of the declaration and appropriation to the O. Company, there was no obligation on the latter to accept the tender, and that clause (10) *in the contract did not operate, as there had been no valid declaration and appropriation between the parties to it.*

SPECIAL CASE stated (at the request of the Olympia Oil and Cake Company Limited) by a Board of Appeal of the Committee of Appeal of the Incorporated Oil Seed Association.

The case stated was as follows:—

1. This is an appeal by the above-named Olympia Oil and Cake Company Limited (hereinafter called "the buyers") from an award of Berthold Pinner, the umpire acting in the arbitration between the Olympia Oil and Cake Company Limited and the Produce Brokers Company Limited, pursuant to the rules of the contract hereinafter referred to.

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

2. On the 30th May 1912 the above-named Produce Brokers Company Limited (hereinafter called "the sellers") agreed to sell and the buyers agreed to buy six thousand (10 per cent. more or less) tons of 2240lb. each Harbin and (or) Dalny Soya beans to be shipped from an Oriental port or ports during Dec. 1912 and (or) Jan. 1913, by steamer direct or indirect *via* Suez Canal or Cape to Hull, at 7*l*. 18*s*. 9*d*. per ton gross weight, *ex* ship, usual new bags included. The contract provides "if shipped as a cargo, buyers to have the option of charter-party."

3. By clause 3 of the contract it is provided that particulars of shipment, with date of bill or bills of lading, appropriate weight, marks (if any), and numbers of bags are to be "declared by original sellers not later than forty days from the date of the last bill of lading," and "in case of resales, copy of original appropriation shall be accepted by buyers and passed on without delay. Buyers shall not object to slight deviations in marks so long as the beans can be identified on arrival as the *bonâ fide* shipment intended to be delivered on the declaration."

4. Clause 10 of the said contract further provides: "This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract." A true copy of one part of the said contract is hereto annexed and forms part of this case.

5. The form of the contract used is the printed form of contract issued by the Incorporated Oil Seed Association for adoption by persons engaged in the oil seed trade in sales of cargoes of Manchurian Soza beans with slight variations adopted by the parties.

6. By a contract dated the 9th Sept. 1912 the sellers purchased from the East Asiatic Company (the shippers of the cargo), under a contract similar to the above-mentioned contract, an identical quantity of six thousand tons, 10 per cent. more or less Harbin, and (or) Dalny Soya beans for shipment in Dec. 1912 and (or) Jan. 1913.

7. By letter dated the 24th Jan. 1913 the sellers informed the buyers that they had not yet themselves received a tender, but believed that the same would be in the *Canterbury*. On the 29th Jan. the sellers agreed to purchase from the buyers six thousand tons Harbin and (or) Dalny Soya beans, December/January, to Hull, and stated in their letter of this date confirming the purchase, "We shall put this against our sale to you of the 30th May 1912.

8. On or about the 4th Feb. 1913 the sellers received a declaration and appropriation of 6400/6600 tons per *Canterbury*, stated to have sailed from Vladivostock on the 31st Jan. By letter dated the 4th Feb. the sellers declared and appropriated this shipment to their contract with the buyers, and claimed that the buyers should retender the same in fulfilment of the said contract of the 29th Jan. 1913.

9. The *Canterbury* sailed from Vladivostock on the evening of the 3rd Feb., and shortly after sailing struck submerged rocks fifteen miles from Karatsu. She was towed off on the 4th Feb., but foundered immediately afterwards. The loss was known in London at about 3 p.m. on the 4th Feb. It was not known to the East Asiatic Company at the time of their tender, but the sellers were aware of it at the time of making their said tender.

10 The buyers contending that they were not bound to accept the tender per *Canterbury*, arbitration was claimed under the terms of the contract, and the dispute was referred to arbitration in pursuance of the rules indorsed on the contract, the above-named Berthold Pinner being appointed umpire by the Incorporated Oil Seed Association in default of appointment by the arbitrators named by the respective parties. By his award, dated the 9th May 1913, a copy whereof is hereto annexed and forms part of this case, the said umpire awarded "that the appropriation per *Canterbury* is a good appropriation in the terms of the contract, and must be accepted by buyers."

11. The buyers thereupon appealed from the said award to the Committee of Appeal of the Incorporated Oil Seed Association, and the above-named members of the committee (hereinafter called "the board") were duly elected as a board to hear the appeal in accordance with the provisions of the contract and the rules and regulations of the association.

12. The buyers contended before the board: (1) That the steamship *Canterbury* having sunk or been lost with her cargo before the tender by the sellers, the said tender was bad; (2) alternatively, that the said tender was bad because the sellers knew of the said sinking or loss of the *Canterbury* and (or) her cargo before they made the said tender; (3) that there was not a resale within the meaning of clause 3 of the contract, the sale to the buyers having taken place before the sellers purchased the beans under the contract of the 9th Sept. 1912, and that the buyers were not bound to accept the tender as an appropriation passed on by their sellers on a resale; and (4) that the provisions of clause 3 as to resales could not in this case apply, the *Canterbury* and her cargo being at the bottom of the sea when the sellers made or purported to make the appropriation. The buyers requested the board to state a case for the opinion of the court on the question of law arising in the reference.

13. The buyers further desired to offer evidence relating to other contracts under which the sellers were alleged to have made tenders or appropriations of the said cargo or portions of it to other buyers before or at the same time as they made the said tender to the buyers, but the board did not deem this evidence relevant to the matter in question upon this appeal.

14. The sellers contended: (1) That under clause 3 of the contract the buyers, as "buyers" from the sellers under a resale, were bound to accept as a valid declaration the copy of the original appropriation received by the sellers and handed on by them to the buyers; (2) alternatively, that by clause 3 the sellers, having passed on without delay to the buyers the copy of the original appropriation received and accepted by them as "buyers," were entitled to call on the buyers to accept such copy as a valid declaration; and (3) that by reason of the loss of the *Canterbury* with all her cargo, the contract became void pursuant to clause 10 of the contract.

The questions of law submitted for the opinion of the court were: (1) Whether, regard being had to the terms of the contract of the 30th May 1912, a tender or appropriation under clause 3 could validly be made if at the material time, and whether to the knowledge of the sellers or not, the vessel and her cargo had already become a total loss; (2) whether there was any difference "in case of resales," and, if so, whether the sentence in clause 3, line 19, of the said contract, beginning "in case of resale," applied to the facts of this case; (3) whether under the circumstances above detailed the provisions of clause 10 of the said contract applied so as to render the contract void as regarded the beans shipped by the *Canterbury* which had not arrived by that vessel; (4) (*a*) whether the board was right in rejecting evidence tendered by the buyers relating to other contracts under which the sellers were alleged to have made tenders or appropriations of the said cargo or portions of it to other buyers before or at the same time as they made the said tender to the buyers; (*b*) whether, if the court should be of opinion that such evidence was relevant and ought to have been received by the board, the tender of the sellers was bad if the board should find that the sellers tendered or appropriated the said cargo or portions of it to other buyers or under other contracts of sale before or at the same time as they made the said tender of the whole cargo to the buyers or after they made the said tender to the buyers; and (5) whether the sellers were relieved from every obligation to the

buyers under the said contract by tendering the cargo shipped per the steamship *Canterbury*.

Dated the 14th day of January 1914.

(Signed) Arthur H. Jones,
F. Stromeyer,
Members of the Board of Appeal.
(Signed) E. H. Clegborn,
Secretary to the Incorporated Oil Seed Association.

The two clauses of the contract referred to were as follows:

3. Particulars of shipment with date of bill or bills of lading, approximate weight, marks (if any), and numbers of bags to be declared by original sellers not later than forty days from the date of the last bill of lading. The buyers shall have at least three clear days after appropriation to give the necessary orders for port of destination at port of call, demurrage (if any) up to three days to be for account of sellers. In case of resales, copy of original appropriation shall be accepted by buyers and passed on without delay. Buyers shall not object to slight deviations in marks so long as the beans can be identified on arrival as the *boná fide* shipment to be delivered on the declaration. Any expenses incurred in consequence of such marks not being in accordance with the declaration shall be paid by sellers. Provisional invoice to be computed upon the gross shipping weights.

10. This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against the contract, and also if shipment or delivery be prevented by embargo, hostilities, prohibition of export, or blockade.

The award of the umpire, Mr. Berthold Pinner, was as follows:

I hereby award that the appropriation per *Canterbury* is a good appropriation in the terms of the contract and must be accepted by buyers.

Leslie Scott, K.C. and *Dunlop* for the appellants.

Leck, K.C. and *MacKinnon* for the respondents.

The facts and arguments are sufficiently set forth in the special case and in the judgments.

Cur. adv. vult.

May 19.—Avory, J.—The contract in this case, made on the 30th May 1912, was for the sale by the respondents to the appellants of 6000 tons of Soya beans, to be shipped during Dec. 1912 and (or) Jan. 1913 to Hull, payment to be made in London on vessel's arrival in Hull. By clause 3 of the contract it is provided that particulars of shipment, with dates of bills of lading, &c., shall be declared by the original sellers not later than forty days from the date of the last bill of lading; and, in case of resales, copy of the original appropriation shall be accepted by buyers and passed on without delay. By clause 10 of the contract it is provided that "this contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against the contract, and also if shipment or delivery be prevented by embargo, hostilities, prohibition of export, or blockade."

On the 9th Sept. 1912 the respondents, the Produce Brokers Company Limited, bought from the East Asiatic Company, under a similar contract, 6000 tons of Soya beans; and on the 4th Feb. 1913 the Produce Brokers Company received from the East Asiatic Company a declaration and appropriation to the said last-mentioned contract of a cargo of beans shipped by them per the steamship *Canterbury*, and later, on the 4th Feb. 1913, the Produce Brokers Company declared and appropriated this shipment to the contract with the appellants, the Olympia Oil and Cake Company Limited. The *Canterbury*, having started on her voyage, was wrecked and foundered on the 4th Feb. 1913, and the cargo was totally lost. The loss was not known to the East Asiatic Company at the time of their tender, but was known to the respondents at the time of their tender to the appellants. Under those circumstances the substantial question submitted to the court is whether the tender or appropriation made by the respondents at a time when the vessel and her cargo had become a total loss was a valid appropriation in fulfilment of their contract with the appellants.

It was contended on behalf of the respondents that, having passed on without delay to the appellants the copy of the original appropriation received and accepted by them for the original sellers, the East Asiatic Company, the appellants were bound, under clause 3 of the contract, to accept the same as a valid appropriation; and in the alternative, that by reason of the loss of the ship and her cargo, the contract was void pursuant to clause 10 of the contract, which they said ought to be construed as a contract for the sale of goods "to arrive in Hull," the property in which would not pass except upon arrival, or as what is called a c.i f. contract. In my opinion, clauses 3 and 10 of this contract both contemplate a declaration and appropriation of a ship and goods then in existence by the seller to the buyer, under the particular contract which is in question; that a valid appropriation cannot be made under this contract of goods which for the purpose of the contract are at the time no longer in existence, even though there may have been a prior valid appropriation of the same goods by the original seller; and that clause 10 does not come into operation in a case where there has been no valid declaration and appropriation as between the seller and the buyer under the particular contract in question.

For these reasons I think that questions 1, 2, 3, and 5, submitted to the court in the special case, should be answered in the negative, and that the fourth question does not arise. If it did, I think that the tender would be bad if the sellers had tendered the same goods to other buyers under other contracts before or at the same time as the tender in question, provided such other tenders were accepted by such other buyers.

For these reasons, the answers which I have indicated will be the answers sent back to the tribunal of appeal.

Rowlatt, J.—The form of contract in this case was a printed form of contract for the sale of a cargo, though it was altered by the addition of the words "or parcels, sellers' option." It was also provided that if shipped as a cargo the buyers were to have the option of charter-party. In the events that happened, the sellers did offer a cargo in fulfilment of the contract, and it is as a cargo contract that it has to be interpreted.

It is plain that under a contract such as this a seller may either tender a cargo which he has shipped himself, or which he has acquired from another after shipment. In either case it is necessary, in order to fulfil the contract, that the seller should at some time declare the ship whose cargo is to be received by the buyer. Clause 3 of the contract, noted in the margin "Declara-

tion of shipment," does not, in my view, create the duty of declaring. It assumes its existence, and provides for the time, and to some extent for the manner, of its performance. The clause says that a tender by an original seller (which here means an original tenderer—that is, one who is himself the shipper) must be not later than forty days from the date of last bill of lading. In case of resales (which here means a retender—that is, by one who is not the original shipper), copy of original appropriation shall be accepted. The meaning of that is that a tender by a seller who has not himself shipped may be made by handing on a copy only of the original appropriation. This clause cannot, in my judgment, mean that anything purporting to be an original appropriation shall be accepted. It only means that an appropriation, valid in itself, may be made by handing on merely a copy of the original appropriation. The clause further provides that it shall be passed on without delay. The English is faulty; but there was no dispute at the Bar that the meaning is that every passing on of an original appropriation must be without delay. No question arises here as to the lapse of time before passing on an original tender; but it is easy to see that in certain circumstances troublesome questions might arise on that point.

The next clause that requires detailed notice is clause 10. That clause deals with two distinct matters. The latter part deals with cases where shipment is prevented by named causes and may in other cases raise totally different questions from those with which we are now concerned. The first part assumes shipment, and deals with the non-arrival of goods by a ship or ships declared against this contract. The words "against this contract" are to be noted; and it is to be observed that it is the ship that has been the subject of the declaration. I think that the meaning is quite clear: that where the contract has been fulfilled up to the point of declaring a ship, and the only matters to be carried through are delivery and payment, the contract shall be off, and the obligations of delivery and payment mutually cancelled, as to any goods that do not arrive.

Now, the real question between the parties is whether that clause applies to absolve the seller who declares a ship known to be lost. It seems to me that the clause only applies where there has been a good declaration of a ship, but afterwards the goods do not in fact arrive. Was there then a good declaration? Mr. Leck argued that when goods had once been shipped, that created a tenderable cargo, which remained in existence for that purpose even after the ship had been lost, and that it could be appropriated with the pre-existing certainty, and with the intention, of making the contract void. Pushed to its logical conclusion, this would involve that the person in whose hands the ship was lost could afterwards enter into a contract to sell a cargo, and if the price fell buy a cargo afloat, tender it, and pocket the difference; and if the price rose tender the lost ship, and escape from the speculation without loss. Mr. Leck, however, shrank from this conclusion, and suggested that in new contracts the already sunk ship would be impliedly barred. It is hard to see where he gets the justification for this distinction, if his main argument is correct; but, however that may be, it is clear that this result might follow—namely, that a seller who had sold forward, the market having risen, might actually give a premium for a lost cargo to tender, and so avoid his contract and escape a greater loss. On this footing—namely, as a specially valuable cargo—the Produce Brokers Company actually demanded that the Olympia Oil and Cake Company should tender back the cargo to them, in order that they might tender it on again, and so avoid an ulterior contract. It is impossible, indeed, to foresee when the career of usefulness of this lost cargo in avoiding outstanding contracts would end.

Further, this construction involves what to my mind is the absurdity of supposing that a contract like this, which contemplates the handing on of rights acquired by the seller from a third party, can be fulfilled by handing on a right which has *ex hypothesi* become void. In the hands of the Produce Brokers Company their contract with the Asiatic Company had become, or was bound to become, void under clause 10. Yet the contention is that they can hand on this avoided contract in fulfilment of their own with the Olympia Company.

I think that the plain object of this contract is to secure the appropriation of a cargo shipped, and at any rate believed to be afloat, and then expected to be duly delivered, and that when a cargo is known to be lost it becomes for the purpose of any tender as if it had never been shipped.

For these reasons I agree with the answers read out by Avory, J., though I prefer to limit myself to the case of a ship known to be lost, the case of a ship lost but not known to have been lost not, in my judgment, arising.

Shearman, J.—I am of the same opinion, and therefore it is only necessary for me to add a word or two to what has already been said. The question for our decision is this: What is the true interpretation of the contract of the 30th May? That is a printed form of contract, and we have here a not unfamiliar problem. Primarily it is a contract between the two parties to it; but, as is well known in the course of the trade, these goods are transferred and retransferred. The written form of contract contains a number of clauses which are intended to apply after there has been what has been described in the argument as a string of different sellers and different buyers. Here the parties have agreed in their written form of contract a number of terms which deal with these retransfers and deal with the string of transactions; but the framer of the contract did not have in his mind the particular event that has occurred, and consequently we have to look at the contract and try and spell a meaning out of it in certain events which I think were not contemplated by the framer of the contract.

It is argued that, as this is a string contract, the moment one gets a cargo which could be tendered under the contract, the appropriation must be deemed to be good through all the transfers of people who are on this chain or string. I think that that argument rests upon an entire fallacy. In those cases when all the string has been gone through, one can treat it as they do here. They talk about resale, which, to my mind, means a second sale or a sale in sequence, or a string. I think that that is the meaning of the

word "resale," though different interpretations were put upon it in the argument. But in dealing with that point, one must not forget that, although when it is a case of looking at the entire series of transactions the original seller is supposed to sell to somebody else, who passes it on to a third party, and then that third party passes it on to a fourth; that is the way the transaction grows, though they are not in that exact sequence. As often as not, as, indeed, in this case, after the sale has been made the seller buys for the purpose of delivering the same.

In my judgment the transaction between two parties in this chain does not come into the line at all until a valid appropriation has been made. Once bearing that in mind, I do not think there is much difficulty in solving this question. The seller in this case did not have a cargo to appropriate; and at the time in fact that he made his formal appropriation—the contract speaks of shipment and speaks of goods—at the time he made what purported to be an appropriation, the ship was at the bottom of the sea and was not in a deliverable state. Under these circumstances, in my judgment, this was not a good tender, and accordingly the sellers in this case never did put themselves on the string or bring themselves in the line at all. In the result it follows that questions 1, 2, 3, and 5 must be answered in the negative.

Judgment accordingly.

Solicitors for the appellants, *Andrew M. Jackson and Co.*, Hull.

Solicitors for the respondents, *Waltons and Co.*

Oct. 14 *and* 16, 1914.

(Before Bailhache, J.)

Robinson and Co. v. Continental Insurance Company of Mannheim. (a)

Marine insurance—Plaintiffs British subjects—Defendants alien enemies—Action on policy—Right of plaintiffs to proceed with action—Right of defendants to appear—Costs.

An action was brought upon a policy of marine insurance effected on behalf of the plaintiffs, who were British subjects, with the defendant company. The policy was effected before the war between Great Britain and Germany. The loss was before the war, and the pleadings were closed before the war. The war had the effect of making the defendant company an alien enemy. On an application on behalf of the defendants for a stay of proceedings during the war:

Held, that there was no rule of the common law which suspended an action in which an alien enemy was defendant, or prevented his appearing and conducting his defence.

Quære, *whether in the event of the alien enemy defendant succeeding in the action, he would be entitled to an order for payment of costs until after the war.*

Commercial Court.

Summons before Bailhache, J. adjourned to open court for argument.

The defendants, a German insurance company, were sued for a loss under a policy of marine insurance.

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

The defendants took out the present summons asking that all proceedings should be stayed during the war.

Theobald Mathew for the defendants.

Raeburn for the plaintiffs.

The facts and arguments are sufficiently stated in the considered judgment.

Bailhache, J.—In this case the defendant company apply for the postponement of the hearing of the action on the ground that the company is an alien enemy. The action is brought upon a policy of marine insurance effected on behalf of the plaintiffs, who are British subjects, with the defendant company. The policy was effected before the war. The loss was before the war and the pleadings were closed before the war. The war has had the effect of making the defendant company an alien enemy and the defendant company contends that that fact of itself entitles the company to a postponement of the trial. The contention is that by the common law of England all actions between British subjects and alien enemies are suspended during the war, and further that an alien enemy cannot appear and cannot be heard in our courts during hostilities.

There is, I think, abundance of authority for the proposition that an alien enemy, if objection be taken by the defendant, cannot sue as plaintiff in our courts and cannot proceed with an action pending in these courts while the state of hostilities, which makes him an alien enemy, lasts. Whether he can sue or proceed with his action if no objection be taken by the defendant is perhaps open to doubt. See, for instance, the judgment of Lord Davey in *Janson* v. *Driefontein* (87 L. T. Rep. 372; (1902) A. C. 484, at p. 499). It is, I think, equally true that a defendant alien enemy cannot during the war prosecute a counter-claim. Does the converse hold good and does the same rule obtain when an alien enemy is defendant? If one considers the reason for the rule that an alien enemy cannot sue or prosecute his action during hostilities it would appear that on principle the rule ought to be confined to those cases where the alien enemy is plaintiff. I take it that the reason why an alien enemy when plaintiff cannot proceed with his action against a British subject during hostilities is founded upon the assumption that when two countries are at war all the subjects of each country are at war, and that it is contrary to public policy for the courts of this country to render any assistance to an alien enemy to enforce rights which, but for the war, he would be entitled to enforce to his own advantage and to the detriment of a subject of this country. But to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy, and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief.

I know of no modern English authority on the point except a statement by Lord Davey in the *Driefontein* case, where, at p. 499, he lays down three rules which he says are established in our common law, and expresses the third rule thus: "The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods were insured is suspended during

the continuance of war and revived on the restoration of peace."

If this is a correct expression of the rule, it covers by its terms the case of an alien enemy defendant as well as an alien enemy plaintiff. It is not the decision of the House of Lords in that case, and is not therefore binding upon me, although of course it is a statement of the law entitled to great weight. In that case, however, the point did not arise for decision; moreover, the alien enemy there was the plaintiff and the British subject was the defendant, and I doubt whether Lord Davey contemplated the converse case. I observe that other members of the House, who took part in that decision, confine themselves to the statement that an alien enemy cannot sue while the war lasts. (See Lord Halsbury, p. 493; Lord Lindley at pp. 509 and 510.) In the seventh edition of Bacon's Abridgment, vol. 1, at p. 183, the law is thus stated: "The plea of alien enemy is a bar to a bill for relief in equity, as well as to an action at law; but it would seem not sustainable to a mere bill for discovery; for, as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery."

The statement of the rule by Lord Davey seems to me to be expressed in too wide terms. Mr. Raeburn, for the plaintiffs, was good enough to refer me to several American authorities. The law there appears to be clear that an alien enemy may be sued during the continuance of hostilities. There is an elaborate judgment of the Supreme Court of Missouri to that effect in *De Jarnette* v. *De Giverville* (56 Missouri Reports, 440), and in the case before the Supreme Courts of the United States, *McVeigh* v. *United States* (11 Wallace Reports, 259). At p. 267 Swayne, J., in delivering the unanimous judgment of the court, says: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence"; and he quotes the passage from Bacon's Abridgment which I have already cited.

Fortified by the passage from the abridgment and by these American decisions and by my view of the reason for the rule, which forbids an alien enemy to sue, I am of opinion that the rule is confined to cases in which the alien enemy is plaintiff, and that war does not suspend an action against a defendant alien enemy.

The next question is: Can he appear and defend either personally or by counsel? I think he certainly can. To allow an action against an alien enemy to proceed and to refuse to allow him to appear and defend himself would be opposed to the fundamental principle of justice. No state of war could, in my view, demand or justify the condemnation by a civil court of a man unheard. The point came before the Supreme Court of the United States in the case just cited. The District Court had allowed an action to proceed against an alien enemy, but had struck out his claim and answer. Swayne, J. deals with the matter in these words: "The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he would defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilisation. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." I desire to adopt the language of the learned judge as my own, except that I am not such a convinced disciple of Rousseau as to be able to base my opinion upon the principles of the social compact to which Swayne, J. refers.

I have come to the conclusion that there is no rule of the common law which suspends an action in which an alien enemy is defendant, and no rule of the common law which prevents his appearing and conducting his defence.

In this case I understand that the presence of the alien enemy in this country at the trial is not necessary and is not contemplated, and no difficulty arises such as might otherwise be created by the impossibility of his getting here, and no question arises in this case whether an express licence to come into this country is necessary or whether a licence would be implied from the fact of the process of the court, and I express no opinion upon these points. It may be that in this case the war has so hampered the defendants in the preparation of their case, in their witnesses, or in other ways, that it would be right to grant them a postponement on these grounds, and if any application is made to postpone the trial on grounds of that character it will be dealt with on its merits. I know nothing of the merits of this case, and it may be that the defence will succeed. In that case, a question would arise as to costs. I will hear argument about it if the point does arise, but as at present advised I do not think I ought to make any order which would entitle the defendants to payment of costs until after the war. I mention this point now because in considering my judgment it occurred to me as a possible difficulty in the way of allowing the action to proceed. I think, however, the difficulty, if it arises, will be sufficiently met by suspending the defendants' right to issue execution.

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

June 29, 30, *and July* 6, 1914.

(Before Bailhache, J.)

British Dominions General Insurance Company Limited v Duder and others. (a)

Marine insurance — Reinsurance — Constructive total loss—Compromise between assured and insurers of original policy—Benefit of compromise to reinsurers.

Where a loss occurs under a policy of insurance and the underwriter is covered by reinsurance to the full extent, the contract of the reinsurer is to pay the original insurer forthwith the full amount for which the original insurer is liable to the assured, the indemnity afforded by reinsurance being against liability, and not against the discharge of liability. In such a case the reinsurer is entitled to have all the

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

rights of the original insurer, whether of abandonment or of subrogation, exercised for his benefit.

The plaintiffs insured a ship against total and (or) constructive total loss only and reinsured the risk with the defendants, the policy of reinsurance not containing the usual clause " to pay as may be paid thereon." The ship stranded, and notice of abandonment was given by her owner, who alleged that she was a constructive total loss. The plaintiffs refused to accept the notice of abandonment, and the owner brought an action against them which was compromised by the plaintiffs paying the owner less than the loss. The defendants were invited to agree to the compromise, but declined on the ground that there had been no constructive total loss in fact. In an action by the plaintiffs against the defendants on the policy of reinsurance :

Held, that there was a constructive total loss in fact; that the defendants were disentitled to the benefit of the compromise, and were liable to the plaintiffs for the full amount of the reinsurance, subject to the benefit of any rights they might have had in respect of the abandonment of the ship if no compromise had been effected.

COMMERCIAL COURT.

Action tried by Bailhache, J.

The plaintiffs' claim was upon two time policies of reinsurance dated the 23rd Jan. 1913 upon the hull and machinery of the steamship *Katina*, valued at 20,500*l*., one policy being for 850*l*. and the other for 650*l*., and expressed to be against total and (or) constructive total loss only, warranted free from all average and salvage charges.

The facts and arguments are sufficiently stated in the judgment.

Roche, K.C. and *R. A. Wright* for the plaintiffs.

Maurice Hill, K.C. and *MacKinnon* for the defendants.

BAILHACHE, J. read the following judgment:—This is an action upon two time policies of reinsurance dated the 23rd Jan. 1913 on the hull and machinery of the steamship *Katina*, valued at 20,500*l*. The policies were in the same form; one was for 850*l*., the other for 650*l*. The policies were against total (and or) constructive total loss only, and were warranted free from all average and salvage charges.

The plaintiffs were the original insurers to the extent of 1500*l*. under a time policy dated the 31st Dec. 1912, on the hull and machinery of the *Katina*, valued as in the reinsurance policy. This policy was an f.p.a. policy, but covered collision damage. By clauses attached to the policy the insured value was to be taken as the repaired value. The reinsurance policies contained the same clause.

The *Katina* stranded on the rocks a few miles below Hartland Point, on a dangerous and inhospitable shore, on the 25th May 1913. Notice of abandonment was given three days afterwards. It was not accepted, but the underwriters agreed to treat the matter as though a writ had then been issued. In stranding the *Katina* sustained serious damage. Her bottom was badly holed, and it was doubtful whether she would be got off and towed to a place of safety. An arrangement was, however, made by the Salvage Association with a firm of salvors to make the attempt, they being guaranteed 250*l*. towards their expenses, and leaving their remuneration, if successful, to be fixed. They were successful. The *Katina* came off on the 5th June, and, after being beached in Clovelly Bay, was ultimately taken to Swansea, where she was put upon the hard on the 14th June, and dry-docked two days later. She would have gone straight into dry dock but for the fact that she was drawing too much water forward, a most unfortunate circumstance, as while on the hard she became filled with mud, and much expense was incurred in cleaning her. She was cleaned and a specification of repairs was prepared, and on the 10th July tenders were invited. They were received and opened on the 17th July. The Ocean Dry Dock Company, in whose dry dock she was, tendered at 15 000*l*., and the Mount Stuart Dry Dock Company, Cardiff, at 12,290*l*.

Under those circumstances the plaintiffs, the original insurers, sue their reinsurers, and claim from them payment in full under the reinsurance policy. The plaintiffs have now, of course, to support the owner's notice of abandonment, and they maintain that the *Katina* was a constructive total loss on all the three grounds set out in sect. 60 of the Marine Insurance Act 1906.

The first ground is where the subject-matter is reasonably abandoned on account of its actual total loss appearing to be unavoidable. The statutory instance of such a constructive total loss is where the owner is deprived of the possession of his ship by a peril insured against, and it is unlikely that he can recover the ship. It was conceded, as I think rightly, that where a ship is inmovable upon the rocks the owner is deprived of possession of her within the meaning of the section, and the question debated was whether it was unlikely that she would be got off and float as a ship. The owner thought not. Captain Hick, a very competent officer of the Salvage Association, thought otherwise, as also did the salvors. The question depended upon whether she would remain as she was without further damage until the tides made again. If so, she could probably, with care and expenditure of skill and money in making a cradle for her, rock blasting, and the like, be floated off on the 5th June. A strong southerly or south-westerly gale would have spoiled averything. The month was June. I must not lay too much stress on the fact that she was got off, but, in judging of what the probabilities were, that fact does show that the more sanguine view was at least tenable. I think it was the right view, and I hold that the notice of abandonment cannot be maintained on this ground. Before leaving this part of the case I should like to say that notice of abandonment, upon the ground under discussion, can rarely be safely given immediately. Some time must generally elapse before it can be reasonable to suppose that a ship in such a position as the *Katina* was cannot be recovered. If, for instance, in this case the *Katina* had failed to come off on the 5th June, and notice had then been given, I should, upon the facts before me, have held the notice valid and timely.

The next ground upon which the notice was sought to be supported was that the cost of preserving the ship from actual total loss would exceed her value when the expenditure had been incurred. This is, I think, a new ground of abandonment, and is, I take it, quite irrespective of what she can be made worth by a further expenditure after her recovery. Now in this case salvors were willing to try to recover the *Katina*. True, they required a guarantee of 250*l.* towards expenses, but otherwise upon the ordinary salvage terms, "no cure, no pay." The salvage remuneration must necessarily have been proportioned to the value of the *Katina* when salved, a large proportion, no doubt, but still something less than her full value when recovered. I think it is impossible in such a case to maintain notice of abandonment upon this second ground, and I so hold.

The third ground was the familiar one that the cost of repairing the *Katina* would exceed her value when repaired. The repaired value was, as I have said, the conventional sum of 20,500*l.* The original policy and the reinsurance policies all provide that, in estimating the cost of repairs, nothing in respect of the break-up value of the vessel or wreck shall be taken into account. The matters therefore to be considered in this case are the cost of repairs and of the salvage operations. My calculations as to the cost of repairs can be most clearly stated by setting out in parallel columns the amounts as claimed by the plaintiffs and the amounts as allowed by me:

	Amount claimed. £	Allowed. £
Salvors (in part settlement of claim) conveying steamer to Swansea	2080	... 2080
Docking, cleaning, and temporary repairs	2750	... 1750
Tug hire, port dues, &c.	100	... 50
Ocean Dry Dock tender for repairs...	15,000	... 15,000
Stores, outfit, &c.	700	... 400
Separation mats and fenders	50	... 50
Coals	80	... 80
Optician's tender	6	... 6
New condenser	410	... 200
Machinery damage	100	... 100
Salvage Association, Lloyd's agent, &c....	200	... 50
Incidentals, surveyors, superintendence, further salvage, &c.	1500	... 820
	£22,976	£20,586

The figures were much discussed during the hearing of the case, and I need now only say a word about two figures. I would have allowed the salvors 2500*l*, although they accepted 2080*l.* This was only done under great pressure brought to bear upon them by Mr. Lowrey under circumstances which fully appear in the correspondence, and I am satisfied that the amount allowed them was less than they were entitled to, less than they would have been awarded by the courts, and certainly much less than they would have accepted from the owner. I do not think the owner could possibly have calculated on paying anything less than from 2500*l* to 3000*l.*, and I have taken the lower figure. The other figure is the 15,000*l.* for repairs. I am satisfied that it would have been prudent to accept the tender of the Ocean Dry Dock Company rather than the tender of the Mount Stuart Dry Dock Company. The figures as worked out by me justify the notice of abandonment and constitute a constructive total loss. The margin is small, and it was recognised on all hands that, as one of the letters put it, it was a near thing. It is not in truth so near a thing as it looks. The only item for contingencies is 100*l.*, for possible machinery damage. I should have passed a considerably larger one. However, I see from Mr. Baggallay's letter of the 14th July 1913 that "the owners have met the position very fairly, agreeing to various cropping of frames." This, in my opinion, on a policy which makes the insured value the repaired value, they were not bound to do, or, if they did, they were entitled to some monetary allowance for depreciation in value. This they have not claimed.

One last point remains. The owner gave notice of abandonment, and insisted that the *Katina* was a constructive total loss. The underwriters declined to accept the notice and maintained the contrary. Neither party was sure of his ground, and a compromise was effected whereby the *Katina* was sold for 5000*l.*, and the underwriters took the proceeds, paying salvage and certain other expenses amounting to just over 5000*l.* They also paid to the owner 50 per cent. of his claim. The defendants were asked to agree to this compromise and to pay accordingly. This they declined, upon the ground that there was no constructive total loss in fact. The result was that for a time the plaintiffs stood out and declined to fall into line with the other underwriters, and the owner sued. That action was settled upon the terms of the compromise, and the plaintiffs paid the owner's costs. The defendants now say that they ought to have the benefit of the compromise, and ought only to pay 50 per cent. on their policies. They say that their contract is one of indemnity, and that all they can be asked to pay is the sum which the plaintiffs have actually paid to the original assured. The reinsurance policies do not contain the usual clause "to pay as may be paid thereon." I think the defendants' contention fails. I have no doubt that the original underwriters may make a bargain with their assured of which the reinsurers may be entitled to the benefit as in this very case, if the reinsurers had agreed with the original underwriters that they should make the best terms they could with the owner, and that they, the reinsurers, would, without questioning liability, accept those terms. This, however, is exactly what the defendants refused to do. The original underwriters bought the compromise by giving up their right to put the owner to proof of a constructive total loss. The reinsurers declined to pay this price, and, having declined, cannot, I think, sustain the benefit of the compromise so bought. I am doubtful whether, unless the compromise was made for their benefit as well as that of the original underwriters, the reinsurer could in any case take advantage of it. True, a reinsurance policy is a contract of indemnity, but against what? I incline to think against liability, and I see no more reason why a reinsurer should pay less by reason of a compromise made with the assured for the benefit of the original underwriter and not of the reinsurer than in the case where the original underwriter becomes bankrupt and pays a small dividend or none. Where a loss

occurs and the original underwriter is covered by reinsurance to the full extent, the contract of the reinsurer is, I think, to pay the original insurer forthwith the full amount for which the original insurer is liable to the original assured. The indemnity afforded by reinsurance is against liability, and not against the discharge of the liability. Of course, in such a case the reinsurer is entitled to have all the rights of the original insurer exercised for his benefit, whether these rights are of abandonment or of subrogation, and when those rights have been exercised he is entitled to be recouped to the extent to which they have materialised.

Applying these principles, although I decline to give the defendants the benefit of the compromise, I must, of course, see that they are not prejudiced by it. I must disregard it. In so doing, the original underwriters must give the reinsurer the benefit of any rights he would have had if no compromise had been made, which legally reduces his liability to the original assured. The latter must therefore give the defendants the benefit of the right to have the *Katina* abandoned to the plaintiffs less the cost of salvage. I estimate her value after payment of salvage at 2000*l.*, and I make in round figures the proportion of that value attributable to the plaintiffs' policy to be 300*l.* To this extent the liability of the defendants must be diminished, and for this sum they must have credit. I therefore give judgment against the defendants for the full amount of their respective subscriptions, less their proportionate shares of 300*l.*, with costs.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

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

Wednesday, July 22, 1914.

(Before BAILHACHE, J.)

CONNELL AND THE CORPORATION OF TRINITY HOUSE, LONDON *v.* LAWTHER, LATTA, AND CO. AND ANOTHER. (*a*)

Pilotage—Compulsory pilotage—Ship navigating in compulsory pilotage district—Stopping outside port for orders—Orders from port taken to ship by boat—No pilot employed—Pilotage Act 1913 (2 & 3 *Geo.* 5, *c.* 31), *s.* 11.

Sect. 11, *sub-sect.* 1, *of the Pilotage Act* 1913 *provides as follows: "Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of . . . making use of any port in the district . . . shall be either* (a) *under the pilotage of a licensed pilot of the district; or* (b) *under the pilotage of a master or mate possessing a pilotage certificate for the district who is* bonâ fide *acting as master or mate of the ship."*

The London pilotage district extends from Dungeness to Gravesend, and embraces Dover. A ship, not an excepted ship, was directed to proceed to Dover for orders. She came up the Channel, passed Dungeness, and proceeded to Dover, where she stopped about a quarter of a mile from the Admiralty Pier, and while lying there a motor boat came from the port with orders for her to proceed to Hamburg. Neither her master nor her mate possessed a pilotage certificate for the district.

Held, that the words "making use of any port in the district" included the use which the ship made of the port of Dover, and that she was in the circumstances bound to employ a licensed pilot of the district.

COMMERCIAL COURT.

Action tried by Bailhache, J.

The plaintiffs claimed (1) a declaration that the steamship *Anglo Columbian* was on the 6th April 1914 bound to be under the pilotage of a licensed pilot of the London district, and was bound to employ the plaintiff Connell as a pilot from Dungeness to Dover; (2) a declaration that the said steamship on the same date was making use of the port of Dover within the meaning of sect. 11 of the Pilotage Act 1913; and (3) payment of pilotage dues and shipping money amounting to 4*l.* 15*s.*

The plaintiffs, the Corporation of Trinity House, were the pilotage authority for the London pilotage district; the plaintiff Connell was a pilot licensed by Trinity House to pilot all classes of vessels in the London pilotage district within the limits between Dungeness and Gravesend, and Dover was within the area of the London pilotage district.

The *Anglo-Columbian*, of which the defendants Lawther, Latta, and Co. were managers and the defendant Westacott the master, was a British steamship of 4792 tons gross belonging to the port of London, and owned by the Nitrate Producers Steamship Company Limited. She shipped a cargo of nitrate at Antofagasta, and on the 16th April 1914 passed Dungeness while proceeding to Dover for orders from the charterers for discharge to a port in the United Kingdom or Continent between Havre and Hamburg. Arriving at Dover, she stopped about a quarter of a mile outside and to the southward and eastward of the eastern end of the Admiralty Pier entrance and signalled for orders, and later a motor-boat arrived alongside with orders to proceed to Hamburg, and she proceeded accordingly.

The Pilotage Act 1913, s. 11 (1), provides as follows:

> Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship) while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be either (*a*) under the pilotage of a licensed pilot of the district; or (*b*) under the pilotage of a master or mate possessing a pilotage certificate for the district who is *bonâ fide* acting as master or mate of the ship.

The *Anglo-Columbian* was not an excepted ship under the Pilotage Act 1913, nor did her master or mate possess a pilotage certificate for the district. When she was off Dungeness the plaintiff Connell offered his services as pilot, but the master refused. On the 16th April 1914 the plaintiff Connell claimed from the owners the sum of 4*l.* 15*s.* to which he would have been entitled if his services had been made use of, but the owners refused to pay. It was agreed between the parties that an action should be

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

brought in the Commercial Court to obtain a decision of the points in issue between the parties, and to recover the amount claimed by the plaintiff Connell.

Dunlop for the plaintiffs.—The vessel was making use of the port within the meaning of the section. The words "making use" have the widest possible meaning:

> *British Motor Syndicate* v. *Taylor and Sons*, 82 L. T. Rep. 106; (1900) 1 Ch. 577.

Raeburn for the defendants.—"Making use" of a port means making use of the facilities of the port *quâ* port, and if nothing is done involving the use of the facilities provided by the port, although she may be making use of the place, she is not making use of the port. No use was made of the port of Dover in respect of which any payment could be demanded by the port authority.

Dunlop in reply.—It is provided by sect. 62 of the Pilotage Act that that Act must be construed as one with the Merchant Shipping Act 1894, which by sect. 742 defines "port" as including "place."

Bailhache, J.—The question in this case is one of very general importance, but the point lies within a very small compass, and, as I have made up my mind, nothing will be gained by taking time to consider my judgment. The question is whether the steamer *Anglo-Columbian*, which was on a voyage with a cargo of nitrate from Antofagasta to a destination which ultimately proved to be Hamburg, became subject to compulsory pilotage when she was at a point east of Dungeness and within the London pilotage district. The question turns upon sect. 11 (1) of the Pilotage Act 1913, which provides that "every ship (other than an excepted ship)"—and the *Anglo-Columbian* was not an excepted ship—"while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district . . . shall be either (*a*) under the pilotage of a licensed pilot of the district; or (*b*) or under the pilotage of a master or mate possessing a pilotage certificate for the district who is *bonâ fide* acting as master or mate of the ship." Neither the master nor mate of the *Anglo-Columbian* possessed a pilotage certificate, and she was therefore bound to have a pilot on board if, when she last passed to the eastward of Dungeness, she was "entering, leaving, or making use of any port in the district."

It is not suggested that she was entering or leaving the port of Dover, but the question is whether she was making use of that port. Under the charter-party the charterers had the option of ordering her to Dover for orders, and she might have to remain there for twenty-four hours. In the present case the charterers had exercised their option, and had ordered her to Dover to wait for orders. She pursued her usual course to Dungeness, and then altered her course a little so as to bring her close to Dover in order to get the orders she was to receive from there. She arrived off Dover on the 16th April 1914, and stopped close to the breakwater (the precise position is not mentioned), and a motor-boat came out to her with orders to proceed to Hamburg. Did she in so doing make use of the port of Dover? A question was raised at one time as to whether she got within the limits of the port of Dover itself. The boatman who took the letter to the ship was called, and stated that he thought he delivered the letter at a place within the limits of the dockyard port of Dover, but I think that is immaterial as, in my opinion, the word "port" in sect. 11 of the Pilotage Act 1913 does not refer to the dockyard port of Dover, but to the commercial port of Dover.

Did the *Anglo-Columbian* make use of the commercial port of Dover? What is meant by "making use" of a port? It is admitted that if the *Anglo-Columbian* had slowed down in the way she did for the purpose of putting somebody or something on shore at the port of Dover she would have been making use of the port. I can see no difference between that case and where, as in the present case, she slowed down for the purpose of receiving something or someone from the shore. No doubt she was directed to go to Dover for orders because there are at the port of Dover facilities for conveying orders to her as to her ultimate destination. I think Dover was selected because there is a port of Dover where those facilities are to be found, such as motor-boats like the one which was in fact used to convey the orders to the ship. When a vessel is ordered to a port to wait for orders, she is ordered there because of the existence at that port of the facilities which the charterer desires to make use for the purpose of communicating with the ship. The *Anglo-Columbian* was, I think, ordered to Dover for orders for the purpose of making use of the facilities of that port. It is true that in this case the facilities of the port required by the ship were not the shelter or the use of the cranes at the quayside for loading or discharging her cargo, or anything of that kind. The only facility required was the use of the motor-boat, but I think that by using that facility the ship was "making use" of the port of Dover within the meaning of sect. 11 of the Pilotage Act 1913. I should be sorry if I had to decide otherwise, because the compulsory pilotage sections are inserted in the Pilotage Act 1913 for the purpose of safeguarding navigation, and although the *Anglo-Columbian* in the present case did not enter or leave the commercial port of Dover, she approached closer than she would have done if she had not had to call there for orders, and the dangers of navigation are very much the same whether a vessel approaches a port to call for orders or whether she actually enters the port. The necessity for compulsory pilotage is almost as great in the one case as in the other.

In my opinion the words "making use of any port in the district" include the use which the *Anglo-Columbian* made of the port of Dover. My judgment must therefore be for the plaintiffs. There will be a declaration in the terms asked for in the writ, and judgment for the amount of the pilotage dues claimed.

Solicitors for the plaintiffs, *Sandilands and Co.*

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

HOUSE OF LORDS.

July 24, 27, 28, 29, *Aug.* 3, *Oct.* 20, *and Nov.* 9, 1914.

Before the Lord Chancellor (Viscount Haldane), Lords Atkinson, Shaw, and Sumner (with Nautical Assessors).

The Owners of the Steamship Olympic *v.* Commander William F. Blunt; Owners of the Steamship Olympic *v.* Commissioners for Executing the Office of Lord High Admiral of the United Kingdom. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Overtaking and overtaken vessels —Negligence — Steamers crossing — Regulations for Preventing Collisions at Sea, arts. 19, 21, 24 *—Suction or interaction—"Swerve"—Admission of further evidence.*

A warship, the Hawke, *and a large Atlantic liner, the* Olympic, *approaching each other on crossing and converging courses in the Solent, off the Isle of Wight, came into collision.*

The House of Lords held that the real cause of collision was that the Olympic, *having the* Hawke *on her starboard hand and the consequent duty to keep clear, took too wide a sweep round the West Brambles Buoy, and, having plenty of sea room, failed to avail herself of it and keep clear of the* Hawke *as she could and ought to have done.*

Held, also, that, in the case of a vessel so large as the Olympic, *forces of interaction, the true nature of which may not be clearly known, might have been operative at a distance of* 100 *yards or even more, and that the two vessels, moving through the shallow waters in that locality at high speeds, were in sufficiently close proximity for an interaction resembling suction in its effects to take place between them.*

Held, also, that the contention on behalf of the owners of the Olympic, *founded upon the case of* The Pekin (8 *Asp. Mar. Law Cas.* 367; 77 *L. T. Rep.* 443; (1897) *A. C.* 532)*—namely, that, having regard to the locality, the Crossing Rules* (*arts.*19 *and* 21) *were not applicable—was not well founded.*

Decision of the Court of Appeal affirming Evans, P. affirmed.

Appeal in an action commenced by the Oceanic Steam Navigation Company, the owners of the *Olympic* by writ *in personam* against Commander W. F. Blunt, the captain of H.M.S. *Hawke*, claiming the damages suffered by the *Olympic* as the result of a collision between that vessel and the cruiser which occurred shortly after mid-day on the 20th Sept. 1911 in the Solent off Cowes. There was a cross-action by the commissioners executing the office of Lord High Admiral of the United Kingdom commenced by writ *in rem* against the owners of the *Olympic* in respect of the damage suffered by the *Hawke*. In this House the owners of the *Olympic* appealed against the order of the Court of Appeal in each action (Vaughan Williams, Kennedy, L.JJ., and Lord Parker), reported (1913) P. 214, which order affirmed a decree of the President of the Admiralty Division reported in the *Times* of the 20th Dec. 1911.

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

On the day of the collision the two ships were proceeding in an easterly direction on approximately parallel but slightly converging courses, the *Hawke* being to the south of the *Olympic*. It was admitted that the immediate cause of the collision was a sudden swerve to port on the part of the *Hawke*. Those in charge of the *Hawke* attributed this swerve to the forces of suction or interaction between the two vessels. The case for the *Olympic* was that the *Hawke* had not relieved herself of her *primâ facie* liability by her establishing that her turning to port and striking the *Olympic* was due to causes beyond her control, and also that she must have starboarded her helm or been negligently allowed to come to port. The case for the *Hawke* as regards this contention was that her helm never was starboarded, but that whilst under port helm the *Hawke* was caused to swerve towards the *Olympic* in the way she did in consequence of the *Olympic* taking too large a sweep round the West Bramble Buoy and so coming right over to the south side of the channel, when by reason of her speed and close proximity of the *Hawke* the bows of the *Hawke* were caused to swerve towards the *Olympic* by reason of a force which was described as suction, or interaction between vessels; that the helm of the *Hawke* was thereupon ordered to be hard-a-ported, but that it jammed when partly over to port.

It was further the case for the *Olympic* that the *Hawke* was in the position of an overtaking vessel within the meaning of art. 24 of the Regulations for Preventing Collisions at Sea, and was bound to keep out of the way of the *Olympic* and failed to do so. The case on behalf of the *Hawke* was that she never was in a position of an overtaking vessel more than two points abaft the beam of the *Olympic*, but that she was being navigated close over the southern side of the channel on a course S. 74° E. magnetic so that the vessels were on crossing and converging courses, and that the *Olympic*, having the *Hawke* on her starboard hand, was therefore bound to keep clear of the latter under art. 19 of the Collision Regulations, and that she failed to do so, and by her speed and close proximity in the shallow water of the channel caused a suction which drew the *Hawke's* bows towards her as already stated. It was said in answer on behalf of the *Olympic*, that even if the *Hawke* was not in the position of an overtaking vessel under art. 24 of the Collision Regulations she was none the less in a position where she was bound, as a matter of good seamanship, to keep at a reasonably safe distance from the *Olympic* and not to run into her. Further that the crossing rule had no application either in fact or having regard to the nature of the channel in which both vessels were navigated, and that even if the rule did apply there would have been no collision at all if the *Hawke* had kept her course as she was bound to do under the rule, and that the *Olympic* was never in such close proximity to the *Hawke* as to cause her to be affected by any suction as alleged.

At the trial the evidence was conflicting as to the place of collision. The witnesses from the *Hawke* fixed it at a spot which they said bore S. 87° E. magnetic from Prince Consort Shoal Buoy, three cables distant, which, if correct, would put the collision well over to the south side of the channel. The witnesses from the *Olympic* fixed the collision some two or three cables to the north-

ward and westward of that position, which, if correct, put the collision in about mid-channel.

The President, who supported his judgment by a large number of calculations based on the assumption that the collision occurred at the spot marked on a chart by the witnesses from the *Hawke*, holding that the *Olympic* was steered too far to the south and brought too close to the *Hawke* at the time when this vessel was passing through the shallow water near the Prince Consort Shoal Buoy, and that in consequence in the exceptional conditions which prevailed certain forces were set up in the water which were sufficient to account for the *Hawke* being carried towards the *Olympic* in a swerve which was beyond her control, and he found thereupon that the *Hawke* was in no way to blame for the collision, which he held was solely caused by the negligent navigation of the pilot compulsorily in charge of the *Olympic*.

Both parties appealed from this decision.

Between the hearing of the action and the hearing of the appeals important additional facts bearing upon the position of the *Olympic* in the channel at the time of the collision were brought to light, and evidence as to the same was taken before an examiner *de bene esse* by leave of the Court of Appeal.

It occurred to the advisers of the *Olympic* that great light might be thrown upon the true position of the collision by a search for certain wreckage, including the fore-foot of the *Hawke* which weighed several tons, and was detached from the *Hawke* by the force of the collision. Accordingly arrangements were made to sweep the area in which the collision occurred. The wreckage was found about 400 yards to the westward of a line drawn N. and S. through the spot which the President had found to be the place of collision and about 250 yards to the northward of a line drawn E. and W. through the same spot. A line drawn from the place where the wreckage was found in a direction of S. 59° E. magnetic would pass to the northward of Noman's Fort. A line drawn S. 59° E. through the place where the wreckage was found would pass about two and a half cables to the northward of the Chequer Buoy and about two and a quarter cables distant from the line of course navigated by the *Hawke* when passing this buoy.

The hearing of the appeal, which was commenced on the 21st Jan. 1913, occupied fifteen days, judgment being reserved on the 13th Feb. 1913. During the hearing all material positions were by agreement marked on a chart which was referred to as the composite chart and used throughout the appeal.

On the 30th Jan. the Attorney-General (Sir Rufus Isaacs), the leading counsel for those interested in the *Hawke*, stated that he did not proceed with his appeal against the judgment so far as it pronounced that the sole fault of the *Olympic* was that of her compulsory pilot. On the same day application was made on behalf of the *Olympic* for the admission of the additional evidence which had been taken *de bene esse* under the order of the court, and the court decided to admit the evidence.

On the 7th Feb. counsel for the *Olympic* was contending that the spot in which the wreckage was found indicated the true place of the collision when he was stopped, the court intimating they would hear the other side on the point. The Attorney-General said he would argue the case on the assumption that the position in which the wreckage was found indicated substantially the position in which the collision occurred, but reserved his right to argue the question of the position of the wreckage fixing the place of collision if necessary.

The Court of Appeal gave judgment dismissing both appeals with costs, except so far as the same were caused by the issue raised in connection with the additional evidence and the inference to be drawn therefrom, as to which each party was to bear its own costs.

The proceedings in the Court of Appeal are reported (1913) P. 214.

Vaughan Williams, L.J., in giving judgment, stated that the Court of Appeal had admitted the evidence of the finding of the wreckage on the ground that it was relevant and material to the decision of the action by the *Olympic* against the *Hawke*, and also having satisfied itself that the search for the wreckage was not postponed by the owners of the *Olympic* taking their chance of winning their case independently of any search of wreckage.

He stated that he adhered to the natural *primâ facie* conclusion that the place in which the wreckage was found approximately indicated the position on the sea of the collision, and went on to say that the fact displaced some important inferences of fact on which the president had based his judgment, and held that the place of collision found by the president was not the right place. He then found that the *Hawke* was not an overtaking ship as regard the *Olympic*, and proceeded to deal with the suggestion that the vessels were on crossing courses. He stated that the court had taken the opinion of the assessors on this point, and that their advice was, "that the *Hawke* was a steam vessel crossing so as to involve risk of collision," but that, they added, that "those in charge of the *Olympic* were as a matter of good seamanship justified in inferring that the *Hawke* could and would adopt such a course as would keep her clear of the *Olympic* if that ship continued on a course of S. 59° E." He added that the question whether the *Olympic* was justified in assuming that the *Hawke* could take a certain course was a question turning on the construction of the articles, and not a question merely of good seamanship, and found that there was nothing that the *Hawke* did or left undone which ought not or ought to have been done. He decided that the witnesses from the *Hawke* must have placed the *Hawke* further to the south than she really was, and that the *Olympic* must have come considerably south of mid-channel. He held that the onus was on the *Olympic* to show that notwithstanding the suction swerve the *Hawke* could by good seamanship with the helm and machinery in proper order have avoided the collision, and that the *Olympic* had failed to satisfy this onus. He held that the *Hawke* was not to be found in fault for the jamming of her helm. Summarising his reasons he found:

(1) That the *Olympic* had not proved that the *Hawke* was an overtaking vessel; (2) that the vessels were crossing vessels; (3) that the onus was on the *Hawke* to prove that the cause of the collision *primâ facie* was the suction, or some other cause independent of the management of

the *Hawke*, and that there being no proof of negligence in the management of the *Hawke* after the commencement of the swerve the onus of proving that the swerve was inevitable accident rested on the *Olympic;* (4) that the *Olympic* failed to prove that the collision resulted from inevitable accident, but on the contrary the evidence showed that the accident resulted from the *Olympic* coming too much to the south and thus unnecessarily exposing the *Hawke* to danger which might have been avoided.

Kennedy, L J. in his judgment stated that it appeared to him to be practically certain that the wreckage enabled the court to fix approximately the spot of collision, and pointed out that the Attorney-General, in his speech for the respondents, whilst declining to admit that the wreckage determined approximately the place of collision, did not anywhere challenge by argument the correctness of such an inference. He stated that the Court of Appeal found on the evidence before them that the collision took place rather more than 400 yards 2 cables to the north-westward (*i.e.*, more than two cables to the westward and about one cable to the northward) of the spot designated by the respondents' witnesses at the trial and accepted by the court below as the spot of collision. He pointed out that on this finding the calculations in the judgment as to times, speed and courses required at least modification. He added that the place where the collision occurred was probably about some sixty yards west-south-west of the position of the wreckage. He pointed out that the swerve of the *Hawke* must have taken place shortly after she passed the Chequer Buoy, and before she ever got to the East Conical Buoy. He pointed out that the *Hawke* must have passed more than 200 yards to the northward of the Chequer Buoy instead of twenty yards, as her witnesses alleged. He then found that the evidence given by the witnesses from the *Hawke* as to the navigation of the *Hawke ;* her distance from the buoys was incorrect, basing this finding on the consideration that otherwise having regard to the evidence as to the distance at which suction would operate, he must find that the witnesses from the *Hawke* had committed perjury in stating that their helm was not starboarded. He considered that the evidence of the witnesses from the *Hawke* as to the distance of passing the buoys and as to having, in fact, passed the Prince Consort Shoal Buoy before the collision happened, was to be accounted for by the fact that they had arrived at the distance by working backwards from the wrong place of collision and had all made serious mistakes. With regard to the jamming of the helm, he found that the jamming was caused by negligence of the helmsman of the *Hawke*, but that it had not been established that the jamming of the helm had contributed in fact to the collision, and that the nautical assessors were not in accord on this point. He then held that the *Hawke* was not an overtaking vessel, that the vessels were crossing vessels, that the *Olympic* had a duty to keep out of the way which she did not discharge, and that the *Hawke* was not in fault for the collision.

Lord Parker (whose judgment was read) held that upon the new evidence before the court the place of collision must be taken as approximately determined by the finding of the wreckage, and added that though he was not prepared to find that the theory propounded on behalf of the *Hawke* was absolutely impossible, yet it appeared to him to involve difficulties and improbabilities so great that it ought to be rejected. He pointed out that on the evidence the forces of interaction between the two vessels could probably be counteracted by helm at any distance beyond 200 yards, and that if the *Hawke* really passed the Chequer Buoy at a distance of twenty yards, only her distance from the *Olympic*, when she came round to port, must have been at least 300 yards. He found that the wreckage only fixed approximately the actual place of first contact, and that it was probable that the collision took place seventy-five yards (more or less) to the south-west of the spot where the wreckage was found. He came to the conclusion that the *Hawke* did not starboard and that her course must have been considerably further north than her witnesses thought. He added that there was nothing in the evidence which would justify the court in holding that the forces of interaction must have been inoperative. He then found that the *Hawke* was not an overtaking vessel as regards the *Olympic*, that the vessels were crossing vessels, and there was nothing to take the case out of the crossing rule and that the *Hawke* was not to blame for what she did or did not do.

After the petitions of appeal had been presented, the owners of the *Olympic* (the appellants) received an intimation from the respondents that the position of the three buoys off Cowes—the West Conical Buoy, the Chequer Buoy, and the East Conical or Prince Consort Shoal Buoy—as shown on the charts prepared for use at the trial by the Admiralty, were not correct. A petition was thereupon presented by the respondents to their Lordship's House for leave to adduce evidence on or before the hearing of the appeal as to the position of these buoys. Both parties agreed that the revised chart showed the true position of the buoys, and much of the argument adduced by Sir Robert Finlay, K.C. for the appellants, was directed in demonstrating that the change of the *locus in quo* (1) the place where the collision occurred, and (2) of the courses actually run by the vessels as considered in reference to the three buoys above mentioned entitled this House to consider the facts *de novo* and to weigh the evidence in the light of the facts so found.

On the question of the position of the wreckage it was argued that the finding of the fore-foot established, with the corrected chart, the contention of the *Olympic* that she did not take too wide a sweep round the West Bramble Buoy, and so come close over to the south side of the Channel and the *Hawke*, as alleged and found against her at the trial.

Sir *Robert Finlay*, K.C., *F. Laing*, K.C. *D. Stephens*, and *H. C. S. Dumas* appeared for the owners of the *Olympic*.

Sir *John Simon* (A. G.), *Butler Aspinall*, K.C., *A. D. Bateson*, K.C., and *C. R. Dunlop* for both respondents.

The House having taken time for consideration, gave judgment dismissing the appeal.

The Lord Chancellor.—This appeal turns on questions of fact, as to which there are concurrent findings of the two courts below. In an ordinary case these findings would not be reviewed by this tribunal. But in the case before

us the circumstances are peculiar. After the trial fresh evidence was obtained, which has displaced the inference drawn at the trial as to the place of collision. This evidence was before the Court of Appeal. But since the hearing there, further information has been obtained and accepted by both sides as to the position of the three buoys which were rounded by the *Hawke*, positions which are material in determining her real course. Under these circumstances your Lordships have thought it necessary to examine the evidence closely, and to permit the learned counsel for the appellants to challenge its interpretation more freely than is usual, where on questions of fact the findings have been concurrent. But there is one finding of fact to which this observation does not, in my opinion, apply. The President of the Admiralty Court, who saw the witnesses, and the Court of Appeal agree in accepting the testimony of those on board the *Hawke* that her helm was not, as suggested on behalf of the appellants, starboarded just before the collision. They agreed in holding that the swerve to port was not so caused. This finding must, I think, be accepted as conclusive. Indeed, there is no evidence on which it can be questioned if the collision can be accounted for on any alternative theory. If, then, the only alternative explanation, that there was an interaction, resembling suction in its effects, between the two vessels moving through shallow water at high speed and in sufficiently close proximity, can be established as possible it must, in the view I take of the case, and particularly of the concurrent finding on this point, be accepted. The real question is whether the courses, speeds, and positions of the two ships admit of this explanation being offered.

It must be borne in mind throughout the consideration of the evidence that the burden of making out their case rested on the appellants who were plaintiffs, a matter which is important where testimony is uncertain, and especially where, as here, the evidence of both sides has been in several material points proved to be erroneous.

The first and main question which we have to answer is whether the *Hawke* was a crossing ship within the meaning of art. 19 of the Collision Regulations. If she was then it was the duty of the *Olympic*, which had her on her starboard side, to keep out of her way, the duty of the *Hawke* being, under art. 21, to keep her course and speed. If, on the other hand, the *Hawke* was an overtaking ship, coming up with the *Olympic* from any direction more than two points abaft the latter's beam, within the meaning of art. 24, the *Hawke* cannot invoke arts. 19 and 21, but was, notwithstanding these articles, under a duty to keep clear of the *Olympic* until she was past and clear of her.

Whether the *Hawke* was a crossing ship depends on her course, position, and speed at the times which are material. In view of the conflict of testimony it is important to fix as nearly as possible the actual place of the collision. This is determined approximately by the spot where the wreckage was found. It may be, having regard to the expert evidence that was given, that the actual collision took place some sixty or seventy yards south-west of where the fragments were found. But it is at least clear that the collision took place not less than a cable in a south-westerly direction from the place estimated on the chart by the captain of the *Olympic*, and about two cables to the westward and one to the northward of the place supposed by the witnesses for the *Hawke*.

As the learned judge who tried the case accepted the view put forward by the witnesses for the *Hawke* on this point it is necessary to see what difference to the reasoning on which he based his conclusion is made by the real position as established before the Court of Appeal. One point of difference is certainly this. The course of the *Hawke* must have been considerably more northward and nearer to mid-channel than her witnesses supposed. This inference is strengthened by the circumstance that since the hearing before the Court of Appeal it has been agreed that the places of the three buoys which the *Hawke* rounded just before the collision are wrongly marked on the charts which were used at the trial. It now appears that the West Conical Buoy was in reality about sixty yards north of the spot marked for it on these charts; the Chequers Buoy 100 yards west and a little north; and the East Conical Buoy about seventy-five yards north. Having regard to the real place of the collision, I think that in addition to this extension of the distance of the *Hawke's* course from the banks on the south, the line of the *Hawke* was not, as her commander and Lieutenant Aylen thought, some thirty yards only away from the Chequers Buoy as she passed it, but considerably northward. It is not necessary to reflect on the good faith of these witnesses any more than on those for the *Olympic*, who, as I shall show later on, must be taken to have been at the trial at least as inaccurate. Neither set of observers are likely to have had their attention directed to the positions with the closeness which was necessary for really accurate observation.

In both cases there was much discussion after the event, and many calculations of what they thought the positions must have been; calculations which were vitiated by erroneous impressions as to the place of collision. Under such circumstances nothing is easier than to confound inference with observation and conclusions with premises. Certainty as to what really happened becomes very difficult for the judges who have to deal with a case such as this, and all they can do is to estimate probabilities, and to bear in mind that the burden of proving their case rests on those who are plaintiffs. I have come to the conclusion, bearing these considerations in mind, that the *Hawke* must be taken to have been sufficiently close to the *Olympic* just before the collision to render it possible that the force of interaction, to which I have referred, was the real cause of the collision. The *Olympic*, when she made her turn round the West Bramble Buoy, a turn which involved, an alteration in her heading of some eleven points, appears to have been, having regard to the true place of her collision, considerably south of the line through the Channel estimated by her witnesses. The forces of interaction in the case of a vessel so large as the *Olympic* might have been operative at a distance of 100 yards, or even rather more, and the two vessels may in the view which I take have been as close as this.

It is necessary to consider next whether the *Olympic* and the *Hawke* were crossing vessels on converging courses. As to the course of the *Olympic*, there is no question as to what her course was. On rounding the West Bramble Buoy she steadied on S. 59° E., a course which would take her slightly to the W.S.W. of where the wreckage was found.

About the course of the *Hawke* there has been controversy. Sir Robert Finlay relied in his argument for the appellants on the evidence of witnesses on behalf of the *Olympic* that the *Hawke* was on a course parallel to that of the latter vessel. He referred us to the testimony of the following witnesses: Captain Smith, Bowyer the pilot, Holehouse, Alexander, Murdoch, Wilde, Tulloch, Hume, Saxton White, Lashmar, Gaudion, and Lee. I have read through the whole of the evidence, and I have considered the passages to which the learned counsel referred us. The evidence is open to the observation which I have already made, that it is not probable that the attention of these witnesses was at the time sufficiently concentrated on the point to make it quite reliable testimony as to the courses having been really parallel. Some of them, when pressed, were not prepared to pledge themselves in the witness-box to exactitude.

On the other hand, the evidence of Commander Blunt and Lieutenant Aylen, who were navigating the *Hawke*, is quite distinct. After rounding Egypt Point they are clear that they steadied on a course of S. 74° E. This evidence, in my opinion, altogether outweighs the somewhat vague assertions of the witnesses for the *Olympic*. If it is accepted, as I think it must be, and as the courts below have agreed in accepting it, it follows that the two vessels were on intersecting courses, converging to the extent of 15 degrees, and were crossing vessels within the meaning of the rules, unless the appellants can show that the *Hawke* was an overtaking vessel.

To the consideration of this point I therefore turn. At the trial, the case made for the *Olympic* was that when she rounded the West Bramble Buoy and steadied on her course of S. 59° E., the *Hawke* was somewhere about two to three points on her starboard quarter, or, put otherwise, five to six points abaft her beam, and distant about a quarter of a mile. Now the speed of the *Hawke* from this time has, I think, been conclusively shown from the recorded number of revolutions of her engines, and from the state of her bottom and of the tide, to have been not more than 15·2 knots. Taking it that the speed of the *Olympic* when she slowed down for her turn round the buoy was only twelve knots, after which on steadying on her course of S. 59° E. her engines were put at full speed, the President showed in his judgment that if the *Hawke* was in this position, and assuming the place of collision to have been either that asserted by the *Hawke's* witnesses or that asserted on behalf of the *Olympic*, the collision could not possibly have taken place within the three minutes which, according to the log of the *Olympic*, was the space of time which elapsed between the steadying of that vessel and the collision, or even within four minutes, if a minute is added, as was suggested, to that logged time. And if the place of collision is taken to be that accepted by the Court of Appeal the calculations made by the learned judges in that court show that, on the hypothesis that the *Hawke* was in the position alleged, the overtaking of the *Olympic* would have been equally impossible. So strongly was this felt by the learned counsel who argued the case for the *Olympic* in the Court of Appeal that they abandoned this case altogether and put forward a new theory, unsupported, I may observe, by the evidence of any witness, set out pictorially on what was called the argumentative chart.

According to this theory the stem of the *Hawke* was at the moment of the steadying of the *Olympic* only seventy yards behind the stern of the *Olympic*, and was bearing not more than three points abaft her beam. It is, however, pointed out to me by the nautical assessors that, according to the positions as depicted on this chart, the two vessels were distant laterally about 400 yards, and that, if this is so, taking the stem of the *Hawke* and the stern of the *Olympic* as the determining points, the *Hawke* could not have been two points, or, indeed, more than three-quarters of a point, abaft the beam of the *Olympic*. But apart from this difficulty in the theory of the chart, if the *Hawke* was at this period seventy yards behind the stern of the other vessel, she must, if she was to become level with her bridge, as the witnesses for the *Olympic* say she was just before the final swerve, have made up not only the seventy yards, but a further interval of 690ft., which represents the distance from the stern of the *Olympic* to her bridge, a distance of 1½ cables in all. Allowing three minutes for the time in which this distance was travelled, an allowance which appears to me on the evidence to be the utmost that can be made in favour of the appellants, it would require a speed on the part of the *Hawke* in excess of that of the *Olympic* of three knots an hour to enable her to make up this interval and become level with the bridge of the *Olympic*. Putting the average speed of the *Olympic* even as low as fourteen knots in this period, and I think it must be taken to have been higher, this results in attributing to the *Hawke* a speed of seventeen knots during the period in question, a conclusion which is contradicted by the evidence to which I have referred. Lord Parker, of his judgment in the Court of Appeal, tests the question in another way, and I think the criticism which he makes on the argument put forward for the appellants is equally fatal, if it is taken as proved that the speed of the *Hawke* did not exceed 15·2 knots. The result of it is to show that the average speed of the *Olympic* herself between the time when she steadied on her final course and the moment of impact was considerably in excess of the average speed of sixteen knots, and that she, therefore, could not have been overtaken by the *Hawke*.

In addition to these reasons for thinking that the *Hawke*, if two points or more abaft the beam of the *Olympic* when the latter steadied on her course, could never have overtaken her, we have also to bear in mind that the hypothesis of overtaking is not borne out by the *Olympic's* log. This records her as having the West Bramble Buoy abeam at 12 42, as having straightened and steadied on her final course at 12.43 p.m., and as having started her turbine engines at 12.44. According to her captain and to Professor Biles if, under these conditions she was going, as

appears to have been the case, twelve knots at 12.43, she would increase her speed to twenty knots in three or four minutes. The log then gives 12.46 p.m. as the time of the collision in both deck logs and the official log, and this is the time alleged in the appellants' preliminary act. Assuming that, owing to her electric clocks recording minutes only and not seconds, the time of collision can be taken as really 12.47 p.m., she took five minutes to get from the West Bramble Buoy to the place of collision, and the distance from the buoy to the spot where the wreckage was found is about twelve and a half cables. This gives her an average speed in this interval of fifteen knots. But as her engines were only set at full speed after this interval commenced she must have travelled at an increasing speed and gone faster during the latter part of the interval than during the earlier part. If the *Hawke* was behind her originally, she could never, having regard to the speed of the other vessel, have overtaken her, for a simple calculation shows that in order to accomplish this the speed of the *Hawke* would have had to have been 16 8 knots.

In the face of the various calculations to which I have now referred, it appears to me to be impossible for the appellants to say that they have discharged the burden of proof which lies on them to make out that the *Hawke* was an overtaking vessel which was overhauling the *Olympic* till shortly before the collision. The facts, and the deductions from them, point to acceptance of the testimony of the witnesses for the *Hawke* that at no material period was that vessel ever abaft the beam of the other. This testimony was accepted by both the president and the Court of Appeal. In a case of this kind one must, as I have already said, somewhat discount the recollection of observation supposed to have been direct, but really made at a time when attention was not closely directed to the material point But when such testimony is confirmed by calculations made on materials which are beyond dispute, it is to be preferred to similar testimony which is not only at variance with these calculations, but has, as happened here, been discredited by having been thrown over in argument by those who have adduced it. I am therefore of opinion that the appellants have failed to prove that the *Hawke* was an overtaking ship.

It seems to me that the real explanation of what happened is that her pilot thought that the *Olympic* would come round into the channel well ahead of the *Hawke*. He appears to have misapprehended the speeds of the two vessels and their relative positions. He seems to have thought that the *Hawke* was abaft his beam when she was not, and that he himself was further north in the channel than he really was. He took the *Hawke* to be on a parallel instead of on what was a converging course. As the result he did not discharge the duty which the collision rules imposed on him of keeping the *Olympic* out of her way.

As to the other points made at the Bar for the *Olympic*, I do not think it necessary to deal with them except very briefly. Whatever might be said against the view that the jamming of the helm was an accident for which no one could be held responsible, the point seems to me to be insufficient to affect the result of this case following from the conclusion that it was the duty of the *Olympic* to keep out of the way.

Nor do I think that it has been shown by the appellants that the *Hawke* ought, according to the rules of good seamanship, to have ported before reaching the Chequers buoy, or that the pilot of the *Olympic* was at liberty to or did in fact assume that she would do so. The facts relating to the locality as well as to the navigation of the *Olympic* are not such as to justify the appellants' contentions founded on the cases of *The Pekin* (8 Asp. Mar. Law Cas 367; 77 L. T. Rep. 443; (1897) A. C. 532) and *The Albano* (10 Asp. Mar. Law Cas. 365; 96 L. T. Rep 335; (1907) A. C. 193. Moreover, there is no substance in the suggestion that the *Hawke* is put in the position of being herself a ship at fault over the collision because she did not give the usual s und signals on porting off Egypt Point. If she failed to do so there is nothing to show that such failure occasioned the collision. Nor did she by porting after passing the Chequers Buoy make herself in fault by failing to keep her course. On the contrary the dictates of good seamanship probably required her to do this. As to the argument that the *Hawke* ought just before the collision to have kept her port engine full steam ahead, instead of putting both engines full speed astern, I have only to say that it does not appear to me that such a manœuvre would have averted the collision.

As the result of the consideration I have given to this case I think that the decision arrived at by the courts below was the right one. The respondents presented a supplementary petition for leave to adduce evidence in rectification of the charts. As the parties have agreed that they were erroneous and, without discussing the petition, have agreed the necessary correction, it is needless to say more than that there will be no costs relating to this petition on either side, and that no decision has been invited or given upon the admissibility of such evidence in this House.

Lord ATKINSON.—I concur. Notwithstanding the conflict of testimony which exists in this case, due, I think, to inaccuracy of observation, not to wilful untruthfulness, two facts may be taken to have been clearly established. First, that the *Olympic*, after she rounded the West Brambles Buoy, steadied on a course of S. 59° E. magnetic, and kept that course up to the time of collision. And, second, that the place where the collision occurred, being approximately at the site of the wreckage, was not the place fixed for it by the witnesses on either side, but was on the contrary, in fact, about 200 yards in a S.S.W. direction from the place fixed by Captain Smith, and about two cables' length to the westward and one to the northward of the place fixed by the *Hawke*. Now, as all the evidence goes to show that the *Olympic* never changed her magnetic course from the time she settled upon it after rounding the West Brambles Buoy till the collision, it necessarily follows that her true course, that is the course actually traversed by her, must have been south of that traced upon the composite chart and parallel to it. From this it is plain that the *Olympic* on rounding the West Brambles Buoy did not hug the shore in the way indicated by the course traced by the pilot, nor even as indicated by that traced by Captain Smith, but must have taken a still wider sweep than even this latter shows and gone more to the southward. This is, I think, what the learned

President found at the first trial, and it tallies exactly with the evidence of Captain Blunt, who says that the *Olympic* took too wide a sweep; that, having regard to the position of his own ship, the *Olympic* began to turn round the West Brambles Buoy too late; that she came out too far into the channel, did not go back into a more northerly position before steadying on her course of S. 59° E., but, on the contrary, steadied upon that course immediately.

It is obvious from the great divergence in direction between the two courses traced for the *Olympic* as she rounded this buoy, by her pilot and captain respectively, that they are deposing according to their recollection of matters which at the time of their occurrence did not call for special observation or accurate ascertainment. Both these courses would have been, I presume, safe courses, and both permissible according to the requirements of good seamanship. The misfortune is that both are, by the physical facts since discovered, proved to be erroneous. A similar remark applies to the evidence of the *Hawke* as to the course she steered. If it be true that after rounding Egypt Point she steadied on a course of S. 74° E., and kept that course till practically the time of the collision, then her actual course, though the same according to the compass S. 74° E., must in fact have lain about a cable's length to the northward, and therefore nearer to the course of the *Olympic* than that traced for her, else she never would have arrived at the place of collision. She must have rounded Egypt Point, therefore, at a greater distance than her witnesses supposed. There was nothing at the time to require them to ascertain or determine that distance with accuracy, and it is quite possible they may have underestimated it. But the laying of the course of the vessel after she had rounded the point is, like the alleged starboarding of her helm just before the collision, quite a different thing. It is not a matter of estimate, conjecture, or approximation. It is something done on board the ship under the eyes of many of her officers, and must have been known to many of them. There does not appear to me to be any room for mistake about it. The thing either took place or the witnesses who say it did take place speak falsely.

Now, I could well understand the truthfulness of these witnesses, members of the *Hawke's* crew, being impeached, but that has not been done. On the contrary, Sir Robert Finlay has expressly disclaimed any intention of the kind. The learned president believed them. I accept, therefore, the statement as accurate, that when the *Hawke* rounded Egypt Point she steadied on a course of S. 74° E., which was not a course parallel to the course of the *Olympic*, but a course converging to it at an angle of 15 degrees. The importance of fixing the true position of the two vessels as they steadied on their respective courses consists, in my view, in this, that it is only by doing this that the respective bearings of the one upon the other can be ascertained. It is only necessary to look at the composite chart to see that the wider the sweep taken by the *Olympic* in rounding the West Brambles buoy, the more she came to the south in that sweep the more would she tend to get as it were behind, or to the westward of the *Hawke*, and in like manner the wider the sweep taken by the *Hawke* in rounding Egypt Point, the more would she tend to get in front, or, roughly, to the eastward of the *Olympic*.

I think these considerations tend to support the evidence of Captain Blunt. It runs thus: "And at some moment you observed her to steady?—*A.* Not to steady, to be steady —*Q* At the moment when you did observe her to be steady, how did she bear from you? *A.* Roughly speaking, I should say her bows were about in line with my stern, and the distance between us would be approximately rather over a cable—a cable to a cable and a quarter; I will not split straws about it.—*Q.* Her bows in line with your stern? *A.* Yes, my quarter.—*Q* Were you the leading ship then? *A.* Certainly.

Now if the courses of the two ships were respectively S. 59° E. and S. 74° E., converging at an angle of 15 degrees, which I for my part cannot doubt, it would admittedly have been the duty of the *Olympic* to have kept out of the way of the *Hawke*, unless the *Hawke* was, in fact, an overtaking ship within the meaning of art. 24. If she was an overtaking ship, then the obligation to keep out of the way of the *Olympic* admittedly rested upon her, and the *Olympic* was in no way to blame in keeping her course up to the time of the collision, as she admittedly did. The question, therefore, whether the *Hawke* was an overtaking ship or not becomes one of the crucial questions in the case. The burden of proving the affirmative of it rests upon the *Olympic*. Has she discharged that burden? In my view she has not, because the case she puts forward in support of it is, in several points, inconsistent, and in some incredible. A ship may be an overtaking ship though she be on a course converging with that of the ship she is overtaking. Again, obviously a ship may not be an overtaking ship, though at some particular moment she be two points abaft the beam of the ship she is alleged to be overtaking. A ship to be an overtaking ship within art. 24 must, in addition, be proceeding at a rate of speed sufficiently greater than that of the ship she is alleged to be overtaking as to enable her to come up with the latter. The two vessels must be proceeding in the same direction within a wide range, and there must be such proximity between them that, should either act contrary to this rule, it will involve danger of collision.

The duty of one of the vessels to keep out of the way of the other arises from this proximity, and if the article once applies the overtaking vessel must keep out of the way of the other till she has passed that other and got clear. The essential condition, therefore, is that the overtaking vessel should come up with the other, so as to involve risk of collision, from a direction more than two points abaft the beam of that other—that is, from such a position, with reference to that other, that at night those on board the former could not see the sidelights of the latter: (*The Chanoury*, 28 L. T. Rep. 284; 1 Asp. Mar. Law Cas. 569; *The Franconia*, 35 L. T. Rep. 721; 3 Asp. Mar. Law Cas. 295; 2 P. Div. 8; *The Main*, 55 L. T. Rep. 15; 6 Asp. Mar. Law Cas. 37; 11 P. Div. 132-138).

Now Captain Blunt positively states that the *Hawke* never bore two points abaft the beam of the *Olympic*. If he be accurate in that, of course there is an end of the case on this point; but, putting his evidence aside for the moment and

dealing with the point on the evidence given on behalf of the *Olympic*, coupled with the only evidence given in the case as to the speed of the *Hawke*—namely, that of her crew—how does the matter stand? According to the evidence of the *Olympic's* witnesses, that vessel steadied on her course, after rounding the West Brambles Buoy, at 12.43. They state that the *Hawke* was at that time bearing two and a-half to three points on the *Olympic's* quarter, which would be five to six points abaft her beam, and, according to the estimate of Captain Smith, was then distant about half a mile from the bridge of his ship, on which he stood. That bridge was admittedly situated 690ft.—230 yards—from the stern of his ship. Strange to say, the pilot of the *Olympic* estimates the distance of the *Hawke* from the same bridge at the same moment as a quarter of a mile, just half that estimated by the captain. This discrepancy in itself shows the unreliability of these estimates of distance. The effect of the evidence of all the *Olympic's* witnesses is that the *Hawke* then came along on a course practically parallel with that of the *Olympic*, going faster than the latter and drawing up upon her very quickly, till she came so far abreast of her that Captain Smith saw the stern of the *Hawke* through an aperture in the shelter on the bridge of his own vessel; that for an appreciable time two ships ran at apparently equal speeds; that the *Hawke* then seemed to drop astern, and that then the accident occurred. But all this overhauling by the *Hawke* must have been done in three minutes; for the accident occurred, according to all the *Olympic's* logs and her preliminary acts, at 12.46 o'clock. A great effort has been made on behalf of the *Olympic* to expand this three minutes into four minutes, inasmuch as the clocks from which the times were taken are alleged to have been electric clocks, which only register minutes and not seconds.

Now the speed of the *Hawke*, from the recorded revolution of her engines, the state of the tide, the condition of her bottom, and the other matters mentioned in the evidence, was proved by her witnesses, not to be more than 15·2 knots —practically fifteen knots. But fifteen knots means a knot in four minutes. And the absurdity of the *Olympic* case can, I think, be well illustrated by this, that if the *Olympic*, at the time Captain Smith observed the *Hawke* from his own bridge, had become stationary, and the *Hawke* had resolved to ram her, and had proceeded to do it, it would have taken her nearly two minutes to have traversed, at the rate of fifteen knots, the half mile, which, according to the captain's own estimate, separated her from the *Olympic's* bridge. Again, the *Olympic*, according to her own evidence, never slowed down to less than eleven to twelve knots as she rounded the West Brambles Buoy. As soon as she steadied she put her engines full speed ahead, and must have picked up speed quickly, for, as it is shown by Lord Parker in his judgment in the Court of Appeal, her average speed from the Thorn Buoy to the place of collision was sixteen knots. Assuming even that the *Olympic* did not pick up speed at all from the time she steadied till the collision, twelve knots means a knot in five minutes, fifteen knots means a knot in four minutes. In the three, or at the most four minutes, which elapsed between the steadying of the *Olympic* and the collision, the latter vessel must have traversed about four-fifths of a knot, the *Hawke* a knot. The difference between their speeds is one-fifth of a knot. That superiority in speed the *Hawke* would no doubt have over the *Olympic*, but whether the distance of the former from the *Hawke* be half a mile as fixed by the captain, or a quarter of a mile as fixed by the pilot, it would be absolutely impossible, it appears to me, for a ship with only an advantage in speed over the *Olympic* of one-fifth of a knot per minute to have done all in three or four minutes the *Hawke* is alleged to have done. I need not enter at length into a more detailed analysis of the respective rates of speed of the two vessels. That has already been done by my noble and learned friend upon the Woolsack and by the Lord Justices in the Court of Appeal. I, like them, am quite unable to accept the case put forward by the *Olympic* upon this point. Not only do I think that she has failed to show that the *Hawke* was on this occasion an overtaking ship within the meaning of art. 24, but the inclination of my opinion is that that contention has been disproved.

It was urged on behalf of the *Olympic*, however, that she was excusable for not complying with this art. 24 on the principle laid down in *The Pekin (sup.)*. The facts of that case are, however, wholly different from those of the present case. There the two vessels, the *Normandie* and the *Pekin*, were traversing a narrow channel in a very winding river. The one, the *Pekin*, going up the channel on the proper side within the meaning of art. 21 of the regulations of 1884. The fault, or one of the faults, laid to the charge of the *Pekin* was that she did not keep her course as directed by art. 22, but on the contrary, at a particular buoy, called the Old Dock Buoy, ported her helm, the *Normandie* having, unfortunately, at the same time starboarded her helm and so brought about the collision. In the report of the judgment of Sir Francis Jeune, art. 16 seems to be confounded with art. 22. It is an entire mistake, it appears to me, to suppose that case decided that art. 16, dealing with vessels crossing so as to involve risk of collision, did not apply to narrow winding channels. That point was distinctly ruled in *The Leverington* (55 L. T. Rep. 386; 6 Asp. Mar. Law Cas. 7; 11 Prob. Div. 117). Lord Herschell, in the latter case, says: "We are further of opinion that art. 16 applies to the present case. Though these are narrow channels still the general rules of navigation apply, so far as practicable, in such places, no other special rules being provided as is the case in some rivers." Lord Esher concurred, and Fry, L.J. said: "I think that art. 16 applies in narrow channels, and that it would be unwise and incorrect to hold that it does not apply in such places." Indeed, in *The Pekin* Sir Francis Jeune distinctly says: "But vessels may, no doubt, be crossing vessels within the meaning of art. 22 in a river. It depends on their presumable courses." But all that is meant by this last expression would appear to me to be this. Where two ships are navigating a narrow channel so winding in its course that the physical features necessitate, or the rules of good seamanship require, that either should relatively to the other take for a time a course, which if continued would intersect the

course of that other so as to involve risk of collision, and it can be reasonably assumed by the one that the other will change her course so as to avoid this risk as soon as those physical features will, consistently with the rules of good seamanship, permit, the article as to crossing ships does not apply; but the circumstances of each case must determine whether this necessity exists or this assumption can reasonably be made. This is, I think, clearly brought out in the judgment of James, L.J. in the *Oceano* case (3 P. Div. 60, at p. 63), where, in commenting on the case of the *Velocity*, he says: "What was decided really, was that in such a river the particular direction taken for a moment or a few moments in rounding a corner or avoiding an obstacle was not such an indication of the real course of the ship as to justify the other ship in saying, 'I saw your course; I saw that if you continued in that course we should be crossing ships, and I left you, therefore, the entire responsibility of getting out of my way under the rule.'"

The place, however, where the collision in this case occurred was not a winding or narrow channel. The *Olympic* and the *Hawke* had both continued down it on straight courses. There was plenty of sea room for the *Olympic* to have got out of the way of the *Hawke*. That is admitted, and so far from the pilot of the *Olympic* expecting that the *Hawke* would, upon a port helm, go off to starboard and keep out of his way, he expected a precisely contrary manœuvre on her part, for he says: "After I had steadied on my course I walked to the starboard side of the bridge and saw that she (the *Hawke*) was a long distance astern just on my quarter—in a manner of speaking I did not trouble any more about her. I left her plenty of room to go both sides of me; in fact I thought she was going to the port side of me. I thought she was going to pass on my port side north of the middle," and later on he said that just before the swerve commenced the two ships were on parallel courses, that the *Hawke* was level with the *Olympic* quarter, and then the ships' hulls were two cables apart.

It is clear that there was nothing wrong in the *Hawke* following the course of S. 74° E. Her omission to sound her whistle when rounding Egypt Point could not have contributed in any way to the accident, and the putting of her helm slightly to port about the Chequers Buoy tended rather to prevent than to contribute to the collision. The main question is, did she describe the curve, styled the swerve "solely under the influence of a starboard helm, or solely under the influence of some external force, call it suction or attraction or whatever it may be?" All the witnesses examined for the *Hawke* deny absolutely that her helm was ever starboarded, though it may well be that her action gave that impression to those on board the other ship. For the reasons I have already given I think their evidence on this point must be accepted. The suggestion that they may have been mistaken and that the helm may have been put and kept hard-a-starboard without their having observed it appears to me to be wholly and entirely incredible.

One must conclude, therefore, that the *Hawke* swerved under some powerful external force the true nature of which may not be clearly known. So far as the evidence goes the vessels were near enough to each other for that force to operate. If the evidence of the *Hawke's* witnesses be true, as I think it must be taken to have been, there is no other way of accounting for the collision. The *Hawke* endeavoured to port her helm, but owing to the rapidity and force with which the helm was put over it jammed. I concur with Kennedy, L.J. in thinking that using the machinery which moves the helm in such a way as to make it jam is an act of negligence, but I doubt very much if it was in this case negligence in any way contributing to the accident, or that if the helm had been got over hard-a-port, it would to any appreciable extent have counteracted the external force operating on the vessel and have checked the swerve. Whether, however, that be so or not, I do not think she can be held to blame for an act such as this, done or omitted in the agony of an impending collision. Again, it is said she ought to have reversed with her port engine instead of merely stopping it. Our assessors advise us to the contrary. They think the course taken was the wisest and the best, but, even were it otherwise, the same remark applies to it as to the last-mentioned act of negligence. It was an act done in the agony of an impending collision. I think, therefore, that the *Hawke* did nothing wrong in bringing herself within the reach of that strange force's action, and cannot be held to blame in having neglected to do something different from what she, in fact, did to counteract that force.

In my opinion, therefore, the *Olympic* was solely to blame for the collision. The decision appealed from was, I think, right, and should be upheld, and this appeal dismissed with the order as to costs already indicated by the Lord Chancellor.

Lord Shaw.—I agree with the judgments of my noble and learned friends who have preceded me, and I desire to offer only one additional observation.

After the judgment of the learned President of the Admiralty Division was delivered, and before the final trial of the case by the Court of Appeal, an application was made to be allowed to take supplementary evidence. I have read that supplementary evidence. At the Bar of your Lordships' House a further admission was made, and I have also taken stock of that. It was alleged that that supplementary evidence and that admission had a materiality upon the questions of the bearings of the vessels, of their courses, and of their positions at particular points of time. I think they had, but, having considered them fully along with the original evidence, I am of opinion that these supplementary matters did not weaken, but, on the contrary, confirmed, the conclusion arrived at by the learned President of the Admiralty Division.

Lord Sumner.—This appeal raises no new questions of law, and turns upon extremely special questions of fact. I have had the advantage of considering both the judgments which have been already read to your Lordships' House, and I cannot usefully add anything to them.

I concur in the motion proposed.

Appeal dismissed with costs, except as regards the supplementary petitions, as to which there were no costs.

Solicitors: for the appellants, *Thomas Cooper and Co.*, for *Hill, Dickinson, and Co.*, Liverpool; for the Admiralty, *Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Oct. 22, 1914.

(Before Buckley, Phillimore, and Pickford, L.JJ.)

Burrell and Sons v. F. Green and Co. (a)

appeal from the king's bench division.

Charter-party—Loss of time—Cesser of hire—"Damage preventing working of vessel"—"Accident to cargo"—Ship driven into port of refuge—Delay by charterers in giving instructions to master—Appeal against finding of umpire.

A ship under charter was driven into a port of refuge. An umpire found that there was in fact an unreasonable and improper refusal by the charterers on the ship's arrival at the port to give instructions to the master with regard to the restowage of the deck cargo, and that the charterers ought in the ordinary course of business to have given the master instructions. It was contended for the charterers that this was a finding in law, and that the finding was wrong in law, as it was the duty of the master to act without waiting for the charterers' instructions.

Held, that there might have been before the umpire facts to justify his finding, and, that being so, there was no rule of law which compelled the court to say that the umpire was wrong in his finding.

Decision of Bailhache, J. (12 *Asp. Mar. Law Cas.* 411; 109 *L. T. Rep.* 970; (1914) 1 *K. B.* 293) *affirmed.*

Cross-appeal by the charterers from a decision of Bailhache, J.

Question for the opinion of the court upon an award and special case stated by an umpire.

A charter-party provided that:

In the event of loss of time from deficiency of men or stores, breakdown of machinery, collision, docking, stranding, or other accident or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost shall be allowed to the charterers, including first twenty-four hours, and if such detention shall exceed thirty days charterers to have the option of cancelling this charter; but should the vessel be driven into port or to anchorage by stress of weather or from accident to the cargo, such detention or loss of time shall be at the charterers' expense.

The chartered vessel, which carried, amongst other things, a deck cargo, encountered heavy weather in the course of the voyage and the deck cargo shifted. It was found necessary for safety to put into port, and upon arrival it was necessary to discharge the deck cargo and to examine the ship, which was injured by reason of the combined effect of the stress of weather and the shifting of the cargo, and, in order to execute the necessary repairs to the ship, the vessel was detained in all for thirty-three days and seventeen hours, of which period nine days and twelve hours were occupied by the repairs to the ship itself, and four days and twelve hours in awaiting the charterers' instructions.

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

It was contended by the charterers that, under the terms of the charter-party, the vessel was off hire for a period of nine days and twelve hours, upon the ground that it was time lost from an accident or damage preventing the working of the vessel. For the shipowners it was contended that the ship was on hire during the period when she was being repaired, on the ground that the delay was due to an accident to the cargo.

Bailhache, J. held that the words "should the vessel be driven into port or to anchorage by stress of weather or from accident to the cargo, such detention or loss of time shall be at the charterers' expense" referred only to times actually lost by stress of weather or by accident to cargo and repairing the result of such accident, but did not include time lost owing to damage to the ship which was caused by the accident to the cargo, such damage coming within the words "or other accident or damage" in the earlier part of the clause, and that consequently, as the delay caused by the repairing of the vessel exceeded twenty-four hours, she was off hire during the nine days and twelve hours occupied in repairing her.

The award and special case stated by the umpire are fully set out in the report of the case in the court below: (12 Asp. Mar. Law Cas. 411; 109 L. T. Rep. 970). The only paragraphs of the award and special case set out in this report are those material to the appeal, which are as follows:

10. The master immediately on arrival at Victoria applied to the charterers for advice and instructions with regard to the restowage of the deck cargo. I find as a fact that the charterers ought in the ordinary course of business to have given the master instructions with regard to the deck cargo, but they failed to do so for a considerable time, and in consequence of this failure the discharging of the deck cargo, which was recommended by the surveyors, was not commenced until 6 a.m. on Monday, the 25th Nov., and time was lost thereby. The discharging of the after-deck cargo continued until noon of Tuesday, the 26th, when the surveyors considered that sufficient of the after-deck cargo had been removed, but the discharging of the fore-deck cargo occupied until 2 p. m. on the 1st Dec., when the whole of the fore-deck cargo was discharged.

18. I further find that on the vessel's arrival at Victoria there was in fact an unreasonable and improper refusal by the charterers to give instructions to the master, whereby a period of four days and twelve hours was lost.

19. In case it may be necessary to apportion the time occupied by the different operations, I divide the thirty-three days and seventeen hours approximately as follows: Three days and four hours in actually steaming to Victoria. A reasonable time for surveys and for charterers giving instructions before discharge of deck cargo could begin—say, seventeen hours (up to noon on the 20th Dec.). Time lost through charterers' delay in giving instructions, four days and twelve hours (up to midnight on the 24th Nov.). Time occupied in connection with discharge of deck cargo for purpose of restowing, distinct from any work of discharging solely for the purpose of repairs, six days and fourteen hours (up to 2 p.m. on the 1st Dec.). Time occupied in repairing, nine days and twelve hours (up to 2 a.m. on the 11th Dec). Time occupied in reloading, seven days and twelve hours; and in bunkering and preparing for sea, one day and eighteen hours (sailed 8 a.m. on the 20th Dec.).

Bailhache, J.'s judgment on this point raised by the cross-appeal was as follows: "Mr. Maurice Hill's other contention is a very much

simpler one, and it is this: He says that there is no obligation at all on the part of the charterer, who was at San Francisco, to give instructions to the master of the *Strathdene*, who was at Victoria, a long way off, as to what was to be done with the deck cargo, which obviously required to be discharged in order to see what damage the ship had sustained. I should have thought myself that there was great force in that contention, but I think I am precluded from considering it, because the arbitrator, who is a judge of fact in this case, and, indeed, the judge of fact and law as well, except so far as he leaves the question to me, has come to the conclusion which is expressed in clause 10 of the award: 'I find as a fact that the charterers ought in the ordinary course of business to have given the master instructions.' Upon that finding, if the charterers ought to have given the master instructions and failed to do so, and by reason of their failure to do so the ship was delayed, it is quite clear that the ship ought not to be off hire for that period. Therefore, upon the findings in the award, I decide against Mr. Hill's contention in that respect. I must vary the award by finding that the *Strathdene* was off hire for nine days and twelve hours."

The shipowners appealed as regards the costs awarded by Bailhache, J., in which appeal they now succeeded in the Court of Appeal.

The charterers gave notice of cross-appeal against that part of the judgment of Bailhache, J. which is set out above

Maurice Hill, K.C. and *Russell Davies* for the charterers.—The umpire found that at Victoria there was in fact an unreasonable and improper refusal by the charterers to give instructions to the master, whereby a period of four days and twelve hours was lost, and that the charterers ought in the ordinary course of business to have given the master instructions. The umpire calls this a question of fact, but it is a question of law, and not of fact. The charterers had no duty or right to give instructions to the master. It was for the shipowners, through the master, to say what was to be done. This was not properly a time charter, but a voyage charter, and it was the business of the master, who was an agent of necessity of the owner, to prosecute the voyage. It was the duty of the master, having reached a port of refuge, to do what was necessary for the due prosecution of the adventure, and therefore the owners are liable for the delay, and the ship should be treated as having been off hire during the period of four days and twelve hours:

Phelps, James, and Co. v. *Hill*, 7 Asp. Mar. Law Cas. 42; 64 L.T. Rep. 610; (1891) 1 Q. B. 605; *Hansen* v. *Dunn*, 11 Com. Cas. 100.

Adair Roche, K.C. and *Neilson*, for the shipowners, were not called upon to argue on the cross-appeal.

Buckley, L.J.—The first question which we have to decide arises upon a cross-appeal by the charterers asking this court to set aside the judgment of Bailhache, J., "so far as it answers in favour of the owners the question whether the *Strathdene* was off hire during the time lost. four days and twelve hours, between the 20th and 24th Nov. 1912." The charterers ask the court to answer that question in their favour. The point was this: The *Strathdene* had deviated from her voyage on the 16th Nov. 1912 in order to go into a port of refuge—namely, Victoria. She arrived at Victoria on the 19th Nov. On the 20th Nov. surveys were made. The period in question in this cross-appeal is from the 20th Nov. till the 24th Nov., when the charterers did give certain instructions.

What the arbitrator has found as regards that is contained in pars. 10 and 18 of the special case. I will read those paragraphs in a moment, but what they come to is this: That application was made to the charterers for instructions, that the charterers refused to give instructions for a considerable time, and that after a time they did give instructions. That is the period in respect of which this cross-appeal is brought. The four days and twelve hours were lost because, the charterers having been applied to for instructions which they ultimately gave, that period of time expired before they gave the instructions. The statement in the special case is: "The master immediately on arrival at Victoria applied to the charterers for advice and instructions with regard to the restowing of the deck cargo. I find as a fact that the charterers ought, in the ordinary course of business, to have given the master instructions with regard to the deck cargo, but they failed to so for a considerable time, and, in consequence of this failure, the discharging of the deck cargo, which was recommended by the surveyors, was not commenced until 6 a.m. on Monday, the 25th Nov., and this time was lost thereby."

Par. 18 supplements that in this respect: "I further find that, on the vessel's arrival at Victoria, there was in fact an unreasonable and improper refusal by the charterers to give instructions to the master, whereby a period of four days, twelve hours, was lost."

We do not know, and we have nothing to do with, the facts upon which the arbitrator came to those conclusions. What I find from that paragraph of the special case is that an application was made to the charterers; that they refused to give instructions for a time; and that after that time they gave them. It was said that the facts were such as to make it perfectly reasonable and easy, inasmuch as the vessel arrived at Victoria, to communicate with and get instructions from the charterers, whose head office, it is true, was at San Francisco, but who had an office at Seattle. It is sufficient for me to say that there may have been before the arbitrator such facts as to justify the finding at which he in fact arrived. That being so, there is no rule of law, as far as I know, which compels me to say that, in that finding, the arbitrator was wrong. I think that this cross-appeal fails.

Phillimore, L.J.—I am of the same opinion. The case arises on a clause of the charter-party expressed as follows: "That in the event of loss of time from deficiency of men or stores, breakdown of machinery, collision, docking, stranding, or other accident or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost shall be allowed to the charterers, including the first twenty-four hours, and, if such detention shall exceed thirty days, charterers to have the option of cancelling this charter; but should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense."

The vessel was driven into port either "by stress of weather or from accident to the cargo." Therefore the detention due to her being driven into port in that way would be at the charterers' expense.

The number of days during which the deck cargo was discharged, as it necessarily was, has been allowed to the shipowners, and a certain number of hours, called "a reasonable time for surveys and for charterers giving instructions," seventeen hours, have been allowed also to the shipowners.

We are discussing now the period of time during which the ship was actually delayed in between the time of the surveys and the time actually of discharging cargo, which was in fact four days and twelve hours, and which is found by the arbitrator to have been lost through "charterers' delay in giving instructions."

Mr. Maurice Hill, for the cross-appellants, the charterers, says that, as a matter of law, the captain was bound to act as soon as he got the surveys, and to do that which was in fact done, without waiting for the instructions of the charterers. It is not necessary to decide here exactly how far the charterers were *pro hac vice* owners of the ship, and how far the charterers were or were not entitled to be heard before the master pledged their credit for anything, because it is clear that, in the facts of this case, there may have been very good reasons why, as a matter of business, the charterers should be consulted; and if the charterers had to be consulted, inasmuch as the time before the period of consultation was allowed to the shipowners and a time after the period of consultation was also allowed to the shipowners, the time in between, which ought not to have existed, must be allowed to the shipowners too. By the words "the time in between, which ought not to have existed," I mean the time during which the charterers ought to have given the master instructions, but failed to do so.

For these reasons I think that the arbitrator was right, and that Bailhache J. was right in allowing this item which was claimed by the shipowners.

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

Bailhache, J. considered himself bound by the finding of fact of the arbitrator in this case, which is to the effect that has been stated.

We do not know what was the state of circumstances, and the evidence before the arbitrator, upon which he arrived at that finding. It seems to me that, whatever interpretation is put upon the charter-party with respect to the restrictive obligations of the owners and the charterers, there might possibly have been circumstances which would justify such a finding. We do not know the circumstances in which the arbitrator did arrive at that finding.

For these reasons I consider, as Bailhache, J. considered, that we are bound by the finding of fact by the arbitrator, and that the cross-appeal must be dismissed.

Appeal allowed. Cross-appeal dismissed.

Solicitors: for the charterers, *Parker, Garrett, and Co.*; for the shipowners, *Botterell* and *Roche.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION

Nov. 17 *and* 18, 1914.

(Before ATKIN, J.)

DUNCAN FOX AND CO. *v.* SCHREMPFT AND BONKE. (*a*)

Trading with the enemy—C.i.f. contract—Tender of documents after outbreak of war—Goods to deliver at Hamburg—Seller not entitled to force acceptance of documents involving delivery of goods to alien enemy.

The claimants, who were produce merchants of Liverpool, in May 1914 *sold certain Chilean honey to the respondents to be shipped on a German-owned steamer and delivered at Hamburg, terms c.i.f. cash in Liverpool against documents. The honey was shipped on the 28th June and the shipment was declared on the 28th July, but the ship was interned at a neutral port.*

On the 4th Aug war was declared with Germany, and on the 5th Aug. a proclamation was issued prohibiting trading with the enemy, and on the same day the shipping documents were tendered. The respondents having refused payment;

Held, that the respondents (the buyers) were justified in refusing the tender of the documents on the ground that if they accepted them they would be offending against the provisions of the proclamation of the 5th Aug., inasmuch as it would involve trading with the enemy.

SPECIAL CASE stated by arbitrators:

Differences having arisen between Duncan Fox and Co. (hereinafter referred to as the claimants), who are an English firm of general merchants carrying on business at No. 31, James-street, Liverpool, and Schrempft and Bonke (hereinafter referred to as the respondents), who are an English firm of merchants carrying on business at the Old Hall, Old Hall-street, Liverpool, as to the liability of the respondents in respect of a claim made against them by the claimants under a contract of sale, dated the 11th May 1914, such differences were referred to two of us—namely, Frederick Pyemont Pyemont and Arthur Edward Pattinson—as arbitrators appointed by the claimants and respondents, respectively, on or before the 21st Aug. 1914, under clause 20 of the Conditions of Sale of the Liverpool General Brokers' Association Limited, which said clause is incorporated in the said contract; and we, the said Frederick Pyemont Pyemont and Arthur Edward Pattinson, on or before the said 21st Aug. 1914, under the powers conferred upon us by the said clause, called in the other of us—namely, Edmond Gladstone Brownbill, a member of the said association—as third arbitrator.

2. By contract of sale contained in two letters, both dated the 11th May 1914, the claimants sold to the respondents, through Messrs. Hale and Paterson, brokers, acting for both parties *inter alia*, "about 300 barrels June and (or) July shipment Chilian honey per steamer and (or) steamers direct or indirect, with or without transhipment, at 20*s*. 6*d*. per hundredweight, cost freight and insurance (f.p.a.) to Hamburg, delivered weights, tare, 12 per cent., no draft. . . . Payment net cash in Liverpool in exchange for shipping documents on presentation of same and sellers to give buyers policy or policies of insurance covering 2 per cent. over the net invoice amount."

3. On or about the 28th June 1914 the claimants shipped on board the German steamship *Menes* at Penco 300 barrels of honey, and they received a bill of lading

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

dated the 28th June 1914 for carriage of the said goods by the said steamship from Penco to Hamburg, there to be delivered to the claimants or their assigns. By art. 16 of the conditions indorsed on the said bill of lading it is provided that if the entering of any port should be considered unsafe by reason of war the master was to have an option of landing the goods at any port more or less near to the port of destination at the shipper's risk and expense. By art. 24 all questions arising under the bill of lading were to be governed by the law of the German Empire and to be decided in Hamburg. The said bill of lading is hereto annexed and marked B.

4. On the 28th July 1914 the said Hale and Paterson sent to the respondents a written notice which, omitting formal parts, was as follows: "Under date the 27th inst. and subject to correct transmission and translation of cable advice sellers declare shipment of 300 barrels honey per *Menes* (s.) in completion of contract dated the 11th May 1914, which kindly note." The said notice was received by the respondents on the 28th July 1914, or the day following.

5. On the evening of the 4th Aug. 1914 war was declared by Great Britain on Germany. On the 5th Aug. 1914 a Royal Proclamation relating to trading with the enemy was issued. By the said proclamation all persons resident, carrying on business, or being in the British dominions were warned not to supply to or obtain from the German Empire any goods, wares, or merchandise, or to supply to or to obtain the same from any person resident, carrying on business, or being therein, nor to supply to or obtain from any person any goods, wares, merchandise, for, or by way of transmission to or from the said empire, or to or from any person resident, carrying on business, or being therein, nor to trade in or carry any goods, wares, or merchandise destined for or coming from the said empire, or for or from any person resident carrying on business or being therein on pain of penalties.

6. On the same date (5th Aug.) the said Hale and Paterson received from the claimants a provisional invoice for the said goods, and on the same day the said Hale and Paterson sent the said provisional invoice to the respondents, with a covering letter of that date, which stated that the shipping documents for the parcel were ready and awaited the disposal of the respondents on the terms of said contract. The said letter and invoice were received by the respondents. No other tender of documents was made than is contained in the said letter. No question has been raised as to the sufficiency of the form of tender. We find as a fact that the respondents waived the necessity of any further or other tender.

7. The documents thus tendered included the said bill of lading and a policy of insurance on the said goods. No question has been raised with regard to any of the documents except the said bill of lading, and the respondents agree that the other documents are in order.

8. The respondents refused to accept the documents. On the 7th Aug. 1914 the respondents stated on the telephone to the said Hale and Paterson that they could not take up the documents as there was no valid bill of lading, and on the same day they wrote a letter to the said Hale and Paterson confirming the said statement. The said steamship *Menes* had not arrived at Hamburg at the date of the said tender of documents.

9. The claimants maintain that the documents tendered were in order and claim payment. The respondents maintain that in the circumstances hereinbefore stated the said bill of lading was not valid, and they also dispute their liability to pay against the documents so tendered on the ground that payment is not due until after the said goods shall have arrived and been weighed.

10. We have been asked by the parties to state our award in the form of a special case for the opinion of the court.

11. In addition to the foregoing facts we find that the said bill of lading was received by the claimants as agents for the respondents, and that the property in the said goods passed to the respondents at shipment. If we had not so found we should have been prepared to find that the property passed to the respondents on receipt by them of the said provisional invoice.

12. We find also that the expression "delivered weights" contained in the said contract has a well-known meaning in the trade in reference to contracts such as this, that it refers to the adjustment of the price and not to the time of payment, and that if on weighing the goods at the port of landing it be found that the invoice of the goods is incorrect, an adjustment of the purchase money is made if it has been already paid, and that this effect is to be given to the words "delivered weights" in the contract.

13. We find also that by the custom of the trade, interest is payable at the rate of 5 per cent. per annum on the purchase price from the date of tender of documents until payment.

14. The following are the questions for the opinion of the court: (*a*) Whether in the circumstances hereinbefore stated the tender of the said bill of lading (with the other documents) was a good tender of documents under the said contract, and if the court should answer this question in the affirmative: (*b*) Whether the claimants were entitled to payment on tender of the documents.

15. If the court should be of opinion that the tender of the said bill of lading (with the other documents) was a good tender of documents under the said contract, and also that the claimants were entitled to payment on presentation of the documents, then we find and award that the claimants do recover against the respondents the sum of 350*l*. 10*s*. 7*d*. being the price of the goods as per the said invoice, together with interests thereon at 5 per cent. per annum from the 5th Aug. 1914 until payment, and that the respondents do bear and pay their own and the claimants' costs of the arbitration and this award.

16. If the court should be of opinion that the tender of the said bill of lading (with the other documents) was a good tender of documents under the said contract, but that the claimants were not entitled to payment upon tender of the said documents apart from any question of moratorium, or if the court should be of opinion that the tender of the said bill of lading (with the other documents) was not a good tender of documents under the said contract, then we find and award that there is nothing due to the claimants from the respondents, and that the claimants do bear and pay their own and the respondents' costs of the arbitration and this award.

Barrington Ward for the claimants.—The case for the claimants is founded upon the findings of fact set forth in par. 11 of the case (*sup.*). The fact that war supervened made no difference to the documents or to the effect of their delivery. A seller under a c.i.f. contract has (1) to ship at the port of shipment goods of the description contained in the contract; (2) to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; (3) to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; (4) to make out an invoice in the proper form; and (5) to tender these documents to the buyer so that he may know what freight he has to pay, and obtain delivery of the goods, if they arrive, or

recover for their loss if they are lost on the voyage:

Biddell Brothers v. *E. Clemens Horst Company*, 12 Asp. Mar. Law Cas. 1, 80; 105 L. T. Rep. 563; (1911) 1 K. B., at p. 220, per Hamilton, J.;
Ireland v. *Livingston*, 1 Asp. Mar. Law Cas. 389; 27 L. T. Rep. 79; L. Rep. 5 H. L., at p. 406.

Here the claimants have complied with all these conditions, and the contract has to be determined according to the standard ruling at the time. When goods are shipped, once they are put on board, the property and risk pass to the buyer. Here he may get the benefit at the end of the war. Under the c.i.f. contract one is dealing with symbols of goods. Although war had broken out on the 5th Aug., the risk and property had passed. [Atkin, J.—Does not your tender of the bill of lading cause the buyers to enter into a contract with an alien enemy?] No. Supervening illegality is outside the contract. The proclamation of immunity may be later, but it entitles the trader to release his goods.

Greaves Lord for the respondents, the buyers.—The sellers must deliver, and have purported to do so by giving a contract. [Atkin, J.—It may not be a contract.] The buyers do not get the goods unless they act under the contract, and that contract has been rendered illegal by Royal Proclamation. It was a contract for the benefit of an alien enemy, and it has been either avoided or suspended. In the circumstances the documents are not effective to give the buyer delivery of the goods in the sense provided by the contract. It is also illegal for the sellers to complete the contract with the buyer. The contract became illegal in that it involved the carriage of the goods to the country of an alien enemy.

Barrington Ward in reply.—This is a contract for the sale of documents. There may be illegality if the buyers make use of the documents. It is a contract for the sale of shipping documents to be handed over, not in Hamburg, but in Liverpool. [Atkin, J.—Suppose you had sold munitions of war to the German Government under similar circumstances, could you have compelled payment?] This was not a contract to deliver at Hamburg. The seller was not bound to go to Hamburg. He might have gone on the discretion of the master. Finally, the sellers' receipt as agents for the buyers on the 4th Aug. was performance of the contract.

Nov. 18.—Atkin, J.—This is a dispute between two English merchants carrying on business, amongst other places, in Liverpool, in respect of the sale of goods. The contract was made on the 11th May, and it was a sale by Messrs. Duncan Fox and Co. to Messrs. Schrempft and Bonke of about 300 barrels May shipment, and 300 barrels June and (or) July shipment new crop Chilian honey first steamer at a price, cost, freight, and insurance to Hamburg. The goods were reshipped on the 28th June at Perco, in Chili, upon a German steamship; the destination of the goods was Hamburg, and a bill of lading was taken to the plaintiffs or their assigns, the bill of lading being signed by the German master and being expressed to make the contract subject to German law to be determined at Hamburg. The goods were declared under the contract of the 28th July, and the plaintiffs having received the bill of lading, tendered, or did that which was equivalent to a tender of, the documents—the policy, bill of lading, and invoice—on the 5th Aug.

On the 4th Aug. war broke out between this country and Germany, and on the 5th Aug. the proclamation was issued in respect of trading with the enemy, a proclamation that had run until the 9th Sept., when it was revoked. It was a proclamation warning "All persons resident, carrying on business, or being in our dominions, not to supply to or obtain from the said empire"—that is, the Empire of Germany—"any goods, wares, or merchandise, or to supply to or obtain the same from any person resident, carrying on business, or being therein, nor to supply to, or obtain from any person any goods, wares, or merchandise for or by way of transmission to or from the said empire, or to or from any person resident, carrying on business, or being therein . . . nor to trade in or carry any goods, wares, or merchandise destined for or coming from the said empire or for or from any person resident, carrying on business, or being therein; . . . . and we do hereby further warn all persons that whoever in contravention of the law shall commit, aid, or abet any of the aforesaid acts will be liable to such penalties as the law provides." The buyers, when the documents were tendered under the contract, refused to take them up and pay for them, relying upon the fact that the bill of lading was not in order. I am not sure that that point at that time was not a point which turned upon the fact that the bill of lading was a bill of lading in a German ship; but the point is now taken, and I think if it had not been taken it probably would have been the duty of the court to take it, that this was a contract where illegality had supervened and which could not be enforced, and that the seller could not compel the buyer to take up the documents because by so doing he would, in fact, be carrying out a contract in violation of that proclamation. I think that is a perfectly sound point.

This was a sale of goods to be delivered to a person resident, carrying on business, or being at Hamburg; it was for the supply of honey to Hamburg, and it appears to me under those circumstances that it was a contract which could not be enforced in this country certainly during this war.

A further point might be raised as to the effect of requiring a buyer to accept a bill of lading which might involve him in entering into a contract of carriage with an alien enemy, but I do not think it is necessary to determine that point here. The contract is a German contract, and the point might possibly arise as to how far the Bill of Lading Act has an operation on such a contract as that; but, inasmuch as this contract which was sought to be enforced by the tender is a contract for the sale of goods in Germany, I think it is quite plain that the person carrying it out would be either supplying goods to a person resident or carrying on business in that empire, or would be trading in merchandise destined for the said empire. In those circumstances to deal with those goods in the way that was proposed by the seller in performance of the contract would, to my mind, be a direct violation of the proclamation and would be illegal. I think the buyer, therefore, was entitled to refuse to carry out the contract. I therefore think that the questions propounded in par. 14 of the case must

be answered in the negative. The award of the Liverpool arbitrators must stand for the respondents with costs.

Judgment for the respondents.

Solicitors for the claimants, *Chester* and *Co.*, for *Morecroft, Sproat,* and *Killey*, Liverpool.

Solicitors for the respondents, *Weightman, Pedder,* and *Co.*, Liverpool.

Nov. 17 *and* 18, 1914.

(Before ATKIN, J.)

GROOM LIMITED *v.* BARBER. (a)

Charter-party—War risk—C.i.f. contract—Goods lost owing to capture of vessel by enemy cruiser—Whether war risk on buyer or seller.

The appellants bought 100 *bales of cloth from the respondent, which were to be shipped from Calcutta to London. The contract of sale provided that should the goods not arrive from loss of vessel or other unavoidable cause, the tender to the buyer of the insurance policy with the bill of lading should be deemed a good tender of the goods not arriving. It also contained a clause, " War risk for buyer's account."*

On the 15*th July* 1914 *twenty-five bales goods were shipped per steamship* City of W., *and on the following day the shippers took out an insurance policy which did not cover war risk—that is to say, an f.c.s. policy.*

On the 20*th Aug. the respondent tendered the documents, including the above policy, but on the following day the steamer was posted as lost, having been sunk by a German cruiser. In arbitration proceedings claiming payment of* 441*l.* 2*s. on the shipper's draft, the arbitrator found the appellants (the buyers) responsible for the war risk. On a case stated:*

Held, following Biddell Brothers v. E. Ciemens Horst Company (12 *Asp. Mar. Law Cas.* 1, 80, 105 *L. T. Rep.* 563; (1911) 1 *K. B.* 220), (1) *that, apart from the special terms of the contract, the tender of a policy containing the f.c. and s. clause was a sufficient tender within the meaning of the contract, it being proved that there was no custom in the trade for the seller to take the war risk;* (2) *that this being a c.i.f. contract, it was duly performed by the tender of the proper documents within a reasonable time after shipment, and that it was immaterial to consider whether before the date of the tender of the documents the property in the goods was the seller's or the buyer's or some other person's; and, further, that the seller's obligation could not depend on whether the goods are lost or not.*

AWARD stated in the form of a special case.

The hearing of this arbitration appeal took place before the local appeal committee of the United Kingdom Jute Goods Association at the London Commercial Sale Rooms, Mincing-lane, on the 7th Oct. 1914, when Mr. L. F. C. Darby, counsel, appeared for the appellants and Mr. F. D. Mackinnon, counsel, appeared for the respondent.

At the outset of the hearing it was conceded by both counsel that the committee was duly constituted and had power to hear and determine the matters in question.

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

By a contract in writing dated the 8th June 1914, J. F. Barber, a merchant of Mincing-lane in this city (hereinafter called "the seller"), sold to C. Groom Limited, of No. 36, Gracechurch-street in this city (hereinafter called "the buyers"), on the terms of the rules and regulations for the time being in force of the United Kingdom Jute Goods Association Limited and subject to the conditions indorsed upon the contract, one hundred bales of Hessian cloth at 18*s.* 6*d.* per hundred yards for shipment from Calcutta, one half between the 1st and 30th June and the other half between the 1st and the 15th July 1914 by steamer and (or) steamers to London upon cost, freight, and insurance terms, the latter to be with particular average for gross invoice amount, plus 10 per cent. for payment by cash against documents less any usual rebate.

Amongst other things the contract provided that: (4) Should the goods or any portion thereof not arrive from loss of vessel or other unavoidable cause, the tender to the buyer of the insurance policy with the bill of lading or other document or documents which, with the policy, will enable the buyer to recover the amount of the insurance from the underwriters shall be deemed a good tender of the goods not so arriving. (5) Ship's name to be declared by the first seller without undue delay, and any declaration so made shall be valid as regards successive buyers if passed on without undue delay, and no vessel to be declared which has already entered at the custom house. (8) . . . . Where W.P.A. insurance has been contracted for, average is to be payable on each bale if amounting to 3 per cent. " war risk for buyer's account."

It was admitted by the parties that on the same day that this contract was made—namely, the 8th June 1914—the seller had bought identical goods upon identical terms, except as regards price, from Messrs. Becker, Gray, and Co., merchants and shippers of London and Calcutta.

The goods which came into question in this arbitration were twenty-five of the bales which were to be shipped between the 1st and 15th July 1914.

On the 5th July 1914 Messrs. Becker, Gray, and Co. duly shipped the said goods at Calcutta in the steamship *City of Winchester*, and on the 16th July took out an insurance policy upon the said goods which did not cover war risk, or, in other words, which contained the customary free from capture and seizure clause (f.c.s.).

The shipping documents were sent to London through the medium of the Hong-Kong and Shanghai Banking Corporation.

On the 3rd Aug. the seller wrote a postcard to the buyers calling their attention to the fact that war risk was for their account, and that the risk must be covered by them to protect their own interests.

On the 4th Aug. the buyers wrote to the seller contending that the seller was responsible for the insurance against war risk. In his reply the seller called the buyers' attention to rule No. 8 of the association indorsed upon the contract, according to which the war risk was for the buyers' account.

On the 12th Aug. the buyers wrote to the seller with reference to the shipment in question and requested to be informed as to the boat the goods were coming by and when they left Calcutta, as of course the goods would have to be covered against war risk, and the buyers would not get the documents till the boat was nearly in this country. The buyers' letter continued: " Please let us have this information to-morrow so that we can get them covered." On the 14th Aug. the seller replied that he so far had no advice of the name of the steamer carrying the goods.

On the 20th Aug. the seller received information regarding the name of the steamer carrying the goods, the information being contained in an invoice received by him from Becker, Gray, and Co. Within about an

hour of the receipt of this invoice the seller dispatched a similar invoice to the buyers.

On the 21st Aug., at 2.27 p.m., the loss of the steamer *City of Winchester* was posted at Lloyd's, she having been captured on the 6th Aug. by a German cruiser and subsequently sunk. It has not been contended that any earlier information was received in London regarding such loss.

The invoice was the only document which the buyers received from the seller. The parties have admitted that it is to be presumed from the delivery of an invoice that the seller is in a position to deliver the documents under the contract.

On the 22nd Aug. the buyers wrote to the seller returning the invoice because the *City of Winchester* had been captured on the 6th Aug., and stated that, although the buyers had asked previously for the name of the steamer, the seller's invoice received on the 21st Aug. gave the first advice. Under the circumstances the buyers refused to accept any responsibility in the matter.

The policy which the seller was in a position to tender to the buyers, together with the bills of lading, was not produced to the committee, but it was admitted by the parties that it was the usual form of Lloyd's policy, and that it contained the free from capture and seizure clause.

The matter was thereupon referred to arbitration under the terms of the contract, the seller claiming that he was entitled to be paid at the maturity of the shippers' draft—namely, the 23rd Nov. 1914—the sum of 441*l.* 2*s.*, or such sum at an earlier date less the usual rebate, whilst the buyers contended that they were entitled to refuse the documents and regard the contract as unfulfilled.

The umpire's award was in the following terms: "That according to the terms of the contract, the buyers are responsible for war risk, and that Messrs. C. Groom Limited do pay Mr. J. P. Barber the sum of four hundred and forty-one pounds two shillings (441*l.* 2*s.*) on or before the 23rd day of November 1914. Messrs. C. Groom Limited to pay the expenses of this arbitration (6*l.* 8*s.* 6*d.*).

The foregoing being the facts, there were two contentions made on behalf of the buyers before the committee:

1. (*a*) That it was the duty of the seller to insure against risks of war. (*b*) That there was no proper presentation of documents to the buyers unless the buyers tendered or were in a position to tender a policy or policies of insurance which would enable the buyers to recover against the insurer for the loss of the goods. (*c*) That the documents tendered, or which the seller was in a position to tender, were not a good tender under clause 4 of the contract.

2. (*a*) That no property in the goods passed to the buyers because no goods in a deliverable state were unconditionally appropriated to the contract by the seller with the consent of the buyers. (*b*) That when the seller invoiced the goods to the buyers and tendered or was in a position to tender the documents and purported to appropriate the goods to the contract they had ceased to exist, and as a consequence (*c*) That unless the seller tendered or was in a position to tender documents which entitled the buyers to receive the goods or obtain a complete indemnity for the loss of them the buyers were not bound to pay the price.

The buyers' contention that there was undue delay by the seller in declaring the ship's name was withdrawn in the course of the hearing. The statement on behalf of the buyers that they could not have insured against the war risk until the name of the vessel was known is contrary to the experience of the committee and cannot be upheld.

As regards the first contention, the committee decide, on a question of fact, that the insurance policy referred to in par. 4 of the conditions is by the custom of the trade a policy which contains the free from capture and seizure clause, and that the tender of such a policy is a sufficient tender within the meaning of the contract, and that there is no custom of the trade and it has never been the practice for a seller to effect any war risk insurance for buyer's account, and that the tender of a war risk policy has never in practice been made by merchants or others doing business in jute goods.

The committee further decide that the legal interpretation of the contract is to the effect that the war risk is upon the buyers, and that the buyers have no right to claim from the seller the delivery of a policy covering the war risk.

As regards the second contention, the committee is of opinion that the seller fulfilled his obligation under the contract by intimating to the buyer that he was in a position to deliver the documents deliverable under the contract, and that it was the buyer's obligation to take up such documents, and that the fact that the goods had been lost by a war peril and were in consequence not in a deliverable state is not a sufficient ground to relieve the buyers from their obligation under the contract.

Consequently the committee award and decide that the buyers are to pay to the seller the sum of 441*l.* 2*s.* (four hundred and forty-one pounds two shillings) on the twenty-third day of November, one thousand nine hundred and fourteen.

In case, however, the matters in question should be referred to the court for its decision, and it should be decided that the documents which the seller was in a position to tender were insufficient owing to there being no insurance against war perils or that there had not been a valid appropriation of the goods to the contract, then the committee decide that the buyers are entitled to recover nothing from the seller.

The committee further decide and direct that the buyers do pay to the seller his costs to be taxed, and also the costs of this award amounting to the sum of 15*l.* 17*s.* (fifteen pounds seventeen shillings), and in case the seller should pay such last-mentioned costs, then the committee directs that the buyers do forthwith repay to the seller the amount which he shall so pay.

Maurice Hill, K.C. (*L. F. C. Darby* with him) for the buyers.—The buyers are under no liability. Two questions arise: (1) Whether, having regard to the terms of the contract, the seller should have insured the war risk at the buyers' expense; (2) whether in the case of a c.i.f. contract and sale of goods by description the seller can appropriate to the contract goods already destroyed. In the case of a contract c.i.f. cash against documents where there is a custom for delivery f.c.s., it cannot be disputed that the seller is entitled to the price on tendering the policy. Here, however, the matter is expressly provided for by a clause which is to operate if the goods do not arrive. Such a policy and such a bill of lading must be tendered as will enable the buyer to recover from insurers. [ATKIN, J.—Suppose a peril other than an ordinary marine peril, are not the goods at the seller's risk?] With goods it is a common thing to have the policy covering every kind of risk. With ships it is different. Custom will be overridden by the contract:

> *Ewell* v. *Scott Robson*, 96 L. T. Rep. 842; (1908) 1 K. B. 270.

As to the words "war risk for buyers' account," they settle who is to bear the cost of insurance. [ATKIN, J.—Does it mean, "If you want me to insure against war risks you must pay for it?"] The seller knows when the ship sails

and he is the person to insure. [Atkin, J.—Has the buyer got an insurable interest under a c.i.f. contract, the sellers having the *jus disponendi?*] That is a question which may have to be discussed hereafter. When the seller insures he must do all the insurance; but when the buyer insures he does so to protect the seller. The next question is: When the seller c.i.f. is not the shipper, can he call upon the buyer to accept documents relating to goods which have already ceased to exist? In the simple case of seller and buyer, goods are generally appropriated when shipped. The assent of the buyer may be before or after, and may be inferred from the course of business. By the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), s. 18, r. 5: "Where there is a contract for the sale of unascertained or future goods by description, and goods of that description are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made." In the present case Barber agreed to sell twenty-five bales by description. He never could appropriate until he declared the goods by invoicing them, and he could not appropriate the goods unless they were in existence. Moreover, by sect. 32 of the same Act, delivery to a carrier is a good delivery. At whatever point of time he selects for appropriation, the goods must be in existence. [Atkin, J.—Is not the effect of a c.i.f. contract this: that the seller may deliver the goods or the documents for the goods stipulated in the contract? Even assuming that that is not the law, does not clause 4 protect the seller?] He referred to

> *Biddell Brothers* v. *E. Clemens Horst Company* 12 Asp. Mar. Law Cas. 1, 80; 105 L. T. Rep. 563; (1911) 1 K. B. 220, 955.

Mackinnon for the sellers.—The key to the meaning of the c.i.f. contract is that it involves the purchase of documents of title to goods. The Sale of Goods Act (*sup.*) relates primarily to transactions relating to sale on land. It is not easy to apply it to the sale of goods on the sea. The handing over of the documents is a symbolical delivery of the cargo. It is suggested that goods cannot be delivered because they are not in existence. It might also be argued that goods cannot be delivered unless they are in a merchantable condition. It is submitted that a c.i.f. contract may be performed by the delivery of a document. A bill of lading is only necessary because the goods may be lost owing to perils other than maritime perils. [Atkin, J.—It is a question of appropriation.] Appropriation is not necessary. There can be a good tender to the buyer although the property has not passed. In no case where the duty of the buyer is prescribed is it suggested that he must inform the buyer of appropriation. He referred to

> *Biddell Brothers* v. *E. Clemens Horst Company* (*sup.*), per Kennedy, L.J., at p. 956 in Law Reports.

As to clause 4 of the contract (*sup.*), that must be read to apply to losses which can be recovered. As to the first point, the question as to the usual form of policy under the "c.i.f." clause is a question of fact, and that has been found by the committee. Moreover, since 1906, all policies contain the f.c. and s. clause unless otherwise agreed. Here, however, the contract, by par. 8, has made it express. It is suggested that clause 8 imposes an obligation to insure and to tender the policy. The result of the tender would probably be refusal, and if the seller did not insure there would not be a good tender. The clause means that the war risk is the buyer's concern. "Account" means "for and at one's own purposes and risk."

Maurice Hill, K.C. in reply.

Nov. 18.—Atkin, J.—In this case the parties entered into a contract for the sale of 100 bales of Hessian cloth in accordance with the rules of the United Kingdom Jute Goods Association Limited, and the question has arisen whether or not there has been a breach of contract on the part of the buyers in not taking delivery. The terms of the contract provided that the shipment was to be made "half 1st to 30th June, half 1st to 15th July 1914" in Calcutta. This question arises as to the shipment of the second half. The sellers had entered into a corresponding contract for the supply of the goods with a firm of Messrs. Becker, Gray, and Co., who are the firm who in fact shipped the goods.

The material dates are these: On the 15th July 1914 Messrs. Becker, Gray, and Co. shipped goods corresponding to the contract on the *City of Winchester* at Calcutta and took out an insurance policy which was in the ordinary terms. It was a policy of insurance free of capture and seizure. On the 20th Aug. the seller got the documents from his own sellers, Messrs. Becker, Gray, and Co. and thereupon did that which was conceded by the parties to amount to a tender of the documents. As a matter of fact the cargo had been lost on the 6th Aug. because the *City of Winchester* had been captured and sunk by an enemy cruiser. The buyers refused to accept the tender of the documents because the goods were already lost. Thereupon an arbitration was held in accordance with the terms of the contract, and two questions arise on the case as stated by the arbitrators, who were the local appeal committee.

The first point that was made was this, that the policy of insurance which was tendered with the documents was not in order, because either the policy itself ought to have covered the war risk or there ought to have been a separate policy covering that risk. Upon that point the committee find as follows: "The committee decide as a question of fact that the insurance policy referred to in par. 4 of the conditions is by the custom of the trade a policy which contains the free from capture and seizure clause; that the tender of such a policy is a sufficient tender within the meaning of the contract; that there is no custom of the trade and it has never been the practice for a seller to effect any war risk insurance for buyer's account, and that the tender of a war risk policy has never in practice been made by merchants or others doing business in jute goods. The committee further decide that the legal interpretation of the contract is to the effect that the war risk is upon the buyers, and that the buyers have no right to claim from the seller the delivery of a policy covering war risk."

The contract is a contract on cost, freight, and insurance terms, and it provides as follows in

clause 8: [His Lordship read clause 8 as above set out in the case, and continued:]

I think it is an incident of a contract on cost, freight, and insurance terms as stated by Lord Sumner in his judgment in the court of first instance in *Biddell Brothers* v. *E. Clemens Horst Company* (*sup.*) that a seller under a contract of sale has, amongst other things, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. I am satisfied that at the time this contract was made the terms current in the trade were terms which would exclude war risk—in other words, that the terms of the policy would contain the f.c.s. clause. I am therefore of opinion that, apart from the special terms of the contract, a policy in such terms would in fact be in order. The finding of the committee in that respect makes that matter quite certain.

But this contract contains the words: "War risk for buyer's account." This is said to mean that the seller must by virtue of the contract take out a policy covering the war risk, but that he may charge the buyer with the expense of it. The contention amounts to this: that at all times, in times of peace, a war risk policy ought to be taken out at the expense of the buyer. I am perfectly satisfied myself that no seller or buyer ever contemplated such a thing being done, and that, if a buyer was charged with such a policy in ordinary times of peace, he would be the very first person to object. To my mind, those words mean that war risk is the buyer's concern; if the buyer wants to cover a war risk he must take the necessary steps himself. The words may mean that, in the proper course of business, the buyer is entitled to ask the seller to take out a policy of insurance against war risk, at the buyer's expense, at the time when he is taking out the other policy. I do not decide that it does mean that, but it may do so. If it does, I am quite satisfied that in this case the buyer never did in fact request the seller to take out a war risk policy upon those terms, because, when he did make his request, the buyer never intended himself to pay the cost. He merely intimated that the seller was under the obligation to take out the policy, and to take out the policy at the seller's expense. Under those circumstances I am satisfied that on this point the contention of the buyer fails, that the award is perfectly right, and that the policy was in order.

The next question is one of general interest on contracts on cost, freight, and insurance terms. It is contended that the seller cannot tender documents representing goods which were lost at the time of the tender because at the time of the loss there had been no goods appropriated to the contract so as to have passed the property to the buyer. It is said that, as the goods tendered were non-existent, the documents were not in order. The committee dealt, or, at any rate, appeared to have dealt, with the point in their award. They say: "As regards the second contention, the committee is of opinion that the seller fulfilled his obligation under the contract by intimating to the buyers that he was in a position to deliver the documents deliverable under the contract, and that it was the buyers' obligation to take up such documents, and that the fact that the goods had been lost by a war peril and were in consequence not in a deliverable state is not a sufficient ground to relieve the buyers from their obligations under the contract." I am not sure that this finding quite fully deals with the point as to the property not being in the buyer at the time of the loss. It was contended on the part of the buyer that in a c.i.f. contract the seller's duty is to so act as to pass the property to the buyer, either on shipment or, at any rate, in case of loss, at some time before the loss. It is said that if this is not done the seller cannot make a valid delivery under the contract, inasmuch as there are no goods in existence which can be said to be the buyer's goods, or which can be so appropriated as to become the buyer's goods. The committee have not dealt with the question of fact as to whether there was any appropriation in fact of goods to this contract by or on behalf of the seller. In the view that I hold, the question is immaterial, but, if it had become material, I should have had to refer the case back to the arbitrators for a finding. Upon the evidence as disclosed in the case there does not appear to have been any appropriation, and I shall assume that there was none.

What is the meaning of a contract for the sale of goods on cost, freight, and insurance terms? I think the answer has been given authoritatively in the judgment of Lord Sumner in *Biddell Brothers* v. *E. Clemens Horst Company* (*sup.*). He says: "The meaning of a contract of sale upon cost, freight, and insurance terms is so well settled that it is unnecessary to refer to the authorities upon the subject. A seller under a contract of sale containing such terms has, first, to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly, to make out an invoice as described by Blackburn, J. in *Ireland* v. *Livingston* (1 Asp. Mar. Law Cas. 389; 27 L. T. Rep. 79; L. Rep. 5 H. L, at p. 406), or in some similar form; and, finally, to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage." In my opinion the result is that the contract of the seller is performed by delivery to the buyer, in reasonable time from the agreed date of shipment, documents which are ordinarily the bill of lading, the invoice, and policy of insurance, which will entitle him to recover on the policy the value of the goods if lost by a peril agreed in the contract to be covered, and in any case will give him any rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods. It therefore becomes immaterial whether before the date of the tender of the documents the property in the goods was vested in the seller, the buyer, or some third person. The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender; nor need he have obtained any right to deal with the bill of lading until the moment of tender. If it were

otherwise, the shipper of goods in bulk or of goods intended for several contracts, or the intermediate seller who may be the last of a chain of purchasers from an original shipper, might find it impossible to enforce a contract on c.i.f. terms. The seller's obligation cannot depend upon whether the goods are lost or not, and, if there is no loss, the property has to pass to the buyer before delivery, of the documents. At what stage of the transaction must it pass? Unless it be at the time of shipment, I can see no reason for fixing upon any other time than on delivery of documents, and, if it be the law that a tender of documents is ineffectual unless in fact at the moment of shipment the property actually passed to the ultimate buyer, it appears to me that business operations would be very seriously embarassed. I do not think that the above is inconsistent with the judgment of Kennedy, L J. in *Biddell Brothers* v. *E. Clemens Horst Company* (*sup.*) Difficult questions arise as to time when, in performance of a contract on c.i.f. terms, the property passes to the buyer. But the question when in fact the property passes is distinct from the question whether the seller undertakes, as a term of the contract, that the property shall pass at a given time, and the Lord Justice is only dealing with the former question.

After the decision of the House of Lords in the case cited, *Biddell Brothers* v. *E. Clemens Horst Company* (*sup.*), I do not think it necessary to consider former cases. The object of the courts in construing commercial contracts is to try to give effect to the intention of both the contracting parties, and not to impose upon business men terms which they never contemplated. If old forms are now used to express different meanings from those read into them in earlier days, the courts should be prompt to recognise the altered use if they are satisfied that there is in fact a change. I do not say that a contract on cost, freight, and insurance terms means to-day anything different to what it ever meant, but if the courts at other times have rightly imputed to the contract a different meaning to what I have suggested in my judgment, the true meaning of the words is now altered. I am further of opinion that in this particular contract the meaning which I have said is the true meaning of a c.i.f. contract is explicitly stated in clause 4. Clause 4 provides: "Should the goods or any portion thereof not arrive from loss of vessel or other unavoidable cause, the tender to the buyer of the insurance policy with the bill of lading or other document or documents which, with the policy, will enable the buyer to recover the amount of the insurance from the underwriters shall be deemed a good tender of the goods so not arriving." The amount of the insurance means, in my opinion, the amount of the insurance if the loss is such as was agreed in the contract of sale to be covered, and in this case I think there was a good tender in the terms of this clause. The result is that the award of the arbitrators in favour of the sellers must stand, and that the buyers must pay the cost of this hearing.

Judgment for the sellers.

Solicitors for the buyers, *Druces* and *Attlee*.
Solicitors for the sellers, *B. A. Woolf* and Co.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Friday, Sept. 4, 1914.

(Before the Right Hon. Sir S. T. Evans, President.)

The Chile. (a)

Enemy ship—Outbreak of hostilities—Ship in British port—Right to capture or detain—Jurisdiction of Prize Court—Hague Conference 1907—Convention VI., arts. 1, 2—Reciprocal arrangements—Right of alien enemy to appear in Prize Court—Sufficiency of affidavit.

By the Hague Convention 1907, *No. VI., it is stated* (inter alia), *in art. 1, that it is desirable that any merchant ship belonging to one of the belligerent Powers which is in an enemy port at the commencement of hostilities should be allowed a certain number of days, if necessary, to depart freely to its port of destination, or to any other port indicated to it; and, in art 2, that if the ship cannot, owing to circumstances beyond its control, depart within the specified period, it should be detained, but not condemned.*

A German vessel arrived in an English port before the outbreak of hostilities between Great Britain and Germany, and was seized after the commencement of the war by the Collector of Customs of the port.

Held, that the seizure of the ship was lawful; and upon the application of counsel for the Crown, the ship was ordered to be detained by the marshal until further order of the court, with liberty to apply and all questions of costs reserved.

The agents of the owners of an enemy ship have no locus standi *in an English Prize Court, where the affidavit filed by them shows no grounds entitling them to appear in the proceedings.*

This was a cause in which His Majesty's Procurator-General asked by his writ for the condemnation of the ship and its cargo as droits and perquisites of His Majesty in His office of Admiralty.

The *Chile* was a German sailing ship of the port of Bremen of 2182 tons gross register, which arrived at the port of Cardiff on the 4th Aug. 1914 with no cargo, but had 665 tons of rough ballast. War broke out between Great Britain and the German Empire at 11 p.m. (English time) on the 4th Aug., and on the following day the ship was seized whilst in port by the officers of customs. The writ was issued on the 13th Aug., when it was not known whether there was or was not any cargo on board; but it had since appeared that there was no cargo, and consequently it was proposed, when the case came on for hearing, to ask for an order for detention and not for condemnation under Order XXVIII., r. 1, of the Prize Court Rules, which is as follows:

Where it is held in a suit for condemnation that the ship is an enemy ship, but in pursuance of some international convention or otherwise is only liable to detention and not to condemnation, the decree shall direct the marshal to retain the ship in his custody until further orders.

By the Hague Convention, 1907, No. VI, it is provided:

Art. 1. When a merchant ship belonging to one of the belligerent Powers is, at the commencement of hostilities

(a) Reported by J. A. Slater, Esq., Barrister-at-Law.

in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war, and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

Art. 2. A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.

The *Attorney-General* (Sir J. Simon), *Butler Aspinall*, K.C., and *G. W. Ricketts* for the Crown.—The ship's papers and the affidavits proved conclusively that the *Chile* was a German ship. A Prize Court always had had jurisdiction to deal with enemy vessels wherever found, except in the territorial waters of a neutral Power, and Lord Mansfield had laid it down that, in the absence of any reciprocal arrangement between the belligerents, a vessel captured under circumstances like the present could be confiscated as the property of the enemy: (*Lindo* v. *Rodney*, 2 Dougl. 613). An effort had been made at the Hague Conference of 1907 to mitigate the harsh rule as to capture and confiscation when a vessel of one of the belligerent nations happened to be in a port of the enemy at the time of the outbreak of hostilities. Both Great Britain and the German Empire were parties to arts. 1 and 2 of Convention VI. Applying the principle there laid down, an Order in Council was published on the 4th Aug. in which it was stated that, in the event of one of His Majesty's Principal Secretaries of State being satisfied by information reaching him not later than midnight on Friday, the 7th Aug., that the treatment accorded to British ships and their cargoes which at the date of the outbreak of hostilities were in the ports of the enemy was not less favourable than the treatment accorded to enemy merchant ships by the terms of the order, enemy ships should be allowed up till midnight on Friday, the 14th Aug., for loading and unloading their cargoes and departing from any British ports to which the order applied. The British Government could get no satisfactory assurance that any reciprocal treatment had been accorded by the German Government to British ships in German ports, and it would not be right for us to release German ships if Germany detained ours. In the absence, therefore, of such reciprocal arrangement the Prize Court had jurisdiction to deal with the *Chile*. The British Government wished to act in letter and spirit in accordance with any Convention entered into at The Hague. Art. 1 of the Convention was binding as an international contract. It occupied a position similar to the Declaration of Paris, which, it was submitted, must be treated as modifying the common law. Art. 2 granted the right of detention, and it seemed that the best course to be adopted was for the court to make an order for detention only, with liberty to apply. Such an order would preserve the full control and jurisdiction of the court over the ship, at the same time recognising the obligation to return it at the end of the war if Germany acted in accordance with her obligations. This course would suspend for the time being the transference of the property in the ship to the Crown. As a result, if the ship perished owing to some disaster unconnected with the war, the ownership of the vessel would still be in the original owners and not in the Crown.

Bateson, K.C. and *Dunlop* for the owners of the ship.—[The PRESIDENT.—By what right do the owners, who are alien enemies, appear in this court?] It was contemplated by several of the Prize Court Rules that an alien should be able to appear, particularly Order III., r. 5, which was as follows: "An alien enemy shall, before entering an appearance, file in the registry an affidavit stating the grounds of his claim." This must have anticipated the case of an alien enemy appearing. See also

The Fenix (otherwise *The Phœnix*), Roscoe's English Prize Cases, vol. 2, 238; Spinks, 1; Story's Prize Law, 21.

[The PRESIDENT quoted the following extract from the judgment in the case of *The Hoop* (Roscoe, vol. 1, 104; 1 Ch. Rob. 196): "In the law of almost every country the character of alien enemy carries with it a disability to issue or to sustain, in the language of the civilians, a *persona standi in judicio*. . . . The same principle is received in our courts of the law of nations. They are so far British courts that no man can sue therein who is a subject of the enemy unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy, such as coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*." There must be cases in which an alien enemy was entitled to be heard. How far he might go was another matter; but it was not enough to say simply, "You are an alien enemy and cannot be heard at all." [The PRESIDENT.—I agree, but if you are an alien enemy you must show in your affidavit some ground which entitles you to appear. That has not been done. Your affidavit is wholly insufficient. On that ground alone I decide to-day that you cannot be heard.] (*a*)

Lewis Noad for the Cardiff Railway Company. —Considerable sums were owing for dock dues &c. As it appeared that no condemnation of the ship was asked for, some provision should be made as to the payment of these dues. If the ship was to be detained, it might be sufficient if liberty to apply was given. He referred to

The Belvidere, Roscoe, vol. 2, 183; 1 Dods. 353.

The *Attorney-General* in reply.

(*a*) The affidavit filed by the agents of the owners set out (*inter alia*): "1. The *Chile*, belonging to the port of Bremen, was lying in the port of Cardiff at the time war was declared between Great Britain and Germany, and before the said vessel could leave the said port of Cardiff she was seized and taken as prize. 2. Restitution of the said vessel is claimed upon the ground that confiscation of the said vessel would cause injury to peaceful and unsuspecting commerce, and would be contrary to the provisions of the Hague Convention, No. 6, of the 18th Oct. 1907. 3. Alternatively, and upon the grounds set out in par. 2 hereof, it is claimed that the said vessel should be detained during the continuance of hostilities and should be released upon the termination thereof."

The PRESIDENT.—This is the case of a vessel which was seized by the Custom House officers in the port of Cardiff. It is abundantly clear upon the ship's papers that the ship was a merchant ship belonging to an enemy country, and it is abundantly clear also that by international law the Crown was entitled to seize this ship through the instrumentality of the officers of the Crown in the port of Cardiff, although the ship was there before the commencement of hostilities. For the purpose of this case it has been admitted that the ship was within the port of Cardiff before the hour of eleven o'clock on the night of the 4th Aug., the time of the commencement of hostilities. I therefore declare that this was an enemy ship and that she was properly seized by the officers of the Crown, being droits of Admiralty to which the Crown is entitled.

Several matters have been discussed in the course of this case with reference to what ought to be done having regard to the law of nations upon the one hand and to Convention VI. of the Hague Conference 1907, arts. 1 and 2, on the other hand. I propose to-day, in this case, to make an order which will not finally determine the rights of the Crown under arts. 1 and 2 of that Convention. The view has been put forward that art. 2 may have to hang upon art. 1, and therefore it does not come into play if no days of grace were agreed within the meaning of art. 1. It is possible that that argument may be well founded, but I proceed to day no further with it, except only to deal with the rights of the Crown in this vessel. The Crown are entitled, if they wish, to ask for less than the law could give them. Therefore I need not determine finally the question which may arise hereafter.

The writ in this case was issued by the Procurator-General in the form prescribed by the rules, and it has been duly advertised. Pursuant to the advertisement the clients of Mr. Bateson, who are agents for the shipowners, have entered an appearance; but in the course which the case took Mr. Bateson did not find it necessary, even if he had the right, to appear here to argue any matter before the court. I raised the point, as I was bound to do, I think, as to whether Mr. Bateson's clients had any right to appear at all. That depends upon whether there are any cases in which an enemy subject has the right to appear in the Prize Court in this country. That matter, however, I leave undecided, acceding readily to the request of the Attorney-General on that point. But I do decide for the purposes of today that the affidavit which has been filed here, and which must be filed before an appearance can be entered by an enemy subject, is wholly insufficient. It does not state even who are the owners of the ship; and it discloses no ground entitling them to appear. For that reason alone, unless I allow the affidavit to be amended, and an appearance to be entered, I can dispose of the claim put forward by the persons whom Mr. Bateson represents to appear here to-day. Mr. Noad appears here for the dock company for dues, but though I make no order in his favour I do not think any order which I make will interfere with his rights.

The order which I make is this: Having heard the evidence and counsel for the Crown, I pronounce the sailing ship *Chile* to have belonged at the time of the seizure to enemies of the Crown, and as such to have been lawfully seized by the officers of the Crown, as good and lawful prize and as droits and perquisites of His Majesty in his office of Admiralty; and on the application of the Crown I order that the ship be detained by the marshal until a further order is issued by the court. Any question of costs which the Crown may desire to raise will be reserved till such further order is made by the court as may appear necessary. (*a*)

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors: for the owners, *Stokes* and *Stokes*; for the Cardiff Railway Company, *Torr* and *Co.*, for *Corbett, Chambers*, and *Harris*, Cardiff.

Friday, Sept. 4, 1914.

(Before the Right Hon. Sir S. T. EVANS, President.)

THE PERKEO. (*b*)

Enemy ship—Capture on high seas—Ignorance of declaration of war—Right of capture—Hague Conference 1907 — Convention VI., art. 3 — Germany not a party to the article—Article not applicable—Condemnation.

By international law enemy ships, and the cargoes of enemy subjects therein, are liable to capture and condemnation as lawful prize if they are taken on the high seas at any time after the outbreak of hostilities. It is immaterial that the ships set sail before the declaration of war or that the masters of the same were still ignorant of a state of war being in existence at the time of capture. The only exception to this rule is provided by art. 3 of the Hague Convention 1907, No. VI, which substitutes detention and restoration at the conclusion of the war for condemnation, and the exception only applies to those Powers which have assented to the article. As the German Empire had refused to give its assent, the exception has no application in the case of ships and cargoes belonging to the subjects of that country.

THE writ in this case asked for a decree that the ship *Perkeo* and the cargo laden on board belonged at the time of capture and seizure to enemies of the Crown and as such, or otherwise, was subject and liable to confiscation as good and

(*a*) The order as finally settled by the President was as follows;—

The President having struck out the appearance entered by Messrs. Stokes and Stokes on behalf of the owners of the sailing vessel *Chile*, and having considered the evidence, and having heard the Attorney-General for the Crown, pronounced the said sailing ship *Chile* to have belonged at the time of seizure thereof to enemies of the Crown, and as such to have been lawfully seized by the officers of His Majesty's Customs at the port of Cardiff as good and lawful prize and as droits and perquisites of His Majesty in his office of Admiralty; and thereupon, upon the application of the Attorney-General for the Crown, ordered the said ship to be detained by the marshal until further order is issued by the court. All question of costs reserved. Liberty to apply.

(*b*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

lawful prize and as taken by His Majesty's ship *Zulu*, M. B. Birkett, commander.

The *Perkeo*, a steel four-masted barque of the port of Hamburg, 3765 tons gross, was formerly known as the *Brilliant*, and only appears under the name *Perkeo* in the supplement of Lloyd's Register. The ship was transferred from the British to the German flag immediately before leaving New York on the 14th July for Hamburg on her last voyage; but the certificate given by the German Consul at New York clearly stated that she was, previous to capture, a German ship. The ship was captured off Dover on the 5th Aug. 1914, the day following the declaration of war between Great Britain and the German Empire. It was assumed that the master had no knowledge of the outbreak of hostilities.

By art. 3 of Convention VI. of the Hague Conference 1907 it is provided:

Enemy merchant ships which left the last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the preservation of the ship's papers. After touching at a port in their own country, or at a neutral port, such ships are subject to the laws and customs of naval war.

The *Attorney-General* (Sir J. Simon), *Butler Aspinall*, K.C., and *Bicketts* for the Crown.—By international law the ship was liable to capture and condemnation as lawful prize. The only exemption to this rule could have arisen under art. 3 of Convention VI. of the Hague Conference 1907. But the German Empire had refused to be a party to this article. Consequently par. 10 of this Order in Council of the 4th Aug., as to reciprocal arrangements, had no application. The ship was therefore lawful prize. There had been an appearance entered on the part of the owners, but the affidavit filed was altogether insufficient.

The PRESIDENT.—From the evidence it is quite clear that this was a German ship, transferred from the British to the German flag on the 14th July. It was also under the command of a German citizen when captured. It is also the type of ship referred to in art. 3 of Convention VI. of the Hague Conference 1907. The exception provided by the Hague Conference does not arise at all because the German Empire refused to be bound by art. 3. The right of capture therefore exists. There will be an order for the condemnation of the ship, and it will be appraised and sold.

Solicitor for the Crown, *Treasury Solicitor*.

Solicitors for the owners of the *Perkeo*, *Stokes and Stokes*.

Sept. 11 *and* 16, 1914.

(Before the Right Hon. Sir S. T. EVANS, President.)

THE MARIE GLAESER. (a)

Enemy ship—Capture on high seas—Ignorance of declaration of war—Hague Conference 1907—*Convention VI., art.* 3—*Right of alien enemy to appear in Prize Court—Nature of affidavit required as condition precedent — Shareholders — Neutrals and British subjects — Neutral mortgagees — Claims—Identification of mortgagees with ship —Rejection of claims—Claimants for price of necessaries—Bounty of Crown.*

A ship flying the German flag, which left her last port of departure before the declaration of war between Great Britain and Germany, was captured on the high seas whilst still ignorant that a state of war existed. Held that by international law there was an undoubted right to capture and to condemn her, since Germany had refused to accede to art. 3 of the Hague Conference 1907, *Convention VI. She was therefore condemned, and not ordered simply to be detained.*

At the time of capture the ship was subject to a bonâ fide *mortgage to a Dutch company, but remained in the possession of the German owners. The Dutch company claimed that their rights, as mortgagees, should be met out of the proceeds of the sale of the ship.*

Held, that the mortgagees were identified with the nationality of the ship, and that "upon the authorities, upon principle, and upon grounds of convenience and practice" the claims of the neutral mortgagees must be rejected in the Prize Court. In this respect there was no difference between neutral mortgagees and British mortgagees.

As the affidavit filed by the agents of the German owners of the ship showed no special right in them to be heard in an English Prize Court, their claim was struck out.

Shareholders in an enemy ship, even though they be British or allied subjects, and necessaries men have no rights in the Prize Court.

THE writ in this case asked for a decree that the steamship *Marie Glaeser* belonged at the time of capture and seizure to enemies of the Crown and as such or otherwise was subject and liable to confiscation as good and lawful prize and as taken by His Majesty's ship *Gibraltar*, R. A. Hopwood, commander.

The *Marie Glaeser* was a German steamship of 1317 tons register, of Rostock. She left Bristol on the 1st Aug. 1914, called at Barry, leaving that port on the 4th Aug., was captured on the 5th Aug. whilst on a voyage to Archangel, in ballast, and afterwards handed over to the Collector of Customs at Greenock. The date of the writ was the 17th Aug. Appearances were entered by certain agents on behalf of the owners, by shareholders in the ship, by mortgagees, and by various people in respect of necessaries supplied and disbursements made as well as for brokerage.

By art. 3 of Convention VI. of the Hague Conference 1907 it is provided:

Enemy merchant ships which left the last port of departure before the commencement of the war, and are

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the preservation of the ship's papers. After touching at a port in their own country, or at a neutral port, such ships are subject to the laws and customs of naval war.

The *Solicitor-General* (Sir S. O. Buckmaster) and *G. W. Ricketts* for the Crown.—There was no dispute as to the facts of the case. War broke out at 11 p.m. on the 4th Aug., and the *Marie Glaeser* was captured on the following day. The ship was clearly a German one. As Germany had refused to be a party to art. 3 of Convention VI. of the Hague Conference 1907, the exception to the right of capture where the master had no notification of the state of belligerency did not apply. The ship was good prize and should be condemned. As to the appearances entered, the owners had not shown by their affidavit filed on their behalf that they were entitled to be heard. There was no suggestion as to the ground on which they claimed a *locus standi*. As to the shareholders, their rights could not be considered strictly at all, since the ship was under an enemy flag. The nationality or the domicil of the shareholders did not signify. The flag alone was the test to be applied, and by advancing their money in a German concern the shareholders had clearly identified themselves with an alien enemy. In Westlake's International Law (part 2, p. 169) it is stated: "If a ship sails under the enemy flag, the character which her owner or any of her part owners may have as individuals is immaterial. By accepting the flag they have placed themselves under its protection; if that fails then she may be captured and will be condemned, and no share which a friend may have in her will be saved. A mortgage or lien on a ship sailing under the enemy's flag, whether it arises by contract or by law as a factor's lion—unless it is a general law of the mercantile world, as that which gives a lien of freight—is treated as a part interest in the ship and is not saved from the condemnation": (see also *The Primus*, Roscoe's English Prize Cases, vol. 2, p. 290; Spinks, 48). As to the mortgagees, a claim made by the mortgagees of a ship had never been recognised in a Prize Court. Their case was similar to that of a bottomry bond, and on the authority of *The Tobago* (Roscoe, vol. 1, 456; 5 Ch. Rob. 218) it could not be sustained. *The Tobago* (*ubi sup.*) was a particularly strong case against the mortgagees, for there the claimant was a British merchant, whilst here the claim was on behalf of Dutch neutrals. A neutral could not claim what a British subject was not entitled to. Moreover, how could a captor at sea inquire into all kinds of lien? As to necessaries and disbursements and brokerage claims, these could not be enforced in a Prize Court. There was no legal right in respect of the same. The Crown of its bounty had allowed in the past claims for necessaries when made by British subjects, and it was not desired to depart from the practice in accordance with what was stated by Lord Stowell in *The Belvidere* (Roscoe, vol. 2, 183; 1 Dods. 353).

Lewis Noad for the owners, some shareholders, and certain claimants for necessaries, &c.—[The PRESIDENT.—You must first show me that the owners, as alien enemies, have a right to be heard.] The right of an alien enemy to be represented and heard, if he came in the proper form, was shown by the case of *The Fenix* otherwise *The Phœnix* (Roscoe, vol. 2, 238; Spinks, 1). [The PRESIDENT.—That case is against you. Alien enemies may appear in court in certain cases—for example, if they are trading under a licence. That is not so here. The affidavit you have filed is altogether insufficient. It does not say who the owners are, nor does it give any particulars as to the personality or the authority of the deponent. The Attorney-General asked me last week to allow the question of an alien enemy's appearance to stand over. To-day I decide against you on the ground of the insufficiency of your affidavit.] As to the shareholders, although the dictum of Professor Westlake (*ubi sup.*) was worthy of all respect, there was no decision on the point that they were to be identified with the alien enemy. [The *Solicitor-General* referred to *Cremidi* v. *Powell* (Roscoe, vol. 2, 577; 11 Moo. P. C. C. 88).] As to necessaries, &c., the claimants ought to be allowed to come into court and prove for the same.

Leslie Scott, K.C. and *Darby* for the mortgagees. —The mortgage was entered into in 1905, and therefore no point could be raised as to its having been made just prior to the outbreak of hostilities. The mortgagees were a Dutch firm and therefore neutrals. The mortgage was a valid German mortgage and the court ought to recognise it as such. The dictum of Lord Stowell in *The Tobago* (*ubi sup.*) already referred to ought not to be accepted at the present day, as not being applicable to mortgages. The rules of international law as to the recognition of the rights of neutrals had advanced considerably since Lord Stowell's day. It had to be admitted that there was no decision exactly upon the point, but the right of a neutral who was a mortgagee should be put on the same footing as the right of a neutral trader to goods found upon an enemy ship in accordance with the terms of the Declaration of Paris. There was no question here of wanting to impugn the right of capture and also of sale, but the proceeds of the sale ought to be set aside to meet the claims of the mortgagees.

The *Solicitor-General* in reply.—The Crown would without doubt meet *bonâ fide* claims made and proved by British subjects in respect of necessaries. As regarded the mortgage, apart from the fact that there was no mention of it in the ship's papers, the court could not take cognisance of any private arrangements made with an enemy owner. He cited the following cases:

The Ariel, Roscoe, vol. 2, 600; 11 Moo. P. C. C. 119;
The Aina, Roscoe, vol. 2, 247; Spinks, 8;
The Hampton, 5 Wallace, 372;
The Battle, 6 Wallace, 498;
The Carlos F. Roses, 127 U. S. Rep. 655.

The PRESIDENT. — This vessel, the *Marie Glaeser*, was clearly a German vessel, as appears from the ship's papers. She was also under a German master, manned by a German crew, and

flying the German flag. The date of the capture was the 5th Aug., the day following the outbreak of hostilities. As the ship had left Barry during the 4th Aug., I will assume that the master was unaware, when he was stopped by H.M.S. *Gibraltar*, that war had been declared. No doubt questions will arise at some time or other as to how far the conventions of the Hague Conference are applicable and binding upon this court generally. But no question arises to-day, since the only article that could have been prayed in aid would have been art. 3 of Convention VI. In any case, however, the German Empire cannot claim the benefit of this article, since Germany refused to be a party to it, as was referred to in the case of *The Perkeo* (*ante*, p. 600). The exception provided by the Hague Conference, therefore, does not apply, and consequently, by international law, the ship is a fit subject for condemnation, and I make an order for her appraisement and sale.

It is necessary, however, to consider the various claims which have been advanced by different classes of persons. First of all, there is an appearance at the request of persons who are acting as agents of the owners—admittedly Germans. It is sufficient for me to repeat to-day what I said in the case of *The Chile* (*ante*, p. 598); (1914) P. 212), that the affidavit filed is altogether insufficient to show any claim by which the enemy owner has a right to come before the court. The rule is clear (Order III., r. 5, of the Prize Court Rules): "An alien enemy shall, before entering an appearance, file in the registry an affidavit stating the ground of his claim." That does not mean an affidavit merely stating his contentions, but showing facts which in the special circumstances entitle him to come to the court and to enter an appearance. The principle is put briefly by Dr. Lushington in *The Panaja Drapaniotisa* (Roscoe, vol. 2, 560; Spinks, 337) as follows: "To support a claim in the Prize Court the individual asserting his claim must first show that he is entitled to a *locus standi*. No person to whom the character of enemy attaches can have such claim, save by the express authority of the Crown; therefore, to prevent deception, which might arise from the use of ambiguous terms, and to stop claims which might be preferred in one sense by the subjects of friendly or neutral States resident in the enemy's country and carrying on a trade there, it has always been deemed necessary that the claimant should describe, both affirmatively and negatively, the character in which he claims." There were certain forms of affidavit in use in former times which have now gone; but what is necessary is that the deponent shall state what is the exact position of the owners, their status, their nationality, the nature of their claims, and the special circumstances to be considered in their behalf. See also *The Felicity* (Roscoe, vol. 2, 233; 2 Dods. 381), *The Troija* (Spinks, 342), and *The Hoop* (Roscoe, vol. 1, 104; 1 Ch. Rob. 196), in the last named of which occurs the following passage in the judgment, on p. 107: "In the law of almost every country the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our courts of the law of nations. They are so far British courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hâc vice*. But otherwise he is totally *ex lege*." I will make a final reference to Story's Prize Law, in which, at p. 21, it is stated: "Nor can an enemy interpose a claim, unless under the protection of a flag of truce, a cartel, licence, pass, treaty, or some other act of the public authority suspending his hostile character." In the present case there is nothing to show that the hostile character of the enemy owners has been suspended in any way, and there is no suggestion of any licence to trade, pass, or anything else of a similar kind which would support the claim of an alien enemy to appear. The affidavit is, therefore, clearly insufficient, and there are no special or sufficient circumstances for granting Mr. Noad's application. The appearance on behalf of the owners cannot stand and must be struck out.

As to the appearance on behalf of the shareholders, if they are alien enemies their property must go according to international law, as the ship was under the enemy flag. And this rule also applies even though some of the shareholders are neutral or even British subjects. The property in the ship is governed by the flag, and the shareholders have taken the risk by which they must abide. Perhaps the shareholders who are not alien enemies may put their case before the Crown and rely upon the exercise of its prerogative of bounty. With that, however, I have nothing to do. My duty is to administer the law. What I have said as to shareholders applies with the same, or perhaps with greater force to the claims for necessaries and disbursements. There is no reason to believe that the Crown will act with less generosity than in former times, and, as the Solicitor-General has intimated, if claims are put forward by British subjects, and if they are proved to be made *bonâ fide* no doubt they will be satisfied.

As to the appearance on behalf of the mortgagees, there is said to be no reported decision which covers the point raised on their behalf, that the mortgage debt should be paid out of the proceeds of the sale of the ship. Personally I have little doubt upon the matter; but as this question of a mortgagee's rights will naturally affect a large number of persons, and in deference to Mr. Leslie Scott, I will reserve my judgment and deliver it at an early date.

The decree which I now make is that the ship was properly seized as a prize of war at sea, and that she is subject to condemnation, and that I do condemn her and order her to be sold.

Sept. 16.—The PRESIDENT.—This merchant vessel, belonging to enemy owners, was captured at sea on the 5th Aug. last by H.M. cruiser *Gibraltar*, and has already been condemned by the court as lawful prize. She was a German vessel, registered of the port of Rostock, owned by a German limited company, commanded by a German master, and flying the German flag.

A claim has been made on behalf of certain mortgagees who are neutrals—a limited liability company in Holland—that a sufficient sum out of

the proceeds of sale of the prize should be set aside to satisfy the amount which might be found due to the mortgagees, on the ground that they were, as neutrals, entitled to have their property or interests protected. It has been contended on their behalf by counsel (1) that no case in an English Prize Court had dealt with the claim of a neutral mortgagee in a sense adverse to the claim now put forward; (2) that the decisions in our Prize Courts touching liens, as, for example, in the case of *The Tobago* (*ubi sup.*), were not applicable to the case of mortgages, on the ground that some kind of "property" in the ship passed to and vested in mortgagees; and (3) that in any event at the present day the international law of prize should be extended and applied so as to protect mortgages held by neutrals in accordance with what he contended was the policy and principle upon which the Declaration of Paris was founded.

It will be convenient first to set out a few facts as to the mortgage. It was executed on the 26th June 1905 by Otto Zelck (a subject of the German Empire) as manager of the German limited liability company called "Steamship Company Marie Glaeser" in Rostock in favour of a Dutch company called "Eerste Nederlandsche Scheepsverband Maatschappij," in Dordrecht, Holland, on certain conditions for a loan of 172 500 marks. The operative part of the mortgage was in these terms: "I grant by these presents to the Dutch company a mortgage on the steamer *Marie Glaeser* registered in the ship's register in Rostock, amounting to 172,500 marks German currency." The repayment with interest was spread over a term extending up to Dec. 1917; but in certain events the whole was made repayable immediately.

It is unnecessary to go through the whole of the conditions of the mortgage, but it appears from the affidavit in support of the claim that the amount remaining due is 69,000 marks. The mortgage was duly entered in the ship's register at Rostock. It is not disputed that the mortgage represents an honest business transaction. The mortgagors have remained and were at the time of the capture in possession of the vessel. No reference to the mortgage has been entered upon any of the ship's papers.

With regard to the first two contentions of counsel for the claimants, it is not quite accurate to say that our Prize Courts have never adjudicated upon claims of a neutral mortgagee. In *The Aina* (*ubi sup.*) a claim was made by a person, alleged to be a neutral, who was mortgagee of one third part of a captured enemy ship. Two questions there arose—(1) whether the claimant was a neutral; and (2) whether, supposing him to be a neutral, he would be entitled to come to the Prize Court and claim one-third of the ship by virtue of the mortgage. It is true that the court decided that the claimant was not a neutral, and that was enough to support the decision. But the court also unequivocally stated that, even if he were a neutral, his claim could not be sustained. Dr. Lushington said, at p. 250: "If I am to do it in the present case, innumerable questions would arise, and the court might be called upon to inquire into the validity of the mortgage, and be compelled to determine that validity, not by the law of England, but by the law of the country where it was executed."

With regard to the authorities generally, the first and leading case usually referred to is *The Tobago* (*ubi sup.*). Counsel for the claimant sought to distinguish that case, and even invoked the aid of certain passages or phrases in the judgment.

The claimant in that case was a British subject. The claim was founded upon a bottomry bond on a French vessel executed by her master to the claimant before hostilities between Great Britain and France had commenced. The claim was rejected upon the broad ground that the court recognised no liens upon a captured vessel, with the special exception of some liens attaching by the general law of the mercantile world independently of contract. As Lord Stowell said: "Those lending money on such security take this security subject to all the chances incident to it, and, amongst the rest, the chances of war." It may be observed in passing that by the mortgage in the case now before the court the risk of war is expressly mentioned, and the mortgagees had the right, at the expense of the mortgagors, to insure against it if they thought war was imminent. Lord Stowell then goes on: "But it is said that the captor takes *cum onere*, and therefore that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend takes it liable to the freight due to the owner of the ship, because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. By that law he is not bound to part with it but on payment of freight; he being in possession can detain it by his own authority, and wants not the aid of any court for that purpose. These are all characters of the *jus in re*—of an interest directly and visibly residing in the substance of the thing itself. But it is a proposition of a much wider extent which affirms that a mere right of action is entitled to the same favourable consideration in its transfer from the neutral to a captor. It is very obvious that claims of such a nature may be so framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts, and it is therefore unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. In like manner his rights operate on no such liens where the property itself is protected from capture; indeed it would be almost impossible for the captor to discover such liens in the possession of the enemy upon property belonging to a neutral. The consequence, therefore, of allowing generally the privilege here claimed would be that the captor would be subject to the disadvantage of having neutral liens set up to defeat his claims upon hostile property, whilst he could never entitle himself to any advantage from hostile liens upon neutral property. This court therefore excludes all consideration of liens or incumbrances of this species." The passages just quoted were expressly adopted by the Privy

Council in 1857 in *The Ariel* (*ubi sup.*), and the substance of the decision in this last case is succinctly stated towards the end of the judgment delivered by Sir John Patteson as follows: "Liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize."

It has been contended that a claim under a mortgage is in some essential respects different from that under a bottomry bond. It may be noted that by the municipal law of this country the claim of a mortgagee, whether in possession or not, ranks below the claims of persons who have maritime liens on the mortgagor's ship, for example, for bottomry, salvage, and wages: (see *The Duke of Bedford*, 2 Hagg. Ad. 294; *The Bold Buccleuch*, 7 Moo. P. C. C. 267; *The Mary Ann*, L. Rep. 1 A. & E. 8; *The Feronia*, 17 L. T. Rep. 619; L. Rep. 2 A. & E. 65; and *The Ripon City*, 77 L. T. Rep. 98; (1897) P. 226). So if the mortgagees of the *Marie Glaeser* had been British subjects, and the effect of the mortgage depended on British law, *The Tobago* (*ubi sup.*) would be an authority *à fortiori* against their claim.

As to the contention that the mortgagees in the present case have, by virtue of the mortgage, some kind of "property" in the *Marie Glaeser*, no information has been given to the court as to the exact meaning of the word "property" so used, or as to its nature, or whether it imports some kind of "ownership" of the vessel. By our own statute law, "except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be the owner thereof": (Merchant Shipping Act 1894, s. 34). Whether the German law as to mortgages substantially differs from ours, or what the German law on the subject may be, this court declines to inquire. To do so is no part of the duty of a Court of Prize. This is clearly shown by Lord Stowell in his judgment in *The Marianna* (Roscoe, vol. 1, 518; 6 Ch. Rob. 24), which was a claim by a neutral on a lien for unpaid purchase money.

It is not profitable to guess what is the effect of the German mortgage deed; but there is certainly nothing upon the face of it which indicates any transfer of ownership, or anything other than a charge for the mortgage debt. Portions of the conditions seem to negative anything of the kind. The truth is that capture of enemy vessels at sea during war would be a hazardous and almost worthless right of belligerents if the captors were confronted with such claims as are put forward in this case, or if mortgages gave to mortgagees rights prior to those of the captors.

But counsel for the claimants as his last resource has boldly pressed the court to extend the law at the present day so as to protect neutral mortgagees of enemy ships, on the ground that the law of nations has advanced, as he contends, in this direction by and since the Declaration of Paris 1856, and that such a protection is necessary to accord with the policy and spirit of the Declaration with regard to neutrals.

It is advisable to glance briefly at the way the Declaration has been dealt with by various nations. Before the Declaration of Paris the treatment of enemy goods under a neutral flag, and neutral goods under the enemy's flag, which was afterwards embodied in the second and third heads of the Declaration, was agreed to and observed by France and this country during the Crimean War. The Declaration itself—the terms of which "are not strictly authoritative law" (Hall, 6th edit., p. 686)—has been adopted by practically all the civilised States of the world except the United States of America, Spain, and Mexico.

The United States refused to become a party to it chiefly on the broad ground that they desired a complete exemption from capture at sea of all private property. Nevertheless the United States announced at the beginning of the Civil War that they would give effect to its principles during those hostilities; and again, in 1898, during their war with Spain the President issued a proclamation on the 26th April 1898, declaring that the policy of the United States Government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods not contraband of war are not liable to confiscation under the enemy's flag." Spain also in the same year, while maintaining that she was not bound by the Declaration, gave orders for the observation of the rules that (1) a neutral flag covers the enemy's goods, except contraband of war, and (2) neutral goods, except contraband of war, are not liable to confiscation under the enemy's flag: (Hertslet, Commercial Treaties XXI., 837). Our own country, one of the original parties to it, has steadfastly adhered to it. Spain and Mexico, which had for half a century refrained from acceding to it, have recently finally acceded, the former on the 18th Jan. 1908, and the latter on the 13th Feb. 1909.

This court accordingly ought to, and will, regard the Declaration of Paris not only in the light of rules binding in the conduct of war, but as a recognised and acknowledged part of the law of nations, which alone is the law which this court has to administer. But how can it be used or applied so as to support the claimant's case? This court can only enunciate what it conceives to be the law of nations. If any matter of international law in controversy between nations requires to be settled by international convention, this court cannot antecedently declare the controverted doctrine to be a part of international law.

The Declaration of Paris, in the two parts referred to, only deals with goods or merchandise carried on vessels, and not with the vessels themselves. If it had been intended to deal with vessels and property, rights, or interests in them, that would have been expressed. The object of the Declaration was to ensure the maintenance of maritime commerce by making certain goods carried over the seas immune from confiscation. The lending of money upon vessels, or "financing" their owners, are business transactions which may be usual, necessary, and profitable. But they cannot with propriety be put upon the same footing in international law as the commerce which constitutes the world-wide trade of the carriage of merchandise by sea. There does not appear to be any direct relation in principle

between guarding the safety of this commerce upon its course across the oceans in the common interest of the nations and giving protection by special rules of international law to persons or companies who invest their moneys in shipping ventures. Apart, therefore, from any assistance which may be derived from decisions of various Prize Courts since the date of the Declaration, this court could not accede to the suggestion that neutral mortgagees of vessels should have a rule of law created for their protection.

But have any decisions in any Prize Court since 1856 proceeded in the direction urged? Has any Court of Prize since assented to such a claim as is now being made? The answer, it is believed, is in the negative.

On the contrary, there have been decisions against such claims. In 1866 the Supreme Court of the United States of America decided in *The Hampton* (5 Wall. 372) that "in proceedings in prize, and under principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens, subject to being overridden by the capture, not as *jura in re*, capable of an enforcement superior to the claims of the captors." I am reading from the first part of the headnote. The claimant there was "a loyal citizen"; and the *bona fides* of his mortgage was not disputed. His claim was to have the amount of his mortgage paid to him out of the proceeds of the sale of the captured vessel. [His Lordship quoted at length from the judgment of Miller, J. in delivering the opinion of the Supreme Court, which rejected the claim.] So in 1867 in *The Battle* (6 Wall. 498), also in the Supreme Court of the United States of America, Nelson, J., in delivering the judgment, said: "The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens to require examination." And in the case previously cited mortgages were treated as liens.

In 1870, in the Prize Court of France, a claim was made by Hoffman and Co., British shipowners, who had a mortgage upon a Prussian ship *Der Turner*, that a sum to discharge the mortgage should be set aside from the proceeds of sale. It was there suggested that the claim might be allowed "by analogy and in accordance with the principles established by the Paris Conference that neutral property under an enemy flag is not subject to capture." But the decision was against the claim. [His Lordship read the summary and part of the French judgment, which appears in Barboux, Jurisprudence du Conseil des Prises, 1870-1871, p. 76.]

In 1899, again, the Supreme Court of the United States of America, in *The Carlos F. Roses* (177 U. S. Reports, 655), dealt with the subject exhaustively in a claim put forward by a British company which had advanced money upon a cargo on a captured ship, and which had received bills of lading covering the shipments. Fuller, C.J. delivered the judgment of the court. In his judgment he said, at p. 666, "the right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties. Hence, the Prize Courts have rejected in its favour the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading." He also cited with approval a passage from *The Frances* (8 Cranch, 418), and approved of the decision in *The Hampton* (*ubi sup.*) and *The Tobago* (*ubi sup.*).

To come down to a later and recent date, in 1905, during the Russo-Japanese War, the Sasebo Prize Court in Japan followed the same lines. In *The Nigretia* (Takahashi, p. 551) a preferential claim was made, apparently by a Japanese subject, for salvage expenses incurred before the seizure. It was argued for the petitioner that the preferential right claimed was an "actual right recognised by law, and not based upon a voluntary contract like a mortgage and that therefore it was entitled to protection." The court of first instance pronounced that "according to international law, the right of a captor being absolute, neither the real right" (by which no doubt is meant a right *in rem*) "nor the obligatory right of a third party can be set up against it." On appeal the Higher Prize Court confirmed this doctrine and the decision: (Takahashi, 553).

In another case in the same court, in 1904, *The Russia* (Takahashi, 557) a claim for a prior right for necessaries was made. The court said (p. 559): "If the ship is a lawful prize she cannot be released on account of a neutral person having a claim against her. . . . Even though the petitioner's claim was created by the disbursement of the ship's necessary expenses for continuance of the voyage, a third party has no right to make any claim upon the property, as not only is there no provision in our Prize Court Regulations recognising a prior claim upon a prize, but according to international law the right of the captor to a prize confiscated as the enemy's property is absolute."

The court has no hesitation in pronouncing that upon the authorities, upon principle, and upon grounds of convenience and practice the claim of the neutral mortgagees of this captured vessel must be rejected.

The case has thus far been dealt with from the points of view presented at the Bar. But there is also another broad ground, which can be shortly stated, upon which the claimants could not succeed in any view of their rights. Even assuming that they had a "property" in the vessel, or even if they had rights of ownership and could properly be regarded as the owners of the whole or any part of the vessel, the fact that the vessel was sailing under the German flag, with papers entitling her to do so, and navigated by a German master in the commerce of the German Empire, would be fatal to their claim: (see *The Vigilantia*, Roscoe, vol. 1, 31; 1 Ch. Rob. 1; *The Vrow Elizabeth*, Roscoe, vol. 1, 409; 5 Ch. Rob. 4; *The Primus*, Roscoe, vol. 2, 290; Spinks, 48; *The Industrie*, Roscoe, vol. 2, 297; Spinks, 54). The doctrine is summed up in Hall's International Law (6th edit.), at p. 498, and it is confirmed, in my opinion, by the quotation made by the Solicitor-General in his argument from Westlake's International Law (Part 2, 169).

The costs are entirely in my discretion; and as the decision in this case governs a number of other cases, I shall make no order against the mortgagees to pay them.

Ship condemned as prize of war and ordered to be appraised and sold.

Solicitors: for the Crown, *Treasury Solicitor*; for the owners and various other parties interested in necessaries, &c., *Thomas Cooper* and *Co.*; for the mortgagees, ***Lightbound, Owen,* and *MacIver.***

Oct. 26 and 29, 1914.

(Before the Right Hon. Sir S. T. EVANS, President.)

THE BERLIN. (a)

Enemy fishing vessel—Vessel employed exclusively in coast fishery—Exemption from capture—Position of vessel when captured—Presumption that vessel is deep-sea fishing vessel—Right of capture—Hague Conference 1907, Convention XI., art. 3—Evidence admissible in prize cases—Prize Court Rules 1914, Order XV.

By art. 3 of the Hague Conference 1907, Convention XI., it is provided that: "Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, and cargo. This exemption ceases as soon as they take any part whatever in hostilities."

This immunity from capture does not extend to deep-sea fishing vessels which are engaged in a commercial enterprise which forms a part of the trade of the enemy country.

Quære, *whether Germany can, during the present war, claim any of the benefits of the Hague Conventions.*

The Prize Court is not bound by the ordinary rules of evidence of the municipal courts, but may in its discretion draw inferences from trustworthy information in its possession.

THIS was a case in which the court was asked to condemn a vessel and her cargo, and to order the sale thereof under the following circumstances.

The *Berlin* was a sailing cutter of 110 tons metric measurement, registered at Emden, in the German Empire. She was captured on the 5th Aug. 1914, the day after the declaration of war between Great Britain and Germany, by H.M.S. *Princess Royal* and taken to Wick, by the order of the commander, by the steamer *Ailsa*. At the time of her capture the *Berlin* was about 500 miles distant from Emden, and nearly 100 miles distant from the coast of Scotland. She had on board materials for curing fish and some cured fish.

Arthur Pritchard for the Crown.—The vessel ought to be condemned. The whole of the evidence in the case showed that she did not fall within the exemption from capture accorded to vessels engaged exclusively in coast fisheries as provided by the Hague Conference 1907, Convention XI., art. 3. He referred to

The Paquete Habana and *The Lola*, 175 U. S. 677;
The Young Jacob and Johanna, 1 Ch. Rob. 20;
Herring Fisheries (Scotland) Act 1867 (30 & 31 Vict. c. 52, s. 11);
Westlake's International Law, vol. 2, 133.

Cur. adv. vult.

Oct. 29.—The PRESIDENT.—In this case the Crown asks for the condemnation of the sailing ship, the *Berlin*, and her cargo as enemy property. No claim has been made in respect thereof, but it is necessary, nevertheless, to ascertain whether by international law the ship is immune from capture as a fishing vessel. The *Berlin*, as it appears from the ship's papers, was a German fishing cutter manned by fifteen hands. She was owned by the Emden Herring Fishing Company. She had on board 350 empty barrels, 100 barrels of salt, fifty barrels of cured herrings, and she also had two drifts of nets. The vessel, as appears from her log, had been on a fishing voyage in the North Sea. From the 27th July onwards she had been catching herrings in latitudes between 55 degrees and 58 degrees 30min. N., and in longitudes between 1 degree E. or W., and in depths of from 66 to 148 metres. At these times, therefore, she was far out in the North Sea, at distances of about 100 miles from the nearest coast—Great Britain—and about 500 miles from her home port and from the German coast. She was brought into Wick on the 6th Aug. by the steamer *Ailsa*, and handed over to the Chief Officer of Customs, who retained her as prize captured at sea.

There is no direct evidence, in the legal sense, as used in our municipal courts of law, of her capture by one of His Majesty's ships or of the place or time of her capture. It was reported to the officer of the *Ailsa* that she had been captured by the *Princess Royal.* I have seen a confidential report made by the commander of the *Princess Royal* of the capture, and it appears that the exigencies of war rendered it necessary for him to request the *Ailsa* to take the captured vessel to Wick on his behalf. It appears also that the capture took place at 11.30 a.m. on the 5th Aug. Apart from this, I should have presumed that the capture was not made until after war was declared on the 4th Aug. (11 p.m.). When the capture took place the vessel was in the North Sea in the position which I have approximately stated.

It would have been advisable for the commander of the *Princess Royal* to enter the time and the place of capture in the vessel's log, or to make a declaration in the presence of the vessel's master, lest objection might be made of the absence of direct legal evidence. But fortunately, in this court, I am entitled to act upon other evidence or trustworthy information and to draw inferences therefrom upon which the court may think it safe and just to act. The Prize Court is not bound by such confining fetters as our municipal courts: (see *The Franciska*, Roscoe's English Prize Cases, 2, 346; Spinks, 287).

The question that now arises is whether this vessel, the *Berlin*, is immune from capture as an enemy vessel on the ground that she is a vessel engaged in coast fishing. The history of the varying practices of this and other countries in exempting from capture in war those vessels which are engaged in coast fishing, up to the year 1899, has been given in the Supreme Court of the United States of America in the case of *The Paquete Habana* and *The Lola* (*ubi sup.*). The judgment of the court was delivered by Gray, J. The conclusions stated by him, which form the judgment of the majority of the Supreme Court, were as follows:—

"This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilised nations of the world, and independently of any express treaty or public Act, that it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes, and crews, unarmed, and honestly

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way. Nor has the exemption been extended to ships or vessels employed on the high seas in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured, and made a regular article of commerce. This rule of international law is one which Prize Courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own Government in relation to the matter."

Since the date when that judgment was pronounced the matter has been dealt with by Japan in its prize regulations and in some of its Prize Court decisions, and it forms also the subject of one of the Hague Conventions of 1907. Art. xxxv. of the Japanese regulations governing captures at sea, which came into force on the 15th March 1904, provides as follows:—

"All enemy vessels shall be captured. Vessels belonging to one of the following categories, however, shall be exempted from capture if it is clear that they are employed solely for the industry or undertaking for which they are intended:—

"1. Vessels employed for coast fishery. . . ."

[His Lordship referred to the judgments of the Japanese Court in the cases of *The Michael* and *The Alexander* (Russian and Japanese Prize Cases, vol. 2, 80 and 86) and continued:] I do not propose to make any pronouncement in the case now before the court as to whether the German Empire or its citizens have in the circumstances of this war the right to claim the benefit of The Hague Convention. But in order to show how the doctrine with which I am now dealing has been treated by the nations with the progress of years and events, I refer to art. 3 of the 11th Convention of The Hague Conference 1907, which is as follows:—

"Vessels employed exclusively in coast fisheries or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, and cargo. This exemption ceases as soon as they take any part whatever in hostilities. The contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance."

In this country I do not think that any decided and reported case has treated the immunity of such vessels as a part or rule of the law of nations (see *The Young Jacob and Johanna, ubi sup*, and *The Liesbet van den Toll*, 5 Ch. Rob. 283). But after the lapse of a century I am of opinion that it has become a sufficiently settled doctrine and practice of the law of nations that fishing vessels plying their industry near or about the coast (not necessarily in territorial waters) in and by which the hardy people who man them gain their livelihood are not properly subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves. The foundation of the doctrine is stated in Hall's International Law, 6th edit., 446, and the rule is formulated by Westlake in his International Law, Part 2, 133.

It is obvious that in the process of naval warfare in the present day such vessels may without difficulty and with great secrecy be used in various ways to help the enemy. If they are, their immunity would disappear; and it would be open to the naval authorities under the Crown to exclude from such immunity all similar vessels if there was reason for believing that some of them were used for aiding the enemy. And this seems to be the sense in which art. 3 of The Hague Convention of 1907, No. XI., should be regarded.

As to the *Berlin*, I am of opinion that she is not within the category of coast fishing vessels entitled to freedom from capture. On the contrary, I hold that by reason of her size, her equipment, and her voyage she was a deep-sea fishing vessel engaged in a commercial enterprise which formed part of the trade of the enemy country, and as such could be, and was, properly captured as prize of war. I therefore decree the condemnation of the vessel and cargo, and order the sale thereof.

Solicitor for the Crown, *Treasury Solicitor*.

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