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REPORTS

OF CASES RELATING TO

MARITIME LAW;

CONTAINING ALL THE

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom,

AND SELECTIONS FROM THE MORE IMPORTANT DECISIONS

IN

The Colonies and the United States.

EDITED BY

JAMES P. ASPINALL, Barrister-at-Law.

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REPORTS

OF

All the Cases Argued and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

April 28 *and* 29, 1875.

(Present: The Right Hons. Sir J. W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, Sir R. P. COLLIER, and Sir H. S. KEATING.)

THE ANGLO-INDIAN.

Collision—Lights—Duty to show light astern to following ship.

It is primâ facie the duty of an overtaking ship to keep out of the way of a ship ahead of her, but if the latter ship sees another approaching her from a direction where her lights are not visible, and which vessel she has reason to suppose does not, in fact, whether keeping a good look-out or not, see her and is likely to come into collision with her, it is her duty to give some warning to the overtaking ship, not necessarily by exhibiting a light, but by some signal, such as the firing of a gun, the showing a light, or otherwise, which will indicate her whereabouts to the overtaking ship, and call the attention of that ship to the danger of a collision.(a)

THIS was an appeal from the decree of the Right Hon. Sir Robert Phillimore, Knight, Judge of the High Court of Admiralty of England, in a cause of damage promoted in that court by the respondents, the owners of the brigantine *Excel* and of the cargo laden on board her; and also by the personal representatives of her late master, and others of the crew of the *Excel*, against the barque *Anglo-Indian*, of which the appellants were owners, for the recovery of damages arising out of a collision between the said two vessels.

The *Excel* was a brigantine of 210 tons register, or thereabouts. The *Anglo-Indian* was a barque of 440 tons register.

The collision happened about 2.30 a.m. on the 14th April 1874, in the Bay of Biscay, about fifty miles south by west of Cape Finisterre.

The wind at the time was blowing a gale from the north-north-west, and the night was dark and cloudy, with passing showers.

The case set up in the court below on behalf of the respondents, as stated in their petition, was, that the *Excel*, whilst in the prosecution of a voyage from Swansea to Barcelona, was hove to on the starboard tack, under double-reefed mainsail and mainstay sail, heading about west, and forereaching at the rate of between one and two knots an hour, making considerable lee way. The regulation lights were said to be duly placed and burning brightly at the time. Shortly before 2.15 a.m. a green light—which afterwards proved to be that of the *Anglo-Indian*—was observed astern of the *Excel*, and distant about 300 yards. The *Anglo-Indian*, it was alleged instead of keeping out of the way of the *Excel*, approached her in a direction which involved risk of collision, and exhibited her red light to those on board the *Excel*; and, as it was further alleged, although the *Anglo-Indian* was loudly hailed from the *Excel*, and a light was exhibited over the stern of the *Excel*, the *Anglo-Indian* ran into and struck the *Excel* upon the stern, and did her so much damage that she shortly afterwards foundered and was lost, together with her cargo and everything then on board her. Upon this occasion the master was unfortunately drowned.

The case on the part of the appellants was, that on the occasion in question the *Anglo-Indian*, bound from London to Jamaica, was close-hauled on the starboard tack under reefed upper topsails, foresail, and foretopmast staysail, heading about west, and making about five knots an hour. Her proper regulation lights were duly exhibited and burning brightly, and a good look-out was being kept.

Under these circumstances, about 2.30 a.m., on the 14th April, the hull of the *Excel* was made out a very short distance ahead and a little on the starboard bow of the *Anglo-Indian*. The helm of the *Anglo-Indian* was thereupon immediately put hard astarboard, but it was impossible to avoid a collision, and the stem of the *Anglo-Indian* struck the *Excel* on the port side of her stern.

The respondents alleged that the collision was caused by the negligence of those on board the *Anglo-Indian*, and by reason of their neglect to keep a proper look-out and to keep the *Anglo-Indian* out of the way of the *Excel*.

The appellants denied the statements of the respondents that a light was exhibited over the stern of the *Excel* and that the *Anglo-Indian* was

(a) See notes to *The Earl Spencer*, *post*, p. 4.—ED.

hailed, and attributed blame to those on board the *Excel* for improperly neglecting to keep a good look-out, for improperly neglecting to take any measures to show the position of the *Excel* to those on board the *Anglo-Indian*, and for improperly neglecting to observe the provisions of article 20 of the Regulations for Preventing Collisions at Sea.

The evidence was taken orally in open court before the learned judge of the court below, who was assisted by two of the Elder Brethren of the Trinity Corporation. The learned judge found the *Anglo-Indian* alone to blame for the collision, giving his reasons as follows:

Sir R. Phillimore.—There is no question at all as to the duty of the *Anglo-Indian*, that is clearly prescribed by the 18th article: "Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel;" and her defence for not keeping out of the way, as I understand it, is that the night was so dark that it was the duty of the *Excel* to have shown a light over her stern, and that if she had done so the collision would not have taken place. But on the evidence I am satisfied that the night was not of the character described by the *Anglo-Indian* witnesses. I am satisfied that the *Excel* ought to have been visible to those on board the *Anglo-Indian* at the distance that she says, viz., at the distance of at least 300 or 400 yards, and that if there had been a proper look-out on board the *Anglo-Indian*—and in my opinion and the opinion also of the Elder Brethren there was not—she would have seen the *Excel* in time to have got out of her way, and to have crossed her stern by starboarding at an earlier period. The question, therefore, does not arise, nor does the court intend to discuss it, whether in the present state of the sailing regulations it would or would not have been the duty of the *Excel* to have shown a light over her stern, because I am satisfied, as I have already said upon the evidence, that this vessel ought to have been visible to those on board the *Anglo-Indian* at a sufficient time to have avoided the collision. And, indeed, there is a dilemma out of which the *Anglo-Indian*, in my judgment, would find it difficult to escape, even if she had not been going at a speed of about six knots an hour, she being the overtaking vessel. She was going about six knots, and that rate of speed would only be justifiable if she could have seen a vessel in sufficient time to get out of her way. I am satisfied upon the evidence, as I have already said, that if there had been a proper look-out this vessel would have been seen in due time to have prevented the collision, and therefore I pronounce the *Anglo-Indian* alone to blame. The cross action must be dismissed.

From the decree made in accordance with the above judgment the owners of the *AngloIndian* appealed for the following among other reasons:

1. Because the evidence taken in the court below shows that the collision was attributable to the negligence of those on board the *Excel*.

2. Because those on board the *Excel* neglected to keep a good look-out.

3. Because those on board the *Excel* neglected to take any measures to show the position of the *Excel* to those on board the *Anglo-Indian*.

4. Because on the evidence adduced by the respondents themselves it is evident that those on board the *Excel* considered it necessary to show a light over the stern, and that no light was shown in time to give those on board the *Anglo-Indian* warning.

5. That the learned judge ought to have held the *Excel* to blame for neglecting to show a light to indicate her position to the *Anglo-Indian*.

6. Because the collision was not occasioned by any negligence of those on board the *Anglo-Indian*.

Butt, Q.C., and *R. E. Webster*, for the appellants.—It was the duty of those on board the *Excel* to have kept a better look-out. It was, further, their duty to have exhibited a light over the stern of the *Excel* in sufficient time to have given warning to the *Anglo-Indian* and to have enabled her to keep out of the way of the *Excel*. This duty arises out of the general maritime law, which requires a ship, being approached by another ship from such a direction that the former is not as visible as the latter, to exhibit a light or give a signal so as to warn the approaching vessel:

The Iron Duke, 4 Notes of Cases, 94, 585; 9 Jur. 476; *The Osmanli*, 7 Notes of Cases, 509.

And this duty is continued and enforced by the 20th article of the regulations for preventing collisions, which provides that "nothing in these rules shall exonerate any ship 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 duty to exhibit a light being under such circumstances an obligation of the general maritime law, was a precaution required by the ordinary practice of seamen." There is no obligation to carry a fixed light over the stern, but a light should be shown in a proper time as a signal.

Milward, Q.C. and *E. C. Clarkson*, for the respondents.—There is no duty to exhibit any light except those provided by the regulations. By article 2, it is expressly provided that the lights therein provided, and "no others," shall be carried, and to find that it was the duty of a sailing vessel to carry more than the side lights at night would be an overruling of the regulations. But even if there was such a duty, it can only arise when there is danger of collision, and in the present case there was no reason to apprehend danger until the ships were close together, and then the green light was actually shown. Those on board the *Excel* kept a bad look-out.

Butt, Q.C., in reply.

April 29, 1875.—The judgment of the court was delivered by

Sir R. P. COLLIER.—This was a suit brought by the owners of the *Excel*, a brigantine of 210 tons, against the *Anglo-Indian*, a barque of 440 tons, in consequence of a collision, for which the *Excel* maintained that the *Anglo-Indian* alone was to blame. The collision took place in the Bay of Biscay, about fifty miles off Cape Finisterre, in the open sea, at between 2 and 3 a.m. in April 1874. The *Excel* was going in a westerly direction, at about 1½ or 2 knots an hour. The *Anglo-Indian* was proceeding at a rate of somewhere about 6 knots an hour in the same course, behind the *Excel*. The *Anglo-Indian* ran into the stern of the *Excel*, and the *Excel* was sunk. The learned judge of the Admiralty Court has found that the *Anglo-Indian* was alone to blame.

The question involved in this case is chiefly one of fact, and their Lordships repeat what, indeed, they have often said, that they are extremely loath to interfere with the finding of the court below on a question of fact, that court having had the advantage, which they have not, of seeing and hearing the witnesses, unless they come to a very clear conclusion that that finding was wrong.

Now, the findings of fact of the learned judge are these: First, with respect to the state of the night, in regard to which there was some conflicting evidence, those on board the *Excel* representing that the night, though dark, was clear, with passing clouds; those on board the *Anglo-Indian* representing that it was dark and very stormy, with rain, or, at all events, occasional rain. The learned judge says: "But on the evidence I am satisfied that the night was not of the character described by the *Anglo-Indian* witnesses. I am satisfied that the *Excel* ought to have been visible to those on board the *Anglo-Indian* at the distance that she says, viz., at the distance of at least 300 or 400 yards." Their Lordships accept that finding, and are of opinion that it is borne out by the evidence. Then the learned judge goes on and finds another most material fact, namely, "that if there had been a proper look-out on board the *Anglo-Indian*—and in my opinion," the learned judge says, "and the opinion also of the Elder Brethren, there was not—she would have seen the *Excel* in time to have got out of her way, and to have crossed her stern by starboarding at an earlier period." Their Lordships are of opinion that this finding also is entirely supported by the evidence. Indeed, in their Lordships' view, it might not be incorrectly said that upon the evidence there was no look-out at all on board the *Anglo-Indian*. The man upon the look-out says that when he first saw the vessel the *Excel* was "ahead, a little on the starboard bow;" that he first saw her masts; that when he saw the masts "she was at no distance at all," and "When I saw the masts," he says, "on the starboard bow, I wheeled round and sung out, 'There is a vessel on the starboard bow,' but I was too late; we were foul of her already." And he subsequently says, "I was foul of her the moment I saw her." He further adds that he saw no light whatever on board her, and also that he heard no hailing on board her, which other people on board the *Anglo-Indian* did hear. This certainly would point to the conclusion that the man Robinson, who was keeping the look-out, as it is supposed, on board the *Anglo-Indian*, was really keeping no look-out at all. That being so, and having reference to the 17th article, which provides that "Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel," their Lordships have no doubt whatever that the finding of the learned judge was right, that the *Anglo-Indian* was to blame.

The question remains, whether there was negligence contributing to the accident on the part of those navigating the *Excel*. On this subject there has been a discussion before their Lordships as to the meaning of three articles in the Regulations for Preventing Collisions at Sea; those articles being the 2nd, the 19th, and the 20th. The second is to the effect that "the lights mentioned in the following articles," numbering them, "and no others, shall be carried in all weathers, from sunset to sunrise." Article 19 is in these terms: "In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger." Then the 20th is: "Nothing in these rules shall exonerate any ship, 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." It has been argued on the one side that Article 2 is absolutely prohibitory to a vessel under any circumstances showing any light except the lights prescribed. On the other hand it has been argued that, although undoubtedly it would not be proper for a vessel under the circumstances in which the *Excel* was to keep up a fixed light at her stern, nevertheless, that under the circumstances of a vessel approaching her which would not be able to see her as well as she would see that vessel, it was her duty to have exhibited a light in time to avoid the collision; that she might have done this, but neglected to do so. Their Lordships do not entirely accept either of the views which have been thus expressed. Undoubtedly it is *primâ facie* the duty of the overtaking vessel to keep out of the way of the vessel ahead of her, but their Lordships would be loath to lay it down that no duty whatever attaches under such circumstances as the present to the vessel ahead. If that vessel saw another approaching her, whether keeping a good look-out or not, which she had reason to suppose did not in fact see her, and was likely to come into collision with her, they would be loath to say that no duty was cast upon her. On the contrary, they are of opinion, under those circumstances, it would be her duty to give some warning to the approaching vessel, not necessarily by exhibiting a light, but by some signal, such as the firing of a gun, the showing a light, or otherwise, which would indicate her whereabouts to the approaching vessel, and call the attention of that vessel to the danger of a collision. The question, therefore, comes to this, whether in this case it has been established that the *Excel*, in the words of Article 20, did neglect any precaution which might be required by the ordinary practice of seamen, whereby she might have avoided the collision?

Now, the facts with reference to this subject may be taken to be these: The *Excel* saw the *Anglo-Indian* approaching at a distance of about 300 or 400 yards. That is found as a fact by the learned judge, and their Lordships think rightly. It appears that, simultaneously with her sighting this vessel she sighted the green light of the vessel, and that green light would then indicate that there was no danger of collision; that the *Anglo-Indian* would pass behind her stern. Very soon after both lights opened, the red and the green, and then undoubtedly there was imminent danger of a collision. The evidence on the part of the *Excel* is that, under those circumstances, after an ineffectual attempt to obtain the globe light, the green light was taken from the starboard side of the vessel and exhibited from the stern. That fact appears to be proved, and their Lordships are by no means satisfied upon the evidence that that green light was not shown in sufficient time to have enabled the overtaking vessel, if she had

kept a good look-out, to have avoided the collision, which might have been in all probability prevented by a very trifling starboarding of the helm.

Under these circumstances, in their Lordships' view, it is not established that the *Excel* did neglect any precaution "which may be required by the ordinary practice of seamen," and that no case of contributory negligence has been made out against her.

Under these circumstances, their Lordships will humbly advise her Majesty to affirm the decision of the Admiralty Court, and to dismiss this appeal with costs. *Appeal dismissed.*

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

Solicitor for the respondents, *Thomas Cooper.*

Thursday, June 17, 1875.

(Present: Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT P. COLLIER.)

THE EARL SPENCER.

Collision—Ship overtaken—Duty to show a light astern—Speed.

Although a ship is, under some circumstances, bound to keep a look-out astern, and to show a light or give a signal to another ship overtaking her and evidently unable to see her, nevertheless, where a steamer going at a high rate of speed in a fair-way overtakes a sailing ship showing no light or signal, and does not see her until too near to avoid a collision, although keeping a good look-out, the steamer will be held alone to blame, if a lower rate of speed would have given the steamer time to have avoided the collision upon sighting the sailing ship.(a)

THIS was an appeal from a decree of the Right Hon. Sir Robert Phillimore, the learned Judge of the High Court of Admiralty of England, in a case of damage lately pending in that court, promoted by the respondents, as the owners, master, and crew of the *Merlin*, and the owners of her cargo, against the steamship, the *Earl Spencer*, owned by the appellants, the London and North-Western Railway Company.

The cause arose out of a collision which took place between the two vessels about 4.30 a.m., on Saturday morning, the 17th Oct. 1874, within Holyhead Bay, North Wales, a little inside the breakwater. The *Merlin* was a schooner of 65 tons register, manned by a crew of four hands, all told, and whilst proceeding from Carmarthen to Liverpool with a cargo of tin plate, was in Holyhead Bay, inside the breakwater. The *Earl Spencer*, a paddle-wheel steamship of 431 tons register and 350 horse power, was proceeding from Greenore, Ireland, to Holyhead, with cargo and passengers.

The case for the appellants, as set up in their answer, was, that under the foregoing circumstances, the *Earl Spencer* proceeded on her said voyage in safety until about 4.25 a.m. on the 17th Oct. 1874, when the tide being ebb, the weather dark and rainy, and a gale blowing from the S.S.W., the *Earl Spencer* was rounding the breakwater of and entering Holyhead Outer Harbour, heading about S.$\frac{1}{2}$E., with her regulation lights burning brightly, and a good look-out being kept on board of her at such time; and after rounding the breakwater those on board the *Earl Spencer* suddenly sighted a vessel, which turned out to be the *Merlin*, with no lights visible, bearing about half a point on the starboard bow of the *Earl Spencer*, and close ahead of the latter vessel, and inside the breakwater. The captain of the *Earl Spencer*, thinking that the *Merlin* was a vessel at anchor, starboarded the helm of the *Earl Spencer* to go to the eastward, and outside of her and of the other shipping, there being several vessels at anchor to the westward of the *Merlin*; but, discovering immediately afterwards that the *Merlin* was under weigh, the captain of the *Earl Spencer* ordered the engines of that vessel to be stopped and reversed full speed, which order was immediately obeyed, but the time which had elapsed from the sighting of the *Merlin* was so short, and as the *Merlin* was steering a course which crossed the course of the *Earl Spencer*, that latter vessel was unable to avoid the *Merlin*, but her bow came into contact with the stern and port quarter of the *Merlin*. The captain of the *Earl Spencer* attempted to tow the *Merlin* into safety, but, after an unsuccessful attempt to do so, was compelled, through fear of risking the lives and property under his care, to abandon her, after taking on board her crew.

The appellants charged those on board the *Merlin* with improperly omitting, under the circumstances of the case to hail the *Earl Spencer* or to show a light, or to take any proper measures in due time to warn those on board the *Earl Spencer* of the proximity and position of the *Merlin*, although, from the relative position of the two ships, the regulation lights of the *Merlin* were not visible to those on board the *Earl Spencer*. The appellants further charged that those on board the *Merlin* neglected to comply with the provisions of articles 19 and 20 of the regulations for Preventing Collisions at Sea. The appellants further charged that the said collision was occasioned or contributed to by the negligence of those on board the *Merlin*.

The case of the *Merlin*, as stated in her petition was, that she was on the starboard tack, heading about S.E. by S., with a moderate gale from the S.S.W., weather rainy, and tide about one and a half hour's ebb, and was making about 1$\frac{1}{2}$ to 2 knots per hour, with her proper regulation lights duly exhibited and burning brightly; that she was under double-reefed mainsail, reefed topsail, standing jib, and fore staysail, and her crew were engaged in setting her double-reefed foresail, the captain having charge of the helm. That the *Earl Spencer*, with her three lights open, was seen at the distance of about a cable's length astern of the *Merlin*, and coming towards her under steam. The *Earl Spencer*, though loudly hailed from the *Merlin*, ran against and with her stem, struck the *Merlin* a violent blow on

(a) This decision and the one preceding it, *The Anglo-Indian* (*ante*, p. 1), have the effect of overruling the decision of the Admiralty Court in *The Earl Spencer* (*ante*, vol. 2, p. 523), where it was decided that there was no duty upon any ship to exhibit lights other than the lights provided by the regulations, and that, in fact, such exhibition of lights would be contrary to law. Now, however, a vessel seeing another overtaking her will be bound to show a light or signal if there is danger of collision, and the headmost ship has reason to believe that the following ship cannot make her out; in effect, where the special circumstances or the ordinary practice of seamen require the exhibition of such a light. Whether the exhibition of the stern light is required will of course be a question for the court or the assessors in each case. —ED.

her port quarter, doing her a great deal of damage. The crew of the *Merlin* got on board the *Earl Spencer*, to save their lives, and the *Earl Spencer*, after an unsuccessful attempt to take the *Merlin* in tow, proceeded into Holyhead Harbour, and the *Merlin* and her cargo, and everything on board her, were totally lost.

The respondents charged those on board the *Earl Spencer* with neglecting to keep a proper look-out; with improperly neglecting to keep out of the way of the *Merlin*; with going too fast, considering the state of the weather, and not duly complying with the provisions of article 16 of the Regulations for Preventing Collisions at Sea; and that the said collision, and the consequent loss of the *Merlin* and her cargo, and everything on board her, were occasioned by the negligent and improper navigation of the *Earl Spencer*.

On the 11th Feb. 1875 the witnesses were examined orally in court before the learned judge of the court below, assisted by Trinity Masters. The respondents called only two witnesses, one of whom was the master of the *Merlin*, who admitted in cross-examination that if he had seen the *Earl Spencer* sooner than he did he would have shown a light over the stern of his vessel, but that, although he was steering, he had not looked round to see if any vessel was approaching astern of him till the *Earl Spencer* was only a cable's length off. The evidence of the appellants supported their case, as set up in their answer. The appellants also proved that the night was so dark that a vessel not showing lights could not be seen at a greater distance than from one to two cable lengths off, and that the *Merlin* was actually seen as soon as it was possible for anyone to make her out. It was contended by the appellants that, under the circumstances of the case, the speed of the *Earl Spencer* was justifiable and proper, and that it was the duty of those on board the *Merlin* to exhibit a light over the stern of that vessel in sufficient time to enable the *Earl Spencer* to keep out of the way of the *Merlin*, and that, even if the speed of the *Earl Spencer* had been less she could not, by reason of the neglect of duty on the part of the *Merlin*, have avoided the collision. The learned judge of the court below pronounced the *Earl Spencer* to blame, on the ground only that she entered the harbour at an improper speed, and, having reserved the question of the duty on the part of the *Merlin* to show a light, on the 18th Feb. 1875 delivered his judgment, finding that there was no duty on the part of the *Merlin* to exhibit a light, and that the *Earl Spencer* was alone to blame for the collision. The judgment of the learned judge will be found *ante*, vol. 2, p. 525; 32 L. T. Rep. N. S. 370.

From this decree the appellants appealed, for the following reasons:

1. Because the evidence showed that the *Merlin* neglected to keep a good look-out astern, as she was bound to do, under the circumstances of the case.

2. Because it was the duty of the *Merlin*, under the circumstances of the case, to exhibit a light over her stern, or make some signal in due time, to warn those on board the *Earl Spencer* of her proximity and position.

3. Because the neglect to exhibit a light or to make a signal was the neglect of a precaution required by the ordinary practice of seamen, or by the special circumstances of the case, within the meaning of article 20 of the Regulations for Preventing Collisions at Sea.

4. Because it was admitted by the master of the *Merlin* that if he had seen the *Earl Spencer* sooner he would have shown a light.

5. Because the finding of the learned judge, founded upon the opinion of the Elder Brethren of the Trinity House, that there was not time or opportunity for exhibiting a light over the stern, is not in accordance with the evidence given by the master of the *Merlin*.

6. Because the evidence showed that the *Earl Spencer* kept a good look-out, and that it was impossible to discover the *Merlin* sooner than she actually did.

7. Because the speed of the *Earl Spencer* was not excessive under the circumstances of the case.

8. Because the evidence established that it was necessary for the *Earl Spencer* to enter the harbour at full speed.

9. Because a reduced speed on the part of the *Earl Spencer* would not have enabled her to avoid the collision.

James P. Aspinall (*Butt*, Q.C. with him), for the appellants.—It is clearly established by the evidence of the master of the *Merlin* that he could have seen the *Earl Spencer* earlier if he had looked round; that he did not look round soon enough to enable him to give us any warning of his position; that if he had looked round he would and could have given us some signal, as it was his practice to do so. There was a good look-out kept on board the *Earl Spencer*, and the *Merlin* was seen as soon as it was possible to see her; it was impossible to see vessels on that night at a greater distance than the length of a cable or two; the master of the *Earl Spencer* acted reasonably, under the circumstances—it would have been dangerous to port, and to have stopped and reversed, as soon as he made out that there was a ship, was not a course he was bound to carry out, as he reasonably believed the schooner was at anchor. The speed of the *Earl Spencer* was not excessive. Every vessel is entitled to go at full speed when there is no fog, so long as that speed does not *necessarily* endanger other vessels, and there was nothing here to endanger the *Merlin* if she had used the due precautions which we say she was bound to do. To rule otherwise would be to say that all steamships are bound to go at such a speed that they cannot overtake and endanger a slow sailing vessel on a dark night; and this would apply equally to ships on the high seas in the usual track of vessels. If the *Merlin* had given a signal, the *Earl Spencer* would have recognised her position in sufficient time to have avoided her, and, whatever the speed of the *Earl Spencer*, there would have been no collision. It would have been dangerous for her to go at less speed at the mouth of the harbour on such a dangerous coast. But even if the speed of the *Earl Spencer* was too great under the circumstances, with such less speed as she could have kept up with safety to herself, she would not have avoided a collision. She was just at the entrance to the harbour, when the *Merlin* was sighted. The lowest speed at which she could have gone with safety would have been half speed, which would have been about 7 or 8 knots. She could not have stopped herself after sighting the schooner in time to have

avoided the collision any more than if she had been going at full speed. The distance was too short. If the *Merlin* had displayed a light or signal the *Earl Spencer* would have been enabled to avoid collision altogether, whatever her speed, either by stopping or by some other means. There was special reason for showing a light in that place, because the land is high, and the *Merlin* was between the *Earl Spencer* and the land, and consequently obscured by it, and not so visible as in the open sea. The *Merlin* was bound under the circumstances to show a light. It is the duty of every vessel, navigating a fairway on a dark night such as this, to show a light to any other vessel approaching astern of the former in such a direction that the leading vessel's regulation lights are not visible to the following vessel, more especially if the following vessel is a steamship and the followed a sailing ship, because the steamship must overtake the other. This duty arises from the regulations and from the maritime law: First. The regulations for preventing collisions contain no provision which prohibits the exhibition of a stern light or signal, but, on the contrary, they expressly provide such a light or signal must be exhibited, if required by the ordinary practice of seamen, or, in other words, by the maritime law or common law of the sea. Secondly. By the practice of seamen, and by maritime law, the exhibition of a light or signal over the stern of a ship, in such circumstances as the present, is obligatory, and in default thereof a ship is precluded from recovering for damage received. First. By article 2 of the Regulations for Preventing Collisions, the lights mentioned, &c., "shall be caried in all weathers," and "no others." These lights are to be carried on board large vessels, and must be fixed and stationary, as distinguished from other temporary lights: (see Arts. 3, 4, 5.) Wherever lights cannot be fixed they are to be "exhibited" over the side in time to prevent collision (Arts. 6 and 9), thus showing that the rules contemplate a distinction between carrying and exhibiting. Where the rules say that "no other" lights are to be carried, it can only mean that, for the purposes intended by the rules, no other lights are to be carried—that is to say, there is to be no variation in the colour of the respective side lights or masthead light, as the red is intended to indicate port and green starboard; that there is to be no variation in the mode of fixing the lights, as the mode prescribed by the rules is the most effective for the purpose intended, viz., to prevent each light being seen across the bow. It is submitted that the rules indicate only the lights which are to be carried for the purpose of giving warning to vessels ahead, and the way of carrying such lights; they do not interfere with the occasional exhibition of other lights for particular purposes. Under article 9, a fishing boat would be bound to exhibit her red light to a vessel approaching abaft the beam. This contention is strongly corroborated by article 20, providing "nothing in these rules shall exonerate any ship, 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." If nothing in the rules exonerates a ship from the neglect of a precaution required by the practice of seamen, or by the circumstances of the case, the observance of articles 2 and 5 will not exonerate the *Merlin* from neglect to show a light or signal astern if such signal was required by the ordinary practice of seamen in the special circumstances. In *The Anglo-Indian* (*ante*, p. 1; 33 L. T. Rep. N. S. 233), this question was considered, and the duty to show a light or signal was laid down, and in that case the facts requiring a signal were not so strong as here. Secondly. By the ordinary practice of seamen and special circumstances the *Merlin* ought to have shown a light and given a signal. The master's own admission shows that it was his practice. The groundwork of all rules as to the exhibition of lights and giving of warnings at night, whether at sea or on land, is that the thing or vehicle carrying the lights is an obstruction in a highway, blocking up the free right of passage and endangering the safety of other vehicles, whether the vehicle exhibiting the lights or giving the warning be in motion or stationary. The duty to exhibit a signal or give a warning does not depend upon the direction in which the vehicle is proceeding. I submit that every vessel, seeing another approaching her which she has reason to believe, from the direction in which she is approaching, does not see her and is likely to come into collision with her, is bound to give some warning to the approaching vessel. The duty to exhibit a light when in motion to vessels ahead is prescribed by the rules. So also with respect to vessels at anchor. But I submit that there is no practical distinction between vessels at anchor and a slow sailing vessel, when approached by a steamer from astern. It is equally an obstruction to the highway, and on a dark night it is next to impossible for a steamer to make it out until too near to avoid a collision. The difference of pace between a sailing vessel beating and a steamer is usually so great that the beating ship is, comparatively speaking, stationary, and this is a thing of course well known to seamen, and one against which they ordinarily provide. The duty of showing a light was laid down first in the case of vessels at anchor, and the duty of vessels in motion did not arise till within recent times, for the obvious reason that it was not until more modern times that commerce increased so enormously and steam made such a difference in speed. But the principle is the same in both cases, namely, that they are bound to give warning of an obstruction, and the obligation arose long before any statutory rules, and out of the maritime custom.

Baldessorni delle Assecurazioni Marittime, tom. 2, part 2, tit. 6, §§ 32, 33, 34;
Bynkershoek Quest. Jur. Priv. lib. 4, c. 22;
The Rose, 2 W. Rob. 1, 4;
The Columbine, 2 W. Rob. 33;
The Iron Duke, 2 W. Rob. 377; 4 Notes of Cases, 9 Jur. 476;
The Delaware v. *Osprey*, 2 Wallace Jr. 268;
The Louisiana v. *Fisher*, 21 Howard 1;
The Saxonia, Lush. 410;
The Olivia, Lush. 497.

These cases establish that it is the duty of a ship to exhibit to another approaching, a light. This duty exists wholly irrespective of the direction from which one vessel is approaching the other. The obligation would have existed even if the approach had been from the stern. In *The Saxonia* (*ubi sup.*), it is said: "No blame can attach to a vessel for running foul of another vessel

if it has been impossible until the collision was inevitable." Hence, before the rules there was an obligation by maritime law to show a light or signal to vessels approaching from the stern when the night was so dark that vessels could only be seen at short distances; that this obligation is not taken away but rather enforced by the regulations; that the present case was most clearly one where a light or signal was necessary, the night being very dark, and the master admitting he would have shown it if he had seen the *Earl Spencer*; that he ought to have kept a look-out astern, so as to have seen the *Earl Spencer* sooner, and show a light in time; that the neglect to show the light or signal prevents the plaintiffs from recovering, as there would have been no collision if it had been shown.

Milward, Q.C. and *E. C. Clarkson*, for the respondents.—It is the duty of a following ship to keep out of the way of a ship ahead, and it is so prescribed by the Regulations for Preventing Collisions at Sea, article 15; but there is no duty imposed upon the leading ship save that of keeping her course. [Sir R. P. COLLIER.—Is there no duty on the part of the leading ship to keep a look-out astern.] There is a duty to look out ahead, but not astern. [Sir MONTAGUE SMITH.—It must be the duty of some one on board a leading ship in a fairway and crowded place to look round now and then, although she may not be bound to have the same vigilant look-out astern as ahead.] If the steamer had been going at a moderate pace there would have been time to have signalled when she was seen, so as to have prevented a collision. In *The Anglo-Indian* (*ante*, p. 1), the duty to show a light astern under some circumstances is laid down, and that is binding, but in the present case, if the steamer had come up at a proper pace, the schooner would have had time to give, and might have given, some signal, but it was impossible to do so in consequence of her excessive speed and the shortness of the time. There is, however, no law requiring a leading ship to have on board a signal to be shown astern. [Sir MONTAGUE SMITH.—But you must take all prudent measures, and would it not be a prudent thing to have some such light or signal?] We were clearly not bound to carry a riding light ready for exhibition. We had no opportunity of getting a light ready. We were entitled to assume that they would see us in due time, and that they would come at a pace which would enable them to take proper measures to avoid us. It was not our province to be supplied with extraordinary means of making our position known. If it had been required that sailing vessel should carry such signals or lights, the sailing rules would have so provided. [Sir MONTAGUE SMITH.—It is said that lights or signals are to be used in special circumstances in article 20.] That does not contemplate that sailing ships are to carry another light ready to supplement the ordinary fixed lights. It is expressly provided by the sailing rules, article 2, that no lights other than those prescribed in the specific articles named therein shall be carried. [Sir MONTAGUE SMITH.—Would you contend that if a vessel approaching you at a moderate rate of speed were unable to see you, and you knew it, and you were necessarily in a place of danger, you were not bound to take some precaution to make her aware of your position? There must be some duty to look astern.] We were bound to do that which any ordinary seamen taking ordinary care would do, but I submit that it was impossible to do anything under the circumstances; they came upon us too rapidly. [Sir R. P. COLLIER.—You could do nothing when you actually saw the steamer, but the master says if he had looked round he could have seen the steamer a long distance, and would have shown a light. Why did he not do so?] The real cause of the collision was, not the failure to give a signal on the part of the *Merlin* but the excessive speed of the *Earl Spencer*; but for that they would have had ample time to have avoided us; if they had been going slower when they sighted us, they could have ascertained which way we were going, and then would have had time to shift their helm so as to clear us. If extra signals or lights are encouraged, there will be great confusion and danger ensuing therefrom. The only duty as to look out astern is, that a leading ship must keep such a reasonable look-out as will enable her to give warning to ships approaching at a proper speed.

Aspinall, in reply.—Even supposing the speed of the *Earl Spencer* was excessive, that would only make her half to blame; if a signal of her position had been given by the *Merlin* at an earlier period, the *Earl Spencer*, in spite of her speed, could and would have avoided the collision. When entering a channel where they are likely to be followed, ships are bound to keep some look-out so as to prevent ships coming into them astern by giving a signal, and some one on board ought to look astern sufficiently often to enable him to take precaution in reasonable time.

The judgment of the court was delivered by

Sir ROBERT P. COLLIER.—The material circumstances of this case are as follows:

The *Merlin*, a small coasting schooner of 65 tons, with four hands on board, was bound on a voyage from Carmarthen to Liverpool with a cargo of tin plate, but owing to a strong gale setting in from the S.S.W. she beat up for and entered Holyhead Harbour, and at the time of the collision, which was in the night or towards the morning of the 17th Oct., there being a strong wind and also a drizzling rain, she was going about two and a half knots an hour. The *Earl Spencer* is a steamer, carrying passengers and cargo, plying between Greenore and Holyhead, and was coming into Holyhead at the same time, taking very much the same course as the *Merlin*. According to her own showing the steamer entered the harbour of Holyhead at a speed of eleven knots an hour, and at about a cable's length or somewhat more she saw the *Merlin* in front of her. It appears that the captain came to the conclusion that the *Merlin* was anchored, although the *Merlin* showed no light; acting upon that view he put the helm of the *Earl Spencer* to the starboard, and the result was that in a short time he ran into the port quarter of the *Merlin*, and the *Merlin* was subsequently sank. The court below has held that the *Earl Spencer* was alone to blame for this collision, owing to the excessive speed at which she entered the harbour. Their Lordships have no doubt that the finding of the court is right so far as the *Earl Spencer* is held to be to blame. Their Lordships entirely agree that she entered the harbour with a reprehensible and they may add a reckless speed, considering the time of the night, the state of the weather, and that a number of vessels were in

the habit of anchoring very near to the path which she took.

It appears to their Lordships also that she is to blame for executing a wrong manœuvre. Seeing no light on board the *Merlin*, and seeing the *Merlin* in the usual route of the steamers, which would not be the usual anchoring ground, though not far from it, it appears to their Lordships that the captain was not justified in assuming that the *Merlin* was at anchor, and that he took a wrong manœuvre in starboarding his helm, whereas if he had attended to the advice of the mate in time, which was to port the helm, the collision would have been avoided.

The question remains whether there was contributory negligence on the part of the *Merlin*. The captain of the *Merlin* certainly says that he was at the helm, and that if he had looked round he probably could have seen the steamer some considerable distance off, and if so that he should have waived a light or adopted some mode of attracting her attention.

On the whole, however, their Lordships see no reason to dissent from the finding of the court below, that the *Merlin* was not guilty of contributory negligence such as would fix her with a portion of the blame of this collision. Their Lordships do not at all depart from the rule which they laid down in a recent case, *The Anglo-Indian* (*ubi sup.*). They are far from saying that it is never the duty of a vessel ahead to look behind. There may, undoubtedly, be circumstances of an exceptional character which may throw upon the vessel ahead the duty of looking behind, and, further, of giving some signal, by the way of a light or otherwise, to a vessel behind approaching her under circumstances under which there is reason to suppose that the after vessel does not see the vessel in front, and when there is danger of a collision. But in this case, although no doubt the night was a dark, and to a certain extent a stormy one, it appears to their Lordships that the *Merlin* could have been seen at a sufficient distance by the steamer for the collision to have been avoided if the steamer had gone at a proper speed (which, according to their Lordships' view, would be somewhere about one half or possibly less than half of the speed at which she was going). That being so, the captain of the *Merlin* might reasonably have supposed that steamers coming in his wake would (as their *primâ facie* duty at all events was) keep out of his way, and their Lordships are not able to say that he was guilty of negligence contributing to the accident, simply because a look-out behind was not kept, and no signal was given to the approaching vessel.

For these reasons their Lordships are of opinion that the judgment of the court below is right, and they would humbly advise her Majesty that it be affirmed, and that this appeal be dismissed with costs.

Appeal dismissed.

Solicitor for the appellants, *R. F. Roberts.*

Solicitors for the respondents, *Ingledew*, *Ince*, and *Greening.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and CYRIL DODD, Esqrs., Barristers-at-Law.

Jan. 20 *and Feb.* 12, 1875.

LOCKHART *v.* FALK.

Ship and shipping—Charter-party—Demurrage—Lien and exemption clause—Detention at port of loading—Action for by shipowner—Construction of charter-party.

By a charter-party between the plaintiff and the defendant, a vessel of the plaintiff was to proceed to W. and there load a cargo "in the customary manner," and forthwith proceed to R. and deliver the same. . . . "The cargo to be discharged in ten working days (weather permitting), commencing from the day after the ship has got into her proper discharging berth. Demurrage at 2l. per 100 tons register per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside the ship." It was proved that at W. the customary rate of loading was twenty tons a day.

In an action by the shipowner against the charterer for damages for undue detention of the vessel at the port of loading, the judge of the County Court held that the claim was not for demurrage, and gave judgment for the plaintiff for 44l. 2s. 8d., being damages for detention for sixteen days at the rate of 2l. 15s. 2d. per day. And on appeal therefrom, it was

Held, by the Court of Exchequer (Cleasby, Pollock, and Amphlett, BB.), dismissing the appeal, that the decision of the County Court judge was right, and that the demurrage and lien and exemption clauses in the charter-party were applicable to the port of discharge only, and did not apply to the shipowner's claim for damages arising from delay on the part of the charterer at the port of loading.

Bannister *v.* Breslauer (16 *L. T. Rep. N. S.* 418; 36 *L. J.* 195, *C. P.*; *L. Rep.* 2 *C. P.* 497), *and* Francesco *v.* Massey (*L. Rep.* 8 *Ex.* 101; *ante*, vol. 2, p. 594, *n.*), *discussed and distinguished.* (*a*)

(*a*) Since the above decision the Exchequer Chamber, in *Kish* v. *Cory* (*ante*, vol. 2, p. 593), have decided somewhat differently. In that case a charter-party between a shipowner and a charterer provided that the cargo was to be loaded in thirteen working days, and was to be discharged at not less than thirty-five tons per working day from the time of the ship being ready; that there should be ten days on demurrage for all like days above the said days, to be paid at the rate, &c.; and that the charterer's liability should cease when the ship was loaded, the captain or owner having a lien on cargo for freight and demurrage. An action was brought by the shipowner against the charterers for four day's demurrage at the port of loading beyond the thirteen clear working days allowed by the charter party, and it was held that the demurrage days related to the port of loading as well as the port of discharge, and that the charterer's liability for all such demurrage ceased when the ship was loaded. The distinction between that case and the present is that in the present there were no definitely named number of days for loading, consequently no days to which the term demurrage, as strictly applied, could refer at the port of loading; whereas in *Kish* v. *Cory* there was a definite number of loading days, and therefore, in accordance with the decisions, the demurrage clause was held to apply to both port of loading and discharge. It is to be regretted, however, that the meaning of the word "demurrage" should be so restricted. In the ordinary commercial sense it means

The date given in the bill of lading is not conclusive evidence that the cargo was shipped before that date.

THIS was an appeal from the decision of the judge of the County Court of Yorkshire, and the following are the material facts of the special case stated by the judge for the opinion of the Court of Exchequer.

The plaintiff in the action entered a plaint for 50*l.* and the following were the particulars annexed to the summons: "The plaintiff sues the defendant for that on the 16th March 1874, it was mutually agreed between Jno. Corran, the master of the plaintiff's vessel, the *Zoe*, of 138 tons, as agent for the plaintiff and the defendant, that the plaintiff's said vessel should go with all convenient speed to Western Point, and there load, from the defendant or his factors, a full and complete cargo of rock salt, in the customary manner (certain damages and accidents excepted), and demurrage was to be 2*l.* per 100 tons register per day. And the plaintiff's vessel proceeded to Weston Point, and did all that was necessary to have the defendant's part of the charter fulfilled; but the defendant did not load the said vessel in the customary manner, but detained her twenty-nine days beyond the usual time, namely, from the 2nd to the 20th April last, both inclusive; and the claim for detention amounts to 52*l.* 8*s.* 2*d.*, and the plaintiff abandons the excess over 50*l.*, and sues for 50*l.* only."

The cause was heard on the 21st July 1874, when the following appeared to be the facts: The plaintiff is the owner of a vessel called the *Zoe*, and the defendant is a salt merchant. On the 16th March 1874, Jno. Corran, the master of the *Zoe* as agent for the plaintiff, and the defendant, entered into a charterparty, of which the following is a copy:

It is this day mutually agreed between Jno. Corran, master of the good ship or vessel called the *Zoe* . . . now in Runcorn, and H. E. Falk, that the ship . . . shall with all convenient speed, proceed to Weston Point and load from the said H. E. Falk, or his factors, a full and complete cargo of rock salt, in the customary manner, say abont 250 tons . . . and being so loaded, shall therewith proceed to Riga Bridge and there deliver the same. Freight, at the rate of 10*s.* 3*d.* (say ten shillings and three pence) and five guineas gratuity, per delivered ton of 20cwt. being paid by the receivers of the cargo, on the delivery of the same, in cash, at the current rate of three months' London exchange. The cargo to be discharged in ten working days (weather permitting), commencing from the day after the ship has got into her proper discharging berth. Demurrage at £2 per 100 tons register per day. Penalty for non-performance of this agreement, amount of freight. The ship to be addressed to the charterers' agents and brokers at the ports of discharge, paying the usual addressed commission of the port ("the act of God," &c., excepted). The ship to have an absolute lien on cargo for freight and demurrage; the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside the ship. Vessel to clear with charterer at Runcorn.

Liverpool, this 16th of March 1874.

(Signed) JOHN CORRAN,
Per proc H. E. FALK,
THOS. LANCASTER.

The vessel proceeded to Weston Point on the 20th March, and on the 21st March notice was given to the defendant that the vessel was ready to load cargo. The captain called repeatedly afterwards at the defendant's office, and from time to time was promised that the cargo should be sent alongside, but none was, in fact, sent until the 11th April, and between that date and the 20th April, the defendant loaded on board the *Zoe* part of the cargoes of several lighters, and sent the rest of such cargoes to other vessels which he was loading in the same dock. On the 18th April the balance to complete the cargo was alongside the ship, but it had to be lifted on shore and weighed before it was loaded on board the *Zoe*, and the loading was not completed until the 20th April.

The ship sailed on the 20th at 10 a.m. There was no evidence of any demand for demurrage or detention before such sailing, or until after all the cargo was delivered alongside. Bills of lading were signed by Jno. Corran the master, dated the 18th April; but, at the hearing, he deposed that he did not sign them until the 20th April. The bill of lading (a copy of which was here set out in the case), was made "unto order or to order of assigns, he or they paying freight for the said goods, and all other conditions as per charter party." It was proved by the plaintiff that the usual despatch of the port was twenty tons per working day for loading, and it was contended on his behalf that at that rate the loading should have been completed on the 4th April, and he claimed damages for sixteen days' detention of the ship from that day until the 20th April.

It was submitted on the part of the defendant that as no evidence had been given of a claim for demurrage or detention at the port of loading having been made until after all the cargo had been delivered alongside, and till after the vessel had sailed, the liability of the defendant under the charter-party had ceased, that the demurrage, for which the captain had an absolute lien on the cargo, included such detention or delay in loading as had occurred in the present case; that the plaintiff was bound by the date of the bill of lading; and that at all events the amount must be reduced to the sum of 5*l.* 10*s.* 4*d.* Judgment was given for the plaintiff for 44*l.* 2*s.* 8*d.*, the amount which the learned County Court judge thought the plaintiff was entitled to recover, viz., for sixteen days at 2*l.* 15*s.* 2*d.* a day. The learned judge was of opinion that the word "demurrage" in the foregoing clause of the charter-party did not apply to detention prior to delivery of the cargo at the port of loading, and that the plaintiff's claim for such detention was not affected by the said clause.

The grounds of appeal were: first, that the plaintiff was not entitled to recover against the defendant anything in respect of demurrage, or damages in the nature of demurrage, or on the particulars of his claim as filed in this action; secondly, that if the plaintiff was entitled to recover any sum, the damages awarded were excessive, the evidence proving that the whole cargo was delivered alongside the ship before or not later

any detention of a ship in port of loading or discharge and whether any number of days have been named for loading or not; and a charter-party is essentially a commercial document, drawn by commercial men, who may be presumed to intend the meaning which a word ordinarily conveys to their minds. It is to be hoped that the decision in *Kish* v. *Cory* will lead to a more liberal interpretation of the word, and that it will be held that whenever a lien is given for freight and demurrage, and the charter-party exempts the charterer from liability when the cargo is loaded, the exemption extends to any detention at the port of loading. The charterer inserting these clauses is usually only an agent, and the master has ample security against the principal by means of his lien.—ED.

than the 18th April; thirdly, that the plaintiff did not, at any time before action make any demand for demurrage or for anything comprised within his particulars.

Gully for the defendant (appellant).—Substantially the plaintiff's claim is for "demurrage" at the port of loading, and the word applies to any damage arising from undue detention or delay, and must be so construed on the present occasion. Demurrage and detention differ in this, that in the one case there is a fixed number of days, and in the other the days are not fixed; but that is not material here because the days can be ascertained precisely by reference to the number of days in which the vessel could be loaded "in the customary" manner at the particular port. The plaintiff's claim is for the stipulated demurrage amount of 2*l.* 15*s.* 2*d.* a day, and for that he had a lien on the cargo, and cannot maintain this action, all liability on the charterer's part having ceased upon the cargo being delivered alongside. In *Francesco* v. *Massey* (*ante*, vol. 2, p. 594, *n.*; L. Rep. 8 Ex. 101; 42 L. J. 75, Ex.) the last case in which the question of demurrage was discussed, it was decided that the protection to the charterer afforded by a clause similar to that in the present charter was coextensive with the lien given by the charter-party, and that it extended to demurrage at the port both of loading and discharge, and that the ship having been loaded, no action lay against the charterer for demurrage accruing during the loading. [CLEASBY, B. referred to *Gray* v. *Carr* (*ante*, vol. 1, p. 305; L. Rep. 6 Q. B. 522; 40 L. J. 257, Q. B.) to the same effect as *Francesco* v. *Massey*, and the cases of *Christoffersen* v. *Hansen* (*ante*, vol. 1, p. 305; 26 L. T. Rep. N. S. 547; L. Rep. 7 Q. B. 509; and *Bannister* v. *Breslauer* (16 L. T. Rep. N. S. 418; 36 L. J. 195, C. P.; L. Rep. 2, C. P. 497)]. The result of all the cases would appear to be that where a lien is given and a certain number of days for demurrage fixed by the charter-party, the lien is applicable only to those fixed days, and not to any detention beyond the fixed period. Here the delay in loading gives rise to the lien; and as the loading was to be in the "customary manner," the custom of the port showed that a certain time was allowed for loading. Whether, therefore, the charter-party itself specifically fixed the precise time, or the time could be made certain by construing the words of the instrument with reference to the facts of the case, the result was precisely the same. The parties intended to make provision for demurrage at both ends, the loading and the discharge, and the clause applies to both accordingly. The words "lien for demurrage" in this charter mean the demurrage therein mentioned at 2*l.* 15*s.* 2*d.* a day, or they mean nothing. That is the plaintiff's claim, and for that the verdict was given. But if this claim is for "demurrage" it is barred by the last clause in the charter-party when the loading was completed. (He contended also that the bill of lading was an estoppel to the claim of damages for delay beyond the 18th April.)

R. G. Williams, Q. C. (with him was *E. T. Wheeler*) for the plaintiff (respondent).—If no time is fixed after which demurrage begins, then no claim for demurrage arises. It is not necessary, however, to make it strictly demurrage that the time should be fixed. The defendant here has contended that the clause providing for the loading being accomplished "in the customary way" is equivalent to a precise number of days being specifically fixed, but those words had no reference to time at all. They relate merely to the manner of loading, as, *e.g.*, by lighters or from the wharf, &c. For that there is conclusive and express authority. Thus, in *Lawson* v. *Burness*, in this court (1 H. & C. 396), Pollock, C.B. said (at p. 400), "It appears to me that the words 'customary manner' mean the mode of loading, whether from a lighter or from a wharf." And in *Tapscott and others* v. *Balfour and others*, in the Common Pleas (*ante*, vol. 1, p. 501; 27 L. T. Rep. N. S. 710; 42 L. J. 16, C. P.; L. Rep. 8 C. P, 46), Bovill, C.J. approved of that construction of those words, and thought that the words directing the loading of a vessel in the "usual and customary manner" applied not to the time, but to the place or mode in which the loading was to be performed. The rate of "2*l.* per 100 tons per day," and the "ten days" limited by this charter, have relation to a demurrage claim, whereas the plaintiff's claim is for not loading within reasonable time, as to which the charter fixes no rate or number of days at all, and so the exemption from liability clause is not applicable. In Maude and Pollock on Shipping, 3rd edit. p. 305, "demurrage" is well defined as the "sum which is fixed by the contract of carriage as a remuneration to the shipowner for the detention of the ship beyond the number of days allowed for loading or unloading." Such a clause as the last clause in this charter-party relates *primâ facie*, to future and not to past liabilities: (See *Pedersen* v. *Lotinqa*, 28 L. T. Rep. 267; *Christoffersen* v. *Hansen* (*ubi sup.*) No doubt in *Oglesby* v. *Yglesias* (E. B. & E. 930; 27 L. J. 356, Q. B.), and *Mildam* v. *Perry* (3 L. T. Rep. N. S. 736; 3 E. & E. 495; 30 L. J. 90, Q. B.), it was held to apply to past and already accrued liabilities; but that was because the express words of the instrument rendered such a construction necessary; but that will not be in the absence of express words, or such as raise a clear inference to that effect. The case of *Francesco* v. *Massey* (*ubi sup.*) is clearly distinguishable. There was there a time fixed for both loading and discharging, and demurrage was given at both ports. [CLEASBY, B. —In *Bannister* v. *Breslauer* (*ubi sup.*) a provision for the ceasing of the charterer's liability on the shipment of the cargo was held no answer to an action for delay in loading.] No time was fixed in that case for loading or unloading, nor was there a demurrage clause, and if the clause did not apply to detention there was nothing to which "demurrage" could apply. And, moreover, that case had doubts thrown upon it in *Gray* v. *Carr* (*ubi sup.*) The present charter fixed the time for discharging, but is silent as to that for loading, and the lien and exemption clause must be limited to after claims at the port of discharge, and cannot be applied to the present claim for damages already incurred at the port of loading.

Gully, in reply, referred to and distinguished the cases cited on the other side.

Cur. adv. vult.

Feb. 13.—The judgment of the court (Cleasby, Pollock and Amphlett, BB.) was now delivered, as follows, by

CLEASBY, B. — The question in this case is whether the charterer is liable for detention at the port of loading by not loading in the customary manner? There is also a question of amount

depending upon the number of days during which the vessel was detained.

We think that the detention must be taken up to the time when the cargo was loaded, and that the date of the bill of lading is not conclusive.

There is a clause in the charter-party giving the shipowner a lien for freight and demurrage, and providing that the charterer's liability shall cease upon the cargo being delivered alongside the ship. The question really becomes whether what may be called the "lien and exemption" clause which, no doubt, applies to demurrage, properly so called, applies also upon the language of this charter, to a clause for undue detention at the port of loading. A similar question has frequently arisen before, and we should not think of departing from what has been already decided; but it must always be borne in mind that if the language be not the same, the decision may not be applicable. There is no case exactly the same as the present case.

The word "demurrage," no doubt, properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in, or to be collected from the instrument; but it also has a popular and more general meaning of compensation for undue detention time; and from the whole of each charter-party containing the clause in question, we must collect what is the proper meaning to be assigned to it.

When the charter-party contains no clause allowing demurrage at a specified rate at all, it has been held that the word "demurrage," in the exemption clause, applies to detention, and that the charterer is discharged as soon as a cargo is on board. This was the case of *Bannister* v. *Breslauer* (*ubi sup.*). That decision is certainly not applicable to the present case, because we have in this charter-party a demurrage clause, though not a precise one. In the present case the charter provides that the ship shall be discharged in ten working days, and afterwards has these words: "Demurrage at 2*l.* per 100 tons register per day."

It has also been decided that where there is a time specified for loading, and also a time for unloading, fixed by its being at the rate of so many tons a day, and afterwards a demurrage clause for a fixed number of days, at one agreed price per day, then in that case the exemption clause applies to demurrage whether at the port of loading or of discharge; but it was thought clear that it did not apply to detention beyond the ten days and demurrage days at the port of loading. This was the case of *Francesco* v. *Massey* (*ubi sup.*). The effect of that decision is that, where there is a clause for demurrage at a specified rate for a certain number of days, and, a number of days being allowed for loading, there can be demurrage in the proper sense at the port of loading, the exemption clause applies to demurrage there. And if we could read the provisions for loading in the present case, as fixing a particular time for doing so, the decision would apply at all events, to the period, although not specified, to which the demurrage clause might be considered to apply. But we do not think that we can read the words, that the vessel shall load a cargo "in the customary manner," as equivalent to a provision that she shall load in a certain number of days, or at a certain rate per day, for the purpose of applying the word "demurrage" to a detention beyond that period; those words do not admit, in our opinion, of an addition that she may remain, if she does not load "in the customary manner," for a number of days on demurrage.

The conclusion at which we arrive is, that, in the present case, the word "demurrage" in the lien and exemption clause must be confined to demurrage days after the ten working days allowed for discharge, and must not be extended to improper detention at the port of loading. The decision of the court below was therefore right, and this appeal must be dismissed.

Judgment for the plaintiff (respondent).

Attorneys for the plaintiff (respondent), *Prior, Bigg, Church,* and *Co.*, agents for *J. B. Wilson,* Liverpool.

Attorney for the defendant (appellant), *H. G. Field,* agent for *Thos. Etty,* Liverpool.

COURT OF ADMIRALTY.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

May 4 and 11, 1875.

THE NILE.

Salvage—Apportionment—Government transport—Owners—Senior naval officer—Transport officer—Right to reward.

A ship chartered to Government as a transport under a charter-party in the ordinary form used by the Government for chartering ships in time of war, is not demised to the Government in a way which deprives her owners of the right to salvage reward for services rendered by her under the directions of the Queen's naval officers commanding at the place where she is stationed.

The senior naval officer on a station sending out of harbour a transport with her own crew and a number of men from one of her Majesty's ships, for the purpose of rendering assistance to and towing into harbour a ship in distress, is entitled to share in the sum awarded for the service, and the naval officer (being also a transport officer of the station) who commands the men from H.M.'s ship, is to be considered so far in charge of the whole expedition that he is entitled to reward in that capacity.

THIS was an application to the High Court of Admiralty to apportion between salvors a sum of 1000*l.* recovered in two consolidated causes instituted in that court by them for salvage services rendered to the steamship *Nile.* The two causes were instituted, the one on behalf of owners, master, and crew of the steamship *Finisterre,* and the other on behalf of the commander, officers, and crew of H.M.S. *Simoom.* The owners of the *Nile* appeared, and filed an answer to the plaintiffs' petition, by which they pleaded a tender of the sum of 1000*l.*, and this amount having been duly tendered, was accepted by the plaintiffs.

The facts, as stated by the plaintiffs in their petition in the consolidated causes, were as follows:—

1. The *Finisterre* is a screw steamer of 551 tons register, with engines of 90-horse power nominal, working up to about 400-horse power, and is of the value of about 18,000*l.* H.M.S. *Simoom* is an iron steamship of 1980 tons register, and carries a complement of 172 officers and men. The *Nile* is a screw steamer of about 725 tons register, and was, at the time of the occurrence hereinafter mentioned, bound for Demerara with a general cargo.

2. On the 27th Feb. 1874 the *Finisterre* (which was then engaged under charter in her Majesty's Transport Service) was lying at anchor at Porto Grande, in the Island of St. Vincent (one of the Cape de Verd Islands), with some stores on board. (Copies of the charter-party and sailing instructions from the Admiralty to the master of the *Finisterre* are hereto annexed, and may be referred to as part of this petition.) The *Simoom* also lay at anchor at Porto Grande, under the command of Capt. Peile, R.N. the senior officer of Her Majesty's navy in that locality.

3. In the forenoon of that day, whilst the *Finisterre* was coaling for her return voyage to the Gold Coast, a boat's crew from the *Nile* landed at St. Vincent with the intelligence that the *Nile* was then lying outside in a helpless state, fast drifting on to the rocks on the north-east side of the island. The boat's crew applied for immediate assistance to the vice-consul, who acquainted Capt. Peile with their request.

4. The master of the *Finisterre*, on receipt of a communication from Capt. Peile, at once got up steam and made preparations for towing, and by about 1 p.m. the *Finisterre* was able to weigh anchor and put out to sea under steam, having previously taken on board from the *Simoom* Navigating-Lieutenant Adlam, transport agent at St. Vincent, two petty officers, four seamen, and twenty-one Kroomen, together with a 9in. hawser, and other gear, sent by the order of Capt. Peile. The wind at this time was blowing a fresh gale from the north and east, with a heavy sea running, with a current setting in the same direction as the wind.

5. At about 2 p.m. Point Columna was rounded, and the *Nile* was sighted to the northward, and about five miles distant. She had all possible sail set, but she lay helpless and unmanageable in the trough of the sea, with the sails all aback, and was drifting directly on to a rocky lee shore, with no anchorage ground near. She had no steam, the main shaft of her screw having broken many days previously, since which time she had drifted helplessly.

6. The *Finisterre*, proceeding at full speed, came up with the *Nile* at about 3.30, and, heaving to, inquired by signal if the *Nile* wanted assistance, and received the answer, "Yes." The master of the *Nile* then asked what the *Finisterre* would charge for towing the *Nile* in? Those on board the *Finisterre* answered that they could make no agreement. The master of the *Nile* then told the *Finisterre* to take him in tow.

7. The *Finisterre* remained hove to while the *Nile* took in all sail, both vessels in the meantime rolling heavily. After all sail had been taken in, the *Finisterre* got into position off the *Nile's* starboard bow and lowered her port lifeboat, manned by the two petty officers and two of the seamen from the *Simoom*. A heavy line was taken by the boat to the *Nile*, and by this means a new 10in. hawser of the *Finisterre*, and the 9in. hawser of the *Simoom*, were passed on board the *Nile* and were with considerable difficulty made fast; the *Finisterre's* hawser was made fast to her chain cable, which had been ranged along her deck and carried over the stern, so as to give the full weight of the vessel in towing, and to prevent the hawser parting. The *Simoom's* hawser was made fast round the *Finisterre's* mainmast.

8. Whilst these operations were being carried on, in a heavy sea, the *Finisterre* maintained her position (though not without great difficulty) by alternately going ahead and backing her engines, and in so doing she ran great risk of fouling her propeller with the hawser, and of being completely disabled.

9. After the hawsers were made fast the *Finisterre* gradually got a strain upon them, and then went ahead in a south-westerly direction, endeavouring for about three-quarters of an hour to get the *Nile* before the wind and sea, and in a position for towing ahead. During this time both vessels rolled and pitched heavily, and it was a matter of great difficulty to prevent the hawsers from parting and keep the *Finisterre* in position. At length the *Nile* was got before the wind and was towed towards the harbour of St. Vincent, then about twelve miles distant.

10. Before the entrance of the harbour was reached it became dark. There were no harbour lights, and the *Finisterre* had no pilot on board; moreover, the *Nile* steered badly, and yawed about a good deal. Under these circumstances it was not prudent to attempt the usual entrance, but the *Finisterre*, taking a long sweep round, entered the harbour on the southward or leeward side of Bird Island, and brought the *Nile* safely to an anchor in 10 fathoms of water at about 9 p.m.

11. At the time the *Finisterre* made fast to the *Nile* the latter vessel was quite helpless, and was in such a position that nothing but steam power could have prevented her from drifting on to the rocks in the course of a very short time, and there becoming a total wreck; no steamer besides the *Finisterre* was at hand or could have been procured. It was the Harmatton season at the time when the services were rendered, during which season thick haze suddenly falls over the sea and island, and totally obscures the island. If such haze had set in, the danger to both vessels would have been greatly increased.

12. In rendering the above-mentioned services the *Finisterre* incurred considerable risk of damage by collision with the *Nile*, and also of being disabled by the fouling of her propeller. Had she been disabled her position would have been one of extreme peril.

13. The men from the *Simoom* took an active part in all the measures adopted for the preservation of the *Nile*, and materially contributed to her safety. The task of the boat's crew which took the heaving line to the *Nile* was one of considerable danger.

14. The damage done to the machinery of the said ship *Nile* was afterwards repaired at St. Vincent, in order to do which a considerable portion of her cargo was discharged and landed. A working party of six seamen and ten Kroomen was furnished from the *Simoom* to assist in such discharge, and were employed thereat, in conjunction with the crew of the *Nile*, on the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, and 9th days of March following.

The charter-party mentioned in the second paragraph of the petition, so far as material, was as follows:—

This charter-party of affreightment, made the 12th Nov. 1873, by and between the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland (for and on behalf of her Majesty) of the one part, and Charles Ellis (of the firm of H. Ellis and Sons, of 17, Gracechurch-street, shipbrokers, the owners of the steamship undermentioned) of the other part: Whereas a copy of the Regulations for Her Majesty's Transport Service has been delivered to the second-named party, and to the master of the ship hereinafter mentioned, before the execution hereof, as the second-named party doth hereby admit, and the said regulations are to be taken to be incorporated and to form part of this charter, in so far as they are applicable hereto: Now it is hereby witnessed that the second-named party has let, upon and subject to the conditions and rules specified in the said regulations, so far as they are applicable hereto, and the said Commissioners have hired and taken to freight the good ship undermentioned, viz.:

Ship's name.	Gross tons by register, new measurement.	Master's name.
Finisterre	... ... 551	George Hearsley

For service and employment as a transport on monthly hire for the space of five calendar months certain, and thenceforward until the Commissioners, for executing the office of Lord High Admiral aforesaid for the time being shall cause notice to be given to the said second-named party, his executors or administrators, or to the master or other person having charge of the said ship, that she is discharged from her Majesty's service, such notice to be given when the ship is in port in the United Kingdom. And the said second-named party does covenant and agree with the said Commissioners in manner following, that is to say, that the said ship shall, at all times during the continuance of this charter, be strong, firm, tight, staunch, and substantial, both above water and beneath, and in every respect seaworthy and properly manned, fitted, stored, furnished, equipped, and found, at the proper cost and charge of the said owners and that the said ship shall proceed to such ports or places (with or without convoy, at the option of the said Commissioners) as the said Commissioners, or any officer authorised by them, shall from time to time order and direct, and so from time to time during the continuance of the said ship in her Majesty's service, and

that in the performance of all services required to be performed under the regulations aforesaid, the said master and his crew, with his boats, shall be aiding and assisting to the utmost of their power; that the said master, or other person having charge of the said ship, shall not nor will take or permit to be taken on board thereof during her employment under this charter-party, any passengers, goods, letters, or effects, without the licence and consent of the said Commissioners, or the officer in chief whose command he may be under, in writing, for that purpose first had and obtained; and that the master of the said ship (for and on behalf of the owners) shall obey all orders and instructions which he may receive from the said commissioners, or any officer authorised by them, and the master shall in all respects comply with the said Regulations for her Majesty's Transport Service, and with the Instructions for Masters of Transports, copies whereof have been delivered to him as aforesaid; and that the owners of the said ship shall be held responsible to her Majesty for any deficiency in quantity, or any loss or damage which shall arise to the public stores or provisions from the state of the ship's stowage, or from any incapacity, want of skill, insobriety, or negligence on the part of the master, officers, or crew of the said ship or any of them, according to such valuation as shall be set upon them by the proper officer of the department to which they shall belong. In consideration of which covenants, &c. [The charter-party here provided for the rate of freight to be paid to the owners, and the mode of payment, and proceeded:] And it is further agreed on the part of her Majesty, that if the said ship shall happen to be by the enemy burnt, sunk, or taken during the aforesaid service, and it shall be made to appear to the satisfaction of the said Commissioners that the same did not proceed through any fault, neglect, or otherwise in the master or the ship's company, and that they made the utmost defence they were able, the value of her shall be paid by her Majesty, according to the valuation made thereof on the declaration of officers of the said Commissioners (reasonable wear and tear first deducted); but that if the said ship shall be lost from the dangers of the seas or tempest, or be driven on shore by accident, stress of weather, or any other cause, and thereby lost, damaged, captured, or rendered incapable of service, either upon an enemy's or a friendly coast, such loss damage capture, or insufficiency, shall be considered as a sea risk, and her Majesty in such case shall not be liable to pay for or be in any manner prejudiced by any such loss, damage, capture, or insufficiency, &c.

The following paragraphs of the regulations for her Majesty's Transport Service (referred to in the petition) were used in the course of the case:

EXPLANATORY MEMORANDA.

The terms used in the following Regulations are to be understood as follows, unless there be something in the context or subject-matter repugnant to or inconsistent with such construction, viz.:—

. . . . . .

3. "Transport:" A ship wholly engaged for the Government service, on monthly hire, or a ship wholly engaged by Government to execute a special troop, or convict service, though not hired by the month.

Chapter 3.—*Transports and troop freight ships; employment, pay, fittings, manning, and supplies.*

35. A "transport" being a ship wholly engaged by the Government, either on monthly pay or for the execution of a special service, the rate of hire is to represent merely the charge for her use as a ship complete and ready for sea, as defined by Art. 36, and manned in accordance with Art. 42. The vessel will be employed in the conveyance of troops, horses or other animals, stores, or as a hospital ship, or in any other way that may be ordered, and the place of fitting will be decided on acceptance.

When necessary steam transports will be required to tow other vessels.

The "Instructions for Masters of Transports" referred to were as follows:—

Chapter 1.—*General instructions.*

Art. 1. The master is to obey all orders which he may receive from the Director of Transport Services, from any transport officer attached to the ship, or from officers in charge of divisions or resident at ports; also, from naval superintendents or senior naval officers. Should there be no naval officer, he is to obey the orders of the military or other Government authorities in the execution of the services which he may have been directed to perform.

When a transport officer is attached to the ship, the master will receive all orders through him; but should orders at any time be delivered direct to the master, he is immediately to communicate them to the transport officer, and he is at all times to afford him every facility in the execution of his duties.

Art. 2. The master is to make himself acquainted with the conditions of the charter-party, with the Regulations of Her Majesty's Transport Service, with these Instructions, and the Printed Instructions to Transport Officers, and he is to comply with the directions, stipulations, and conditions contained therein.

Art. 4. The master is to take especial care that all the boats are constantly ready for immediate service, &c.

The crew and boats are to be at all times available for the police service, either in loading or discharging cargo, embarking or disembarking troops, obtaining supplies of provisions, water, &c., or for any other purpose connected with the vessel's employment as a transport; and a suitable boat, with a proper crew and fully equipped, as required by the Regulations, is at all times to be held at the disposal of the transport officer.

Art 11. Should any improper conduct or incivility occur on the part of the master, the ship's officers or the crew, towards the transport officer, the military officers, troops, or passengers on board, it will be reported to the divisional officer, or in his absence to the resident transport officer, naval superintendent, or senior naval officer at the port at which the vessel may be lying, or at which she may first touch, by whom the complaint will be investigated, even to the suspension of the master from his duties, if it be considered imperatively necessary. The master, however, will not be removed from the ship, excepting under the authority of the flag officer in command at the port, or on the station.

Three sets of salvors claimed to have the sum recovered apportioned between them; the owners master, and crew of the *Finisterre*; the commander, officers, and crew of H.M.S. *Simoom*; and Lieut. Adlam, who was navigating lieutenant of the *Simoom*, and also chief transport officer at St. Vincent.

W. C. Gully, for the owners, master, and crew of the *Finisterre*.—The owners of the *Finisterre* are entitled to salvage as well as her master and crew. The service was mainly effected by means of steam power, and this is at the risk and expense of owners, who are thereby entitled to reward. [Sir R. PHILLIMORE.—Is not the *Finisterre* to be considered as a Government ship, and, consequently, debarred from recovering salvage so far as the ship is concerned?] I submit not. By the charter-party the owners are to bear all risk, except that of capture by the enemy, and was only chartered to carry provisions from St. Vincent to Cape Coast. Sir R. PHILLIMORE.—Was she not under the orders of the *Simoom?*] Only in so far as she was under the orders of the Admiralty, and bound to fulfil her agreement under the direction of the naval officers. There was no legal obligation, under the charter-party or otherwise, upon the master of the *Finisterre* to go out of Porto Grande to render assistance to the *Nile*, even when ordered to do so by the commanding officer, Capt. Peile; it might have been necessary to obtain that officer's permission before going, but there was no obligation to go. The mere setting in motion of the *Finisterre* and directing her to proceed to the assistance of the *Nile*, is not such a service which will entitle Capt. Peile to participate in the reward; nor can the part of the crew remaining on board the *Simoom* claim, as they had no extra duties thrown upon them. This is not like a case of prize, where the commanding officer shares with those acting under him. It must be shown in a

salvage cause that something has actually been done by the person claiming. [Sir R. PHILLIMORE. —If the *Finisterre* had been a tender to the *Simoom*, Capt. Peile's order for her to go out would have entitled him to salvage reward.] The only thing which gives a right to salvage is the incurring of labour, trouble, or risk. If a tug owner sends out his tug, it is the risk, and not the order to go out, that entitles him to salvage. Capt. Peile gave an order, but ran no risk and took no trouble. If the *Finisterre* had perished the loss would have fallen entirely upon her owners, and not upon Capt. Peile. There was nothing in the charter-party entitling him to order her to run the risk. A ship under charter to the Government can only be employed in accordance with her charter-party, and although the Regulations for her Majesty's Transport Service (par. 35), provide that she will be employed in the conveyance of troops, &c., and "in any other way that may be ordered," those words must mean, "in some other ways in which a transport ship is usually employed," not in rendering service wholly unconnected with the transport service. And, again, the duty imposed by Instructions to Masters of Transports (art. 1), to obey all orders given by the transport officers and by senior naval officers, relates only to orders given in relation to transport service and not to the ordinary duties of the navigation and working of the ship, which is wholly in the control of the master. A transport officer on board would not take command; the master would direct the working of the ship. Hence, although the master may have received assistance from Lieut. Adlam and his men, the master was really at the head of the salving party.

W. G. F. Phillimore, for Capt. Peile and the officers and crew of H.M.S. *Simoom*.—If Capt. Peile had power to order the *Finisterre* to go to render assistance, he is clearly entitled to salvage. That is settled in *The Thetis* (3 Hagg. 14, 57), which was a claim by the king's officers and the admiral on the station to share in salvage reward, and in that case Sir C. Robinson says: "On these facts several propositions have been advanced, with statements of the respective parties which have been withdrawn or qualified in argument so as to diminish very considerably the points now in dispute. The owners first denied the right of king's officers to claim salvage, and maintained that they were bound to proceed on any service which might call for their skill and labour, without reference to any private emolument; that Capt. Dickinson was bound to obey the order of Admiral Baker, and that it was not competent to him to aver that he acted independently of the admiral, so as to entitle him to remuneration. But these topics have not been urged by their counsel, and the argument has been confined to the proper estimate of their *quantum* of reward. Again, Admiral Baker represented himself as principal salvor, as agent appointed by the underwriters, and also as having engaged in their service as a speculator on his own private account; but I do not understand that either of these propositions has been maintained by his counsel, and it is manifest that almost everything which he did was done by authority and in virtue of his command. . . . It is alleged on his behalf (Capt. Dickinson), 'that there is no principle of constructive assistance in civil salvage, and that no admiral or commanding officer of a station, not being an actual salvor, but merely by virtue of such command, has any right to claim to share in the salvage earned by, and awarded to, a ship belonging to such station.' There is no difficulty in acceding to this proposition, as expressed in these terms. What is earned by or awarded to a ship will not be disturbed by secret constructive claims, but that will not exclude a claim from being propounded on behalf of an admiral on special grounds of extensive contribution of assistance; and in regard to the description of the admiral's service in this case, as mere constructive assistance, I think it went far beyond that, and what is proposed as the test of that principle, the performance of mere official duties. . . . The services which Admiral Baker represents himself to have performed beyond the disputed merit of originating and directing the service, are, that he furnished men and stores from the ships at his own responsibility, and procured some things at his own cost and credit. . . . If, then, admirals can be entitled at all for anything but mere personal presence and exertion, it must be for such services as these, which are infinitely more conducive to the success than the admiral's own presence could in this instance have been. The case of *The Aquila* (1 C. Rob 37), which has been so much relied upon, seems to admit that some services might have entitled even a magistrate, though it is not said what they should have been. It would be saying nothing to require personal service: since, then, such persons would not be distinguished from any other. The exception supposed in that case is, in my judgment, very applicable to the present, as authority for what I am disposed, as the effect of general principle alone, to hold; and on these observations I shall pronounce that Admiral Baker is entitled to share as having contributed effective assistance; and deeming it expedient, in a case of novelty, to act as far as I am able on rules and principles established in analogous cases, and thinking that the proportion allowed in other civil cases will not be unfit to be applied to this, I shall adopt the rule of the prize proclamation." On appeal to the Privy Council (2 Knapp, 390) the amount awarded to the admiral was increased, on account of the "responsibility, which it is quite clear that in the first instance Admiral Baker took upon himself." That is a distinct authority that a naval officer not actually present, but putting in motion and directing a salvage service is entitled to share. To entitle to salvage reward, personal work and labour is not necessary; it is enough that the claimant does some act which furthers the salving of the property:

The Purissima Concepcion 3 W. Rob. 181;
The Aquila, 1 C. Rob. 37.

Capt. Peile was senior naval officer. He was applied to for assistance, and immediately ordered the *Finisterre* to go out and take off some men from the *Simoom*; he alone could have done this. [Sir R. PHILLIMORE.—In *The Aquila* (*ubi sup.*), Lord Stowell says, speaking of a magistrate who claimed as a salvor, having protected derelict property from plunder: "This, however, is certain, that if a magistrate, acting in his public duty on such an occasion, should go beyond the limits of his official duty in giving extraordinary assistance, he would have an undeniable right to be considered as a salvor; it will therefore be necessary to inquire what has been the extent of this gentleman's services; if they amount to the ordinary discharge of

his duty, I shall be disposed to leave him to the general reward of all good magistrates, the fair estimation of his countrymen and the consciousness of his own right conduct."] But there is a considerable distinction between the position of a naval officer and a magistrate; the latter is bound to protect property that is in danger and to prevent robbery; there is no duty on a naval officer to send out a ship to perform a salvage service. Capt. Peile having the power of sending out his own crew and stores, and of ordering out the *Finisterre*, took upon himself the responsibility and direction of the whole service. He took upon himself the risk of the loss of the crew and the transports, by which the Government would have been seriously inconvenienced during the war then going on in Ashantee, even if they would not have had to pay for her loss, as she was sent out under Capt. Peile's orders. Where, in the case of a derelict ship, the master of the salving ship puts on board the derelict some of his hands, and so becomes short handed, he always receives a considerable sum for his responsibility; here no salvage could have been effected, but for Capt. Peile, and he was alone responsible, and should be rewarded accordingly. The definition of a "transport" in the regulations shows that the *Finisterre* was not intended to any particular service, but was in the general service of the Government, and hence under the orders of the senior naval officer of the station and could be ordered where he chose. In *The Scout* (*ante*, vol. 1, p. 258; 26 L. T. Rep. N. S. 371; L. Rep. 3 Adm. & Ecc. 512), the salving ship was wholly demised to charterers, and they were held entitled to recover salvage to the exclusion of the owners; here there is no absolute demise, but still the owners did not contribute to the service in any way; they may have sustained a risk, but nothing further. [Sir R. PHILLIMORE.—If the *Finisterre* had been lost, could her owners have recovered from the Government?] That may be doubtful, and hence I cannot contend that they ran no risk; but I say there is no claim for the ship, because under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 484, "Where salvage services are rendered by any ship belonging to her Majesty, or by the commander or crew, thereof, no claim shall be made or allowed for any loss, damage or risk, thereby caused to such ship, or to the stores, tackle, or furniture thereof," and the *Finisterre* was for the time being at least a "ship belonging to her Majesty." Under the charter-party, the Government paid for the coaling of the *Finisterre*, and saving the stipulations as to the payment of the master and crew, she was entirely in the service of the Government. [Sir R. PHILLIMORE.—The owners were responsible for repairs and for all loss by sea or tempest. Do not those words take her out of the category of a Government ship, that risk falling upon the owners? It is difficult to contend that the private character of the ship is destroyed by this charter-party, and if she is still a private ship, her owners may recover for all services outside their contract, as if there had been no charter-party.] At any rate, the fact of her being so chartered reduces the amount to which the owners are entitled, as they were put to less expense and risk. In *The Collier* (L. Rep. 1 Adm. & Ecc. 87), where the owners of the salving ship were the charterers of the salved ship, it was intimated that the fact that they were so interested in the property salved would affect the quantum: so here, I contend, that the *Finisterre*, partaking of the character of a Government vessel, her owners are only entitled to a diminished reward. Moreover, as the whole control of the ship had passed out of the hands of the master into those of the transport officer on board, and the owners were put to no expense, and as the service was rendered under orders, it might fairly be supposed that the Government would have paid any loss sustained, and, therefore, the owners' risk is very small, and the reward they would have received under ordinary circumstances ought to be diminished by the special circumstances of the case. There is a duty upon transports to tow other vessels imposed by the Regulations (par. 35), and by the Instructions (art 1), to obey the orders of the senior naval officer and of the transport officer. A transport officer was on board the *Finisterre* and in charge of her, and he was sent out by Capt. Peile. The services of the crew of the *Simoom* are set out in the petition.

E. C. Clarkson, for Lieut. Adlam, submitted that, as transport officer in command of the *Finisterre*, he had the whole control of the salvage service, and was in effect the principal salvor; the men from the *Simoom* were under his orders, and they actually made fast to the *Nile*. Although the owners cannot be altogether excluded, there is really very little distinction between the present case and *The Scout* (*ubi sup.*). In effect, the master and crew were in the service of the Government, as this was a time charter-party, and their whole time was to be devoted to the Government; it mattered not to the owners how they were employed. The only distinction between the present case and *The Scout* is, that in that case the charterers paid the wages, in the present the owners paid them; the risk of loss of ship fell upon the owners in both cases.

Gully, in reply.—As it is admitted that there was no demise of the *Finisterre* to the Government, the ordinary rule as to the reward to be paid to a steamship should prevail. [Sir R. PHILLIMORE.—Your ownership was very much curtailed. Can you say that you can support your full claim when the order for the service emanated from Capt. Peile?] This being a service outside the charter-party, the master was not bound to obey the order, and might have refused; in consenting to go he was risking the property of his owners. Capt. Peile was only entitled to give such orders as were within the ordinary course of the transport service. By the Instructions (art. 4), a ship's crew and boats are to be available for the public service, either in loading or discharging cargo, &c., "or for any other purpose connected with a vessel's employment as a transport," clearly showing that her duties are confined to the duties of a transport. The mere giving of an order to render service is not enough to entitle to salvage. In *The Thetis* (*ubi sup.*), the admiral did more than give orders, he assisted in making plans for and effected the service. In *The Purissima Concepcion* (*ubi sup.*), the express ground on which the shipping agent was allowed to recover was, that he personally superintended the service. As to Lieut. Adlam, it does not anywhere appear that he took command of the *Finisterre*, and it should, therefore, be presumed that the master remained in command of his own ship.

Cur. adv. vult.

May 11.—Sir R. PHILLIMORE.—In this case

a salvage service of considerable merit was rendered on the 27th Feb. 1874 to a large screw steamship called the *Nile*, lying on the north-east side of the Island of St. Vincent, in a state of the greatest danger. At the time when the service was rendered, the *Finisterre*, a screw steamship of 551 tons, with a master and twenty-one men, was lying at anchor at Porto Grande, in the Island of St. Vincent, and in the same port lay H.M.S. *Simoom*, under the command of Capt. Peile, the senior officer of her Majesty's navy in that place. A boat's crew from the *Nile* went to the vice-consul, asking for assistance. He referred them to Capt. Peile, who communicated with the *Finisterre*. The result was that a lieutenant, two petty officers, four sailors, and twenty-one Kroomen went to the *Finisterre*, and this vessel, with these officers, in addition to her own crew, proceeded to the *Nile* and brought her in safety into port. For this service 1000*l*. has been tendered and accepted. The court is now asked to apportion this sum among the salvors.

There is no doubt the principal salvor was the *Finisterre;* the steam power which she supplied was the agent in delivering the *Nile* from her perilous situation. But a question has arisen, who are entitled to receive her share of remuneration, and whether, in consequence of certain circumstances, that share is, notwithstanding her steam power, to be of a more limited character than, on general principles, it would otherwise be.

The peculiar circumstances are these. The *Finisterre*, at the time of the Ashantee War, had been chartered by the Government as a transport. By the terms of the charter-party she supplied her own crew and master, and if she was burnt, sunk, or taken by an enemy, her value was to be replaced by her Majesty to her owners; if she was lost from the dangers of the sea or tempest, or from being driven on shore by accident, such loss was to be considered as a sea risk, and not to be indemnified by her Majesty. The charter incorporated certain regulations for her Majesty's transport service, and instructions for masters of transports. According to the latter, "the vessel will be employed in the conveyance of troops, horses or other animals, or stores, or as a hospital ship, or in any other way that may be ordered." I must here observe that I am of opinion the words "in any other way" must be construed as applying to things *ejusdem generis*—things connected with transport service. It is also provided in the instructions that the master may receive orders from the senior naval officer.

Having reference to those documents, I am of opinion that the *Finisterre* was never demised—indeed it was not so contended—to her Majesty; that there was no temporary transfer of ownership to her Majesty, and that her owners are entitled (a point faintly, if at all contested) to her share of the salvage remuneration.

I think, however, that she was so far under the control of the senior naval officer, Capt. Peile, that on the one hand she could not have acted as salvor without his permission; though, on the other hand, she could not have been ordered by him to perform this service, which was not in my judgment within the terms of her charter. And I think that in awarding her remuneration, I ought to bear in mind that she was set in motion, so to speak, by Capt. Peile.

The same observation leads me to the conclusion that these officers are undoubtedly to be considered, having regard to the principle and decided cases on the subject, as the meritorious salvors.

I am also of opinion that Lieut. Adlam, who must be mentioned as having had, in a great measure at least, charge of the expedition, has a distinct *persona standi* as a salvor.

I award 400*l*. to the owners of the *Finisterre;* 200*l*. to Lieut. Adlam; and 400*l*. to Capt. Peile and the crew of the *Simoom* and the Kroomen on board the *Finisterre*.

Proctors for the owners, master, and crew of the *Finisterre*, *Pritchard* and *Sons*.

Proctor for Capt. Peile and the officers and crew of the *Simoom*, *Burchett*.

Solicitor for the defendants, *T. Cooper*.

May 25 *and* 26, 1875.

THE ADRIATIC.

Collision—Failure to render assistance—Onus of proof—Merchant Shipping Act 1873, *sect.* 16.

The Merchant Shipping Act 1873 (36 *&* 37 *Vict. c.* 85), *s.* 16, *having imposed upon the master of every ship, in case of collision with another ship, a duty, "if and so far as he can do so without danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary to save them from any danger caused by such collision;" this duty is not discharged by a steamship, where, it being practicable and safe to lower a boat to render assistance, although possibly dangerous to stay by the injured ship, she continues her voyage without lowering her boat, and merely hails and signals for other vessels to go to the assistance of the other ship.*

A ship failing to render assistance to another with which she has been in collision, and showing no reasonable cause for such failure, will be held to blame for the collision, unless proof be given to the contrary on her behalf.

THIS was a cause of damage instituted on behalf of the owners of the three-masted schooner *Columbus*, against the steamship *Adriatic*, and her owners intervening.

On behalf of the *Columbus* it was alleged as follows:—

The *Columbus* was bound upon a voyage from Fowey to Runcorn, and had on board a crew of six hands, all told, and the master's wife and child.

On the 8th March 1875, at about 9 p.m., the *Columbus* was boarded by a licensed pilot, about two miles west of the North-west Lightship off the entrance to the Mersey; she was working up channel, and her lights were burning brightly and a good look-out was kept on board of her till after the collision. The wind was blowing a fresh breeze from the S.S.W., and at about 11 45, p.m., the *Columbus* was on the port tack heading west, and about mid-channel, and a mile S.E.E. of the Crosby Lightship, when the pilot, as the flood tide had made, gave orders to take in sail and to get the anchor ready for letting go. The crew of the *Columbus* obeyed the pilot's orders, and her helm was put down. The *Columbus*, however, did not come up into the wind more than a point or a point

and a half, having but little or no way on her, and her crew were in the act of hauling down her jibs, when the *Adriatic*, whose mast head light had been previously seen three miles off, was observed coming up at great speed, with all three lights visible, about a quarter of a mile on the starboard beam of the *Columbus*. The crew of the *Columbus* loudly hailed the *Adriatic* to stop and reverse, but the *Adriatic* still kept on at great speed. Immediately before the *Adriatic* struck the *Columbus*, the *Adriatic* went off under a starboard helm, but immediately after struck the *Columbus* with great violence on the starboard quarter, just aft the mizen rigging, cutting right into the *Columbus* and taking her quarter clean off, carrying away the wheel, deck house, and bending the rudder. The blow caused the *Columbus* to fall alongside the *Adriatic*, starboard side to starboard side. The crew of the *Columbus* loudly hailed for assistance, saying that their stern was gone; but the *Adriatic* steamed ahead and left the *Columbus*, did not stay by her, and rendered her no assistance, and did not ascertain if assistance was required; no boat was lowered from the *Adriatic*, and except burning a blue light, she offered no help, but proceeded on towards Liverpool. The *Columbus* immediately began to sink, and her boat was put out, into which all got, but the *Columbus* sank so rapidly that the boat was capsized, and her crew were compelled to hang on to the topgallant yard, which remained above water. The master's wife was rescued by her husband, but his child was drowned. The survivors were picked up after an hour by the steamer *Enterprise*. The plaintiffs' petition further alleged:

17. A good look-out was not kept on board the *Adriatic*.
18. Those on board the *Adriatic* improperly neglected to starboard in due time.
19. Those on board the *Adriatic* were going at too great a speed.
20. Those on board the *Adriatic* improperly neglected to slacken her speed, or to stop and reverse in time.
21. Those on board the *Adriatic* improperly, and without reasonable cause, failed to stay by the *Columbus*, or to render her assistance, or to ascertain if the *Columbus* had need of assistance.

On behalf of the defendants it was alleged as follows:—The *Adriatic* was a steamship of about 3888 tons gross register, and at the time of the collision was on a voyage from New York to Liverpool, with about 400 passengers. At about 11.50, p.m., on the 8th March 1875, the *Adriatic*, in charge of a compulsory pilot, passed the Crosby Lightship, steaming dead slow, and so continued along the narrow channel between the lightship and the Rock Lighthouse. A good look-out was kept on board the *Adriatic*, and her lights were duly exhibited and burning brightly. The night was very dark, but clear, and a vessel, which proved to be the *Columbus*, having no light visible, was made out about a point and a half on the port bow of the *Adriatic*, apparently heading so as to cross the course of the *Adriatic* from port to starboard. The helm of the *Adriatic* was immediately put hard a starboard, and her engines stopped, but the starboard bow of the *Adriatic* came into contact with the starboard quarter of the *Columbus*. The blow appeared to those on board the *Adriatic* to be a slight one, and they had no reason to suppose that the *Columbus* had sustained any serious damage. The *Columbus* then dropped alongside the *Adriatic*, and drifted astern. Whilst the vessels were alongside, those on board the *Adriatic* hailed the *Columbus* and asked if she needed assistance, and no reply was made. When the *Columbus* drifted astern, the *Adriatic* was nearly athwart the channel, and those in charge of the *Adriatic* could not attempt to stay by the *Columbus* without exposing the *Adriatic* and the crew and passengers on board her to danger. But whilst the pilot was manœuvring to get the *Adriatic* into position in the channel, rockets and blue lights were burned on board the *Adriatic*, and three steam vessels, the *Voltaic*, the *Enterprise*, and the *Kittiwake*, came within hail of the *Adriatic*, and were directed by the master of the *Adriatic* to proceed to the *Columbus* and render any assistance that she might be in need of. The defendants' answer alleged that the *Columbus* neglected to have her regulation lights duly exhibited, and was in fault for such neglect; that they neglected to keep their vessel under command, suffered her to drift, and neglected to let go the anchor in proper time; the defendants also pleaded inevitable accident and compulsory pilotage.

The cause came on for hearing on the 25th and 26th May, 1875, before Sir R. Phillimore, assisted by Trinity Masters. Witnesses were called by both plaintiffs and defendants. The main questions of fact in the cause were, whether the lights of the *Columbus* were burning and visible, and whether the *Adriatic* sufficiently complied with the provisions of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), sect. 16, in rendering assistance or causing assistance to be rendered to the *Columbus*, or whether there was any reasonable cause for the *Adriatic* not giving such assistance. It appeared that immediatly after the collision the *Adriatic* went ahead, and on getting straight in the channel kept on her course to Liverpool, and did not lower a boat. No evidence was given to show that she communicated with other steamers, as alleged by her, beyond the burning of the blue lights and hailing, &c. The finding of the court upon these and the other facts of the case will be found in the judgment.

Milward, Q.C. (*J. T. Goldney* with him), for the plaintiffs, contended that under the Merchant Shipping Act 1873, sect 16, it was the duty of the *Adriatic* to stand by and render assistance. Her crew knew that the *Columbus* was injured; they did not know the extent; they hailed and got no answer; and yet they lowered no boat, but went away. The mere hailing another vessel, under no obligation whatever to render assistance, is not enough, even if there were such hailing. This neglect to give assistance throws upon the defendants, within the words of the section, the onus of proving that they are not to blame. The master of the *Adriatic* failed to render assistance, and, unless "reasonable cause for such failure is shown, the collision must, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default." No such reasonable cause exists, as he might have lowered a boat whilst straightening up the channel, and then have waited for his boat. He was in no such danger as would prevent this. The defendants, then, are to blame, in the absence of proof to the contrary, and of this proof they have given nothing. The lights of the *Columbus* were burning, and there was nothing to prevent the *Adriatic* from making her out in time to avoid a collision.

Butt, Q.C. (*G. Bruce* with him), for the defendants, contended that the lights of the *Columbus*

were not alight, or they would have been seen from the *Adriatic*. The Merchant Shipping Act 1873 does not impose any positive obligation upon a ship damaging another to render assistance herself. It is sufficient if she procures assistance to be rendered. This the *Adriatic* did by signaling for other ships to give assistance. She could not render assistance herself without danger to herself and passengers in such narrow waters, and this was in itself a "reasonable cause for such failure," within the meaning of the Act. The defendants have given sufficient proof that the collision was not caused by their negligence in showing that all precautions were used and a good look-out kept, and yet the *Columbus* could not be discovered in sufficient time to avoid a collision.

Milward, Q.C., in reply.

Sir R. PHILLIMORE.—This is a case of an unfortunate collision which happened between 12 and 1 o'clock at night, on the 8th March last, in the Crosby Channel, about a mile S.E. of the Crosby Lightship. One of the vessels, the *Columbus*, was a three-masted schooner of 167 tons register, coming from Fowey to Runcorn, with a crew of six hands, all told, and the captain's wife, and, unfortunately, his child, who perished in consequence of the collision. The other vessel was a ship of great size, 3883 tons gross register, and she was prosecuting a voyage from New York to Liverpool, having with the passengers and crew altogether about 400 persons aboard. The *Adriatic* struck the starboard quarter of the *Columbus*, under the circumstances which I am about to mention, and cut off her stern; the *Columbus* sank, the boat which she put out was capsized and also sank; the topgallant yard remained above water, which the crew managed to reach, and the captain saved his wife in an almost miraculous way, as she was floating about almost insensible, but the child which she had in her arms was lost.

Now, both the vessels were coming up the Reach, which lies about a mile S. to S.S.E. of the Crosby Lightship. The wind at the time was S.S.W. The schooner was ahead of the screw steamer two or three miles, and when she had come to a distance a little below the Crosby Light, she, under the advice of her pilot, went across the river in order to anchor. The pilot ordered the helm to be put down, and her canvas to be taken in. The canvas under which she was is thus described by the captain. He says, when he had got about midchannel, the mainsail and mizen were set full, and all square sails were out; he had the jib set, and the staysails were down.

This misfortune having happened in the way which I have described, the court is compelled to consider the bearing of the Act of Parliament, to which so much reference has been made, because there is no doubt as to this fact, that after the collision the captain of the *Adriatic* thought it his duty to proceed on his voyage. It is quite true that he starboarded to get out of the way of the schooner, and afterwards ported and stopped a time. What the exact time was is a matter of great dispute in this case. But he ported; and having got himself straightened down the river, went on to Liverpool without stopping, or in any way rendering assistance, by means of his vessel or his boats, to the vessel with which he had come in contact. What he did was—and he says it was best under the circumstances—that when he fell in with two or three steamers he told them that he had come into collision with another vessel, and desired them to go to assist her, but he himself rendered no assistance at all.

The 36 & 37 Vict. c. 85, s. 16, enacts that: "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), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision." There is a further portion of the enactment, which it is not necessary to state, but it goes on: "If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default."

Now that he knew in this case that he came into collision with another vessel, and had done her some injury, is not contested. He himself says he hailed the other vessel and asked if she was much injured, and that he had received no answer to that inquiry, and having received no such answer, he conceived she was not much hurt, and took steps to get the other vessels to go and see what assistance they could render the vessel, and ascertain whether she had been much damaged or not. Now the evidence on the other side says, not only is it untrue that there was no answer to the hailing, but that there were screams and shouts for assistance, which were neglected by the *Adriatic*. The vessel that did come up and render assistance was the *Enterprise*; and it is possible, as has been suggested by Mr. Butt, that the captain of the *Adriatic* imagined that he had communication with the vessel, whereas it was with other steamers. But the evidence given by the master of the *Enterprise* is, that his attention was attracted, that he saw the *Adriatic* coming up, and she did not speak to him, but that he heard cries which caused him to stop his ship, and lower his boat and go to the assistance of those people clinging to the yard, and who were thus saved.

Now, the captain of the *Adriatic* says he was in command of a vessel of unusual length, 450ft.; that he was in great danger himself of going on the Crosby shore; that he could render no assistance to the other vessel as effective as that which could be given by the other steamers; and that it was untrue to say he went away immediately, and did not stop for a certain time. But there was one point not disputed, and which seems to me and the Elder Brethren to be decisive against the defence set up by the captain of the *Adriatic*, namely, that there was no reason why he should not have lowered his boat and sent it to the assistance of those who were struggling in the water; so that the defence he has made in the pleadings, and the explanations he makes through his counsel of what occurred after the collision, do not prevent me from saying he is to blame. If he stopped for a considerable period, as he says he did, what was there to prevent him from lowering a boat, and endeavouring to find out to what extent this vessel was damaged? I think it not improbable to suppose, in spite of what has been said, that if

that course had been pursued, the life of the unfortunate child would have been saved.

But whatever may have been the result, I am of opinion, and I am supported in it by a conference with the Elder Brethren, that it was the clear duty of the captain of the *Adriatic* not to have proceeded on, but to have stayed by the vessel and lowered his boat, and not left her until he had ascertained what her condition was. While I say this, I acquit the captain of the *Adriatic* of any deliberate intention of inhumanity altogether; it would be very wrong to charge him with that. It is very likely that his great anxiety with regard to his ship, her unusual size, the number of passengers he had, and other circumstances, interfered with that presence of mind which he ought to have exercised on this occasion. I think, therefore, to use the words of the statute, he has shown "no reasonable cause for failing to stay by the vessel," or rendering such aid as was in his power.

The next question is, whether the collision should not "be deemed to have been caused by his neglect or fault," or whether there is "proof to the contrary."

Now this part of the case lies in the very narrowest compass, because it is admitted by the counsel for the defendants that if there was evidence to satisfy the court that the schooner carried her side lights, and especially her green light, they ought to have been visible and must have been visible to the *Adriatic* at a sufficient distance to enable her to get out of the way of the other vessel; therefore it comes to a question as to the credibility of one set of witnesses and the other, where there is a conflict between them, negative on the one side and positive on the other, as to the fact of the schooner having carried proper lights. Now, in this case I do not feel that amount of difficulty which sometimes presses in a case where the evidence on both sides is so closely balanced, because it is not denied that, up to the time that the schooner went about, she was carrying proper lights. I do not think that the contrary could have been contended for with much success, and I wish to say that I never heard better evidence than that given by the wife of the captain of the *Columbus*. She pointed out, as the reason why she saw the lights, that she took her child to see them, as she was in the habit of doing, and she saw that they were in their proper places. But the same witness speaks with equal positiveness to having seen the red light up to the time of the collision.

I have no hesitation in saying that the positive evidence greatly exceeds, in point of value and weight, the negative testimony on the part of the defendants. I have no doubt, and no hesitation in pronouncing as a matter of fact, that the *Columbus* did carry her side lights at the time of the collision; and, if so, it is admitted that the *Adriatic* was alone to blame for the collision. That being admitted, and that being the finding of the court, I so pronounce.

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

Solicitors for the defendants, *Rae* and *Jenkins*.

June 1 and 2, 1875.

THE EASTERN BELLE.

Co-owners—Sale—Mortgage—Arrest of ship in co-ownership suit—Right of mortgage to release.

Where a part owner of a ship institutes a suit against the ship claiming as against his co-owner an account and a sale of the ship, a mortgagee holding a mortgage, which would not be satisfied by a sale of the ship, is entitled, on intervening in the suit, to a release of the ship and to his costs from the time of his claiming the release.

A shipowner sold certain shares in a ship and, the purchaser having neglected to register the sale, subsequently mortgaged the whole ship to a third person, who had no knowledge of the previous sale, to secure a balance exceeding the value of the ship. The purchaser subsequently registered his shares, and then finding the mortgage registered, instituted a suit against the ship claiming as against his co-owner an account and the sale of the ship. The mortgagee intervened and claimed the release of the ship and damages and costs for its detention:

Held that the mortgagee was entitled to the release of the ship and to costs from the time the plaintiff became aware of the mortgagee's claim.

THIS was a cause of co-ownership instituted in *rem* on behalf of George James Atkins, part owner of the *Eastern Belle*, against that ship. The cause was instituted on the 10th March 1875, and no appearance was entered on behalf of any other part owner, but on the 15th March an appearance was entered on behalf of John Grant Morris, a mortgagee of 64-64th shares of the ship.

The facts of the case are fully stated in the pleadings. The plaintiff's petition was so far as is material as follows:

1. The *Eastern Belle* is a ship of 1,130 tons gross register, belonging to the port of Liverpool. The plaintiff is the owner of 8-64th shares therein. The remaining 56-64th shares are nominally vested in James Baines, of Liverpool, in the county of Lancaster, but the plaintiff is unable to say whether or no he is beneficially entitled to the same except as appears from the facts hereinafter stated.

2. The *Eastern Belle* was purchased in or about the month of May 1872, through one Henry Jonas Smith on behalf of himself and certain other persons who are unknown to the plaintiff. The plaintiff was requested by the said Henry Jonas Smith to purchase 8-64th shares, and consented to do so and paid for the same on the 15th June 1872, and the said shares were duly transferred to him by bill of sale, dated the 18th July 1872.

3. After the date of the said purchase the plaintiff was informed by the said Henry Jonas Smith that the *Eastern Belle* was engaged in making voyages from Liverpool to Valparaiso under charter, and to other places. The plaintiff from time to time made applications to the said Henry Jonas Smith and James Baines, for information respecting the freight earned by the said ship, and the amount of profits due to him as part-owner thereof, but the plaintiff was for a long time wholly unable to obtain any information respecting the same.

4. On or about the 19th Feb. 1874, after repeated applications the plaintiff received from the said James Baines a promissory note for 175*l*. This was represented to the plaintiff to be his share of the profits of the first voyage of the *Eastern Belle*, in respect of his 8-64 shares therein, but no accounts or vouchers of any kind were furnished to the plaintiff. The said promissory note was dishonoured at maturity, but renewed by the plaintiff at the request of the said James Baines for a further period of three months, when it was again dishonoured, but ultimately paid on proceedings being taken in respect thereof.

5. The plaintiff continued to apply for accounts respecting the earnings of the *Eastern Belle*, but was wholly unable to obtain the same until, in the month of October

1874, an account was rendered to him whereby it appeared that the profits due to the plaintiff in respect of his said shares arising out of the said first voyage of the *Eastern Belle* amounted to the sum of 314*l*.

6. The *Eastern Belle* has completed several other voyages, and has earned divers large quantities of freight, and there is due to the plaintiff, in respect of his shares thereof, a large sum of money; but the plaintiff, though he has repeatedly applied for the same to the said Henry Jonas Smith and James Baines, has been wholly unable to obtain any account in respect of the said freight.

7. The *Eastern Belle* is about to leave England in ballast, but the plaintiff has not been consulted with respect to the said voyage, and is unwilling that the said ship should be sent on the said voyage until the accounts between the co-owners is setttled.

8. There are accounts outstanding and unsettled between the said co-owners of the said vessel in respect of the matters above-mentioned.

The petition concluded by praying the judge "to refer the said accounts to the registrar and merchants to ascertain the amounts due to the plaintiff and to direct the said vessel to be sold."

An answer was filed on behalf of the mortgagee which so far as material was as follows:

1. At the time of the request referred to in the second article of the petition filed in this cause, Henry Jonas Smith in the said article named, explained to the plaintiff that the sum of 500*l*. which it was proposed that the plaintiff should pay for eight sixty-fourth parts or shares in the said ship was to be the purchase-money not for eight unincumbered shares, but for eight shares subject to a mortgage on the ship, it being then proposed to raise about 4,500*l*. by mortgage on the said ship.

2. Accordingly, on the 11th July 1872, James Baines in the said petition named, who was then sole registered owner of the *Eastern Belle* by an instrument of mortgage of that date, mortgaged her to James Wilkie Adamson and Thomas Ronaldson to secure to them the repayment of the sums for the time being due on that security, whether by way of principal or interest, and such mortgage was thereupon duly registered at the Custom House at Liverpool which was and is the said ship's port of registry.

3. The said James Baines, by bill of sale, dated the 5th July 1872, transferred to William Roberts eight sixty-fourths in the said ship. Such bill of sale was not registered until the 7th Aug. 1872, on which day it was registered at the said custom house as being subject to the said mortgage.

4. The bill of sale to the plaintiff referred to in the said second article of the said petition was and is a bill of sale, bearing date and executed on the 18th July 1872, whereby the said William Roberts, in consideration of the sum of 500*l*. transferred eight sixty-fourth parts or shares to the plaintiff. The plaintiff neglected to register such bill of sale until the 28th Feb. 1873, on which day he caused it to be registered as hereinafter stated.

5. In the month of Jan. 1873, the defendant John Grant Morris, who was then under advances to the said James Baines, on an account current between them, the repayment of which advances was secured to the said defendant by mortgages to him by the said James Baines of two ships called the *Cavour* and *Belle Isle*, of which the said James Baines was then the registered owner, was requested by the said James Baines to advance and lend him the sum of 5,000*l*., for the purpose of paying off the said mortgage to James Wilkie Adamson and Thomas Ronaldson, and to make further advances which the said defendant agreed to do upon having a mortgage of the said ship *Eastern Belle*, of which the said James Baines represented himself as being sole owner, made to the said defendants to secure the repayment of the sums from time to time owing from the said James Baines to the said defendant on account current between them. The said James Baines is still the registered owner of the *Cavour*. The *Belle Isle* was totally lost in the month of May 1873.

6. The said defendant, however, caused search to be made by his solicitors, Messrs. Bateson and Company, of the register of the said ship on the first day of Feb. 1873, and they found that the said William Roberts appeared to be registered owner of eight sixty-fourth parts thereof, and the said defendant required the said James Baines to obtain from the said William Roberts a bill of sale of such shares. Accordingly, the said William Roberts, by bill of sale, dated the first day of Feb. 1873, transferred eight sixty-fourth parts or shares in the said ship James Baines, and such bill of sale was thereupon duly registered. The said James Baines thereby became, as the said defendant believed, sole owner of the said ship.

7. The said James Baines then by an instrument of mortgage in the form prescribed by the Merchant Shipping Act 1854, dated the said first day of Feb. 1873, by him duly executed, mortgaged sixty-four sixty-fourth parts or shares in the said ship to the said defendant, for the purpose of securing the repayment by the said James Baines to the said defendant of the amounts which should from time to time be owing, whether by way of principal or interest from the said James Baines to the said defendant, and the said defendant on the same day caused the said mortgage to be duly registered at the said custom house. The said defendant thereby became, and has ever since been and still is duly registered mortgagee of sixty-four sixty-fourth parts of the said ship. By a deed of even date with the said statutory mortgage and made between the said James Baines of the one part and the said defendant of the other part, and duly executed by the said James Baines, the terms of the said security intended to be granted by the said statutory mortgage were declared. The said defendant craves leave to refer to the said deed.

8. On the 4th Feb., the said defendant, at the request of the said James Baines, paid to the said James Wilkie Adamson and Thomas Ronaldson, the sum of 5000*l*., in discharge of the amount due to them or their said mortgage; and received from them their instrument of mortgage with a memorandum of discharge indorsed thereon, and such discharge was duly registered at the said custom house on the 7th day of the same month.

9. On the 28th Feb., the plaintiff's said bill of sale of the 18th July 1872, was registered at the said custom house, as subject to the defendant's said mortgage.

10. By reason of the negligence of the plaintiff in not registering his said bill of sale until the said 28th Feb., he enabled the said James Baines to represent himself and to appear to the said defendant as sole owner of the said ship, and the said defendant was induced to believe and did believe that the said James Baines was such sole owner, and the said defendant made the said advance of 5000*l*., and has from time to time made further advances to the said James Baines, on his, the said defendant's, mortgages of the *Eastern Belle*, of the *Cavour*, and *Belle Isle*, in the belief that the said James Baines was such sole owner; and the said defendant had not until after the institution of this suit any notice or knowledge that the plaintiff was entitled, or claimed to be entitled, to any share or interest in the *Eastern Belle*.

11. The plaintiff has always left the chartering and employment and management of the *Eastern Belle* to the said James Baines, who, on or about the 16th Sept. 1874, with the authority of the plaintiff, entered into a charter party of that date with Messrs. Dreyfus, Freres, and Cie., of Paris, whereby it was mutually agreed that the said ship then lying in Peru, loading or on passage to port of call for orders to discharge in the United Kingdom or Continent (and after discharging cargo of guano, having liberty of loading outwards from United Kingdom or Continent for a port or ports *en route* for owner's benefits), should, as soon as discharged, proceed to Callao, and be placed at the disposal of the said charterers' agents for orders to load a cargo of guano at any one of the guano deposits in Peru for carriage to the United Kingdom or the Continent, which cargo the charterers bound themselves to ship, the freight to be paid being seventy-two shillings and sixpence per ton if discharged in the United Kingdom, and two shillings and sixpence per ton extra if on the Continent. The said defendant craves leave to refer to the said charter-party, which is a beneficial one for the ship. The said defendant before the institution of this suit made considerable advances to the said James Baines on the security of the said mortgages for the purpose of meeting the outlay necessary to fit and enable the *Eastern Belle* to perform the said charter-party; and at the time of her arrest in this suit she was about to leave Falmouth in ballast for the purpose of proceeding in the performance of the said charter party.

12. At the time of the institution of this suit, there was owing to the said defendant, upon account current between himself and the said James Baines, upon the se-

curity of the said ships *Cavour* and *Eastern Belle*, the sum of 20,401*l.* 11*s.* 9*d.*, or thereabouts, and such sum and a further amount for interest since accrued, still remain owing to the said defendant from the said James Baines on the said mortgage securities. The said ships are not together of sufficient value to pay to the said defendant the amount due to him on his said securities. The plaintiff before the institution of this suit had notice that the said James Baines, being the sole registered owner of the *Eastern Belle*, had as aforesaid mortgaged her to the said defendant, and that such mortgage was still on foot, notwithstanding which the plaintiff has without any notice to the said defendant and without making any offer to redeem the said vessel or his 8·64th parts thereof, arrested the said vessel in this suit, and the plaintiff is keeping the said vessel under arrest and preventing her from performing the said charter-party, and earning her freight thereunder; and by reason of such arrest the said defendant, who is desirous of taking possession of the *Eastern Belle* as mortgagee thereof, and of enabling her to earn her freight, is prevented from so doing, and also from exercising the power of sale given to him by the Merchant Shipping Act 1854, if and when he may think fit, and the powers conferred upon him by the recited deed of even date with the said statutory mortgage.

13. On the 24th March 1875, the said defendant caused notice in writing of his desire to have possession of the *Eastern Belle* for the purpose of enabling her to earn her said freight, to be given to the plaintiff, but the plaintiff still persists in keeping the said ship under arrest. The defendant craves leave to refer to the said notice.

The answer concluded by praying the judge "to declare that the defendant, John Grant Morris, as duly registered mortgagee of 64·64th parts or shares of the *Eastern Belle*, is entitled to the possession of the said vessel *Eastern Belle*, and to order the said vessel to the released from arrest, and to order that possession thereof be given to the said defendant, and to declare that the plaintiff was not, as against the said defendant entitled to arrest the said vessel, and that he is not entitled to keep her under arrest, and to reject the prayer of the plaintiff; that the said vessel be sold, and to condemn the plaintiff in all damages sustained, or to be sustained by the said defendant by reason of the said arrest, or of the said vessel being kept under arrest, and to refer it to the Registrar to report the amount of such damages, and to condemn the plaintiff in costs of this suit incurred by the said defendant, and that further and otherwise right and justice may be administered to the said defendant in the premises."

The reply filed on behalf of the plaintiff was so far as is material as follows:

1. The plaintiff admits the allegations contained in the first article of the said answer.

2. As to the second article of the said answer, the plaintiff admits the same except, so far as it refers to the terms of the mortgage therein mentioned, to which the plaintiff craves leave to refer.

3. The plaintiff admits the allegations contained in the third and fourth articles of the answer, and as to the third article he further says, that he was induced to delay the registration of the said bill of sale by and at the request of the said Henry Jonas Smith.

4. The plaintiff has no knowledge of the matters alleged in the fifth, sixth, seventh, and eighth articles of the said answer, and does not admit the same.

5. The plaintiff denies the allegations contained in the tenth, eleventh, and twelfth articles of the said answer, and further says, in reply to the twelfth article, that if the accounts between the defendant and the said James Baines, in respect of the said ships *Cavour*, *Belle Isle*, and *Eastern Belle*, are properly taken, the value of the said ships is sufficient to satisfy the claim of the defendant, and also the amount due to the plaintiff. The charter-party in the eleventh article mentioned is not a beneficial charter-party. It was made without the knowledge or consent of the plaintiff, and not on behalf of the defendant, and the plaintiff is unwilling that the said ship should sail on such voyage, unless the amount due to him is otherwise secured.

6. In reply to the thirteenth article of the said answer, the plaintiff says that the notice therein referred to was not given until after the institution of this suit, as will appear by reference to the minutes of the proceedings of this Honourable Court.

7. Before the time when the defendant made the advances to the said James Baines in the twelfth article of the answer alleged, the defendant had notice that the plaintiff was the beneficial owner of 8·64 shares in the said vessel *Eastern Belle*.

8. The plaintiff has always been ready and willing and has offered to transfer his shares to the defendant or any other person, and to give up possession of the vessel on having the amount due to him secured, as he is entitled to have.

9. At the time of the arrest of the *Eastern Belle* in the suit, the plaintiff had no notice or knowledge whatever of any mortgage to secure an account current either to the defendant or to any other person.

10. The plaintiff has been and is willing to concur in any sale that may be decreed by this Honourable Court, and that the proceeds thereof may be received by this Honourable Court for the purpose of being dealt with when as soon as the accounts have been properly taken between the said James Baines and the defendant, and between the plaintiff and his co-owners.

The reply concluded by praying the judge "to pronounce against the prayer of the defendant, and to direct that the accounts may be taken between the defendant and the said James Baines, and between the plaintiff and his co-owners, and to declare the plaintiff is entitled to have the ship kept under arrest, or bail given until such accounts have been duly taken, and to condemn the defendants in the costs of, and occasioned by his said appearance and answer, and to make such further and other order in the premises as right and justice may demand."

The rejoinder filed on behalf of the defendant was so far as material as follows:

1. They say that the several allegations contained in the reply filed in this cause are immaterial, and the said reply is bad in substance.

2. That the defendant, John Grant Morris, has not any knowledge as to the allegation contained in the third article of the said reply, and does not admit the truth thereof.

3. That they deny the truth of the allegations contained in the fifth article of the said reply save as to the unwillingness of the plaintiff that the ship should sail.

4. That they deny the truth of the allegations contained in the seventh article of the said reply.

5. As to the eighth article of the said reply, they say and submit that the plaintiff is not entitled as against the defendant John Grant Morris.

6. They deny the truth of the ninth article of the said reply, and say that the plaintiff had, at the time of the arrest of the *Eastern Belle*, notice of the said mortgage to the said defendant to secure an account current.

The conclusion filed on behalf of the plaintiff denied the several allegations contained in the rejoinder of the defendant, and averred that the reply filed on behalf of the plaintiff was good in substance, and that the plaintiff did not plead further, and prayed that the pleadings might be concluded.

May 31 *and June* 1.—The cause came on for hearing before the judge. The facts stated in the pleadings were substantially proved by the witnesses called in support thereof. It was shown by the defendant that at the time the mortgage advance was made he had no knowledge of the plaintiff's claim to be the beneficial owner of the 8·64th shares; and it was also shown by the plaintiff, that at the time of the arrest of the *Eastern Belle* he had no notice or knowledge of any mortgage to secure an account current to the defendant or any other person.

On a previous occasion before the pleadings had been filed the defendant (the mortgagee) had applied to the court upon motion for the release of the ship and had in support of his motion, filed affidavits setting out all the facts afterwards appearing by his answer. The motion was refused, the court declining to release the ship at that stage of the proceedings, as the plaintiff's affidavits alleged collusion between the mortgagor and the mortgagee.

Butt, Q.C. and *R. E. Webster*, for the plaintiffs.—The defendant here claims not only the release of the ship, but also damages for her detention and costs. Even if he is entitled to her release, he can only recover damages if he can show that the plaintiff has been guilty of *mala fides* or *crassa negligentia* in arresting the ship: (*The Evangelismos*, 12 Moore P. C. C. 352; Swab. 378.) But the defendant cannot show this, as even now there is an important question of law pending, viz., whether the defendant, as mortgagee, is entitled as against the plaintiff to possession. Can a mortgagee claim in a suit by a co-owner to take a ship out of the possession of the court without leaving something in the place of the *res* to satisfy the claim of the plaintiff against his co-owner? Suppose the plaintiff's shares had been sold to him after the mortgage to the defendant; there was nothing to prevent the mortgagor from making the plaintiff his co-owner. A mortgagee must know that shares may be transferred after mortgage, and that the position of co-ownership may be so created, and that questions relating thereto may arise. Consequently, we submit that, although a ship may be mortgaged as a whole, co-owners may arrest for the purpose of utilizing what may remain after the mortgage is paid off and may insist on a sale for their contingent benefit after the mortgagees' claim is settled. In such case it cannot be said that the mortgagee is in any way injured by the plaintiff's shares not having been registered sooner, because the plaintiff cannot be in a different position than if he had bought the shares after the mortgage. The mortgage in the present case was registered in 1873, and that would give a year and a half in which to deal with the shares, and the mortgagee ought to presume that they would be dealt with. The Admiralty Court Act 1861 (24 Vict. c. 10), sects. 7 and 11, clearly contemplates a sale by co-owners, even though the ship be mortgaged, so that they may secure the benefit of the surplus. Till the hearing of the case the plaintiff had no opportunity of judging how far there was or was not a surplus and consequently was clearly entitled to arrest, and in arresting was acting *bonâ fide*. Even in case of the defendant being entitled to damages, the defendant has suffered nothing substantial as the charter-party the loss of which he fears need not be completed till the end of the present year. The plaintiff had good reason to believe that there was collusion between the mortgagor and mortgagee.

Cohen, Q.C. and *E. C. Clarkson*, for the defendant.—We admit that the original arrest was not unlawful and that if the plaintiff, after ascertaining the facts from our answer and affidavits, had good reason to believe that there would be a surplus upon the sale of the ship he might ask for a sale, that the mortgage might be paid off and accounts taken. But where a co-owner having no title as against a mortgagee asks for an account and sale merely in the hope that something may turn up he is not entitled to it either in this court or in the Court of Chancery. If the plaintiff and the mortgagor had both united in the mortgage they might have undoubtedly had a suit for an account so long as the mortgagee did not intervene; but if the mortgagee does intervene the co-owner proceeding against the ship must either redeem or release the ship, because the mortgagee has a right to possession, and has a statutory power of sale, which gives him an absolute right to the ship. The court cannot order a sale of the ship against the wish of the mortgagee, as such an order would have the effect of depriving the mortgagee of property to which he is not entitled, and to the use of the ship by which he may earn freight, and recoup himself for the money advanced. To order a sale where the amount produced thereby would be less than the money secured would be contrary to the doctrines of equity and the practice of the Court of Chancery. The plaintiff should redeem if he wants a sale. [Sir R. PHILLIMORE. It may be out of the power of a small co-owner to redeem, and yet it seems hard to deprive him of rights against his co-owner, which he would possess if there were no mortgagee.] The plaintiff can have his accounts taken before the registrar, but he cannot have the sale, as that would injure the mortgagee. The mortgagee took his mortgage without notice of the plaintiff's ownership and his right can no more be interfered with than if he had purchased the whole ship from Baines without notice of the plaintiff's claim. By the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 71, a mortgagee acquires an absolute power to dispose of the ship, and the court is now asked to take away that power. If then the plaintiff has no right against the mortgagee, the keeping the ship under arrest, after the plaintiff became acquainted with the facts of the case as stated in the defendant's affidavits, was a wrongful detention. The *Evangelismos* (*ubi sup.*) was no doubt a strong decision, but we submit that it has been modified by subsequent cases, and if a ship is kept under arrest without any semblance of a right the person keeping her must pay the damages. It is not enough that a plaintiff should think he has good ground in law; there must be good ground. The court was induced to continue the arrest by a now abandoned statement as to the existence of fraud. If the court is induced by false representations to keep a ship under arrest this is enough to give a title to damages. The charge of collusion was not withdrawn till the hearing, and without that collusion the plaintiffs had no case at all. They had before them all the knowledge they now have when our affidavits on the motion were filed, and yet they kept the ship under arrest.

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

June 2.—Sir R. PHILLIMORE.—The circumstances of this case are peculiar, but I think I shall do justice by making the following order, viz.: that the suit be dismissed, and the vessel released from arrest; that the defendant recover no damages, but that he has his costs paid from the date of his filing the affidavit stating the circumstances under which he became mortgagee.

Solicitor for the plaintiff, *Rowland Miller*.

Proctors for the defendant, *Pritchard* and *Sons*.

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Friday, June 25, 1875.

STANTON *v.* RICHARDSON.

ON APPEAL FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Ship and shipping—Charter-party—Warranty of seaworthiness—Ship unfit for particular cargo—Obligation of owner.

A charter-party containing the words, "the ship to load the following cargo of lawful merchandise . . . . ; a full and complete cargo of sugar in bags, hemp in compressed bales $\frac{\text{and}}{\text{or}}$ *measurement goods not exceeding what the vessel can reasonably stow and carry over and above her tackles," gives the charterer the option in what form he will tender the cargo, provided he tenders some or all of the goods named and no other, and does not present a cargo of any kind or of all kinds together, which is unreasonable, as regards the nature of the goods he presents.*

A shipowner, entering into a charter-party to carry such a cargo, is bound to provide a ship which is reasonably suited to carry that particular cargo, and is staunch and seaworthy for the purposes of that cargo, and should be kept so.

A charter-party provided that the ship should load "a full and complete cargo of sugar in bags, hemp in bales, $\frac{\text{and}}{\text{or}}$ *measurement goods; specifying different rates of freight for "dry" and "wet" sugar. A cargo of "wet" sugar was provided by the charterer at the port of loading. A great deal of moisture drains from wet sugar, and, owing to the nature of the material, the ships pumps were unable to clear the ship of the drainage. The ship was perfectly seaworthy except for this particular cargo, and the pumps were sufficient for ordinary purposes, but she would not have been seaworthy for the voyage in her then condition.*

The sugar had to be unloaded, and the charterer refused to reload it, or to provide another cargo.

Cross actions were brought by the owner against the charterer for not providing a cargo, and by the charterer against the owner to recover damages by reason of the ship not being fit to carry the cargo provided.

The jury found that the cargo offered was a reasonable cargo, and that the ship was not reasonably fit to carry a reasonable cargo of wet sugar.

Held (affirming the judgment of the court below) that the shipowner undertook by the charter-party that the ship should be reasonably fit for the carriage of a reasonable cargo of any of the goods specified in the charter-party, including wet sugar, and that the charterer was entitled to a verdict.

THE appellant, Stanton, was the owner of a vessel called the *Isle of Wight*, and agreed to charter her for a voyage from Manilla to Yloilo to England. The ship was to load a "full and complete cargo of sugar in bags, hemp in compressed bales, $\frac{\text{and}}{\text{or}}$ measurement goods, not exceeding what she can reasonably stow and carry over and above her tackles." The rate of freight was specified to be 4*l.* 2*s.* 6*d.* per ton for "dry" sugar, 4*l.* 5*s.* for "wet" sugar, and 4*l.* 15*s.* for hemp and measurement goods. The owner engaged that the ship "before and when receiving cargo shall be a good risk for insurance," and he engaged to take all proper means to keep her tight, staunch, and strong during the voyage. The ship proceeded to Yloilo, and on survey was reported to be a first class risk, fit to carry a dry and perishable cargo to any part of the world.

A cargo of "wet" sugar in bags was provided by the charterer, Richardson. Much moisture drains from this sort of sugar, and when the greater part of the cargo had been loaded it was found that there was such an accumulation of molasses in the hold, that the ship would not be seaworthy if she proceeded in her then condition. The pumps were quite sufficient for ordinary purposes, but, owing to the depth of the hold and the nature of the material, they were unable to get rid of the drainage from the sugar, and no pumps adapted for such a cargo could be procured at Yloilo. The cargo had to be unloaded and warehoused at Yloilo, and was afterwards sent to England in another vessel, the *Milton;* and the charterer refused to furnish another cargo for the *Isle of Wight.*

Stanton therefore brought an action against him for not supplying a cargo; and Richardson brought a cross action for the damages he had sustained from the *Isle of Wight* not being fit for the cargo provided.

The cases were tried before Brett, J. at the sittings in London after Hilary Term, 1872, and he directed the jury that there was an implied warranty that the ship was fit to carry a reasonable cargo of Yloilo wet sugar, and the verdict was taken in favour of the charterer in both actions.

A rule was obtained for a new trial on the ground of misdirection, but was discharged by the Court of Common Pleas (Bovill, C.J., Byles and Brett, JJ.), as reported (*ante*, vol. 1, p. 449; L. Rep. 7 C. P. 421; 27 L. T. Rep. N. S 513); and their decision was affirmed by the Exchequer Chamber (Cockburn, C.J, Mellor, J., Bramwell, Cleasby, Pollock, and Amphlett, BB.), as reported (*ante*, vol. 2, p. 228; L. Rep. 9 C. P. 390; 30 L. T. Rep. N. S. 643).

From this judgment the present appeal was brought.

Manisty, Q.C. and *A. L. Smith*, who appeared for the appellant, urged the same arguments, and relied on the authorites cited in the courts below.

Butt, Q.C. and *J. C. Mathew* were not called upon to argue for the respondent.

The LORD CHANCELLOR (Cairns). — My Lords, there cannot, I think, be the slightest doubt that in this case it would not have been correct to have left to the jury at the trial any question upon the construction of the charter-party, and indeed I do not understand that the contrary of that proposition was argued by the learned counsel for the appellant. There are no terms in the charter-party which require explanation by evidence, and by the opinion of a jury. The question of construction, therefore, being for the Court, the counsel for the appellant naturally felt themselves constrained to contend that the misdirection to be complained of on the part of Brett, J. was that he did not place upon the charter-party the construction for which the appellant contends, and then leave to the jury the question whether a reasonable cargo had been tendered, having regard to that construction of the charter-party on which the appellant insists.

I will ask your Lordships to turn to the charter-party, for the purpose of ascertaining, in the first place, what is the true construction to be put upon it. It provides that the ship, after arriving at Hongkong and discharging there, shall "sail for Manilla for orders to load either there or at Yloilo or at Zebu, the following cargo of lawful merchandise to be put within reach of the vessel's tackles by the freighters, or their agents." The freighters are bound to provide that "following cargo," whatever it may be, and they are to be allowed fifty working days for loading the cargo, and customary dispatch at the port of discharge, and if they detain the vessel longer they are to be liable to pay demurrage in the usual way.

Now the cargo which, on the one hand, the charterers had the right to have carried, and which, on the other hand, they were bound to provide, is thus described: "A full and complete cargo of sugar in bags, hemp in compressed bales, $\frac{\text{and}}{\text{or}}$ measurement goods." These words "and" and "or" are not without some significance, because they appear rather to show that this specification of different kinds of cargo was to be read either disjunctively or conjunctively, it might be all of one kind or it might be a mixture of the two kinds mentioned, "not exceeding what the vessel can reasonably stow and carry over and above her tackles." And then it provides for the passage which is to be performed; and then, in consideration of that, the freighters agree that freight on said cargo shall be paid "at the following rates if loaded at Manilla for the United Kingdom, 4*l.* 2*s.* 6*d.* sterling for dry sugar; 4*l.* 5*s.* for wet sugar; 4*l.* 15*s.* for hemp and measurement goods." Having regard to the specification of two prices for the two kinds of sugar mentioned, we are entitled in construing the contract to go back to the sentence where sugar was first mentioned, and to read the word there as if it were "wet or dry" sugar; then the contract becomes a contract to carry "a full and complete cargo of wet or dry sugar in bags, hemp in compressed bales, and measurement goods, not exceeding what the vessel can reasonably stow."

Now as regards the cargo which might be tendered, and which the shipowner was bound to carry; I feel no difficulty in advising your Lordships as a matter of ordinary construction, about which, unless there is something to be found in other parts of the document qualifying the ordinary meaning of the words, there can be no doubt, that the meaning of this stipulation is that it gives to the charterer the option in what form he will tender the cargo; he may tender it all of wet sugar, or of dry sugar, or of hemp, or of measurement goods, or he may admix the different items of cargo as he thinks fit, always provided that he does not present a cargo of any kind, or of all kinds together, which is unreasonable as regards the nature of the goods which he presents. The only limit as regards quantity is that which is laid down, namely, what the vessel can reasonably stow. Provided he keeps within that limit, and presents goods which are of the ordinary kind at the place which is mentioned, he may take his choice in what form he will present the goods; that is to say, which of the various items mentioned he will choose as the cargo to be carried.

The consequence of any other construction would be, as regards the freighter or charterer, of the most serious kind. The ship is to come to Manilla in a limited number of days, the cargo must be put on board there: he must, according to the ordinary usage of merchants, if he is a prudent man, have his cargo prepared beforehand; he must have entered into his contracts, or have the goods in his store ready to be put on board. But, according to the view of the learned counsel for the appellant, his right to select the cargo to be put on board will have to be subject to considerations as to which he can form no proper opinion himself beforehand. He must consider what the pumps of the vessel, if they be the ordinary pumps, will be able to effect in the way of discharging the moisture arising from the wet sugar; he would have to consider whether the evaporation consequent upon the state of the weather will be greater or less at the actual time when the goods are put on board; and he will, therefore, not be in a position to provide a complete cargo of one of the specified articles, wet sugar, unless he will take the risk of the pumps being adequate to discharge the moisture, and of the state of the weather being such as not to throw any unusually severe strain upon those pumps. It appears to me that these are conditions which it never could have been intended that the freighter or charterer would undertake. And, on the other hand, when your Lordships turn to the position of the shipowner, any inconvenience which may arise is one from which he can guard and protect himself in the simplest way possible. He it is who knows exactly what the pumps of his ship will do; he must be taken to know the nature of the cargo he engages to carry; he must be taken to know what wet sugar requires in the way of pumping power: and it is for him if he wishes to guard against any inconvenience upon the subject, to stipulate that as regards one item, which is onerous and irksome, namely, wet sugar, he will not, under any circumstances, carry beyond a certain amount. Therefore, when you compare the inconvenience of the burden as against the charterer, and the ease with which it may be borne by the shipowner, every consideration would lead to the conclusion that it is the shipowner who must protect himself by an express stipulation. But I am content to rest upon the ordinary meaning of the words, which appear to me to give to the charterer the option of how he will load the ship.

Now if that be so, the charter-party must be read in the events which have happened, as if it were a charter for a full and complete cargo of wet sugar, not exceeding what the vessel can reasonably carry over and above the tackles. If that be so, what is the obligation, as regards the ship, upon the shipowner? Clearly to provide a ship which is reasonably suited to carry that particular cargo; a ship which is staunch and seaworthy.

It was, indeed, attempted to be contended that that general obligation which would be implied by law, was in some way qualified by two actual provisions of the charter-party, especially the express provision as to insurance. That provision appears to me to be entirely consistent with, and not in any way antagonistic to, the implied undertaking that the ship shall be staunch and seaworthy. It is a separate and a higher engagement that the "vessel before and when receiving cargo shall be good risk for insurance," that is to say,

that she may be insured at the most favourable rate at which an insurance can be effected for the particular cargo. It was admitted, and could not be denied, that she might be staunch and seaworthy, and yet that it might not be possible to predicate of her that she was a good risk for insurance. Then the other express provision is that "in and during the voyage the master shall take all proper means to keep the vessel tight, staunch, and strong, well manned and found, and in every way fitted and provided for the voyage." That appears to me to take up the case at the commencement of the voyage, and in place of being inconsistent with an implied warranty that this ship should be staunch and seaworthy up to that time, to assume that the meaning of the contract was that up to that time she should be provided as a staunch and seaworthy ship, and that then there should commence this further obligation, that during the whole of the voyage the master should be bound to keep her in that state up to the time of her arrival.

Now if that is the construction, as I submit that it is, of the charter-party, was there any misdirection on the part of the learned judge? As I understand his charge he adopted this construction of the charter-party; he directed the jury, as he ought to have directed them, as a matter of law: This is the construction of the charter-party—those are the rights of the charterer—that is the obligation of the shipowner. And then he told the jury, taking that direction from him, to find whether the cargo of wet sugar presented to the shipowner at Yloilo was a reasonable cargo within the meaning of a charter-party having that construction. And the jury found with that direction, that the sugar offered to the captain was a reasonable cargo, that the ship was not reasonably fitted to carry a reasonable cargo of wet sugar, that the damage suffered by the sugar was not "the result of its own defective condition, without any defect in the ship, or any fault of the captain," and they found that the damage caused to the sugar was "caused by the unfitness of the ship to carry the cargo offered to her, or by the ship being unreasonably unfit to carry a reasonable cargo of Yloilo wet sugar, or by want of reasonable care or skill of the captain in treating the cargo delivered to him." I think the direction of the learned judge was perfectly correct, and with these findings following upon that direction, of course the case was entirely exhausted.

I submit that there is no ground for differing from the unanimous opinion of the Courts of Common Pleas and Exchequer Chamber, and I move that the judgment of those courts be affirmed, and this appeal dismissed with costs.

Lord HATHERLEY.—My Lords, the unanimity of the judges before whom this case has been argued in its successive stages, is not at all surprising, regard being had to the circumstances of the case.

In the first place with regard to the construction of the contract, it appears to me that the learned judge at *nisi prius* was perfectly right in taking upon himself to construe that contract as a matter of law, and to state the result of such construction to the jury, provided, of course, that his construction be found to be correct.

It appears to me that there can be no doubt that this engagement was that the ship in question should call at the specified ports, amongst others Yloilo, that she should there take a complete cargo of sugar in bags, nothing being said in that part of the contract as to whether the sugar was to be wet or dry. She was to take "a full and complete cargo of sugar in bags, hemp in compressed bales, and measurement goods." Therefore the cargo might either be a cargo of sugar in bags, or of hemp in compressed bales, or of measurement goods. Wet sugar might, we understand, be packed in bags; and to show that it was in contemplation, we have not only the fact stated in evidence that it is an article constantly shipped from Yloilo, but we have also an express provision in the charter-party as to what the price shall be, and the price is put at 4*l.* 2*s.* 6*d.* per ton for dry sugar and at 4*l.* 5*s.* a ton for the wet sugar. Therefore it appears to me as plain as anything can well be, that the shipper had the choice of the cargo, whether it was to be of sugar at all in bags, or whether he should prefer to have it composed partly of sugar, and partly of other articles; and he had the choice as to the sugar itself whether it was to be wet or dry. The only misdirection complained of is with reference to this point as to the construction of the contract. The rest of the case seems to have been placed before the jury very clearly and distinctly. The judge asks, "Was the ship reasonably fit to carry a reasonable cargo of Yloilo wet sugar?" Then again he says, "If you think the sugar was the ordinary Yloilo cargo, then the damage is suffered by some defect in the ship, or some treatment of the captain." As regards the question of the pumps, what he says is, "The pumps were certified it is true, but they were not brought up and examined, it was assumed that they were sufficient. You have it in evidence that in ordinary sugar ships ordinary pumps are used. The only way you have to consider the matter here is this, whether though in an ordinary sugar ship ordinary pumps will do, whether this was an ordinary sugar ship, whether she was not too large for what she had undertaken to do unless she had extra appliances." Nothing could be more clear than that way of putting the case before the jury. The learned judge tells the jury that the shipper was entitled if he pleased to put on board a cargo wholly of wet sugar, in which I think he is quite correct; but he says that that wet sugar must be a reasonable cargo to be carried, and he leaves it entirely to the jury to say whether a reasonable cargo of Yloilo wet sugar was supplied; they have found that it was. And with regard to the pumps, he puts the case in the exact way in which the difficulty has been encountered by the parties to the contract. The shipowner does not appear to have bethought himself what he was about to do when he stipulated that he would take this commodity, having this particular and special character, with the common pumps that he had used hitherto in his ship with ordinary cargoes of a different description. It is not because he has not thought fit to protect himself, or to furnish himself, as he would have done if he had thought of it in sufficient time, with sufficient pumps for the cargo that he has undertaken to carry, that he is entitled to be relieved from his contract.

I apprehend the learned judge was quite right in telling the jury, as a matter of law, that he had contracted to carry a reasonable cargo of Yloilo wet sugar. As regards all the other parts

of the case there is hardly a dispute between the parties.

Therefore, my Lords, I come to the same conclusion as that at which the courts below have arrived.

Lord O'Hagan.—My Lords, I am quite of the same opinion.

I think there is no misdirection in this case. In my opinion the Court of Common Pleas was perfectly right in saying that the charge of the learned judge was entirely correct in point of law, as it certainly was very clear and careful in its statement of facts. The learned judge did what appears to me to have been his plain duty. He first construed the contract, in the next place he applied his construction of it to the facts of the case, and then left those facts to the jury to be determined by the light of the law, as he had expounded it to them. His construction appears to me to have been perfectly correct. The words of the passage which has been read from the charter-party seem in themselves to require no comment, and no elucidation. Plainly it was within the option of the charterer here to have one of the three sorts of cargoes indicated in the charter-party, just as he chose. If he selected sugar it was for him to say whether the cargo of sugar to be put into the vessel should be wet or dry, and that is my opinion quite irrespective of the subsequent clause in the charter-party which distinguishes between the price to be paid for the wet and the dry sugar. The words of the provision in the charter-party seem to be perfectly clear. They give an option to the charterer, and he exercised that option. Now, considering not merely the words of the charter-party, but the reason of the thing, it seems to be quite a monstrous supposition that the construction contended for by the appellant could have been in the minds of these parties at the time when they entered into the charter-party. The nature of the arrangements of the vessel, the character of the pumps, and all the other matters which would have to be considered in order to determine whether the vessel was suited to carry a cargo of this description, all that knowledge was with the shipowner, and with the captain of the ship. The charterer had no such knowledge at all, and to cast upon him the necessity, or the duty of acquiring that knowledge would seem to me an extremely unreasonable thing, not to be done unless we were coerced by the words of the contract, which appear to coerce us the other way. That having been the construction of the learned judge, he seems to me in the most emphatic way to have put to the jury the question which it was their special duty to answer.

One passage towards the end of the charge seems to me to show that more clearly than the rest of it: "Your real point to consider will be this—was this misfortune the result of the sugar put on board being different from the ordinary Yloilo sugar put on board ships; or was it the result of a large ship undertaking to do this with pumps sufficient for herself, but not sufficient to lift the ordinary drainage of an ordinary Yloilo cargo? Was it the result of one thing or the other?" That was the jury's question. That question was put to them in the clearest and most lucid way by the learned judge, and he got a very emphatic answer from the jury, who determined that the cargo was reasonable, but that the arrangements of the ship were unreasonable, that the captain's conduct was unreasonable, and that the whole of the mischief arose from the conduct of the shipowner, and not from the conduct of the charterer.

My Lords, under all the circumstances of the case, I think the judgment of the Court of Common Pleas was right.

Lord Selborne.—My Lords, I agree.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Attorney for the appellant, *Shum, Crossman,* and *Crossman.*

Attorneys for the respondent, *Waltons, Bubb,* and *Walton.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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

Tuesday, June 29, 1875.

(Present, The Right Hons. Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Henry Keating.)

The Australasian Insurance Company (apps.) *v.* William Townley Jackson (resp.)

Marine insurance—Barratry—Wilful act—Knowledge that act is illegal—Kidnapping Act 1872 (35 *&* 36 *Vict. c.* 19).

The Kidnapping Act 1872 (35 *&* 36 *Vict. c.* 19), *having prohibited the carrying of Polynesian native labourers in ships without a licence, under penalty of forfeiture of the ship, a master who, without the authority of his owners, but with a knowledge of the prohibition, ships and carries native labourers, and so brings about the seizure and condemnation of his ship, commits an act of barratry in respect of which his owners may recover against their underwriters.*

Where a master ships and carries Polynesian native labourers without a licence, against the provisions of the Kidnapping Act 1872, *proof that the master, although he may never have seen the Act itself or the proclamation thereof in the Australasian Colonies, was informed before shipping the labourers that such an Act existed, and that it was illegal to carry them, is sufficient evidence to justify a jury in finding that he shipped and carried the labourers wilfully and with knowledge of the prohibition, so as to make his act barratrous.*

This was an appeal against a decision of the Supreme Court of New South Wales, discharging a rule *nisi* for a new trial, on the ground of misdirection, obtained by the appellants in an action in the said court, in which the respondent was plaintiff and the appellants were defendants.

The action, which was commenced on the 9th Feb. 1874, was brought to recover as for a total loss, under four policies of insurance made by the respondent with the appellants' company, upon hull and furniture, cargo, outfit, and boats of the respondent's barque *Crishna,* which was engaged in the beche-de-mer trade. The perils insured against were, amongst others, those of "barratry of the masters and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the" respective subject-matters of insurance above-mentioned.

The appellants paid into court, as to one of the ship's boats, a sum which was accepted by the respondent, but as to the residue, they pleaded that there was no loss by the perils insured against. On that plea issue was joined.

The cause was tried on the 6th May 1874, before Sir James Martin, C.J., and a jury. On the trial, the following, amongst other facts, appeared: The *Crishna* sailed from Sydney on the 5th April 1872, on a beche-de-mer voyage, under the command of Capt. Walton, who had no authority from the owners to get or engage in carrying native labourers, nor any general authority or discretion to use the vessel in any way he might consider necessary. After the *Crishna* sailed, and whilst she was on her voyage, on the 31st Aug. 1872, the Kidnapping Act 1872 (35 & 36 Vict. c. 19), was proclaimed in the Australian Colonies. [The sections of the Act applicable will be found in the judgment.] After the said Act had been proclaimed and before Capt. Walton had taken any natives on board, he was warned by the captain of the *Royal Duke*, whom he fell in with in Shelburn Bay, Torres Straits, that there was a Kidnapping Act out which prohibited vessels from carrying Polynesian labourers, and rendered them liable to seizure for so doing unless they had first obtained a licence and given a bond for 500*l*. Afterwards he was again warned by a black named Peter, who told him all the fishing vessels had left the Straits for Sydney on account of the Act. Finally, in Jan. 1873, Capt. McCourt, or McCaint, of the *Enchantress*, warned him of the prohibition, and that all the vessels had left the Straits for licences. Upon the advice of McCaint, and Hoare the chief mate of the *Crishna*, Capt. Walton went to Cape York, where Mr. Jardine, the police magistrate there, had the Act, for the purpose of himself seeing it. After Capt. Walton's return from Cape York he took on board about thirty natives, and on the 11th Jan. 1873, he sailed with them on board for Sydney. On the passage the *Crishna* was seized by her Majesty's ship *Basilisk*, taken into Brisbane, and there condemned by the Vice-Admiralty Court in Queensland, and sold by the order of that court, which was the total loss in respect of which this action was brought. The evidence will be found more fully stated in the judgment.

At the trial the defendants called no witnesses and adduced no evidence.

The Chief Justice summed up in accordance with *Earl* v. *Rowcroft* (8 East. 126), reading to the jury and commenting upon Lord Ellenborough's judgment in that case.

After the jury had retired, the counsel for the defendants asked the Chief Justice to reserve two points for the court:

First, as to the reception of a printed copy of the *Queensland Gazette* without proof of it.

Secondly, as to the captain not having any knowledge that the Act had passed making what he did an offence, contending that his act in order to be barratrous ought to be a wilful act.

These points were accordingly reserved.

The jury returned a verdict for the plaintiff on all the issues.

On the 8th June 1874, the defendants obtained a rule *nisi* for a new trial, on the grounds:

First, that the verdict was against the evidence.

Secondly, that his Honour admitted in evidence a paper purporting to be the *Queensland Gazette*, without further proof thereof.

Thirdly, that his Honour should have directed the jury that the master was not guilty of barratry unless he wilfully violated the provisions of the Kidnapping Act 1872, or at least with knowledge of the same and of the proclamation thereunder having been published.

On the 26th Sept. 1874, the rule came on for hearing. The two first mentioned points were abandoned without argument, the sole point argued being as to the alleged misdirection. The rule was discharged by a majority of the court (Hargrave and Faucett, JJ.), Sir James Martin, C.J., dissenting. The following judgments were delivered:—

Sir James Martin, C.J.—In this case the verdict was for the plaintiff, with 3720*l*. damages. The amount, therefore, involved in the question before us is large, and the loss which the insurance company will sustain if the verdict stands is heavy. The controversy has arisen from the passing of a very peculiar statute, under which the doing of an act innocent in itself involves liabilities to serious penalties; penalties which may be incurred, too, without the possibility of the persons incurring them even knowing of the existence of the law. It has been twice held in the Vice-Admiralty Court of this colony—in the case of *The Melanie* (12 Sup. Ct. R. 97), and in that of *The Challenge* (12 S. C. R. 127)—that in a suit of condemnation under this statute, knowledge by the master of the provisions of the Act is immaterial, and it appears that a like interpretation has been adopted in Queensland. In this case the condemnation seems to have been founded on much the same grounds as in the cases I have just mentioned. The captain was carrying Polynesian natives in an innocent (perhaps even in a meritorious) way, and because there was a literal violation of the Act, his vessel was seized by a ship of war, and condemned as forfeited by the Vice-Admiralty Court of Queensland. It certainly appears, on the whole, to be a case of extreme hardship. The law is clear that in a case of barratry, where the loss has been brought about by condemnation in a Vice-Admiralty Court, the mere proof of the decree of such court, unless it be impeached for fraud, is sufficient evidence of the violation of the law upon which the condemnation was founded, and it is not competent for the defendant, in the absence of fraud, to show that the condemnation was improper. I think, therefore, that I rightly held that the decision of the Vice-Admiralty Court was conclusive between the parties here. But then the question arises, what is to be proved in addition to make out the case of barratry? As to that it appears to me to be clear, that misconduct on the part of the master must be proved to establish barratry. The innocent violation, for instance, of a blockade or of any law, does not amount to such misconduct; there must be some wrong act done. Time after time has the difficulty arisen of properly defining barratry. After looking through a large number of cases in which the matter has been discussed, I have come to the conclusion that the best definition is that to be found at page 820 of Arnould on Marine Insurance (1st edit.), which I accordingly adopt as correct for the purpose of this case, "Barratry then in English law may be said to comprehend not only every species of fraud and knavery covin-

ously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence, by whatever motive induced, whereby the owners or charterers of the ship (in cases where the latter are considered as owners *pro tempore*) are in fact damnified." It seems to me that every word of that definition is material. In a note at page 821, there is a definition by Lord Hardwicke, which is said to be the tersest and the best. He defines it, "An act of wrong done by the master against the ship and goods." But this, I think, is not sufficiently extended to amount to a complete definition. There are various cases to show that an act to constitute barratry must be knowingly done. At page 839 of Arnould, it is said, I think correctly, that a foreign sentence stating the ship to have been seized for breach of blockade, is not conclusive evidence of barratry, for the breach of blockade might have been committed by the captain in ignorance and without intention, in which case it would be no barratry." Looking at these passages in Arnould, and at the cases generally by which they are borne out, I am of opinion that to establish barratry here, it was necessary to show not only that the master carried the Polynesians under such circumstances as amounted to a breach of the law, but also that he knew that he was acting contrary to law. If there was no evidence that before he took the islanders on board he became aware of the passing of the Kidnapping Act, no wrong was done by him. It is impossible to hold that a wrong is committed by a person who does an act innocent in itself without knowing that it is contrary to positive law. It is certainly true that the jury were not told by me that it was necessary in support of the plaintiff's case to find that the captain had knowledge of the passing of the Act. All that I did was to read to them the evidence as to the passing of the Act being communicated to the captain. There was evidence that he was told that an Act of the kind had been passed, and that he went to Cape York for the purpose of seeing Mr. Jardine, and inquiring about the matter. As to whether he ever actually met Mr. Jardine, or saw a copy of the Act, there was no evidence, but there was evidence that he was told something about the Act, and that evidence was mentioned by me to the jury. The question now is, whether there ought to be a new trial, because I did not pointedly tell the jury that it was their duty to decide whether they believed the evidence or not; and that if they thought that the captain had no knowledge of the passing of the Act, they ought to find for the defendants. It is true that I was not asked by the defendant's counsel to do this. If I had been so asked, and had refused, there is no doubt a new trial ought to be granted, and it is now to be determined whether the fact that my attention was not called to the omission, makes any difference. I am of opinion that there ought to be a new trial for this omission. I think that the jury were very likely, because I said nothing pointedly to them about the materiality of knowledge by the captain of the passing of the Act, to think that matter immaterial, it being in fact most material, as it was necessary for them to say in effect (if they found for the plaintiff) that there had been wrong conduct on the part of the master, inasmuch as he knew the thing which ultimately caused the condemnation to be prohibited. It is very probable that if the case goes down again to trial, the jury may think that the master did know this, but that is not a matter with which we have anything to do now. It is entirely a question for the jury. I may say in conclusion, that under the peculiar circumstances of this case, I think it would have been well for the parties to have saved the expense of this litigation, and to have done what was recommended by the court in the cases of *The Melanie* and *The Challenge*, namely, apply to the Home Government for a remission of the forfeiture, which application there can be no doubt would be complied with.

Hargrave, J.—As to the first two of the three grounds upon which this rule *nisi* was obtained for a new trial, viz.: First, that the verdict was against evidence; and, secondly, that the *Queensland Gazette*, containing the proclamation of the imperial statute against kidnapping was improperly admitted as evidence, nothing has been urged to this court in support of either of these two grounds; and I assume, therefore, that the evidence before the jury was quite sufficient to support the verdict, and that the *Gazette* and proclamation were properly before the jury in evidence. The third ground of the rule is, therefore, the only ground for me to consider, viz.: that "the Chief Justice ought to have expressly directed the jury that the master was not guilty of barratry unless he wilfully violated the provision of the Kidnapping Act, or, at least, with knowledge of the same and its provisions and of the proclamation thereunder." From the Chief Justice's own report to this court of his directions to the jury, and comments on the evidence, it is perfectly clear to my mind that his Honour placed the whole law bearing upon the issue of "barratry" quite properly before the jury, more especially by reading to the jury and commenting upon Lord Ellenborough's well-known judgment in *Earl* v. *Rowcroft* (8 East, 126); and the jury must, therefore, have been well aware that "known illegality" was the essence of "barratry," and was the only issue for them to try. His Honour also read to the jury the express evidence of the mate as to the proclamation having been communicated to the captain, and his having express knowledge of the passing of the Act and of its provisions; and especially read to the jury the evidence as to the captain's going to Cape York in order to inquire into the matter from Mr. Jardine, the then Government superintendent there. Moreover, even assuming the word "wilfully" to be essential to the definition of barratry (which I by no means admit), still it is clear that the omission of this word from his Honour's direction to the jury ought to have been distinctly pointed out at the time to the judge by the defendant's counsel, which was not done, but the reservation of the point only asked for. No "omission" ever forms any ground for the new trial, unless the omission has been distinctly refused to be rectified, as well as essential in law to the direction. But in this case, as I have said, I think the direction to the jury was in all respects perfectly sound in law, as put by the Chief Justice to the jury. The evidence also seems to me to be amply sufficient to prove in law the "wilful" breach of the Act as well as the "known illegality," if there be any distinction in the terms; and the evidence is quite as conclusive as to wilful breach of the law as is usual in any other breach of our criminal or

quasi-criminal statutes. I am also inclined to think that the verdict is perfectly good under the general words contained in this insurance now sued on, viz.: "All other perils, losses, and misfortunes;" and the declarations seem to be so framed by the pleader. See the case of *Butler* v. *Wildman* (3 Barn. & Ald. 398); *Jones* v. *Nicholson* (10 Exch. 28); and *Davidson* v. *Burnand* (L. Rep. 4 C. P. 117; 3 Mar Law Cas. O. S. 207.) But now the only point for consideration by this court is the third ground mentioned in the rule, which really amounts to this, that a new trial may be granted whenever another judge, or even the same judge, should think that upon a second trial he should direct the jury in different or stronger language, or use particular expressions in law not used at the first trial, or think that he would read and explain to the jury at Nisi Prius some other of the law authorities or text writers which may be cited to this court *in banco*, although admittedly, as in the present case, only confirmatory, and to the same effect as the case or text writer properly read and explained to the jury at the first trial. No new trial has ever yet been granted, and I hope never will be granted, upon any such ground. I desire also to add, as I have often said in this court, that this full court sitting in banco ought to discourage these speculative new trial motions, and compel both parties to put forth all their strength at the first trial of every action; and after a fair trial, every successful party should be left in possession of his verdict and judgment, unless upon clear legal grounds for a new trial, which assuredly do not exist in the present case. For these reasons I think the plaintiff's judgment against this insurance ought not to be disturbed, but this rule should be discharged with costs.

Faucett, J.—I should have had no difficulty in this case were it not that his Honour the Chief Justice, who tried the case, is of opinion that there ought to be a new trial, because I think the verdict was right upon the evidence. The only question to be now determined is, whether this was such a misdirection as would entitle the defendants to a new trial. I do not now consider the effect of the decisions in the case of *The Melanie* and in the case of *The Challenge*. But I assume, in the present instance, that to establish a case of barratry it was necessary for the plaintiff to prove that the captain had actual knowledge of the existence of the statute for the violation of which the vessel was condemned. At the trial the plaintiff's counsel opened his case by stating that he would not contest that point, but would admit that it was incumbent on him to prove that the captain at the time he violated the statute had actual knowledge of its existence, and he undertook to prove such knowledge as a necessary part of his case. Accordingly, evidence was given which went to show such knowledge. It was proved that the captain was told of the passing of the Act, and that he said he was all right, as he had his men on the articles. It was also proved that he went to Cape York to see Mr. Jardine in reference to the Act. On the other hand, it was contended for the defendants that such knowledge was not proved. It was said that it was not shown that the captain had ever seen Mr. Jardine or had ever seen a copy of the Act. Now, considering that the defendants gave no evidence, I do not think this latter argument of much weight. But, however this may be, the fact appears to be that the question whether or not the captain had actual knowledge was fully contested, and was, as I further collect, the substantial and only question contested at the trial. The want of proof of such knowledge was in fact the defence, and as now admitted the only defence relied on. This being so, his Honour, we are told, in summing up, read a definition of barratry, and read and commented on Lord Ellenborough's judgment in *Earl* v. *Rowcroft* (8 East, 126). He is also under the impression—although this is denied—that he read the definition of barratry in page 820 of Arnould on Marine Insurance, which contains the words "known illegality." He then read and drew the attention of the jury to the evidence of captain's knowledge. Under these circumstances, I cannot doubt that the law was correctly read to the jury, and that their attention was drawn not only by the counsel on both sides, but by his Honour to the real and, as it appears to me, the only question of fact that was contested between the parties. If, indeed, his Honour had been asked to tell the jury in express terms that barratry could not exist without knowledge of the existence of the statute, and had refused to do so, there might be some ground for the present motion. But he was merely asked—after the jury had retired—to reserve the question whether he ought not to have directed them in the terms set out in the third ground for this motion? If I could see that the direction had been wrong, I might think this course sufficient. But as I cannot see that the jury was misdirected or misled, and as I think the evidence quite justified the verdict, I cannot see sufficient reason for sending the case down for a new trial, for the mere purpose of enabling the judge to give a fuller and more pointed direction on a point that was before fully contested, and, moreover, without any probability of a different result.

On the 8th Oct. 1874, the appellants prayed leave to appeal from the judgment of the Supreme Court above-mentioned to her Majesty in Council, and leave was granted to them by an order dated the 9th Oct. 1874, made by a judge in chambers, which was afterwards, on the 30th Nov. 1874, made a rule of court.

This appeal was brought into pursuance of the leave obtained, and the appellants submitted that the judgment of the Supreme Court of the 26th Sept. 1874, was erroneous, and ought to be set aside or varied, for the following among other reasons:

1. Because the verdict given in the action was against the evidence.

2. Because the learned judge misdirected the jury, in not telling them that in order to find a verdict for the plaintiff they must be satisfied that the master knew of the provisions of the Kidnapping Act 1872, and that it was in force when he took the natives on board.

3. Because the learned judge misdirected the jury, in that he did not direct them, as he should have directed them, that under the circumstances the master was not guilty of barratry, unless he violated the provisions of the Kidnapping Act 1872, with knowledge of the same, and of its provisions, and of the proclamation thereunder having been published.

4. Because the learned judge who tried the case

was of opinion that he had not directed the jury correctly, and that a new trial ought to have been granted.

Manisty, Q.C. and *F. W. Gibbs*, for the appellants, contended there was a misdirection.

Cohen, Q.C. and *Macleod Fullarton*, for the respondents, were not called upon.

The judgment of the court was delivered by

Sir Barnes Peacock.—This is an appeal from a judgment of the Supreme Court of New South Wales discharging a rule *nisi* for a new trial. The action in which the rule was obtained was brought by the respondent, William Townley Jackson, as one of the co-owners of the ship *Crishna*, of which Walton was master, upon several policies of insurance upon that vessel for several amounts, the total being 3750*l*. The loss was occasioned by the condemnation and sale of the vessel under the provisions of 35 & 36 Vict. c. 19, entitled An Act for the Prevention and Punishment of Criminal Outrages upon Natives of the Islands in the Pacific Ocean. That Act received the royal assent on the 27th June 1872. By sect. 21 it was enacted that the Act should be proclaimed in the several Australian Colonies by the respective governors thereof within six weeks after a copy thereof should have been received by such governors respectively; and should take effect in the several colonies from the day of such proclamation.

The 9th section of the Act enacts: "If any British subject commits any of the following offences"—namely, decoys a native of any of the aforesaid islands, and so on, defining the offences —"he shall, for each offence, be guilty of felony, and shall be liable to be tried and punished for such felony in any Supreme Court of Justice in any of the Australian Colonies, and shall, upon conviction, be liable, at the discretion of the court, to the highest punishment other than capital punishment." The 16th section enacts that "Any British vessel which shall upon reasonable grounds be suspected (1) of being employed in the commission of any of the offences enumerated in the 9th section of this Act, or (2) of having been fitted out for such employment, or (3) of having, during the voyage on which such vessel is met, been employed in the commission of any such offence, may be detained, seized, and brought in for adjudication, upon the charge of being so employed or fitted out as aforesaid, before any Vice-Admiralty Court in any of her Majesty's dominions by any of the following officers;" and then it describes the officers who are entitled to bring her in for condemnation Sect. 18 says: "The Vice-Admiralty Court before which any vessel is so brought for adjudication shall have full power and authority to take cognisance of and try the charge upon which such vessel is brought in, and may, on proof thereof, condemn the vessel and cargo, or either, as the case may be, as forfeited to her Majesty, or may order such vessel and cargo, or either of them, to be restored, with or without costs and damages, as to the court shall seem fit."

By sect. 6 it is enacted that "All the provisions with reference to the detention, seizure, bringing in for adjudication before any Vice-Admiralty Court, trial, condemnation, or restoration of vessels suspected of being employed in the commission of any of the offences enumerated in the 9th section of the Act shall *mutatis mutandis* apply to any British vessels which shall be found carrying such native labourers without licence, or in contravention of the terms of any licence which may have been granted to the master thereof;" and by the seventh section a penalty is imposed on the master for carrying such natives.

One of the risks insured against by the policies of insurance was barratry by the master or crew of the vessel.

It appears that the master in the month of Jan. 1873, took on board thirty Polynesian labourers, and that the ship was seized by one of her Majesty's vessels, and carried into Brisbane, in Queensland, for the purpose of being condemned for a breach of the 6th section of the Act of Parliament, on account of the master's carrying Polynesian labourers on board. The ship was condemned, and was afterwards sold by order of the Vice-Admiralty Court at Brisbane for that offence.

It was contended that the case was not one of barratry unless the master knew that the Act of Parliament had been passed, and also that the Act had rendered it illegal to carry Polynesian labourers on board his ship.

It was proved that the vessel left Sydney on her voyage before the Act had received the royal assent, or had been proclaimed in Queensland; but evidence was given to show that the master was aware of the Act, and that he knew, from information which he had received, that the Act rendered it illegal for him to carry Polynesian labourers on board. William Hoare, who was the first mate of the *Crishna*, said that they left suddenly, on the 5th Apil 1872, that was before the Act was passed. Then he says, "there were thirty Polynesian natives taken on board this vessel. Capt. Walton I understood was to get 3*l*. a head for carrying them to Sydney. He told me so. There was a vessel called the *Royal Duke*, which I saw in Shelburn Bay, in Torres Straits; that was about two and a half months to three months before the seizure of the *Crishna*. We were lying in Shelburn Bay, about ninety miles to southward of Cape York. I remember the captain of the *Royal Duke* telling Walton and myself that there was a Kidnapping Act out which prohibited vessels carrying Polynesian labourers unless they were part of the ship's crew; that the vessels were liable to seizure; and Walton made the remark that he was all right, as he had all his men in the articles. That was before we had Delargy's natives on board." Then he goes on later: "I remember in Jan. 1873 meeting a cutter called the *Enchantress* at Cocoa Nut Island. She was twenty-five tons; John McCaint was the captain's name. I remember his telling Walton that the Act was out which prohibited vessels carrying these natives, and that all these vessels had left the Straits for licences. McCaint and I advised Walton to go to Cape York and see the Act himself. Walton went with McCaint to Cape York, where Mr. Jardine, the police magistrate, had the Act. We were then 58 miles from Cape York. The two captains in the cutter *Enchantress*, and a boat with some natives in it, followed to bring Walton back. I am sure Walton went on no other business than to see the Act." Then he says, "Walton returned in three or four days. A day or two after Walton returned, Delargy's natives"—those were the thirty Polynesian natives —"came on board. We started for Sydney on the 11th Jan. 1873." Then it appears that the ship

was seized by one of her Majesty's vessels, and carried into Brisbane for condemnation; that she was there condemned and sold on account of the offence which this master had committed in carrying the natives on board.

Now, even assuming that, under the peculiar circumstances of the case, the master having left on his voyage before the Act was proclaimed, it was necessary to prove that he was aware of the existence of the Act, and that it was thereby rendered unlawful for him to carry Polynesian labourers, their Lordships are of opinion that there was sufficient evidence to go to the jury, that the master was acquainted with the Act so far as to know that an Act had passed which rendered it unlawful for him to carry Polynesian labourers on board. The Chief Justice says (in his notes): "Stephen"—that is the counsel for the defendant—"addressed the jury. I sum up in accordance with *Earl* v. *Rowcroft* (8 East, 126). The jury retired, and after they had so retired Stephen asks me to reserve two points; first, as to the reception of the printed copy of the *Queensland Gazette* without proof of it;"—that is not a matter which is now raised—"and, secondly, as to the captain not having any knowledge that the Act had passed making what he did an offence." He could not have had liberty reserved to enter a nonsuit upon the ground of the captain's not having any knowledge that the Act had passed, making what he did an offence, except upon the ground that there was no evidence to go to the jury as to that knowledge. Their Lordships have already pointed out that the evidence was sufficient, if the jury believed it, to prove that the captain had knowledge that the Act had passed, and that it rendered it unlawful for him to carry Polynesian labourers. The Chief Justice goes on, "He contends that the act ought to be a wilful act. I reserve these points. No evidence was called for the defence, but counsel for the defendants, in his address to the jury, contended that the evidence was not sufficient to show that the master had become aware of the passing of the Kidnapping Act, or at least of the nature of its provisions; and that his taking the Polynesians on board was not a breach of a law that he must be taken to have known, and was an innocent act, and therefore not barratry; and that defendants consequently were entitled to a verdict." Now the learned counsel for the defendants, when he addressed the jury and contended that the evidence was not sufficient to show that the master did in fact know of the Act, must have been fully alive to the fact that that question ought to be submitted to the jury.

The principal ground upon which the rule was moved for was that the Chief Justice ought, under the circumstances, to have directed the jury that the master was not guilty of barratry unless he wilfully violated the provisions of the Act, or at least acted with knowledge of the same and of its provisions.

The learned Chief Justice stated that he read the evidence to the jury as to the passing of the Act having been communicated to the captain, but it is said that he did not in a sufficiently pointed manner call their attention to the question whether the master did or did not know that the Act had rendered it unlawful for him to carry the Polynesian labourers on board. He says, in his judgment upon the rule: "I am of opinion that there ought to be a new trial for this omission. I think that the jury were very likely, because, I said nothing pointedly to them about the materiality of knowledge by the captain of the passing of the Act, to think that matter immaterial, it being, in fact, most material, as it was necessary for them to say in effect (if they found for the plaintiff) that there had been wrong conduct on the part of the master, inasmuch as he knew the thing which ultimately caused the condemnation to be prohibited. It is very probable that if the case goes down again for trial the jury may think the master did know this, but that is not a matter with which we have anything to do now."

Now, their Lordships are of opinion that the question whether the master did or did not know of the Act was sufficiently left to the jury, and that they must have understood that that was, in fact, the only question which they had to try. Mr. Justice Faucett says: "It was contended for the defendants that such knowledge was not proved. It was said that it was not shown that the captain had ever seen Mr. Jardine, or had ever seen a copy of the Act. Now, considering that the defendants gave no evidence, I do not think this latter argument of much weight. But, however this may be, the fact appears to be that the question, whether or not the captain had actual knowledge, was fully contested, and was, as I further collect, the substantial and only question contended at the trial. The want of proof of such knowledge was, in fact, the defence, and, as now admitted, the only defence relied on."

It appears to their Lordships that that view of the case was correct; they think that there was sufficient evidence to go to the jury, and that the question was substantially left by the Chief Justice to the jury, and that they must have understood that that was the principal if not the only question which they had to try; and, under these circumstances, their Lordships are of opinion that the majority of the court did right in discharging the rule *nisi* for a new trial. Under these circumstances they will humbly recommend her Majesty that the decree of the court below be affirmed, with the costs of this appeal.

Appeal dismissed.

Solicitors for the appellants, *Wilde, Berger, Moore,* and *Wilde.*

Solicitor for the respondent, *T. W. Derby.*

EXCHEQUER CHAMBER.

Reported by ETHERINGTON SMITH, Esq., Barrister-at-Law.

June 19, 21, 22, *and* 26, 1875.

(Before BRAMWELL, B., BLACKBURN, LUSH, and QUAIN, JJ., POLLOCK and AMPHLETT, JJ.)

ANDERSON *v.* MORICE.

Marine insurance—Seaworthiness—Peril of the seas—Insurable interest—Burden of proof.

A ship whose cargo was insured, and which had previously been to all appearance staunch and sound, and had recently been thoroughly repaired and had a few days before been examined without any defects being discoverable, sank suddenly at her moorings, when she had taken in five-sixths of her cargo. No direct evidence could be given why she foundered, nor could any certain cause be assigned for her doing so:

Held (affirming the judgment of the Court of Common Pleas), that the questions of seaworthiness and loss by a peril of the sea, were properly left to the jury, and that the evidence upon them was such as to enable the jury to find as they did in favour of the plaintiff on those issues.

The plaintiff had made a contract with B. S. and Co. for the purchase of rice, in these terms: "Bought the cargo of new crop rice, per Sunbeam, at 9s. 1½d. per cwt., cost and freight. . . . Payment to be by seller's draft on purchaser, at six months' sight, with documents attached.

He chartered the Sunbeam to proceed to Rangoon to ship rice for any port in the United Kingdom or Continent, and effected an insurance with the defendant, "At and from Rangoon to any port or place of discharge in the United Kingdom or Continent, by the Sunbeam, warranted to sail from Rangoon on or before the 1st April, on rice as interest may appear, amount of invoice to be deemed the value; average payable on every 500 bags; the said merchandise, &c., are and shall be valued at 5500l., part of 6000l."

When the Sunbeam sank in the Rangoon river she had nearly finished loading; the rest of the rice necessary to complete the cargo was alongside in lighters. After she sank, bills of lading for the rice on board were signed by the captain, and the sellers drew bills of exchange, which were accepted and paid by the purchaser (the plaintiff) to whom the bills of lading had been indorsed.

The Court of Common Pleas held that the plaintiff had an insurable interest in the rice shipped on board the Sunbeam at the time of the loss, and was entitled to recover in an action on the policy.

The Court of Exchequer Chamber (Bramwell, B., Blackburn and Lush, J.J, Pollock and Amphlett, BB.) (Quain, J. dissentiente) held, reversing the judgment of the court below, that the plaintiff had no insurable interest, because,

First, no part of the rice was ever at the plaintiff's risk, the cargo being incomplete, and he could not have been called upon to pay for it, notwithstanding its loss;

Secondly, the plaintiff, not having sustained any loss, had no option by the exercise of which he could elect to bear the loss, and pay at the cost of the underwriters. Sparkes *v.* Marshall (2 *Bing. N. C.* 761), *explained;*

Thirdly, the policy was upon rice, and not upon an expectancy of profit, and therefore did not cover an interest in profits that might arise collaterally from a contract relating to the rice; following Lucena *v.* Crawford (2 *B. & P., N. R.*, 315).

Per Quain, J., dissentientem: That it was the intention of the parties that the rice should be at the vendee's risk from the loading, and that, as he had notice to insure before the loading began it was intended that he should insure by an ordinary policy, and that the goods should be at his risk from that time. He was, therefore, bound to pay for the rice lost, and had an insurable interest at the time of the loss, for which he was entitled to recover in the action.

ERROR from the judgment of the Court of Common Pleas, in favour of the plaintiff.

The facts are sufficiently set out in the report of the case in the court below (*ante*, vol. 2, p. 424), and the argument on the appeal was based on the cases cited in the argument, and in the judgment there reported.

Butt, Q.C., *Cohen*, Q.C. and *Hollams* for the defendant below, the plaintiff in error.

W. Williams, Q.C. and *J. C. Mathew* for the plaintiff below, the defendant in error.

Cur. adv. vult.

June 26.—The following judgments were delivered:

QUAIN, J.—As to the first point argued before us, namely, whether there was any evidence of a loss by perils of the seas, I agree with the other members of the court that there was evidence from which the jury were fairly at liberty to infer a loss by sea perils.

But I am unable to concur with the other members of the court, in holding that the plaintiff had no insurable interest in the rice at the time of the loss, and that on that ground the judgment of the court below should be reversed.

It seems to me to have been the manifest intention of the parties to the contract of the 2nd Feb. 1871, that the rice should be at the risk of the plaintiff from the time it was loaded on board the ship, and that, therefore, he had an interest in it from that time. By the contract, the plaintiff "bought the cargo of rice, per *Sunbeam*, at 9*s.* 1½*d.* per cwt., cost and freight. Payment by seller's draft on purchasers, with documents attached." As the price included cost and freight only, and not insurance, it seems plain that the insurance, if any, was to be effected by the purchaser; and, in a letter dated the 7th March, from the seller's agents to the plaintiff, which was put in evidence, a telegram from the sellers at Calcutta dated 6th March, is set out these words: "*Sunbeam.* Rangoon: advise Anderson; insurance." Before the receipt of this telegram, namely, on the 3rd Feb. 1871, the day after the making of the contract, the plaintiff effected the present policy on rice by the *Sunbeam*, as interest may appear. The policy is in the usual form, beginning, "The adventure on the said goods, from the loading thereof on board the said ship;" but it is said that though the language of the policy is sufficient to cover a loss during the loading, the interest of the plaintiff in the goods did not attach till the loading was complete, and the shippers in a position to obtain bills of lading; and this on the ground that the plaintiff was only bound to pay by acceptance of a draft with documents attached. But I think it fairly to be inferred from the fact that the plaintiff was to insure the goods, and had notice from the sellers to insure on the 6th March, which was before the loading began, that the plaintiff was to insure the goods in the ordinary way, by an ordinary policy from the loading, and therefore that it was intended that the goods should be at his risk from that time. It could scarcely have been within the contemplation of the parties, especially in a case like the present, where the ship was being loaded, not in dock, but from lighters at the mouth of a river, that the cargo should remain uncovered by insurance during the loading, or that it would require two policies, one effected by the vendor to cover the goods during the loading, and another by the vendee to attach from the time that the loading was complete. The fact that the goods were to be paid for by an acceptance with documents attached, is not inconsistent with the goods being at the risk of the vendee before the time arrives for presenting the draft for acceptance, if it can

be inferred from the facts of the case that such was the intention of the parties.

In *Fregano* v. *Long* (4 B. & C. 219) the goods were to be paid for three months after their arrival at Naples. By the terms of the order the goods were to be despatched on insurance being effected. Insurance on behalf of the vendee was effected accordingly, and the court held that it was to be inferred from the order to insure that the goods were to be at the risk of the vendee, and that he was bound to pay for them, though they were lost, and never arrived at Naples. "It was next contended," says Holroyd, J. in that case, "that Fregano was not liable to the vendor unless the goods arrived; but the order for insurance is decisive as to that." In *Castle* v. *Playford* (*ante*, vol. 1, p. 255; 26 L. T. Rep. N. S. 315; L. Rep. 7 Ex. 99) the goods were to be paid for in cash on delivery; but the purchaser, by the terms of the contract, took upon himself "all risks and dangers of the seas," and from this it was inferred that, though the goods were lost by perils of the seas before delivery, the purchaser was still bound to pay for them. So, in the present case, I infer from the fact that it was intended that the plaintiff should insure, that the goods were intended to be at his risk, in order to enable him to effect a valid insurance; and as nothing was said as to the time from which he was to effect the insurance, I infer that it was intended that he should insure by an ordinary policy, beginning the risk from the loading, and that the goods were considered by the parties to be at his risk from that time. The plaintiff, therefore, according to the authorities above cited, was bound to pay for the goods lost, and in this case has done so accordingly.

For these reasons, I think that the judgment of the court below ought to be affirmed.

The judgment of Bramwell, B., in which Pollock and Amphlett, BB. concurred, was delivered by

BRAMWELL, B.—Many questions were disposed of in the argument. As to what remained, we are of opinion that the defendant below is entitled to judgment, on the ground that the plaintiffs below have shown no interest in the subject-matter of the insurance at the time of the loss.

By the contract between the plaintiffs and the sellers of the rice, the plaintiffs were to have the cargo of the *Sunbeam*, and to pay for it by acceptances at six months, with the bills of lading attached. It is manifest, therefore, that until the cargo was completed and the bills of lading could be given, the plaintiffs by the mere bare words of the contract were not liable for its price, and had no property in any part of it that might be on board except contingently on the cargo being completed. The cargo never was completed; but it was suggested that as the completion of the cargo became impossible, through no default of the sellers, there arose by implication a right on their part, not expressed in the mere bare words of the contract, to be paid by the buyers for so much as had been loaded. For this contention we see no ground in reason or principle. The plaintiffs also were in no default, and there is no reason why the loss of goods, in which, certainly, they had no property but for the loss, should fall on them. It would be to make them liable for the loss because there was a loss.

Further, we consider this concluded by authority. *Appleby* v. *Myers* (L. Rep. 2 C. P. 651) is in point. It was, indeed, said that here there was a reason why the plaintiff should bear the loss, viz., the inconvenience which would follow if it should be held that the plaintiffs should insure after the cargo was complete, and that the sellers must insure for their protection during its completion. But this received its answer at the bar, viz., that the same inconvenience would result as to the insurance of the rice on its passage from Rangoon to the ship, damage or loss during which certainly would not fall on the plaintiffs; a line must be drawn somewhere, and may well be at the time when the cargo is complete.

Then, it is said that the contract of purchase shows that the plaintiffs are to insure, and that, consequently, the rice was at the plaintiffs' risk, which involved that they were to pay for it, and *Castle* v. *Playford* (*ante*, vol. 1, p. 225); was cited. We entirely agree with that case, but the argument assumes that the rice was to be at the plaintiffs' risk before the cargo was completed and begs the question. The rice was to be at the plaintiffs' risk when the cargo was completed—and perhaps, as we shall next mention, to some extent during its completion—but it was not to be their property nor at their risk till completion, save possibly as was suggested, viz., that if any of the rice during the loading, and after it was on board, had been damaged, the sellers might complete the cargo, and insist that they had fulfilled their contract by shipping merchantable rice, and that the plaintiffs must take the damaged rice, if damaged after it was put on board, and so that the plaintiffs had an interest in respect of which they might insure. But assuming that they would have been bound to take a cargo damaged as supposed, they would only be so bound when the cargo was completed. The interest supposed, therefore, and the possibility of loss, are contingent; contingent on the completion of the cargo, therefore, they had no interest arising from this at the time of the loss.

As to the argument that the plaintiffs had an option to take this rice, which they might exercise after it was lost, we cannot, with great respect, agree to it. It seems strange that it should rest with the plaintiffs to make the underwriters liable or not at their pleasure. But the plaintiffs had no such option. No doubt it exists in some cases, and one party to a contract may have a right to insist on performance or to refuse to perform at his opition. But that is where there has been some default in the other party. Here there has been none. If the sellers had loaded a short cargo, and the plaintiffs had not been bound to take it, no doubt they would; they might have claimed it, and the sellers could not have been heard to say that they (the sellers) had broken their contract by loading a less quantity than agreed, and so the buyers were not entitled to it. But that is not the case here. The sellers might have refused to give bills of lading to the plaintiffs, and to draw on them for the price of what was shipped, and, probably, would have done so had they been well insured. It is manifest that what occurred was a new bargain between the plaintiffs and the sellers. It might as well have been made between the sellers and a stranger.

Sparkes v. *Marshall* (2 Bing. N. C. 761) does not apply. There the property had vested in the buyer. The seller may have been in default for sending the oats to Southampton instead of Ports-

mouth, but that did not take away the right of the buyer to insist as he did on having them.

Then it is said that the plaintiffs had an insurable interest in the profits they would have made. They had, but they have not insured profits, and, therefore, cannot recover on that ground. This was settled by the unanimous opinion of the judges and by the House of Lords in *Lucena* v. *Crawford* (5 B. & P. 269; 2 B. & P. N. R. 315), and has been well known and acted on ever since.

The plaintiffs had no interest in the subject-matter of insurance at the time of the loss, and so are not entitled to recover. The judgment must be reversed.

The judgment of Blackburn, J., in which Lush, J., concurred, was read by

LUSH, J.—In this case the defendant is an underwriter for 100*l.*, on a policy in the ordinary form of a Lombard-street policy, "At and from Rangoon to any port or place of discharge in the United Kingdom or Continent" on the ship *Sunbeam*. The subject matter of the insurance is described as "5500*l.* (part of 6000*l*) on rice, as interest may appear. Amount of invoice and 15 per cent. to be deemed the average value, payable on every 500 bags." The policy contained the usual printed words: "Beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship." The *Sunbeam* at Rangoon foundered at anchor with 8878 bags of rice on board, and this rice was totally lost.

The question in the cause was, whether the plaintiffs were entitled to recover in respect of the loss of this rice from the underwriters, and, if so, for what per centage. The decision of the court below was that they were entitled to recover 100*l.* per cent. from each underwriter. There was a minor point made, that even if the underwriters were liable, it was not for so great a per centage; for, if in calculating the amount at risk the invoice value is taken to mean the invoice as between the shipper and the purchaser, that with the 15 per cent. added would not amount to 6000*l.*, and the underwriters would be liable to make good something less than 100 per cent. If the phrase invoice value is to be taken as another expression for the ordinary shipping value, which includes not only the costs but the premiums of insurance, the value exceeded 6000*l.* It becomes unnecessary, in the view which we take of this case, to decide anything on this point. We only mention it lest it should be said we overlooked it.

The important issues were on the third plea, denying the plaintiff's interest; the fourth plea, alleging unseaworthiness; and the fifth plea, denying the loss by perils of the sea. On all these the plaintiff had a verdict, subject to leave to enter a verdict for the defendant on the ground that there was no evidence of loss by perils insured against, or that the evidence showed that the ship was not seaworthy, and on the ground that there was no insurable interest, or to reduce the damages on such principle as the court should lay down. A rule *nisi* was accordingly obtained on those grounds, and also for a new trial, on the ground that the verdict was against the weight of evidence. After a long argument, and much consideration, the Court of Common Pleas discharged the rule, giving their reasons in an elaborate judgment, reported in L. Rep. 10 C. P. 58; *ante*, vol. 2, p. 424. Against this judgment the appeal was brought, and argued on the 19th, 21st, and 22nd June, before my brothers Bramwell, Lush, Quain, Pollock, and Amphlett and myself.

During the argument we gave our judgment that the evidence was such as to make it a fair question for the jury whether the ship was or was not unseaworthy, and was or was not lost by perils of the seas, and therefore that the rule to enter the verdicts for the defendants on those issues was properly discharged. The question whether the verdict was against the weight of evidence was not before us. But, on the question whether there was an insurable interest, we took time to consider, and the majority have come to the conclusion that the judgment below was wrong on this point, and ought to be reversed, for the following reasons:

As the rice in question had been actually laden on board the *Sunbeam* at Rangoon, there can be no question that the adventure described in the policy had begun. But as the policy of insurance is a contract of indemnity, the plaintiffs cannot recover unless they suffered a loss from the perishing of that rice, and that loss was such as to be included in the subject-matter of the insurance, as described in the policy.

The first question, then, to be determined is, whether the plaintiffs were so situated with respect to the rice in question, at the time of its loss, that they would, if uninsured, have suffered any loss from the destruction of the rice; and, if any loss, whether that loss was of such a nature as to be included in this policy. The facts which are material as to this are not in dispute. The plaintiffs, Messrs. Anderson, had made a contract with Messrs. Borrodaile, contained in a bought note, set out in the sixth paragragh of the case. The material parts are these: "Bought.—The cargo of rice per *Sunbeam*, at 9*s.* 1½*d.* per cwt., cost and freight. Payment by seller's draft on purchasers at six months' sight. with documents attached." The *Sunbeam*, which had been taken up by Guben, Christian, and Co., the sellers of the cargo to Borrodaile and Co., arrived at Rangoon within the time mentioned in the contract, and Guben, Christian, and Co. proceeded to put the rice on board; they had by the 31st March, when the ship was lost, put 8878 bags on board, but this was only a portion of what they intended to ship. The remainder—it does not distinctly appear whether 400 bags or 1600 bags, but at all events, a substantial portion of what they intended to be the lading of the *Sunbeam*—was in lighters or on the shore, intended for the *Sunbeam*, but not yet on board of her. The time for preparing the shipping documents had not yet arrived, and by the terms of the bought note, Anderson and Co. were to pay by accepting drafts with documents attached. The question, therefore, arises, what loss, if any, did Anderson and Co. sustain by the perishing of this rice at this time. It was admitted by Mr. Williams in the argument, and, as we think, could not be disputed, that if the rice intended for the *Sunbeam*, and put on board the lighters, had perished before it was put on board, Anderson and Co. would have sustained no loss, his vendors being still bound as before to supply him with rice, though that which they had intended to give him had perished, to their loss and not his, because it was then at their risk, not his. It was not admitted by Mr. Butt, but was very faintly denied, that as soon as the intended lading was

completed, and the shipping documents were either prepared or things in such a position that they could be prepared, Anderson and Co. would have been bound to pay for the cargo, though, from subsequent disaster, it perished either at Rangoon or on its way home. We all think it is the plain intention of the parties to this contract that, from the time the lading was complete, at least, the rice was to be at the risk of Anderson and Co., and that it is not material to consider whether they would have had the full property before the drafts were accepted.

But there remains the disputed question whether each separate bag was at the risk of Anderson and Co. from the time it was put on board the *Sunbeam*, or whether it remained at the risk of the sellers until the whole intended loading was complete, and the shipping documents were ready, or at least everything was done to enable them to make out the shipping documents. This, we think, depends entirely on the intention of the parties to the contract as appearing from it. There is nothing to prevent the parties from agreeing that as the goods are shipped bag by bag, each bag shall be at the risk of Anderson and Co., although the payment is postponed till all is on board; and if they have sufficiently expressed such an intention, then *Castle* v. *Playford* (*ante*, vol. 1, p. 225; 26 L. T. Rep. N. S. 315; L. Rep. 7 Ex. 98), is an express authority in this court, that Anderson and Co. must bear the loss, though it occurred before the stipulated time for payment had arrived. In that case the words of the contract were express, and left no doubt that the intention was that the buyer was to bear the risk, but we think the same result follows if the intention sufficiently appears, though it is not in express terms. On the other hand, *Appleby* v. *Myers* (L. Rep. 2 C. P. 651) is an express authority that if from the contract it appears that the intention of the parties is that the payment is to be only on the completion, nothing can be recovered, though that completion is prevented by an accident for which neither party is to blame. Both decisions are binding on us, even if we disapproved of them, but we agree with both. In the present case, there is nothing in the terms of the contract to indicate that the parties had present to their minds the possibility of a loss happening at the same time when this did, and, consequently, there are no words used expressly providing for it. We must collect the intention from the words used, applying to them the general rules which the courts have from time to time adopted as rules to enable them to ascertain the intention.

The cases bearing on this subject are collected in Mr. Benjamin's Book on Sales, B. 2, chaps. 2 to 6. In *Gilmour* v. *Supple* (11 Moore P. C. 566), Sir C. Cresswell, delivering the judgment of the Privy Council, says, we think very truly: "It is impossible to examine the decisions on this subject without being struck by the ingenuity with which sellers have contended that the property in goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and buyers or their representatives have with equal ingenuity endeavoured to show that they had or had not acquired the property in that for which they had contracted; and judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances, it cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon very nice and subtle distinctions, and if some of them should not appear altogether reconcileable with each other. Nevertheless, we think, that in all of them certain rules and principles have been recognised, by the application of which to this case we may be enabled to arrive at a correct judgment upon it." One of these rules is thus stated by Blackburn on Sales, p. 151 (See Benjamin on Sales, p. 235): "The first is, that where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of these things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property." This is in effect repeated in the judgment in *Gilmour* v. *Supple* (*ubi sup.*), and is, we think, consistent with all the cases.

Now, completing the lading so that shipping documents could be made out, seems to us a thing to be done by the vendor for the purpose of putting the goods into a deliverable state, or, to substitute the language of Sir C. Creswell, an act to be done by the seller for the benefit of the buyer, to place the goods sold in a state to be delivered, and, therefore, "until he has done it the property does not pass." But we agree that this is only a *primâ facie* indication of the intention, and that it must yield to anything sufficiently indicating a contrary intention. We must, therefore, look to the contract to see if there are any indications of a contrary intention in this case. It may be observed, that risk and property generally go together, and, consequently, in many of the cases, though the important point was, at whose risk is the thing; it is treated as if the sole question was, whose property is it? In the present case, however, the real question is, at whose risk was it? and we do not, therefore, attach any weight to the stipulation that the seller was to attach the shipping documents to the drafts, thereby certainly preserving to the sellers a lien on the goods till the drafts were accepted, and the bill of lading handed over; and, perhaps, preserving in them till then the property, so as to enable them to confer a title on a purchaser for value without notice, as good in equity as, and preferable at law to, that of Anderson and Co. This would not prevent the risk from being on the purchaser from the time the loading was complete. Nor do we proceed on the ground that the word "cargo" has any technical sense requiring that the whole ship should be filled up. But we do proceed on the ground that the *primâ facie* rule of construction is, that the parties intended that the risk should become that of the buyers, Anderson and Co., when and not till the whole lading was complete, so as to enable the shippers, by getting the shipping documents, to call on the buyers to accept and pay for the cargo; and that there is nothing in this contract to rebut the presumption that such was the intention.

We do not think that the fact that the vessel was designated, and that unless under exceptional circumstances the seller could not, without the consent of the shipowner, take any goods once on board out of her affects the question

as between the vendor and purchaser. The court below says, that putting any on board the *Sunbeam* "was such an appropriation of the rice on board as to prevent the sellers from withdrawing that rice without the consent of the buyer." If we could see anything in the contract to give the buyer a right to object, we should think it indicated an intention that the property so put on board should be at the buyer's risk; but we cannot find anything to that effect. If we could see anything to indicate an intention that as each bag was shipped, it should be at the buyer's risk, we should think it indicated an intention that it should not be taken out without his consent. But we cannot reason in a circle.

We have, therefore, come to the conclusion that no part of this rice ever was at the plaintiff's risk, and that he never could have been called upon to pay for it, notwithstanding its loss.

The court below, after coming by a somewhat different process of reasoning to the same result, say that the plaintiff would, if the rice had not perished, have had an option to pay for it, and, therefore, had, after the loss, an option to pay for it, and charge the underwriters with the loss. No one can dispute that the plaintiff might pay the sellers for the rice that perished, though not bound to do so, just as he might have paid them for any bags of rice that had been lost on board the lighters or in their warehouses on land, after they had been brought there, in order to put them on board the ship. It might be a liberal thing to do so at his own expense. But the decision below seems to affirm that after the loss the insured, though he had not sustained any loss, may elect to bear it, and pay at the cost of the underwriters.

To this we cannot agree. The authority on which they acted (*Sparkes* v. *Marshall*, 2 Bing. N. C. 761) seems to us to be misapplied. In that case Bamford had written to Sparkes, the plaintiff, that John and Son, of Youghal, had engaged room in the *Gibraltar Packet* to take about 600 barrels of oats on his account. The plaintiff at once adopted this by directing insurance to be made on his account on oats per the *Gibraltar Packet*, from Youghal to Southampton and Portsmouth. The judgment proceeds on the ground that this was an appropriation by Bamford, assented to by Sparkes, vesting the oats in Sparkes. It appears from the correspondence in the case that Bamford knew that the *Gibraltar Packet* was bound for Southampton only, whilst Sparkes thought she was bound for Southampton and Portsmouth, and also that John and Son shipped only 486 barrels of oats on account of Sparkes instead of about 600. It may be, though it is not quite clear, and the court did not determine it, that these facts gave Sparkes a right to undo the appropriation to him, and so divest the interest already vested in him, but he never did so. The decision, we think, involves the position, that the underwriters had no right to call upon Sparkes to exercise for their benefit, after the loss, his right, if he had it, to undo and divest an interest vested in him before the loss. But this is a very different proposition from saying that the assured had a right after the loss to vest in himself a right not vested in him before the loss, and so incur a liability to pay at the underwriter's expense. We do not think they could do so.

There is only one further point, briefly stated in the judgment below thus: "We are further of opinion that even if the property in the rice did not legally pass to the plaintiff, yet he had an insurable interest in it, because he had an existing contract with regard to it from the time of its being loaded on board, by virtue of which he had an expectancy of benefit and advantage arising out of or depending on the safe arrival of the rice." This was more fully discussed on the argument before us. If the market was a rising market, the plaintiff would have derived benefit from the completion of the contract, if a falling one he would have sustained loss, and the loss of the *Sunbeam* put an end to this chance. We need not discuss whether under a properly framed policy the plaintiff could have insured this expectancy of profit. For the subject-matter of this insurance is on "rice," and though that is to be construed liberally as covering any interest in the rice, it cannot be construed as covering an interest in profits that might arise collaterally from a contract relating to the rice. For this it is enough to refer to *Lucena* v. *Crawford* (2 Bos. & P. N. R. 315). The action was on a policy on ships and goods; eight questions were asked of the judges. The eighth, set out at p. 278 of the report, was as to whether the commissioners had profits in respect of which they had an insurable interest, and then asks, "Can the policy of assurance in the first count of the declaration mentioned (*i.e.*, a policy on ships and goods), be considered as a policy effected on such interest of the commissioners, if such they had, and the same is an insurable interest?" The answer of the judges is stated at p. 315: "The learned judges were unanimously of opinion that the policy in question could not be considered as a policy on profits, having been expressly declared upon as a policy upon the plaintiffs' interest in the ships and goods themselves, and that if it had been intended as a policy on profits, it should have been so stated." This, we think, decisive of the question; but we may refer to *Royal Exchange Assurance Co.* v. *McSwinney* (14 Q. B. 647), as showing how important it is not only to have an insurable interest, but to have the subject-matter of insurance so described in the policy as to embrace that interest.

For these reasons we think that this rule should have been absolute to enter the verdict for the defendants on the third plea, denying the insurable interest, and that the judgment should so far be reversed.

Judgment reversed.

Attorneys for the plaintiff, *Parker, Watney*, and *Co.*

Attorneys for the defendant, *Hollams, Son*, and *Coward.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and CYRIL DODD, Esqrs., Barristers-at-Law.

Wednesday, July 7, 1875.

GABARRON AND ANOTHER *v.* KREEFT; KREEFT *v.* THOMPSON.

Unascertained goods—Property passing—Sale of goods—Charter-party providing that bills of lading should be signed, as presented.

Kreeft bought from M. all the ore of certain mines, to be shipped by M. on ships chartered either by

K. or by M. The ore was to be paid for by bills drawn against bills of lading, or by longer bills on execution of charter-parties, and on a certificate that there was enough ore in stock to load the chartered ships. On being so paid for the ore was to be considered the property of K. When the Macedonia arrived at the port of loading K. had already accepted drafts which more than covered the value of its future cargo, and when the Trowbridge arrived the payments made exceeded anything that could be due for its cargo.

The charter-party of the Macedonia did not authorise the signing of bills of lading as presented, that of the Trowbridge did.

No certificate was sent that there was enough ore in stock to load the Trowbridge.

The Macedonia was loaded with ore, which ought to have been applied to fulfil the contract with K. by M., without any statement by M. that it was not being shipped under the contract; but when the shipment was complete M. procured the bills of lading to be made out to his own order, and by indorsement for value they passed to G., to whom the ore so shipped was delivered by T., the owner of the Macedonia.

When the Trowbridge arrived, though there was ore which ought to have been shipped under the contract, M. telegraphed to K. that he would not load the ship on his account, and then loaded it, taking bills of lading made out to S. (S. being a fictitious person), which bills of lading passed by indorsement for value to G.

Held by the Court (Kelly, C.B., Bramwell and Cleasby, BB.), that G. was entitled to the ore shipped on board the Trowbridge. By Kelly, C.B.—On the ground solely that the charter-party justified the signing of the bills of lading as presented, and that the bills of lading, as signed, gave a title to G. By Bramwell and Cleasby, BB.—On the ground that the ore was not specifically appropriated to the contract, and that, upon the facts, no property in the ore passed to K.

Held, by the majority of the Court (Bramwell and Cleasby, BB.), that T., the owner of the Macedonia, was not liable to K. for having delivered the ore shipped thereon to N., on the ground that the property in the ore had not passed to K., and that T. had performed his duty under the charter-party.

Held by Kelly, C.B. (dissenting), that T., the owner of the Macedonia, was liable to K. for the value of the ore, because the property in the ore had passed to K.

GABARRON *v.* KREEFT was a feigned issue to try the title to 400 tons of ore shipped at Cartagena, in Spain, by one Munoz on board the ship *Trowbridge*.

Kreeft v. *Thompson* was an action by the charterers of the ship *Macedonia* against the shipowner, for refusing to deliver to them ore shipped to the Tyne Dock on board that ship.

Both cases were tried together, before Bramwell, B., at the London Sittings after Trinity Term 1874.

In *Gabarron* v. *Kreeft* a verdict was entered for the defendant, leave being given to the plaintiffs to move to enter a verdict for them for an agreed sum.

In *Kreeft* v. *Thompson* a verdict was entered for the plaintiff for 92*l.*, with leave to the defendant to move.

The ore in question, in both actions, was part of the produce of mines in Spain in the hands of Munoz. Munoz had, before the shipment of either parcel of ore, entered into a contract with Kreeft, which was set out in the following letter:

124, Fenchurch-street, London, 25th Oct. 1871.

Senor Don Francisco Munoz, of Cartagena.

We hereby confirm the verbal arrangement made with you this morning respecting the produce of such of the Porman iron mines as may be in your hands, viz.:—

We agree to buy from you the whole of the iron ores which you may obtain from these mines within twelve months from this date, at the price of 7*s.* 6*d.* per English ton, delivered f. o. b. on ships at Porman, upon the conditions that you can obtain freight for all the ore so purchased by us. . . . You binding yourself to load the said vessels chartered by you when they arrive on your side, and also such vessels as we may charter. Payment for the ores to be made by your drafts upon us at fourteen day's date, if drawn against bills of lading, at three months' date if drawn against charter; if the latter mode of payment is adopted, you are bound to send us with advice of each draft an attested certificate that the quantity of ore drawn for is actually in stock, and that this ore is to be considered our property. . . .

KREEFT AND Co.

The bills of lading for the ore shipped on board the *Trowbridge* were made out to one Sabadie, and were after indorsement pledged for value to Gabarron. Sabadie was a fictitious person.

By the charter-party of the *Trowbridge*, the captain was to sign bills of lading, "as presented."

The charter-party of the *Macedonia* did not authorise the signing of bills of lading, as presented; by it the owner agreed to proceed to Cartagena, and load from the factor to the freighter (Kreeft) the quantity of ore in question, and therewith to proceed to the Tyne to discharge at Tyne Dock, and to deliver the same afloat to the said freighter Kreeft, or *assigns*, on being paid the agreed freight. The bills of lading of the *Macedonia* were, through the fraud of Munoz, made out to order, and were by indorsement for value passed to Gabarron.

Various vessels were loaded, and various payments were from time to time made, so that when the *Macedonia* arrived at Cartagena, Kreeft had already accepted drafts drawn by Munoz, which more than covered the value of the cargo which was afterwards put on board that ship; and when the *Trowbridge* arrived in March 1872, that ship's arrival being later than that of the *Macedonia*, the payments made exceeded the value of the ore shipped to such an extent that no payment could be due for the ore to be shipped on board that ship. When the *Macedonia* arrived at Cartagena Munoz began to ship ore, and kept on shipping it on board that vessel for several days, without giving any intimation that he was shipping it otherwise than for Kreeft, in accordance with the contract. But when the ore was all shipped on board the *Macedonia*, Munoz fraudulently induced the master to sign bills of lading to this order, which as before stated, passed by indorsement for value to Gabarron.

After the arrival of the *Trowbridge*, and before any ore was put on board, Munoz telegraphed to Kreeft that he would not ship on their account, and after loading her took bills of lading to Sabadie's order, which, as before stated, also passed by indorsement for value to Gabarron. No certificate was given, as required by the contract, with regard to this ore.

The facts and inferences of fact are set out in the judgment, so that it is unnecessary to enter more fully into detail here.

The court granted rules in both cases, in accordance with the leave reserved at the trial.

Benjamin, Q.C. and *R. E. Webster* appeared to show cause on behalf of Kreeft. They referred to

Pickering v. *Busk*, 15 East, 38;
Turner v. *Trustees of Liverpool Docks*, 6 Ex. 543; 20 L. J. 393, Ex.
Thompson v. *Dominy*, 14 M. & W. 403;
Brown v. *Hare*, 4 H. & N. 822; 29 L. J. 6, Ex.;
Gurney v. *Behrend*, 3 E. & B. 622; 23 L. J. 265, Q.B.;
Benjamin on Sales, 2nd edit., p. 248.

Watkin Williams, Q.C. and *Arbuthnot* (*A. L. Smith* with them), in support of the rules in both actions, cited

Ogle v. *Atkinson*, 5 Taunt. 759;
Ellershaw v. *Magniac*. 6 Ex. 570;
Falke v. *Fletcher*, 18 C. B., N. S., 403; 34 L. J. 146, C. P.;
The Chartered Bank of India v. *Henderson*, 30 L. T. Rep. N. S. 573; L. Rep. 5 P. C. 501;
Gilbert v. *Guignon*, *ante* vol. 1, p. 498; 27 L. T. Rep. N. S. 733; L. Rep. 8 Ch. 16;
Moakes v. *Nicholson*, 12 L. T. Rep. N. S. 573; 19 C. B., N. S., 290; 34 L. J. 273, C. P.

The arguments of counsel are indicated and dealt with fully in the following judgments:

Cur. adv. vult.

GABARRON AND ANOTHER *v.* KREEFT.

BRAMWELL, B.—It will be convenient in this case briefly to state the facts as I appreciate them. The defendants bought from one Munoz all the ore of a certain mine in Spain, to be shipped by Munoz free on board at Cartagena, on ships to be chartered by the defendants, or by him. The ore was to be paid for by bills against bills of lading; or on the execution of a charter and on a certificate that there was enough ore in stock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. Various vessels had been loaded and others chartered, and various payments made up to March 1872, when the *Trowbridge*, one of the chartered ships, arrived at Cartagena. The payments that had been made at that time exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded; so that had Munoz shipped ore on the *Trowbridge*, he would have been entitled to no payment from the defendants in respect of it. He had ore which he could and ought to have so shipped, taking bills of lading to the order of the defendants. Instead of doing this, he on the 8th April, and before any ore was put on board the *Trowbridge*, picked a quarrel with the defendants, telegraphed to them that he would not load the *Trowbridge* on their account, and though they telegraphed to him threatening him if he did not, he loaded the *Trowbridge*, took bills of lading making the shipment to be by one Sabadie, and the cargo deliverable to Sabadie's order. It is agreed he had at the time of shipment no intention to ship for the defendants. In giving these bills of lading the captain was clearly justified, as the charter said he was to sign bills of lading as presented. Sabadie was a sham; the ore was the ore of Munoz. Munoz indorsed Sabadie's name on the bills of lading, and then his own, and then pledged it to the plaintiffs.

The question is, whether the plaintiffs or defendants are entitled to the cargo. If the cargo ever belonged to the defendants, it is certain that Munoz could confer no title unless by estoppel or otherwise, as hereafter mentioned. This is clear on principle, as shown by *Ogle* v. *Atkinson* (5 Taunt. 759).

Did, then, the ore ever belong to the defendants? Certainly not, till it was paid for. For the agreement was not a sale of specific property, but an agreement to sell all the ore to be produced. Did it become the property of the defendants on being paid for? The contract says it shall, but it seems to me impossible that it can be so. There is nothing to distinguish the ore paid for from that not paid for; certainly there is no evidence that the ore put in the *Trowbridge* was specially carmarked, as the subject of the cargo for it or any other ship. No certificate in relation to it was given, as provided by the contract. It is impossible to suppose that if this ore had been stolen while in the possession of Munoz, though after it was paid for, the loss would have been the defendants', or that the defendants would not have had a right to reject this ore and object to its being loaded, or that Munoz might not have loaded other ore.

These considerations seem to show that no property passed in this ore before it was put on board the ship. Did that cause the property to pass? Now it is clear that Munoz had no right to put any part of that ore on the ship, except for the purpose of its being delivered to the defendants. On the other hand, it is equally clear to me that, had he said to the captain when loading, "I load this on my own account, and not on the defendants'," and the captain had taken it on board, the loading, together with the other facts, could not have passed the property. But it does not appear that he said anything till he presented the bill of lading, and then he showed that he had not loaded for the defendants, but for his own purposes. If the property had passed on taking a bill of lading made out as it is, the loading was in my opinion nugatory. The captain knew no better, and was justified in giving the bill of lading as he did, but his doing so did not take the property out of the defendants, if in them, any more than it would if the ore had been bought and paid for by the defendants, stored in their yards, and shipped by Munoz as a mere agent: (*Ogle* v. *Atkinson*, 5 Taunt. 759.)

The question, then, is reduced to this, did the property pass on actual shipment, the shipper having no right to ship except to pass the property, and having no right to retain possession for any lien for the price or otherwise, but taking when he does take it, a bill of lading deliverable otherwise than to the defendants, to whom it ought to have been made deliverable? If this matter were *res integra*, there would be strong grounds for contending it did. It would be impossible to suppose that Munoz could be heard to say, "I was doing what was right if shipping as your property, wrong if shipping as mine, but it is the latter I did." If Munoz could not say this, neither it is argued could anyone claiming title under him. It is true that Munoz had told the defendants that he would not ship on their account, but they had equally told him he should, and should ship on no other, and he shipped. Suppose goods not specific were sold to be delivered by the seller into the buyer's cart when sent for, and the seller, said I shall not put those goods in your cart unless you pay more than the agreed price, and the buyer said, you shall, and I shall send my cart, and did, and the goods were put in it by the seller, it is clear that the seller could get no more than the agreed price.

I know that different considerations may arise as to a cargo, but the question between Munoz and the defendants is the same (8 Ex., 570).

But the matter is not *res integra*, though there is no case precisely in point; *Ellershaw* v. *Magniac* certainly is not. There the shipper had shipped a different cargo to what he had agreed to ship; the captain taking it on board knew that. He was bound to tell the shipper to take it out or to give him bills of lading deliverable to him. I am aware that a cargo of linseed was to be shipped, and that some linseed was shipped. But the plaintiff had a right to reject a part cargo. The case may be tested thus: If a bill of lading of the linseed had been given deliverable to the plaintiff, he might have refused to receive it; still that case shows that a shipper rightfully shipping for a buyer, can nevertheless, get a bill of lading deliverable to himself. Neither is *Turner* v. *The Trustees of the Liverpool Docks* (6 Ex. 543; 20 L. J. 393, Ex.) in point. For there the shippers had a right of lien on the goods till they were paid for in the agreed manner. But that case also shows that goods may be put by the seller on the buyer's ship with nothing said at the time, and that, nevertheless, the seller may get a bill of lading deliverable to himself. It does not appear in that case that the shippers at the time of shipment said anything about the form of the bill of lading to be given, or reserved to themselves any right as to it. Then there is the case of *Falke* v. *Fletcher* (18 C. B., N. S., 400), in which Willes, J. (p. 409), uses expressions which go to show that a shipper may ship, saying nothing, and then demand a bill of lading in exchange for the mate's receipt, in such form as he pleases. *Wait* v. *Baker* (2 Ex. 1) is also not in point, because there the vendor had a right of lien. But Parke, B., said: "The delivery of the goods on board the ship was not a delivery of them to the defendant but a delivery to the captain, to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried." He said the same thing in *Van Casteel* v. *Booker* (2 Ex. 691). In *Moakes* v. *Nicholson* (19 C. B., N. S., 290), it was held that retaining the bill of lading, though made out in the buyer's name, prevented the passing of the property. There, however, the vendors had a lien. Mr. Benjamin on Sales, p. 306, thus sums up the result: "Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried." The cases seem to me to show that the act of shipment is not completed till the bill of lading is given, that if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him.

It seems to me, therefore, that in this case the property never passed to the defendants, and the plaintiffs are entitled to recover. I feel bound by the authorities, which, perhaps, establish a more convenient state of law than would exist if bills of lading might be got deliverable to one person, while the property was in another.

As to the question of estoppel, viz., that the defendants having authorised the signing of bills of lading as presented, have authorised an act by which Munoz has been able to deceive the plaintiffs, I am of opinion that would not avail the plaintiffs if the property in the ore had passed to the defendants. The defendants no more enabled the commission of a fraud than they would have done if the ore had been their property, never that of Munoz, in their stores, and Munoz only an agent for shipment, and the charter in the present form. What the defendants have done is, supposing the property is theirs, to put it in the possession of Munoz, and so make him appear the owner. But if I hand my watch to a man to keep for me, though I in a sense enable him to appear to be the owner, yet if he sells or pledges it, I do not loose my property.

I think judgment should be for the plaintiffs.

CLEASBY, B.—The question upon this interpleader is, whether the plaintiffs or the defendants are entitled to a cargo of ore put on board a vessel called the *Trowbridge*, at Cartagena.

The defendants had agreed to purchase of one Munoz all iron ore the produce of a certain mine; and it was to be paid for either by bills at fourteen days, if drawn against bills of lading, or by bills at three months from date of charter-party. In this latter case it was provided by the contract of sale that certificates of the quantity being in store should accompany the bills, and that the ore so drawn for was to be considered as the property of the defendants. It is obvious that the bills of exchange in this latter case would not refer to the exact burden of the vessel designated, but to an estimate only of the quantity to be taken on board. Munoz loaded the *Trowbridge* with ore in the name of one Sabadie, and procured bills of lading making the ore deliverable to the order of Sabadie, which Sabadie indorsed to Munoz, and Munoz then indorsed them for a valuable consideration to the plaintiffs. It must be taken that Munoz was not justified in doing this, and that he made the refusal of the defendants to accept two more bills an occasion for breaking his contract; and the question is, whether, under the circumstances of the case the cargo of the *Trowbridge* had ceased to be the property of Munoz when he obtained the bills of lading afterwards indorsed to the plaintiffs. I say, had ceased to be the property of Munoz, because it is, I think, clear that although the defendants agreed to buy the whole produce of the mine, the ore did not become the property of the defendants when it was taken for the time to the store, but was at that time the property of Munoz. It must be taken, I think, that by virtue of the payment the defendants had become entitled to a quantity of the ore in store corresponding with the amount of the bills drawn against the charterer of the *Trowbridge*, but it cannot de doubted that this alone would not transfer the property in any particular part, and upon this no authorities need be referred to. And the question becomes whether by any subsequent act of appreciation the property in a particular part has passed.

The question, what is a sufficient appropriation, has formed the subject of many decisions. In my opinion, as soon as there was an appropriation, by which I mean an unconditional appropriation of a part of the stock, that part would become the property of the defendants. Now it is said in the present case that by the finding of the jury up to a certain time, Munoz was loading under the contract, and afterwards was

not doing so. The effect of this would be as to so much as was loaded up to that time the property would pass; and a question would then arise as to how far Munoz would affect the title of the defendants to what had been appropriated, by delivering on board the vessel a quantity of other ore which could not be distinguished. But in reality, upon all the facts found in this case, and dealing with them subject to the powers conferred upon us to draw inferences, there is nothing to show that any quantity was delivered on board before the 8th April, when it is clear that Munoz was not appropriating any as the property of the defendants, but only selecting what he should send by the vessel. There is no proof that part was loaded. The utmost evidence is that of the letter of the 11th April, the contents of which, having been argued upon on both sides, may be taken as some evidence of the statements contained in it, and thus showing that the *Trowbridge* and several other vessels were loading on that day. But coupling this with the date of the bill of lading, the 26th April, I cannot regard this as proof that any quantity was loaded on the 8th April. And if none was on board before that time, then it appears to me that the mere act of selection from the bulk of a particular part to be placed on board the vessel is not such an appropriation as to make the contract of purchase operate on it—because the selection was in the mind of the person selecting not a selection of a portion of what had been paid for, but of what he alleged was not paid for.

It was further argued that, independent of the intention of Munoz to appropriate the ore loaded to the contract and particular drafts, the fact of loading the ore on board the vessel chartered by the defendants was of itself such an act as vested the property in them. But upon the effect of delivering a cargo contracted for on board the vessel of the vendee, the authorities are too numerous to refer to. I may mention *Turner* v. *The Trustees of the Liverpool Docks* (6 Ex. 543), as an early one, with *Ellershaw* v. *Magniac*, in the note in that case (6 Ex. 570), and *Shepherd* v. *Harrison*, in L. Rep. 5 H. of L. 116, as the last. The effect of these is, that the delivering of goods contracted for on board a ship when a bill of lading is taken, is not a delivery to the buyer but to the captain as bailee to deliver to the person indicated by the bill of lading, and that this may equally apply when the ship is the ship of the vendee. Such would, I think, be the proper conclusion, independent of the clause of the charter-party, that the captain is to sign bills of lading "as presented." This does not mean merely as regards price or any particulars of that sort, because it is plain that when the charter was effected it was uncertain whether Munoz would not choose to draw at fourteen days against bills of lading, in which case he might, no doubt, have made the cargo by the terms of the bills of lading deliverable to himself. The captain knows nothing about the arrangements between Munoz and the defendants, he only knows that Munoz is the person who is to fulfil the charter-party on behalf of the defendants. Thus the defendants make it obligatory upon the captain to give to Sabadie or Munoz this document of title to property transferable by indorsement, and this, if not an estoppel against the defendants, as between them and the *bonâ fide* holder of this document of title, very much strengthens the conclusion that Munoz having this power expressly reserved to him, acted throughout with reference to it as he did in fact exercise it to the last.

For the above reasons I am of opinion that the plaintiffs are entitled to succeed upon this issue.

KELLY, C.B.—This case differs from *Kreeft* v. *Thompson* in one point only, but that one is all-important. Here, the facts in all other respects being substantially the same, the charter-party of the ship (in this case called the *Trowbridge*) contained these words: "The captain to sign bills of lading, as presented." Now these words appear to me, not only to convey an authority to the master, but to impose an obligation upon him to grant and sign bills of lading, in whatever form and to whatever effect he might be required by Munoz to sign them. I think, therefore, that the bills of lading, though a fraud upon Kreeft, were granted and signed under and in strict pursuance of his authority, and having been indorsed for value to the plaintiffs, entitled them to the ore in question, and therefore to the judgment of the court.

KREEFT *v.* THOMPSON.

BRAMWELL, B.—This case differs from *Gabarron* v. *Kreeft* in the following particulars. It is an action on a charter-party by the charterers against the shipowner for not delivering a cargo to the plaintiffs according to the charter-party. The charter-party did not authorise the captain to sign bills of lading *as presented*. By it the shipowner agreed to deliver the cargo to the plaintiffs. The loading had partly taken place while Munoz was intending to fulfil his contract, but was finished after. The cargo had been specifically drawn against.

If I am right in my opinion in *Gabarron* v. *Kreeft*, the property in this cargo never passed to the plaintiffs, for I think it makes no difference that at the beginning of the loading Munoz intended to ship for the plaintiffs. As I have said, the act is not complete till the bill of lading is given.

Was the shipowner, nevertheless, bound by the charter to deliver the cargo to the plaintiffs? I think not; I think the charter only means that the cargo shall be delivered to the charterer if he has a right to receive it, and that he had no right to receive this. Then it will be said that the shipowner had no right to take it on board. I think he not only had such right but was bound to do so. I think that if Munoz had said to him, I will not ship for the plaintiffs, but will ship for myself, and the captain had said, I will not take the cargo but sail away in ballast, he would have done wrong. A captain, when he cannot get the agreed cargo, is bound to take some other cargo if he can get it, so as to lessen the loss. Suppose Munoz had wholly refused all shipment, and some other owner of ore had offered a shipment, the captain would have been bound to take it, and had he done so would not have been bound to deliver it to the plaintiffs. I think, on the authorities referred to in *Gabarron* v. *Kreeft*, that the captain could not refuse to sign the bill of lading which Munoz required, unless he let Munoz take out the cargo, and that he would have done wrong had he required him to do so. There is no suggestion in any of the cases cited in *Gabarron* v. *Kreeft* that any action would be maintainable against a captain or owner for giving bills of lading

to the order of the shipper. Besides, Munoz was the agent of the plaintiffs, and the captain was justified in signing bills of lading as he required.

I think our judgment should be for the defendants.

CLEASBY, B.—This is not like *Gabarron* v. *Kreeft*, in which the question of property only was involved. It is an action on a charter-party by the freighters against the shipowners. By the charter-party the defendant was to receive from the factor of the freighters at Cartagena, a cargo of ore, and deliver it in the Tyne Docks to the freighters or assignees. No question arises in the present case upon the pleadings, and the case is to be dealt with entirely on the facts, but as it is a question of contract, it is essential to see what the exact contract is, and it is to deliver to the freighters or assignees. The word "assignees" cannot mean, I think, assignees of the charter-party, but it may mean either assignees of the cargo or assignees of the bill of lading, which is the title to property in the cargo.

I must say I have very great difficulty in dealing with this case from the scantiness of the materials for any decision. The question relates to the cargo of a vessel called the *Macedonia*, which it appears was chartered as early as the 9th Nov. 1871, and drawn against on the 29th Nov. It has been noticed that by the arrangement between Munoz and the plaintiffs, the cargo might be drawn against either by bills at three months from the date of the charter-party, or at fourteen days from the bills of lading. It might appear from this that bills of lading were not to be taken except when they were drawn against. But that is not the case; the correspondence shows throughout that in cases where the bills had been drawn against the charter-party, bills of lading were still to be taken by Munoz and forwarded to the plaintiffs. See, for example, the letter of the 29th Nov. 1871, in which Munoz says, "We have drawn on you this day a bill for 123*l.* at ninety days, which we place to your credit on account of cargoes per *Macedonia*, *Nautilus*, and *Messenger*, invoices of which will follow with their respective bills of lading." And as regards the cargo by the *Macedonia*, which we are now considering, and which had been drawn against so early as the 29th Nov., we have the following in the letter of the plaintiffs themselves, dated the 24th of Jan., "We are expecting bills of lading of *Macedonia*, and *Retriever*," &c. It is true there is nothing to show that these bills of lading did not make the cargo deliverable to the plaintiffs. But this is not material, because the shipowner or captain knew nothing of the arrangement between Munoz and the plaintiffs, and if there were to be bills of lading Munoz must be the person to determine in what form they should be, because it is admitted that he might draw in each case against bills of lading, in which case, no doubt, the bills of lading would be deliverable to himself, or he would have no security, and the captain would not ask him why he took the bills of lading deliverable to himself.

The effect of this seems to me to be that the captain must look to Munoz to determine how the bills of lading are to make the cargo deliverable, and that he performs his contract by delivering the cargo according to the bills of lading, though by the charter-party the cargo is deliverable to freighters or assignees. If he is addressed to Munoz as the factor of the shipper, and Munoz is to determine whether he will take bills of lading deliverable to himself, the shipper is bound by his act in having the goods made deliverable to himself, and it cannot make any real difference in substance whether, by the bills of lading, the cargo is made deliverable to Sabadie or to Munoz. This seems to be a more satisfactory mode of deciding the case than by deciding it on the ground that the plaintiffs did not perform their part of the contract, because their factor did not send a cargo deliverable to the freighters or their assigns, although it really comes to the same thing.

KELLY, C.B.—The question in this case is, whether a quantity of iron ore, shipped on board the *Macedonia* by one Munoz, is the property of the plaintiffs Kreeft and others, and whether the master was bound to deliver it to them upon its arrival in England, or whether it had passed under the bills of lading to order, signed by the master, at the instance of Munoz in favour of one Sabadie, and from whom it passed by indorsement to Gabarron, the plaintiff in the other action.

I am of opinion that the ore had become the property of the plaintiffs, if not before, at the time when it was shipped on board the *Macedonia;* that the master was bound by the terms of the charter-party to deliver it to the plaintiffs upon the arrival of the ship in the Tyne; and that not having done so, his owner, whom the defendant represents, is liable to this action.

The ore was shipped by Munoz at Cartagena, under a contract between him and Kreeft, by which Kreeft had contracted to buy from him the whole of the iron ores which he might obtain from the mines within twelve months from the 25th Oct. 1871. And it was expressly agreed that Munoz should load such vessels as should be chartered by Kreeft; payment to be made at fourteen days' date, if drawn for against bills of lading, and at three months' date, if drawn against charter; and Munoz to send with advice of each draft, an attested certificate that the quantity of ore drawn for was actually in stock, and that that ore was to be considered the property of Kreeft. The *Macedonia* was chartered by Kreeft, and by the charter-party the owner expressly agreed "to proceed to Cartagena, and load from the factor to the freighter (Kreeft) the quantity of iron ore in question, and therewith to proceed to the Tyne, to discharge at Tyne Dock, and to deliver the same afloat to the said freighter Kreeft, or assigns, on being paid the agreed freight." The *Macedonia* proceeded to Cartagena, and Munoz having already drawn, and Kreeft having accepted drafts exceeding in amount the price of the ore in question, and having taken it out of stock, and so separated it from the bulk of the stock, shipped the quantity of ore in question on board the *Macedonia*, the shipment continuing for several days, and no intimation having been given by Munoz to the master that the ore was otherwise than destined to and shipped for the account of Kreeft, the charterer of the ship. But when the shipment was complete, Munoz fraudulently prevailed on the master to sign bills of lading for the ore to order, which afterwards passed by indorsement for value to Gabarron.

Under these circumstances, I am of opinion that the whole case depends upon the contracts between the parties, that is to say, between Kreeft and Munoz, and Kreeft and the owner

of the *Macedonia* respectively; and that Munoz having contracted that the ore, when drawn for and the drafts accepted, should become the property of Kreeft, it became his property as soon as he had accepted beyond the amount of its price, and it had been separated from the bulk of the stock.

But if this were doubtful, I am clearly of opinion that it became his property the moment it was put on board the *Macedonia*. The case was contended in argument to be the same as if the plaintiff had purchased and paid for a quantity of merchandise which the seller contracted to deliver into the purchaser's waggon when he should send for it, and that he had hired the waggon of the defendant, who had contracted to carry it to the plaintiff's warehouse and there deliver it to the plaintiff, but whose servant, the waggoner, having received it into the waggon, had signed a contract to deliver it, and had afterwards in fact delivered it, to another person. It has been argued that the shipment was made with a view to the bill of lading, and with the intent to take a bill of lading to order, and that the shipment was not complete till the bill of lading was signed. No doubt the shipment and the bill of lading in general constitute but one transaction. But in this case it is to disregard altogether the contracts between the parties to apply to it this general rule or practice. Here Munoz had received a copy of the charter, and knew that the vessel had been chartered by the plaintiff and that the owner had contracted to receive the ore from him, and to deliver it to the plaintiff upon the ship's arrival in the Tyne. And I hold that it was not competent to Munoz, or to the master, or to both together, to change the property by the wrongful act of Munoz, or the unauthorised acquiescence of the master, the one in demanding, the other in granting, the bills of lading.

Upon the simple and plain ground, therefore, that under the contract between Kreeft and the shipowner, the master, as the agent of the owner, was bound to deliver the ore on its arrival in the Tyne to Kreeft, and that he could not exonerate himself from that obligation by the unauthorised signature of the bills of lading; it appears to me that Kreeft was entitled, upon the arrival of the ship in the Tyne, to the delivery of the ore, and consequently that the defendant is liable to this action for the non-delivery.

Many cases were cited on the one side and on the other, but it appears to me that none of them has any application to the case before the court, except indeed the case of *Ellershaw* v. *Magniac*, in a note in 6 Ex. 570, where the facts were very similar to the present, but with this marked distinction, that there was no such express contract as here, that the property of the goods should vest in the purchaser upon their having been drawn for, and the drafts accepted; and further, that a part of the goods only was shipped, and the vessel filled up with other goods, for which the purchaser had not contracted, and so that as he was not bound to accept the one and had never contracted for the other, the property in neither had vested in him by the shipment. On these grounds, I am of opinion that the plaintiff Kreeft is entitled to the judgment of the court.

Rules absolute.

Attorneys for the plaintiff Gabarron, *Williamson, Hill*, and *Co.*, for *Ingledew*, and *Co.*, Newcastle-on-Tyne.

Attorneys for the defendant Kreeft, *Fry* and *Hudson*.

Attorneys for the plaintiff Kreeft, *Fry* and *Hudson*.

Attorneys for the defendant Thompson, *Williamson, Hill*, and *Co.*, for *Ingledew* and *Co.*, Newcastle-on-Tyne.

COURT OF ADMIRALTY.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

Wednesday, July 14, 1875.

THE JENNIE S. BARKER; THE SPINDRIFT.

Collision—Steamtug lying to—Duty to avoid sailing ship.

A steam tug hove to during fine weather in a fairway and waiting for employment, is bound to keep out of the way of sailing ships using the fairway.

THESE were cross causes of collision instituted, the one on behalf of the Liverpool Steam Tug Company (Limited), the owners of the tug *Spindrift*, against the barque *Jennie S. Barker*, and her owners intervening; the others by the owners of the *Jennie S. Barker*, against the *Spindrift*, and her owners intervening.

The causes were by agreement heard upon the petitions filed in each cause, without answers being put in. The petition filed by the owners of the *Spindrift*, was, so far as is material, as follows:—

1. Between noon and 0.30 p.m., on the 14th June 1875 the steam tug *Spindrift*, of 175 tons gross register, manned by a crew of nine hands, all told, was about one mile from the land, between Point Lynas and Middle Mouse.

2. The wind at such time was about south-west, blowing a moderate gale, with squalls, and the tide was about half ebb, and of the force of about one and a half knots per hour. The *Spindrift* was lying to, with her engines stopped and her helm lashed to port, and was heading about south-east.

3. At such time a barque, which proved to be the above-named barque *Jennie S. Barker*, was seen at the distance of about one mile and a half from the *Spindrift*, coming up astern of her, a little on her port quarter.

4. The *Jennie S. Barker* approached and caused danger of collision with the *Spindrift*. The engines of the *Spindrift* were ordered ahead, but before she could go ahead the *Jennie S Barker* ran against, and with her stem and port bow struck the *Spindrift* on her starboard paddle-box, and did her a great deal of damage, in consequence of which she took the assistance of a steam tug, by which she was towed to Liverpool.

5. Those on board the *Jennie S. Barker* improperly neglected to keep a good look-out.

6. The *Jennie S. Barker* improperly neglected to keep out of the way of the *Spindrift*.

7. The helm of the *Jennie S. Barker* was improperly starboarded before the said collision.

8. The said collision was occasioned by all or some or one of the matters stated in the three last preceding articles of this petition, or otherwise, by the negligent and improper navigation of the *Jennie S. Barker*.

9. The said collision was not in any way occasioned by any negligence on the part of those on board the *Spindrift*.

The petition filed on behalf of the owners of the *Jennie S. Barker* was as follows:—

1. The *Jennie S. Barker* is a barque of 1059 tons register, and at the time of the occurrence hereinafter mentioned was on a voyage from St. John, New Brunswick, to Liverpool, with a cargo of deals. The *Spindrift* is a steam tug of the Port of Liverpool.

2. Shortly before noon, on the 14th June 1875, the *Jennie S. Barker* was off the coast of Anglesea, near to Point Lynas, heading about S.E. by E., to E.S.E., and

intending to pick up a pilot at the Point Lynas Station to take her into Liverpool. The wind was unsteady, blowing hard from S.S.W. to S.W., with occasional heavy squalls which were accompanied by thick, heavy rain. The *Jennie S. Barker* was under lower fore and maintopsails, foresail, fore and maintopmast staysails, and mizen staysail, and was going about five knots an hour.

3. At this time and under these circumstances the look-out of the *Jennie S. Barker* saw and reported a pilot boat and a steam tug, which latter vessel afterwards proved to be the *Spindrift*. She was right ahead, heading somewhat in the same direction as the barque, but more to the south. She appeared to be about a mile distant. At this time the weather became thick with rain, and the pilot boat was lost to view.

4. The *Jennie S. Barker* kept her course until she was about three ship's lengths from the *Spindrift*, when it was found that, although steam and smoke were coming from the steam pipe and funnel of the latter, she had apparently stopped, and was not moving ahead. The helm of the *Jennie S. Barker* was thereupon, in order to avoid a collision, at once put hard up, but she did not answer her helm.

5. Immediately before the collision the helm of the *Jennie S. Barker* was put hard down, with the view of easing the blow, but before the port helm had taken effect the martingale of the barque and the starboard paddle-box of the *Spindrift* came into contact, the jib boom of the barque at the same time catching the mast of the tug and bringing it down, and considerable other damage was done.

6. At the time when the helm of the *Jennie S. Barker* was put up, no one was visible on the deck of the *Spindrift*. Her crew were seen running up from below just at the time of the collision.

7. The *Spindrift* improperly neglected to keep out of the way of the *Jennie S. Barker*.

8. A proper look-out was not kept on board the *Spindrift*.

9. Those on board the *Spindrift* improperly neglected to hail or otherwise warn the *Jennie S. Barker* that the *Spindrift* was stopped.

10. The said collision was caused by the negligence and improper navigation of the *Spindrift*, and was not caused by any negligence of those on board the *Jennie S. Barker*.

The causes came on for hearing before Sir R. Phillimore, assisted by Trinity Masters, and witnesses were called by both parties.

By the witnesses called on behalf of the *Spindrift*, it was proved that she was lying-to waiting to be engaged to tow vessels into Liverpool; that the place where she was hove to was the fairway channel for ships entering the port of Liverpool; that she lay in the same position till the barque was close to, expecting the barque to go clear, but then seeing that the barque was not going clear, an order was given to her engines to go ahead, but that nobody being at the starting gear when the order was given, the order was not instantly executed, and before the tug could move ahead she was struck by the barque.

The witnesses called on behalf of the barque proved that they observed the tug some distance away, and the barque was kept on her course in the expectation that the tug, as a steam vessel, would keep out of the barque's way; that they had engaged no steam tug, and expected that the *Spindrift* would, as other tugs had done previously, get under way and come alongside the barque, with a view of getting engaged by the barque to tow her into Liverpool. Another tug was following and had spoken the barque, but was not engaged. The master of the barque held on till close to the tug, and then seeing that the tug was not moving, and that he was nearing her so as to strike her on the starboard side, put his helm a starboard, so as to pass astern of her and along her port side. The barque, however, would not answer her helm quickly enough, being very deeply laden, and her helm was thereupon put hard aport to lessen the effect of the blow.

The remaining facts of the case are set out in the petitions.

The main question was, whether the *Spindrift*, being hove to, was to be considered as a steamer within the meaning of the Regulations for Preventing Collisions at Sea.

Milward, Q.C., and *E. C. Clarkson*, for the *Spindrift*.—A tug boat lying to is not to be treated as a steamship, so as to come within article 15 of the Regulations for Preventing Collisions at Sea, to be under any obligation to get out of the way of a sailing ship under way. The sailing ship ought to have seen that the tug was lying to, and should have given way. [Sir R. PHILLIMORE.—The ship says that she had good reason to believe you were lying to waiting for her, and the question is, why were you not sufficiently under command to enable you to have kept out of her way?] To make it the duty of the tug to keep out of the way of the ship she must have been "proceeding in such a direction as to involve risk of collision;" but the tug was not "proceeding" at all, and is, consequently, not within the rule. This was distinctly held in *The Helvetia*, which was affirmed on appeal to the Privy Council (*a*). [Sir R. PHILLIMORE.—That was the

(*a*) JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Nov. 28, 1868.

THE HELVETIA.

THIS was an appeal from a decree of the High Court of Admiralty of England in a cause of damage instituted by the owners of the late steam tug *Prince Arthur* and her master and crew against the steamship *Helvetia* and the National Steamship Company (Limited), her owners intervening. The case on behalf of the plaintiffs in the Court of Admiralty was that the steam tug was, on the morning of the 16th Aug. 1867, hove to off the South Stack Lighthouse on the starboard tack, under her foresail and jib, and with her engines stopped, waiting for employment in the usual way. The weather was fine and clear, the wind a moderate breeze from the N.W. In the circumstances the *Helvetia* was at about 10 a.m. observed on the starboard side of the tug a long way off inward bound. The *Prince Arthur* continued hove to, and the *Helvetia* under canvas and steam continued to approach her. When the *Helvetia* got very near the steam whistle of the *Prince Arthur* was sounded, and her engines were turned astern full speed; but the *Helvetia*, without slackening speed, came on and ran into the *Prince Arthur* on her starboard side and sank her. It was alleged that if a proper look out had been kept on board the *Helvetia* those on board of her must have seen that the *Prince Arthur* was lying to, and that the *Helvetia* ought to have kept out of the way of the *Prince Arthur*. On behalf of the defendants it was alleged that the *Helvetia* was bound upon a voyage from New York to Liverpool, and when off Holyhead, on 16th Aug., about 10 a.m., her look out reported a steam tug on the port bow. This steam tug, which was the *Prince Arthur*, was about six miles from the *Helvetia*, bearing two points on her port bow, and pursuing a south-easterly course. The *Helvetia* continued her course until just before the collision when, in order to ease the blow, her helm was ported, her engines were stopped, and her topsail halyards let go. It was submitted that as the *Helvetia* and the *Prince Arthur* were crossing so as to involve risk of collision, and the *Prince Arthur* had the *Helvetia* on her starboard side, it was the duty of the steam tug to keep out of the way, and that the negligence of the steam tug caused the collision, or, at any rate, contributed to it.

The facts of the case are fully set out in the judgment of the learned judge of the High Court of Admiralty, which was as follows:

Jan. 30.—Sir R. PHILLIMORE: If the court entertained any doubt whatever as to the judgment which it ought

case of two steamers, and distinguishable from the present, on the ground that the steamer could not possibly suppose the tug to be waiting for her, and must have known that she was lying to without the intention of moving.] But if, as there held, a tug lying to is not to be considered a steamship under way, the decision applies equally to the present case.

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to give in this case, it would have adopted the usual course of retiring with the Elder Brethren of the Trinity House, and having a deliberate consultation with them before it pronounced its decision. I have, during the course of the arguments, and during the course of the discussion, put before the Trinity Masters such questions as I thought necessary to elucidate any difficulties incident to nautical experience and nautical science arising out of this case, and I have obtained from them answers which to me are perfectly satisfactory. I, therefore, proceed to give my judgment immediately. This was a collision which took place about twenty-two miles, I think, off Holyhead, somewhere between Holyhead and Bardsey Island, about half-past ten on the morning of the 16th of Aug. 1867; the weather was perfectly fair, and the day was, as I think one of the witnesses said, a beautiful fine day. The vessels which came into collision were a paddle steam tug of the ordinary size, called the *Prince Arthur*, belonging to the port of Liverpool, and which carried a crew of twelve hands, all told, and the screw steamer, the *Helvetia*, manned by a crew of ninety-eight men, and bound for Liverpool from New York, she is, according to the evidence, 371ft. in length, and no less than 2769 tons register. The case set up on behalf of the *Prince Arthur* is that she was lying to, waiting for a job, and that while she was so lying to, she was run into by the steamer *Helvetia*, and sunk. Now, the first fact of importance to ascertain, and for the ascertaining of which the court is responsible, is the condition in which this steam tug actually was at the time when she was run into, and at the time when she was seen. The evidence on this point is that she was lying to with her jib and foresail set, and with her engines in this condition: the fires had been pulled forward so as to keep the steam down, and there was just enough steam—and only enough steam—kept on her to enable her to work her engines a little astern; she was lying, I think, within eight or nine points of the wind, and according to the opinion of the gentlemen by whom I am assisted, there is nothing in that circumstance which would prevent her being what is called "lying to." Such being the facts, as they appear to me, irresistibly proved by the evidence in this case, the first question I put to the Trinity Masters was, whether a vessel in such a state as that I have described (I should have added to that that she had her helm lashed hard-a-port) whether a vessel in that condition was, or was not, according to the proper nautical understanding of the term "lying to," and they have no doubt whatever that with her helm lashed hard-a-port, and the fires as I have described, lying as near to the wind as possible, that she was lying to. I may say that this evidence with regard to her condition so given on behalf of the plaintiffs is entirely uncontradicted by the evidence produced by the defendants; indeed, in my opinion, it is confirmed, because, with regard to the speed of the steamship, it was admitted by the witness Bentley, the mate of the *Helvetia* (and who, as has been truly said, is responsible for this collision, and who had every motive therefore to exempt himself from that responsibility), that the steam tug did not move more than a vessel would do with her helm lashed and lying to; and although it is true that he maintained that she was in motion at the time of the collision, he admitted that that was an inference which could not be drawn from the speed at which he alleged that she was approaching. Now, the next question of importance is at what distance these two vessels were seen. The witness Evans, who is the mate of the *Prince Arthur* says he saw the *Helvetia*, when she was reported to him the second time, about three-quarters of a mile to a mile distant. The witness Bentley, produced by the defendants, said, I think, it was from six to seven miles off that he saw this vessel, and the last witness who was produced, James McEvoy, and to whom the court is certainly not inclined to give much credence, says that he saw the tug three-quarters of an hour, and that she was twelve or thirteen miles off when he first saw her. It is admitted by the defendants that the steamer *Helvetia* never altered her course till the moment of collision; that she did port her helm just before the collision is true, but it had no effect whatever on the course of the vessel. Therefore, that must be taken, whatever the inference may be from it, as a fact proved in this case. On the part of the steam tug it is maintained also, that, with the exception of keeping her occasionally a little to the westward, and occasionally a little to the eastward, as she was lying to, her helm was unaltered during the time. The evidence of a witness of the name of Higman is of importance at this part of the case. That witness is a shipwright, and he was a passenger on board the *Helvetia*, and he gave evidence to this effect: That he saw the tug four or five miles off, two or three points on the port bow, as they approached; that he made an observation to a Mr. Watson; that he saw the officer in charge of the *Helvetia* walking up and down and talking to a pilot; that the *Helvetia* continued her course; that when he saw them approaching the tug, he took notice of the officer to see if he was looking towards the tug, he then called to the officer when they were two or three lengths off, and asked him if he saw the tug under his bows; that the officer then looked over the rails and saw the tug, and called out, "Hard-a-port, stop the engines." That was very serious evidence, considering the character of the person who gave it, and the opportunity he had of forming his opinion. On the other side, Bentley, who was the officer who had the watch, is produced, and he admits that he was walking up and down with the pilot in the way that is described. He denies that he did not see this vessel at an earlier period, because he says that she was reported to him by the look-out; that he saw the tug two points on his port bow when she was six or seven miles off. He is asked as to this conversation, and he denies it, but at the same time he admits that he did look over the rail just before the collision, and that he did at that time give the order to port. The question arises immediately to anybody conversant with the rules of evidence and the mode by which the truth is ascertained in cases of conflicting testimony—where is the pilot, who could have given the court the means of ascertaining whether Higman or Bentley was speaking the truth? The pilot is not produced, and no reason is given at all to account for his absence; therefore I come to the conclusion, and I think rightly, that the court ought to rely upon the evidence of Higman, and if it does do so there is no doubt that there was very gross negligence and carelessness on the part of those on board the *Helvetia*; and, though that is an opinion for which the court is alone responsible, it is satisfactory to say that in that opinion the Trinity Masters entirely agree. The question then comes to be considered—whether the *Helvetia* being (according to the opinion of the court, corroborated by that of the Trinity Masters) to blame for this collision, to use the words of the 20th rule "from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen"—whether the steam tug can be said in any way to have contributed to this collision, so as to render her equally to blame, or at all to blame for it. It has been contended that the evidence shows that the steam tug falls under the 14th article of the Regulations, which is in these words:—"If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." And it is said that this is a point which has not yet been decided, with reference to such circumstances as exist in the present case, namely, that of a steam tug lying to, and having some steam power on her, sufficient to enable her to lay to. That is the evidence as to the condition of the steam tug in this case; and it is said that a steam tug in that condition, and in this case shown to be a little on the port side, heading S.W. by S., and the other vessel being shown to be heading N.E. half E., it is said that, given these circumstances, there is a case to which the rule applies, for the two ships are both under steam, and are "crossing so as to involve risk of collision." The court laments that the duty should be cast upon it of construing for the first time this article; but I must say that I do not feel at present any difficulty whatever in putting what appears to me the true construction upon

The ship had no right to keep on her course till the collision was inevitable; she ought to have taken steps sooner. The real cause of collision was the starboarding of the ship.

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it. I do not think that this rule ever was intended to apply to a steam tug lying to, though not motionless, in such a condition as the steam tug was in this case. I think it applies to two ships under steam, and crossing in the usual sense of the term—namely, both approaching one another, both pursuing their own courses, and crossing each other in so doing; and again, it is a consolation to know, though the court must be responsible for the construction of this rule, that the Elder Brethren of the Trinity House, by whom I am assisted, are not able to conceive, consistently with usage and the ordinary practice of vessels of this description, that any other construction could be reasonably put upon that article. I should also mention, and I particularly drew the attention of the Trinity Masters to it, the sail carried by the tug at the time she was lying to, and their opinion is that so far from that sail preventing her from being what is technically and properly called "lying to," it would rather assist her than otherwise; that the sail that she carried was necessary for her, that she might be lying to. I am not aware that any advantage would be derived from a further discussion of the evidence in this case. I am of opinion, upon the evidence, that this steam tug was lying to, and that the collision was caused by the *Helvetia*, and in both those opinions the Elder Brethren by whom I am assisted entirely concur. They are of opinion that the steamer saw the tug, or ought to have seen the tug, in full time to have got out of her way, and that there was nothing in the action of the tug that was wrong, that there was nothing that could indicate to the tug the probability of this enormous vessel running over her, with twenty miles of sea on either side of her, where the steamer could easily pass; and upon the other hand, if there had been a good look-out on board the *Helvetia*, they must have known, or at least ought to have known from the position in which the steam tug was, and the manner in which she was lying, that she was lying to, and that it was the duty of the *Helvetia* therefore to get out of her way. These are the circumstances which induce the court to come to the conclusion which it has stated, and I pronounce the *Helvetia* to be alone to blame.

From this judgment the owners of the *Helvetia* appealed to Her Majesty in Council upon the grounds—First, because the evidence showed that the *Prince Arthur* was under steam within the meaning of Art. 14 of the Regulations for Preventing Collisions at Sea; secondly, because the evidence showed that the *Prince Arthur* was crossing the *Helvetia*, having the latter on her own starboard side, within the meaning of the said Art.; thirdly, because it was, therefore, the duty of the *Prince Arthur* to keep out of the way of the *Helvetia*; fourthly, because it was the duty of the *Helvetia* to keep her course; fifthly, because the *Helvetia* was justified in assuming, until the collision became inevitable, that the *Prince Arthur* would keep out of the way of the *Helvetia*; sixthly, because there was nothing in the state of the tug or her engines to prevent her from keeping out of the way; and, seventhly, because the tug at any rate contributed to the collision, because it might have been avoided by reasonable care on the part of those on board the tug, by going astern or otherwise moving away from the *Helvetia*.

Dr. *Deane*, Q.C. and *Arthur Cohen* for the appellants.

The *Solicitor-General* (Sir W. B. Brett) and *Vernon Lushington* for the respondents.

Their LORDSHIPS, without calling upon the respondents, dismissed the appeal with costs, characterising it as frivolous.

Proctor for the appellants, *Jennings*.

Proctors for the respondents, *Toller* and *Son*

[The facts and the judgment of the learned judge of the Admiralty Court are taken from the printed appendix used on the appeal, and the decree of the Judicial Committee is given as it appears in the *Shipping Gazette* of the date, after comparison with the printed copy of the Order in Council dismissing the appeal, dated 9th Dec. 1868, and preserved in the library of the Privy Council office.—ED.]

Butt, Q.C. (*W. C. Gully* with him).—There is a great distinction between this case and *The Helvetia* (*ubi sup.*); in the latter case the tug was lying to under sail. Here the ship knew that the tug was lying to waiting for employment, and that it was customary for tugs so lying-to to get out of the way of vessels coming up; they get under way and come alongside to speak the vessel. [Sir R. PHILLIMORE.—Had the ship any right to go on ahead until the collision was inevitable?] She expected the tug to get out of the way; but, of course, could not tell whether the tug would go ahead or astern, so that either starboarding or porting would be equally dangerous; she could only go on.

Milward, Q.C., in reply.

Sir R. PHILLIMORE.—I will begin the few observations I have to make by saying that, in my judgment, the case of *The Helvetia* (*ubi sup.*) has not any clear application to this case, as the circumstances are so different, and it was agreed that there was very little brought forward in this court and in the Privy Council to enable it to be understood.

Now, in this case, the steam tug *Spindrift* was hove to in a fairway channel, and it is no doubt a question of considerable importance, what is the duty of a steam tug when it is in this position? I have consulted with the Elder Brethren of Trinity House on this point, and have looked at the case, and especially at the consequences which would ensue from laying down the law, that a steam tug in such a position is to be considered in the same category as a sailing vessel, or a vessel at anchor, and having no obligation cast upon her of getting out of the way of another, a sailing vessel. I think I am bound to come to the conclusion that a steam tug that places herself, as I have said, in the fairway of a channel, hove to, waiting for employment, is bound to keep herself in readiness to move out of the way of sailing vessels, especially in such weather as is proved to have existed at the time.

The evidence, however, shows that there was not due vigilance displayed by the steam tug on this occasion. There was no man at the starting gear when the order was given to go ahead, and I think it was one of the witnesses produced on behalf of the *Spindrift*, the mate, who very fairly and properly stated that when the vessel was hove to in this way, there was no one to execute the order to go ahead at the time. The Elder Brethren think that the master of the barque was well founded in the observation that one stroke or two would carry the steam tug ahead if the order had been complied with, and the steam tug had started forwards with that object.

It has been said that the barque was to blame, at all events for starboarding her helm, as the evidence established that she did so when nearly abeam of the tug. In the first place, there is the greatest improbability that this should have been the case, and I am bound to say that the evidence has not removed the inference of that improbability from my mind. I do not believe that she did starboard when she was abeam of the tug. On the other hand, it has been urged that it is very improbable she could not have answered her helm more readily than she did, because the case made on behalf of the *Jennie S. Barker* is, that the helm had no action under the circumstances. Well, it is to be remembered—and upon

this point I have had the advantage of conferring with the Elder Brethren—the evidence establishes that she was deep in the water, that her tonnage was great, that there was a strong wind on her beam, and that she had but very little canvas. Taking all these circumstances together, the Elder Brethren think—and I agree with them—that the statement of the *Jennie S. Barker* is one that they have no reason to disbelieve. The statement of her captain is, that she did not answer her starboard helm before the collision.

Therefore, looking to all the circumstances of the case, I can come to no other conclusion than that the *Spindrift* must be held alone to blame for the collision.

Solicitors for the *Spindrift, Hall, Stone,* and *Fletcher.*

Solicitors for the *Jennie S. Barker, Bateson* and *Co.*

Tuesday, Jan. 19, 1875.

THE JAMES ARMSTRONG.

Salvage—Apportionment — Agreement — Values— Varying decree.

Where salvors have entered into an agreement as to the apportionment of salvage, which in the opinion of the Court of Admiralty is equitable, and not obtained by coercion, the court will uphold the agreement, and apportion the salvage awarded in accordance therewith.

Where the High Court of Admiralty has made a decree awarding salvage upon values furnished by the respective owners of the ship, freight, and cargo, and accepted by the salvors, and afterwards it is discovered by the owner of cargo that he has been ordered to pay upon the value of the cargo without deducting the freight due upon delivery, the court has power to and will, if it sees fit, reduce the amount of salvage, and vary the proportions payable by the respective owners.

THESE were causes of salvage instituted on behalf of the owners, master, and crew of the steamship *Queen of the Bay,* and of the owners, masters, and crews of thirteen pilot cutters and luggers belonging to the Scilly Islands, and of the owners and crews of nine gigs belonging to the same place, and of William Williams, gentleman, of St. Mary's, Scilly, against the barque *James Armstrong* and the cargo lately laden therein, and the freight due for the transportation thereof. The *James Armstrong* was a barque of 382 tons register, and was on a voyage from Truxillo to Waterford for orders, with a cargo of mahogany, dyewood, and broken stowage; she put into Waterford, and getting orders there left for London on Jan. 23rd, 1874. On March 3rd, 1874, about 1.30 p.m., the *James Armstrong* was discovered by some of the salvors derelict, bottom upwards, and with a large hole in her stern, about three miles E.N.E. of St. Mary's Head, Scilly; she was then driving seaward. The whole of the pilot cutters made fast, and tried to tow her towards the land; they towed her till midnight, when her tackle fouled the bottom and held fast; she was then to the N.E. of the Island of Menewhethan, about three miles off.

The other facts are sufficiently stated in the petition filed on behalf of the *Queen of the Bay,* the gigs, and William Williams, which so far as material alleged:

1. That on Tuesday, 3rd March 1874, at about 11.30 a.m., William Williams, of Borough St. Mary's, in the Scilly Isles, observed something floating very low in the water in a south easterly direction, and two miles outside the eastern island of Menewhethan, got a spy-glass and then discerned the said object to be a vessel, floating apparently bottom upwards, and which afterwards proved to be the *James Armstrong,* the vessel proceeded against in this cause, and that he thereupon hurried off to Hugh Town two miles distant and gave information of the said wreck, and that, in consequence of such information, a telegram was dispatched by Lloyd's agent at Scilly to the manager of the West Cornwall Steamship Company, Limited, at Penzance, which was received by him at 2.40 p.m. of the same day at Penzance, and that he thereupon dispatched from Penzance the *Queen of the Bay,* of 80-horse power nominal, owned by the said company, and which plies regularly between Scilly and Penzance, carrying the mails with a crew of eight hands on board, including Captain Gibson, her master, to a spot three miles N.E. of Menewethan in the Isles of Scilly, and that the said steamer arrived at the spot designated at about 6.30 p.m. on the same day, and there found the pilot cutter *Rapid* with a rope fast on a derelict vessel, which proved to be the barque *James Armstrong,* the vessel proceeded against in this cause, laden with a cargo of mahogany, rosewood, and cocoanuts of great value. That there were five or six gigs and seven other pilot cutters standing near the said derelict. That the master of the steamer immediately tendered the services of the steamer to the cutter *Rapid,* and afterwards to the men in the cutters and boats, but some dispute having arisen between the boatmen as to the terms upon which her services should be accepted her offer was refused. That he still kept the steamer on the spot in the anticipation that the boatmen would be unable to save the derelict.

2. That at about midnight all the boats except the *Rapid* had left the derelict, and that the *Rapid* then hailed the steamer to make fast to the derelict, which was done immediately, and then towed her for three-quarters of an hour without effect. That the steamer still attached thereto, and that at 4 a.m. of the 4th March she re-commenced towing, and towed the derelict for three hours without effect. That at 7 a.m. of the same day the said pilot cutters returned and tried to clear the wreck by sweeping the chain, but failed. That the said steamer remained attached to the derelict, and at 4 p.m., it being high water again, attempted to tow the said derelict off but failed, and that at 6.30 p.m. the said steamer and the said boats left the said derelict.

3. That on Thursday the 5th March 1874, the said steamer, at 5 a.m., again proceeded to the said wreck and found her still fast. That the said steamer then recommenced and kept on towing her until 7 p.m., but failing to move her off left her for the night.

4. That at 5.30 a.m., on Friday the 6th March 1874, the said steamer again proceeded to the said derelict and tried to sweep the chain cables, but failed to do so, that the said steamer continued towing at the said derelict in various directions, but failing to free her a diver was sent down but could do nothing. That the said steamer remained attached to the said derelict from 5.30 a.m. until 2.30 p.m. of that day, and then proceeded to St. Mary's Pier in the Isles of Scilly, when the captain of the steamer requested the agent of the steamer to telegraph to Penzance for the assistance of a practical diver. That the said steamer then returned to the said derelict, and remained by her until 6.30 p.m. of that day.

5. That at 6 p.m. on Saturday the 7th March 1874, the said steamer again proceeded to the said derelict, when an attempt was again made by a diver to clear the said derelict, but without effect, and that the said steamer remained there until 4.40 p.m., when the master, having received information that a practical diver had been obtained, and was on board the pilot cutter *Presto,* which had left Penzance that morning with mails and passengers, and the weather being calm, and it being urgently necessary that no delay should take place in the arrival of the diver, the steamer left the said derelict at 4.40 p.m. and proceeded to meet the said pilot cutter, and fell in with her about 7.30 p.m. off the Logan Rock, and there took off the diver, mails, and other passengers, and arrived at Scilly with them at 11.50 p.m., but that the said pilot cutter did not reach Scilly until 6.30 p.m. on the next day.

6. That 8 a.m. on Sunday the 8th March, the said steamer proceeded to the said wreck with the said diver, and with the *Friar Tuck* fitted as a diving boat, and with the cutters, *Gem* and *Atlantic* in tow, and that at 9.30 a.m. the said diver went down and worked until 3.40 p.m., when the tide made, and he could work no longer. That at 4.30 p.m. the said steamer returned to St. Mary's Pier.

7. That on Monday morning the 9th March, the said steamer having coaled, took extra ropes on board, and proceeded to the said derelict. That at 9 a.m, the said diver went to work, unshackled one chain and cut sundry wire ropes from under the derelict. That at 2 p.m. he left work as the wind was blowing strong. That the said steamer returned at 3 p.m. to St. Mary's Pier.

8. That at 8 a.m. on Tuesday the 10th March, the said steamer having coaled, proceeded to the said derelict with the diver's boat in tow, but that as the wind was still blowing strong, the diver could not work. That the said steamer returned to St. Mary's Pool, and there remained at anchor in case the derelict should get adrift.

9. That on Wednesday the 11th March, the said steamer kept up steam at St. Mary's Pool, but no work could be done, as it was still blowing strong.

10. That at 8 a.m. on Thursday the 12th March, the said steamer again proceeded to the said derelict with the diver's boat in tow, and that the said diver worked for three hours, but had to give up as it was still blowing strong, and that the said steamer returned at 5 p.m. to St. Mary's Pier.

11. That at 8 a.m. on Friday the 13th March, the said steamer again proceeded to the said wreck with the said diver's boat in tow, that the said diver worked from 9 a.m. until 2 p.m., and succeeded in cutting chain and other gear, and reported that the wreck was clear. The said steamer then towed the derelict between Inisidgen Point and Bar Point, when she grounded, it being low water. That the anchor of the said steamer held the said wreck to wait high water, and that at midnight weighed anchor, and towed the said wreck nearer to Crow Bar, when she grounded, the said steamer holding fast until 7 a.m. on Saturday. That the said diver then went down and cleared the wreck's anchors and 15 fathoms of chain, which was placed on board the *Atlantic* pilot cutter. That the said diver cut the wreck's fore rigging and put a rope fast to the mast, which said rope broke when the said steamer attempted to pull it out. That at 1 p.m. the said steamer weighed anchor, the said diver having stated that all was clear. That the said master finding it impossible to tow the derelict over Crow Bar for want of sufficient water, decided upon taking the said wreck to sea and towing it round and through St. Mary's Sound. That in doing so the said derelict again caught fast in Crow Sound on a ledge of rocks. That the said steamer then left the said wreck, it being then 3 p.m., to coal and get carpenter's tools to cut away the mast if possible. That at 5 p.m. the said steamer proceeded to the said wreck, and found she had partially righted; the crew of the said steamer then commenced to cut away the mast, assisted by some of the men of the pilot cutters, and that having succeeded in doing so, the steamer held to the wreck all night.

12. That at 7 a.m. on Sunday the 15th of March, 1874, the said steamer went to the said wreck with 15 fathoms of the said steamer's chain to make fast to the bows of the said derelict, to which another tow rope was attached, there then being two ropes fast. That the said diver went down at 9 a.m. and found her starboard rigging fast to the bottom, which he cut, and finished his work at 12.15 p.m., two hours before high water. That the said steamer kept fast to the wreck until 3.40 p.m. with her anchor down. She then weighed and proceeded to sea for St. Mary's Sound, and arrived at St. Mary's Roads at 7.15 p.m. with the wreck safely in tow. That the said steamer anchored with the wreck fast until Monday afternoon at 2 p.m., when she weighed anchor and towed the said derelict to St. Mary's Pier Head, the said tow rope being then attached to the capstan on the pier, when she was taken possession of by the receiver of wrecks.

13. That the said steamer is of the value of 7000*l.*, and was then the only steamer plying for passengers and goods between Penzance and the Isles of Scilly, and also carries the mails between the mainland and the said islands, and that the master and crew are acquainted with the intricacies of the navigation of the Scilly Isles. That in the said month of March she was advertised to make two voyages in each week each way, and that by her salvage services performed to the said derelict between the said 3rd March and the said 15th March, the cost of coaling the said steamer during the said days averaged 10 tons per diem, making in all 130 tons at 32s., and that the gross earning lost by the said steamer by her aforesaid services were considerable.

14. That the said derelict could not have been brought into a place of safety without the assistance of a steamer commanded and manned by persons acquainted with the intricate navigation of the Isle of Scilly, and that by rendering the services aforesaid the said steamer not only incurred the aforesaid pecuniary loss, but also incurred considerable risk of damage to her machinery and hull by reason of the dangers and risks attending navigation in and about the Isles of Scilly.

15. That on the 3rd March 1874, six row gigs, namely, the *Franklin*, John Bastion, master, the *White Gig*, Joseph Legg, master, the *Lively*, Joshua Woodcock, master, the *Chance*, John Williams, master, the *Hound*, Richard Nicholas, master, *Lloyd's Gig*, Alfred Hicks, master, with their crews, proceeded to the said vessel early in the afternoon of the same day, and having got fast to her, towed at her for five or six hours until the steamer came up at about 7 p.m., when they left her to the steamer. That by so towing the wreck the said row gigs and other boats rendered important and material salvage service to the wreck by preventing her from being drifted away from Scilly by the northern current, and by materially aiding in keeping her in a good position against the tide, and that but for such services, the said wreck might have drifted away and not been found by the steamer.

16. That amongst the sailing boats engaged in rendering, or endeavouring to render, salvage services to the said derelict, were the following gigs, namely, the *Franklyn*, with nine men, which came up with and made fast to the derelict at 1.20 p.m., the *Dart*, with eight men, which came up with and made fast to the derelict at 2 p.m., and the *Lark*, with men, which came up with and made fast to the derelict at 2.30 p.m., but all the said gigs towed at the said derelict from the time of their arrival until 7 p.m. of that day, and that at 7 p.m. the *Dart* joined the steamer, and that subsequently during the following day her crew assisted the steamer in her aforesaid services.

A similar petition was filed on behalf of the pilot cutters and luggers. The luggers named were chiefly engaged in carrying chains and ropes between the cutters and derelict. Considerable loss was suffered by the salvors in the way of damage to tackle, &c. The defendants admitted the service, and submitted to the judgment of the court.

At the hearing on July 8th, 1874, it appeared upon an affidavit of the shipowner, that the value of the ship at the time of the salvage service was 500*l.*, and that the value of the freight was not more than 512*l.*, and it was taken that ship and freight together were of the value of 1000*l.*; and from an affidavit of the owner of cargo it appeared that the value of the cargo as salved was 3000*l.* At that time the cargo had not arrived in London, and no freight was really earned, and the values were estimates.

The Admiralty Advocate (Dr. Deane, Q.C.), and Dr. *Tristram* for the steamship *Queen of the Bay*, and gigs.

R. E. Webster, and *W. G. F. Phillimore*, for the pilot cutters and luggers.

E. C. Clarkson for the defendant the owner of the ship.

Hollams for the defendants the owners of cargo.

Sir R. PHILLIMORE.—I consider the salvage as one of great merit, and as derelict to be dealt with most liberally. Unfortunately the property

is very small, and it is agreed that 4000*l.* will represent it. The first thing I shall do is to take the sum of 400*l* out of it for damages that have been done to the steamer and sailing vessels, and something for the gigs. That leaves 3600*l.*, out of which I have to award salvage, and considering all the circumstances of this case I shall give 2000*l.* salvage.

R. E. Webster.—Before the court apportions the salvage I wish to call attention to an agreement which was entered into between the master of the steamer and the pilot cutters as to the way in which they were to share. It was as follows:

At Sea, 3rd March, 1874.

It is this day mutually agreed between Capt. Stephen Gibson, of the one part, and Walter Hicks, licensed pilot, of the other part, that the *Queen of the Bay* steamer shall tow a certain derelict vessel now off St. Martin's Head into the port of Scilly, and if required within the piers at St. Mary's, on the following terms, that is to say, that whatsoever amounts may hereafter be awarded to the eight pilot cutters and their crews for services already rendered in towing said derelict, or for any subsequent work in getting said derelict into Scilly, and then safely mooring her, and also whatever sums may be awarded to the *Queen of the Bay* for towing said derelict into Scilly shall be thrown into one common fund, and that the same shall be divided into ten and a half equal shares, and that each of the eight pilot cutters shall have one share, and the *Queen of the Bay* two and a half.

Approved—Robert Ashford, Abraham Hicks, William C. Mortimer. STEPHEN GIBSON, WALTER HICKS.

That agreement was signed on behalf of all parties and approved by them, and I submit that it ought to be considered binding. We pay the luggers—the four signatures after that of the master of the steamer (Gibson) are signatures of the pilot cutter masters.

The Admiralty Advocate.—That agreement no doubt was entered into when the steamer first came up, but not by the whole of the pilot cutters, and those who did not sign it repudiated the agreement, and refused to have anything to do with the steamer, and the steamer was never employed on the basis of that agreement at all. If she had then taken hold of the derelict she would have been able to keep her in deep water, and tow her straight into safety in about six hours. The cutters were unable to manage her, and let her get into shallow water, and so kept the steamer at work for sixteen days. The agreement was made upon the supposition that the steamer could get hold at once.

R. E. Webster in reply.—There was no repudiation, only delay in employing the steamer, the master of which kept the agreement in his own possession.

Sir R. PHILLIMORE.—The court finds itself placed in a position which it would not have solicited for itself, but as both parties in this case have agreed that I should decide what appears to me to be the true result of the statements made by each of them I must not shrink from the task. I have this great fact before me, that here is a very deliberate agreement, duly signed and made, and which, as far as I am able to understand it, does not appear to me at all inequitable in its terms. Such an agreement made, as this was, not under any coercion or under the operation of any disturbing force of any sort or kind, ought to be upheld by the court unless the cancelling of it be shown to be necessary. Some reasons have been mentioned by the Admiralty Advocate why this agreement should not be acted upon. Forming the best judgment I can on these very scanty details, I cannot conscientiously arrive at any other conclusion than the following: I have no evidence that this agreement which was produced out of the custody of the owners of the steamer has been cancelled, and I must therefore pronounce for it and order the money to be apportioned in accordance with it.

Notice of appeal was given against the decree on behalf of the shipowner, but the appeal was afterwards abandoned, and the shipowner paid his proportion of the salvage on the basis of the above award. The cargo, which had been salved, was subsequently sold in London with the consent of the salvors, who expected there to find a better market. The cargo then realised the sum of 2797*l.* 3*s.* 3*d.*, out of which sum the freight due for the carriage of cargo under the charter-party had to be paid. The owner of cargo alleged the sum due for freight to be the whole amount payable under the charter-partys, viz., 1513*l.* 7*s.* 5*d.*; while the shipowner alleged the freight due at London in the amount delivered to be about 1000*l.*, and no more, and that from this sum he was entitled to deduct the expenses of carrying the cargo from Scilly to London before the freight paying salvage could be ascertained. The owner of cargo, on the sale being effected, discovered that he had made a mistake in his estimate of the value of the cargo, in so far as he had not deducted from that value the freight payable on delivery, and that consequently by the decree he had become liable to pay salvage on the freight as well as his cargo, although the salvage on the freight was payable by the shipowner; deducting the whole freight due from the price of the cargo, there remained 1283*l.* 15*s.* 10*d.*

The following notice of motion was accordingly filed on behalf of the owners of cargo:

We Parker, Watney, and Clarke, solicitors for the defendant, owner of cargo, give notice that we shall by counsel on the first day of December, move the judge in court to allow the defendant, C. W. Dieseldorff (the owner of the cargo which was on board the said ship when the salvage services were rendered), to reduce the value of the said cargo from 3000*l.* to 1283*l.* 15*s.* 10*d.*, the net proceeds of the sale of the said cargo, and to reduce the salvage accordingly.

This motion came on for hearing on 1st Dec. 1874, and was opposed both on behalf of the salvors and of the shipowner, and it then appeared that there was the above mentioned dispute as to the amount of freight which was due in London, and which the owner of cargo claimed to deduct from the value of his cargo before paying salvage; the shipowner also alleging that he was only bound to pay for the amount of freight actually due after deducting the expenses of carriage from Scilly to London, and that this amount was only 512*l.*, to which the salvors objected, alleging the amount due to be considerably greater. Under these circumstances the judge referred the case to the registrar to report the amount of freight payable to the shipowner, and in respect of which the shipowner was liable to contribute to the salvage awarded. On 8th Jan. 1875, the registrar's report was filed, and thence it appeared that the freight payable to the shipowner was due as follows:

Whole freight payable under the charter-party	£1768	17	3
Advanced at Honduras	255	9	10
Freight payable on delivery of cargo in London	1513	7	5
Expenses attending transshipment of cargo and conveyance from Scilly to London	700	7	0
Leaving net freight earned by shipowner in London	813	0	5

The report concluded as follows: "But inasmuch as the salvage services were concluded in March 1874, and great delay then ensued in arranging for the transshipment and conveyance of the cargo to London, I am of opinion that the amount of freight in respect of which the owner of the vessel is liable to contribute to the salvage awarded in this case may be fairly estimated at 1000*l.*

Jan. 19, 1875.—The motion again came on for hearing.

Butt, Q.C. and *Gainsford Bruce*, for the owners of cargo.—The cargo owners have become liable to pay upon too large a sum whilst the shipowner is liable to pay upon too small a sum for freight. The contributory value of the cargo is the amount at which the cargo sold less the freight payable in London; the freight payable in London was 1513*l.* 7*s.* 5*d.*, and consequently the cargo should contribute upon a value of 1283*l.* 15*s.* 10*d.*, and not upon 3000*l.* as taken at the hearing. At the same time the value of ship and freight must be taken at a larger sum, the freight alone being greater than the value at which ship and cargo were taken at the hearing. In all such cases in this court the whole freight is deducted from the value of the cargo. The only point they can raise is as to the power of the court to alter the contributory value after the hearing and award. [Sir R. PHILLIMORE.—I think I have the power if I chose to exercise it, so on that point you need not argue.] Then the cargo having been properly sold, the price realised, less the freight, must be taken as the true contributory value. [Sir R. PHILLIMORE.—The value of the cargo as given by you at the hearing, including freight, was 3000*l.* I can on principle allow that figure to be altered. The freight you are entitled to deduct, as that should have been allowed for at the hearing. The only practicable way out of the difficulty in this peculiar case will be to ascertain exactly where the mistake lies, and then remodel the whole award and make a decree pronouncing the exact sum payable by each party.]

W. G. F. Phillimore, for the salvors. If the court determines to take that course, I ask that the amount upon which the shipower must contribute should be increased The values which he gave at the hearing were too small. [Sir R. PHILLIMORE.—If I have power to remodel the case at all I must have power to make the shipowner pay upon a larger sum.] It is not fair to the salvors that the values given by the defendants should be altered now. The defendants should be bound by them.

E. C. Clarkson for the shipowner. I submit that the court has no power to remodel the decree as against the shipowner. At the time of the hearing the cargo was not in London, and had not been sold, consequently no freight had been earned, and the value of the freight was estimated and that estimate was accepted by all parties. The shipowner appealed against the decree, and then abandoned his appeal; if the decree is altered now he cannot have his right of appeal restored as it was before, and cannot be placed in the same position as he was at the time of the pronouncing of the decree. If any alteration is made in the contributory value at all, the full freight should be deducted from the cargo and the full expenses from the freight, and the sum of the two remainders and the value of the ship will give the contributory value of the whole.

Butt, Q.C. in reply.

Sir R. PHILLIMORE.—The question raised on this motion is embarassing and peculiar. Several suits of salvage against ship freight and cargo proceeded to hearing, and an award was made upon values agreed, and that award was appealed against, but the appeal was abandoned. Since the hearing new evidence of value has been produced, from which it appears that the owner of cargo has been decreed to pay a greater proportion of salvage than he would have done if the real value of the cargo had been brought to the notice of the court at the hearing; in fact the award was made against the cargo inclusive of the value of the freight instead of less the freight.

When this motion first came before the court the affidavits were vague and inconsistent, and I referred the matter to the registrar to report as to the amount of freight due on delivery of the cargo, and he has given an estimate of what is the fair contributory value of the freight, and with this estimate I agree, as I have no doubt extra expense was occasioned by the delay.

It has been contended that the whole of the freight received on the delivery of the cargo in London should be deducted from the proceeds of the cargo in order to ascertain the value of the cargo for the purpose of the salvage suit. But I am not satisfied that that is so; and I think the registrar has arrived at a proper conclusion. The salvage service was completed at Scilly, and for the purpose of this case it is necessary to consider what was the value of the freight and cargo at Scilly. In estimating the value of the freight the registrar no doubt had in his mind the principle laid down by Dr. Lushington in *The Norma*; (Lush, 124). I am also of opinion that the cargo must have deteriorated by the delay. and that consequently the salvors are entitled to have the value of the cargo as given at the hearing, and that it would be unfair to take its value at the sale six months later. I shall hold that the respective parties are bound by their values; 500*l.* for the ship, and 300*l.* including cargo and freight.

On consideration of all the circumstances of the case, I think I shall do justice by holding that the total value of the property liable to pay salvage is less by 500*l.* than the values on which the court based its award. I arrive at this result by adopting the registrar's report and taking the value of the freight on which I have to award as 1000*l.* Taking this as the value of the freight it becomes necessary to reduce the value of the cargo, as given at the hearing by this sum of 1000*l.*, for I think it has been clearly proved that the freight was erroneously included in this value; the value of the cargo will therefore be 2000*l.* The value of the ship, according to the amended value taken at the hearing, was 500*l.*, and the freight on

which I awarded was 512*l*. It follows that, as I intend to remodel the whole case, the owners of the ship, having been ordered to pay salvage on an amount of freight too small by 500*l*., will have to contribute on a value of 1000*l*., and the owners of cargo upon the value of the cargo less the amount of freight due, viz., upon 2000*l*. The amount of the sum already awarded as a reward for the services must in consequence be reduced by one-eighth, that, is, from 2000*l*. to 1750. The defendants will have to pay 1750*l*. as salvage, and 400*l*. as compensation for the damage done to the salvors, making together 2150*l*. This sum will have to be paid by the defendants as follows: By the owners of the vessel, *James Armstrong*, upon a value of 1500*l*., the sum of 922*l*.; by the owners of the cargo, upon a value of 2000*l*, the sum of 1228*l*.

The question remains as to the costs of this application. The salvors must be borne harmless, and therefore the question is whether the owner of cargo, or the shipowner, or both, are to pay their costs. The mistake was that of the owner of cargo, and he therefore must pay the costs of the salvors, but as it was a matter within the knowledge of the shipowner, he and the owner of cargo must each bear their own costs.

Solicitors for the plaintiffs, the owners of the *Queen of the Bay*, &c.. *Brook, Tanner*, and *Jenkins*.

Solicitors for the plaintiffs, the pilot cutters, &c., *Lowless* and *Co*.

Solicitors for the ship, *Hollams, Son*, and *Coward*.

Solicitors for the cargo, *Parker, Watney*, and *Clarke*.

June 25, *July* 16, 20, *and* 30.

CARGO *ex* WOOSUNG.

Salvage—Government ship as salvor—Agreement—Validity of—Exorbitancy of demand—Consent of Lords of the Admiralty—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104, *sects.* 484, 485)—*Life salvage.*

Where a Government ship is sent to protect from plunder a ship and cargo wrecked upon a barbarous coast, and the officer in command of the Government ship enters into an agreement to salve ship and cargo at a fixed rate of reward, that agreement will be upheld by the High Court of Admiralty even though the sum agreed upon be greater than would be awarded by the Court, if the agreement is honest, has been entered into by competent parties, and the amount agreed upon is not so exorbitant as to be inequitable and to induce the court to believe that it was obtained by force or collusion. An agreement to pay the salvors half the value of the property salved upheld.

Semble, that a despatch boat, the officers and crew of which are uncovenanted civil servants of the Bombay Government, and which is employed solely for political purposes, is one of Her Majesty's ships within the meaning of the Merchant's Shipping Act 1854 (17 *&* 18 *Vict. c.* 104, *sects.* 484 *and* 485), *so as to render it necessary for her officers and crew to obtain the consent in writing of the Lords of the Admiralty before proceeding to recover for salvage services.*

There is no salvage of life entitling a ship to recover reward in the High Court of Admiralty where the ship takes off from an island on a barbarous, but inhabited coast, a ship's crew and passengers who have been wrecked there, but have been previously got ashore in safety, and who, although suffering privations from scarcity of water and exposure, are not in any immediate danger.

THESE were two causes of salvage instituted, the one on behalf of Edward Elton, the commander, and others the officer and crew of the steamer *Kwangtung*, and the other on behalf of the owners, master, and crew of the steamship *Corinna*, against the cargo lately laden on board the steamship *Woosung* and the ship's fittings belonging thereto and lately on board thereof, and against the owners thereof intervening.

The facts of the case sufficiently appear in the pleadings and judgment. Pleadings were filed in both causes. The petition on behalf of the commander and officers and crew of the *Kwangtung* was, so far as is material, as follows:—

1. The *Kwangtung* is an iron paddle-wheel steamer belonging to the Bombay Government. She is of 523 tons Government measurement, and 150-horse power, and has two engines. Her crew consist of a commander, clerk and gunner, three officers, four engineers, the quartermasters, and about seventy men. She also carries seven soldiers as marines. The *Kwangtung* was originally a gun vessel, but a few years since was fitted up as a dispatch boat, and has since been and is now employed solely on political duty.

2. The commander and officers of the *Kwangtung* are uncovenanted civil servants of the Bombay Government, and the plaintiffs are prosecuting this suit with the permission and approval of the Lords Commissioners of Her Majesty's Admiralty.

3 The *Woosung* was an iron screw steamer belonging to Newcastle-upon-Tyne, of 1,622 tons register, and at the time when she became a wreck, as hereinafter mentioned, she had on board a general Indian cargo of about 3,000 tons, consisting of silk, indigo, raw hides, tea, coffee, shellac, wheat, rice, linseed, and other goods of the value of half a million sterling.

4. About midnight on the 20th Feb. 1874, the *Woosung*, laden as in the last preceding paragraph is mentioned, and in the course of her voyage from Calcutta to London, struck on a coral reef off the Island of Kotama, in the Red Sea, in latitude 15°40'30 N., longitude 42° 14 E., and in a few hours filled with water. At daylight the following morning the passengers and crew, consisting of between fifty and sixty persons, were with much difficulty and risk conveyed to the island, which was found to be uninhabited and without water.

5. The master of the *Woosung*, within twenty-four hours of this disaster, dispatched his second officer in one of the lifeboats with a letter for assistance to the authorities at Lolicea, a small Turkish town about twenty six miles off, on the coast of Arabia; and upon receipt of that letter the governor came down to the wreck with some men, and among them a certain Greek trader. The captain of the *Woosung* afterwards entered into an agreement with the Greek, under which the latter undertook to engage some Arabs and boats, and to save and land on the island as much of the cargo as he could for one-third its net value realised on sale, after all expenses paid. Before concluding the agreement with the Greek, the master of the *Woosung* again dispatched his second officer in a lifeboat to cruise off Jebbel Leer, a distance of between twenty-five and thirty miles off, to intercept any vessel that might be passing; and this officer, on the 28th Feb., succeeded in speaking to the steamship *Corinna*, bound for London, which received on board the passengers and crew, leaving only the master, first and third officers, chief engineer, and three servants, remaining by the wreck.

6, The Greek and the Arabs whom he had engaged proceeded to the wreck. The Arabs, however, having almost as soon as they had reached the place begun to plunder the ship and to destroy her furniture, the British Political Resident at Aden was, by telegram received on the 5th March, 1874, from the Secretary of State for India, ordered to send a gunboat to prevent the plunder. The *Kwangtung* was despatched forthwith, leaving Aden at half-past two, p.m. the same day, arriving off the

wreck at eleven, p.m. on the evening of the next day, the 6th March.

7. The *Kwangtung* found the *Woosung* lying in a most exposed position, about 290 miles from Aden, and about thirty miles out of the track of vessels, so that no vessel passing up or down the Red Sea would sight the wreck. There was no place nearer than Aden from which any assistance, except that of the Arabs already mentioned, could be obtained, and at Aden there was no assistance available at the time, except the *Kwangtung*.

8. The approaches to the wreck were very dangerous; there were numerous coral reefs which were not to be found marked on any chart, and there were some spots close to the wreck with only twelve feet of water on them. The bottom was composed mostly of immense boulders of coral rock, and there was a wash at low water between the island and the wreck, a distance of about two miles. There was, therefore, the greatest difficulty and danger in bringing a ship near the wreck, so much so that when the *Corinna* came to the rescue of the passengers and crew, she was obliged to anchor some miles off, her commander being afraid to bring her closer; and on a subsequent occasion, when Her Majesty's ship *Salamis*, from Aden, homeward bound, called at Kotama to land Captain Wilson, the representative of the Salvage Association, she suddenly ran into three fathoms of water, and narrowly escaped striking; and those on board her finding the ground too dangerous to approach closer, anchored that vessel also several miles off.

9. At the time when the *Kwangtung* arrived, it was evident that the *Woosung* had been very badly strained. . . . She could not hold long together, and gave every indication that she would break up on the first breeze, as she shortly afterwards did, having gone all to pieces in a gale which blew for several days during the second week of the following month of April.

10. The greater part of the cargo of the *Woosung* having been, by the time the *Kwangtung* had arrived, fifteen days under water, the raw hides which formed part of it were in an advanced state of putrefaction. The vessel was full of noxious gases, and when on the evening of the arrival of the *Kwangtung* the commander, first officer, and a cutter's crew from the latter vessel, with lanterns, boarded the wreck, and went below to examine it, the lights they carried in many places were extinguished by the foul air.

11. The position of the most valuable portion of the cargo was found to be such as to give very little hope that any efforts to save it would be successful. . . . The Arabs had refused, in consequence of the noxious gases, to go down into the lazarette where part of the silk was.

12. By the time that the *Kwangtung* had arrived at the wreck, the Greek and his Arabs had begun to discharge a part of the cargo, with the exception, however, of about eight or ten chests of indigo they had salved, and were occupied in salving only a portion of the hides, cotton, shellac, jute, tea, and light goods that had been stowed at the top. At that time, there was no prospect of their being able to save a single bale of silk, or at most more than 90 or 100 chests of indigo. They possessed no tackle of their own, and that belonging to the ship some of them had stolen and carried away, and even if they had had any tackle or appliances, they were without the skill to make use of them. They were without any system or concerted plan, and but a small number of them were really at work, and then only a few hours each day, beginning about eleven a.m,, and leaving off before four p.m.; such work as they were doing therefore proceeded very slowly.

13. Captain Carlin, the captain of the *Woosung*, having informed the commander of the *Kwangtung* of the position of the indigo and silk, as already described, and that the Arabs were not able to save them, requested the commander of the *Kwangtung* to undertake the salvage of these portions of the cargo, upon the same terms as those he had entered into with the Greek. The captain of the *Kwangtung* consulted with his officers, and after taking into consideration the labour, fatigue, and great risk to life and health, which the salvage must inevitably involve, and the doubtful value of the goods when salved, it was considered that less than one half of the net proceeds of what the plaintiffs could recover would not sufficiently remunerate them, and the plaintiffs consequently refused to undertake the salvage at the same rate as the Greek. After a discussion of about three hours between Captain Carlin and the commander of the *Kwangtung*, it was ultimately arranged that the plaintiffs were to receive one half; and the terms set out in the following agreement having been agreed upon, the agreement itself was drawn up and signed by the parties:—

"Kotama. March 9th, 1874.

"It is this day mutually agreed between Capt. Carlin, of the *Woosung*, and Capt. Elton, of the *Kwangtung*, *i.e.*: The latter agrees to save as much as possible of the cargo, gear, tackling and fittings belonging to the above named vessel, including everything on deck or below that he possibly can, and consign the same to Messrs. Luke, Thomas and Co., at Aden, to be retained in their custody until further advices. After the sale of which, and after all expenses have been paid thereon, Captain Carlin on his part agrees to pay to Captain Elton or his agents one half of the proceeds of the same. In this agreement, Captain Elton finds all necessary men, gear, and appurtenances for the discharging, unrigging, shipping and unshipping. Also for landing at Aden; and Captain Carlin holds himself irresponsible for any accident or damage that may accrue to the *Kwangtung*, either alongside of the *Woosung* or otherwise.

"H. ELCOCK. "D. CARLIN,
"C. L. EDWARDS." "Master.

14. The plaintiffs began by stripping the wreck; and after they had succeeded in saving a large portion of the fittings and gear, the captain of the *Woosung*, seeing the imminent danger there was of the vessel breaking up, decided that the salvage of the indigo and silk should proceed with all speed. The plaintiffs were obliged to make openings to the interior of the wreck, where, from the foul air, putrid water, and intense heat, it was then impossible to work. To let in air and fresh water, the plaintiffs had to get up wind sails, and to open (and, in many instances, to break open) all the between deck ports and scuttles, which was accomplished with very great danger and difficulty, the ports and scuttles on the starboard side being some depth under putrid water. In order to get at the indigo (and all the indigo salved by the plaintiffs was, with the exception of fifteen or twenty chests, under the between deck hatches and under water), the plaintiffs had to throw overboard a large quantity of the lighter cargo, which was rotten and useless; and then, so as to reach the main hold where the indigo lay, they had to break open a great portion of the decks. . . .

15. The lazarette of the *Woosung*, under which about nineteen bales of the silk had been stowed, was approached from the main deck inside the saloon by an opening of about three feet square, and it was full of putrid water, which lay to a depth of about four feet on the between decks. . . .

16. None of these nineteen bales of silk could be reached without the utmost endurance and suffering on the part of the plaintiffs. . . . It was impossible for a man to remain down in the place for more than a very short time. The men came up fainting, and their eyes running with water, and the medical officer had to be in constant attendance to see that their eyes were bathed as soon as they came up, in order to alleviate the inflammation from which some of them were suffering. The first officer still continues to suffer from an acute inflammation of the eye occasioned by the salvage operations; and he has been obliged, after having been some time in hospital, to return to this country on sick leave, for the purpose of obtaining medical treatment. Two of the plaintiffs were nearly drowned in the course of the service. Many others of the plaintiffs fainted when they came on deck.

17. The plaintiffs, by reason of the dangerous condition of the vessel, and the consequent peril in which the cargo was placed, laboured, at the urgent desire of the captain of the *Woosung*, at the salvage each day as long as they could endure the strain, and during all the time were constantly at work from five o'clock in the morning until half-past six o'clock in the evening, with only short intervals between for meals. The men had, at the private expense of the commander, to be plentifully supplied with stimulants to keep them up to the exhausting work.

18. The indigo and silk, as soon as they were salved by the plaintiffs, were put on board the *Kwangtung*, which had been brought close up to the wreck, and between it and the land.

20. The plaintiffs having, after nine days of severe and exhausting labour, by the means and in the manner described, saved, in addition to the gear and fittings of the *Woosung*, 547 chests of indigo, and nineteen bales of raw silk (which was found to be as much as the *Kwangtung* could carry), they then conveyed the salved property to Aden, where they arrived on the 18th March 1874. The plaintiffs were engaged in the voyage from Kotama to Aden, and in the discharge of the salved property at Aden about six days; and as soon as the unloading was finished, the property was delivered to Messrs. Luke, Thomas and Co., who subsequently handed it over to Captain Wilson, the representative of the Salvage Association. It was afterwards transshipped to England, where it was sold, and realised, after payment of all expenses of sale, transshipment and warehousing, the sum of *l.* net.

21. The Arabs continued at the salvage during all the time that the plaintiffs were engaged upon it, and learnt, from the plaintiff's example, to work with greater effect and more skill and system than before. The plaintiffs left with them, when the *Kwangtung* departed for Aden, such of their hauling gear and appliances as they could spare, and thereby enabled them to continue the salvage of the indigo and silk, which the plaintiffs had commenced.

22. On the 31st March, the *Kwangtung* again left Aden to return to the wreck, taking with her, by the desire of the Lloyd's Salvage Association, a quantity of diving gear and four Englishmen engaged by the association, who were to be employed in diving for the cargo still remaining in the wreck. She arrived at Kotama on the 2nd April, after a voyage of three days, and the plaintiffs then found that Capt. Wilson, the representative of the Salvage Association, and who had been landed at Kotama from Her Majesty's ship *Salamis*, on the 27th March, was in charge of the wreck, and had assumed the control of affairs there. Capt. Wilson, however, refused to permit the plaintiffs to continue the salvage upon the terms of the agreement of the 9th March, and offered to engage them by the day and at the rate of 100*l.* a day. The plaintiffs, however, refused to depart from the terms of their agreement, and thereupon, having in the meantime salved about twenty-seven cases of indigo, they, at the orders of Capt. Wilson, discontinued the salvage. Having stayed near the wreck for about seven or eight days, the *Kwangtung* again departed for Aden, taking on board the twenty-seven cases of indigo and a cargo of the goods which the Arabs had raised and landed on the island. These, on the ship's arrival at Aden, after nine days occupied in the voyage, and in the unloading of the vessel, were duly delivered in accordance with Capt. Wilson's directions.

23. About the same time that the plaintiffs had been discharged by Capt. Wilson, or within two or three days afterwards, the services of the Arabs were also discontinued, and after the plaintiffs' discharge, the only further portion of the cargo saved consisted of about 100 cases of indigo. On the 12th April, when the *Kwangtung* departed for Aden, it had begun to blow a fresh gale, which lasted for several days. The butts of the *Woosung's* decks were then opening two or three inches, and two or three days afterwards she went to pieces, and (excepting a small portion of the cargo which had been recovered by Capt. Wilson after the wreck broke up) all that then remained of the vessel and cargo were sold on the spot, for comparatively a very small sum, by Capt. Wilson.

24. A period of about nine or ten days elapsed from the time when the plaintiffs were obliged to discontinue their services until the breaking up of the *Woosung*, and during that time the plaintiffs, if they had been permitted to do so, would have been able to salve, if not the whole, the greater and most valuable part of the cargo still remaining in the wreck, and which, as already described, was afterwards lost.

25. On the day of the ship's fittings and furniture of the *Woosung*, so salved by the plaintiffs as aforesaid, were sold at Aden, and realised the sum of about 460*l.* net, one-half of which was, in accordance with the said agreement of the 9th March, 1874, paid to the plaintiffs. The plaintiffs do not further prosecute their suit as against the said fittings and furniture, or as against the owners thereof.

26. The indigo and silk so salved by the plaintiffs could not have been recovered without their exertions, and but for their services, already described, would have been lost.

The answer on behalf of the defendants was as follows:

1. The tonnage, horse power and crew of the *Kwangtung*, are correctly set forth in the 1st Article of the Petition filed herein. She is one of Her Majesty's ships, belonging to the Bombay Marine, and was, at the time of the happening of the matters next hereinafter stated or admitted, stationed off Aden, and subject to the orders of Her Majesty's political resident there. The consent of the Admiralty to an adjudication upon the plaintiffs' claim has been granted, but the Admiralty have not signified any approval or in fact approved thereof.

2. The *Woosung* and her cargo are correctly described in the 3rd Article of the Petition. She was, through the gross carelessness of her master, wrecked at the time and place described in the 4th Article of the Petition. The passengers and crew were conveyed to the Island of Kotama the morning after the collision, with a plentiful supply of stores from the ship.

3. The master of the *Woosung* took the steps and made the agreement stated in the 5th Article of the Petition. He also communicated with the Turkish town of Hodeida; and the governor of this town sent a force of police to protect the property, and a gun boat to assist in the salvage, but as the assistance of the Greek trader, mentioned in the said article, having under him from two hundred to four hundred Arabs, most of them skilled pearl divers, and thirty to forty boats of large tonnage had been already procured, the services of the Turkish gunboat were thought unnecessary, and she shortly afterwards returned to Hodeida. The agreement with the Greek trader was, as the defendants submit, made at a very high rate, and solely on account of the absence of any other available assistance at that time. It is true, as stated in the said article, that the passengers and most of the crew were sent off. In addition to those of the crew mentioned in the said article as remaining, the stewardess remained behind and acted as an interpreter.

4. It is not true, as stated in the 6th Article of the petition, that the Arabs, engaged to salve the cargo, began to plunder the ship or destroy her furniture. Some petty articles only of insignificant value were, as the defendants believe, pilfered by Arabs unconnected with the Arab salvors.

5. The circumstances in which the *Kwangtung* was despatched to the *Woosung* are as follows:—On the 3rd of March a telegram reached London, which was in the words and figures following:

"Aden, 3rd March.

"The *Emelia* (s.) reports that the *Woosung* (s.) or (?) of Newcastle, is wrecked on the Kolamelee (or Rolamee) reef, twenty-five miles from Jibbell Teer, master, chief engineer, and three men on board, remainder gone to Suez. No further particulars. The *Woosung* (s.), Carlin from Calcutta to London, left Aden 19th Feb."

On receipt of this telegram the defendants empowered the "Association for the Protection of Commercial Interests in Wrecked and Damaged Property," hereinafter called the "Salvage Association," to act as their agents in this matter. Thereupon Captain J. A. Heathcote, on behalf of the Salvage Association, had an interview with the Under Secretary of State for India, representing for this purpose the Secretary of State in Council, and representing to him that the Salvage Association, who had at that time no other information than that contained in the said telegram, were afraid that the natives might plunder the cargo of the *Woosung*, and requested that he would send one of her Majesty's ships to the *Woosung* to protect, and also to take such steps as might be found possible for saving the cargo. The said Capt. Heathcote further offered, on behalf of the Salvage Association, to reimburse the expenditure for coal consumed on board the ship to be sent, and further to make such present to her officers and crew, should their assistance result in the salvage of property, as the Secretary of State should think fit. These terms were the same on which similar assistance had been several times recently afforded by the Secretary of State in Council. The said Captain Heathcote further wrote a letter to the said Under Secretary of State containing the substance of his representation. The said Under Secretary of State,

on behalf of the Secretary of State in Council, agreed to send upon these terms one of Her Majesty's ships as requested, and despatched a telegram to the political resident at Aden, in the words and figures following:—

"Steamer *Woosung*, Calcutta to England, stranded near Jubeel Teer, and crew obliged to leave vessel. Cargo, valued 200,000*l*., is being plundered by Arabs, send gunboat to protect property immediately, if you think necessary."

6. In obedience to these instructions the political resident ordered the *Kwangtung* to proceed to the *Woosung*, which she did on the 5th of March.

7. With the exception of the actual reef on which the *Woosung* was lying, there was no spot near the wreck with so small a depth of water as twelve feet only. There was no difficulty or danger whatever in bringing a ship, coming from Aden, near the wreck. . . . . .

8. At the time of the arival of the *Kwangtung*, the *Woosung* was a total wreck, but it is not true that she could not hold long together, or that she gave an indication that she would break up in the first breeze, or that she shortly afterwards did so. She in fact remained unbroken for a long period, including many days of heavy weather, and only broke up when she did through a hurricane of unusual violence.

9. It is true that, by the time of the arrival of the *Kwangtung* at the wreck, the hides which were stowed on the top of the rest of the cargo were beginning to get rotten, and that in the closed in spaces of the wreck, at night time, or when undisturbed for some hours, some foul air accumulated, but this all dispersed when the work began by day, although the smell continued very offensive.

10. At the time of the arrival of the *Kwangtung* much valuable work had been and was being done by the Greek trader and the Arabs employed under him. The Greek trader, however, and those engaged under him, had fitted up tackle from the ship's materials, and were working very well. They had, at the time when the *Kwangtung* arrived, made a way down to the indigo, by removing most of the cargo of small value, and they had already saved from eighty to one hundred chests of indigo, and would have saved the whole of the indigo in that hold, as well as the greater part of the other indigo in the vessel; and they did, in fact, afterwards save a very considerable quantity, notwithstanding the interruption and obstructions caused by Captain Elton, as hereinafter mentioned. The Arabs being divers by profession, were able to work in water with more effect than the plaintiffs, and could save, and did, in fact, save, cargo which the plaintiffs were entirely unable to save. The first engineer of the *Woosung*, who was working with the Greek trader, was well able to break open the decks as required.

11. Soon after the *Kwangtung* arrived on the 6th of March, an agreement was entered into between the master of the *Woosung* and Captain Edward Elton, the commander of the *Kwangtung*, for the saving of the ship's fittings and furniture which were of small value, and realised the sum stated in the 25th Article of the Petition, on the terms that the plaintiffs should receive one-half of the net value of the articles salved.

12. On the 9th March, the agreement stated in the 13th Article of the Petition was entered into. This agreement was entered into upon the importunity of Captain Elton and by collusion between the master of the *Woosung* and him. The defendants submit that it is an agreement which the master of the *Woosung* had not power to make, and an inequitable agreement, and one not binding upon them. They further submit that Captain Elton and the *Kwangtung* had been sent to the *Woosung* in pursuance of the agreement entered into between the Salvage Association and the Secretary of State in Council, whose servant Captain Elton was; and that this last mentioned agreement over-rode any agreement between Captain Elton and the master of the *Woosung*. And the defendants lastly submit that Captain Elton is an officer in Her Majesty's service, in command of one of Her Majesty's ships, and sent on a special service, had no right to undertake, except upon his own terms, any work of salvage to a British ship, on which he and his men never could be properly employed, or to dictate an agreement fixing his remuneration before he proceeded to work.

13. The greater part of the saving of the fittings and gear had been accomplished before the agreement of the 9th March was entered into. After the 9th March Captain Elton set his men at work in saving the cargo from the hold, into which the Arabs had cleared a way, and by the 17th March the plaintiffs had salved the cargo stated in the 20th Article of the Petition. This cargo was then conveyed to Aden, and discharged and delivered as stated in the said 20th Article. The net value of the cargo so saved and carried to Aden by the *Kwangtung* was 25,929*l*.

14. The work of saving this portion of the cargo was difficult work and hard labour, with some disagreeable or unpleasant adjuncts, and performed in hot weather. With the exception, however, of that portion of the cargo to which the 15th and 16th Articles of the Petition relate, there was no great difficulty and no danger in the salvage of it. As to that portion of the cargo which is referred to in the 15th and 16th Articles of the Petition, which was of comparatively small value, only being worth 700*l*., and no more, it was difficult of access, and more hardship was incurred by those who worked inside the lazarette. It is true also that accidents happened to two of the men employed as stated in the 16th Article. The other statements in the 15th and 16th Articles are greatly exaggerated.

15. The statements in the 19th Article are greatly exaggerated. Any inconvenience which was suffered by those on board the *Kwangtung* might have been avoided by hauling the *Kwangtung* at night a short distance from the wreck.

16. When Captain Elton first set his men to work at the salvage, he drove away from the wreck the salvors who were then working under the agreement with the Greek trader, and kept them away for some days, whilst his men worked at the indigo in the hold, which had been opened by those salvors, and used the tackle erected by them; he afterwards offered to allow those salvors to resume operations at some parts of the wreck which had not been cleared, and where the indigo was not accessible, and where there was not much opportunity for any lucrative salvage. Most of those salvors refused to return to work on such terms, and their services were lost to the defendants during the whole time that the plaintiffs remained at the wreck.

17. When the *Kwangtung* left for Aden, the whole of those salvors returned to work under the command of the Greek trader and of the first engineer of the *Woosung*. They found, however, that the *Kwangtung* had taken away with her the whole of the derricks and gear belonging to the *Woosung*, which had been before used for the salvage operations by the Arab salvors, and afterwards by the plaintiffs; and also all materials from on board the *Woosung* out of which fresh gear could have been erected. . . .

18. The *Kwangtung* returned to the wreck in the circumstances stated in the 22nd Article of the Petition. At that time, as stated in the same article, Captain Wilson, as agent for the Salvage Association, was in charge of the wreck. It is true that Captain Elton was ready to resume his salvage operations on the terms of the agreement of the 9th March, and that Captain Wilson refused to permit him to continue them upon these terms. He, in fact, considered them exorbitant, and had before this, when at Aden, upon being first informed by Captain Elton of the said agreement, repudiated it and refused to allow Captain Elton to work under it. When the *Kwangtung* had returned to the wreck, Captain Wilson offered to engage the services of Captain Elton and his men at the rate of 100*l*. per day, or for such remuneration as the Secretary for State should fix. Captain Elton accepted the proposal of working for such remuneration as the Secretary for State should fix. The crew of the *Kwangtung* were thereupon set to work on the 4th April. At the part of the ship they were then set to work there were a quantity of hides at the top, which had to be removed before the indigo below could be got up; and the crew of the *Kwangtung* began to remove them, while the salvors engaged by the Greek continued the diving operations in the main hold. The crew of the *Kwangtung* were, however, after about two hours' work, stopped by Captain Elton, who thereupon informed Captain Wilson that if the crew were employed in this way, he would take the alternative proposal of 100*l*. a day. Captain Wilson thereupon asked if Captain Elton wished to have the arrangement for arbitration cancelled. Captain Elton replied that he would have arbitration when his

crew worked at indigo, and 100*l.* a day when they worked at hides. Captain Wilson refused these terms. But no expostulation could induce Captain Elton to modify these terms, and he informed Captain Wilson that, as they were objected to, he should start for Aden that night.

19. Twenty-seven cases of indigo were saved on the 3rd April by the divers sent out by the Salvage Association. The only work done by the plaintiffs towards saving them was some assistance in hauling in ropes.

20. It is true that, after staying near the wreck for seven or eight days, the *Kwangtung* again departed for Aden, taking on board the twenty-seven cases of indigo, and a cargo of the goods which the Arabs had raised and landed on the Island. . . .

21. When the *Kwangtung* departed for Aden the second time, Capt. Elton claimed, and took away with him as being made out of the ship's fittings, which he had an agreement with the master of the *Woosung* to save, the single remaining tackle which had been rigged up as before mentioned, and was being used in getting the cargo out of the wreck, and Capt. Wilson had to buy of Capt. Elton the necessary materials for constructing fresh tackle.

22. Further work was done at the wreck, and further cargo was saved after the *Kwangtung* had started for Aden; but the weather was very bad and prevented continuous operations, and on or about the 11th April, a gale sprung up which prevented further work, and developed into a hurricane of very unusual violence, through which the wreck broke up and the rest of the cargo was lost.

23. Save as hereinbefore appears the several allegations contained in the petition are untrue.

24. The defendants have offered to pay the plaintiffs, such a remuneration as the Secretary of State in council should fix, and the plaintiff have refused to accept this offer.

25. The defendants submit that Capt. Elton, the officers, and the crew of the *Kwangtung* are entitled to reasonable salvage only for the services rendered by them to the cargo of the *Woosung*, and they further submit that that part of the remuneration which would have been otherwise awarded to Capt. Elton, should be largely reduced on account of his conduct and the obstacles which he threw in the way of a salvage of the cargo, as hereinbefore stated.

The pleadings were thereupon concluded in this cause.

The petition filed on behalf of the owners, master, and crew of the *Corinna* was, so far as material, as follows:—

1. On the 28th Feb. 1874, the steamship *Corinna*, of 696 tons register and 190 horse power, manned by a crew of twenty-six hands including her master, whilst on a voyage from Bombay to Havre, with cargo, was in the Red Sea in latitude 15.41 north, and longitude 41.40 east, with the Island of Jibbel Teer bearing south-east distant twelve miles. There was at such time a strong southerly wind and a heavy sea.

2. At such time the *Corinna* fell in with a lifeboat belonging to the British steamship *Woosung*, and having on board her the second officer and eight of the crew of that vessel.

3. The *Woosung*, whilst proceeding from Calcutta to London with a valuable cargo and a number of passengers, had, on the night of the 25th of the said month of Feb., struck upon a reef off the south-west end of Kotama Island, and had there remained fast. Her passengers and crew had succeeded in saving themselves by getting on to Kotama Island, where they had encamped under tents and awnings. They were, however, short of water and exposed to other hardships and deprivations, and in danger therefrom, and also in danger of being molested, plundered and ill-treated by the inhabitants of the adjacent coasts. The passengers were eight in number, four of them being ladies, two of them children. The lifeboat had been sent out by the master of the *Woosung* for the purpose of procuring assistance, and had been two days at sea without meeting with any vessel.

4. The second officer of the *Woosung* delivered to the master of the *Corinna* a letter from the master of the *Woosung*, informing him of the condition of affairs, and requesting assistance. The plaintiffs crave leave to refer to such letter.

5. The *Corinna* at once steamed towards Kotama Island, and at about 2.30 p.m. arrived within about three miles of it, in twenty-four fathoms of water. A boat was immediately sent from the *Corinna* to the shore for the purpose of bringing the *Woosung's* people off. At dusk the master of the *Corinna*, finding that there was a strong current setting to the E.N.E., anchored the *Corinna* and burned lights and rockets at intervals, and at about 11.30 p.m. three boats from the *Woosung* came alongside, but not that containing the *Woosung's* passengers, it having got among the reefs and lost its way. The master of the *Corinna* sent a boat in search, and at 0.30 a.m. the boat with the passengers arrived alongside.

6. Forty-four of the crew of the *Woosung* and her eight passengers and their clothes were taken on board the *Corinna*, which at 2.30 a.m. proceeded with them for Suez, leaving, at their own request, the master, first officer, and five more of the crew of the *Woosung* with the wreck, as they were then practically safe from the natives, communication having been had with the *Corinna*.

7. At 2 p.m. on the 1st March, the *Corinna*, whilst proceeding to Suez, fell in with the Spanish steamer *Emeliano*, bound for Aden, and in accordance with the request of the master of the *Woosung*, the master of the *Corinna* boarded the *Emeliano*, and asked her master to send assistance from Aden to save the *Woosung* and her cargo.

8. The *Corinna* arrived in safety at Suez at about 6 p.m. on the 8th March, and the crew and passengers of the *Woosung* were then landed.

9. The *Emeliano* arrived at Aden in about thirty-six hours after she was boarded by the *Corinna* as aforesaid, and caused a steamship called the *Kwangtung* to be at once despatched to the assistance of the *Woosung*. The *Kwangtung* worked for eight days at the *Woosung*, and succeeded in saving a large quantity of her cargo and some of her fittings. After such eight days of work, a heavy storm came on and put an end to the operation, the *Woosung* broke up, and with the rest of her cargo was lost.

10. By the services of the plaintiffs, the passengers and crew of the *Woosung* were rescued from danger.

11. The plaintiffs also by speaking the *Emeliano* and obtaining the prompt assistance of the *Kwangtung*, contributed greatly to the saving of the cargo and fittings of the *Woosung*.

12. In deviating from her voyage and going to Kotama Island, the *Corinna* incurred some risk, and her master took upon himself considerable responsibility.

13. The *Corinna*, at the time in question, was of the value of 19,500*l.*, and her cargo and freight were together of the value of 74,166*l.*

The answer filed on behalf of the defendants this cause was as follows:—

1. It is not true, as stated in the 1st Article of the Petition filed herein, that there was at the time mentioned a strong southerly wind or a heavy sea.

2. It is not true, as stated in the 3rd Article, that the passengers and crew of the *Woosung* were short of water, or exposed to other hardships or privations, or in danger therefrom, or in danger of being molested, plundered, or illtreated by the inhabitants of the adjacent coasts, or as suggested in the 6th Article, that the master, first officer, and five men of the crew were rendered safe from the natives by communication having been had with the *Corinna*.

3. Before the *Corinna* came up to the *Woosung*, communications had been made by the master of the *Woosung* with the mainland and with the village of Loheia and the Turkish town of Hodeida, and with the Turkish governor of Hodeida, and the Turkish governor had offered the services of a gunboat and police, which afterwards arrived, and an agreement had been made with a certain Greek trader for the salvage of the cargo. Under this agreement from 300 to 400 Arabs were employed with the permission of the Arab chief of Loheia, and it had become well known on the mainland that the wreck was under the protection of the Turkish and Arab authorities. On the first happening of the wreck there had been some deficiency of water for the passengers and crew, who placed themselves on a small allowance of water as a measure of precaution, but there was abundance of Champagne and beer, and other liquors, and before the *Corinna* arrived arrangements for a constant and sufficient supply of water had been made.

4. Save as hereinbefore appears the several allegations contained in articles 1 to 8 both inclusive, and in Article 13 of the Petition, are true.

5. An account of the provisions consumed by the passengers and crew of the *Woosung* when on board the *Corinna* was sent in to the owners of the *Woosung*, and has been paid by them.

6. The *Emeliano* arrived at Aden, as stated in the 9th Article of the Petition, and there gave information which caused a telegram to be sent to England. In consequence of which telegram, a second telegram was sent to Aden at the instance of the defendants, ordering one of Her Majesty's ships to go to the wreck, and the *Kwangtung* did go to the wreck. When this telegram was so sent, no other communication had reached England, and the defendants did not know of the communications made by the master of the *Woosung* with Loheia and Hodeida, or of the agreement with the Greek trader mentioned in the 2nd Article hereof. Those on board the *Kwangtung* worked for eight days at the *Woosung*, and saved some property; but the commander of the *Kwangtung* at first insisted and afterwards impeded the Greek trader and the Arabs working with him under the agreement hereinbefore pleaded, and induced the master of the *Woosung* to enter into a most onerous agreement for the remuneration of the services which his crew were to perform, and has put and is now putting the defendant to large costs and expenses in and about the resisting of his improper demands, and has in divers other ways so obstructed and diminished the operation of salving the defendants' cargo, that the arrival of the *Kwangtung* instead of contributing to the saving of the cargo of the *Woosung*, in fact impeded it.

7. Save, as hereinbefore appears, the several allegations contained in Articles 9 to 12, both inclusive, of the Petition, are untrue.

The pleadings were thereupon concluded in this cause.

The value of the cargo salved by the officers and crew of the *Kwangtung* was 27,608*l.* 9*s.* 9*d.*, the total value salved being 69,391*l.*, most of which was carried to Aden by the *Kwangtung*.

The cause was heard June 25, July 16 and 20 before Sir R. Phillimore and Trinity Masters.

Butt, Q.C., *Herschell*, Q.C., and *E. Jones*, for the commander, officers, and crew of the *Kwangtung*.

Butt, Q.C., *E. C. Clarkson* for the owners, masters, and crew of the *Corinna*.

Sir *H. James*, Q.C., *Cohen*, Q.C., and *W. G. F. Phillimore*, for the defendants.

Butt, Q.C., for the plaintiffs.—As to the claim of the *Kwangtung*, I submit that the agreement ought to be upheld. It was entered into between perfectly competent parties after due deliberation, and under no undue pressure; consequently, according to the practice of the court, it ought to be held binding. The amount agreed upon is not extraordinary considering the arduous nature of the services performed. There is nothing to prevent the officers and crew of a Queen's ship, which I must admit this was, from entering into an agreement as to the way in which their services are to be rewarded. As to the claim of the *Corinna*, I submit she is entitled to substantial reward; first for the carrying of the first intelligence to Aden (*The Sebastian Cabot*, Pritchard's Admiralty Digest, 865); secondly, because she rescued the passengers from a position of great danger to life.

Sir *H. James*, Q.C., and *Cohen*, for the defendants.—The agreement is bad. It was obtained by undue pressure, and by the threat to abandon the salvage if not accepted on those terms. The sum enforced was exorbitant. This court never gives one half out of such a considerable sum. Where a salvor is in such a position that he can say to the persons in distress "You must consent to my terms or I will leave you to certain destruction." this amounts to duress afloat, although it might not ashore. In the present case it was only the threat to leave that produced consent to the enormous demand. No doubt if persons agree to an amount for salvage with a full knowledge of all the circumstances and chances, it is binding, whether the work turns out more or less (*The Waverly*, *ante*, vol. 1, p. 47; 24 L. T. Rep. N.S. 231), but it is very different where parties enter into an agreement, one party refusing all terms except his own; in the latter case the master must accept or lose his salvor. If it be once admitted that these agreements are not, under all circumstances, binding, even in the case of a merchant ship, and if that such a demand, not on the ground of fairness, but on account of the danger of the damaged ship, is a sum which is exorbitant, it is contrary to all equity that such an agreement should be upheld. It has been decided over and over again that an agreement obtained by compulsion is bad, and if a person takes advantage of the distress of a ship to force from her master a sum of money, which is greater than the circumstances warrant, under the threat of abandonment that amounts to compulsion:

The Emulous, 1 Summer's C. C. Rep. 207, 210;
The Schutz v. *The Nancy*, Bee's Adm. Rep. 139;
The British Empire, 6 Jurist, 608;
The Helen and George, Swab., 368.

The system of imposing terms without reference to the fairness of remuneration is against public policy. The demand here was grossly exorbitant and wholly out of proportion to the services rendered. Again, this was a Queen's ship, and consequently her officers and crew are entitled to even less than those on board a merchant ship. It is the duty of officers and men in the public service to render assistance to vessels in distress, and although entitled to reward, their reward should be small in comparison to that given to merchant ships having no such duty (*The Clifton* 3 Hagg. 117, 121). Moreover it is indicated by the Legislature in the Merchant Shipping Act, 1854, sect. 487, that in no case shall officers and crews of Her Majesty's ships be entitled, on any occasion, to more than one half of the property salved, because it there provides that the bond to be taken as security for the salvage shall never exceed half the value. This would show that the very highest claim allowable is one half. If the master of the *Woosung* had known that orders had been given to the *Kwangtung* from the India office as to salving the property, and giving assistance, he never would have entered into the agreement. He was entitled to know all the circumstances of the case before making his terms (*The True Blue*, 2 W. Rob. 43). It was not fair that the master of the *Woosung* should not know what he was paying for; the plaintiffs knew they could claim for nothing but personal services, and yet they let the master suppose they could claim in respect of the ship. The Queen's ship was proceeding under orders, and not voluntarily. In a merchant ship the owners engage the crew to perform a particular service, and not to perform salvage. In a Queen's ship the captain is bound to take her wherever he is ordered, whether it be to fight, convoy, or salve. Hence their services are given by Government, and they can only be paid for the extra labour they perform. They have

no claim for the tackle used in salving as that was Government property (Merchant Shipping Act 1854, sect. 484), and nevertheless the agreement stipulates that the captain of the Queen's ship is to provide tackle. This clearly shows that part of the consideration for the sum agreed upon was the finding of tackle. In this respect alone the agreement is bad, inasmuch as it stipulates for a money payment for that to which the defendants were already entitled for nothing. I submit that the contract ought to be set aside, because the amount agreed upon was exorbitant, because those terms were obtained by force or compulsion, and because it was wrong in a Queen's officer to impose any terms at all after he had been ordered to render assistance.

As to the claim on behalf of the *Corinna* we submit that there was no life salvage. The claim for life salvage arises under statute (Merchant Shipping Act 1854, sects. 458, 459), and before such a claim can be enforced there must have been an actual saving of life from the dangers of the sea; there must be a removing of the lives from a position of immediate danger, and that danger, must arise from the sea or a perilous position of the ship on which the lives are. Here, however, the passengers were ashore, in an island which was not deserted and was inhabitable. There may have been inconvenience but no danger. The owners of cargo can only be made liable upon grounds of public policy, and therefore, only by showing that there was such danger of the sea as rendered it a duty to save life. There was no such danger, as the passengers might have stayed on the island some time longer without risk. Again there was no salvage service in carrying intelligence to Aden. There was no deviation from her ordinary course, and no risk or peril: (*The Ocean*, 2 W. Rob. 91.)

Butt, Q C. in reply.—In the claim of the *Corinna* I submit that the deviation to pick up the passengers and the taking the letter were all one act tending towards the salvage of the *Woosung's* cargo, and should be rewarded. There was danger to the passengers on the island; there was great privation, and want of water.

In the claim of the *Kwangtung*, I submit that there was no duress; the parties met upon equal terms, and had every opportunity for discussion, and the terms were reduced into writing. The ignorance of the law of salvage by Queen's ships will not avail here, because not only ought the master to have known of this provision, but he himself admitted that had he known it he would have signed the agreement. There was not any obligation in the plaintiffs to render assistance in salving, their only duty was to protect the property from the Arabs. The claim is not exorbitant compared with the sums paid to other persons.

Cur. adv. vult.

June 30.—Sir R. PHILLIMORE.—This is a case in which the circumstances are peculiar, and the salvage claim large.

The *Woosung* was an iron screw steamer of 1622 tons register, with a general Indian cargo of 3000 tons, consisting of silk, indigo, raw hides, coffee, tea, shellac, wheat, rice, linseed, and other goods, of value of half a million sterling. About midnight in the month of Feb. 1874, in the course of her voyage from Calcutta to London, she struck on a coral reef off the Island of Kotama, in the Red Sea, and the next morning her passengers and crew, consisting of between fifty and sixty persons were conveyed to an island which the evidence proved to be a desert island uninhabited, and with no water in it. The master of the *Woosung* dispatched in a short time one of his officers in a lifeboat with a letter to the authorities of the Turkish town of Loheia, about twenty-six miles off. The governor came down to the wreck with some men and a Greek trader, who undertook to engage some Arabs, when the captain of the *Woosung* entered into an agreement by which the Greek undertook to provide men and boat, and he was to take one-third of the nett value realised on the sale, after all expenses were paid. It appears that the Greek and the Arabs whom he engaged reached the place soon afterwards, and here I must observe there has been a conflict of evidence with respect to the conduct of the Arabs, which is only relevant to the question I have to decide before me in an indirect way. I am satisfied upon the evidence, particularly upon a letter written by the agent for the Salvage Association, who gave evidence as far as it was in his power to give in favour of the owner in this case, that the Arabs did plunder, and that their work did proceed from time to time very carelessly. In a letter written upon the 12th April the agent thus expresses himself: "Some boxes have been so completely smashed, and the Arabs were stealing the indigo so fast, that I was obliged to sacrifice the linseed, much of which has been partially damaged. Up to the present time 220 bags have been started and filled with indigo. And with respect to this agreement to the Greek he says, "I have made this arrangement under the firm conviction that a large quantity of valuable property already salved, against which the Greek has a claim of one-third of its nett value will be benefited to a very considerable extent by the arrangement I have made with him for 16,000*l.*, and that the abandonment of his claim against the property still remaining to be salved will enable me to recover it at a very considerable less cost than one-third of its nett value. The Greek has been most reluctantly obliged to make this arrangement, and nothing but a want of money has prevented his following the property to England under the terms of his agreement with Capt. Carlin." In another letter he says, "I am fully alive to the serious nature of the step I have taken, and trust you will give me credit for acting for the best. At the same time I trust you will take into consideration the difficulties of my position, the extent to which the property is being pillaged, the complete stoppage of further salvaged operation, and the difficulty of getting the cargo off the island." By a telegram upon the 5th March 1874, from the Secretary of State for India, the British Political Resident at Aden, was ordered to send a gunboat, which was the *Kwangtung*. And here I may observe that, in my opinion, the *Kwangtung* was sent to protect the property, but without any orders to act as salvor. The *Kwangtung* found the *Woosung* in the place mentioned, which was a most exposed position, 299 miles from Aden and 30 miles out of the track of vessels. When she arrived, the *Woosung* was examined, and I think it is not denied that she had been badly strained. She was on a slanting ledge of a rock, her shear had quite gone, she was very much hogged, and had a heavy list to starboard. There were about 31ft. of water on the

starboard side, and only about 16ft. on the port side. The vessel having been holed in several places, and her stern had settled down until the starboard waterways abreast the mizenmast were under the water. She was not in a state, as the further history of the case shows, to stand any bad weather. The greater part of the cargo of the *Woosung* had been fifteen days under water when the *Kwangtung* arrived. Part of the cargo (the raw hides and linseed) were immersed in the water, and the hides were in an advanced state of putrefaction. There were noxious gases in the vessel, and considerable danger was experienced from the foul air that existed. The indigo was in the main hold, beneath the between decks, which were in some places under water about four feet, and was jammed so tight between the beams by the swelling of the grain in the bottom of the vessel that it could only be got at by breaking up the decks; and there was a considerable quantity of silk in the lower lazarette, stowed away at the bottom of the vessel, underneath a number of boxes of various goods, and from 10ft. to 20ft. in some places, and in others under putrid water. Under the circumstances they found it necessary to break up the decks to get at the indigo, and, as the Greek had no means or appliances for doing this, the commander of the *Woosung* and his men undertook to do it. The name of the captain of the *Woosung* was Carlin, and he had a conference with the commander of *Kwangtung* with respect to the position of the indigo and silk, and a long discussion ensued between them, and ultimately they came to an agreement at Kotama on the 9th March. [His Lordship read the agreement above set out.]

Now the question debated for several days was, as to the validity of the agreement. It was contended that it was void by reason of its exorbitancy, and it had also been pleaded that it was void by reason of collusions between Captains Carlin and Elton, and the misconduct of Captain Elton and those under his control. The latter charge has been completely withdrawn, and the court has to regret that, under the circumstances, it was ever made.

Now with regard to agreements of this kind, what is the probable amount which the court would award in the absence of an agreement? for salvage does not furnish a satisfactory test of the validity or invalidity of an agreement. The rule of the court was laid down by Dr. Lushington in the case of the *Theodore* (Swab. 352), and in many other cases; but in the *Theodore* it is concisely stated as follows: "The court is very much indisposed to set aside an honest agreement, but it must be satisfied that the agreement is honest. Where there is any doubt, its rule is to adhere to the agreement, and the court will be just as ready in favour of the salvors to set aside an agreement if it is satisfied that it was wholly inequitable." In the very useful work published on the practice of this court by Mr. Bruce and Mr. Williams, the cases referring to this point of law are very carefully examined, and the result in my judgment is very accurately stated: "It is submitted that the true principle is that the agreement of the parties must bind unless the court is led to the conclusion that it was entered into in ignorance of material facts or induced by fraud. Whether the amount is inadequate or exorbitant, that fact can only be regarded by the court as pointing to the probability that there was some unfair dealing at the time of the making of the agreement. This applies with especial force to cases where persons in extremity in order to obtain assistance have entered into an agreement to pay an exorbitant sum to the salvors."

Now the first thing the court has to consider is, who are the parties to this agreement? Are they ignorant persons, or is one ignorant and the other cunning, and trying to overreach the ignorant one? Or is it made between persons perfectly able to understand what they are about, and the conditions that they enter into? It cannot be doubted that they belong to the latter category. I think that Captain Carlin and Captain Elton were really as competent persons as can be conceived.

The next thing the court has to consider is whether the agreement was hastily or deliberately entered into. Now, the Captains have been examined, and I saw no reason whatever to doubt the credibility of the evidence given by Captain Carlin. He says, fairly enough, he did not know what the law was with regard to salvage, and did not know anything about the law as to Her Majesty's ships, or ships in the public service; but, he said, he bargained for a long time for him to take a third, and it was only when the bargaining failed that he agreed to give half. He says it was therefore entered into very deliberately, and it was entered into by competent persons. Now, the sum was very large, but I think it was stated, and not contradicted, that the salvage went to the Indian office, and that Captain Elton was to receive one-tenth. It is true that Captain Carlin says he was not aware of the law of salvage relating to ships in the public service—there is not much distinction to be drawn between a ship belonging to the Bombay Government and a ship belonging to Her Majesty—and he says that he was not aware, according to the law, that a ship belonging to the Crown could not claim salvage—that is to say, on the ground of service rendered by a ship. He said if he had been aware of it, it would have made no difference whatever in his arrangements with Captain Elton. I must observe in this case, without entering into the consideration of how far ignorance of the law could possibly affect this agreement, but it appears from the evidence that the ship relied upon the men on board of her, and the service was essentially rendered by the men on board the ship, and not, as in many cases, the agency of the steam power of the other vessel. Now, I am of opinion, as I have already expressed, that there was no disability fixed by the law upon Captain Elton to obtain salvage employment, and to obtain it at a reasonable and proper remuneration, whatever that may be, for the services. It is not necessary to go into these documents to which the court has referred. The result is that the court has, by the permission of the Lords of the Admiralty, to consider the case, as if it were the case of any ordinary merchantman.

Now, the agreement having been entered into deliberately by competent persons, and the charge of collusion and misconduct having been withdrawn, does the amount itself warrant the court in coming to the conclusion that this sum is so grossly inequitable and exorbitant, as to render it proper, that the court should set the agreement aside, having regard to the principles of law which I have stated already? Now,

we must consider a little of the facts of the salvage in this case. It was rendered, it is true, in one sense without much personal danger to the salvors. But there is one thing the evidence shows—that of those who rendered this salvage service, many of them were sufferers from the worst of dangers, perhaps, and the chance of disease, by the mischief which was generated by this putrid stench, and by the noxious gases that were evolved. The evidence of Mr. Edwards is very remarkable on this point. He was a lieutenant on board the *Kwangtung*, and went to the *Woosung* in his capacity of first officer, and he gives us an account of the affair. He says, "I never worked so hard in my life, and I did not know when the ship might break up. We had to replace the men and wash our eyes." And then follows an account of the suffering of his eyes: "The most intense madness I ever suffered in my life; I would not suffer it again for 100,000*l.*; I was nearly a month in the hospital, under great suffering." Now, I take this opportunity of saying that I hope those in whose hands the distribution of the salvage reward is placed will not fail to recognise the eminent services of this officer, and it was stated by counsel that if I entertained that opinion I should express it. I do entertain it, and I hope that those who hear me to-day will carry that opinion to the proper quarter, where my opinion may be acted upon. The next circumstance that I have to observe upon is that the work of the Europeans was good, not to repeat more of the evidence than is necessary to establish the fact; and the manner in which the Arabs worked was not to be compared in its efficacy and usefulness to the manner in which the Europeans worked.

It is said—and this is the main argument addressed to us by Sir H. James and Mr. Cohen—that this compact is void by reason of duress and compulsion. In one sense, the services of every salvor are unwittingly under duress, they accept the lesser evil of losing a portion of the property rather than submit to the greater evil of losing all the property and all the benefit. In this sense all services are rendered under compulsion. But there is no compulsion and no duress unless direct evidence is given that all reasonable limits are transgressed, and there has been a use of false representation, or excitement from ungrounded fears, in order to procure acceptance by the salvors of their services. There does not appear any evidence of that kind in the present case, and if I compare it with the salvage reward paid to the Greek and others—take the stewardess, who received 1900*l.*, and the first engineer, who received 3500*l.*—when I compare this with the admitted and uncomplained of salvage service afterwards by these persons, I must say the charge of compulsion on this account utterly fails.

The services lasted, I think, six days, and were perfectly effectual. Now, I think it unnecessary to travel further into this question, because I have not to consider—and I wish this to be perfectly understood—whether half the proceeds would be the amount which I should have to award were it a question now of an ordinary salvage service; but the question is whether the amount, having regard to the circumstances which I have stated, and the principles of law to which I have adverted, of itself presents such features of exorbitancy as to be inequitable and to induce the court to do that which it sometimes does, viz., very reluctantly interfere with an agreement made between competent persons.

I must decline to do so upon the present occasion, and I must pronounce for the validity of the agreement. I must repeat that I hope what the court has said as to Mr. Edwards will not be forgotten, but that it will be mentioned in the proper quarter. I will add that if the charge of misconduct is not withdrawn, I have no hesitation in saying it was not founded upon the evidence before me.

I have considered the case of the *Corinna*, and I am of opinion that there was no life salvage. I shall award 200*l.* for the services she performed in forwarding the intelligence to Aden.

Solicitors for the plaintiffs, Capt. Elton and others, *Kearsey, Son*, and *Hawes*.

Solicitors for the owners, &c., of the *Corinna*, *Gellatly, Son*, and *Warton*.

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

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

June 18, *and* 19, 1875.

(Present: the Right Hons. Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, Sir R. P. COLLIER, and Sir H. S. KEATING.)

H.M.S. BELLEROPHON.

Collision—H.M.'s ship carrying ram—As to duty of officer in charge to give warning of danger.

Where a ship carries a latent instrument dangerous to others, those who have control of it are bound to take all reasonable precautions that it shall not cause damage to others.

Where one of H.M.'s ships carries under her bows below water a ram, not ordinarily dangerous to vessels navigating the seas, but dangerous to vessels coming in contact with it, and the officer in charge of H.M.'s ship has under the circumstances reasonable ground for supposing that the ram will occasion damage to another (friendly) ship, and has reasonable means and opportunity of warning the other ship of the danger so as to enable her to avoid it, although the other ship has in the first instance been guilty of negligence whereby she has occasioned the necessity for giving notice, it is the duty of the officer in charge of H.M.'s ship to give notice to the other ship; but if there is no reasonable ground for apprehending danger, and no reasonable opportunity for giving the notice, there is no obligation to give the notice.

THESE were appeals from decrees of the learned Judge of the High Court of Admiralty of England, on behalf of the Liverpool, Brazil, and River Plate Steam Navigation Company (Limited), owners of the steamship *Flamsteed* and on behalf of the owners of her cargo, the appellants, against the Hon. George Wellesley, C. B., Vice-Admiral in Her Majesty's Navy, commanding the fleet on the North American station, and Richard Wells, Esq., captain of H.M.S. *Bellerophon*, the respondents, in two cases of damage promoted in that court by the appellants against the respondents.

The cause was instituted on behalf of the present appellants, the owners of the late steamship *Flamsteed*, and of her cargo, in consequence of the loss of that vessel, which was sunk through being struck by the spur or ram of H.M.S. *Bellerophon* on the 24th Nov. 1873, in the North Atlantic Ocean, to the north-east of Cape de Verde Islands.

The *Flamsteed* was a screw steamship of 935 tons net register, and engines of 80 horse power, and at the time in question was on a voyage from Liverpool to Lisbon, Rio de Janeiro, and other places, laden with a cargo of general merchandize of great value.

H.M.S. *Bellerophon* is an armour plated iron ship of 4270 tons register, and engines of 1000 nominal horse-power. She was manned by a crew of 630 men, including several officers and some divers. At the time in question she was bound for Bermuda.

The *Bellerophon* is of peculiar construction, and carries some feet under water at her stem a large sharp pointed spur or ram projecting some distance from her bows, and expressly designed for striking vessels under water and sinking them in time of war.

The *Flamsteed*, on the day in question, being in latitude 25 deg. 35 sec. north, and longitude 20 deg. 51 sec. west, sighted the *Bellerophon* on the port bow some miles distant. The *Bellerophon* was then under sail on the port tack with royals set. She had her funnel up with smoke issuing from it, but was not actually under steam. Her fires were alight in four boilers. In one they were condensing water, but in the other three the fires were banked low. She made signals to the *Flamsteed* for newspapers. The *Flamsteed* acceded to this request by signal, and the master of that vessel having starboarded his helm, came round the *Bellerophon*, at the distance of about half a mile on her port side, and passing round her stern brought up off the starboard quarter of the *Bellerophon*, at a distance of from a quarter to half a mile. The *Bellerophon* at this time was hove-to with her mainyard aback, and she sent off from her starboard quarter a boat to the port side of the *Flamsteed*. A newspaper was then handed to the officer of the boat, and the master of the *Flamsteed* made an offer to the officer to tow him towards the *Bellerophon*. This offer was accepted, and the boat was made fast to the *Flamsteed* on her port side, the master and crew of the *Flamsteed* being then in ignorance of the existence of the ram at the bow of the *Bellerophon*. The *Flamsteed* accordingly steered towards the starboard side of the *Bellerophon*. Owing, however, as contended by the appellants, to the *Bellerophon* having drifted to a great extent, and to her head having paid off to leeward, or, as contended by the respondents, to a miscalculation of his distance on the part of the master of the *Flamsteed*, that vessel approached so close to the starboard side of the *Bellerophon* that the spritsail-yard or starboard whisker of the *Bellerophon* caught the forerigging and afterwards the bridge of the *Flamsteed*. The *Bellerophon's* anchor on her port bow then caught the foremost davit of the *Flamsteed*, tore it off (it fell in to the engine room), and the anchor then caught the aftermost davit and held the *Flamsteed* for some short appreciable time until the anchor fell to the ring. While the two vessels were so held the master of the *Flamsteed* ordered his engines to be reversed with a view of going astern of the *Bellerophon*, and they were accordingly reversed, but the master shortly afterwards decided to go ahead and ordered the engines ahead accordingly, and the *Flamsteed* passed along the starboard side and ahead of the *Bellerophon* at a slight angle with the *Bellerophon*. Neither the *Bellerophon's* jibboom nor bowsprit were carried away, and it was admitted in the evidence on both sides that the hulls of the two vessels never came in contact. However, when the *Flamsteed* was passing ahead of the *Bellerophon*, and when the two vessels were apparently clear of each other the sharp spur point of the *Bellerophon's* ram struck the *Flamsteed* 14ft. below the water line under her port quarter, about abreast of the mainmast, making a hole which caused the *Flamsteed* and the cargo on board her to sink in a few hours afterwards. The remaining facts are stated in the judgment.

It was admitted that those on board the *Flamsteed* did not know, and had not any reasonable means of knowing that the *Bellerophon* was armed with such a spur or ram, or with any spur or ram, and it was contended by the appellants that those on board the *Bellerophon* could and ought to have given notice or warning to those on board the *Flamsteed* that the *Bellerophon* was armed with a ram or spur. No such notice, however, was given.

Had such notice or warning been given, those in charge of the *Flamsteed* might have kept the engines going astern instead of giving the order that they should go ahead, in which case the damage done by the ram or spur would have been avoided.

The causes were respectively instituted in the Court of Admiralty in the sum of 40,000*l.* to recover for the loss of the *Flamsteed*, and in the sum of 12,000*l.* to recover for the loss of the cargo.

The causes were heard together before the learned judge of the court below, assisted by Trinity Masters, on 18th, 19th, 20th, and 21st Nov. 1874, and on the latter date judgment was given as follows:

Sir R. PHILLIMORE (after stating the facts).—Now it is quite clear that the damage was caused in this case by one of two causes, either by the *Flamsteed* coming too near under a starboard helm, or by the *Bellerophon* drifting and paying off, and coming down upon the *Flamsteed*. I have already stated that the evidence establishes that the *Bellerophon* did not drift to any appreciable amount, or pay off, or come down in the way that has been described from the *Flamsteed*, and, in my judgment, as well as that of the Elder Brethren of the Trinity House, this collision was caused by the *Flamsteed* not porting in due time, but waiting to port until she had come too near to the starboard side of the *Bellerophon*. It has been urged upon the court that even if this were so with regard to the first contact, there was contributory negligence on the part of the *Bellerophon*, inasmuch as she ought then to have warned her not to go ahead because she carried a ram, whereas she omitted to do so, and backed her headyards, which was a sort of invitation to her to go forward, and was the cause of her suffering the injury of the thrust below her water line. Now, one answer appears to the court to be quite sufficient upon this point, and that is—the whole time between the first contact and the second contact was little, if at all, more than one

minute, and I cannot at all assent to the proposition of law that it was the duty of the *Bellerophon* to intimate, either (if the fact were so) that she was a leewardly vessel, or that she carried a ram. It does not appear to me that the law imposes any such obligation upon a vessel in the condition in which she then was. I think it is an extremely unfortunate circumstance that the *Flamsteed* should, in consequence of an act of courtesy and kindness on her part, have suffered this tremendous loss, to the extent of, it is said, nearly 160,000*l.*; but the court must be on its guard against allowing any consideration of that kind to make it find that there has been contributory negligence on the part of the *Bellerophon*, unless that is made out by the evidence before it, and I have no such evidence before me. I am, therefore, constrained to say that the *Flamsteed* has failed in establishing the averments in her petition, and that the *Bellerophon* is not to blame for the collision in this case.

From these decrees the appellants appealed for the following amongst other reasons:

1. Because the respondents were guilty of negligence and did not use due care to avoid the collision.

2. Because the fact that the *Bellerophon* was armed with such a dangerous engine of destruction as the spur or ram, which was covered by water and concealed from view, cast upon those in charge of the *Bellerophon* the duty of using every possible precaution and taking the utmost care by giving notice or otherwise, to prevent damage occurring from the ram or spur with which the *Bellerophon* was armed.

Sir *Henry James*, Q.C. and *Arthur Cohen* (*W. B. Trevelyan* with them) for the appellants.—We submit the captain of the *Bellerophon* was to blame for not putting the master of the *Flamsteed* in possession of the facts which would have enabled the latter to keep clear without injury. The loss was occasioned by the ram coming in contact with the *Flamsteed*; that did not occur at the first moment of collision, and at the first contact, but was occasioned by the negligence of the *Bellerophon* in not giving warning so as to send the steamer astern. Even granting that the first collision was occasioned by the plaintiff's negligence it was still the duty of the defendants to take all reasonable precautions to avoid accident, and in this case the reasonable precaution would have been to give due notice of the danger ahead. If the owner of property leaves it in such a condition that it is dangerous to other persons, he is bound to give reasonable notice to every person whom it is likely to injure. The obligation to give this notice arises the moment the possibility of danger occurs, and in the present instance as soon as it was seen that the *Flamsteed* was approaching the hidden danger: (*Ilott* v. *Wilkes*, 3 B. & Ald. 304) [Sir J. W. COLVILLE.—Can it be said that the captain of the *Bellerophon* was bound to suppose that the *Flamsteed* would come into collision before the collision occurred, or that she would go anywhere near the ram?] There was the same duty as there is in the case of a sunken vessel or an obstruction in a highway; the person causing the obstruction is bound to give notice.

Broom v. *Mallet*, 5 C.B. 599;
White v. *Crisp*, 10 Ex. 312.

Any person giving a carrier dangerous goods to carry without giving notice of their character is liable for any injury done; and so anyone who for his own purposes brings upon his land, and collects and keeps there anything likely to do mischief if it escapes, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.

Farrant v. *Barnes*, 31 L.J. 37, C.P.;
Fletcher v. *Rylands*, 13 L. T. Rep. N. S. 121; 14 L. T. Rep. N. S. 523; L. Rep. 1 Ex. 265.

No one has a right to expose a person using a highway to danger. Notice must be given, or liability attaches upon injury received. In the present case there was a dangerous instrument of a novel and unusual construction used upon a highway in such a manner as to be dangerous to other persons, and it could not be seen; it was the duty of those using it to warn other people upon the highway of its existence and dangerous character. We contend that the first contact was occasioned by the negligence of the *Bellerophon* in paying off too soon, but even supposing that it was caused by the plaintiffs' negligence, that is not an answer to this claim, the only result of such a finding would be that both ships are to blame. There was ample time after the first contact to have given warning of the danger. The obligation not to do injury is absolute.

Bonomi v. *Backhouse*, 9 H. of L. 503; E. B. & E. 622;
Vaughan v. *The Taff Vale Railway Company*, 29 L. J. 247, Ex.
Bagnall v. *The London and North-Western Railway Company*, 7 H. & N. 423; 31 L. J. 121, 480, Ex.;
Jones v. *The Festiniog Railway Company*, 18 L. T. Rep. N. S. 902; L. Rep. 3 Q. B. 733

Again, there was no such negligence on the part of the *Flamsteed* as would have occasioned her loss by itself, and the captain of the *Bellerophon* must have seen that she was running into danger, hence he is alone liable for his negligence in not giving warning: (*Radley* v. *The London and North-Western Railway Company*, 44 L. J. 73, Ex.) But if there was a breach of any obligation on the part of the *Bellerophon*, the fact of negligence on the part of the *Flamsteed* having led to the committing of that breach, though it prevents the *Flamsteed* from saying that she did not contribute to the result, does not allow the *Bellerophon* to escape entirely from liability. The *Bellerophon* was exposing persons using a public highway to unforeseen danger, and she cannot excuse her own negligence by saying that those other persons were also negligent.

The *Admiralty Advocate* (Dr. Deane, Q.C.), *Staveley Hill*, Q.C. and *H. Stokes*, for the respondents, were not called upon.

The judgment of the court was delivered by

Sir HENRY S. KEATING.—In this appeal the appellants were the owners of a steamship called the *Flamsteed*, and brought their suit in the Admiralty Court in consequence of the loss of that vessel from injuries received by a collision with H.M.S. *Bellerophon*. The *Flamsteed* was a screw steamship of 935 tons register, with engines of 80 horse power, and on the 24th Nov. 1873, the time when this collision took place, was on a voyage from Liverpool to Lisbon and other places. When at sea, about 500 miles from the Cape de Verde Islands, at six or seven a.m., she sighted H.M.S. *Bellerophon*. The *Bellerophon* is an armour-plated iron ship of 4220 tons register, with engines of 1000 horse power. She had the usual crew of such a ship—

indeed, one rather in excess of the usual number, for she had as many as 630 hands on board. She was commanded by Captain Wells, one of the respondents in this case, and was flying the flag of Vice-Admiral Wellesley, who is another respondent, her destination being Bermuda. It appears that the *Bellerophon*, whose course was lying to the north-west, that of the *Flamsteed* being south-west-by-south, signalled to the *Flamsteed* to ask if she could lend a newspaper. The *Flamsteed* gave an affirmative answer, and accordingly the *Bellerophon* lowered a boat manned by twelve able seamen, to send for the newspapers. Before the boat pulled off to the *Flamsteed*, that steamship held on her course; then starboarding her helm as she passed the stern of the *Bellerophon*, and, still under a starboard helm, came off the starboard quarter of the ship of war, at a distance of about three-quarters of a mile. Being in that position the boat pulled up to her, the officer who was with the boat received the newspapers, and then the captain of the *Flamsteed* appears to have offered to take the boat in tow, and to bring her nearer to the *Bellerophon*. There was no request upon the part of the officer that this should be done, nor any necessity for doing so. The weather was fine; there was at the time a moderate breeze, with no sea on, but only the usual swell of the Atlantic—indeed, it is said less than the usual swell. There was nothing whatever to prevent the boat from getting back from the *Flamsteed* to the *Bellerophon* in the same way that it had reached the *Flamsteed*. The officer, however, accepted the offer of the captain of the *Flamsteed*, and the *Flamsteed* accordingly, with the boat in tow upon her port side, starboarded her helm and proceeded towards the *Bellerophon*. The evidence here certainly discloses a most remarkable and ill-judged course adopted by the *Flamsteed* in approaching a ship of war such as the *Bellerophon*. The *Bellerophon*, a ship of great size, was hove to under sail; and, it appears from the evidence, that although iron vessels of that class have masting and rigging, this is not for the purpose of rendering them sailing vessels properly so called, because they are made primarily for the purpose of being moved by steam; and that thus the masting of the *Bellerophon*, as in similar cases, is of a lighter description than that put in sailing vessels which do not move by steam; indeed, Capt. Wells in a portion of his evidence describes the masting as being rather in the nature of jury-masting than ordinary masting. At the time in question the fires of the *Bellerophon* were banked up; she had no assistance from steam-power, as her screw was disconnected; she was under sail, but close to the wind, hove to; and yet the *Flamsteed*, having full sea room before her, instead of taking the course which their Lordships are advised would have been proper and natural to have been adopted under such circumstances, namely, to have gone under the stern of the *Bellerophon*, to have dropped the boat, and proceeded on her course, seems to have steered directly for the *Bellerophon* amidships, and to have continued on to within 100 yards of that enormous vessel, floating in what was described by the captain to be "a helpless state" upon the water, and unable to make any active exertion whatever, to escape a collision. The *Flamsteed*, steering in that way, when thus close to the *Bellerophon* ported her helm, apparently with the idea of performing what at that distance would have been the very nice and perilous manœuvre of passing along her starboard side, and running ahead of her. That manœuvre, it would appear by the evidence, might perhaps have been successfully performed, assuming the *Flamsteed* to have answered her helm quickly, for having full steam-power upon her she could of course, if she could have kept clear of the *Bellerophon*, easily run ahead of her. But having adopted the perilous course of coming so close to the ironclad, although she ported her helm, and it is said put it hard-a-port, which it is probable, yet she was unable to keep herself at a sufficient distance, and her rigging became entangled with the whisker, as it is termed, of the ship-of-war—that is, one end of the spritsail yard running out from the bowsprit. Having become thus entangled, she was caught by the anchor of the *Bellerophon*, and her first motion appears to have been to have backed astern, whilst the captain of the *Bellerophon* threw his sails aback, which he says was the proper course to pursue, not that it produced a great effect upon his ship, for that it could not have done, but that it was the proper and ordinary course. A suggestion was made that his doing so acted as an invitation to the *Flamsteed* to go ahead and so approach the danger; but that having been suggested originally was disposed of in the course of the argument, because it was admitted by counsel, and was quite clear upon the evidence, that all the operations on the part of the *Flamsteed* were wholly independent of anything done by the *Bellerophon* which would appear, as stated by the captain, to have lain like "a log upon the water." In the entanglement occasioned by the fouling of the rigging, the painter which upheld the anchor of the *Bellerophon* gave way, and, the anchor having fallen, the *Flamsteed* then appears to have forged ahead, and endeavoured to pass in some way in front of the *Bellerophon*, and in a manner not very intelligible got under her bowsprit, and so close to her stem that, probably from the effect of the swell of the sea, she came in contact with the ram of the *Bellerophon*, and received the injury in question, which took place 14ft. below the water-line, just abaft the mainmast. It was not made any question in the court below, nor could it have been here, that the injury inflicted upon the *Flamsteed* proceeded from contact with the ram of the *Bellerophon*.

Their Lordships do not entertain any doubt, nor, indeed, has it been seriously questioned by the counsel for the appellants, that the collision in the first instance arose from the rash and unseamanlike mode of proceeding on the part of the *Flamsteed* in approaching the ship of war. So much too close did she bring herself to the *Bellerophon*, that the men were obliged to jump out of the boat towed at her port side, under the apprehension that she should be swamped. There can be no doubt, therefore, that the collision was caused in the first instance wholly by the fault of the *Flamsteed*.

But whilst that is not seriously denied upon the part of the *Flamsteed*, it is yet sought to establish a case of contributory negligence on the part of the *Bellerophon*, and it is said that this contributory negligence consisted in the omission of an alleged duty on the part of the *Bellerophon* to give at some period or another of this transaction distinct notice to the *Flamsteed*

that her stem was constructed in a peculiar manner, forming a ram which protruded under the water. It was contended in the court below that there were other points of contributory negligence on the part of the *Bellerophon*, that the *Bellerophon* was a ship that drifted to leeward in some unusual way, and that notice of this tendency ought to have been given to the *Flamsteed*. It was also suggested that she had hoisted her jib and that her head paid off, and that the paying off to leeward partly induced the collision that took place, and brought the *Flamsteed* more immediately under the bows of the *Bellerophon*. However, those two points were ultimately abandoned upon the argument before their Lordships, and the only point for their consideration is whether the *Bellerophon* was guilty of contributory negligence, in omitting to give notice to the *Flamsteed* that her stem was so constructed that a vessel going close under her bowsprit might sustain damage by reason of this ram. On the part of the appellants, it was said the law requires that wherever persons control and are in possession of a dangerous instrument, which is latent, and which may produce damage to others, they are bound to give notice of the existence of that latent instrument of danger, and therefore that the circumstances in the present case imposed upon the *Bellerophon* the obligation to give notice of the existence of the ram in her bow. It appears to their Lordships important to consider exactly what the nature of this latent instrument of danger in the bow of the *Bellerophon* was. It was insisted by the learned counsel, and truly said, that it was intended for the purpose of causing damage to others, and no doubt the ram upon the *Bellerophon* was for the purpose of being used as an instrument of offence in naval warfare, and would be or might be efficacious for that purpose. But it was not an instrument in itself necessarily dangerous to persons navigating the high seas; on the contrary, except under certain extraordinary and exceptional circumstances, it could produce no danger whatever to any of Her Majesty's subjects or others so navigating. Still, if, being such as it was, and under the circumstances which took place, the captain of the *Bellerophon* (speaking of him for convenience sake as the person responsible), had under the circumstances reasonable ground for supposing that this ram would occasion danger to the *Flamsteed*, and had reasonable means and opportunity of warning the *Flamsteed* of that danger so as to enable her to avoid it, then, although the *Flamsteed* had in the first instance been guilty of negligence, and even although by her negligence she had occasioned the necessity for giving notice, still their Lordships are of opinion it would have been the duty of the captain of the *Bellerophon*, or of those in charge of her, to have given that notice to the captain of the *Flamsteed*. Their Lordships entirely concur in the view that if there be a latent instrument of danger, those who have the control and the possession of it are bound to take all reasonable precautions that it shall not cause damage to others. But they are of opinion that there was no obligation upon the captain of the *Bellerophon* to give notice of this ram unless there was a reasonable probability of danger to the *Flamsteed* from the want of notice; and further unless he had a reasonable opportunity of giving such a notice as might have enabled the *Flamsteed* to avoid the ram.

Many cases have been referred to in support of the proposition as stated by the appellants from which their Lordships do not in any way dissent; but they are unaware of any case which establishes a rule of law which would conflict with that to which reference has been made, namely, that the obligation to give a notice or a warning of danger must arise from the existence of some reasonable probability of danger to the party to whom that notice is to be given, and an opportunity of giving it so as to enable such party to avoid the danger; and applying that rule in the present case, their Lordships, upon the facts, think that there is no ground whatever for saying that at any period of this collision, the captain of the *Bellerophon*, or those in charge of the *Bellerophon*, had any reasonable ground to suppose that anyone navigating the *Flamsteed* would have placed that vessel in a position which would have rendered notice of the existence of the ram necessary to preserve them from danger. When the captain of the *Flamsteed* was asked in the court below what ought to have been done by the *Bellerophon*, and when ought the notice to have been given, it was said by the captain at first that it ought to have been given when he was approaching the ironclad, the *Flamsteed* being then directed amidships; but is it reasonable that their Lordships should suppose upon these facts that the captain of the *Bellerophon* was to assume that the *Flamsteed* had any such wild intention as that of almost scraping the starboard side of his ship, so as to become entangled, and thrown across his bows, under his bowsprit and close to his stem? The captain of the *Flamsteed* himself seems to have thought that at that time there was no danger of his getting so close. After he had said that the notice might have been given to him when he was off the quarter, because "he (the captain of *Bellerophon*) saw we were going to try to pass to leeward of him," it was observed to him, "He did not think you were coming close to him?" his answer was "No, nor I did not think so either." Therefore it appears perfectly clear that at that period there could have been no obligation arising from any reasonable anticipation of any contact between the *Flamsteed* and the ram for any notice to be given to the *Flamsteed* of the existence of that ram.

But it is suggested that at some subsequent time that notice ought to have been given. With reference to that suggestion, it is to be observed that the whole of the transaction described occupied but a very short time. The learned counsel for the appellants observed that Capt. Wells, in putting the time at something over a minute, had understated it. That is possible. The captain of the *Flamsteed* himself states it at two or three minutes. People do not look at their watches on these occasions so as to estimate accurately the time, but their Lordships think it safe to assume upon the evidence that the whole of this took place in a very short space of time, that it was a continuous act occupying it may be a minute, it may be a minute and a half, or two, or even three minutes, and yet it is suggested that it was to be expected from the captain of the *Bellerophon*, and that he ought, in the midst of the confusion occasioned by the mismanagement of the *Flamsteed*, to have anticipated that the *Flamsteed* would go close across his bows, and that he could and ought then to have given notice.

This seems to their Lordships to be a proposition that cannot possibly be maintained. Admitting fully the obligation to give the notice, if there were reasonable ground for apprehending danger, and if a notice could be given so as to be productive of the effect of averting that danger, yet on the facts of this case their Lordships come to the conclusion that there was no reasonable ground for anticipating any danger to the *Flamsteed* from the rain, and they are further advised that in a nautical point of view there was no period after the first collision when any notice to the *Flamsteed* would or could have averted the unfortunate accident, and therefore that there was no omission upon the part of the captain of the *Bellerophon* which would constitute the contributory negligence sought to be established in this case.

In one of the cases cited of *Vaughan* v. *The Taff Vale Railway Company* (29 L. J. 247, Ex.), the late Mr. Justice Willes seems, to have laid it down very clearly, "Negligence is the absence of care more or less according to the circumstances." It is the circumstances that must regulate the obligation to give notice, or to do any other act which would have the effect of averting danger from those who might otherwise be exposed to it. Their Lordships, therefore, come to the conclusion that this collision in the first place was produced wholly and entirely by the fault of the *Flamsteed*, and that there was no negligence on the part of those in charge of the *Bellerophon*, at any period of that collision.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court of Admiralty, and also that this appeal be dismissed with costs to be paid by the appellant.

Appeal dismissed.

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

Proctor for the respondent, *H. G. Stokes*, Admiralty Proctor.

EXCHEQUER CHAMBER.

ON APPEAL FROM THE COURT OF COMMON PLEAS.

Reported by Etherington Smith Esq., Barrister-at-Law.

Saturday, June 19, 1875.

(Before Bramwell, B., Blackburn, Lush, and Quain, JJ., Pollock, and Amphlett, BB.)

The Australian Agricultural Company v. Saunders.

Marine insurance—Fire insurance—Double insurance—"Insured elsewhere"—Construction of policy.

The plaintiffs insured wool against fire with the defendants, "in any shed, or store, or station, or in transit to S. by land only, or in any shed or store, or on any wharf in S., until placed on board ship." They afterwards entered into another policy with another insurance company in these terms: "Lost or not lost at and from the river H. to S. per ship or steamers, and thence per ship or steamers to L., including the risk of craft, from the time that the wools are first waterborne, and of transshipment and landing and reshipment at S." It was a condition in the defendants' policy that if the wool was "insured elsewhere," notice of such insurance was to be given to them, otherwise the policy was to be void. No notice of this second policy was given to the defendants by the plaintiffs. The wool was burned while in warehouse at S. where it had been placed for the purpose of storage, and was waiting for reshipment.

The plaintiffs sued on the first policy for the loss of the wool.

Held (affirming the judgment of the Court of Common Pleas), that they were entitled to recover. That the second policy did not apply to keeping goods on land, but only to marine risks, that these goods were not within the meaning of the words, "transshipment, landing, and reshipment at S." while stored in warehouses there, and that there was therefore no double insurance, and consequently the goods were not "insured elsewhere" so as to make notice of the second policy necessary.

Held also, that by "insured elsewhere" was meant a specific insurance of the same risks, and that the words were not satisfied in the case of different policies upon different policies upon different risks, by the mere possibility of one overlapping the other under some possible circumstances.

This was an appeal from the judgment of Willes and Keating, JJ., sitting as a division of the Court of Common Pleas in favour of the plaintiffs, in an action brought by them on a policy of insurance against the loss by fire of some wool, which was burned while in store at Sydney, in Feb. 1870.

The plaintiffs are large shippers of wool from Australia to London, and most of it is grown up the country and brought down to Sydney for shipment. The wool comes sometimes by land to Sydney, and is thence shipped to England. It sometimes comes down the river Hunter in steamers to Sydney, and is reshipped without being landed; or it is landed from the steamers and placed in warehouses for the purpose of being pressed, and it is frequently stored whilst waiting for shipment. Wool which is to be pressed is taken to the stores of the stevedores of the ship in which it is to be loaded, and is by them pressed and warehoused. Wool received by the stevedores is considered as between the ship and shippers as being in the custody of the ship, and the stevedores charge the pressing and warehousing against the ship. The stevedores give receipts for wool received by them, which are treated by ship and shippers as equal to mates' receipts, and in exchange for them bills of lading are given on demand whether the wool is in store or on board the ship. Wool brought by steamers to Sydney by the river Hunter for shipment to England is usually removed by drays from the wharves, where it is landed from the steamers, to the store of the stevedore appointed to store and press for the ship for which the cargo is intended. At these stores all descriptions of goods are kept for shipment and other purposes, but they are principally used for storing and pressing wool for shipment.

The wool in question came in several steamers by the river Hunter to Sydney, and on being landed was taken possession of by one Moore, as agent for the plaintiffs, and conveyed to his stores to be weighed. Moore engaged a ship to carry the wool to England, and afterwards sent the wool to the stores of the stevedores of the ship, who had received authority from the master to receive wool for shipment by that ship; they received the wool, and gave the usual stevedore's

receipts on behalf of the ship. Whilst the wool was in the stevedores' stores waiting for shipment the plaintiffs effected a policy of fire insurance with the defendants in these terms: "On wool in fleeces or bales in any shed or store or station, or in transit to Sydney by land only, or in any shed or store, or on any wharf in Sydney, until placed on board ship." And there was also a provision in clause 5 of the policy that "No claim shall be recoverable if the property insured be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the company in writing, provided that upon such notice being given after the issue of the policy, it shall be optional with the company to cancel the same, returning the rateable premium for the unexpired term thereof." In Jan. 1870, the plaintiffs effected a policy of marine insurance in the Indemnity Mutual Insurance Company, as follows: "Lost or not lost at and from the river Hunter to Sydney, per ship or steamers, and thence per ship or steamers to London, including the risk of craft, from the time that the wools are first waterborne, and of transshipment and landing and reshipment at Newcastle and Sydney." No notice of this insurance was given to the defendants' company. After both these insurances had been effected, and while both the policies were in force, viz., on Feb. 9th 1870, a fire took place at the stevedores' stores, and 182 of the plaintiffs' bales were burned. Other bales of the plaintiffs which had been at other stores were afterwards shipped on board the said ship, and bills of lading were given in respect thereof in return for the stevedores' receipts. The carriage of the wool in question down the river Hunter to Sydney was under a distinct contract from the contract for carriage from Sydney to London. The plaintiffs sued the defendants on their fire policy for the loss and obtained judgment in their favour, against which judgment this appeal was brought.

The question raised was whether the first or the second policy applied, and, if the latter, whether the defendants were not relieved from all liability by the operation of clause 5. The court below held that the second policy did not insure the goods on land, but was a marine policy, simply covering, in addition to the perils of the seas, only such risks as arose upon the loading and discharge of the vessels and the necessary transshipment incidental to the voyage.

Manisty, Q.C. (*Edwards*, Q.C. with him) for the defendants.—The question arises here from the plaintiffs having effected two policies, first, the fire policy with the defendants, and secondly, what may be called the marine policy with the Indemnity Mutual Insurance Company. There being a proviso against double insurance without notice, the first question is, whether the marine policy covered the same risk as the fire policy, because, if it did, then, notice not having been given to the defendants of the second insurance, they are not liable under the provisions of their own policy. It is therefore admitted that the plaintiffs are entitled to recover from the defendants on the Liverpool policy, unless the marine policy covered the same risk. Looking at the words of the latter policy, it is an insurance which attached when the goods were loaded on craft in the river Hunter, and continued while they were at Sydney, and during transshipment, and during the voyage to London (*Pelly* v. *The Royal Exchange Assurance Company*, 1 Burr. 341). [BLACKBURN, J.—The marine policy cannot attach until it is destined for a particular ship.] We contend that the policy attached when the goods were put on the ship in the river, and continued while they were being transshipped at Sydney; and that by the custom and practice, they were then to be considered just as if on board ship. The practice necessitated the temporary warehousing of the wool before loading it again on the ships for England, and the risk when so warehoused is covered by the words of the policy "transshipment, and landing, and reshipment."

Watkin Williams, Q.C. (*J. C. Mathew* with him) for the plaintiffs.—The Liverpool policy, it is admitted covers the loss, unless it is taken out of it by the operation of clause 5, which is that if the assured "insured elsewhere," the policy was not to hold good unless notice was given. The plaintiffs' contentions are: First, they were not insured elsewhere; that is, the loss was not covered by the marine policy; secondly, if it were possibly covered, that does not constitute an insurance elsewhere within the meaning of the policy:

Harrison v. *Ellis*, 7 E. & B., 465;
Pearson v. *The Commercial Union Assurance Company*, *ante*, vol. 2, p. 100; 29 L. T. Rep. N. S. 279; L. Rep. 8 C. P. 548.

As to *Pelly* v. *The Royal Exchange Assurance Company* (*ubi sup.*), if there had been an affreightment from the river to London, then, perhaps, transshipment being necessary, this warehousing might have been held to be incidental to the transshipment. But the case is different here. They were warehoused for the convenience of the owners, and if the goods were taken to a warehouse for any purpose, not being part of the actual transshipment, then it is contended the marine policy would not apply; secondly, the provision in clause 5 does not apply to cases where the goods are only possibly, but where they are specifically insured. Here even if possibly the policies might overlap, there is no specific insurance, and so the plaintiffs need not have given notice, and when could notice as a question of fact have been given? The clause manifestly points to a similar description of policy to the fire policy, and does not mean a marine policy.

Manisty, Q.C. in reply.—The plaintiffs were bound to give notice, whatever the effect might be; they were, in the words of the clause, "insured elsewhere," and they must give it after the fire if they could not give it before. The real question is, did the marine policy, in fact, cover the risk, and if it did, it matters not whether it did so accidentally or not. Crompton, J., in his judgment in *Harrison* v. *Ellis* (*ubi sup.*), shows that the ground of the judgment is that there would have been in fact a double insurance. So in *Pearson* v. *The Commercial Union Assurance Company* (*ubi sup.*), the deviation was held not within the scope of the policy, because the jury had expressly found that the ship was moored in the river for an unreasonable time, and for a particular purpose unconnected with the transit.

BRAMWELL, B.—I am of opinion that the judgment of the court below should be affirmed. To begin with, I am very clearly of opinion that no action could be maintained against the underwriters for indemnity on the marine policy in respect of this loss. The words in it are very clear, "Lost or not lost, at and from the river Hunter to

Sydney, per ship or steamers, and thence per ship or steamers to London, including the risk of craft, from the time that the wools are first waterborne and of transshipment and landing and reshipment at Sydney," that is, including the case where the wools are taken from one ship to another, and where it is necessary to land them for that purpose, and afterwards the risk of reshipping. This, it is quite clear to me, does not include a loss by fire of the goods when warehoused on land, which is no part of landing or transshipment, and it is so clear that one need only read the words themselves to perceive it to be so. But it is said nevertheless, that the wools were virtually on board the ship at the time of loss, and so within the policy. In point of fact, however, they were not on board ship, nor were they in course of the act of reshipment. I am therefore very clearly of opinion that this particular loss could not be recovered against the underwriters on the marine policy. But then, the assured was not to recover if any other insurance were effected and not notified to the Liverpool company. Now, as far as mere words go, there might here be said to be an isurance elsewhere, but was there in fact? Mr. Manisty says that the words "insure elsewhere" must be an insurance as to the whole or a portion of the risks in the policy sued on. If so, in my opinion, this is not a case of such double insurance, because no action could have been maintained on the Marine Insurance policy in respect of this loss, but the action could be maintained on the policy in question. Then it was said here that there was a possibility of the goods being within the risk covered by both policies. For my part I doubt whether such a possibility would be sufficient; for to come within the provision, there must be such a double insurance as that the underwriters in the one case would have the benefit of the other. But in my opinion there is no evidence here that the risk in the two policies did overlap one another. It is suggested as the policy on wool to Sydney was in these terms, "on wool in fleeces or bales, in any shed, or store, or station, or in transit to Sydney by land only, or in any shed or store, or on any wharf in Sydney until placed on board ship," that landing and reshipment might involve putting the goods on a wharf, so that while there if a fire occurred, there would be a loss within the scope of the policy. The answer is first, that there is no evidence that there could be such a mode of landing and reshipment as one process, going on as a continuous process in the manner supposed, nor do I believe that it exists; and that being so, the possible case which has been put is therefore a possible case as to which we have no evidence of its possibility in point of fact. Another answer is, that if it were so, the marine policy would cover the loss, and the fire policy would not. It seems, therefore, that the loss by fire is not within the marine policy for the reasons given; and next, although it is possible a case might occur in which the loss might be in both policies, yet first there was no evidence that such could take place at Sydney; and secondly, if it were possible there, it would show that the case was not in the fire policy at all, but in the marine policy, and so in neither case would there be a double insurance.

Blackburn, J.—I also think that the judgment below should be affirmed. The fire policy is on "wool in fleeces or bales, in any shed, or store, or station, or in transit to Sydney by land only, or in any shed, or store, or on any wharf in Sydney until placed on board ship." The wool was, in fact brought to Sydney and stored there, and before it was put on board ship was burnt, and so it is, I think, quite clearly a loss for which the insurers were liable unless they are saved by the 5th clause of the policy, which is to the effect that the policy was to be void if the wool were insured elsewhere without notice given to the insurance company. Now, I think, taking that and the average clause together, that it is clear what is meant and if the marine policy did insure the goods on shore then the plaintiffs ought to have given notice of the insurance to the defendants, but such a construction of the clause would be too much strained if we were to say this notice was equally necessary if the second insurance was of a different character to the first. It must I think, have been a second insurance against fire, and I do not think that if there were only an accidental and possible overflapping of the policies, this was contemplated in the words "insured elsewhere." Then arises the question does the marine policy, in fact, cover the goods in the warehouse at Sydney? The facts are that the goods came down the river Hunter to Sydney, and were put in Moore's warehouse there until it was convenient to secure a ship in which to forward them to England. Thence they were sent to the stevedore's warehouse, and there they were burned. They would not *primâ facie* be covered by the marine policy when they were on land, but the words of the policy go on to say "including the risk of transshipment and landing and reshipment at Sydney," Now I do not think that it was a deviation, landing the goods at Sydney, so as to vitiate the insurance on that account, but it is very difficult to say that the underwriters in a marine policy are liable for a fire on shore. It would require evidence of a very strong custom to induce me to think that the goods were just in the same position as if on board ship, and there is none here to establish this contention. I think, therefore, that "insured elsewhere" means specifically insured, and against the same risks and under the same conditions, and at the same time, and not a mere possibility of a wholly different insurance overlapping. For this reason and upon the facts stated, I think that the plaintiffs are entitled to succeed.

Lush, J.—I also think that the judgment of the court below ought to be affirmed upon the ground that the goods were not insured elsewhere in any other office against fire "in any shed, or store, or station, or on any wharf in Sydney." I do not think any of those events were ever covered by the marine policy. It says: [The learned judge then read the principal clauses.] Now I think this means landing in the course of the voyage as incidental to it merely, and as a means of transshipment which would be necessary from the river craft to the ship. Here, as I understand the facts, the goods came down to Sydney in several instalments, and were stored in warehouses until it was convenient to send them on to London. If so, it was not a landing and reshipment within the meaning of the policy at all, and so this disposes of the contention that the goods were just in the same position as regards the policy as if on board ship. As to the second question it does not arise in my opinion, for the marine policy ceased to be in force from the moment of the

goods being landed as described. But I will go further than this, and say that I do not think that a policy which in certain events may possibly overlap the former one is such a one as that the assured would have under the provision in the defendants' policy to give notice of it to the underwriters.

Quain, J.—I am of the same opinion. I think the first question is what the risk undertaken by the Indemnity Company was, and I find it to be in the words of the policy of transshipment, landing, and reshipment. Now first, I think that the goods lost were not being transshipped, landed, or reshipped within the meaning of these words; nor secondly, do the facts found extend it in the present case by reason of any custom. There may perhaps be some customs so notorious as to qualify the plain meaning of words as simple and intelligible as these, but here there is no such notorious custom found to exist in the case. In Lord Mansfield's words, I should define the risk as being that which the insurers knew would arise from the ordinary and known course of trade, and the custom must be one so notorious and universal that it always made it necessary for the particular course to be adopted, which was in fact adopted. Now so far from this being so here, I find in paragraph 7 of the case it is stated that *sometimes* this is done and *sometimes* that, and they are not therefore invariable and necessary practices, and consequently do not come within the words of the policy. On the second point I agree with the rest of the court, because I think that what was intended by the 5th clause is a certain definite policy, and not a mere contingent risk. It was not clear that the goods would be landed and warehoused at Sydney, and so this was not in my opinion an insurance elsewhere within the meaning of the condition so as to require notice of it to be given.

Pollock, B.—I am of the same opinion. The first question is whether by the marine policy having been effected it can be said that the goods previously covered by the Liverpool policy were then insured elsewhere. I refer to the marine policy itself to see, and I quite agree with what was said by Willes, J., in the court below that it was meant to cover marine risks in a marine transit. It is reasonable to assume that when that was entered into the intention was that the goods should go to England. Then what did actually occur was not something incidental to the marine transit, but something which made a break in the course of the water transit, and put it into the power of the agent at Sydney to send the goods elsewhere. It is true that the goods when burned were in the hands of a stevedore, but then there had been a distinct break in the voyage when they came to be put into his warehouse. Having disposed of that, there is therefore one other point only. If the second policy did chance to overlap the former one, could it be said that the goods were thereby insured elsewhere so as to absolve the defendants altogether? On this point I agree with my brother Bramwell. These conditions had been of late inserted into fire policies with the object of enabling the insurers to know the character of the risk, and that the parties had the real value of the goods insured. But it would manifestly be quite immaterial to the underwriters of a fire policy whether they knew or not that the assured had a wide marine policy also, even if the two policies might possibly in some event overlap. On both grounds I think the judgment ought to be affirmed.

Amphlett, B.—I am of the same opinion. On the main point I quite agree with the rest of the court, and will not repeat what they have said. On the second question, if we think that the marine policy did not attach, the second point of the defendants is no longer open because paragraph 21 of the case admitting that the plaintiffs are entitled to recover unless they are deprived of this remedy by means of having effected the marine policy excludes it. That clause could have no operation if they had not insured the risk under the marine policy. But I agree that the plaintiffs had no double remedy, and say further that, in my opinion, in no event could there be one under these policies, or could the policies overlap, because the only event within the marine policy would be a fire happening while the goods were on shore for the express purpose of being reshipped. But if so the words in the fire policy "on any wharf in Sydney" would not mean this, because the goods would be considered in law as on the ship while they were being shipped.

Judgment affirmed.

Attorneys for the plaintiffs: *Waltons, Bubb,* and *Walton.*

Attorneys for the defendants: *Chester, Urquhart,* and *Co.*

COURT OF ADMIRALTY.

Reported by J. P. Aspinall, Esq., Barrister-at-Law.

May 11 *and June* 1, 1875.

Banda and Kirwee Booty.(a)

Booty of war—Reference to Admiralty Court—Non-payment of part of booty—Distribution—Jurisdiction.

When the Crown grants to captors booty of war and

(a) This case cannot be called a "maritime law case," but it deals with a subject which is intimately connected with prize law, and turns to some extent upon jurisdiction of the High Court of Admiralty as a prize court, and it was hence thought desirable to insert it here.

The origin of the jurisdiction of the High Court of Admiralty as a prize court is very doubtful. From the reign of Charles II. it has derived its jurisdiction as a prize court entirely from a commission from the Crown issued at the commencement of each war to the Lords of the Admiralty. Whether prior to that reign the court exercised jurisdiction as a right incident to the office of Lord High Admiral and his deputy, there appear to be no documents in existence to show. It seems, however, probable that prize jurisdiction was originally inherent in the office of the Admiral, and that special commissions calling forth the jurisdiction are of comparatively modern institution. Prior to the reign of Elizabeth England was seldom at peace with her neighbours, and, although the wars may not have been of any importance, it appears by the State papers that there were perpetual captures of ships by British vessels; in fact, before there was a regularly established fleet belonging to the Crown, the captains of ships do not seem to have waited for a declaration of war; they seized any foreign vessel where there was a pretext for quarrel. In this state of things the services of the Admiralty Court, or some other tribunal, were constantly called into requisition to decide the question of prize or no prize, The Admiralty Court was not the only tribunal which formerly investigated questions of prize, In A.D. 1343 a British ship having seized and brought in another ship as prize, an order was issued by Edward III. to his Chancellor and council to call the parties before them, inform themselves of the facts, and render complete and speedy justice to the

by order in council made under 3 & 4 Vict. c. 65, s. 2 refers the claims of all parties whomsoever to the property captured to the Judge of the High Court of Admiralty, who is to take into consideration any capture that may have been made of any property during the operations by any of the claimants and is to make such order as to him shall seem right both in regard to the persons who

parties (see Rymer's Fœdera, vol. v., p. 376). Again, in the reign of Henry VI., in the year 1426, a proclamation was issued to all sheriffs of counties, by which it was declared that nothing taken upon the seas in whatever manner was to be distributed, separated, or sold on the sea, or in any port or harbour into which they were brought, but were to be kept entire until the Council of the King, the Chancellor of England, the Admiral of England, or his deputy-general for the time being, should be certified of the above prize, and duly informed if the goods there taken belonged to friends or enemies; and that they (the council, &c.) being certified, should give good and quick attention thereto; that it was a good test whether goods belong to friends or enemies if the persons from whom they are taken were brought to shore and put to ransom or not; and it was directed that persons capturing goods and bringing them ashore without the persons from whom they were captured should be imprisoned until it was known to whom the goods belonged: (Rymer's Fœdera, vol. x., p. 368). These two instances show clearly that at that date the Admiralty Court was not the sole court, and hence it is not probable that a distinct prize commission then existed. This view is again corroborated by the Instructions issued by Henry VIII. to the Admiral on the occasion of the invasion of France in 1512 (see Rymer's Fœdera, vol. xiii., p. 329; Robinson's Collectanea Marittima, p. 1). These instructions greatly consist of extracts from the Black Book of the Admiralty, and would seem to show that the Admiral himself dealt with prizes taken by the fleet, and dealt with them of his inherent right: (see paragraphs 19, 20, 21; the latter two being translations from the Black Book; see Twiss's Black Book of the Admiralty, vol. i., p. 23, sects. 8, 9.) The Black Book itself very clearly indicates the position and powers of the Admiral, and yet no mention there occurs of distinct prize powers. It is pretty clear that in the reign of Elizabeth the Admiralty jurisdiction, both instance and prize, had become pretty well defined, for we find that a commission was issued on Jan. 30, 1585, to two civilians) Dr. Valentine Dale and Dr. Julius Cæsar) to execute the Admiralty jurisdiction during the vacancy of the office of Lord High Admiral (see State Papers, Domest. Eliz., vol. ccxxxvii., fol. 66; vol. clxxvi.), This commission was not a special prize commission, and in fact, makes no mention of prize as distinct from any other part of the Admiralty jurisdiction. The war with Spain commenced in 1586, and in 1587 and 1588 the Spanish Armada was prepared and sailed for England; Lord Howard of Effingham was then Lord High Admiral, but there is no trace to be found of any separate prize, commission being issued to hear and adjudge prize causes. Between this period and the reign of Charles II., although there are many commissions existing giving power to the High Admiral to will and require the judge of the Admiralty Court to issue letters of marque and others appointing divers persons to hear appeals from the Admiralty Court in prize causes, there is no trace of a separate prize commission, and the ordinary commission of the Lord High Admiral and of the judge makes no mention of prize (see Rymer's Fœdera, vol. xx., pp. 115, 1628; vol. xviii., p. 1052; vol. xix., p. 300). The first trace of any special authority in prize matters is to be found during the Commonwealth, when an Act or ordinance was passed by the Parliament (April 17, 1649, cap. 21) directing that the Admiralty Court should proceed against all captures, taken from persons supporting the King and from foreigners his friends, as lawful prize; and in pursuance of this Act an order was issued in 1850 which is recorded in the Admiralty Registry as "an order of the pretended Parliament in 1650 for the judges of the Admiralty to proceed to the adjudication of the French ships and goods taken by the fleet." Then came the Restoration, and at the commencement of the first war in the reign of Charles II. (with the Dutch in 1664), the office of Lord High Admiral of England and Ireland was in commission, and so far as can now be ascertained no special prize commission was issued. Shortly afterwards James, Duke of York, was created Lord High Admiral of England, Ireland, and Scotland; this is the first instance on record of the appointment of one Lord High Admiral for all three Kingdoms; and in 1672, when the second war in that reign with the Dutch commenced, we find for the first time a special commission issued to the Lord High Admiral authorising him to require the Admiralty Court of England to proceed to the adjudication of prize causes, and this has continued until recent times. The cause of this change, if change there was, was probably to enable the Crown to keep the prize jurisdiction in the hands of the English Admiralty Court, and stop the exercise of that jurisdiction by the Irish and Scotch courts. As the judges of the Admiralty Courts were considered as lieutenants of the admirals, the directing of one only to exercise the prize jurisdiction would have the effect of excluding the others. The Irish and Scotch courts have nevertheless continued to claim to exercise prize jurisdiction, but with little success, as the practical result of these commissions has been to bring all prize causes before the English court. Since 1672 prize commissions have always been issued at the commencement of each year, and the Admiralty Court has not exercised prize jurisdiction until such a commission has been issued. Hence it has come to be generally supposed that the prize jurisdiction is not inherent, but is called forth by the prize commission, and this opinion is expressed by Lord Mansfield in *Lindo* v. *Rodney* (Dougl. 572): but it must be remembered that that learned judge searched the records whilst they were all in confusion, without indexes, and before the calendars of State papers had come into existence. The opinion that prize jurisdiction was inherent was clearly entertained by the judges of the Vice-Admiralty Courts first created in our West Indian and American colonies, for they claimed to and did exercise this jurisdiction without any special prize commission, and by virtue of the general commission only, which makes no mention of prize. The commissions of these courts were (in A.D. 1801) revoked by order of the King, and new commissions issued without holding the prize jurisdiction, and all Vice-Admiralty Court commissions are now issued in this form. Prize jurisdiction was only given to certain courts, and then only by virtue of a special prize commission issued to the Lords of the Admiralty, and this continues to the present time.

The mode of giving prize jurisdiction has hitherto been as follows:—The Crown first declares war, and an order in council is issued commanding general reprisals, and the seizure of all ships, vessels, and goods belonging to the hostile state or its subjects, or others inhabiting its countries, territories, and the bringing of "the same to judgment in such Court of Admiralty within Her Majesty's dominions, possessions, or colonies, as shall be duly commissionated to take cognisance thereof." And the order continues: "And to that end Her Majesty's Advocate-General, with the Advocate of Her Majesty in her Office of Admiralty, are forthwith to prepare the draft of a commission, and present the same to Her Majesty at this board, authorising the Commissioners for executing the Office of Lord High Admiral to will and require the High Court of Admiralty of England, and the Lieutenant and Judge of the said court, his surrogate and surrogates, as also the several Courts of Admiralty within Her Majesty's dominions, which shall be duly commissionated, to take cognisance of, and judicially proceed upon, all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods that are or shall be taken, and to hear and determine the same, and according to the course of Admiralty and the law of nations, to adjudge and condemn all such ships, vessels, and goods as shall belong to the" hostile state, &c.; "and they are likewise to prepare and lay before Her Majesty a draft of such instructions as may be proper to be sent to the said several Courts of Admiralty in Her Majesty's dominions, possessions, and colonies for their guidance herein." Such a commission is thereupon prepared thus:—

"V. R.

"VICTORIA, by the grace of God, &c.—

"To our right trusty, &c. (naming the Lords Commissioners of the Admiralty) our Commissioners for executing the Office of Lord High Admiral of our United Kingdom

are, and the proportions in which such persons are, entitled to share them . . . reserving, however, to H. M. the right to direct the rates or scale of distribution according to which the property or the proceeds thereof is to be repaid to the several ranks of the force or forces to which such property may be adjudged, and the court proceeds to adjudge certain claimants entitled to share, and in pursuance thereof sums of money on account of the booty are distributed among the successful claimants; the High Court has no jurisdiction, on the application of the successful claimants, complaining that the Government have refused to pay over and distribute the remainder of the booty, to order that such remainder be brought into the registry of the High Court, and abide the event of the suit; under such an order of reference the High Court has no power of distribution.

THIS was a motion, made to the Court of Admiralty on behalf of Major-General Colin Mackenzie, C.B., president of "The Select Prize Committee of the Saugor and Nerbudda Field Force," duly appointed for the protection of the interests of parties entitled to the Banda and Kirwee Booty, and on behalf of others, captors or their representatives, upon the facts stated in the petition set out below, "for an order that the petitioners should have leave to enter appearances as interveners or plaintiffs in the cause or in either character, and further to order that a citation issue from the court calling upon the Most Honourable Robert Arthur Talbot, Marquis of Salisbury, Her Majesty's then present Secretary of State for India in Council to appear and show cause why a monition should not issue against him as Her Majesty's Secretary of State in Council for India from the court monishing him to bring into the registry of this court, the said principal sums claimed by the petitioners (see petition below) and also to account for and to bring into the registry all interest due upon the said principal sums in order that the same might abide the event of this suit."

The petition above-mentioned was, so far as is material, as follows:

1. That in the year 1857 a rebellion broke out in several parts of the territories belonging to the East India Company in India, and amongst others in those parts of their territories known as Central India and Bandelkund for the suppression of which a military force was organised by the Madras Government, and placed by it under the command of the original plaintiff in this cause Lieutenant-General Sir George Cornish Whitlock then brigadier-general.

2. That the said force known as the Saugor and Nerbudda Field Force was composed partly of troops in Her Majesty's service, and partly of troops in the service of the Honourable the East India Company, and was during the year 1858 employed in operations against the Mahratta chiefs of Kirwee which resulted in the capture in that year of their persons at Kirwee and of the town of Kirwee on the 5th and 6th June respectively with moveable property of very great value.

3. That the said Mahratta chiefs, Narrain Rao, and Madho Rao were representatives of the dynasty of the

of Great Britain and Ireland, and dominions thereunto belonging, and to the commissioners for executing that office for the time being, greeting—Whereas, we having taken into consideration the injurious and hostile proceedings of (name of sovereign or state) as set forth in the declaration of this date, issued by our command; and we, therefore, having determined to take such measures as are necessary for vindicating the honour of our crown and for procuring reparation and satisfaction, do, by and with the advice of our Privy Council, order that general reprisals be granted against the ships, vessels, and goods of (name of sovereign or state) and of his subjects or others inhabiting within any of his countries, territories, or dominions, so that our fleets and ships shall and may lawfully seize all ships, vessels, and goods belonging to (name of sovereign or state), or to his subjects or others inhabiting within his countries, territories, or dominions, and bring the same to judgment in any of the Courts of Admiralty within our dominions, which shall be duly commissionated. These are therefore to authorise, and we do hereby authorise and enjoin you our said commissioners now and for the time being, and any three or more of you, to will and require our High Court of Admiralty of England and the Lieutenant and Judge of the said court, and his surrogates, and also the several Courts of Admiralty within our dominions which shall be duly commissionated; and they are hereby authorised and required to take cognisance of, and judicially to proceed upon, all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods already seized and taken, and which hereafter shall be seized and taken, and hear and determine the same, according to the course of Admiralty and the law of nations, and to adjudge and condemn all such ships, vessels, and goods as shall belong to (name of sovereign or state), or to any of his subjects or others inhabiting within any of his countries, territories, or dominions. In witness whereof we have caused our Great Seal of our United Kingdom of Great Britain and Ireland to be put and affixed to these presents.

"Given at our Court at , the day of , in the year of our Lord 187 , and in the year of our reign."

Thereupon the Lords Commissioners issue their warrant to the High Court of Admiralty in a form similar to the following:—

"By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland.

"Her Majesty having been pleased, under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date the day of , 187 , to authorise us to the effect following, as by the commission itself herewith sent you to remain of record in the registry of the High Court of Admiralty of England doth more at large appear:—These are in Her Majesty's name and ours to will and require the High Court of Admiralty of England and you, the Lieutenant and Judge of the said court, and your surrogate and surrogates, and you are hereby authorised and required to take cognisance of and to judicially proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods that are or shall be taken, and to hear and determine the same and according to the course of Admiralty and the law of nations to adjudge and condemn all such ships, vessels, and goods as shall belong to the (name of sovereign or state), or his subjects or to any others inhabiting within any of his countries, territories, or dominions which shall be brought before you for trial and condemnation. And for doing so this shall be your warrant.

"Given under our hands and the seal of the Office of Admiralty this day of , A.D. 187

(Signed) "A. B.
"C. D.

"To the Right Hon. S. L.,
Judge of the High Court of Admiralty of England.
"By command of their Lordships,
(Signed) "V. L."

To the Vice-Admiralty Courts selected for prize jurisdiction, a similar warrant is issued, the main difference being that a copy only of the commission accompanies it. Upon these warrants the prize jurisdiction has hitherto been, and in the case of Vice-Admiralty Courts still will be, based. In the case of the High Court of Admiralty of England the necessity for the special commission and warrants have been done away with by the Naval Prize Act 1864 (27 & 28 Vict. c. 25), by the 4th section of which it is enacted that "The High Court of Admiralty of England shall have jurisdiction throughout Her Majesty's dominions as a prize court." The jurisdiction of the Admiralty Court is now vested in the High Court of Justice, and prize causes having been within the exclusive jurisdiction of the Admiralty Court, the Admiralty Division will have exclusive cognisance of all prize causes: (See The Supreme Court of Judicature Act 1873, ss. 16 & 34.)—ED.

Peishwas being the adopted sons of Maharajah Benaik Rao of Poona, who for a time reigned as Peishwa of the Mahrattas, and who was subsequently settled at Kirwee by the East India Company with the title of Maharajah, and a grant of the surrounding territory. That the said Narrain Rao and Madho Rao after the death of their adopted father continued to reside in the palace at Kirwee, with a retinue of 200 Sepoys, 25 cavalry, and 4 guns, and were residing there at the time of their capture as aforesaid. That shortly after the breaking out of the Indian rebellion the said Narrain Rao and Madho Rao joined in the said rebellion, and caused themselves to be proclaimed Peishwas of the Mahrattas in India, levied troops, issued proclamations for the collection of revenue and actually collected such revenue in Kirwee, and the surrounding districts, and established themselves, and acted in all respects as independent sovereigns for the space of more than six months previous to their capture.

3. That the said Narrain Rao and Madho Rao were shortly after their capture tried before Frank Otway Mayne, Esquire, C.B., under a Special Act No. 11 of 1857 of the Legislative Council of India, and were by him convicted and sentenced under the said Act as having waged war against the Queen and the Government of India.

4. That at the time of the capture of the said Narrain Rao and Madho Rao, and of Kirwee the said Narrain Rao and Madho Rao were possessed of very considerable moveable property, and that the greater portion of the property captured as hereinbefore mentioned belonged to them, and consisted in part of the following *choses in action* which form the principal subject of the present application namely:

(1.) A debt due from the East India Company to the said chiefs amounting to 2,560,000 rupees, which sum had been advanced by the said chiefs to the East India Company in 1854 and 1855 on the Public Works Loan, and for which the said East India Company had given the said chiefs by way of acknowledgment and security forty-two promissory notes promising to repay the same, with interest at the rate of £5 per centum per annum, and which notes were in the *Calcutta Gazette* of the 9th Jan. 1858 notified to have been stopped in the books of the Accountant-General's office on the 7th of that month, as the property of chiefs in open rebellion against the State, and were not dealt with up to the time of the capture of the said chiefs, and are believed to have been destroyed in Kirwee at the time of the capture thereof, there being no trace of their existence from the time of such capture up to the present time.

(2.) A debt due to the said chiefs from the said East India of 2,000,000 rupees being the amount of a further subscription of the said chiefs to the said Public Works Loan in May 1857 for which no notes had been furnished to the said chiefs.

(3.) Certain debts due to the said chiefs from private individuals which were collected after their surrender by the civil officers of the East India Company, and which realised R's.119,149 13a. 1p.

(4.) And also of certain jewels belonging to the said chiefs which were sold by the civil officers of the said company, and realised R's.12,782 5a.

6. That at the time of the capture of Kirwee and of the said chiefs all prize or booty of war captured in India in operations, in which the forces of Her Majesty took part was the property of the Sovereign, and not of the East India Company, and that the above public debts due to said chiefs are prize or booty of war, and were, in fact, specifically included in a return of all the Banda and Kirwee captured property transmitted by the Secretary to the North-Western Provinces to the Secretary to the India Government on the 11th Nov. 1859.

7. That previously to the said capture the Right Honourable Viscount Canning, as Governor-General of India, published in the *Calcutta Gazette*, two general orders in relation to booty of war, namely, (1) a general order dated 27th Nov. 1857 sanctioning the appointment of prize agents, and giving instructions as to the interest of the troops in booty captured, of which said general order the court of directors, in a military despatch dated the 31st March 1858, wrote in the following terms which were approved of by the President of the Board of Control. "We concur in the views announced in your general order of the 27th Nov. 1857 on the question of claim on the part of the troops to have granted them as prize the property belonging to the State, and that belonging to private individuals recovered from the mutineers. We also fully approve of your recommendation that property taken by the troops, which is neither claimed on behalf of the State nor claimed, and identified by individuals, who may establish their loyalty should be considered as prize. We shall accordingly as soon as we are informed by you of the necessary particulars, make application to the Crown in the usual form praying a Royal Grant of the same as prize." (2) A general order dated the 29th Jan. 1858, declaring "that all moveable property of the description ordinarily distributable belonging or which might reasonably be presumed to belong, to rebels, or mutineers, and which has been or should be captured by the troops engaged in suppressing the rebellion, might be fairly treated as prize, and that he had recommended the honourable court of the East India Company to adopt the necessary measures for obtaining Her Majesty's sanction to the distribution of the said property accordingly."

8. That after the termination of the said military operations Lieutenant-General Sir George Cornish Whitlock and the other officers and troops forming the Saugor and Nerbudda Force, and Lord Clyde, as Commander-in-Chief in India, with his personal staff in the field at the time of the said captures, applied to have the proceeds of the said booty distributed amongst them, but the officers and troops belonging to other divisions of the army or armies employed in suppressing the mutiny in that part of India, having preferred claims to shares in such prize or booty of war the Lords Commissioners of Her Majesty's Treasury after having given several decisions adverse to the original plaintiff, and those whom he represented on the 8th June, 1864, made a minute wherein it is stated that they, the said Lords, had "caused a draft of an order in Council to be prepared, which was read at their Board signifying the pleasure of Her Majesty, that the booty of war captured during the operations for the suppression of the rebellion in Central India and which had devolved to Her Majesty in virtue of Her prerogative, should be granted to the forces engaged in those operations, and referring the claims of all parties thereto to the Judge of the High Court of Admiralty under the authority of 3 and 4 Vict. c. 65, with directions that he should make such order as to him should seem right."

9. That by an order in Council dated the 10th June 1864, which is the order referred to in the said minute Her Majesty was pleased by the advice of Her Privy Council to refer to the Judge of the High Court of Admiralty, all claims to the property captured during the aforesaid operations in the terms following—

"Whereas it has been represented to Her Majesty that in the year 1857, a rebellion took place within that part of Her Majesty's East India dominions known as Central India. That land forces consisting of Her Majesty's troops and of troops of the East India Company were for the suppression of the same organised in three columns termed respectively the Central India Field Force, the Saugor and Nerbudda Field Force, and the Rajpootana Field Force under the command respectively of Major-General now General Sir Hugh Rose, G.C.B., Major-General Whitlock, now Lieutenant-General Sir G. C. Whitlock, K.C.B., and Major-General Sir Henry Roberts, since deceased, and that in course of the operations which followed certain property was captured at the places undermentioned, namely, Ihansi, Kalpee, and Gwalior, by the force under the command of the said Sir Hugh Rose, of the estimated value of 490,000 rupees, at Kirwee and Banda, by the force under the command of the said Sir George Whitlock, of the estimated value of 7,000,000 rupees, and at Ahwah Kotah and Buneos, by the force under the command af the said Major-General Sir Henry Roberts of the estimated value of 1,82.000 rupees. And whereas the said property belongs to Her Majesty in right of Her royal prerogative. And whereas Her Majesty has signified her gracious pleasure that the said property, and the proceeds thereof shall be granted to and distributed amongst the forces concerned in the operations above referred to in such manner as may be hereinafter determined. And whereas it has been proposed for the consideration of Her Majesty that the said proceeds of such property should be thrown into a common fund, and be distributed equally among the

forces under the command of the said Sir Hugh Rose, Sir George Whitlock, and Sir Henry Roberts respectively. And whereas the prize agents of the force under the command of the said Sir George Whitlock have preferred a claim that the said property captured at Kirwee and Banda, should be granted exclusively to the force under the command of the said Sir George Whitlock. And whereas the late General Lord Clyde preferred a claim on behalf of himself and his personal staff, that he and they should participate in the same on the ground that he, as Commander-in-Chief in India, directed the operations which led to the capture thereof. And whereas the said Sir Hugh Rose had preferred a claim that he and the force under his command should also participate in the same on the ground that such force co-operated in the actions or movements of the troops which led to the capture of the said property. And whereas Major-General Smith has preferred a claim for participation in the same on behalf of himself, and a brigade under his command in the event of the claim of the force under the command of the said Sir Hugh Rose being allowed, the said Major-General Smith stating that the brigade under his command was detached from the before mentioned force under the command of the said Major-General Sir Henry Roberts, and co-operated in the actions or movements of the force under the command of Major-General Sir Hugh Rose. And whereas a claim has also been preferred by Colonel William Middleton, on behalf of himself and a force under his command known as the Futteypore moveable column for a participation in the same property. And whereas other claims may be preferred by or on behalf of the same or other persons to the property or some part thereof captured during the aforesaid operations. And whereas by an Act passed in the 4th year of the reign of Her Majesty entitled 'An Act to improve the practice, and extend the jurisdiction of the High Court of Admiralty of England,' it was enacted that the said High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war or the distribution thereof, which it shall please Her Majesty by the advice of Her Privy Council to refer to the said court, and in all matters so referred the court shall proceed as in cases of war, and the judgment of the court therein shall be binding upon all parties concerned. And whereas it is Her Majesty's pleasure to refer under the authority of the said recited Act all claims to share in the property captured during the aforesaid operations, and in the proceeds thereof to the judgment of the High Court of Admiralty of England. Now, therefore, Her Majesty is pleased to order and it is hereby ordered by and with the advice of Her Privy Council, that the claims of all parties whomsoever to the property captured during the aforesaid operations, and the proceeds thereof be referred to the Judge of the High Court of Admiralty of England, who shall take into consideration if it shall appear to him necessary for the purposes of justice any capture that may have been made of any property during the said operations by any of the claimants, and shall make such order as to him shall seem right both in regard to the persons who are and the proportions, in which such persons are entitled to share therein and to the costs and expenses incurred in relation thereto by the respective claimants, whether before or subsequently to this order, reserving, however, to Her Majesty the right to direct the rates and scales of distribution according to which the said property or the proceeds thereof shall be paid to the several ranks of the force or forces to which such shall be adjudged."

10. That in obedience to and for carrying out the purposes of the reference made by the said order in Council, this suit was instituted, and after a lengthened hearing of the claims therein preferred to share in the said booty, judgment was on the 30th June 1866, delivered by the then judge of this court, whereby he pronounced the personal representatives of the late General Lord Clyde and the officers of his staff personal as well as general, who were in the field at the time were entitled to share in the booty captured at Banda and Kirwee in April and June 1858, and subject to this right he awarded the whole of the said booty to Lieutenant-General Sir George Cornish Whitlock and the force under his command called the Saugor and Nerbudda Field Force, including among the latter the officers and troops under Lieutenant-Colonel Keating and any other troops left by General Whitlock on his march, who, at the time of the capture formed a portion of his division, and were still under his command, and he disallowed all other claims to the said booty.

11. That in conformity with orders issued by the East India Company, all the said prize or booty of war including the sums payable or received on the said public and private debts due to the said chiefs was handed over to or taken possession of or retained by the said East India Company until such time as the same should become distributable as prize amongst the captors, and remained under the custody of or were retained by the said East India Company, until the transfer under 21 and 22 Vict. c. 106 of the Government of India from the East India Company to Her Majesty the Queen.

12. That upon the said transfer of the Government of India to Her Majesty the Queen the said prize or booty of war, and all the liabilities in respect of the same including the obligation to pay the said public debts, came under the custody and control of or were transferred to Her Majesty's Secretary of State for India in Council, who is liable to account for the same to your petitioners, and those whom they represent as the sole grantees of Her Majesty the Queen of the same.

13. That since the said order of this court of the 30th June 1866, part only of the proceeds of the said prize or booty of war has been paid to the parties entitled thereto or reserved on account of unclaimed shares according to the said judgment of this court, namely, two principal sums with interest due thereon that is to say:—

First, a sum of 5,550,000 rupees specifically named in a Royal Warrant of Distribution (Rs.4,854,664 15a. 1p. thereof being for principal and the residue for interest due on such principal) which said Warrant of Distribution is dated the 22nd Nov. 1866, reciting amongst other things the captures of the said towns of Banda and Kirwee, and that on the occupation thereof property was captured which had been since duly sold, and the sale proceeds have been realised by the prize agents employed for collecting, selling, and realising the said booty, or have been otherwise realised or are about to be realised amounting, or computed to amount with interest after deducting costs to the sum of 55 lacs 50,000 rupees or thereabouts and reciting the said Order in Council of the 10th June 1864, and the said judgment delivered in this cause on the 30th June 1866, Her Majesty was pleased to grant to Her Secretary of State for India in Council for the time being all the aforesaid booty mentioned to have been captured at or in the said towns of Banda and Kirwee, and the proceeds thereof as aforesaid in trust for the use of the personal representative or representatives of the late Lord Clyde, formerly, Sir Colin Campbell, the Commander-in-Chief, and his staff personal as well as general, who were in the field at the time, and the said Major-General Sir George Cornish Whitlock, and the officers and men belonging to the forces engaged in the said captures as aforesaid including the troops under Lieutenant-Colonel Keating and any other troops left by General Whitlock on his march, and who, at the time of the captures, formed a portion of his division, and were still under his command such booty and proceeds to be distributed by Her Majesty's Secretary of State for India in Council, for the time being or by any other person or persons he might appoint in the manner in the said warrant after directed.

Secondly, a sum of Rs.743,829 1a. 2p., namely, Rs.523,253 4a. 6p. for principal and Rs.220,565 12a. 8p. for interest thereon which is not specifically named in the said warrant of distribution, and was not previous to the date thereof comprised in the amended returns made by the India Government of the prize or booty of war to the captors.

14. That in addition to the four several sums claimed and referred to in the 5th paragraph of this petition the following further sums for or in respect of prize or booty of war so granted to the captors as aforesaid by Her Most Gracious Majesty the Queen are still due to your petitioners, and those whose interests they represent namely—

(1) Rs.110,000 in respect of interest on a principal sum of Rs.532,190 6a. 11p. part of certain moneys by the Indian authorities erroneously severed from and afterwards restored to the prize fund from the 29th July 1858 to the 28th Nov. 1862, which said principal sum was erroneously severed from the prize fund, and appropriated to the purposes of the Indian Government.

(2) A sum estimated at 600,000 rupees in respect of on interest Sonwat rupees 1,465,335 and other prize or

booty of war the conversion of which was delayed by the Government of India.

(3) 45,000 rupees erroneously deducted by the Government of India from the proceeds of the said prize or booty of war on account of auction commission together with interest for the same from the date of such deduction.

15. That since the payments of the said portions of the said booty mentioned in the 12th paragraph of this petition claims have been preferred on behalf of your petitioners, and those whose interests they represent, to Her Majesty's late and present Secretary of State for India in Council for payment of the said remaining sums due in respect of the said booty, and that the justice of such claims has been by the Secretary of State for India in Council at one time admitted in respect of claim No. 2 in the 13th paragraph of this petition mentioned, and partially in respect of claim of No. 1 in the same paragraph mentioned, but that your petitioners and those whose interests they represent have been unable to obtain payment of either of the said sums from the late or from the present Secretary of State for India, although repeated applications have been made to them for the same.

16. That as to the other sum mentioned in the 13th paragraph, and the sums mentioned in the 5th paragraph of the petition, notwithstanding that the said public and private debts due to the said chiefs were prize or booty of war, and belonged to Her Majesty the Queen by Her Royal prerogative, and not to the East India Company, and notwithstanding that your petitioners, and those whose interests they represent are the sole grantees of the Crown of the said prize or booty of war including the said public and private debts and notwithstanding the said order in Council of the 10th June 1864, and the said judgment of this Court, Her Majesty's late and present Secretary of State for India in Council have, without title or lawful authority, refused to pay the said sums to the parties entitled thereto and still retain the same.

The petition concluded with a prayer in the terms of the motion, and the facts thereof were substantiated by an affidavit. The section of the 3 & 4 Vict. c. 65 governing the question was as follows:

Sect. 22.—And be it enacted that the said High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please Her Majesty, her heirs and successors, by the advice of her and their Privy Council, to refer to the judgment of the said court; and in all matters so referred the court shall proceed as in cases of prize of war and the judgment of the court therein shall be binding upon all parties concerned.

Dr. *Tristram*, *Haughton*, and *Willis Bund*, for the petitioners.—By 3 & 4 Vict. c. 65, s. 22 all questions concerning booty of war referred to this court are to be proceeded with as in cases of prize of war, that is to say maritime prize; and it has always been the practice of this court sitting as a Court of Maritime prize to order the prize money in the possession of any person to be brought into the registry. By the order in council set out in the 9th article of the petition the court is empowered to proceed with the claims there set out, and has accordingly pronounced that certain persons, including the petitioners, are entitled to share in the booty. We now ask the court to enforce that judgment. [Sir R. PHILLIMORE.—Did not the judge by giving that judgment discharge the authority given him by the order in council? Is not the court *functus officio?* I do not see how I can do anything to enforce the judgment. In maritime prize the money is paid into court no doubt, but in that case the jurisdiction is original and does not arise by statute.] That is true, but the Act giving the jurisdiction over land captures expressly says that the practice shall be that of prize. [Sir R. PHILLIMORE.—In the original judgment (*Banda and Kirwee Booty*, L. Rep. 1 Adm. & Ecc. 109, 268) it is expressly said that the court has nothing to do with the distribution of the prize.] Nothing to do with the rates or scales in which the amount granted is to be distributed among the several ranks held entitled, but the court has something to do with enforcing the payment to the claimants, irrespective of distribution, of the amounts due to them under the royal grant. The order in council expressly reserves rights as to the scale of distribution, but this is all that is reserved and consequently the court has jurisdiction in all other matters, and although it is nowhere expressly said that the money may be ordered into the registry, still as the court has full control over the case, it follows that it must have power over the proceeds of the booty, and can take the necessary steps to enforce the payment. In the *Capture of Chinsurah* (1 Acton's Rep. 179), where there was a capture of a town by sea and land forces, an order was made to bring the money into the registry and it was brought in. The court might in the first instance have ordered all the money, the proceeds of this booty, to have been brought into court if in the hands of persons where it was not safe. [Sir R. PHILLIMORE.—In the present case the order in council gives no power over the question of *quantum*, but you contend that my jurisdiction arises out of the statute. Do you say that any person has been refused his share, or only that enough has not been distributed?] We submit that the award has only been partially carried out; certain persons have not had enough; as soon as Her Majesty signified that the amount captured was to go to the troops, and directed that it should be distributed, the petitioners became entitled to their proportion of the whole, but the whole has not been distributed. [Sir R. PHILLIMORE.—The order in council refers the question to this court to pronounce, not the amount but who were the rightful claimants. You do not come here to enforce your judgment on the latter point, but upon the ground that the admittedly rightful claimants have not received a certain sum of money. The court could enforce its judgment if anyone disputed your right to share, but has it any jurisdiction to compel payment of any specific sum?] The jurisdiction springs from the statutes, and is to be exercised as in cases of prize. If the court refuses the motion it is laying down that it has no power to enforce the judgment. [Sir R. PHILLIMORE.—No, I can enforce the judgment in respect to the matters referred to the court, but not outside them.] By 2 & 3 Will. 4, c. 53, s. 2, booty of war, which formerly, even after gift by the Sovereign, could be recalled (*Alexander* v. *Duke of Wellington*, 2 Russ. & M. 35), now becomes irrevocably the property of the grantees after grant by the Crown. The grantees acquire a legal right to the booty, and this is the tribunal in which their rights are enforced. If we have a right and have suffered a wrong in respect thereof, we have a remedy. The court has seisin of the cause, and therefore jurisdiction over the subject matter, and can give the remedy. The only reservation in the order in council is as to the distribution. The grant was of the booty of war captured and we say we have only had part of it; we do not ask the court to distribute it, but to take measures to enforce its payment to the parties entitled; the rate of distribution and the mode of it we do not ask the court to interfere with. It is well settled that once the prize court has decided prize or no prize it has power to enforce its judgment;

(*Lord Camden* v. *Home*, 4 T. Rep. 382) and that is all we ask. If there had been no payment at all after the original decree, the court could clearly have ordered payment; and refusal to pay would have been a contempt of this court which had held certain persons entitled to payment. If then the court could have ordered payment of the whole, it can order payment of part; that is to say of the balance in the hands of the Secretary of State. In maritime prize cases this court proceeds by virtue of a commission issued to the Lords of the Admiralty authorising them to will and require this court, and the judge thereof, to take cognisance of, and judicially proceed upon all manner of captures, &c., and to hear and determine the same, and according to the course of Admiralty, and the law of nations, to adjudge and condemn all such ships, &c. This court has been given jurisdiction over booty, and it is to proceed as in cases of maritime prize. By the course of Admiralty in maritime prize the court has power to order into the registry the proceeds of the captures, &c. Hence in a case of booty it must have a similar power.

Cur. adv. vult.

June 1, 1875.—Sir R. PHILLIMORE.—This is an application to the court on behalf of Major-General Mackenzie and other persons interested in the distribution of the Banda and Kirwee Booty, to be at liberty to enter an appearance as plaintiffs or interveners in this matter in this court, and further to order a citation to issue to the Marquis of Salisbury Her Majesty's Secretary of State for India, requiring him to enter an appearance, and to show cause why a monition should not issue against him to bring into court certain sums of money, and also the interest due upon these sums.

This application is founded upon a petition supported by an affidavit of the Rev. Alfred Kinloch, late chaplain in the Madras Army, which captured the booty, who appears to have taken an active part in the assertion and maintenance of the claims of the captors of whom he has been the agent. Various documents are appended to this affidavit. The petition sets forth the breaking out of the rebellion in India in 1857. The capture of the Mahratta chiefs and of the town of Kirwee in 1858, and that at the time these chiefs "were possessed of"—I cite the words of the petition—"very considerable moveable property, and that the greater portion of the property captured as hereinbefore mentioned belonged to them, and consisted in part of the following *choses in actions* which form the principal subject of the present application, namely:" [His Lordship here read the description of the property in question as set out in the 5th paragraph of the petition.] The petition further sets forth the following order in council. [His Lordship here read the order in council as set out in the 9th article of the petition.] The petition then states the institution of the suit, and the judgment of the court on the 30th June, 1866, whereby the judge "pronounced the personal representatives of the late General Lord Clyde and the officers of his staff personal as well as general, who were in the field at the time, were entitled to share in the booty captured at Banda and Kirwee in April and June 1858, and subject to this right he awarded the whole of the said booty to Lieutenant-General Sir George Cornish Whitlock and the force under his command called the Saugor and Nerbudda field force including among the latter the officers and troops under Lieutenant-Colonel Keating, and any other troops left by General Whitlock on his march, who at the time of the capture formed a portion of his division, and were still under command, and he disallowed all other claims to the said booty:" (See L. Rep. 1 A. & E. 109). The petition then proceeds to complain that since the order of the court a part only of the proceeds of the booty have been paid, and sets forth what that part is. The part alleged to be unpaid consists of the property of the Mahratta chiefs already referred to and in addition the following sums of rupees. [His Lordship then read the description of the further sums claimed as given in the 14th paragraph of the petition.] The petition further states that applications have been made to Her Majesty's late and present Secretary of State for India in Council, in whom, since the 21 & 22 Vict. c. 106 transferring the Government of India from the East India Company to Her Majesty, the property has become vested, and that such applications have been refused.

I have thought it necessary to state the petition at some length as the question of law which it raises is very important, and I believe quite novel. The petitioners contend that insomuch as the Crown referred the question of booty under the 3 & 4 Vict. c. 65 to the High Court of Admiralty by the order in council, which, I have stated, the court has, therefore, jurisdiction to enforce its decree of the 30th June 1866, and for this object to order the portion of the booty which it is alleged has not been paid in conformity with the decree, to be brought into court, and direct its proper distribution according to that decree. It has been argued that this is the course which the court would pursue in the case of maritime prize, and that the court has the same jurisdiction by the statute in question of military booty. It has been further argued that the refusal of the Secretary of State to pay these sums of money to the claimants, amounts to an annulment *pro tanto* of the decree of the court, and that the court once legally seised of the case must have full power to enforce its decree. There is much that is plausible in this argument, and I have taken some time to consider it.

The first thing to bear in mind is that this court has no original jurisdiction in matters of booty of war, and that its jurisdiction is derived exclusively from the joint operation of the statute and the order in council. The words of the statute (3 & 4 Vict. c. 65, s. 22) are, "And be it enacted that the said High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war or the distribution thereof which it shall please her Majesty, her heirs, and successors by the advice of her, and their Privy Council to refer to the judgment of the said court. And in all matters so referred the court shall proceed as in cases of prize of war, and the judgment of the court therein shall be binding upon all parties concerned." I must, therefore, consider what is the matter and question which it pleased Her Majesty to refer to the court.

The order in council, already stated at length, empowers the judge to determine, first, who are the persons entitled to share in the booty; secondly, the proportions in which they are to share, and, thirdly, the questions of costs and expenses. These then are the only subjects over which the court had jurisdiction, and it is not complained that the decision of the court upon any of these points has

been disregarded by those in whom the custody of the booty is vested. It might have pleased Her Majesty, or it may please Her Majesty, to refer to the court the further questions as to the amount of the booty, and what are the constituent parts of it, but until the court has this jurisdiction given it, it cannot, I think, by any legitimate construction of the existing order in council, exercise such jurisdiction.

I have not failed to notice the argument arising from the reservation to Her Majesty in the order to direct the rates or scales of distribution. But I think it would be stretching the doctrine of inferring admission of one thing from exclusion of another far beyond its proper limits, if I were to construe the order as having given the jurisdiction which is contended for.

Being, therefore, not satisfied by the argument on this *ex parte* application that I have jurisdiction, I think it would be wrong to call upon the Secretary of State to enter an appearance, and show cause against this monition and I decline to do so.

Solicitor for the petitioners, *Woodfall.*

Friday, July 30, 1875.

THE ZETA.

Salvage—Barge adrift in the Thames—Derelict—Surrender to receiver of wreck—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *sect.* 450.

A laden barge accidentally breaking loose from her moorings in the river Thames, and drifting about with no one on board, is not derelict, and consequently not "wreck" within the meaning of the Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *and persons finding her and mooring her in safety are not precluded from recovering salvage for so doing by reason of their neglecting to comply with the provisions of the* 450*th section of the above Act, and to deliver the barge to the receiver of wreck.*

THIS was an appeal from the City of London Court (Admiralty Jurisdiction). The parties stated the following case on appeal:

1. This a cause of salvage instituted in the City of London Court, on the 3rd April 1875, on behalf of Alfred Waller and Joseph Chapman, of Blackwall, in the county of Middlesex, against Richard Cory, Henry James Cory, Francis Wright, and John Cory Havers, of Commercial-road, Lambeth, in the county of Surrey, owners of the barge *Zeta*, and the cargo laden on board her, in the sum of 50*l.*

2. The plaintiffs are both licensed watermen, and the defendants are the members of the firm of William Cory and Son, coal merchants and barge owners.

3. The plaintiffs' case, as stated by counsel on the hearing of the cause, was that between twelve and one o'clock on the 18th March 1875, the plaintiffs, who were in their boat, near the West India Dock, in the river Thames, observed a barge (which proved to be the *Zeta*) adrift near the north shore. The plaintiffs rowed towards her, and boarded her between West India Dock and Blackwall Stairs. On getting on board they found that the *Zeta* was laden with about fifty tons of coal, drifting with no person on board, the head fast rope appearing to have parted.

4. That the plaintiffs succeeded in bringing the *Zeta* up at a causeway about 6ft. wide, and subsequently moored at the Northumberland Coal Wharf, and subsequently the defendants' servants took charge of her there. For the above services the suit was instituted. The value of the said barge is estimated at 150*l.*, and her cargo at about 46*l.*

11. The plaintiffs sent in a claim to the defendants for salvage, but the defendants denied any liability in respect of any claim in the nature of salvage.

12. On the 22nd April 1875 the case came on for hearing in the said court, before Mr. Commissioner Kerr, and on hearing counsel for the plaintiffs (who stated the facts as above set out, and without hearing any witnesses for either side, or counsel for the defendants), the learned commissioner was of opinion that, even assuming that the plaintiffs had earned or become entitled to any salvage reward (which was not admitted by the defendants), they had forfeited any claim thereto, by not taking and delivering the *Zeta* to the receiver of wreck (according to the provisions of the Merchant Shipping Act 1854, sect. 450).

13. The plaintiffs contended that the section of the said Act did not apply.

14. The learned commissioner ruled that the section of the said Act applied, and that the plaintiffs had forfeited their claim to salvage by not complying with the provisions of the said section, and therefore dismissed the suit.

15. The question for the opinion of the High Court of Admiralty is whether (on the above facts) the learned commissioner was right in ruling that sect. 450 of the Merchant Shipping Act applied, and that the plaintiffs had forfeited their claim to salvage by not complying with the provisions of the said section.

If the court should be of opinion in the affirmative the appeal is to be dismissed with costs.

If the court should be of opinion in the negative, then this case is to be remitted to the City of London court for hearing, and the costs of this appeal are to abide the event.

W. G. F. Phillimore, for the appellants (plaintiffs).—The Merchant Shipping Act (17 & 18 Vict. c. 104) enacts that "The following rules shall be observed by any person finding or taking possession of wreck within the United Kingdom (that is to say) . . . . (2) If any person not being the owner finds or takes possession of any wreck, he shall as soon as possible deliver the same to such receiver as aforesaid; and any person making default in obeying the provisions of this section shall incur the following penalties (that is to say) . . . . (4) If he is not the owner, and makes default in performing the several things, the performance of which is hereby imposed on any person not being an owner, he shall forfeit all claim to salvage; he shall pay to the owner of such wreck if the same is claimed, but if the same is unclaimed, then to the person entitled to such unclaimed wreck, double the value of such wreck, &c." Now, even supposing that this barge and her cargo are to be treated as wreck, I submit that the section does not apply to a case where the owner comes in and claims the property. A delivery up to the owner is enough, and the object of the statute is merely to secure the return of the property to the owner, and to provide against fraud on the part of the salvors. An owner even

is bound to give notice of the recovery of wreck; this is part of the public policy which protects the rights of the Crown and owners against all chance of fraud. The restoring of property to its lawful owners has frequently been commended in this court, and masters have not unfrequently suffered for their neglect to do so: (*The Champion*, Bro. and Lush, 69.) It is, no doubt, the duty of a salvor to keep a derelict whose owners do not appear, and deliver her up to the receiver of wreck, but delivery to her owners answers the same purpose. But, secondly, I contend that this is not "wreck" at all. The word "wreck" implies something damaged and abandoned, such as a derelict, but this vessel had never been abandoned, *sine spe recuperandi*. In fact, she had, evidently broken loose from her moorings, and she was wholly uninjured. There was no intention of abandoning her at all.

The Aquila, 1 C. Rob. 37;
The Clarisse, Swab. 129, 130.

There is here no element of wreck or derelict. [He was then stopped by the court.]

R. E. Webster, for the respondents (defendants). —By the Merchant Shipping Act 1854, sect. 2, "Wreck shall include jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water." The object of this sect. 450 is to prevent goods which are floating about not in anyone's charge, from getting into wrong hands; it is intended to protect salved property. No case that has been cited touches the question, because this point has not been raised. The section must apply to such a case as this, or it has no meaning. [Sir R. PHILLIMORE.—How is this wreck; it is not jetsam, flotsam, or lagan; can you call it derelict?] "Derelict" under the Merchant Shipping Act must be taken to have a larger meaning than that usually applied to it in this court; it includes every vessel floating about in tidal waters not in charge of her crew or other persons.

Sir R. PHILLIMORE.—I am of opinion that the 450th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 154) does not apply to a case of this kind. Here is a barge near the West India Dock, in the river Thames; she gets adrift near the shore, and I think it is clear that though she was at one time moored, the rope must have parted. She was laden with coal. It appears to me that it would be quite wrong and improper to put upon this clause such a construction as is contended for, and to hold that this barge was "wreck" within the sense of the interpretation clause and of the statute, namely, that it was either jetsam, flotsam, lagan, or derelict. The term derelict means that a vessel has been left *sine spe recuperanda* and *sine animo revertendi*, and I adhere to what I said in *The Clarisse* (Swab. 129, 130); and I entirely agree in that which was said by that great master of maritime law, Lord Stowell, in regard to derelicts, in the case of *The Aquila* (1 C. Rob. 37). But I think it would be right that I should express my opinion on the other point, which is the real point in the case, on the construction of the statute. I do not consider that the section was intended to apply to salvors who have found a derelict, and have restored it to its owners. I cannot conceive that such a construction can be put upon the Act as this; namely, that though they have restored the derelict vessel to her owners, which, according to the principles of maritime law, it was their duty to do, they are liable to pay, nevertheless, double the value to the owners, and perhaps a penalty of 100*l.*, for what is called an improper detention. This is a penal clause in the statute, and is intended to apply to a criminal and improper detention, whereby it is sought to practise a fraud upon the Crown or the owner, but not to apply to cases of this description. I think it unnecessary to make any further remarks upon that point, and I send this case back again to the learned judge of the court below for trial.

Solicitors for the appellant, *Lowless* and *Co.*
Solicitor for the respondent, *J. A. Farnfield.*

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

(Before the CHIEF JUDGE.)

Monday, Nov. 8, 1875.

Re WHITWORTH AND CO.; *Ex parte* BLACKBURN; *Ex parte* GIBBES AND CO.

Vendor and purchaser—Bill of lading—Bill of exchange—Handing over shipping documents—Ultimate destination—Bankruptcy of purchaser—Stoppage in transitu—Constructive delivery—Carriers' lien.

G. and Co., merchants in America, shipped a number of bales of cotton to Liverpool "consigned to order, for account and risk of W. and Co. of Luddenden Foot." At the same time G. and Co. sent to B. and Co., their agents at Liverpool, the shipping documents and a bill drawn by G. and Co. for W. and Co.'s acceptance. On W. and Co. accepting the bill, B. and Co. handed to them the shipping documents, and by their direction delivered the cotton to the L. Railway Company to be forwarded to Luddenden Foot, but, before the whole of the cotton was delivered there, W. and Co. filed a petition for liquidation. G. and Co. thereupon claimed the right of stoppage in transitu over the remainder of the cotton.

Held, that by the terms of the contract between the parties, Liverpool was the place of destination for the cotton, and that the transaction between them was completed when W and Co. accepted the bill drawn against the consignment, and the shipping documents were handed over to him.

At Luddenden Foot there was a railway siding constructed on the property of the company, but kept in repair at the expense of W. and Co., for whose sole use and convenience it was made. When trucks containing bales of cotton reached Luddenden Foot, they were generally placed on the siding, and thence conveyed across the main line of the railway to the mill of W. and Co. on the other side. Such of the above mentioned bales of cotton as reached Luddenden Foot prior to the filing of the liquidation petition were, with the exception of one truck load, which remained on the general siding of the company, placed on the railway siding. Others were immediately taken across to the mill and manufactured, the rest remaining upon the siding. Other portions of the cotton reached Luddenden Foot after the date of the liquidation petition.

Held, assuming that Liverpool was not the destination of the cotton, that the cotton which was placed upon the railway siding at Luddenden Foot, had reached its ultimate destination; and further, that, under the circumstances, the delivery

of part of the cotton was a constructive delivery of the whole.

THESE were two appeals from an order made on the 8th June 1875, by the judge of the County Court at Halifax.

For many years prior to the 17th of April 1875, Gibbes and Co., of Charleston, U.S.A., cotton growers, were in the habit of consigning to Whitworth and Co., cotton spinners, of Boy Mill, at Luddenden Foot, near Halifax, large quantities of cotton to be used by them for the purposes of their trade. The course of dealing between the parties was that Gibbes and Co., from time to time forwarded the cotton purchased of them to Liverpool, consigned to the order of Whitworth and Co. Simultaneously with the shipment of the cotton Gibbes and Co. drew upon Whitworth and Co. for the amount of the consignment, bills payable sixty days after sight, and forwarded the same for acceptance, together with the bill of lading, to Brown, Shipley, and Co., the agents at Liverpool of Gibbes and Co. Brown, Shipley, and Co., transmitted the draft to Whitworth and Co. for their acceptance, which being done and returned, Brown, Shipley, and Co. forwarded the bill of lading to Whitworth and Co., and they, having indorsed it, sent it to a Mr. Wintle, the manager of the Lancashire and Yorkshire Railway Company at the North Docks Station, Liverpool, where the cotton lay, with cash sufficient to defray the charges for the sea freight. The railway company thereupon paid the charges, took possession of the cotton, and forwarded it by their own line from the North Docks station to Luddenden Foot, for which service the railway company became entitled to a further payment from Whitworth and Co. Sometimes, however, the railway company advanced the charges for the sea freight without waiting for a remittance from Whitworth and Co., and forwarded the cotton so obtained to Luddenden Foot, and delivered it to Whitworth and Co., debiting them with the charges and further costs of carriage. Whitworth and Co. were large customers of the railway company, and in the case of cotton consigned to the firm the trucks containing the same were, on arrival at Luddenden Foot, placed by the servants of the railway company sometimes on one or other of the general sidings of the company in the station yard, and sometimes on a siding called the "Whitworth Siding," of which the following is a description: "Boy Mill is situated at the south end of the railway station at Luddenden Foot, and adjoining to the main line of railway, and on the other side of the railway opposite to Boy Mill, and, connected with the main line by points in the ordinary way, is the Whitworth Siding which is connected by a turn-table and cross lines of rails with the interior of Boy Mill. This latter siding contains standing room for about twenty goods' trucks of ordinary construction. The soil upon which it stands is the property of the railway company, but was originally formed and afterwards kept in repair by the railway company, at the expense and for the sole and exclusive use of Whitworth and Co. Upon this siding a notice board was placed by the railway company, and bearing in large letters the words "Whitworth Siding." The siding is protected at each end by blocks in the ordinary way, and except when trucks are being shunted on to, or taken off the siding, from, or on to the main line, the blocks are invariably kept closed and secured by padlocks." But, wherever the trucks of cotton were placed, no advice notes were ever issued to Whitworth and Co., but down to the 18th April 1875, the firm was allowed to take and remove the goods, subject only to the necessary precautions for crossing the main line at their absolute discretion, without freight being required, on, or before delivery, as they kept a ledger account of freight with the railway company."

In March 1874, Gibbes and Co. under their general contract dispatched by the *Republic* steamer from New York seventy-two bales of cotton, "to be shipped to Liverpool, consigned to order, for account and risk of Whitworth and Co., Luddenden Foot." In due course the invoice, together with a bill of exchange, drawn by Gibbes and Co., for 1047*l.* 19*s.*, was on the 6th April received by Whitworth and Co. for acceptance. This being done, the bill was returned to Brown, Shipley, and Co., who thereupon forwarded the bill of lading to Gibbes and Co. Gibbes and Co. then endorsed the bill of lading to Mr. Wintle, with instructions to send the cotton to Luddenden Foot.

On the 11th and 15th April, the bales, *ex Republic*, reached Luddenden Foot, and upon their arrival thirty-three of them were immediately taken into the mill and manufactured. Of the remaining thirty-nine, twenty, which were in one of the company's trucks, No. 3166, were placed on the Whitworth Siding, and the other nineteen, in truck No. 1260, remained on the railway company's general siding.

On the 13th April Whitworth and Co. in like manner received a similar invoice and a bill for 1079*l.* 16*s.* 9*d.*, in respect of seventy-two bales of cotton shipped per *Celtic*, which were in due course forwarded to Luddenden Foot. This cotton was similarly disposed of, thirty-three bales being on the 19th April taken into the mill and manufactured, twenty being left in truck No. 11,695, on the company's sidings, and the remaining nineteen, in truck No. 7524, reached Luddenden Foot Station on the 21st.

On the 17th April 1874, Whitworth and Co. filed a petition for liquidation. At the general meeting held on the 8th May the creditors resolved upon a liquidation by arrangement, and appointed H. Blackburn trustee.

On the 18th April the railway company, having notice of the petition, removed the truck No. 3166 on to their lines, and claimed a general carriers' lien for unpaid freight on the four trucks of cotton in their possession.

On the 21st April Ernest Schott, the Manchester agent of Gibbes and Co., gave notice to the railway company that he claimed on behalf of his principles the thirty-nine bales *ex Celtic* and the thirty-nine *ex Republic*, which were in the four trucks at Luddenden Foot station.

On the 27th April 1874, Gibbes and Co. applied for an order that, by their notice of the 21st, they had well and effectually exercised their right as unpaid vendors to stop *in transitu* the bales of cotton which remained in the possession of the railway company. By an arrangement between the parties the bales in dispute were sold, and the proceeds, amounting to 1220*l.*, paid into the bank to abide the result of the application.

On the 8th June 1875, the County Court Judge being of opinion that the ultimate destination of the cotton was Luddenden Foot station, and that

the right to stoppage *in transitu* had been rightly exercised as to the thirty-nine bales *ex Celtic*, ordered and declared that Gibbes and Co. were entitled to so much of the sum paid into the Bradford Bank as represented the bales *ex Celtic*, and that the trustee under the liquidation was entitled to the residue of the said sum, being the amount which represented the thirty-nine bales *ex Republic*.

Against so much of this order as related to the bales shipped *ex Republic* Gibbes and Co. appealed, and the trustee appealed against so much thereof as related to those shipped *ex Celtic*. The two appeals now came on for hearing together.

Benjamin, Q.C. and *Jordan*, for the trustee, contended: (1) That the cotton upon its arrival at Liverpool had reached the destination contemplated by the vendors, where it would await the further orders of the purchaser, and consequently that the *transitus* then ceased, the rule being that when goods arrived at the place where they are to remain, to the order and disposition of the purchaser, then, although they have not reached their ultimate destination, the *transitus* is ended: (*Wentworth* v. *Outhwaite*, 10 M. & W. 449.) (2) That, assuming the right of stoppage *in transitu* to continue until the cotton reached Luddenden Foot, then such of the bales as had been placed on the "Whitworth Siding" had reached their ultimate destination, and that thereby there had been such a delivery of part as was equivalent to a constructive delivery of the whole. They cited

Coventry v. *Gladstone*, L. Rep. 6 Eq. 49;
Crawshay v. *Eades*, 1 B. & C. 185;
Bolton v. *Lancashire Railway Company*, L. Rep. 1 C. P. 431; 13 L. T. Rep. N. S. 769.

(3) That the lien for freight claimed by the railway company had nothing whatever to do with the question. That the company could not put an end to the contract existing between them and Whitworth at their own volition without notice to Whitworth or his trustee, and that, even if they could, it would not affect the pre-existing rights of other persons.

Allan v. *Grippes*, 2 C. & J. 218.

De Gex, Q.C. and *Finlay Knight*, for Gibbes and Co., argued *contra*, that the real *transitus* never commenced until the goods reached Liverpool, because the real consignees of the cotton were Brown, Shipley, and Co., who received it as the agents there of Gibbes and Co., and did not part with it until the bills of exchange had been duly accepted; consequently, the cotton was in the possession of the vendors, or their agents until delivered to the railway company to be conveyed to Luddenden Foot, and that, therefore, the right to stop it arose and continued until the cotton reached its ultimate destination, which was not "Whitworth's Siding," but Boy Mill, on the other side of the line; and that the railway company were carriers, not warehousemen, and that their course of dealing with Whitworth precluded them from setting up the lien which they claimed. They cited

Whitehead v. *Anderson*, 9. M. & W. 518;
Tucker v. *Humphrey*, 4 Bing. 516;
Berndtson v. *Stang*, L. Rep. 4 Eq. 481; 13 L. T. Rep. N. S. 583.

The CHIEF JUDGE.—In my opinion, the case is reasonably clear, although the several arguments urged before me appear to have had considerable weight with the learned County Court Judge.

The question is one of most ordinary occurence. Merchants, the owners of the cotton, at Charleston, agree to send shipments to Liverpool, and nowhere else. They send them from Charleston by two vessels for transshipment, and they are to be paid for by an acceptance of Whitworth and Co. The vendors send their bills of exchange to Brown, Shipley, and Co., in order that they may present the bills for acceptance, and at the same time they accompany the bills with shipping documents, and upon the acceptance of the bills the shipping documents are given up. The title to the delivery and possession of the goods is transferred by means of the bills of lading. The destination of the goods was Liverpool. If anything had happened upon the voyage there would have been a right to stop them *in transitu*. At the place which the vendors prescribe as the destination of the goods the goods arrive, and the *transitus* is at an end. The vendees, the persons at whose risk and upon whose account the goods were to be so shipped, had no right to claim them unless they were, as they became by the act of the agent of the vendors, fully authorised to act for them on his own part, the absolute owners of the goods, which were thus sold and delivered. They were paid for by means of bills, which I am quite aware were not good bills by reason of the subsequent failure, but which was the very manner stipulated for between the vendors and the purchaser, and when the goods arrived at Liverpool the purchaser acquired a right, by the fact of his having accepted the bills and performed the condition, to demand from the ship's master the delivery to him of those goods, and he exercised that right.

To what use, then, is the whole of the argument that there remained a *transitus* after that? How is it possible to say that the *transitus* then commenced? If the place of destination had not been reached, then all that Mr. De Gex has said to me about a special or general carrier might have applied, but that is not the present case at all. When Mr. Wintle, the agent for Whitworth and Co., paid the sea charges, which he did on Whitworth and Co.'s account, he became holder of the bills of lading for Whitworth, and the goods were delivered to him in that character, and there was an end of the *transitus*. The *transitus* that takes place after that is only prescribed by the purchaser, the vendors had nothing to do with it. The vendors' *transitus* was at an end, and it is in vain to read cases, in which a ship, being chartered for London, the goods are not delivered from the ship until the vendor exercises his right, or, being chartered for London the ship is stopped at Copenhagen. All these are familiar instances of stoppage *in transitu*. What can that have to do with the case when it is a case of bargain and sale of goods to be delivered on the wharf at Liverpool upon certain conditions being complied with? The conditions are complied with, the delivery takes place, and the *transitus* is at an end, and the right at law to stop the goods after that never existed. If the facts were otherwise there would apparently be a great deal to be said; but I will not go into that.

Upon the history, however, which has been given to me of the way in which "Whitworth's Siding" was a part of the railway, and the use which was from time to time made by Whitworth of that siding, I think the goods had come home when

they were upon the siding. I think, moreover, that there was a constructive delivery of the whole by delivery of part of the goods, if it were necessary, as in my judgment it is not necessary, to resort to any such doctrine. I think, also, the taking out at his own will from several of the trucks, containing different parcels not distinguishable, and working up in his own manufactory the goods so brought from Liverpool, was as clear a constructive possession of the entirety as the law requires.

The only other thing to be noticed is the act of the railway company, who having gone on in an amicable manner, not demanding payment on the instant of delivery but keeping an account of the transactions between themselves and Whitworth, bethink themselves all of a sudden that they will keep such of the goods as had not been carried across the railway. I do not use the word "delivered," but "carried across"—until they were paid their charges. But what has their claim of lien to do with the question which I have to consider? They may be right or wrong. Upon that I will not express any sort of opinion, but of this I am clear, that it could not have altered any rights which existed before. Lien upon what? Upon Whitworth's goods, and it is because they are his goods that they claim the lien. It is not necessary, however, to dwell upon that part of the case at all.

I am of opinion that the order made, and which has given to the trustee only half of the goods which he contends belonged to Whitworth at the time of his failure, cannot be sustained. The proper order is to declare that the trustee is entitled to the whole of the goods, which were in the possession of the railway as the agents, carriers, or anything else you like to call them, of Whitworth, at the time of the failure.

The cases, which have been referred to, really help the matter and do not affect the principle upon which I have endeavoured to decide it. In *Wentworth* v. *Outhwaite* (10 M. & W. 449), which is very plainly in point, although there were certain goods, which were to be delivered to a man at a place thirty miles from Leeds, yet, as they were delivered at Leeds to a workman, the delivery was complete. Lord Abinger there says: "It seems to me that a great part of the very learned argument which we have heard, turns upon a question of fact, whether Leeds was the place of destination to which the goods were to be sent. It may be the place of destination at which the goods are to be at the consignee's risk, and I think that in this case it was the place where they were to be at his risk until he sent for them." In the very terms of the invoice that applies to this case. Mr. Baron Parke's judgment is to the same effect: "The goods had arrived at their place of destination, for that, as I understand, means the place, to which they were to be conveyed by the carriers, and where they would remain unless fresh orders should be given for their subsequent disposition." Then he quotes the decision in *Dixon* v. *Baldwen*, where Lord Ellenborough, after referring to the several cases upon this subject, says, "In those cases the goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and without such order they would continue stationary." Then, in *Whitehead* v. *Anderson*, p. 534 (*ubi sup.*), it is stated, "The law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come into the actual or constructive possession of the vendee. If the vendee takes them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the *transitus* would be at an end, though, in the case of the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action."

But, without going further into the authorities, which, although numerous, are not by any means obscure or doubtful, it appears to me that the right to stoppage *in transitu* ended when the goods were delivered by virtue of the bills of lading to the purchaser's agent, and that after that there could be no right, for there was no *transitus* to which the right of stoppage could apply. I shall make no order as to the costs.

Solicitors for the trustee, *Johnson* and *Weatheralls*, agents for *Rawson, George*, and *Wade*, Bradford.

Solicitors for Gibbes and Co., *Speechly* and *Co.*, agents for *G. E. Mumford*, Bradford.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by GILBERT G. KENNEDY, Esq., Barrister-at-law.

Nov. 20, 22, *and* 23, 1875.

(Before the LORD CHANCELLOR (Cairns), KELLY, C.B., BRAMWELL, B., and BLACKBURN, J.)

OGG AND ANOTHER *v.* SHUTER.

Sale of goods—Cash against bill of lading—Refusal by purchaser to pay—Vendor's right to retain possession—Jus disponendi.

Where by the terms of a contract the bill of lading is deliverable upon the vendee's fulfilling certain conditions, the shipper is entitled not only to retain possession of the goods under such bill of lading until those conditions are fulfilled, but also in case of the vendee's default to dispose of the goods.

L., a potato merchant in France, contracted to sell to plaintiffs, potato merchants in England, twenty tons of potatoes, to be delivered "free on board," and "cash against bill of lading." The plaintiffs paid 30l. on account. The potatoes were put by L. into sacks of the plaintiffs', sent by them for that purpose, and L. drew on the plaintiffs "at sight" for the balance of the agreed price, and despatched the potatoes in England. The shipment on arrival was supposed by the plaintiffs, erroneously, to be sixteen sacks short, and the plaintiffs, therefore, refused to accept the full draft drawn on them by L. but offered to accept a draft for the amount less a deduction proportioned to the supposed short shipment. L.'s agent in England thereupon endorsed the bill of lading to the defendant with instructions to sell, which the defendant did.

Held (reversing the decision of the Common Pleas), that the plaintiffs were in default, and that the defendant was entitled to the verdict. For that the terms of the contract entitled the vendor to

retain possession of the goods until the plaintiffs complied with the conditions of payment, and that as the plaintiffs, made default in complying with those conditions, the vendor or his agent had power to dispose of the goods.

This was an appeal by the defendant under the provisions of the Common Law Procedure Act 1854, against the decision of the Court of Common Pleas in discharging a rule of that court, obtained by the defendant to enter a verdict for the defendant instead of the verdict nominally entered for the plaintiff.

The declaration was in trover for 251 sacks of potatoes and 251 sacks. The pleas were not guilty, and not possessed. Issue thereon.

1. The following is a statement of the case.

2. The plaintiffs brought an action against the defendant, for the conversion by the defendant of certain potatoes alleged to be the property of the plaintiffs, and the cause came on for trial before Keating, J., on the 1st May 1874, at Westminster Hall, when the following facts and correspondence were given in evidence; and the learned judge directed a verdict to be entered for the plaintiffs, with leave to the defendant to move to enter a nonsuit or a verdict for the defendant, the court to be at liberty to draw inferences of fact.

3. The plaintiffs are potato salesmen.

4. The defendant is a partner in the firm of Comfort and Shuter, who are potato salesmen.

5. In the month of Jan. 1874, a contract was entered into by the plaintiffs with Monsieur Paresys Loutre of Merville in France for the purchase of a quantity of potatoes on the terms contained in the following letters and telegrams.

Merville, 5th Jan. 1874.

Messrs. Ogg and Co., London.

In answer to your letter of the 3rd inst. I can let you have 200 tons of potatoes (lesquins) of this country, good sound goods, at the price of 82 francs for 1000 kilogrammes, put on board at Dunkirk, to be delivered in the course of the present month, payable in cash, that is to say, against bill of lading signed by the captain, and the statement of weight of the sworn weighers of the city of Dunkirk. If you accept my offer please reply by return of post, and do not fail to send at the same time a cheque for 25*l.* as an earnest of the bargain.

Paresys Loutre.

Telegram from Plaintiffs to Paresys Loutre.

14th Jan. 1874.

Can you supply us lesquins at 80 francs per 1000 kilograms free on board at Dunkirk?

Lesquins are higher. Cannot supply you at less than 84 francs free on board.

Telegram from Plaintiffs to Paresys Loutre.

15th Jan.

Ship on board of steamer, Dunkirk to London, 20 tons of lesquins at 84; as sample. We send cheque for 30*l.* by letter to-night.

Letter from Plaintiffs to Paresys Loutre.

Jan. 16.

We have duly received your telegram of 14th inst., and confirm ours of the 15th inst., enclosed please find the cheque for 30*l.* on account, also delivery order for 300 sacks shipped to Messrs. Berthelot Derode, to whom you will be good enough to apply. We recommend you to ship as promptly as possible, as this small order is simply to judge of the quality of goods you can supply us with, and if we are satisfied it will lead to more important business.

Letter from Paresys Loutre to Plaintiffs.

18th Jan.

I have received your telegram dated the 14th Jan. at three in the afternoon, and I have replied immediately by telling you that I could not give you lesquins at less than 84 francs free on board, and asked you to reply immediately by telegram. I have likewise received your telegram dated 15th Jan., 5.47 p.m., received the 16th at 10 a.m.; and I have besides received your letter dated the 16th Jan., received on morning of 17th, inclosing a cheque for 30*l.*; also a delivery order for fifteen bundles of sacks, sent by steamer, and asking me to send you 20,000 kilogrammes as a sample. To please you I will send the quantity of lesquins you ask me for, notwithstanding your telegram reached me too late, but I hope that in future we shall have more important sales.

6. In pursuance of this arrangement, Paresys Loutre, by his agent, F. Camys Van Rycke, of Dunkirk, put potatoes of the weight of 18,878 kilogrammes into 251 of the plaintiffs' sacks sent by them to Paresys Loutre, and shipped the same on board the steamship *Blonde* at Dunkirk under the following bill of lading:—

I, Fowler, master, after God, of the ship named *Blonde* now at Dunkirk, intending at a proper time to pursue my voyage under the protection of God until I arrive at the city of London, there to unload, acknowledge to have received into my said ship, to be carried on deck, from here, of you Mr. F. Camys Van Rycke, 251 sacks of potatoes (lesquins), weighing in the whole 18,878 kilogrammes, all the sacks in good condition, marked as in the margin [in the margin of the bill of lading was put "Mark of said sacks, Ogg and Co."], which I promise to deliver in the same form, except perils and accidents of the sea, at London, to order, on payment to me for freight of the sum of 8s. per 1000 kilogrammes, besides advances according to the usual custom of the sea; and for performance of the above I have bound and do bind by this my person my goods and my said ship with the tackle. In faith of which I have signed four bills of lading of the same tenor, the one of which being accomplished the others to be void. Done at Dunkirk, the 24th Jan. 1874. On deck at shipper's risk.

For the Master,
£7 11s. 1d., indorsed F. Camys Van Rycke,
Comfort and Shuter.

7. On the 25th Jan. 1874, the said Camys Van Rycke advised the plaintiffs in the following letter:—

I have the pleasure of advising that according to the order of Mr. Paresys-Loutre of Merville, I have sent you by steamer *Blonde*, Captain Fowler, Ogg and Co., 251 sacks of potatoes (lesquins), weighing net 18,878 kilogrammes. Inclosed is the invoice that Mr. Paresys has given me directions to address to you, and the balance of 34*l.*, which I have drawn on you at sight. Will you give it your good attention? The bill of lading will be sent you with my draft. There remain 49 empty sacks at your disposal.

The invoice was inclosed.

8. Paresys Loutre to plaintiff:—

26th Jan.

In answer to your letter of 24th inst., you must by this time have had the advice from my representative at Dunkirk, Mr. Camys, of the departure of the 20,000 kilogrammes; he must have drawn on you for the payment of the balance for the goods. Lesquins have risen the last ten days 15 francs the 1000 kilogrammes. This kind of potato is becoming very rare here. If the demand for them continues there will remain none in a month.

9. On the 26th Jan. 1874, the potatoes arrived on board the steamship *Blonde* in the Thames, and were landed at Cotton's wharf on that or the next day.

10. Mons. Camys Van Rycke drew a bill of exchange on the plaintiffs pursuant to the terms of the letter of the 25th Jan., and annexed thereto the said bill of lading endorsed by him, of which bill of exchange the following is a copy:

Dunkirk, 25th Jan.

B. P. 34*l.*

At sight, please pay to my order, and against bill of lading hereto annexed, the sum of 34*l.* sterling, value in goods, and according to advice of yours devoted.

F. Camys Van Rycke.

Good for 34*l.* sterling.
To Messrs. Ogg & Co.

[Here followed several indorsements.]

11. The said draft for 34*l*., dated 25th Jan. 1874, was enclosed with the said bill of lading annexed thereto, on 26th Jan. 1874, to Messrs. A. Petyt and Co. (Mr. Camys Van Rycke's bankers), and was presented by Messrs. Devaux & Co. with the bill of lading annexed, to the plaintiffs for payment on the 27th Jan. 1874, who refused to pay the said bill or to honour the same, on the ground stated in the following letter written by them to Mr. Paresys Loutre :—

We have just seen the goods shipped on board the steamer *Blonde*, and we find that there are 16 sacks short shipped, and that there are only 235 sacks of lesquins loaded, which is stated on the bill of lading, of which the captain is the bearer.

We have asked Mr. Devaux, the holder of your draft to keep it until the discharge of the vessel, to see what there is on board. To this he has refused his consent, and we have necessarily refused to pay the amount, viz,, 34*l*. We request you then to write to your agent here, to present to us the invoice receipted, and the bill of lading of what there is on board, and we will pay what is due. On your sending us the invoice and bill of lading we will send you a cheque by return. Pray then to direct your agent at Dunkirk to ascertain if any have been left on the quay, and to take care of our empty sacks.

The statement of the short shipment in the above letter proved to be erroneous, the quantities specified in the invoice, bill of lading, and correspondence being, in fact, on board.

12. On 27th Jan. 1874, Messrs, Scorer and Harris, notaries of the Royal Exchange, London, presented the same bill, with bill of lading attached for payment, and payment was again refused by the plaintiffs, and they noted it, and it was returned to Messrs. C. Devaux and Co.

13. On the 30th Jan., the defendant to whom the said bill of lading and bill of exchange had then been respectively given, and endorsed by Camys Van Rycke presented to the plaintiffs the said draft, and the bill of lading endorsed by the firm of Comfort and Shuter annexed thereto, and requested the plaintiffs to honour and pay the said draft, which they for the reasons aforesaid again declined to do.

14. On the 30th Jan. the plaintiffs wrote the following letter to the defendant :

We hereby give you notice that the 251 sacks potatoes arrived per steamer *Blonde*, were consigned to us and are our property, and if you part with them to anybody else you will be held responsible for sale, &c.

And on the 2nd Feb. 1874, the plaintiffs wrote the following letter to Paresys Loutre :—

Our Mr. Ogg having left London for Antwerp on Saturday last, at that time we were not able to ascertain the correct quantity of potatoes shipped to us per steamer *Blonde*. We wish you to understand that we only want what is right, and we regret that we do not know each other better, and as we have been treated unfairly in business transactions of this nature before, we think it well to see quantity of goods before we pay on bill of lading, especially as the officials inform us of short shipment. Since Mr. Ogg's departure the potatoes have been discharged from vessel to wharf, and find on examination the goods are correct in quantity. I have telegraphed the particulars to Mr. Ogg in Antwerp, and on his return on Thursday, he will then take delivery of the goods. We have not to thank the broker st Dunkirk for all this unnecessary trouble.

15. On the 2nd Feb. the defendant in consequence of instructions he had received from Mr. Camys Van Rycke. sold the goods.

16. At the trial before Mr. Justice Keating, after the foregoing facts and correspondence had been proved, it was found as a fact by the jury that the goods were not of such a perishable nature as to render the sale of the potatoes necessary, and thereupon the learned judge directed that a verdict should be entered for the plaintiffs, with leave to the defendant to move to enter the verdict for him. The court to draw inferences of fact.

17. It was admitted by the counsel for the plaintiffs that the vendor, Paresys Loutre, had, on the 30th Jan., at the time of the plaintiffs' refusal to honour the draft, a lien upon the potatoes for the unpaid purchase money of 34*l*.

The Court of Common Pleas discharged the rule obtained by the defendant, after taking time to consider (*a*).

(*a*) The judgments in the court below were as follows :

Jan. 22.—Lord Coleridge, C.J.—The facts in this case are shortly these. There is a contract for the sale of potatoes by the person whom the defendant represents to the plaintiffs, to be delivered free on board within a month, and payment is to be by cash against bill of lading. The goods are shipped in the plaintiff's sacks, under a bill of lading, which is indorsed to the defendant. A part payment of 30*l*. is made. The action being for a conversion of the potatoes by the defendant, it was objected by his counsel that the property in the potatoes had never passed to the plaintiffs. It was contended on the other side that the property had passed, and that the vendor had merely reserved a lien on the goods for the price. My brother Keating directed a verdict for the plaintiffs, reserving leave to the defendant to move. I am of opinion that his ruling was correct. The result of the decisions which were cited is, that the question whether the property in goods has passed under a contract of sale is a question of intention to be gathered from all the circumstances, the expressions made use of in the contract, and also the surrounding circumstances. In the case of a specific chattel, the rule is that the sale passes the property. So also the general rule, as laid down in several cases, is that, in the absence of countervailing circumstances, the specific appropriation of goods to the contract, viz., their being placed in vessels or receptacles provided by the purchasers, would pass the property. Here the potatoes were separated from a larger bulk, and placed in the plaintiffs' sacks, which had been sent over for the purpose. In addition to this very strong fact there is also the expression "free on board" in the contract, which has in previous cases been relied on, not as absolutely conclusive to show that the property passed, but as a strong element to be considered in favour of that conclusion. There is also the further fact that there was a part payment of 30*l*. All these are very strong circumstances to show that the property passed; but it is contended, on the other hand, that the expression, "cash against bill of lading," in the contract is of itself conclusive to ascertain the intention of the vendor; that, the bill of lading being the *indicium* of property, the fact that the purchaser was not to receive it until he paid the price, unmistakably indicated the intention that till then the property should not pass. In support of this view a great many cases and dicta of judges were cited. These authorities appear to me to go no further than the conclusion that, in the absence of countervailing circumstances, the stipulation for cash against bill of lading would have been conclusive. In like manner many of the circumstances existing in this case have been held, in the absence of countervailing circumstances, to be conclusive evidence of an intention to pass the property. There is also another strong fact against the plaintiff's contention, viz., that the bill of lading was indorsed to the order of the defendant; but that again is only evidence of the intention, and may be rebutted by contrary evidence. The rule as deducible from all the cases, and as it is laid down in the learned works of Blackburn, J., and Mr. Benjamin on Sale, is, that the question whether the property has passed being one of intention to be collected from all the circumstances, no single circumstance is necessarily conclusive in all cases, but the conclusion to be drawn must depend on a balance of the various circumstances on one side and the other. The question is, therefore, one of fact for a jury; and we have here, being placed in the position of a jury, to determine it as a question of fact. I am

Milward, Q.C. and *Willis* for the defendants.—First, the property in these goods did not pass to the plaintiffs. By the first letter, namely that of 5th Jan., the goods are to be put on board at Dunkirk, "cash against bill of lading signed by captain," which shows that the property was not to pass until the purchaser should have paid the cash and received the bill of lading. "free on board" was held by the Court of Common Pleas to mean that when put on board they would become the property of the purchaser, but this expression alludes to the payment, to indicate the party who is to pay for the bill of lading. [Bramwell, B.—Suppose the ship had gone to the bottom, who would have to bear the loss?] The vendor. *Brown* v. *Hare*, 4 H. & N. 822; 29 L. J. 6, Ex. is the case relied on in the court below to show the property had passed, but there was this difference in that case that the bill of lading was forwarded and the object of forwarding the bill of lading was to make the goods deliverable to the consignee. [Bramwell, B.—Where a bill of lading is to order, and cash against bill of lading, I have always understood that if payment is not made the vendor may resume possession of the goods.] The bill of lading being deliverable on payment is conclusive to show the property did not pass. There is not an intention on the part of the vendor to pass the property: (*Sheppard* v. *Harrison*, L. Rep. 5 E. & I. App. 116; 24 L. T. Rep. N. S. 857.) Where goods are to be delivered against goods or money, or anything, the events must be contemporaneous, and until the conditions are fulfilled, although put into vendee's ships, the property does not pass:

Bussey v. *Barnett*, 9 M. & W. 312;
Bishop v. *Shilleto*, 2 B. & Ald. 329;
Brandt v. *Bowlby*, 2 B. & Ad. 932.

[The Lord Chancellor.—This is a contract in mercantile language, but if we paraphrase it thus:

of opinion that, taken altogether, the evidence in this case shows that it was intended by the parties that the property should pass at Dunkirk. There was another point raised as to the form of the action to which it is necessary to avert. It was contended that the plaintiffs could not maintain trover because there was at least a lien on the part of the vendor. This question appears to me to depend on the question whether there was an absolute refusal by the plaintiffs to accept the bill of exchange in compliance with the terms of the contract. If there was, our decision on this point must be for the defendant. The facts, however, do not appear to me to show that there was such a refusal on the part of the plaintiffs to accept the bill. When the potatoes arrived it was supposed by both parties that there were sixteen sacks short. The plaintiffs said that they could not accept the bill for the price of the full number when there were sixteen short; that they were quite ready immediately to pay the amount less the deficiency, or if the defendant liked to wait till the vessel was unloaded, they would accept for what was actually on board. The defendant would be satisfied with nothing else than the immediate and absolute acceptance of the bill for the full amount. The plaintiffs never refused to comply with the contract, and when it turned out that the parties were mistaken, and the full quantity was on board, they were perfectly willing to have taken the whole. Under these circumstances it appears to me that the right of lien did not exist, and the right of possession as well as of property had passed to the plaintiffs. This rule must therefore be discharged.

Grove, J.—I am of the same opinion. Mr. Willis appeared at first disposed to contend that the term, "cash against bill of lading," was absolutely conclusive evidence of the intention not to pass the property; but finding that he could not sustain this view he argued that it was *primâ facie* conclusive, and that there was no circumstance in the present case sufficient to rebut it. Standing by itself it might be conclusive, but there are additional facts in this case. There is first the fact that the bill of lading was indorsed to the consignor's agent, which is strongly in the defendant's favour. But then there are the other circumstances, which appear to me of still greater weight in the plaintiff's favour, viz., that the delivery was to be free on board, that there was a part payment, and that the sacks in which the potatoes were shipped were the plaintiff's. All these are extremely strong facts pointing to the conclusion that the property passed, and one of these was considered so very strong in the case of *Brown* v. *Hare* (*ubi inf.*) as to make that almost a decision in point to the present case. It is true that the cases run very fine, but none of them, I think, depart from the proposition that the question is one of intention for the jury, where there are circumstances pointing both ways. The case of *Brown* v. *Hare* (*ubi inf.*) is very plainly to that effect. In that case the oil, which was the subject of contract, was to be shipped "free on board," and was to be paid for by bill of exchange on delivery to the defendants of the bill of lading. It was so shipped free on board, and the bill of lading taken deliverable to shipper's order. So far the case was very similar to the present, but the bill of lading was there indorsed to the purchasers, whereas here it was indorsed to the vendor's agent. It was held that the property passed to the purchasers when the goods were placed "free on board," in performance of the contract, and that it was a question for the jury whether the plaintiffs so shipped the oil in performance of their contract to place it free on board, or for the purpose of retaining a control over it and continuing to be owners contrary to the contract. The expression "free on board" appears to have been the main point relied upon in that case. Here, not only were the potatoes to be delivered "free on board," but there was part payment and delivery into plaintiffs sacks, which alone would be the strongest evidence, according to one class of decisions, that the property passed. The terms "cash against bill of lading" may very well be satisfied by construing them as meant to preserve the vendor's lien and so as not at all inconsistent with the other facts pointing to an intention that the property should pass.

Denman, J.—I am of the same opinion. It was desirable that we should be referred to the cases on this subject; but in the result I have no doubt the true principle is, that the question whether the property has passed is one of fact for the jury on consideration of the facts on both sides of the question. The rule on the subject is put very clearly in the case of *Van Casteel* v. *Booker* (2 Ex. 691). We have here to act as jurymen; and it appears to me that the facts very strongly preponderate in favour of the conclusion that the intention was that the property should pass, and that the terms which were relied on as pointing to a contrary conclusion should be construed as merely intended to preserve the vendor's lien. With regard to the question whether trover will lie, I agree entirely with the view taken by my Lord.

Keating, J.—I also agree in the conclusion that the intention was that the property should pass, the lien for the balance of the purchase-money, after payment of 30*l.* being reserved to the vendor. With regard to the question whether the action of trover was maintainable, it is the law, that if one party absolutely refuses to perform the contract, the other party may rescind. If the defendant was entitled to rescind he was entitled to sell the potatoes, and his so doing was no conversion; but if he was not so entitled there was a conversion. The question, therefore, is whether there was an absolute refusal on the part of the plaintiffs to perform the contract. It appears to me that there was no such refusal. It being supposed that some of the sacks were missing, they said, "If they are found we will at once accept the bill for the full amount; if they cannot be found we are not bound to accept in respect of cargo that is not delivered." The defendant, the market having in the mean time risen considerably, proceeded immediately to sell the potatoes. I think that a reasonable time had not elapsed, and that there was no evidence of such a refusal to perform the contract as would justify the defendant in rescinding the contract and selling the potatoes. There was, consequently a conversion of the potatoes, and the action is maintainable.

Rule discharged.

"the goods are put on your ships, they are your property, but unless you comply with the condition of payment against the bill of lading, we reserve a *jus disponendi* to sell them."] That would be unarguable, but we contend now that putting them on board was not with the intention of vesting the property in the vendee, but to deliver them subject to the condition: (*Moakes* v. *Nicholson*, 19 C. B., N. S., 290; 34 L. J. 273, C. P.; 12 L. T. Rep. N. S. 573). Secondly: If the property did pass, we contend that the possession might be retained until the fulfilment of conditions, and consequently the vendee cannot bring trover. [Kelly, C. B.—Is not the principle in all these cases that trover will not lie without possession?] Certainly, a vendor who has a right to maintain possession is in the position of a person who has a right to retain goods in pawn. (*Halliday* v. *Holgate*, L. Rep. 3 Ex. (Ex. Ch.), 299; 37 L. J. 174, Ex.; 18 L. T. Rep. N. S. 656, which is confirmed in *Donald* v. *Suckling*, L. Rep. 1 Q. B. 585; 14 L. T. Rep. N. S. 772.) It is here admitted that the vendor had a lien, the conversion is on 2nd Feb., the letter offering to take delivery is on 2nd Feb., showing that the vendee was in default by his refusals, and that there was no manifestation or disposition to pay until that date, and, therefore, the case of *Milgate* v. *Kebble* (3 M. & G. 100), is in point, that case was followed by

Wilmhurst v. *Bowker*, 7 M. & G. 882; and
Bloxam v. *Saunders*, 4 B. & C. 941.

Prentice, Q.C. and *Holl* for the plaintiffs.—First: The property passed immediately the goods were put into the sacks, or rather the moment they were put free on board: (*Aldridge* v. *Johnson* 7 E. & B. 885; 26 L. J. 296, Q. B.). [The Lord Chancellor.—Do you say the property passed absolutely and indefeasibly.] It passed subject to a lien. The potatoes had risen in price, and, therefore, the plaintiffs did not refuse these potatoes in any factious manner, but because they *bonâ fide* believed there was a short delivery, there was a clear intimation they were ready to pay for the goods, and there was nothing to justify the selling.

Valpy v. *Oakley*, 16 Q. B. 941.

Secondly: Trover will lie. Lord Campbell, in *Aldridge* v. *Johnson*, at p. 299, says, "as soon as each of the plaintiff's (vendee's) sacks were filled with barley, *eo instanti* the property in the barley in the sacks became vested in the plaintiff (vendee). The vendor had only a lien on these goods for the purchase money, he had no property in them, only a mere personal right to retain them, and not a right of sale.

Chinery v. *Viall*, 5 H. & N. 288;
Martindale v. *Smith*, 1 Q. B. 389;
Simmons v. *Swift*, 5 B. & C. 857, per Bailey, J., p. 862.

[The Lord Chancellor.—Is not the payment the essence of the contract?] All we submit is that the refusal of the vendee to pay does not entitle the vendor to rescind the contract and sell the goods. *Cur. adv. vult.*

Nov. 23.—The Lord Chancellor (Cairns) delivered the judgment of the court.—In this case it appears from the judgments below, that the Court of Common Pleas drew the inference of fact that the plaintiff was not in default in refusing to accept the draft for 34*l*., which was tendered to him for acceptance along with the bill of lading. We have been unable to reconcile this finding with the statements in the case, more particularly with the statement in paragraph 13, which seems to us to show that the plaintiff was in default. Taking this fact as we understand it, we think that the judgment in favour of the plaintiff is erroneous, and should be reversed.

The transactions in which merchants, shipping goods on the orders of others, protect themselves by taking a bill of lading, making the goods deliverable to the shipper's order, involve property of immense value, and we are unwilling to decide more than is required by the particular case; but we think this much is clear that, where the shipper takes and keeps in his own or his agent's hands, a bill of lading in this form to protect himself, this is effectual, so far as to preserve to him a hold over the goods, until the bill of lading is handed over on the conditions being fulfilled, or, at least, until the consignee is ready and willing, and offers to fulfil these conditions, and demands the bill of lading, and we think that such a hold retained under the bill of lading is not merely a right to retain possession till those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long, at least, as the vendee continues in default.

It is not necessary in this case to consider what would be the effect of an offer by the plaintiff to accept the draft and pay the money before the sale, for no such offer in this case was ever made.

Solicitors for plaintiffs, *Dalton* and *Jessett*.
Solicitors for defendant, *Heather* and *Son*.

SITTINGS AT WESTMINSTER.

Reported by Gilbert G. Kennedy, Esq., Barrister-at-Law.

Nov. 15 *and Dec.* 10, 1875.

(Before the Lord Chancellor (Cairns), Blackburn and Brett, JJ.)

Mackenzie *v.* Whitworth.

APPEAL FROM THE COURT OF EXCHEQUER.

Marine insurance—Re-insurance—Insurable interest — Concealment — 19 *Geo.* 2, *c.* 37, *s.* 4—27 *&* 28 *Vict. c.* 56, *s.* 1—30 *&* 31 *Vict. c.* 59.

A policy of insurance "on goods" will cover a re-insurance.

The plaintiff, an underwriter, effected with another underwriter an ordinary policy "on cotton" on board a named vessel, for a specific voyage. The policy did not state, as the fact was, that it was a re-insurance of a risk already insured against by the plaintiff; and the jury, in an action by him on the policy, having found that the fact of its being a re-insurance was immaterial, and that there had been no concealment, the verdict was entered for the plaintiff, with leave to the defendant to move to enter the verdict for him, on the ground that the plaintiff, being only interested as a re-insurer, was not entitled to recover on the policy sued on; and it was

Held, by the Court of Appeal (affirming the decision of the Court of Exchequer), that the plaintiff was entitled to recover, for that the nature of the interest insured did not alter the risk, and the description in the policy was sufficient to cover such interest.

Glover *v.* Black (3 *Burr.* 1395), *and* Lucena *v.* Crawford (2 *Bos. & P., H. of L.* 350), *discussed.*

This was an appeal from a judgment of the Court of Exchequer, discharging a rule obtained by the defendant to enter the verdict for him: (see the case reported in the court below, *ante*, vol. II., p. 490; 32 L. T. Rep. N. S. 163; L. Rep. 10 Ex. 142; 44 L. J. 81, Ex.)

The rule came on to be argued on the 9th and 10th Feb., before Bramwell, Pollock, and Amphlett, BB., in the Exchequer, when the rule was discharged, the court holding that an insurance of goods would cover a re-insurance.

Herschell, Q.C. and *Baylis*, Q.C.—The question is, whether an insurance on cotton for 5000*l.* will cover a re-insurance. The evidence at the trial was, that in all cases of re-insurance it was customary among merchants to disclose the fact. It was held in *Glover* v. *Black* (3 Bur. 1394) that an insurance on goods, as goods, does not cover *respondentia*. [Brett, J.—The general rule is, that you need not describe the nature of the interest; is not *respondentia* and bottomry an exception to the general rule?] Lord Mansfield, in *Glover* v. *Black*, grounds his decision on mercantile custom, as in the case here, and if custom is not given effect to, the court will be inverting the course of business. It is true the underwriter can protect himself by demanding, on every contract of insurance, whether it is a re-insurance; but this would be tantamount to requiring a warranty, and it is better to adapt the law to the practice of business than to give a decision which would cause the whole course of business to be altered. [Blackburn, J., referred to *McSweeney* v. *Royal Exchange Assurance Company* (14 Q. B. 634).] In *Lucena* v. *Crawford* (2 B. & P., H. of L. 350), it was held that "profits and commission" are not covered by insurance on "ship and goods." [The Lord Chancellor.—There the person insuring has no interest in the goods themselves; all that he is interested in is something dependent upon the arrival of the goods, and that cannot be covered by an insurance of goods.] The case relied on in the court below was *Crawley* v. *Cohen* (3 B. & Ad. 478), where Lord Tenterden says that a carrier may insure, and as he is an insurer himself such insurance is a re-insurance. But the carrier has a special property in the goods, an insurance by a carrier has never been treated as a re-insurance, or he would have come within the statute 19 Geo. 2, c. 37, s. 4, prohibiting all re-assurance, with a certain exception, namely, "unless the insurer shall be insolvent, become a bankrupt, or die, in either of which cases his executors, administrators, or assigns, may make re-insurance to the amount of the sum before by him assured, provided it shall be expressed in the policy to be a re-insurance," which is now repealed. [Blackburn, J.—The carrier has an interest similar to a mortgagee.] In Massachusets a re-insurance must be so stated, in New York it need not. (See 1 Phillips on Insurance, s. 498, c. 5, s. 8.) [The Lord Chancellor.—Up to what time was the statute, ordering re-insurance to be stated on the policy, in force?] Up to 30 & 31 Vict. c. 23, sched. B., when it was repealed. [The Lord Chancellor.—Then I don't think the custom is of any avail here, as there is no time for a custom to have sprung up.] There would be time since 27 & 28 Vict. c. 65, s. 1, when the prohibition was removed; the very time for a custom to spring up would be at the termination of a regulation which had been in force for 160 years. Supposing there to be a real practical difference between an insurance of goods and a re-insurance, a man is brought a slip in the present form, he would then be bound by a contract he did not intend to enter into. There is a practical difference between insurance and re-insurance which disposes underwriters not to take a re-insurance.

Benjamin, Q.C. (*A. T. Lawrence* with him).—There is an authority directly in point to contradict the contention that it requires an interest in order to insure: (*Reed* v. *Cole*, 3 Bur. 1512.) Though this case was decided only one year after *Glover* v. *Black*, yet *Glover* v. *Black* was not referred to, showing *Glover* v. *Black* to be an exceptional case. It has always been held that the nature of the interest may be left at large, though the subject of the interest must be described, and it is only in the one case of *Glover* v. *Black* that it has been held that the nature of the interest must be described, owing to some custom. There is no distinction between goods themselves and their value for the purpose of insurance, there is nothing insured beyond their value, but profits on goods are distinct things, because profits are beyond the value of the goods, and so is freight. For 160 years Parliament enacted that no one should re-insure without putting in the policy that it was a re-insurance, and seven years ago Parliament repealed this, which showed that Parliament formerly thought it necessary and now thinks it unnecessary; therefore, is it surprising that people come forward to say that there is the practice among underwriters to disclose the fact of re-insurance?

Herschell, Q.C., in reply.—*Reed* v. *Cole* was not an action on a policy, it was an action on articles of agreement, and the question turned on those articles. *Cur. adv. vult.*

Dec. 10.—Blackburn, J., delivered the judgment of the Court.—This is an appeal against the judgment of the Court of Exchequer, discharging a rule obtained to enter a verdict for the defendant.

The action is on a policy of marine insurance, which is set out in full in the declaration. It is the ordinary form of a Lombard-street policy, and the blank in the printed form where it is usual to insert the description of the subject-matter of the insurance, is thus filled up "5000*l.* on cotton." The plaintiff made the policy as agent for, and to protect the interest of American underwriters who had insured cotton for Fatman and Company of New Orleans, to the amount of 80,000*l.*, and was in fact a re-insurance to the amount of 5000*l.* At the trial a question was raised as to whether there was an undue concealment. On that issue the verdict passed for the plaintiff, without any point being reserved, and consequently the Court of Appeal has nothing to do with that issue. The only question before this court is that stated in the rule which has been discharged, viz., whether the verdict should be entered for the defendant, "on the ground that the plaintiff (or rather the parties for whom the plaintiff made the insurance, and on whose behalf he sues) being only interested as a reinsurer, was not entitled to recover on the policy sued on."

It is stated in the case that the defendant gave in evidence, by the testimony of witnesses whose evidence was not contradicted, that in all cases of re-insurance policies the

invariable practice has been to disclose the fact of the insurance being a re-insurance. Mr. Herschell argued on this as if it was a statement that it was the usage and custom of trade always to describe the interest in the policy as being a re-insurance, but we think the statement does not bear that meaning. Re-insurance was in this country prohibited by stat. 19 Geo. 2, c. 37, s. 4, unless the assurer should be insolvent, become a bankrupt, or die, "in either of which cases the assurer, his executors, administrators, or assigns might make re-assurance to the amount before by him assured, provided it was expressed in the policy to be a re-assurance," and this prohibition continued in force till as late as 1864, so that there has not been sufficient time for a custom to spring up in this country; and there is no such custom in America where re-insurance was always lawful: (see Phillips on Insurance, c. 5, s. 8, s. 498, p. 270, 3rd edit.) However, the evidence seems to have been directed to the issue found by the jury for the plaintiff, and has reference, not to the description in the policy, but the practice of making a disclosure to the assurer. The question, therefore, seems to us to be confined to this, whether, applying the ordinary principles of interpretation of written documents, and the established rules of insurance law to this kind of insurance, the description in this policy is sufficient to cover it. The court below decided that it was; and we are of opinion that their decision was right, and must be affirmed.

A description of the subject-matter of the insurance is required, both from the nature of the contract and from the universal practice of insurers. It is generally described very concisely, as being so much "on ship," "on goods," "on freight," "on profits on goods," "on advances on coolies," "on emigrant money," and many other examples might be given. And if no property which answers the description in the policy be at risk, the policy will not attach, though the assured may have other property at risk of equal or greater value; the reason being that the assurers have not entered into a contract to indemnify the assured for any loss on that other property. Thus, a policy on "piece goods" will not make the insurer liable for a loss on hats: (*Hunter* v. *Princes*, Marshall on Insurance, 4th edit., 255). In Phillips on Insurance (vol. 1, chap. 5, s. 415, 3rd edit., p. 231) it is said: "It is necessary that the thing insured, and in some cases also the kind of interest intended to be protected, should be sufficiently set forth in the policy, or that the policy should at least prescribe the way of ascertaining to what the contract is to be applied." And this seems a fair statement of what is required, and is in strict accordance with what is stated by Lord Tenterden in *Crowley* v. *Cohen* (3 B. & A. 478): "Although the subject-matter of the insurance must be properly described the nature of the interest may in general be left at large. In some cases the nature of the interest in the thing insured is such as to vary the nature of the risk, and then it should be stated." In *McSweeny* v. *Royal Exchange* (14 Q. B. 634), the policy was "profit on rice." The Court of Queen's Bench held the plaintiffs entitled to recover—but that judgment was reversed. The Court of Exchequer Chamber, in delivering judgment say (14 Q. B. 659), "The first question discussed was, whether the plaintiff had an insurable interest in profits on the rice. Under the circumstances stated in the special verdict we feel no doubt that he had. He had entered into a binding contract with Drouhet and Company, by virtue of which he would have had a right to 6000 bags of rice, delivered to him in England on the safe termination of the voyage of the *Edward Bilton* to England, with the whole of that quantity of rice on board, before the end of May; and he had made another contract to sell the rice in these events, by which contract he had secured a profit of 1*s.* 6*d.* per cwt. We have no doubt that the plaintiff might have recovered, in the events which have happened, a total loss if he had been insured by a policy properly adapted to the case, and so drawn so as to cover his special interest, from the time that the rice was appropriated by the vendors and ready to be shipped at Madras, and also to assure him against losses of the expected profits—not merely by loss of all the rice by the perils of the sea, but by the loss of any part of it, or the loss of the ship or delay of the voyage beyond the month of May; in any of which contingencies this special interest in profits would have been entirely defeated. If such an insurance had been made on this peculiar interest, against all these events, it is obvious that the underwriters would have required a much larger premium for insuring so complicated a risk than for an ordinary insurance by an owner on goods, or profit on goods, which would be liable to loss only by perils of the seas or other accidents happening to the goods themselves.

In all cases where the peculiar nature of the interest alters the risk, it may be properly said that such interest is the subject-matter of the insurance, and at all events there is great force in the argument, that the nature of that interest should be stated. But in the case now before us, the nature of the interest of the parties assured in the cotton does not in the slightest degree vary the nature of the risk. Had the policy in this case been made by the plaintiff in the very same terms but on behalf of and to cover the interest of Fatman and Co., the owners of the cotton, the underwriters would have had to pay to the plaintiffs the sum which would indemnify Fatman and Co. for any damage to the cotton from the perils insured against, and the plaintiffs would have received that sum for the benefit of Fatman and Co. As the facts are, the person on whose behalf the insurance is made, have bound themselves to pay this sum to Fatman and Co., and the defendants are required to pay the same amount, and under precisely the same circumstances, to the plaintiff, but for the benefit, not of Fatman and Co., but of the parties on behalf of whom the plaintiff made the assurance. The subject-matter of the assurance, viz., the cotton, is fully described, and there is no apparent reason which would make it just to require the nature of the interest to be described.

Still, if there were a series of decisions determining that in such a case, or in cases analogous to it, a description was required beyond what would seem to us reasonable, we should be unwilling to disturb the established practice. But we do not find any such decisions. In *Glover* v. *Black* (3 Burr. 1395), the plaintiff had lent a sum of money on a bottomry bond, which is set out in the case at p. 1395. By the condition, if the ship arrived at the Thames he was to be paid his loan with maritime interest, or, if the ship should be utterly lost on the voyage, he was to be paid a just and propor-

tionate average on all goods belonging to the obligor shipped at any time on the vessel and not unavoidably lost. The plaintiff meant to insure his interest in the bond, and told the underwriters so; but by a blunder drew up the policy in the ordinary form of a policy on goods and merchandise. The underwriters were unconscientious enough to contest the policy, and Lord Mansfield very reluctantly decided in their favour. But it seems enough to state the nature of the plaintiffs' interest to show that the real risk intended to be, but not described, was a very different one from that on goods, which is all that that case decided. *Lucena* v. *Crawford* (2 Bos. & B. N. R. 269) has always been treated as deciding that though profits may be insured they must be described as such and we took time in this case, principally with a view to see what were the reasons for this decision and whether they were applicable to such a case as the present. We cannot find the reasons stated in the report of *Lucena* v. *Crawford*, but in the case of *Routh* v. *Thomson* (11 East, 428), in which similar points arose soon after, Lord Ellenborough states them thus at p. 433: "Independently, however, of the difficulty of fixing the value, and supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight, effect an insurance on either merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety? The declaration must aver an interest in the subject insured, and that interest must be proved; and how can it be said that these captors have any interest either in the ship or the freight, when the ship is altogether the king's, and the captors have no interest in either? nor other concern in respect to the same beyond a mere chance that the king may be induced to give them something out of the produce of such ship and freight." This reasoning, whether binding as an authority or not, is clear and intelligible, but it seems to us to have no application to such a case as the present. The assured here had a direct interest in the safe arrival of the cotton; not in any way a collateral interest in something else after the cotton arrived. It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton; and if the mode in which they acquired that interest had been stated in the policy, it would have in no way altered the effect of the defendant's contract, which would still have remained to be, to indemnify against all damage sustained by the cotton in consequence of any of the perils insured against.

We think, therefore, that the judgment below should be affirmed.

Solicitors for the plaintiff, *Norris, Allens, and Carter*, agents for *Simpson* and *North*, Liverpool.

Solicitors for the defendant, *Gregory, Rowcliffe, Rowcliffe*, and *Rawle*, agents for *Sale* and *Co.*, Manchester.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKellar, and J. M. Lely, Esqrs., Barristers-at-Law.

Wednesday, Nov. 17, 1875.

Atwood (app.) *v.* Case (resp.)

Merchant Shipping Act 1854, *s.* 237, *construction of—Going on board newly arriving ship, "before actual arrival."*

By sect. 237 *of the Merchant Shipping Act* 1854, *every person (except as therein accepted) who "goes on board any ship about to arrive at the place of her destination before her actual arrival in dock, or at the place of her discharge, without the permission of the master," incurs a penalty as therein mentioned.*

C., without leave of the master, went on board a ship bound from a foreign port to Bristol, as she lay in the Cumberland basin of Bristol Harbour. The ship (which the crew soon afterwards left) remained in the basin all night, but did not, nor was it intended that she should, discharge her cargo there. The next morning she was moored further into the harbour, and discharged her cargo at another quay in the port of Bristol.

An information having been preferred before justices against C. for contravening sect. 237 *of the Merchant Shipping Act* 1854, *the justices dismissed the same. The informant having appealed under* 20 & 21 *Vict. c.* 43.

Held, that the ship had actually arrived in dock, and that judgment ought to be for the respondent.

This was a case stated for the opinion of the Court of Queen's Bench, under 20 & 21 Vict. c. 43, by two justices of the peace for the town and county of Bristol.

1. Upon the hearing of a certain information preferred by the appellant, a police officer and a person employed in the service of Her Majesty's Board of Trade, against the respondent, a sailor's boarding-house keeper, for that he, not being in Her Majesty's service, and not being duly authorised by law for the purpose, unlawfully did go on board a certain British ship, to wit, the *Lord Duncan*, about to arrive at her place of destination before her actual arrival in dock or at the place of her discharge, without the permission of the master of the said ship, contrary to the 237th section of the Merchant Shipping Act, 1854, we dismissed the case.

2. The section referred to is as follows:

Every person who, not being in Her Majesty's service, and not being duly authorised by law for the purpose, goes on board any ship about to arrive at the place of her destination, before her actual arrival in dock or at the place of her discharge, without the permission of the master, shall for every such offence incur a penalty not exceeding £20; and the master or person in charge of such ship may take any such person so going on board as aforesaid into custody, and deliver him up forthwith to any constable or peace officer to be by him taken before a justice or justices, and to be dealt with according to the provisions of this Act.

3. The said ship arrived from a foreign port on Sunday, the 4th July, 1875, and passed through the gate of the Cumberland Basin in the port of Bristol, in the city and county of Bristol, about seven o'clock in the evening.

4. Immediately after the ship had entered the basin the appellant, who is specially employed by the Board of Trade for the purpose, went on

boards introduced himself to the master, and remained on board with his permission. Very shortly afterwards, and while the ship was being moored, the respondent went on board her, his alleged object being to see one of the crew. He spoke to the master, but did not obtain permission to remain on board, the master telling him that he was not wanted. The respondent went away from the ship and returned on board again shortly afterwards, and he then refused to leave when requested by the appellant so to do.

5. The crew left the ship on arriving in the basin, which is usual, and the ship remained there all night.

6. The next morning she was moored further into the floating harbour, and afterwards discharged her cargo at another quay in the port of Bristol.

7. Cumberland Basin is divided from the river Avon by dock gates, and is a complete dock forming part of, but divided by other dock gates from the rest of the docks formed under and governed by the Bristol Dock Act 1868, and other local Acts. There are quays on each side of the basin at which ships frequently discharge cargoes, but the *Lord Duncan* did not discharge, and it was not intended that she should discharge any of her cargo there.

8. On behalf of the respondent it was contended that the section, being penal, must be read strictly, and that the words were alternative, so that it was enough to take his actions out of the provisions of the statute if the vessel could be said to have arrived: (1) "At her place of destination," or (2) "In Dock," or (3) "At the place of her discharge."

But in this case, as to all three phrases, it was agreed, as a fact, that she had arrived at her place of destination, that she was in dock, and that she had also arrived at the place of her discharge.

9. On behalf of the appellant, it was contended that it was not sufficient that the vessel had arrived in port to exempt a person acting as the respondent had acted, from being amenable to the statute that so long as she had not arrived "at the place of her discharge," he could not board without permission from the master, and that it was not until Monday the 5th July last that the *Lord Duncan* arrived at the place of her discharge.

The justices decided as follows:—(1) That the ship was not "about to arrive at the place of her destination" (which, having regard to the section, they considered a condition precedent to bringing the respondent within its words) as she had actually arrived there, that is to say, she had arrived at Bristol; (2) That she was in dock, that is to say, in the Cumberland Basin; and (3) That she had arrived at the place of her discharge, which was Bristol, although she was not then actually at the quay at which she was afterwards unloaded, inasmuch as that precise locality as to all ships depends more or less upon the Bristol Quay warden's arrangements, and upon various circumstances over which owners and masters of ships have no control or foreknowledge.

A plan accompanied the case.

Bowen for the appellant argued that great stress was to be laid upon the word "actual" in the section. The arrival in the present case was only a constructive arrival. [QUAIN, J.—This is a penal statute and must, as such, be construed strictly.]

Cole, Q.C., for the respondent, was not called upon.

BLACKBURN, J.—I am of opinion that our judgment ought to be for the respondent, and that upon the second of the grounds mentioned by the justices. Neither the first or third grounds are supportable. It is idle to say that the port of Bristol was the place of destination of this ship. She was in dock when she was in Cumberland, Basin, and that is enough. There was an actual arrival of the ship within the meaning of the section.

MELLOR, J.—I am of the same opinion and for the same reason.

QUAIN, J.—A strict construction should be put upon the statute. The ship had arrived in dock. The words "other place of her discharge" were, I think, put in to embrace the cases which might arise of a ship discharging elsewhere than in dock.

On the other two grounds the justices were wrong. *Judgment for the respondent.*

Solicitors for the appellant, *White, Renard* and *Co.*, for *Henry Britten. Press*, and *Inskip*, Bristol.

Solicitors for the respondents, *Darby* and *Cumberland*, for *J. H. Clifton*, Bristol.

Tuesday, Dec. 14, 1875.

HUTCHINSON *v.* GLOVER.

Discovery—Compromise of cross cases of collision between defendant and third party—Plaintiff's right to inspect terms of compromise.

In an action by owner of cargo against shipowner the plaintiff alleged damage in consequence of a collision with another ship caused by defendant's negligent navigation. A compromise of cross suits in the Admiralty Court in respect of the collision had been entered into by the respective owners of the two ships.

Held that the plaintiff had a right to inspect the terms of this compromise.

THIS was a motion on the defendants' behalf to discharge an order made by Quain, J. at chambers, so far as it related to an allowance of inspection by the plaintiffs of certain documents in the defendants' possession.

It appeared from the statement of claim that the plaintiffs were consignees in London of certain bales of hemp, shipped at Konigsberg on board the defendants' steamship *Burlington* for carriage to London upon the terms of a bill of lading containing the usual exceptions from liability.

On the 30th Nov. 1873, while the *Burlington* was coming up the River Thames in the course of her voyage from Konigsberg to London, with the bales on board, and before they were delivered, she came into collision with another vessel called the *Hakon Adelsteen*. In this collision the *Burlington* was struck with violence on her port side and sank under water, and thereby the bales were damaged. The collision and subsequent damage were occasioned, the plaintiffs alleged, by the negligence and unskilful navigation of the master and crew of the *Burlington* or of other servants of the defendants on board that ship. In consequence the plaintiffs suffered a loss upon the bales of 770*l.*—749*l.* by reason of damage to the goods and 21*l.* which they were compelled to pay on account of the said goods by way of general average contribution.

The defendants, in their statement, denied this

allegation of negligence, stated that the *Hakon Adelsteen* was not at the time of the said collision being navigated by them or their servants, and alleged that if and so far the said collision and subsequent damage were occasioned by the negligent or unskilful navigation of either of the said ships, they were occasioned by the negligence and unskilful navigation of those on board, and navigating the *Hakon Adelsteen*.

The managing owner of the steamship *Burlington*, one of the defendants, enumerated in his affidavit of discovery the documents relating to this action which were in his possession or power, and objected to produce all those which related wholly to a suit and cross suit in the High Court of Admiralty to which the owner of the said steamship *Hakon Adelsteen* and the owners of the said steamship *Burlington*, the defendants in the present action, were parties suing at the request and for the benefit of their respective underwriters; such suits were instituted in the said court by the said parties to recover each from the other damages in respect of the same collision as is alleged in the statement of claim. The question, which of the said two steamships was to blame for the said collision was the main issue in the said suits, and he contended that all such documents, papers, letters and other writings were immaterial and irrelevant in this action as being *res inter alios actæ*, that none of them could be admissible as evidence in the present action, and that they could only be used by way of prejudice against the defendants herein.

Amongst these documents was one described as "The agreement for carrying out a private arrangement to put an end to litigation in the said suits entered into between David Brown on behalf of the said owners of the *Hakon Adelsteen* and William Lamplough on behalf of the said owners of the *Burlington*, the defendants in this action, and an average statement made upon the basis of this agreement."

At chambers Quain, J., notwithstanding the defendants' objection, made an order that the plaintiff should be at liberty to inspect this agreement as well as the other documents enumerated.

Witt, now moved on the defendants' behalf by way of appeal from this order. A party to a suit cannot be required to produce documents relating to the compromise of a dispute between himself and a person not a party to the suit. This was so held in *Warrick* v. *Queen's College Oxford* (L. Rep. 4 Eq. 254) where Lord Romilly, M.R. thus described the question before him "A plaintiff files a bill against the lord of a manor, claiming certain rights over certain commons within the manor. Previously to the bill being filed the lord of the manor entered into an agreement with certain other persons who claimed a right upon the land for the compromise of that claim; and the documents relating to that compromise are sought to be seen in this suit without the other persons who were parties to the compromise being parties to the suit. I am of opinion that that cannot be obtained. I express no opinion as to what might be the case if the War Office were parties to this suit; but I do not think the doctrines relating to privilege affect the question on this summons in the slightest degree. The question is, whether a person who claims property in the hands of the defendant is entitled to require the terms of, and the documents relating to, a compromise made between the defendant and a third person relating to the same property at an anterior period, to be produced without that other party to the compromise being before the court. I am of opinion that this court will not compel such production." [BLACKBURN, J.—That seems to go upon technical ground that the party to the compromise should be made a party to the suit.] A compromise between two parties cannot be said to be in the exclusive possession of one of them, and Lord Cottenham decided in *Reid* v. *Langlois* (1 M. & G. 627, at p. 636) that the authorities "show that where a document is not in the exclusive possession of a party, but is shared by somebody else jointly with him, the production cannot be ordered. This is a well established rule, and cannot be considered as now open to dispute." [BLACKBURN, J.—It does not appear that the other party to this compromise objects to its production; his right to do so under any circumstances may also be disputed.] My next point is that this compromise and the documents relating to it are not relevant to the issues in this action. If the admiralty suits had proceeded to judgment, the judgment, even if against the defendants here, could not have been received as evidence against them in this action. [FIELD, J.—The compromise may contain, what the judgment would not, an admission of liability.]

Cohen, Q.C. appeared for the plaintiff to support the judge's order.

BLACKBURN, J.—I do not think it is necessary to call upon Mr. Cohen. If we were to decide this on the question of the exclusive possession of this document, it would devolve upon the applicant to show that the other party to the compromise objected to its production; so it is not necessary to consider that matter here. The next objection to the inspection of this document was that it is not relevant to the action now to be tried; but if it should turn out to contain, as is probably the case, an admission by the defendants that they were negligent in the navigation of their ship, then it would be evidence to be used by anybody against them. In a case in this court, *Richards* v. *Morgan* (4 B. & S. 641) I expressed an opinion, which was overruled by the majority of the judges, that a statement made under the old Chancery system would not be taken as an admission against the person who made it. This is a far stronger case than that, and upon the decision of the court in that case there can be no doubt, to my mind, that the terms of this compromise may be adduced as evidence of any admission by the defendants relative to the issue in this action, which it may contain. We do not require to hear the plaintiffs, but as they have been brought here to answer this application, the motion must be refused with costs.

QUAIN and FIELD, JJ. concurred.

Motion refused.

Solicitors for plaintiffs, *Druce, Sons, and Jackson.*

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

COMMON PLEAS DIVISION.

Reported by J. M. LELY, Esq., Barrister-at-Law.

May 1, 12, *and Nov.* 2, 1875.

NUGENT *v.* SMITH.

Carrier by water—Whether liable as insurer for loss out of realm—Damage to horse by plunging from fright caused by storm—Whether storm "act of God"—How far all shipowners liable as common carriers.

The common law liability of a carrier attaches to a contract for carriage to a place without the realm.

A loss occasioned by the act of God is a loss caused exclusively by a violent act of nature such as a carrier could not possibly foresee or resist the effect of.

It lies upon a carrier to show that a loss for which he would otherwise be liable was occasioned by the act of God.

The plaintiff delivered to the defendant in London a mare to be carried by the defendant by steamer from London to Aberdeen, between which places the defendant advertised and habitually ran steamers. A storm arising during the voyage, the mare was so injured that she died. The jury found that the injury was cause partly by excessive bad weather, and partly by the fright and struggling of the mare, and they negatived all negligence on the part of the defendant.

Held that the defendant was liable, and a verdict having been entered for the defendant at the trial, a rule to enter a verdict for the plaintiff made absolute.

Semble, that all shipowners carrying goods for hire are liable as common carriers in the absence of express stipulation to the contrary.

THE facts of this case sufficiently appear from the written judgment of the court. The following is an outline of the arguments:

Holl and *Douglass Walker*, for the defendant, showed cause.

1. The defendant on his passage from a place within to a place without the realm is not a common carrier, so as to render him liable as an insurer for loss to goods which happens without the realm.

Coggs v. *Barnard*, 1 Sm. L. C. 6th edit. 177;
Morse v. *Slue*, 1 Mod. 85; Vent. 238; 2 Lev. 69;
Lane v. *Cotton*, 1 Lord Raym. 654; 12 Mod. 472;
Barclay v. *Y'gana*, 3 Dougl. 389;
Forward v. *Pittard*, 1 T. R. 27;
Crouch v. *London and North-Western Railway Company*, 14 C. B. 255; 23 L. J. 73, C. P.;
Bennett v. *The Peninsular Steam Boat Company*, 6 C. B. 775;
Jones on Bailments, p. 103;
Story on Bailments, ss. 489, 490;
Abbott on Shipping, 6th edit. 345;
Angell on Carriers, ss. 149-51.

2. Even if the defendant be liable as an insurer, the loss was caused by the act of God.

Forward v. *Pittard* (*ubi sup.*), per Lord Mansfield, C.J.
Amies v. *Stephens*, 1 Str. 127;
Trent Navigation Company v. *Wood*, 3 Esp. 127;
Laurie v. *Douglas*, 15 M. & W. 746;
Grill v. *General Iron Screw Collier Company*, L. Rep. 1 C. P. 612; 14 L. T. Rep. N. S. 711; affirmed on appeal L. Rep. 3 C. P. 476; 37 L. J. 205, C. P.; 18 L. T. Rep. N. S. 485; 2 Mar. Law Cas. O. S. 362;
Notara v. *Henderson*, L. Rep. 7 Q. B. 346; 22 L. T. Rep. N. S. 577: affirmed on appeal *ante*, vol. 1, p. 278; L. Rep. 7 Q. B. 225; 41 L. J. 158, Q. B.; 26 L. T. Rep. N. S. 442;

3. The loss was so far due to the inherent qualities of the horse as to exempt the defendants from liability.

Kendall v. *London and South-Western Railway Company*, L. Rep. 7 Ex. 373; 41 L. J. Rep. 184, Ex.; 26 L. T. Rep. N. S. 735;
Blower v. *Great Western Railway Company*, L. Rep. 7 C. P. 755;

Cohen, Q.C. and *Lanyon*, for the plaintiff, supported the rule.—They referred to the above cases and also cited on the first point:

Lloyd v. *Guibert*, L. Rep. 1 Q. B. 115;
Dale v. *Hall*, Wils. 281;
Laveroni v. *Drury*, 8 Ex. 166;
Kent's Commentaries, vol. 2, Lect. 11, p. 597;
Bacon Abr. tit. Carriers (B.);
Parsons on Shipping, vol. 1, 248 n.;
Lloyd v. *General Iron Screw Collier Company*, 3 H. & C. 284;
Bosson v. *Sanford*, 2 Salk. 440;
Goff v. *Clinkard*, 1 Wils. 282 n.;
Elliot v. *Rossell*, 10 John's Rep. 1;
Schieffelin v. *Harvey*, 6 John's Rep. 170;
Code Napoleon Art. 1784.

On the second point:

Oakley v. *Portsmouth Company*, 11 Ex. 618; 25 L. J. 99, Ex. per Martin, B. at p. 101;
McArthur v. *Sears*, 21 Wendall, 190;
Ferguson v. *Brent*, 12 Maryland, 9;
Hill v. *Sturgeon*, 35 Missouri, 212;
Redfield on Carriers p. 18.

And on the third point.

Kearney v. *London, Brighton, &c., Railway Company*, L. Rep. 5 Q. B. 411; 39 L. J. 200, Q. B.; 22 L. T. Rep. N. S. 886; affirmed on appeal L. Rep. 6 Q. B. 411; 24 L. T. Rep. N. S. 913.

The substance of the various authorities cited sufficiently appears from the judgment.

Cur. adv. vult.

Nov. 2.—The following written judgment of the court (Brett and Denman, JJ.) was read by

BRETT, J.—In this case, which was tried in London before Brett, J., the plaintiff delivered to the defendant's company in London a mare to be carried by steamer to Aberdeen. The defendant company advertised and habitually ran a line of steamers from London to Aberdeen. The mare was shipped without any bill of lading. At a part of the voyage, which was not determined by the evidence, the mare, during rough weather, was injured, and to such an extent that she died. There was a conflict of evidence as to the amount of care and skill exercised by the defendant's servants, and as to the conduct of the mare. The jury were asked: First, was the injury to the mare caused by negligence of the defendant's servants either in preparing for bad weather, or in attempting to save the mare from the consequences of bad weather? Answer, "No." Secondly, or was the injury caused solely by the conduct of the mare herself by reason of fright and consequent struggling without any negligence of the defendant's servants? Answer, "No." Thirdly, or was the injury caused solely by perils of the sea, that is to say, by more than ordinary rough weather, without any negligence of the defendant's servants, or any fright and consequent struggling of the mare? Answer, "No." Fourthly, or was it caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants? Answer, "Yes." Fifthly, were there any known means, though not ordinarily used in the carriage of horses by people of ordinary care and skill, by

which the defendant could have prevented the injury to the mare? This question the jury did not answer. Upon the answers of the jury a verdict for the purpose of the day was directed to be entered for the defendant, the plaintiff having leave to enter a verdict for him on the findings of the jury, if upon such findings the court should be of opinion that he was entitled to judgment. Upon a rule granted to show cause it was admitted on behalf of the defendant that if the whole voyage had been within the realm of England the defendant's company would have been deemed to be common carriers according to the custom of the realm, because they advertised to carry any person's goods from place to place; but it was argued that under the circumstances of the case they could not be so deemed, because they undertook to carry to a port without the realm, and therefore a part of the voyage was beyond the realm and could not be subject to the custom of the realm. It was then argued that it was consistent with the evidence that the injury was caused outside the realm, and, therefore, that in respect of such injury could not be regulated by the custom of the realm. It was also contended that the peril of the sea, which caused the injury, being the result of more than ordinary bad weather, that is to say, of weather not to be expected in an ordinary voyage, was, if the case was to be decided upon a carrier's liability according to the custom of the realm, the act of God within the meaning of that exception to a carrier's liability; and further that the injury having happened partly through the conduct, from its inherent nature, of the mare, the defendant could not be held responsible. It was argued for the plaintiff that the defendant's company by advertising that they would carry the goods for any person from place to place undertook the responsibilities of and became common carriers according to the custom of the realm of England; that this would be the case of any persons so advertising in England, and would be so in the case of any British shipowner so advertising anywhere; that the circumstance of one of the termini of the proposed voyage being outside the realm did not alter the liabilities; that even if the defendant's company were not common carriers, yet they were shipowners carrying goods on board ship as matter of trade for hire, and shipowners so carrying goods are by the custom of the realm responsible as insurers for the safety of the goods to the same extent as common carriers are responsible; that the peril of the sea, which caused the injury in this case, was not the act of God within the meaning of the exception to the complete liability of a common carrier of goods for hire, for that an injury can only be said within the meaning of that exception to have been occasioned by the act of God when it has been occasioned directly and not indirectly by the extraordinary action of some physical force, the consequences of which could not be averted, or by some unexpected and extraordinary natural occurrence which human foresight could not foresee, nor human power resist or prevent; whereas there was in the present case a sea more rough indeed than on an ordinary voyage, that is to say, a peril of the sea, but nothing more; that the natural fright of the mare, caused by the more than ordinary rough weather, was not an inherent vice of the mare which could absolve the defendant from liability for the injury to the mare.

The case was elaborately argued before my brother Denman and myself. The main question treated was the principle on which the liability of the defendant, if any, ought to rest. It was argued on behalf of the defendant that the liability cannot be made to rest on an allegation that the defendant's company were common carriers, because it was said that that liability is imposed by a custom of the realm, and such a custom cannot have force beyond the realm, and the defendant has a right to assume in the present case that the injury to the mare happened beyond the realm. But the phrase "by the custom of the realm" is in truth only a paraphrase for "by the common law." Thus in Selwyn's Nisi Prius title "Carriers," chap. 10, it is said: "And by the custom of the realm, that is by the common law, &c." And in Story on Bailment, s. 469: "The general principles of the Roman and foreign law upon this subject have been stated somewhat more at large, because they form a proper introduction to the doctrine of the common law on this subject, and in which the responsibility of innkeepers is said to be founded on the custom of the realm," because, "in point of fact the origin of the latter may be clearly traced up to the Roman law, from which the common law, without any adequate acknowledgment, has from time to time borrowed many of the important principles which regulate the subject of contracts." And in *Forward* v. *Pittard* (1 T. Rep. 27) Lord Mansfield says: "But there is a farther degree of responsibility by the custom of the realm, that is by the common law." In *Crouch* v. *The London and North-Western Railway Company* (*sup.*), Jervis, C.J. says: "When a party who holds himself out as a common carrier accepts goods, the common law, that is, the law founded on the custom of the realm, ingrafts upon such acceptance a contract to carry safely and to insure, subject only to the exceptions, namely, the act of God and the Queen's enemies." The question, therefore, is one of contract, and depending upon the nature of the undertaking to be implied by the common law of England. The contract is obviously made at the time of the receipt of the goods for carriage. If that receipt be in England, on board an English ship, the whole contract must be construed according to English law. If it be abroad by an English master, on board an English ship, it is still an English contract, because it is a contract made under the English flag (*Lloyd* v. *Guibert*, 35 L. J. 74, Q. B.; L. Rep. 1 Q. B. 115); and therefore in that last case also the question is, what is the undertaking to be implied on the part of the shipowner by the common law of England. The question being one of contract, there is no principle of law which forbids the implication of a promise to carry safely beyond as well as within the realm. The reason of the implied promise given by Lord Holt in *Coggs* v. *Bernard* (2 Lord Raym. 909; s. c. 1 Smith's Leading Cases 177, 6th edit.), and by Best, C.J. in *Riley* v. *Horne* (5 Bing. 212; s. c. 7 L. J., O. S., 32), founded on the reason on which the Prætor allowed the exceptional liability of shipmasters, innkeepers, &c., applies at least quite as strongly to the part of the carriage by sea beyond the realm as to the part within it. There is no ground on which to imply a different extent of undertaking in the same contract for the carriage which is beyond the realm from that which is within it. On principle, therefore, the same promise should be implied for the whole carriage,

whether the whole be within the realm or part be within and part without. *Mors* v. *Slue* (1 Vent. 190; s. c. 2 Keb. 866) has always been treated as a decision that the same promise is implied when the ship is to go beyond sea as when she is always within the realm. And so has *Goff* v. *Clinkard* quoted in *Dale* v. *Hall* (1 Wils. 281); *Crouch* v. *The London and North-Western Railway* (14 Com. B. Rep. 255; s. c. 23 L. J. 73, C. P.) is precisely to the same effect. And Kent, C.J. in *Elliott* v. *Rossell* (6 Johns. 170) lays it down in the strongest terms: "Masters and owners of vessels are liable as common carriers on the high seas as well as in port, and the argument of the ingenious counsel for the defendant is not well supported in the position that the doctrine of common carriers is by the common law of England to be confined to cases of transportation by water within the jurisdiction of the realm, and that it does not apply to losses arising out of the state. All the books and all the cases which touch this subject lay down the rule generally and apply it as well to shipments to or from a foreign port as to internal commerce. If the master be chargeable as a common carrier for goods received to be transported beyond sea, it would seem to be very extraordinary and idle for the law to regard him in that character only from the time that the goods were received on board until he had put to sea, and to regard him when coming from abroad as a common carrier only from the time that he entered within the jurisdiction of the port. There is no colour of such a limitation of the rule." It seems to us there is no answer to this reasoning. In all these cases the undertaking or promise is treated as one and indivisible. And we are of opinion that whether the promise is to be implied only in ships which are held out as common carriers, or in all ships which carry goods for hire, the promise or undertaking to be implied is, both on principle and authority, one and indivisible, and applies precisely to the same extent to a loss occurring in the part of the voyage beyond the realm as to one occurring in the part within the realm. If, therefore, it is right to say that the liability of insurance attaches to a shipowner, because he holds himself out to be a common carrier, the defendant's company, who did so hold themselves out, were subject to the ordinary liability of common carriers, and could not, in the absence of any other defence, absolve themselves on the ground that they may asume that the mare was injured beyond the realm. That some shipowners so treat their business as to be within the definition of "common carriers," and to be properly so treated in every respect, is clear. This was stated in *Mors* v. *Slue* (1 Vent. 190; s. c. 2 Keb. 866), in *Coggs* v. *Bernard* (2 Lord Raym. 909; s. c. Smith's Leading Cases, 177, 6th edit.), and has been in a multitude of other cases. A general ship is, by the mere fact of being so put up, made in all respects a common carrier, though she is going to a foreigh port: (*Barclay* v. *Gona*, 3 Dougl. 389 and *Lavaroni* v. *Drury*, 8 Ex. Rep. 166; s. c. 22 L. J. 2, Ex.). It would be sufficient, therefore, in the present case to say that the defendants were common carriers, and therefore, at all events, subject to the liabilities of common carriers according to the common law.

But it was strongly argued that this is not the real ground of their liability in the case of shipowners: that some shipowners who carry goods for hire are not common carriers, and yet are, in the absence of express contract, liable to the same extent as common carriers; that, in fact, all shipowners who carry goods for hire, whether they be common carriers or not, are, in the absence of express contract, made liable by implication by the common law to ensure the safe carriage and delivery of the goods entrusted to them, except against the act of God and the Queen's enemies; that the true ground of such liability in the case of the shipowner is not that they are common carriers, but that they are shipowners carrying goods for hire. It is not absolutely necessary, as we have pointed out, to determine this question in this case. But it is obviously one of great importance, and, as it was made a main point of argument, and was most ably argued, we think it right to give our judgment on it.

In order to determine whether there may not be some shipowners who carry goods for hire, and who, nevertheless, are not common carriers, we should determine exactly what it is that makes a man a common carrier.—"It is not every person who undertakes to carry goods for hire that is deemed a common carrier. A private person may contract with another for the carriage of his goods, and incur no responsibility beyond that of an ordinary bailee for hire, that is to say, the responsibility of ordinary diligence. To bring a person within the description of a common carrier he must exercise it as a public employment: he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation *pro hac vice*. A common carrier has, therefore, been defined to be one who undertakes for hire or reward to transport the goods of those as chose to employ him from place to place." Story on Bailments (sect. 495). In *Fish* v. *Chapman* (2 Kelly's (Georgia) Rep. 353) it was held in what we venture to call a powerful and business-like judgment, that is, well applying the principles of the law to the business of the country, that "to constitute a man a common carrier, the business of carrying must be habitual and not casual. The undertaking must be general, and for all people indifferently. He must thus assume to be the servant of the public; he must undertake for all people." When it is said that the owners and masters of ships are deemed common carriers it is to be understood of such ships as are employed as general ships or for the transportation of merchandise for persons in general, such as vessels employed in the coasting trade, or in general freighting business for all persons offering goods on freight or for the port of destination (See Story on Bailments, sect. 501). The real test of whether a man is a common carrier, whether by land or water, therefore, really is, whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire so long as he has room the goods of all persons indifferently who send him goods to be carried. If he does this, his first responsibility naturally is that he is bound by a promise implied by law to receive and carry for a reasonable price the goods sent to him upon such an invitation. This respon-

sibility is not one adopted from the Roman law on grounds of policy: it arises according to the general principles which govern all implied promises. And his second responsibility, which arises upon reasons of policy, is that he carries the goods upon a contract of insurance. The policy has fixed this latter liability upon common carriers by land or water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy, it would be without reason; many other persons hold themselves out to act in their trade and business for all persons indifferently who will employ them, and the policy in question is not applied to such trades; the policy is applied to the trade of common carriers, because, when the common law adopted that policy the business of common carriers in England was exercised in a particular manner and subject to particular conditions which called for the adoption of that policy. The question is, whether the policy has not been applied, not only to shipowners who are by their own act common carriers, but also to shipowners who are not common carriers. Whether a shipowner is or is not a common carrier must surely, upon principle, as from the cases and writings just quoted it appears to be on authority, depend on whether the shipowner holds himself out to carry for hire for all persons who may offer. But certainly many shipowners do not, in fact, do so. A shipowner who puts his ships into brokers' hands to procure a charter does not hold himself out to carry for the first person who offers; neither does a master who, in a foreign port, advertises that he is ready to enter into charters. The shipowner or master has a right to consider the credit and responsibility of the proposed charterer, and to reject his proposal if it be thought expedient. One who puts up his ship as a general ship does, by so doing, by the ordinary understanding of shipowners and merchants, hold himself out as ready to carry all reasonable goods brought to him, and so does a shipowner who runs a line of ships from ports to ports, habitually carrying all goods brought to him. It is admitted, therefore, that such are common carriers and liable to all the implied undertakings of common carriers. The question is whether other shipowners carrying goods for hire without express stipulation, though they are not liable to all the implied undertakings of common carriers, are not by the common law, for reasons of policy, made also liable to one of those implied undertakings.

The solution of this question will, we think, depend upon a consideration of the time at which and the reason for which the liability in question was introduced into the common law. No one who has read the treatise of Mr. Justice Story on Bailments, the essay of Sir William Jones, and the judgment of Lord Holt on *Coggs* v. *Bernard* (2 Lord Raym, 909; s. c. 1 Smith's Leading Cases 177, 6th edition) can doubt that the common law of England as to bailments is founded upon, though it has not exactly adopted, the Roman law. It is true that Lord Holt rests, as for authority, solely on Bracton, but the treatise of Bracton adopts all the divisions of the Roman law in the very words of the Roman text, and further adopts the exception of the Roman law and the Roman reasons for it. The divisions may be the logical divisions of the subject, and so be naturally adopted by all in every country who treat the subject logically; but the exception both in the Roman empire and in England was no natural exception, but one depending entirely on public policy arising from the manner in which some particular kinds of business were carried on in both places. It is obvious, therefore, that Bracton, or English judges before him, adopted into the English the Roman law. By the primary divisions of the law of bailment in the Roman law and as enumerated by Lord Holt, those who carry goods for hire are, unless they are within the exception alluded to, liable only as other bailees for hire, that is to say, they are bound to ordinary diligence and to a reasonable exercise of skill, and of course are not responsible for any losses not occasioned by the ordinary negligence of themselves or their servants (Story on Bailments, sect. 437), but those that are within the exception are liable to insurers, &c. The question, therefore, is, what shipowners are brought within the exception? That exception was in the Roman law contained in the well-known edict of the Prætor, and the reason for its promulgation was contained in the commentary of Ulpian: "Ait Prætor, nautæ, caupones, stabularii(*a*), &c.," that is to say, shipmasters and the class of persons who carried on the business of innkeepers. If the proposition contained in the exceptional edict is to be considered as adopted straight and in terms into the common law, it is not some shipmasters, but all shipmasters, who are by the terms of it made liable to the greater liability. Carriers, it will be observed, are not mentioned, and certainly not a limited class of carriers called afterwards common carriers. The "Roman edict," says Story, "it will be at once perceived, does not extend in terms to carriers by land. But, in most, if not in all, modern countries the rule which it prescribes has been practically expounded so as to include them." (sect. 458). It required, of course, authority customary, and thence judicial or parliamentary, to introduce into the common law the original rules and the exception as applicable to any case. But, if the exception was to be introduced at all, to what would it naturally be first applied? It would seem that naturally it would first be applied to the trades or businesses which were carried on in England under the same names and conditions as formerly in the Roman Empire. Modern innkeegers probably carry on the same business as both the *stabularii* and *caupones* did in the olden time. The two trades, therefore, carried on in England under the same conditions as the three enumerated in the edict were the shipmasters and innkeepers. The conditions which had induced the Prætor as matter of policy to hold them to strict liability in Rome, where the same conditions as existed in the mode of carrying on the same business in England. The conditions on which the Prætor had acted with regard to shipmasters were not conditions confined to a certain limited portion of shipmasters, those conditions existed in the case of all. When then the

(*a*) The word "stabularii" here is evidently used in the second sense given for it in Faccidati and Forcellini's Lexicon (*sub verbo*), "Qui mercede *homines eorumque*, jumenta hospitio hospitio excipit." Passages from Ulpian, Seneca, and Apuleius clearly showing that the word was used to describe a person almost identical in character with a modern innkeeper, are cited by the authors, who add to the above definition the remark, "Nam stabulum tum ad jumenta pertinet, tum ad homines:" (See Bailey's edition, 1828.—Note by Denman, J.)

English judges, acting at first no doubt on the general understanding of all merchants and shipowners, adopted into the common law the exceptions of the Roman law, there is no reason which can be suggested why they should not and did not adopt it in its terms as applicable, not to a limited portion of, but to all shipmasters carrying goods for hire. Afterwards, according to the ordinary course of English law, the judges would have to consider whether some other trade or business was not to be in England introduced into the exception. They found a trade established in England, namely, "the trade of common carriers," which was so carried on, by reason of the state of the country as to be within the principle or conditions of the exception, and therefore they added that trade to those already within the exception. Common carriers would not be introduced because they carried the goods of all persons indifferently, but, because those who so carried goods at that time were within the mischief dealt with by the Prætor. If this be a true view, shipmasters and shipowners were not introduced because they were common carriers, but because they were shipmasters and shipowners, and therefore all shipmasters and shipowners were comprised in the exception when it was recognised and introduced by judicial decisions. Common carriers by land were added afterwards, because their business was subject to the same conditions as was the business of all carrying shipmasters and shipowners. Many attempts have been made to introduce into the exception other trades, as wharfingers, forwarding agents, carters, &c.; but all such attempts have failed, because those trades, although in respect of their being public or common trades they are similar to the trade of common carriers, are not similar to it in those respects in which it was similar to the trades of shipmasters and innkeepers. Unless there is something in the authority which binds us to determine that only such shipowners as made themselves common carriers were brought within the exception, reason, and consideration seem to us to show that all shipmasters and owners carrying goods for hire were from the beginning brought within it. Innkeepers were probably judicially declared to be within it first in *Calye's Case* (1 Smith's Leading Cases, 105, 6th edit.) Shipowners were first judicially declared to be within it in *Morse* v. *Slue* (1 Vent. 190; s. c. 2 Keb. 866). The facts of that case as stated in the special verdict in Ventris, p. 190, lead, one would think, strongly to the conclusion that she was a general ship; but, as has been observed by Blackburn, J. in the *Liver Alkali Company* v. *Johnson* (43 L. J. 216, Ex.; s. c. L. Rep. 9 Ex. 338), the count is general, and states that "according to the law and custom of England masters and governors of ships which go from London beyond sea, and take upon them to carry goods beyond sea, are bound to keep safely," &c. This statement is certainly in terms applicable to all ships, and not only to ships acting as common carriers, and therefore the case has generally been considered as a decision upon the liability of all ships. So in *Dale* v. *Hall* (1 Wils. 281) the declaration was not against the defendant as a common carrier, but upon a promise to be implied from the fact of his being a shipmaster receiving goods to be carried for hire. So in *Goff* v. *Clinkard*, quoted in *Dale* v. *Hall* (1 Wils. 281), there is no statement whatever that the ship was a general ship. We think it worthy of notice that Lord Holt in the careful judgment in *Coggs* v. *Bernard* (2 Lord Raym. 909; s. c. 1 Smith's Leading Cases, 177, 6th edit.) in which his words would be well weighed, speaks thus: "And this is the case of the common carrier"—common hoyman, master of a ship, &c. He does not include the shipmaster in the class of common carriers; he treats him as a separate and independent class. And speaking of him he uses a phrase which includes all shipmasters and does not confine the class to those shipmasters only who trade as common carriers. Blackburn, J. treats the case of *Lyon* v. *Mells* (4 East, 428) as a strong authority in favour of the enlarged liability of a barge owner without determining whether such bargeowner was a common carrier or not. And the judgment of the majority of the judges in the *Liver Alkali Company* v. *Johnson* (23 L. J. 216, Ex.; L. Rep. 9 Ex. 338) seems to be a strong authority in favour of the liability being attached to all shipmasters or owners carrying goods for hire, by reason of their decision that the defendant in that case was liable without determining whether he was a common carrier or not. In *Barclay* v. *Y'gana* (1 Doug. 389) it is true that the ship was a general ship, but Lord Mansfield does not decide the case on the ground that the defendant was a common carrier. He says: "It is impossible to distinguish this from the case of a common carrier. In Bell's Commentaries, c. 4, par. 14, p. 157, it is said: 'As to particular ships freighted specially, unless there be a specific agreement the edict applies,'" In *Schiefflein* v. *Harvey* (6 Johns. 170) in seems impossible to say whether the ship was a general ship. There was a bill of lading, but that does not determine the point. The judgment is, however, general. The masters and owners are responsible for every injury that might have been prevented by human foresight or energy. The judgment of Kent, C.J. in *Elliott* v. *Rossel* (10 Johns. 1) is also as strong and general as can be. "In short," he says, "it must be regarded as a settled point in the English law that masters and owners of vessels are liable in port and at sea and abroad to the whole extent of inland carriers, except so far as they are exempted by the exceptions in the contract of charter-party or bill of lading or by statute." Certainly these are terms which seem to show that in the mind of the Chief Justice all masters of all sea-going ships were so liable, and not only those who had made themselves common carriers, and thereby liable to carry the goods of all persons. And it seems impossible to account for the almost universal use of bills of lading by all sea-going ships, if a great number of them, namely, all who were not common carriers, would only be answerable for negligence, for which they are answerable notwithstanding the bill of lading. The exceptions in a bill of lading are exceptions out of a generally recognised absolute liability which it is generally considered would exist if those exceptions were not inserted.

We are, therefore, of opinion that the true rule is that every shipowner or master who carries goods on board his vessel for hire is, in the absence of express stipulation to the contrary, liable by implication by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God or the Queen's enemies. It is not only such

shipowners as have made themselves in all senses common carriers who are so liable; but all shipowners who carry goods for hire, whether inland, coastways, or abroad, outward or inward. They are all within the exception to the general law of bailments which was adopted into the common law from the Roman law. The liability of the defendant's company, therefore, was that of insurers except against the act of God and the Queen's enemies, not because they were common carriers, but because they carried the plaintiff's mare in their ship for hire. We should take notice that our view differs from some few passages in Story, as in sect. 501 and in sect, 504. But the note to sect. 501 seems to intimate a doubt after all whether the section is correct, and the cases quoted in support of sect. 504 do not affect the case before us.

We have next to determine whether the loss in this case can be said to have occurred "by the act of God." Many definitions of this phrase have been attempted. Many cases have decided the occurrences which cannot in law be considered to come within it. The matter is fully treated in Story on Bailments, sect. 511, and the notes to it in Angell on Carriers, sect. 154, and subsequent sections. The definition to be extracted from all the cases is said to be best given in a note to *Coggs* v. *Bernard* (2 Lord Raym. 909) s. c. 1 Smith's Leading Cases, 177, 6th edition in the American edition by Mr. Wallace of Smith's Leading Cases. The best form of the definition seems to us to be that the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not, by any amount of ability foresee would happen, or if he could forsee that it would happen, could not by any amount of care and skill resist so as to prevent its effect. It lies upon the defendant to show that a damage or loss for which he would otherwise be liable is brought within this exception. We cannot say notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the evidence of proof cast upon him, so as to bring himself clearly within the definition. It seems to us impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred. We think also that the fright of the mare was a natural and probable result of the rough sea, a fright likely to happen in the case of an ordinary horse, and cannot be considered such a vice in the inherent nature of this particular mare as to absolve the defendant. We are, therefore, of opinion that the plaintiff was entitled to succeed and that the rule must be made absolute to enter the verdict for the plaintiff.

Rule absolute. (*a*)

Solicitors: *Lyne* and *Holman* for plaintiff; *Lawrence, Plews, Boyer,* and *Co.* for defendant.

(*a*) An appeal against this decision has been recently heard, and the Court of Appeal has taken time to consider its judgment.

EXCHEQUER DIVISION.

Reported by H. Leigh and A. Pawson, Esqrs., Barristers-at-Law.

Nov. 17 *and* 26, 1875.

Gambles and others v. The Ocean Marine Insurance Company of Bombay.

Marine insurance—"At and from P. to N., and for fifteen days there after arrival"—Loss in port during the fifteen days and after discharge of cargo—Ship having begun to take in cargo for another voyage—Deviation.

Under a policy of insurance on ship "at and from P. to N. and for fifteen days there after arrival," the ship sailed from P. and arrived on the 4th Dec. at N., where she completed the discharge of her inward cargo at a certain part of the port on the 13th Dec. Being under charter to load a cargo of coals she took on board two keels of that cargo as a stiffening, and moved to another part of the port to complete her loading. Before the expiration of the fifteen days she was damaged by a hurricane.

Held by the majority of the Court (Kelly, C.B., and Amphlett, B.), on the authority of Shee *v.* Williams (3 *Campb.* 469), *and* Hammond *v.* Reid (4 *B. & Ald.* 72), *that the insurance was for a voyage from P. to N., which was completed when the cargo was discharged; and though the ship might, under the policy, have remained for the fifteen days within the port of N., yet the proceeding to another part of the port and taking on board, during the fifteen days, a portion of a cargo for a new voyage, was in effect the beginning of a new voyage and a deviation, being foreign to the purposes for which the port of N. might be used for the voyage insured, and that, therefore, the assured could not recover.*

Held contra (by Cleasby, B.), that this was a voyage policy from P. to N., with a time policy superadded for the fifteen days after arrival whilst in the port; that the loss in question was clearly within the words of the policy; and there being nothing to prevent these words from having their natural and ordinary meaning, the plaintiffs were entitled to recover.

This action was brought by the plaintiffs against the defendants upon a policy of insurance effected by the plaintiffs with the defendants for the insurance of the sum of 600*l.* on a certain ship of the plaintiff's called the *Mosquito*, valued at 1500*l.*; and by consent of parties, and order of Pigott, B., dated the 1st Aug. 1874, according to the Common Law Procedure Act 1852, there was stated for the opinion of the court, without any pleadings, the following

Special Case.

1. The said ship, of which the plaintiffs were and are the owners, was by the said policy of insurance, bearing date the 22nd Nov. 1873, insured to the amount of 600*l.* This policy is hereunto annexed, and is to be taken as part of this case.

The policy was in the usual form, for 600*l.* on ship as above mentioned, and the only part of it that is material to be here stated is, that it was expressed to be an insurance on the said ship, "at and from the port of Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there, after arrival." The policy bore a 3*s.* stamp.

2. The said ship, under a charter-party dated the 30th July 1873, left the port of Pomaron in the said policy mentioned, on her said voyage

therein mentioned, and arrived on the 4th Dec. 1873 in safety at Newcastle. On the 13th Dec., at 8 p.m., she completed the discharge of her inward cargo at a certain place in the port of Newcastle.

3. The said vessel having been on the 8th Dec. 1873, chartered to load in the River Tyne a cargo of coals for delivery at Gibraltar, and having received on board two keels of the same as a stiffening, was, on the 15th of the said month of Dec., shifted to the Killingnorth Colliery loading place on the River Tyne, there to complete her loading, and was there well and properly moored head and stern in a tier, to wait her turn to go under the loading spout.

The said loading place is at Wallsend, which is about four miles from the town of Newcastle, in the parish of St. Nicholas, Newcastle, and is within the said port of Newcastle, and within the district popularly known by and amongst mercantile men as Newcastle.

5. On the evening of the last-mentioned day it blew heavily from the westward; and for better security, at about 11 p.m., a bower anchor was let go under foot, and the chain ranged upon deck clear for running; and on the morning of the 16th of the said month of December 1873, the wind increased to hurricane force, and at about 4 a.m., owing to its irresistible violence the mooring post on the quay, to which the vessel's head moorings were secured, broke, causing her to become adrift forward and likely to capsize. Thereupon the stern mooring was instantly cut to facilitate the said vessel swinging to her anchor; but notwithstanding this she quickly capsised, filled and sunk on the same day and alongside the said quay.

6. The said ship was subsequently raised, but was found to be very seriously damaged. In raising her all needful craft, including steam tugs, slings, and lifting chains, and all necessary materials and appliances, including powerful pumping apparatus, were provided, together with a large number of suitable hands; and, under the circumstances, many of the stores and materials of the said vessel, including a bower anchor, were washed off the deck and lost, and the cabin and forecastle gutted, and furniture and fittings destroyed and washed away, as also provisions and stores, and various loss and damage sustained in relation to the apparel and other effects of the crew; and, during the service of raising and righting the said vessel, sundry of her materials, including canvas, spars, masts, and rigging, were unavoidably seriously cut, destroyed, and lost; also two holes were discovered in her port bow, and the vessel was much encumbered with mud and other material, and it became necessary to place her in a dry dock for the purposes of survey and repair.

The question for the opinion of the court is, whether the plaintiffs are, under the above stated circumstances, entitled to recover against the defendants upon the said policy of insurance in respect of the said loss. If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiffs for 424*l.* 5*s.* 3*d.* and costs of suit. If the court shall be of opinion in the negative, then judgment of *nol. pros.*, with costs of defence, shall be entered up for the defendants.

Points for argument on the part of the plaintiffs:—

1. That in the case of a policy of insurance upon a ship at and from one port to another, and for a certain specified period of time there after arrival, the risk continues during the whole period of time so specified.

2. That a policy of insurance is not vacated by the ship changing her moorings within the same harbour during such period.

3. That the policy being stamped as a "time policy" covers the risk during the fifteen days after the ship's arrival in Newcastle, irrespective of how she may be employed during those fifteen days.

4. That as the fifteen days had not expired when the vessel was lost, the loss was covered by the policy.

The defendants' points for argument:—

1. That the clause in the policy, "and for fifteen days whilst there after arrival," only covers the vessel whilst lying at Newcastle-on-Tyne for the purposes of the voyage insured and for discharging her inward cargo, and does not cover her if, after having discharged her inward cargo, she is engaged in a fresh adventure entirely unconnected with the voyage insured.

2. That the loading on board the said vessel, after she had discharged her inward cargo at Newcastle-on-Tyne, of two keels of coals, and moving her from her berth (at which she had discharged her inward cargo) to the Killingnorth Colliery, for the purpose of completing the loading of her outward cargo, was in fact the beginning of a fresh adventure, entirely unconnected with the voyage insured, and that therefore the risk under the policy was at an end before the happening of the loss.

Nov. 17.—*Gully*, for the plaintiffs: The point here is a very short and simple one, turning simply on the meaning of the words in the policy, "at and from the port of Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival." The defendants contend that the words "fifteen days" do not mean "fifteen days" if the cargo happened to be discharged, as it was in this case, before the expiration of that period. The vessel arrived in port on the 4th Dec., and on the 13th had completed the discharge of her cargo, and then had six days remaining of the time, namely, until the 19th Dec., during which she was covered by the express words of the policy, the loss occurring on the 16th, three days before the expiration of the limited period. He was stopped, and

Cohen, Q.C. (with him was *Crawford*) was called upon *contra* for the defendants.—No doubt, if the words of the policy are literally interpreted, the plaintiffs might in one point of view be entitled to recover. But the old cargo having been discharged on the 13th Dec. and a new voyage and risk having been commenced on the 15th Dec., the question is, whether or not there was an alteration of risk, and what in insurance law is called a "deviation." The voyage contemplated by the parties to this policy was completed, and the cargo discharged. The policy, so to speak, was then exhausted, and a new risk, which it was never intended that the policy should cover, was undertaken. The policy should be construed fairly and liberally in accordance with the intention of the parties: (*The Teutonia*, L. Rep. 4 P.C. 171; *ante*, vol. 1, p. 214) [Kelly, C.B.—The words are "for fifteen days whilst there."] That means the spot in the port where she is discharging her cargo. What the policy means is "fifteen days" after the ship is moored and anchored, and if so, that is moored and anchored for

the purpose of discharging her cargo. This is not a time policy, but a voyage policy. If, during the fifteen days the ship goes out of her way, and does that which was not contemplated by the parties, then there is a deviation. Suppose, for instance, that after discharging her original cargo she had gone to another part of the port and loaded a cargo for Africa, and had started to sail on her voyage, and been lost in her course down the river, but still in the port within the fifteen days, could it for a moment be said that she would then have been covered by this policy? But that is no more than has been done here. She was proceeding on a new adventure and taking a new risk. [Kelly, C.B.—What more risk is incurred in one part of the port than in another? Cleasby, B.—The increase of risk is not material in a case of deviation. Amphlett, B.—It has been held that where a policy is on a voyage from A. to B., with liberty to deviate to C., the deviation to C. must be for a purpose connected with the original adventure.] That is so, and here the proceeding to another part of the port was not connected in any way with the original voyage or adventure. It was an entirely new adventure and risk, not covered by the terms of the policy.

Gully, in reply.—The court is asked by the defendants, as a matter of law, to insert in this policy, after the words in question, the words "or until she has discharged her cargo, whichever shall first happen." The meaning of the words is a matter of mercantile custom, and, as Cleasby, B., observed, it is for a jury. There is nothing said about a voyage, but that the insurance shall continue for fifteen days after arrival in port, whilst there. All that can be said is that the parties have so agreed. The policy was stamped as a time policy (30 & 31 Vict. c. 23, s. 11), thereby clearly showing what was intended. [Kelly, C.B.—Have you considered the question of deviation, and its effect on the risk? (*Williams* v. *Shee*, 3 Campb. 469.)] This was not a deviation. If the parties have agreed that the risk shall attach for fifteen days after arrival in port, then it is no matter what the ship may be doing, and deviation is not in that case a material consideration. No shipowner on reading this policy would think it necessary to take out a fresh policy until after the 19th Dec., the expiration of the fifteen days. If it is put as a matter of law, there are the express words of the policy. If not, then it was for the defendants to raise the question as a matter of fact for the jury what those words mean.

Cur. adv. vult.

Nov. 26.—The following judgments were now pronounced:

Kelly, C.B.—The policy of insurance in this case was upon a voyage from a foreign port to Newcastle, with liberty to stay there fifteen days after arrival in that port.

The loss in question is certainly within the literal terms of the condition in the policy, having occurred within fifteen days after the arrival of the ship at Newcastle. But the insurance, even if the policy be deemed a time policy, is "at and from the port of Pomaron to Newcastle, and for fifteen days whilst there after arrival." It is, therefore, an insurance for that voyage; and it appears to me that, when the cargo was discharged, the voyage was completed and at an end; and although the ship might, within the policy, have remained for the whole of the fifteen days within the port of Newcastle, the proceeding to another part of the port and there taking on board a portion of a cargo for a new voyage, was in effect the beginning of a new voyage and a deviation, being foreign to the purposes for which the port of Newcastle might be used for the voyage insured.

The cases of *Williams* v. *Shee* (3 Campb. 469) and *Hammond* v. *Reid* (4 B. & Ald. 72), appear to me to establish the principle that it is a deviation to resort to, or to use the ship within a port covered by the policy for purposes unconnected with the voyage insured: (see also 1 Arnould on Insurance, 4th edit., p. 443.) (*a*) I think, therefore, that the taking the coals on board at the part of the port in question was as much a deviation as if the ship, after the taking goods on board for a new voyage, had sailed upon such voyage several miles down the river, and been lost within a few yards of its mouth, but within the limits of the port of Newcastle.

It was contended at the bar in argument that this was a time policy, and it may in one sense be taken to be so—and it appeared, indeed, that it bore the stamp required for a time policy. But if that were so it was still a time policy, not for any voyage or voyages which the ship might undertake, but, upon a voyage from Pomaron to Newcastle, and then for fifteen days in the port of Newcastle.

I see no reason why the principle of the cases to which I have adverted should be departed from. Those cases show that, where the insurance is upon a voyage or voyages, with liberty to go to or touch at other ports or places, yet if the ship should touch at those ports for purposes foreign to the voyage or voyages enumerated and specified in the policy, it would be held to be a deviation, and consequently that the assured could not recover. I think these principles applicable to the case before the court, and that the taking of a cargo or part of a cargo on board for another and a different voyage was as much a deviation as if, upon a time policy for a year, upon a voyage between Dover and Newcastle, the ship had gone to Calais and taken a cargo on board there.

I think, therefore, that our judgment must be for the defendants. My brother Amphlett concurs in this opinion, and in the reasons assigned for it.

Cleasby, B.—I cannot agree with the conclusion arrived at by my Lord and my brother Amphlett in this case, because I think the language of this policy is quite clear, and I do not see any reason why the court should depart from it.

The insurance, as expressed in the policy, was on the ship "at and from the port of Pomaron to Newcastle-upon-Tyne." So far that would be an ordinary

(*a*) The passage in Arnould, referred to by the learned Chief Baron is as follows: Speaking of time policies, the learned writer says:—The purpose for which a port is visited must be within the scope of the adventure contemplated by the policy, otherwise the visit will be a deviation, notwithstanding the port visited is within the terms of the policy. However extensive may be the language of the clause, "the permission to stay 'for any purpose whatever' must be for some purpose within the scope of the adventure:" (per Gibbs, C.J., in *Langhorn* v. *Allnutt*, 4 Taunt. 510, 519.) "The liberty in the policy must always be construed with reference to the main scope of the voyage insured:" (per Lord Ellenborough in *Williams* v. *Shee*, 3 Camp. 469.)

voyage policy; but then it goes on, "and for fifteen days whilst there after arrival." In my opinion the policy covered the fifteen days within the port of Newcastle after arrival there, although the vessel had completed the discharge of her original cargo, and had begun to prepare to take in another cargo, and indeed had, as appears, taken in part of another cargo for the purpose of stiffening in crossing the port. The policy was a voyage policy, with its usual incidents as to deviation and other matters, so far as regards the voyage from Pomaron to Newcastle; but, after that voyage was ended, the parties added a time policy, for "fifteen days whilst in the port of Newcastle after arrival. "That, I think, is plainly nothing more or less than a time policy for fifteen days, and those words are not, in my opinion, affected by the fact that there is, in the same document, an insurance on a voyage. I cannot agree that this policy was intended to cover only the time occupied in discharging the cargo; if that had been intended, it should, and no doubt would, have been plainly provided for; on the contrary, I think that it was intended to give the assured the benefit of the policy, so far as any lawful engagement was concerned, for the period of fifteen days in the port of Newcastle, however the ship might be employed; whether in doing nothing or preparing for another cargo, or in removing to another part of the port, or in taking in another cargo for another voyage.

It appears that what took place was that the captain when he had cleared his previous cargo had to get another cargo as quickly as possible; and in order to do that he had to cross the port to a place where the vessels remain in tiers, and take their turn at the staiths or loading spouts. He had discharged his previous cargo; it was necessary, before he could cross the port, that his vessel should be stiffened, and so, instead of ballast, he took on board two keels' load of coal for that purpose, which would, of course, form part of his future cargo. It appears to me to be immaterial whether he went in ballast or had a stiffening of coals; the act remains the same; the ship was thus lawfully engaged in the ordinary work in which a ship would be engaged in the port under the circumstances. Whilst waiting for her turn at the coaling staith, and during the limited fifteen days, the storm occurred which caused the loss which gave rise to the present action.

Our attention was called during the argument to the fact that the policy bore on the face of it a double stamp, and that it was properly stamped, therefore, both as a voyage policy and as a time policy. I cannot myself understand why this case should be regarded differently from time policies generally; and if I am right in reading this as a time policy, then the objection raised by the defendants, that this was a "deviation," does not apply. In treating of time policies, in his work on Marine Insurances, Mr. Arnould says (vol. 1, 4th edit., p. 349): "In such policies the risk insured is entirely independent of the voyage of the ship (*iter navis*); and the policy covers any voyage whatever which the ship may make, and any loss or damage which she may sustain by the perils insured against within the space of time limited in the policy."

My Lord and my brother Amphlett think this is not a time policy, in which case the argument as to the fifteen days is simple and complete, but I cannot agree with them. I think it is clearly a time policy, and therefore the nature of the risk is immaterial, and that being so, it appears to me that this loss is clearly within the words of the policy, and occurred during the time covered by it, and by reason of the perils insured against, and that there is nothing to prevent the words from having their natural and ordinary meaning, and that, consequently, the assured (the plaintiffs) are entitled to recover. I say nothing as to the question which might have arisen if the vessel had not regularly prosecuted the voyage from Pomaron to Newcastle.

Judgment for the defendants.(a)

Solicitor for the plaintiffs, *W. W. Wynne*, agent for *Forshaw* and *Hawkins*, Liverpool.

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

ADMIRALTY DIVISION.

Reported by James P. Aspinall, Esq., Barrister-at-Law.

July 27 *and* 29, *and Nov.* 2, 1875.

(Before Sir Robert Phillimore.)

The M. Moxham.

Damage done by a ship to realty abroad—Pleading—Governing law—Jurisdiction.

The question of liability of a shipowner proceeded against in the English Admiralty Court for an injury done by his ship to a pier projecting into the sea, but attached to the soil of a foreign country is governed by English law and not by the lex loci; hence a plea that by the lex loci a shipowner is not liable for the negligent acts of the master and mariners in charge of his ship is no defence to an action in rem for the recovery of damages in respect of injuries done by the ship to a pier in a foreign country.

Semble, that the English Admiralty Court has jurisdiction over an action for damage or trespass to realty situate upon the soil of a foreign country, such damage being done by a British ship upon the sea within the ebb and flow of the tide.

This was a cause of damage instituted on behalf of the Marbella Iron Company (Limited) against the steamship *M. Moxham* and her owners intervening. The case now came before the court on motion made on behalf of the plaintiffs to strike out certain portions of the defendants' answer to the petition. The plaintiffs' petition as it originally stood was so far as material as follows:

1. The plaintiffs are the Marbella Iron Ore Company (Limited), an English Joint Stock Company established under the Companies' Act 1862, and the Acts incorporated therewith for the purpose among other things of exporting ore from Marbella, in the country of Spain, to England and other places. The offices of the company are at No. 1, Crown Buildings, Queen Victoria-street, in the City of London. The plaintiffs were, at the time of the grievances hereinafter mentioned, possessed of a pier situate at Marbella aforesaid for the purpose of shipping iron ore on board ships.

2. About 8.30 a.m. on the 5th Oct. 1874, the steamship *M. Moxham* came to Marbella for the purpose of loading iron ore from the said pier of the plaintiffs. There was scarcely any wind at the time, and the sea was perfectly smooth and there was no current.

3. Those on board the *M. Moxham* instead of keeping clear of the pier as they could and might easily have done so negligently navigated the said steamship that she approached and came into violent collision with the said

(a) The plaintiffs have given notice of appeal from this decision.

pier, and carried away the whole head of the pier, causing enormous damage to it, and throwing several trucks laden with iron ore into the sea.

4. The aforesaid collision and the damages consequent thereon were occasioned by the negligence and improper navigation of those on board the *M. Moxham*.

5. The plaintiffs, in addition to the expense of repairing the pier, have sustained and will sustain considerable damages by reason of being called upon to pay demurrage to divers ships at the time of the said collision under charter to load iron ore at the said pier, and by reason of extra expense incurred in the shipment of iron during the repair of the said pier, and extra freight in consequence of the delay in loading vessels.

The answer filed on behalf of the defendants, the owners of the *M. Moxham*, was so far as material as follows:

Parker and Clarke, solicitors, for Ebenezer Carry, &c., the owners of the steamship or vessel *M. Moxham*, the defendants in this cause say as follows:

1. They deny so much of the first article of the petition as alleges that the plaintiffs were possessed of the Marbella pier in the said petition mentioned, [and they say that the said pier was at the time of the said collision annexed to, and that it formed part of the land of Spain, and that this Honourable Court has not jurisdiction to entertained this suit].

2. They say that the said alleged collision was not a violent one, and that it took place owing to the current, and the shallowness of the water near the said pier preventing the *M. Moxham* from answering her helm, as but for such matters she would have done, and that the said alleged collision was not occasioned by any negligent navigation of the *M. Moxham*, but was the result of inevitable accident.

3. They further say that the said pier was so weakly and insufficient and improperly constructed and fastened as not to be capable of sustaining contacts from such ships as the *M. Moxham* necessary incidental to their going alongside the said pier for the purposes in the said petition stated, and that the said alleged collision was a usual and ordinary contact necessarily incidental to the *M. Moxham* going alongside the said pier for the said purposes, and one which the said pier ought, if properly and sufficiently constructed and fastened, to have sustained without being damaged, and no more, and that the said alleged damage was wholly occasioned by the said pier having been so weakly, and insufficiently, and improperly constructed and fastened, and not otherwise.

4. They further say that the said alleged collision happened within the territory and jurisdiction of Spain, [and that the said pier at the time of the collision was annexed to and formed part of the land of Spain] and that if the said collision was occasianed by any negligence or improper navigation of those on board the *M. Moxham*, it was solely occasioned by the negligence of the master or mariners of the *M. Moxham*, and not by the defendants or any of them, and that by the law of Spain in force at the time and place of the said collision, the master and mariners of the ship, and not the ship or her owners are liable in damages in respect of a collision occasioned as in the petition alleged, and by such law neither the *M. Moxham* nor the defendants nor any of them are or is liable in respect of the damages proceeded for in this cause.

5. They deny the truth of the fifth article of the said petition, and further say that the said article is irrelevant as being matter only for the registrar in the event of a reference.

6. The defendants further say that by the law of Spain in force at the time and place of the said collision, wherever the owner of a ship has become liable in damages by reason of the act or default of the master of such ship, such owner is not liable in damages beyond the value of such ship, and her freight being earned at the time of the commission of such act or default, and can fully discharge such liability by abandoning such ship and freight to the person claiming such damages, or by paying to such person the full value of such ship and freight, and the defendants say that if they are liable to the plaintiffs in respect of the collision in the said petition mentioned, they have so become liable by the act or default of the master of the *M. Moxham* and not otherwise, and that by the said law of Spain in force as aforesaid, they are not liable to the plaintiff in respect of the said collision beyond the value of the *M. Moxham* and her freight being carried at the time of the said collision, and are entitled to fully discharge such liability by abandoning the *M. Moxham* and her said freight to the plaintiffs or by paying to the plaintiffs the full value of the *M. Moxham* and her freight being carried as aforesaid.

And the said Parker and Clarke pray the Right Honourable the judge to pronounce against the damage proceeded for, and to dismiss the defendants and their bail from all further observance of justice in this suit, and to condemn the plaintiffs in costs, or to pronounce that the defendants are not liable to the plaintiffs in respect of such damage beyond the value of the *M. Moxham* and her freight being carried at the time of the said collision, and that they are entitled to discharge such liability by abandoning the *M. Moxham* and her freight, or by paying the full value thereof to the plaintiffs, and that further and otherwise right and justice may be administered to the defendants in the premises.

July 27, 1875.—The plaintiffs now moved the court (as stated in their notice of motion) "to strike out so much of Article 1 of the answer filed herein as alleges that this honourable court has no jurisdiction to entertain the suit, and also article 4 of the said answer on the ground that the same are improper and irrelevant, and bad in substance and also on the ground stated in the affidavit of Charles Cydwelyn Ellis to be read on the hearing of this motion." The affidavit referred to in the notice of motion stated that the collision having occurred on the 5th Oct. 1874, the *M. Moxham* was arrested a few days after by process issuing out of the proper tribunal in Spain; that at the time of the collision the *M. Moxham* was under charter, and upon the vessel being arrested the defendants communicated with the plaintiffs, with a view of procuring the release of the ship, and thereupon in order to obtain the said release an agreement was made between the plaintiffs and defendants, and also between the plaintiff and the captain of the *M. Moxham* at his request, and with the authority of the defendants, that the said vessel should be released, and that the liability of the defendants for the alleged negligence of the ship should be determined by proceedings in the English Courts; that upon the faith of this agreement the *M. Moxham* was released, and was allowed to be loaded and sailed for England for the benefit of the owners and charterers; that it was contrary to good faith and the true intent and meaning of the said agreement that the defendants should attempt to set up as a defence that the court had no jurisdiction. The words of the answer between brackets thus [ ] were added or struck out by agreement between the parties at the hearing as shown in the course of the argument.

Butt, Q.C. and *Benjamin*, Q.C. (*Johnstone* with them) for the plaintiff in support of the motion.—An action will not lie in this country for a trespass to realty committed abroad (*Doulson* v. *Matthews*, 4 R. 503), and consequently if this were a common law action it might be said that there is no jurisdiction; but the Admiralty Court Act 1861 (24 Vict. c. 10, s. 7) gives "jurisdiction over any claim for damage done by any ship," and this wholly apart from any question of the action being local or transitory. In *The Uhla* (L. Rep. 2 Adm. & Ecc. p. 29, n.; 19 L. T. Rep. N. S. 89; 3 Mar. Law Cas. O. S. 148) a ship was condemned for the damage done to Falmouth Pier; if the action had been at common law and the venue had been laid in Middlesex, and it had appeared that the *locale* was in Cornwall, the plaintiff would have been non-

suited; but in admiralty no such course could be taken: the court held that it had jurisdiction under the Act, and no question was raised as to the local venue. [Sir R. PHILLIMORE.—Foreign courts do not try local actions arising in countries outside their own jurisdiction.] But this court does not follow Foreign courts, but English courts which do try such actions.

Watkin Williams, Q.C. for the defendants.—We do not wish to contest the question of jurisdiction, having agreed to submit to it as stated in the affidavit of Ellis. I propose to strike out the last words of the first article of the answer.

Sir R. PHILLIMORE.—I am inclined to consider that there is jurisdiction, subject to any argument I may hear to the contrary, and therefore I shall not raise any objection to taking jurisdiction; but of course my not objecting will not give the court jurisdiction.

Butt, B.C.—I claim that all the words in art. 1 of the answer relating to jurisdiction should be struck out, that is to say, all words after the word "mentioned."

Williams, Q.C.—Then I ask that the words alleging the pier was annexed to the land of Spain be inserted in the 4th article of the answer.

Sir R. PHILLIMORE.—Then let the answer stand amended in these respects.

Butt, Q.C.—Then the only question is as to the local law, although as this is a cause over which the court has *primâ facie* jurisdiction, that jurisdiction in the absence of the plea struck out, exists by law and not by consent. Then upon the 4th article of the answer the question is whether a tort committed by a British subject against a British subject in a foreign country is triable in an English Court. There can be no doubt that a wrong committed by one Englishman upon another in foreign territory is triable by the courts of this country, and that a defendant may be made responsible for such a wrong (*Scott* v. *Lord Seymour*, 31 L. J. 457, Ex.; 6 L. T. Rep. N. S. 607; in error, 1 H. & C. 219; 32 L. J. 61, Exch.; 8 L. T. Rep. N. S. 511); that case turned no doubt very much upon a question of procedure, and was, therefore, within the *lex fori*, but the opinion of Wightman, J. (in error) is that a British subject has a remedy for a tort committed abroad by another British subject even though the foreign law gives him no remedy. And this doctrine is concluded by the *Halley* (L. Rep. 2 P. C. 193; 18 L. T. Rep. N. S. 879: 3 Mar. Law Cas. O. S. 131), which is exactly in point, deciding that in a case of tort in foreign territory English courts do not apply the foreign law in order to determine the legal consequences of the act done, but the English law. A British subject is triable in England for the murder of a British subject abroad: (*R.* v. *Helsham* 4 C. & P. 394). By the Admiralty Court Act 1861 (24 Vict. c. 10), s. 6, this court has jurisdiction over any claim for damage done by a ship. This tribunal in dealing with a case within its competence will apply the law of England. The law of Spain cannot apply to a case between British subjects concerning an act done by a British ship; such a question must be governed by British law, that is by law administered in this court.

Messina v. *Petrococchino*, L. Rep. 4 P. C. 144; 26 L. T. Rep. N. S. 551: 1 Asp. Mar. Law Cas. 299; *The Halley*, L. Rep. 2 P. C. 193; 18 L. T. Rep. N. S. 879; 5 Mar. Law Cas. O. S. 131.

[Sir R. PHILLIMORE.—In the United States it has been distinctly ruled that although pilotage may be made compulsory by statute, yet shipowners are not thereby exempt from liability for the negligence of the pilot: (*The China*, 7 Wallace Sup. Court Rep. 54.) This decision in its effect very much resembles *The Halley*.] Even supposing Spanish law would govern if the present case had arisen upon land, it cannot be applied here because the cause of action arose upon navigable waters with ebb anp flow of tide. The ship was afloat, and the negligence of her master occasioned the injury; the thing and the persons occasioning the injury were subject to British law; the master on board his ship was practically upon British territory and within British jurisdiction in respect of all torts or wrongful acts committed by him. By foreign law at least, the conduct of a foreign master on board his own ship is governed entirely by the law of his own country; he is liable to no other jurisdiction in criminal matters. In *Lloyd* v. *Guibert* (L. Rep. 1 Q. B. 115), it is distinctly laid down by the Exchequer Chamber that the responsibility of owners for the acts of their master is governed by the law of the flag, and that whoever deals with a master in a foreign port acts upon that supposition unless the contrary appears. In *R.* v. *Anderson* (L. Rep. 1 C. C. R. 161) it is held that the admiralty jurisdiction of England extends over British vessels not only when they are sailing over the high seas, but also when they are in the rivers of a foreign territory at a place below bridges, where the tide ebbs and flows, and where great ships go, and that all seamen, whatever their nationality, serving on British ships are amenable to the provisions of British law. If, therefore, in both civil contract and criminal acts the law of the flag governs and the tribunals of the flag have jurisdiction, why does not the same rule apply in cases of tort not criminal where the injury has been done by the master of a British ship on board a British ship to a British subject resident abroad?

Watkin Williams, Q.C. and *J. C. Matthew* (*E. C. Clarkson* with them) for the defendants, in support of the answer.—The cause of action is the negligent destruction of a pier forming part of the soil of Spain by servants of the shipowners; by the law of Spain no liability attaches to the shipowners in respect of such negligence. Starting with the assumption that the court has jurisdiction there has been no tort committed, cognizable in this country. Before a tort committed abroad can be tried in an English court it must be a tort within the law of the country where it was committed. By *The Halley* (*ubi sup.*) it was decided that according to the law of England if a person sues on an alleged cause of action committed in a foreign country, it is not enough to make out that there was a liability by foreign law, but there must also be liability by the law of England. To give a right of action for a tort committed abroad there must be such a right both by the foreign and by English law. This is not a mere matter of procedure.

Phillips v. *Eyre*, L. Rep. 6 Q. B. 1, 28; Smith's Leading Cases, Vol. 1, 7th edit. pp. 700, 701; *Le Roux* v. *Brown*, 12 C. B. 801.

We are bound, of course, to use the English procedure, but we cannot be precluded from giving evidence of the foreign law, nor does *The Halley* (*ubi sup.*) show that the defendant is to be deprived of this right; on the contrary a defendant may

avail himself of that law so far as it is in his favour; that case only establishes that a defendant cannot avail himself of foreign law to escape the result of an obligation imposed by that law; it cannot be used to establish the converse of that proposition. The rule as to marriages made abroad is in point; they are valid only here when valid both by English and foreign law. The court should adopt the law of Spain, and if by that law no wrong has been done between the parties, the law of England cannot give a remedy where no wrong exists; the civil liability for an act done derives its existence from the law of the place where the act was done, and when the law of that place does away with that liability. the act cannot be called in question elsewhere: (*Phillips* v. *Eyre*, L. Rep. 4 Q. B. 225; L. Rep. 6 Q. B. 1.) It cannot be that a man is to be held liable in this country for doing an act abroad which is perfectly lawful in the place in which it was done. In *Debree* v. *Napier* (2 Bing. N. C. 781) it was held that the defendant, who was a British subject, was not liable for seizing a ship under the authority of a foreign power, his act being lawful by the law of the country for which he acted although contrary to English statute law. In *Reg.* v. *Lesley*, (Bell's C. C. 220; 29 L. J. 97, M. C.) it was held that an imprisonment on board a British ship in a foreign port under the authority of the foreign government was justifiable on the part of the master of the ship, but not upon the high seas. In Westlake's International Law it is said (p. 240) that "the legal character and consequences of an act must depend upon the jurisprudence of the country where it is done, and not on that of any spot to which its consequences may extend. The damage is not an injury unless it results from an act prohibited by the law which governs the agent." In *The General Steam Navigation Company* v. *Guillou*, (11 M. & W. 877) it was held in an action brought by the plaintiffs against the defendant as owner of a steamer for damage by collision, that a plea alleging that the ship was French and that she was owned by a French company of which the defendant was a member, and that by the law of France the company, being in the nature of a corporation, and not the defendant, was liable for the negligence of the master and crew, was a good plea.

Benjamin, Q.C. in reply.—The negligence complained of was not upon land, but it was in navigating a British steamship on tidal waters, and consequently the act must be taken in the eye of the law to have been done upon British territory. The act was a tort by the law of Spain, and the only question is one of responsibility for the acts of the person who did it, and that question must be governed by the maritime law as administered in this court, as the person doing the act, the master of the ship, was a British subject then upon a British vessel navigating tidal waters.

Reg. v. *Anderson*, L. Rep. 1 C. C. R. 161;
The Industrie, L. Rep, 3 Adm. & Ecc. 303; 24 L. T. Rep. N. S. 446; 1 Asp. Mar. Law Cas. 16.

Cur. adv. vult.

July 29.—Sir R. PHILLIMORE.—I have consulted all the authorities mentioned to the court, and have arrived at the conclusion that the fourth article must be struck out, and I decide that the law of England and not the law of Spain must govern this question. I give this decision now as I understand there is a desire for a commission to examine witnesses in Spain before the trial comes on, and I will give a reasoned judgment at a future time.

Nov. 2.—Sir R. PHILLIMORE now delivered his reasoned judgment.—In this case a suit has been instituted on behalf of an English Joint Stock Company, who are possessed of a pier at Marbella in Spain, against the steamship *M. Moxham*.

The petition alleges that the negligent navigation of the steamship brought her into collision with the pier, and caused great damage to it. The answer denies the negligent navigation and says the damage was the result of inevitable accident or of the insufficient state of the pier, and further pleads in the 4th article according to the amendment proposed and accepted at the hearing as follows: "They further say that the said alleged collision happened within the territory and jurisdiction of Spain, and that the said pier at the said time was annexed to and formed part of the land of Spain, and that if the said collision was occasioned by any negligence or improper navigation of those on board the *M. Moxham*, it was solely occasioned by the negligence of the master and mariners of the *M. Moxham*, and not by the defendants or any of them, and that by the law of Spain in force at the time and place of the said collision, the master and owners of the ship, and not the ship or her mariners are liable in damages in respect of a collision as in the petition elleged, and by such law neither the *M. Moxham* nor the defendants nor any of them are or is liable in respect of the damages proceeded for in this cause." This article has been objected to on the ground that the law of Spain does not govern the question, which is to be decided according to the law of England, and the objection to the jurisdiction pleaded in a former article of the answer having been withdrawn, the only question which I have now to determine is whether the law of Spain or the law of England is to be applied to the circumstances of the case.

The damage of which complaint is made must be taken to have been inflicted by a British merchant vessel while in waters subject to the admiralty jurisdiction within the ebb and flow of the tide upon a pier in the territory of Spain. The act of injury, therefore, was done from the merchant vessel at sea, though the object injured was situate on the land. The defendants contend that in these circumstances this court must apply the local law, which, as they allege, exempts the ship from liability, and neither the *lex fori* nor law of the flag, under which the ship, if improperly navigated, would be liable for the damage.

Various cases were cited in support of this proposition, among them *Dobree* v. *Napier* (2 Bing. N. C. 781) and *Phillips* v. *Eyre*, as decided in the Queen's Bench and in the Exchequer Chamber (L. Rep. 4 Q. B. 225; 6 Q. B. 1). But the latter of these cases was in great measure dependent upon peculiar circumstances, and upon the powers of a colonial legislature as recognised by the law of the Empire, And in the former case the alleged tort arose out of an act of an officer of a foreign state, acting, as the court held, lawfully in the seizure on the high seas of a vessel breaking the blockade, and therefore committing no trespass Both cases, moreover, turning upon acts of state, afford no safe analogy upon which the court could rely. Upon behalf of the plaintiffs these cases were more especially relied upon: *Reg.* v. *Anderson* (L. Rep. 1 C. C. R. 161); *Lloyd* v. *Guibert*

(L. Rep. 1 Q. B. 115; 6 Best & Sm. 100); and *The Halley* (L. Rep. 2 P. C. 193). In the first case, which related to a charge of manslaughter committed on board an English vessel within a French river where the tide ebbed and flowed, Bovill, C.J. said: "There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was, therefore, subject to the law of France, which that nation might enforce if they thought fit; but at the same time he was also within a British merchant vessel, on board that vessel as a part of the crew, and as such he must be taken to have been under the protection of the British law, and also amenable to its provisions." And in this view the other judges seem to have concurred. It seems hardly necessary to refer to other cases, but I would observe that the case of *Lloyd* v. *Guibert* establishes that in a case of contract the responsibility of the owner of a vessel for the acts of his servants is governed by the law of the flag. With regard to *The Halley*, I think it unnecessary to enter into an examination of that case, the decision in which is of more indirect application; but I agree with the counsel for the plaintiffs that it points in the same direction.

Upon the whole I am satisfied, both upon principle and upon the authority of precedents, that the Spanish law is not applicable to the present case, and that the 4th article must be reformed by striking out all that part which pleads the Spanish law, that is all the words after the words "the land of Spain."

Solicitors for the plaintiffs, *C. Ellis* and *Co.*

Solicitors for the defendant, *Parker* and *Clarke.*

Wednesday, Nov. 2, 1875.

(Before Sir R. PHILLIMORE.)

THE GENERAL BIRCH.

Action commenced in district registry—Defendants out of jurisdiction of registry—Appearance in London Registry—Practice.

Where an action in rem is instituted against a ship in a district registry and the shipowners, residing out of the jurisdiction of that registry, enter an appearance in the London Registry, the appearance must show where the action was commenced, the title of the cause in the district registry, and that the defendants are resident out of the jurisdiction of that registry.

THIS was a cause of collision instituted in *rem* on the 30th Oct. 1875 against the Swedish vessel *General Birch* in the Liverpool District Registry. The owners were resident out of the jurisdiction of that registry, being the Shipowners' Association of Christiania, and wished to avail themselves of the right given by the Supreme Court Rules 1875, Order XII., rule 3, to enter an appearance in the London Registry.

W. G. F. Phillimore, on behalf of the owners, now applied *ex parte* to the court under the Supreme Court of Judicature Act 1873, s. 22, for directions as to the mode of procedure. He pointed out that under the Liverpool Admiralty District Registrar's Act 1870, s. 13, the court has power to transfer the cause to the London Registry, but in that case it would then be necessary to appear in the Liverpool Registry and then give notice to the other side of the motion, and the shipowners preferred to have the proceedings continued in London at once. Order XII., rule 3 of the Supreme Court rules would apply if the cause was directed to proceed under the new procedure, but not otherwise. Without directions the shipowners did not know how an appearance ought to be entered in such a case in the London Registry.

Sir R. PHILLIMORE ordered that the cause should proceed under the new procedure, that the appearance should be entered in the London Registry, and that, as the cause had been commenced in the Liverpool Registry, the appearance should recite that the cause had been commenced in the Liverpool Registry, should show what the title of the cause was in the Liverpool Registry, and should state that the defendants resided out of the jurisdiction of that registry.

Solicitors for the shipowners, the defendants, *Waddilove* and *Nutt.*

Wednesday, Nov. 9, 1875.

(Before Sir R. PHILLIMORE.)

THE TWO BROTHERS.

County Court appeal—Appellate court—Divisional court—Admiralty Division—Supreme Court of Judicature Act 1873, *ss.* 34, 42, 45.

Although the Supreme Court of Judicature Act, s. 45, *provides that County Court appeals may be heard before a divisional court consisting of two or three judges* (*sect.* 40), *the Admiralty Division, having all the exclusive jurisdiction of the High Court of Admiralty before the passing of the Act, still retains the jurisdiction to hear and determine County Court Admiralty appeals.*

THIS was a motion for directions as to an appeal from a County Court.

The cause was instituted in the Hull County Court under the County Courts Admiralty Jurisdiction Act 1868, and on the 28th Oct. 1875 judgment was delivered in that court against the defendant for 53*l.* 1*s.* 5*d.* Against this judgment the defendant was desirous of appealing, and had given the usual notice of appeal, and had filed the usual præcipe instituting a cause on appeal in the registry of the Admiralty Court. The defendant had tendered to the registrar, in accordance with the provisions of sect. 26 of the County Courts Admiralty Jurisdiction Act 1868, security for the costs of the appeal, but the registrar had refused to accept the security on the ground that the appeal to the Admiralty Court or Division had been taken away by the Supreme Court of Judicature Act 1873, s. 45. The time within which the security had to be given had in consequence of this action on the part of the registrar of the County Court expired, and the defendant was consequently unable to appeal without special leave. The case now came before the court upon motion on behalf of the defendant to the judge "to allow and direct in what manner an appeal from a judgment of the County Court of Yorkshire, holden at Hull, Admiralty Jurisdiction, shall be proceeded with."

W. G. F. Phillimore, for the defendant.—I ask the court for leave to appeal, upon depositing the required security in the County Court, and to give directions to the County Court Registrar to take the security when offered. Secondly, I ask for directions as to the manner in which the appeal is to be proceeded with. Formerly County

Court Admiralty appeals lay to the High Court of Admiralty. Now, by the Supreme Court of Judicature Act 1873, s. 34 there are assigned to this division "all causes and matters which would have been within the exclusive cognisance of the Court of Probate or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty if this Act had not passed." This appeal would have been within the exclusive cognisance of the High Court of Admiralty if the Act had not passed, by reason of the provisions of the County Courts Admiralty Jurisdiction Act 1868, s. 26, and by sect. 42, "all causes and matters which would have been within the exclusive cognisance of the High Court of Admiralty shall be assigned to the present judge of this said Admiralty Court during his continuance in office as a judge of the High Court." These two sections would seem to keep the jurisdiction to hear County Court Admiralty Appeals in this division, but by sect. 45 it is provided that "all appeals from . . . a County Court . . . which might, before the passing of this Act, have been brought to any court or judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by divisional courts of the said High Court of Justice, consisting respectively of such judges thereof as may from time to time be assigned for that purpose, pursuant to rules of court, or (subject to rules of court) as may be so assigned according to arrangements made for the purpose by the judges of the said High Court." This would seem to show that an appeal such as this should be heard by a divisional court, but no such court as yet exists, and consequently, unless we can appeal to the Admiralty Division there is no appeal at all. The only way out of the difficulty is to hold that the 45th section is permissive, and that the appeal may be to a divisional court, but also lies to the Admiralty Division. This is not a divisional court, which, by sect. 40, consists of two or three Judges of the High Court of Justice. And yet the Legislature seemed to have contemplated the continuance of these appeals to the judges of the Admiralty Division, because, by the County Courts Act 1875, which came into operation the day after the Supreme Court of Judicature Acts, there is an express provision (sect. 10) as to the necessity for obtaining leave to appeal in County Court Appeals from decisions of the Admiralty Court in County Court Appeals. [Sir R. PHILLIMORE.—I see that sect. 34 of the Supreme Court of Judicature Act 1873, in assigning business to the Chancery Division gives that division jurisdiction over all matters within the exclusive cognisance of the Court of Chancery "except appeals from County Courts." This is not the case with any other division. May it not, therefore, be inferred in all other cases, County Court Appeals may be heard in the same manner as heretofore?]

E. C. Clarkson, for the plaintiff, *contra*.—I submit that the only court which has jurisdiction is a divisional court appointed under sect. 45 of the Supreme Court of Judicature Act 1873, and that this court has no power to interfere with the appeal.

W. G. F. Phillimore in reply.

Cur. adv. vult.

Nov. 16.—Sir R. PHILLIMORE.—This is an application for leave to appeal from a decision of the County Court of Yorkshire, the time prescribed by the statute having elapsed. Two questions are raised—one as to whether the application be such as the court ought, in the exercise of its discretion, under the County Court Act, to grant; the other as to whether the application be rightly made to this court having regard to the provisions of the Judicature Acts.

First, I am of opinion that if I have the power I ought, in accordance with the spirit of former decisions on the subject, to grant the application.

The second question is more difficult to determine. The 34th section of the first Judicature Act (1873) relates to the assignment of certain business to the decisions of the High Court. Paragraph (2.) (dealing with Chancery business) provides, that there shall be assigned to the Chancery Division of the High Court, "all causes and matters to be commenced after the commencement of this Act, under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery, or to any judges or judge thereof respectively, except appeals from County Courts." These words of exception as to appeals seem to intimate that where they are not used, appeals from County Courts are included in the category of causes and matters to be assigned. The second paragraph as to assignments to the Probate, Divorce, and Admiralty Division provides that there shall be assigned to that division "all causes and matters which would have been within the exclusive cognisance of the Court of Probate or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty, if this Act had not passed." At the end of sect. 42 it is provided that subject to certain exceptions "all causes and matters which, if this Act had not passed, would have been within the exclusive cognisance of the High Court of Admiralty, shall be assigned to the present judge of the said Admiralty Court during his continuance in office as a judge of the High Court." I am of opinion that the present application relates to a cause or matter which has hitherto been within the exclusive cognisance of the present judge of the High Court of Admiralty. The Acts which gave, within certain limits, jurisdiction in admiralty matters to the County Courts confined the appeal from their decisions to this court. There can be no reasonable doubt, I think, that, if there was no other enactment in this statute as to County Courts, the present application would have been rightly made. But reliance is placed by the counsel who oppose the application on the 45th section, which is as follows: "all appeals from petty or quarter sessions, from a County Court, or from any Inferior Court, which might, before the passing of this Act have been brought to any court or judge, whose jurisdiction is by this Act, transferred to the High Court of Justice, may be heard and determined by divisional courts of the said High Court of Justice, consisting respectively of such of the judges thereof as may from time to time be assigned for that purpose, pursuant to rules of court, or (subject to rules of court) as may be so assigned, according to arrangements made for the purpose by the judges of the said High Court. The determination of such appeals respectively by such divisional courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the divisional

court by which any such appeal from an inferior court shall have been heard."

After much consideration I have arrived at the conclusion that it could not have been the intention of the Legislature to limit the powers already granted by the previous section to the present judge of the High Court of Admiralty, and that the 45th section must be construed so as to be in harmony with the 42nd section. I should mention also that the last County Court Act (38 & 39 Vict. c. 50), which was passed in the same session, though a little earlier than the last Judicature Act, but which comes into operation a day later, viz., on the 2nd Nov., contemplates the High Court of Admiralty as the only Court of Appeal from the Admiralty Jurisdiction of the County Courts.

Having arrived at this conclusion I thought it nevertheless my duty to confer with Sir James Hannen upon the construction of the Act. He has given careful attention to the subject, and while he thinks the question is not free from doubt, expresses his opinion to me in language that I am allowed to cite:—

"My impression is that the effect of the 34th and 42nd sections of the Judicature Act 1873 is that you bring with you into the High Court all the jurisdiction and powers, including, that of hearing appeals from the County Courts, which you formerly possessed as judge of the Court of Admiralty, and that the effect of the 46th section is not to take away or limit any of those powers, but that it is merely permissive and prospective, and that until rules of court or arrangements be made by the judges of the High Court of Justice for the purpose of holding divisional courts for the hearing of appeals from County Courts, &c., your jurisdiction remains unaffected."

Fortified by this agreement with my opinion I decide that this application is rightly made, and I grant it and I direct the registrar of the County Court to receive the security for costs offered by the plaintiff.

Solicitors for the plaintiffs, *Waddilove* and *Nutt*.
Solicitor for the defendants, *Pritchard* and *Sons*.

EXCHEQUER CHAMBER.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

June 16, 17, *and* 18, *and Dec.* 21, 1875.

DUDGEON *v.* PEMBROKE.

Marine insurance—Time policy—Seaworthiness—Perils insured against.

Upon a time policy, the risk attaching while the ship is in the hands of the assured, if the ship be lost (although by perils insured against) in consequence of her unseaworthiness starting upon her first voyage, the assured cannot recover.

Plaintiffs insured their steamer, which being just repaired was then in their dock, on a time policy for a year, underwriteen by the defendant. She crossed the North Sea in fine weather, but made water; and on her return, being waterlogged in bad weather, she stranded and became a total loss.

At the trial the jury could not agree whether she was seaworthy at the beginning of the first voyage, nor whether unseaworthness was the cause of her loss. They found, however, that the plaintiffs did not know she was unseaworthy, and it was admitted that the loss was due immediately to perils of the sea. The verdict was entered for the plaintiffs.

Held, by the majority of the Exchequer Chamber (reversing the Queen's Bench), that if the unseaworthiness at the beginning of the voyage be assumed to have caused the loss, the consequences, under the circumstances, were imputable to the plaintiffs, and should be borne by them rather than by the defendant; and that there must be a new trial.

Per Lord Coleridge, C.J. (besides agreeing with the majority) that upon the assumption mentioned, the ship was not lost by perils insured against; and that a time policy implies a condition of seaworthiness.

Per Brett, J. and Amphlett, B., dissentientibus, that the verdict was rightly entered for the plaintiffs.

THIS was an appeal by the defendant against a decision of the Court of Queen's Bench, in discharging a rule to set aside a verdict found for the plaintiffs, and to enter verdict for the defendant or for a new trial.

The following is a statement of the case:

The action was brought to recover a total loss upon a time policy of insurance for twelve months, effected by the plaintiffs on the steamship *Frances*, in the sum of 5800*l.*, on ship values at 8000*l.*, and machinery at 4000*l.*

The declaration contained a count on the policy for a total loss, and also the common money count. To the first count the defendant pleaded: first, denial of the insurance; secondly, denial of the plaintiff's interest; thirdly, denial of the loss by perils insured against; fourthly, misrepresentation; fifthly, concealment; sixthly, that after the making of the policy, the plaintiffs, well knowing that the ship was unseaworthy, without any justifiable cause, sent her to sea in such unseaworthy condition, and that the loss was occasioned thereby; seventhly, that the voyage was illegal, by reason of the ship having sailed with passengers without a passenger certificate, and that the policy declared on was effected by the plaintiffs for the express purpose of covering the ship on the said illegal voyage. And to the money count, never Indebted.

Upon all these pleas issue was joined, and the plaintiffs demurred to the sixth and seventh pleas.

The cause was tried at the London Sittings after Trinity Term 1873, before Mr. Justice Blackburn and a special jury, and the following facts were given in evidence or admitted on both sides.

The plaintiffs are iron shipbuilders and marine engineers, carrying on business under the firm of J. and W. Dudgeon, at Millwall, on the banks of the Thames, an at No. 10, London-street, in the City of London, and are proprietors of a line of steamers trading between London and Gothenburg, and the defendant is an underwriter at Lloyds.

The *Frances* was an iron screw steamer of 705 tons register, built at Amsterdam in the year 1858, and launched in 1859 for Spanish owners under the name of the *Paris*. Evidence was given at the trial on behalf of the plaintiffs that she had originally been constructed of good iron.

The defendant gave evidence that, in or about the year 1868, the said vessel was lying at anchor in the harbour in Cadiz, and continued there un-

employed for about 18 months. She was then the property of Messrs. A. Lopes and Co., shipowners, of Cadiz and Barcelona.

In the month of Sept. 1871 the *Paris* was at Birkenhead, and was offered for sale there. Two persons who inspected the *Paris* while at Birkenhead in Sept. 1871 were called by the defendant at the trial. Neither made a regular survey of the vessel, but both came to the conclusion that she was very dirty, and had been much neglected, and that her iron was probably corroded, and they did not purchaser her.

In the said month of Sept. 1871 the plaintiffs contracted with the Spanish owners of the *Paris* to build them a new ship, and to take the *Paris*, which was then at Birkenhead, in part payment, at about 4000*l*. She was then brought round to Millwall from Birkenhead with the original boilers on board, which were not fit for use, and she was consequently towed round. During the passage she made water, and her pumps were constantly attended to.

After the arrival of the *Paris* at Millwall, the plaintiffs caused the boilers to be taken out of the ship, and she was offered for sale to the agent of a firm at Hull, who after examining her afloat, but not making a regular survey, advised his principals not to buy her, because in his judgment, as he stated at the trial, the sides and frames in the bunker and boiler space were in a bad condition from corrosion, and the screw tunnel was in a defective atate.

At the time the plaintiffs became owners of the *Paris*, they were the owners of two steamers named respectively the *Mary* and *Louisa Ann Fanny*, running for the conveyance of cargo and passengers between London and Gothenburg; one of them, viz., the *Louisa Ann Fanny*, met with a collision, and the plaintiffs resolved to repair the *Paris* and run her on the line, and change her name to *Frances*. It was stated by the plaintiffs that the vessel's name was so changed in compliment to the daughter of one of their partners, their ships on that line being always called after female names connected with the firm's family.

For this purpose the vessel was placed in a dry dock at Millwall and scraped perfectly clean; and the plaintiffs deposed that they believed the ship to be quite capable of being made fit for the service, and that orders were given to Mr. Harrington, the marine surveyor and engineer, to superintend the repairing of the vessel, and to see that she was properly repaired, and that the plaintiffs' workmen at Millwall were told to execute whatever repairs were required, and that there was no stint whatever as to the amount of the repairs, and that they fully believed that the ship was made seaworthy. Mr. Harrington, who was called on their behalf, confirmed this, and gave positive testimony that everything was done that was required, and in his opinion she was made a thoroughly good strong ship; the old boilers were taken out, the boiler space was all open to view, but the ceiling was only partly removed, and the cement was not removed at all; so that the whole of the inside was not visible. There was contradictory evidence among the skilled witnesses as to whether the removal of the ceiling and the cement was necessary or not. Mr. Harrington deposed that it was not at all required. Strong evidence was given on the part of the plaintiffs' shipwrights and dock people that everything was done that was requisite.

On the defendant's behalf witnesses were called to prove that in their opinion sufficient repairs had not been done, and that in their opinion the ship was not seaworthy by means of corroded iron having been left in the ship, and sufficient new plates not having been put in. A witness called by the plaintiffs on cross-examination stated that the screw tunnel was in a defective condition. Similar evidence as to this was given on behalf of defendant, and it was proved that no repairs were done to the screw tunnel.

After the repairs had been executed, and before the *Frances* left London, a surveyor to the Board of Trade surveyed the outside of the ship, but by reason of want of time the inside was not surveyed, and, consequently, the ship did not obtain a passengers' certificate, and ultimately sailed for Gothenberg on the 3rd Feb. 1872, without one.

On or about the 31st Jan. 1872, the plaintiffs caused the policy now sued on to be effected for a period of twelve calendar months commencing on the 24th Jan. 1872, and ending on the 23rd Jan. 1873, and the policy was subscribed by the defendant for 100*l*.

At the time of the effecting of the said policy of insurance, it was stated to the representatives of the defendant (who then knew nothing of or about the vessel), by the clerk to the brokers on behalf of the assured, that the *Frances* was a vessel the plaintiffs had taken in exchange, that she had been thoroughly repaired or practically rebuilt, and that they were going to put her into their Gothenburg trade, similar to that of the *Louisa Ann Fanny* and *Mary*.

On the morning of Saturday, the 3rd Feb. 1872, the *Frances* sailed from London for Gothenburg with some machinery on deck, but no other cargo, so that she was somewhat crank. Towards noon on Sunday, the day after the vessel left London, some water was observed in the stokehole and engine room, and the quantity of water she made, whatever such was, was more than could be accounted for by any weather the ship met with. The ship arrived safely at Gothenberg on the 7th Feb.

On her arrival in smooth water at Gothenburg, the *Frances* ceased to leak. She was examined there by two carpenters, but the cause of her making water was not discovered.

On the 11th Feb., at 8 a.m., the *Frances* having taken on board a cargo, consisting of oats and about 180 tons of iron, together with a deck cargo of deals, left Gothenburg for London.

On the morning of the 12th Feb., when the *Frances* reached the open sea, the wind began to blow, and a heavy rolling sea was running, and it became necessary to put a sail over the stokehole to prevent the sea from getting in. It was stated by the plaintiffs' witnesses that it blew a gale, but the weather was not such as to make a good ship behave as the *Frances* did.

The *Frances* laboured heavily, and began to make water to such an extent that in sixteen hours the fires were extinguished. A portion of the deals which formed the deck cargo was used for relighting the fires, the rest was thrown or washed overboard. After about twelve hours pumping, the pumps got choked with the oats, and all hands had to be employed in bailing the ship. There was evidence given by the defendant

that had the screw tunnel been in proper order the pumps would not have got choked as they did.

On the night of the 14th Feb., those on board the *Frances* having sighted the Spurn Lights, endeavoured to get her into Hull, the ship at the time being waterlogged did not readily answer her helm. Partly from this and partly from the thickness of the weather, which at the time was very dense, on the following morning, at about 5 a.m., the ship, having been in a state of distress since the morning of the 12th Feb.,went ashore under Didlington Heights, upon the coast of Yorkshire. One of the boats was swamped, but the crew were all saved by a smack. Part of the cargo was afterwards saved, but the vessel could not be got off, and subsequently broke in two, and finally after some months went completely to pieces.

At the time of the effecting of the aforesaid insurance the vessel was unclassed.

At the conclusion of the evidence the learned judge, having reduced into writing the questions he proposed asking the jury, read them to the counsel on each side. Neither side suggested any further question should be put to the jury.

Counsel on each side having addressed the jury, the learned judge thereupon summed up, and left the seven following questions to them, which, together with the answers of the jury, were as follows:

1. Was the representation made by the broker at the time of making the insurance, as to the condition of the vessel, and as to the extent of the examination substantially correct? Answer.—Yes.

2. Did that representation involve in it a statement that the vessel was to carry passengers, and, consequently, had been surveyed by the Board of Trade? Answer.—No.

3. Was there a concealment from the underwriters of anything materially affecting the insurance which the plaintiffs knew and the underwriters did not? Answer.—No.

4. Was the fact that the ship had not been surveyed and certified for passengers under the circumstances one which was material? Answer.—No.

5. Was the vessel seaworthy when she started? Answer.—The jury cannot agree.

6. If not, was that known to the plaintiffs? Answer.—No.

7. Was that unseaworthiness the cause of the loss? Answer.—The jury cannot agree.

Upon these findings the learned judge directed a verdict to be entered for the plaintiffs; and in Michaelmas Term 1873 the defendant obtained a rule calling upon them to show cause why the verdict should not be set aside, as regards the verdict entered for the plaintiffs on the sixth plea, on the ground that the findings of the jury did not warrant the entry of the verdict; and as regards the verdict entered upon the third plea, on the ground that there was no finding to warrant the entry of such verdict; and why a verdict should not be entered for the defendant instead of the verdict for the plaintiffs; or why a new trial should not be had between the parties, on the ground that the findings of the jury on the questions submitted to them were against the weight of evidence, and that their findings were inconsistent and incomplete, and insufficient to warrant the entry of the verdict or otherwise. And it was further ordered in the rule that the demurrers herein should come on for argument with this rule, when evidence as to the finding as to passengers was to be considered, and why the damages should not be reduced by proportion of salvage to be ascertained as might be arranged.

The rule and demurrers on the record also raised questions affecting the seventh plea, but that plea is found for the plaintiffs, and no questions now arise in regard thereto.

The said rule came on for argument in Trinity Term 1874, when the court took time to consider their judgment.

On the 6th July 1874 the court gave judgment, discharging the said rule.

The case is reported *ante*, vol. 2, p. 323; 31 L. T. Rep. N. S. 31; and L. Rep. 9 Q. B. 581.

The question for the opinion of the court is, whether the said rule ought to have been discharged or made absolute.

June 16, 17, *and* 18, 1875.—The appeal was on these days argued at length before Lord Coleridge, C.J., Brett, J., Cleasby, B., Grove, J. Pollock and Amphlett, B.B.

Butt, Q.C. (with him *Cohen*, Q.C.) for defendant, the appellant.

Watkin Williams, Q.C. (with him *A. L. Smith*) for plaintiffs, the respondents.

The arguments sufficiently appear in the judgments of the court. *Cur. adv. vult.*

Dec. 21.—CLEASBY, B., delivered the judgment of himself and Pollock, B.—It does not appear to be necessary in this case to consider the general question of there being an implied warranty of seaworthiness in such a case as the present, because such a warranty is in general a condition precedent, and the breach of it avoids the policy altogether; but in the present case the policy attached on the 23rd Jan., or when the vessel was in dock, having just undergone some repairs, or still undergoing them, and there was no breach of any warranty or condition then; and what took place afterwards would not entirely avoid the policy. We have to deal in the present case with matter subsequent to the commencement of the risk, and to consider not so much the validity of the policy as the right to recover upon it under the circumstances stated in the case. It is of little consequence whether the matter subsequent is regarded as avoiding the policy from the time of its occurrence or as disentitling the plaintiffs to recover under the policy; but it seems more correct to consider it as affecting the right to recover, and not the policy itself, because, notwithstanding the matter subsequent, the assured might no doubt recover upon the policy in respect of a partial loss or damage which had occurred before, as by fire or otherwise. The real question in the present case is whether upon a time policy, where the risk attaches while the ship is in the hands of the assured, and the vessel afterwards starts upon a voyage in an unseaworthy condition, and is lost in consequence of such unseaworthiness, the assured can recover.

In considering the propriety of entering a verdict for the plaintiffs upon the imperfect finding of the issues, the case was properly argued on both sides as if the jury had found the sixth issue, except the averment of plaintiffs' knowledge of the unseaworthiness, in favour of the defendants. And it does not appear to me necessary, so far as regards the sixth plea, to

enter into the question of the *causa proxima* of the loss, and whether it was eventually caused by fog or sea perils, because the meaning of the sixth plea is clearly not that the vessel did not go down from sea perils, but that this was the consequence of the unseaworthiness of the ship which caused her to get into difficulty and become unmanageable, which would not have otherwise occured. Upon the question so raised, there is no authority in this country which can be considered as clear and decisive. If in the present case the vessel had gone down in a storm along with the other vessels in the North Sea, it may be that after the case of *Gibson* v. *Small* (4 H. L. Cas. 353) and *Thompson* v. *Hopper* (6 E. & B. 172, 937) and *Michael* v. *Tredwin* (17 C. B. 551), it would have been difficult to maintain that by reason of the vessel being unseaworthy at the commencement of the voyage the defendants would be entitled to succeed. I by no means say that this is the clear effect of those decisions. The decision in *Thompson* v. *Hopper* in the Exchequer Chamber proceeded only upon the propep meaning of the language of the plea, and it only shows that if a plea alleges unseaworthiness, and then that by reason thereof the vessel was lost, the meaning is that the unseaworthiness was the immediate and proximate cause of the loss, and that such a plea would not be proved by showing that the proximate cause of the loss was the sea peril and dangers of navigation, though the vessel was exposed to them by the shipowner in an unseaworthy state. The decision in the Queen's Bench had been the other way.

The particular question which I have considered as raised in the present case was brought before the Court of Queen's Bench and adverted to in the case of *Hollingsworth* v. *Brodrick* (4 A. & E. 646). The question was not properly raised and could not be decided, but most of the judges advert to the absence of the loss being the consequence of the unseaworthiness as preventing the unseaworthiness from being an answer. And as the matter is thus left undecided, it is useless to refer to the cases more particulary. It cannot be questioned, I think it was not questioned on the argument, that the sixth plea is an answer to the action; but the sixth plea avers, in addition to the other facts raising the defence, that when the vessel was sent to sea the plaintiffs knew that she was in an unseaworthy state, and this averment is negatived by the jury. The judgments in *Thompson* v. *Hopper*, both in the Queen's Bench, and in the Exchequer Chamber, show that with this averment the defence would be complete (see particularly the judgment of Cockburn, C.J., in Exchequer Chamber, and of Lord Campbell, C.J. in Queen's Bench.) Now if the answer would have been sufficient without the averment, the averment need not be proved, and therefore we have to consider the effect in such a policy as this of the assured sending the vessel to sea in a condition which makes her unseaworthy for the voyage on which she is sent, though not so as to the knowledge of the assured, and particularly when such unseaworthiness causes her loss. In the absence of any decision upon the matter in our courts, the case must be considered upon principle.

Now we are considering a contract of a peculiar nature. The contract of insurance is (in the language of Mr. Arnould, p. 1 of his work) "in its essential nature and in all its incidents a contract of indemnity." That is a contract of indemnity from certain losses. And it follows that in such a contract a man cannot recover for losses which are the consequence of his own default. And it can make no difference that the proximate cause of loss was a particular event, if that particular event was in the ordinary course of things brought about by that default. There is no question that knowingly sending a vessel to sea in an unseaworthy state is such a default; but would it not be equally a default, if a vessel had been many voyages, and then lying in dock for some time, to send her to sea without having been surveyed and examined, the consequence being that she is lost, when, if she had been surveyed and repaired, she would not have been lost? And are not in such a case the means snd opportunities of knowledge equivalent to actual knowledge?

The question in the present case, as the pleadings stand, no doubt is whether the fact of unseaworthiness at the beginning of the voyage which causes the loss is itself an answer. The importance or the rule that the assured shall have his vessel in good repair at the commencement of the voyage (which though technically the commencement of the risk in voyage policies only, is substantially and mainly the commencement of the risk in all cases where it is the first voyage undertaken) is laid down in the strongest terms by the most eminent judges: (See Lord Eldon, in *Douglas* v. *Scougall*, 4 Dow's App. Cas. 276.) His language is, "I have often had occasion to observe here that there is nothing in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage insured, and I have endeavoured both with a view to the benefit of commerce and the preservation of human life to enforce that doctrine as far as, in the exercise of a sound discretion, I have been enabled to do so." He is speaking in that particular case of a voyage policy, but the ground is equally applicable to a voyage undertaken under the protection of a time policy. Lord Redesdale, in *Wilkie* v. *Geddes* (3 Dow's App. Cas. 60), uses the following language, the reasoning of which is equally applicable to voyages undertaken under time policies and under voyage policies: "Unless the assured were bound to take care that the vessel was in every respect seaworthy, the consequences would be most mischievous; for the effect of insurance would be to render those chiefly interested much more careless about the condition of the ship, and the lives of those engaged in navigating her." And Lord St. Leonards, in the case of *Gibson* v. *Small* (4 H. of L. C. p. 417), expressed an opinion that under such circumstances as those of the present case it was a condition that the ship was seaworthy at the commencement of the voyage. Having regard to these opinions it appears to me most undesirable to relax the obligations which such considerations have attached to the owner of a vessel to have a vessel which he sends on a voyage seaworthy for that voyage. If he knows that he is under that obligation, and that by not complying with it he may lose the benefit of his insurance, he will take care to make the matter sure. But if it is to depend upon the uncertain conclusion of his knowledge, or of his doing his best, he may do as little as he can do to satisfy an apparent compliance, and take his chance in a matter involving vital consequences. The authorities and reasons are sufficient to satisfy me that in this contract of indemnity the unseaworthiness of the vessel at the

commencement of the voyage, which unseaworthiness really causes the loss, is a fact the consequences of which are imputable to the assured, and to be borne by him, and not by the underwriters; and it follows that in the present case sufficient was proved to entitle the defendant to a verdict on the sixth plea, supposing the facts upon which the jury could not agree to have been found in favour of the defendants. It is made an objection to this as a correct legal conclusion, however just it may appear to be, that it really introduces into a written contract a term not found in it, which the parties might at any time have introduced into it, to the effect that there is an obligation or duty on the assured to have the vessel seaworthy for the voyage for which she is destined. The answer is that the contract is an exceptional one, and the courts have already departed from the ordinary rule by introducing into ordinary voyage policies a condition not found in them, which the parties might insert or not, viz., that the vessel was seaworthy at the commencement of the risk, and have made it a condition avoiding the policy as much as if words to that effect had been inserted at the end. It may be considered that in such a contract of indemnity the real subject of insurance on a voyage policy is a vessel fit for the voyage, and that without this the foundation fails which is treated as a condition. As a general rule upon time policies this condition is said to be inapplicable, because the vessel at the commencement of the risk may be in the middle of a voyage, upon which it may have started in a seaworthy condition, but may have suffered so much as at the time to be quite unseaworthy. But it is acting in the spirit of the decisions to hold that if the vessel be in the possession of the owner destined for a voyage, there is some obligation on the assured to make the vessel fit for the voyage. And the breach of this obligation, though not a condition avoiding the policy altogether, as in the case of a voyage policy, is available as a defence where the loss arises from the improper condition of the vessel.

Unless something is introduced into the policy, not included in its terms, how could a defence be founded on the fact of the assured sending the vessel to sea, knowing it to be unseaworthy, or having the means of knowledge, or sending it to sea without survey and examination when it is obvious such survey and examination ought to be had, and in consequence the vessel was lost? In those cases it would not be a part of the case that there had been any fraud on the part of the assured, but the defence must be founded on some obligation arising out of the subject of insurance, and not contained in the policy. And the result would be that the assured could not recover in respect of a loss attributable to his neglect to have a ship made seaworthy on starting for the voyage.

It is not intended here to decide that in the case of a time policy there is an obligation to have the vessel seaworthy at the commencement of every voyage, wherever it may commence, undertaken during the currency of the policy. In the case of voyage policies there is no warranty of seaworthiness on starting from intermediate ports or upon the return voyage, but only at the commencement of the risk. What is decided here is that when a vessel in the hands of the owner is intended for a voyage and a time policy is made, the assured is under an obligation to have the vessel seaworthy at the commencement of the voyage on which she starts, which is the commencement of the sea risks insured against. And it is considered better to deal with the circumstances of the particular case, such circumstances being of real importance in such a contract, rather than disregard those circumstances, and act upon an inflexible rule of recent invention on account of its simplicity, as has been suggested.

The case of *Fawcus* v. *Sarsfield* (6 El. & Bl. 192) was much relied on in favour of this view. In that case, the defence which is set up in this case was complicated with other matters which makes it not a satisfactory guide, but if it cannot be treated as a decision in favour of the defendant, it affords an argument in his favour; for it certainly appears from that case that if the vessel is in want of repairs, and so unseaworthy, and a partial loss occurs, the underwriters are not liable to make good the damage resulting from the bad condition of the ship, and if not liable for a partial loss caused by unseaworthiness, why liable for a total loss resulting from the same cause? In either case the assured, and not the underwriter should be responsible for the improper condition of the vessel when exposed to the perils. In America the decisions seem to agree with this conclusion. (See Phillips on Insurance, ss. 727 to 731.)

As regards the issue upon the third plea, we were much pressed to hold that as that issue was whether the ship was lost by the perils insured against, and the perils by which the vessel was lost resulted from the unseaworthiness of the ship, and those perils were not insured against, therefore that issue ought to be found for the defendants. In order to determine correctly how the issue ought to be entered, we must consider what is the meaning of the plea. Does it mean that the vessel was not lost by perils mentioned in the policy as perils insured against; or does it mean, as contended by the defendant, that the ship was not lost by perils for which the defendant as a legal consequence insured against, and for which he was responsible? Now the plea is a traverse of an allegation in the declaration; and when the plaintiffs allege that the vessel was lost by the perils insured against, I should say they really make an allegation of fact and not of legal liability, and as the sea perils were the immediate cause of loss, I think that issue was correctly entered for the plaintiffs. The learned counsel for the plaintiffs when the case was before us, was very decided in his opinion, and made it part of his argument that if the plaintiffs had knowingly sent the vessel to sea in an unseaworthy state, the issue would properly be found for the defendants. Notwithstanding this admission, upon a correct view of the language of the issue, I think it is properly entered for the plaintiffs.

The statute 34 & 35 Vict. c. 110, has no direct bearing upon the present question, but so great is the obligation of a shipowner who sends a vessel to sea to send it in a seaworthy condition, that it is, under ordinary circumstances by sect. 11 made a misdemeanor to send it in an unseaworthy condition so as to endanger life, and the owner has to show, to escape from a criminal charge, that he used all reasonable means to make the vessel seaworthy, and was ignorant of the real condition of the vessel.

For the above reasons it appears to me that sufficient would have been proved and found, to make the sixth plea an answer, if the questions on which the jury could not agree had been found for the defendant, and therefore that the issue upon that plea was improperly entered for the plaintiffs, and the judgment entered accordingly should be set aside and a new trial had. This is the judgment of my brother Pollock and myself.

BRETT, J. delivered the judgment of himself and Amphlett, B.—The arguments in this case were almost exclusively confined to questions arising on the third and sixth issues. Objection was taken, but not much if at all pressed, to the judgment on the fourth issue. It seems sufficient to say that we never entertained any doubt that it was correct, and so stated during the argument.

With respect to the third and sixth issues, the material facts to be considered seem to me to be that the plaintiffs, being owners of the *Frances*, insured her whilst she was in the port of London, and under their control, by a policy dated 31st Jan. 1872 for a year from the 24th Jan. 1872 to the 23rd Jan. 1873. The ship sailed from London for Gothenburg on the 3rd Feb. 1872, and arrived on the 7th Feb. 1872. She sailed again for London on the 11th Feb., met with bad weather, leaked, became water-logged, and, on the 14th Feb. became unmanageable, was stranded on the coast of Yorkshire, and was a total loss. Considering, as a whole, the written questions, and the explanation of them to the jury, and the ruling of the learned judge at the trial, as reported by him in his judgment in the Queen's Bench, I think it must be gathered that he directed the jury as to the third issue that the evidence, being uncontradicted, was conclusive that the ship was lost by perils of the sea. And having regard to what the jury did and did not answer we must treat the case as if the jury had found that the ship was, in fact, unseaworthy when she left London, that such unseaworthiness continued until she was lost, that such unseaworthiness was unknown to the assured, that it was a cause of the loss in the sense that she became water-logged and unmanageable by reason of it and the weather, and went ashore in consequence; so that the loss would not have happened, notwithstanding the weather, but for the unseaworthiness. The question is whether upon such facts and assumed findings, the verdict was properly entered for the plaintiffs on the third and sixth issue. If it ought not to have been so entered on both, there should be a new trial, if otherwise, the judgment below is right.

The case was elaborately argued. It was contended for the defendant that the moving and efficient cause of the loss of the ship was her unseaworthiness which existed when she first left port after the effecting of the policy, and continued till she was lost; that consequently it could not properly be said that the ship was lost by a peril insured against. A loss occasioned by unseaworthiness not arising after the attaching of the policy must be treated, it was said, as a loss resulting from the inherent vice of the ship, and in either case the verdict ought to have been entered for the defendants on the third issue. If the loss could be treated *primâ facie* as a loss by a peril insured against, yet a loss, caused by such unseaworthiness as alleged must be treated as arising from a wrongful act of the assured, and a loss so arising cannot be covered by a contract of indemnity, and therefore the verdict ought to have been entered for the defendants on the third and sixth issues, the averment of knowledge in the sixth plea being immaterial. For the plaintiffs it was argued that in a time policy there is no warranty of seaworthiness such as exists in a voyage policy, viz., with the effect that if the ship is unseaworthy at the commencement of the risk the contract of indemnity does not attach, and the premium must be returned; that as you cannot imply any such warranty or condition as to seaworthiness at the commencement of the risk so as to destroy the contract, you cannot introduce any such condition at all; there is no contract about seaworthiness at all, none expressed, none to be implied; that the subject matter of a voyage policy is a ship seaworthy for the voyage at the commencement, but the subject matter of a time policy is only a ship.

If a loss is caused solely by unseaworthiness existing before or at the time the policy attaches, it is no doubt a loss from the inherent vice of the ship, and is not covered under either form of policy; but if it is a loss caused by a peril of the sea, although so caused by the unseaworthiness of the ship existing at the commencement and continuing, it is a loss proximately caused by a peril of the sea. In such a state of things the assured under a voyage policy cannot recover, because the policy by reason of the warranty and the existence, at the commencement, of unseaworthiness, never attaches; but as there is no warranty in a time policy, there is no reason why the *causa proxima* should not solely be regarded. If the ship be intentionally cast away by direction of the assured, her loss is caused by a wrongful act of the assured, and so, if the ship be sent to sea to his knowledge unseaworthy, and is lost in consequence. And it is an admitted principle, that for a loss efficiently caused by a wrongful act of the assured he cannot recover compensation under a contract of indemnity. But the mere fact of the ship being unseaworthy when she goes to sea, if her condition be unknown to the assured, is not a wrongful act, and therefore the principle above enunciated does not apply. And, as there is no bargain that the ship shall be seaworthy at any period of the risk, a loss caused proximately by a peril of the sea is covered by a time policy, although the ship was unseaworthy at the attaching of the risk, and so continued till the time of loss, and would have surmounted the peril if she had not been unseaworthy. It makes no difference whether the policy is effected whilst the ship is in port or at sea, at home or abroad. There cannot be a warranty implied from the same words depending upon the locality of the ship at the time those words are agreed upon.

The questions raised seem to be: First, is there any such warranty of seaworthiness in a time policy as there is in every voyage policy in ordinary form, *i.e.*, a warranty that the ship was or shall be seaworthy at the commencement of the risk?

Secondly, Is there any warranty that the ship shall be seaworthy at any other time than at the commencement of the risk, as for instance at the commencement of any or every voyage sailed during the period insured?

Thirdly, Is there any condition or stipulation, by way of contract, that the underwriter shall not be liable for any loss which would not have happened if the ship had not been unseaworthy at the commencement of the risk, and so continued until the loss?

Fourthly, Was the uncontradicted evidence in this case conclusive that the ship was lost proximately by perils of the sea?

And, fifthly, Did the facts which are to be assumed, that she was unseaworthy when she left London, and so continued until she was lost, and that she would not have been lost if she had not been and continued so unseaworthy, absolve the defendant so as to entitle him to a verdict either on the third or the sixth plea?

As to the first, in *Gibson* v. *Small* (4 H. of L. 353), the House of Lords decided that there is no such warranty in a time policy, at all events if the policy be made whilst the ship is at sea. In *Thompson* v. *Hopper* (6 E. & B. 172), it was decided by the Court of Queen's Bench that there is no such warranty, though the policy be made whilst the ship is in the port of the place of the owner's residence. The only question is, whether this ruling in *Thompson* v. *Hopper* can be and is to be overruled. If it is not, the two cases exhaust the point, and determine that there is no such warranty in any time policy in ordinary form as there is in every voyage policy in ordinary form. It seems impossible to add anything to the arguments which have been used on both sides as to this point. All that can be said seems to be contained on one side in the judgments of Erle, J., and on the other side in those of Lord Campbell and others. The reasoning of those who hold that there is no such warranty in any time policy is, as I understand it, substantially as follows:—The warranty and its effect are admitted to exist in voyage policies, that is to say, in policies in which an insured voyage is, or insured voyages, are named. It is introduced by implication, either on the ground that it was originally proved to be by custom understood in such policies, and has thereupon been adopted by the courts as law; or on the ground that it has been introduced and adopted by the courts alone as a necessary implication from reason. It cannot be implied in time policies, that is to say, in policies in which no voyage is specified as a voyage insured by the first process, because no such custom has ever been proved. It cannot be implied by the second process, because the reasoning which may have been used to introduce it into voyage policies cannot be applied to time policies. It is true that the warranty in different voyage policies, though enunciated by the same term, seaworthy can be fulfilled by a different condition of the ship according to the different voyages named in the different policies; and so far a different degree of condition of the ship might be applied in time policies; still, in voyage policies the condition into which the ship must be or must have been put at the commencement of the voyage insured can be measured or estimated at the time of making the contract of insurance by reference to that named voyage; the ship must be or have been in such a condition at the commencement of the voyage insured as to be reasonably able to encounter the ordinary vicissitudes of an ordinary voyage of that kind. But in a time policy there is no voyage insured, there is no voyage named in the policy. The ship will have to sail a voyage or voyages which are, therefore, the voyage or voyages sailed, not the voyage or voyages insured. But there is nothing in the contract of insurance to fix that voyage or those voyages. The assured may not have determined on any voyage, or if he has, may consistently with the contract of insurance, change the destination of the ship. The ship may, during the time of insurance, sail a summer voyage along the coast or a winter voyage round Cape Horn, or one or many voyages beginning at any time. It would be impossible at the time of making the contract to anticipate what the condition of the ship must be when the risk is to attach or did attach. Neither the assured nor the underwriter can make any calculation about it. It cannot be therefore properly laid down by the courts that all men of ordinary reason must have contracted upon the assumption of there being a warranty of seaworthiness, the burden of fulfilling which neither of them could estimate. In my judgment this reasoning cannot be successfully answered. I am of opinion that there is no such warranty in any time policy in ordinary form.

As to the second proposition with regard to every voyage, it was pointed out by Lord Campbell in *Fawcus* v. *Sarsfield* (6 E. & B. 201), that Mr. Wilde, with all his great experience and knowledge did not contend for it, but asked for a warranty only as to the first voyage sailed under the policy. Lord Campbell gives his reasons for holding that there is no such warranty as to any of the voyages sailed under an ordinary time policy. I agree with those reasons. And certainly it would be strange to imply so futile a warranty as one confined to the first voyage, which might be to Cardiff in ballast, whilst the next should be to Calcutta or Hong Kong with coal, or railway iron, or machinery. I cannot think there is any such warranty as is suggested in the second proposition with regard to any of the voyages.

And if there be no warranty as is suggested in either the first or second propositions, it follows, as it seems to me, that no undertaking of any kind by the assured can be implied with regard to the seaworthiness of the ship at any period of the time of insurance. There is nothing on which to found such an implication. In plain language the underwriter, in a time policy, in his contract, insures against a loss by any of the perils described in the policy whether the ship was or was not seaworthy, when the risk attached or when the loss occurred. If therefore the underwriter can be absolved from a loss caused in any sense by unseaworthiness, it is not by virtue of anything within the contract. If the loss be solely and immediately caused by unseaworthiness, which existed at the commencement of the risk and continued till the loss, without the happening of any peril described in the policy, then the underwriter is not liable because the ship has perished by her own inherent vice. There is, in such case, but the one cause. There is, therefore, no opportunity for the application of the doctrine of *causa proxima* which implies the existence of two causes. But if the ship is proximately lost by a peril described in the policy, though the unseaworthiness existing from the beginning is also a cause, then arises the question whether the underwriter is liable. He is not absolved, if at all, by reason of a breach of contract. There is no contract about seaworthiness. And if there were, in considering an alleged

breach of contract it is recognised law that the *causa proxima* can alone be regarded. Even a particular and novel stipulation in a contract of insurance, it has been held, is to be construed or applied with reference to this maxim. There is a case, as the law at present stands, in which the underwriter is absolved from the consequences of a loss caused by unseaworthiness, though the loss may also be said to have been immediately caused by a peril described in the policy. That is where the ship is immediately lost by a peril described, but where the original and continuing unseaworthiness was also a cause, and the efficient cause of loss, in the sense that it substantially caused the described peril to destroy the ship. That is a state of things consistent with what is set forth in the sixth plea in this case, and in the third plea in *Thompson* v. *Hopper*. If such unseaworthiness was known to the assured before the ship went to sea, it was held in *Thompson* v. *Hopper* that the underwriter is absolved. If it was not so known, it was held in *Thompson* v. *Hopper*, and in *Fawcus* v. *Sarsfield*, that he is not absolved. If it was known, it is said that the assured was guilty of a wrongful act, and that no man can recover an indemnity for a loss occasioned by his own wrongful act, and it was held in *Thompson* v. *Hopper*, that "this is a fundamental principle of insurance law which is applicable if the wrongful act causes a peril described in the policy to be the immediate and proximate cause of the loss of the ship." The headnote to *Thompson* v. *Hopper*, in error, in E.B.&E. 1038, states that the latter part of the judgment of the Queen's Bench was overruled, and that even where there is a wrongful act of the assured, the *causa proxima* alone of the loss is to be regarded, and if the wrongful act of the assured be not the immediate and proximate cause of the loss, the underwriter is liable, if the immediate and proximate cause be a peril described in the policy. Without determining whether this is the real effect of the judgment in error, which I more than doubt, I think it is clear, from the judgment in the Queen's Bench, that all depends on whether the act of the assured which is relied on is more than a breach of contract—whether it amounts to an act wrong of itself in the minds of all right thinking people. It is suggested by Willes, J., whose opinion is to me always of the greatest consequence, that the mere fact of knowingly sending a ship to sea unseaworthy is not a wrongful act. I cannot agree; I will not argue about it. It seems to me self-apparent. It is a wrongful thing to do in the judgment of all right thinking people. But if the unseaworthiness is not known to the assured. I cannot see how it can in reason be said he has been quilty of a wrongful act. He may have taken all the pains, and have gone to all the expense possible, and yet a secret defect may in the end be proved to have existed. How can he be said in reason to have been guilty of anything wrongful, it being assumed he is not guilty of a breach of contract. Here the jury have negatived knowledge. There was, therefore, in my opinion, nothing wrongful in the conduct of the assured, and the underwriters have no defence.

The loss was not the immediate consequence solely of the unseaworthiness. The ship was not lost through her own inherent vice. She crossed the North Sea twice after the policy attached. She was lost by stranding. That was the *causa proxima*. There was nothing to prevent the application of that maxim. The evidence of the loss by stranding as a *causa proxima* was conclusive. Therefore the verdict was rightly entered on the third issue.

That which must be taken to be a material allegation in the sixth plea, unless *Thompson* v. *Hopper* and *Fawcus* v. *Sarsfield* are to be overruled, was not proved. I think the demurrers in *Thompson* v. *Hopper* and *Fawcus* v. *Sarsfield* were rightly decided. Therefore the verdict was rightly entered on the sixth issue.

The judgment in the Queen's Bench was right, and should be affirmed.

Lord COLERIDGE, C.J.—This is my own judgment, (*a*) as to some part of which my brother Grove agrees, and my brothers Cleasby and Pollock agree.

This was an appeal from a judgment of the Court of Queen's Bench discharging a rule to enter a verdict for the defendant and for a new trial. The case is reported L. Rep. 9 Q. B. 581. The judgment of the court discharging the rule delivered by my brother Blackburn enters so fully and clearly into the facts of the case that the special case before us is little more than a repetition of his statement, and it seems unnecessary for the purpose of this judgment again to repeat them. Portions of the pleadings and the questions put to and answered by the jury on the trial it is, however, essential carefully to consider. The declaration was on a policy which no doubt is properly described as a time policy. But it is a policy in very different terms from the policies sued on, and which were the subjects of decision, in *Gibson* v. *Small* (16 Q. B. 128 and 141; 4 H. L. Cas. 353) and *Thompson* v. *Hopper* (6 E. & B. 172). The risk is thus described, "lost or not lost at and from for and during the space of twelve calendar months commencing on the 24th Jan. 1872 and ending on the 23rd Jan. 1873 . . . in port and at sea . . . of and in the good ship *Frances* whereof is master under God for this present voyage . . . beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above, . . . and further until the said ship shall be arrived at as above; upon the said ship until she had been moored at anchor twenty-four hours in good safety." The perils are described so far as is necessary to set out the description, thus: —"Touching the adventures and perils which we the assurers are contented to bear, and do take upon us in this voyage, they are of the seas . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof." The pleas which are material are the third and sixth, which are in substance as follows: the third "that the ship, &c. was not by the perils insured against or any of them, lost as alleged;" the sixth "that after the making of the policy, the plaintiffs, well knowing that the ship was unseaworthy, without any justifiable cause sent her to sea in such unseaworthy condition, that the ship, &c. was lost as alleged by reason of such unseaworthiness of the said ship and not otherwise."

At the end of the trial before my brother Blackburn, he summed up the case to the jury and left seven questions to them, which, with the answers, were as stated in the case. In asking

(*a*) According to the indorsement on the judgment, Grove, J., dissented as to implied warranty, but agreed as to new trial.

the last question my brother Blackburn explained to the jury that he did not mean to ask them whether the unseaworthiness was the sole or immediate cause of the loss, but whether the making water was occasioned by unseaworthiness, and the loss arose from her being water-logged in consequence of that unseaworthiness, so that, but for that, it could not have happened.

Upon these findings of the jury my brother Blackburn directed a verdict to be entered for the plaintiffs. A rule to set aside this verdict and to enter it for defendants or for a new trial was obtained, and was, after argument, discharged; and the question for us is whether it should have been discharged or made absolute. It was contended before the Court of Queen's Bench, and for the purpose of the argument the contention was admitted, and the judgment proceeded on the admission, that the two unanswered questions must be taken as answered in favour of the defendants and that the jury must be taken to have found the ship unseaworthy; and further that the unseaworthiness contributed to the loss within the meaning of my brother Blackburn's direction. But this being assumed, the judgment of the Queen's Bench proceeded on the ground that knowledge of unseaworthiness being negatived, the sixth plea was not proved; that there being no implied condition of seaworthiness in a time policy, the unseaworthiness was no defence when the *causa proxima* of the loss was a peril of the sea.

It is manifest that two questions at once arise. First, is there in such a policy as this no implied warranty of seaworthiness? and secondly, if there is not, still have the answers to the questions, interpreted by the direction of the learned judge, fairly disposed of the third and the sixth pleas?

As to the first point, it appears that though there are dicta, and dicta of great weight, which assume that in such a policy as this there is no implied warranty of seaworthiness, yet it has never been necessary to decide the point, and the point has not in fact been decided. Before the decision of *Gibson* v. *Small*, it had been assumed by text writers, and had been laid down by some English judges, *e.g.* Paterson, J., in *Hollingsworth* v. *Brodrick* (4 A. & E. p. 646); Tindal, C.J., in *Dixon* v. *Sadler* (8 M. & W. 898), that in a time policy, as in a voyage policy, there was this implied warranty. The view was that by the mere fact of effecting the insurance, the assured warranted that there was a ship fit to be insured, and it was laid down in particular that if the time policy was effected on a ship about to sail from a home port, there was an implied warranty: (Park on Insurance, edit. of 1842, p. 489.) Then came the well known case of *Gibson* v. *Small* (16 Q.B. 128), in which the time policy had been effected on a vessel then at sea. The Queen's Bench held that there was an implied warranty. The Exchequer Chamber reversed the decision, confining themselves however pointedly to the question of a time policy on a ship then at sea. The case went to the House of Lords, and the judgment of the Exchequer Chamber was affirmed by the House of Lords, with the assent of the majority of the judges. In delivering judgment, the judges who attended the House of Lords, and the peers expressed opinions on the question of the implied warranty in time policies in general, but they did not agree. Lord Campbell, Pollock, C.B. and Parke, B., laid it down distinctly that there was no implied warranty in any time policy whatever. Lord St. Leonards agreed that in the case before the House, a time policy upon a ship then at sea, there was no implied warranty. But he said, "If a ship was about to sail upon a particular voyage, and a time policy instead of a voyage policy was effected on her, as then advised, he should think that a condition could be implied that the ship was seaworthy at the commencement of the voyage." Martin, B. was of the same opinion, and Maule, J., confidently agreed with him. Three other judges, Alderson and Platt, BB., and Talfourd, J. confined themselves to the case before the House, Erle and V. Williams, JJ. agreed with the original decision in the Queen's Bench. It is clear, therefore, that *Gibson* v. *Small* did not decide the point which the case before us raises. Neither, if it be carefully examined, did the later case of *Thompson* v. *Hopper* (6 E. & B. 172), at least as decided on demurrer. The policy there described the risk "at and from the meridian of the 21st Oct. 1855, to and with the meridian of the of March 1855, upon the ship," &c. and made no mention of a voyage. There were three pleas which all averred that the ship at the time of the insurance being effected was "an outward bound ship lying in British port, to wit, the port of Sunderland." But the third plea contained an averment which the court construed as charging personal misconduct on the plaintiffs, which misconduct produced the loss. And on this the court unanimously held that plea to be a bar to the action. On the question of the implied warranty the court was divided, and as there was agreement as to the third plea upon the reasons given, it was hardly necessary to decide upon the others. The majority of the court no doubt held that there was no implied warranty in any time policy, although the policy before them was the only one on which they were deciding. But even if it were necessary to decide the point, the decision is one which does not bind this court. The authority indeed of Lord Campbell and of the judges who agreed with him is entitled to the highest respect, and so is that of the judges comprising the Judicial Committee in *Jenkins* v. *Heycock* (8 Moore P. C. 351), who intimated that they were inclined to concur with Lord Campbell, and those who thought that in no time policies is there any implied warranty, though they were not called upon to determine and did not determine the point. The later arguments and decisions in the case of *Thompson* v. *Hopper*, reported in the Queen's Bench (6 E. & B. 937), and in the Exchequer Chamber (E. B. & E. 1038), took place after the case had been tried at Nisi Prius, and turn rather on the effect of my brother Bramwell's direction and the finding of the jury upon the facts than on the specific point, though there is no doubt that several of the judges imply, if they do not say so, that they agree upon the point with the majority in the court below, and treat it as a settled one. The point, therefore, seems upon examination to be, in this court, open; and if it be, there is considerable authority for holding that in such a policy as this there is an implied warranty of seaworthiness. Without exception, so far as I am aware, the American text writers, and the American authorities as cited in those text writers, as well since as before the cases of *Gibson* v. *Small* and *Thompson* v. *Hopper*, hold

that there is no difference on this point between a time policy on a ship then in port and to be employed on a voyage, and a voyage policy; but that the difference is between a time policy as last described and a time policy on a ship then at sea. The English authorities to the same effect have already been mentioned, and it is plain that the policy in the case before us is altogether different from that in *Gibson* v. *Small*, and is very distinguishable from that in *Thompson* v. *Hopper*. In the present case the policy is in fact a voyage policy limited to a particular time. The reasons given for implying a warranty of seaworthiness in voyage policies apply with equal strength to the policy before us; the main reason given for not implying a warranty, viz., that the shipowner could not know the state of the ship at the time of the insurance certainly does not apply: the reason given by Lord Campbell in *Thompson* v. *Hopper* (6 E. & B. 188-9) for not implying it is not a reason of principle but one of inconvenience, and would be equally cogent to establish any rule which excluded all dispute of fact. If the matter be, as I think it is, open, I confess to a strong feeling in favour of the older view of the law, except so far as it has been varied by authority. It seems to me wiser and better, to tend more towards honesty of dealing as against gambling and every fraud in insurance transactions, to extend as far as may be, rather than to contract within the narrowest point or limits, the doctrine of implied warranty of seaworthiness. I am, therefore, prepared to hold that in this policy there is an implied warranty of seaworthiness, and on this ground.

As the fifth question put by my brother Blackburn is to be taken as answered by the defendants, I am of opinion that the judgment of the court below was wrong, and that the rule should have been made absolute to enter a verdict for the defendant on the third and sixth pleas. Inasmuch, however, as this case may go further, and inasmuch as the opinion I have expressed is at variance with dicta of great weight, as it is distinctly dissented from by some, and is not distinctly assented to by any of my learned brothers in this court, it is proper to examine the second question, and arrive at a decision with respect to it. The question is, Do the findings of the jury, as explained by my brother Blackburn (including the two which are to be taken as found in favour of the defendants) dispose of the questions arising on the third and sixth pleas? And in discussing this question it is to be assumed that in a time policy, where the loss is found to be by one of the perils insured against, even though the ship was unseaworthy when she started, the underwriters are liable. Now it will be observed that the jury found that the unseaworthiness was one of the concurrent enacting perils at the time of the loss. It will be further observed that they were not asked to find, and did not find, what was the efficient predominating peril at that same point of time. Yet it seems that in a case such as this the verdict would depend upon what the jury found as to this matter. If they had found that the unseaworthiness of the ship was the efficient predominating peril, then the verdict must have been entered for the defendant on the third plea as well as on the sixth plea; if on the other hand they had found that the efficient predominating peril was the bad weather, then the verdict, as now entered for the plaintiff, must have stood. This follows from the fair construction of the language of these pleas. They must mean (the third) the ship was lost through unseaworthiness; (the sixth) the ship was lost through unseaworthiness alone. The same question is involved in both, because the proper question upon the third, as upon the sixth, would be: What was the efficient predominating cause of the disaster—was it the perils of the sea, or was it the inherent vice of the ship herself? A little consideration will make this reasonably clear. Seaworthiness and powers to encounter ordinary perils are convertible terms. But the underwriter does not insure against ordinary perils; he indemnifies only against the extraordinary and unforeseen perils of the sea. "To make the underwriters liable," in the words of Lord Chief Justice Jervis (*Magnus* v. *Buttemer*, 11 C. B. 881), "the injury must be the result of something fortuitous or accidental occurring in the course of the voyage." He does not insure against inherent vice, or, what is the same thing in other words, against ordinary perils. In a voyage policy, it is true, the assured warrant power to encounter ordinary perils. Such perils therefore, are not perils which, if they cause loss, give a right of recovery under such a policy, not merely because they are not within the words of the policy, but because a condition has not been complied with, viz., that the ship shall be fit to meet them. In this case there was no power to encounter ordinary perils, and by this want of power the loss was caused. It is none the less a cause of loss—the loss was no more caused by perils insured against—because in such a policy as this the assured have not to warrant the non-existence of the cause of loss at the beginning of the risk. It may be said with truth that in this case there was evidence of two concurrent perils to which the ship was subject in her voyage, one a peril insured against, the extraordinary and unforeseen action of the sea; the other a peril not insured against, the inherent vice of the ship herself. The evidence of both these perils seems to have been stated to the jury, and they should have been asked which was the efficient predominating peril when the loss happened. According to their answer to that question, the verdict should be entered for the plaintiffs or defendant on the third plea and on the sixth, the issues involved in both these pleas being substantially the same. The averment of knowledge in the sixth plea may be disregarded as being immaterial, and when that is done the issues involved in the sixth plea are the same as the issues involved in the third; and the answers given by the jury to the questions of the learned judge do not dispose of them.

On this second ground, therefore, and for these reasons, I am of opinion that the rule should be absolute for a new trial, and as four of the judges concur in that result, the rule will be absolute for a new trial.

Judgment for defendant, the appellant.

Solicitors for plaintiffs, the respondents, *Cattarns, Jehu*, and *Cattarns*.

Solicitors for defendants, the appellants, *Hollams, Son*, and *Coward*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT, Esq., Barrister-at-Law.

Tuesday, June 16, 1875.

COMMERCIAL STEAMSHIP COMPANY *v.* BOULTON AND ANOTHER.

Charter-party—Demurrage—Lying days—Working days.

A charter-party contained the following clause: "The loading and discharging the said ship to be as fast as the said steamer can work, but a minimum of seven days to be allowed the charterers, and ten days on demurrage over and above the said lying days at 25l. per day."

Eight days, including one Sunday, were consumed at the port of loading. The ship arrived at the port of discharge on a Tuesday, but could not get to her berth till 8 a.m. on Wednesday. She then began discharging, and continued till 8 p.m., began again at 4 a.m. on Thursday and finished at 8 a.m.

Held, that "lying days" meant working days, and Sunday was excluded.

Held, also, that the charterers were liable to pay two days' demurrage for the Wednesday and Thursday.

A ship arrived at the port of loading on Sunday, and was cleared about noon on Monday. The charterers then floated part of the cargo (timber) down the river, and some was put on board that afternoon.

The jury found that Monday was a working day.

Held, that they were justified in so finding.

THIS case was tried before Pollock, B., at the Spring Assizes at Newcastle, in 1875. The action was brought to recover freight and demurrage in respect of two ships belonging to the plaintiffs, the *Brighton* and the *Boston*, which had been chartered by the defendants to carry timber from Muhlgraben or Bolderaa (the port of Riga) to England. The charter-party of the *Brighton* contained the following stipulations:—

The said ship shall, with all convenient speed, having liberty to take an outward cargo direct or on the way for the owners' benefit, sail and proceed to Bolderaa and Mulhgraben, or so near thereunto as she can safely get, and there load from the charterers a full and complete cargo . . . . . the cargo to be brought to and taken alongside at the charterers' risk and expense, and also, if it should be necessary, off into the roads . . . . . and being reloaded, shall proceed to London, or as near thereunto as she can safely get, and deliver the same afloat . . . . . the loading and discharging the said ship to be as fast as the steamer can work, but a minimum of seven days to be allowed the charterers, and ten days on demurrage, over and above the said lying days, at 25*l.* per day.

The *Brighton* arrived at Muhlgraben on Sunday, 26th April 1873, and her master at once gave notice that he was ready to load, and she began to load on Monday, 27th April, at 2.30 p.m. as soon as cargo was sent to her. She finished loading on Monday, 4th May, and commenced the homeward voyage. From the time when she was ready to load on Monday, 27th April, until she was loaded and ready to sail on Monday evening 4th May, eight days, including one Sunday were consumed. On her arrival in the Thames she was directed to proceed to the Victoria Docks. She got into the docks on Tuesday, 12th May, at 5 p.m., but some timber belonging to the defendants was in the way, which prevented her getting to her berth until 8 a.m. on the following morning, Wednesday, 13th May, when she commenced discharging her cargo, and continued to discharge until 8 p.m., when the labourers left off work. She began to discharge again at 4 a.m. on Thursday, 14th May, and had discharged the whole of her cargo by 8 a.m. She was consequently engaged one day and part of another in discharging. The plaintiffs claimed demurrage for all days beyond the minimum of seven days named in the charter-party; their claim included the Sunday, 3rd May, on the ground that they were entitled to treat every "running day" as a "lying day" within the charter-party, and also included two days at the Victoria Docks, on the ground that, as the discharging had gone into a second day, they must be paid as for a whole day. The defendants disputed the claim on the grounds that Monday, 27th April, was not a full working day, and that "lying days" in the charter-party meant "working days'" and Sunday is not a working day; and that the plaintiffs ought to set off the four hours' work on 14th May against the time lost on the 12th May, or at any rate were only entitled to be paid in proportion to the time actually occupied in discharging on 14th May.

By the charter-party of the *Boston* it was stipulated that "eight running days are to be allowed to the said merchants, if the ship is not sooner discharged, for loading and discharging the said ship, and ten days on demurrage over and above the said lying days at 25*l.* per day."

The *Boston* arrived at Muhlgraban on Sunday, 19th April, but was not cleared until about noon on Monday, 20th April, and was not ready to load till about 4 p.m. The cargo, which was timber, was floated down from Riga in rafts, and some of it came alongside on Monday, 20th April, and was taken on board, part on that day after 4 p.m. and the rest the next morning before any more came down. The loading was finished on Tuesday, 28th April, and the ship at once commenced the homeward voyage, and arrived in dock on 7th May; she immediately commenced discharging her cargo and finished at 7 a.m. on 12th May. The *Boston* was thus at Riga for the purpose of loading seven whole days, including one Sunday, and part of two other days, and was at Southampton for the purpose of discharging four whole days and part of two other days. The plaintiff claimed demurrage for seven days over and above the eight running days.

The defendants paid into court enough to satisfy the plaintiffs' claim for demurrage for all the days for which they claimed in respect of the *Boston* except 28th April; they refused to pay demurrage for that day and their liability depended whether Monday, 20th April, was to be included in the loading days or not.

It was left to the jury to say whether Monday, 20th April was a working day, and they found that it was.

A verdict was found for the plaintiffs for 25*l.* in respect of the *Boston*, being the demurrage payable for 28th April, and for 50*l.* in respect of the *Brighton*, being the demurrage payable in respect of the two days consumed in discharging in London, the lying days having been consumed at Riga; leave was reserved to move to enter the verdict for the defendants, or reduce the damages if the court should be of opinion that it ought to be done, having regard to the findings of the jury, the court to draw inferences of fact. A rule was obtained accordingly.

Herschell, Q.C. and *Crompton* showed cause.—

The lying days mentioned in the charter-party relating to the *Brighton* must be taken as running days; (*Brown* v. *Johnson*, 10 M. & W. 331.) [LUSH, J.—The whole clause must be read together and the words "loading and discharging as fast as the steamer can work, but a minimum of seven days to be allowed to the merchants," clearly point to working days being intended to be the meaning.] Then demurrage begins to run from the time the ship gets into dock, not to a berth, and as the lay days had then expired, the demurrage days commence from the day on which she got into dock and include all the days she was occupied in discharging. Each part of a day so occupied must be considered as a whole day.

Brown v. *Johnson*, 10 M. & W. 331;
Tapscott v. *Balfour*, 27 L. T. Rep. N.S. 710; L. Rep. 8 C. P. 46: 42 L. J., 16 C. P.

Aspinall, Q C. and *Gainsford Bruce* supported the rule.

MELLOR, J.—I am of opinion that the rule fails on both grounds.

As to the *Brighton*, the stipulation is, "the loading and discharging the said ship to be as fast as the steamer can work, but a minimum of seven days to be allowed the charterers, and ten days on demurrage over and above the said lying days, at 25*l.* per day. The contention on behalf of the defendants must amount to this, that, though a minimum of seven days is specified, yet if they go beyond the seven days, and take a portion of an eighth, they are not to pay for that as for an eighth day. This interpretation of the charter-party would be so inconvenient that I am of opinion that we must consider that they must load in time or else pay for a day, if any part of a day is occupied beyond the time specified. There is no authority on the question, but any other construction would be attended with the greatest inconvenience.

As to the *Boston*, it is not a question of construction, but whether on the circumstances of the case the jury were warranted in finding that 20th April was a working day. The circumstances are these: The vessel is ready to receive cargo; a portion of the cargo arrives, and in the presence of persons interested in the matter the loading is commenced; the loading of that portion is finished before any other timber arrives. The question then is, was there any reasonable ground for the jury finding that the day on which the first part of the timber arrived was by the assent of the parties treated as a loading day? I will not say that if they had found otherwise I should have thought their finding ought to be disturbed, but I think there was evidence to entitle them to find as they have found.

LUSH, J.—I am of the same opinion.

The question with regard to the *Brighton* turns on the construction of this clause—"the loading and discharging the said ship to be as fast as the steamer can work, but a minimum of seven days to be allowed the charterers," and is, first, whether the seven days allowed as the minimum are exclusive or inclusive of Sundays, or are running or working days? I think, considering the words of the clause, they are working days, and Sunday is excluded and no demurrage was incurred at the port of loading; all the lay days were however, expended there.

Then as to the unloading. The ship got into dock on Tuesday, 12th May, and got to her berth and began discharging on Wednesday morning at 8; the work went on till 8 p.m., and began again on Thursday at 4 a.m., and was finished at 8 a.m., and demurrage is claimed for Thursday. I am of opinion that that day must be counted in favour of the shipowners. The words are "ten days on demurrage over and above the said lying days at 25*l.* per day." There is no word used to show that there is to be any division of a day, or any apportionment of the 25*l.* Such a construction would be exceedingly inconvenient, and I cannot think that it was in the contemplation of the parties. It may be that in consequence of detention for part of a day the ship may lose a tide, or may not get to the next loading place in time. I, therefore, think it is consistent with the language used, and with convenience to hold that for every day or fraction of a day that the ship is detained over the specified time demurrage must be paid.

With regard to the *Boston* the case does not turn on the construction of the charter-party, but whether the first day of loading was to be included in the loading days under the circumstances. We find here that the charterers sent down a portion of the cargo an hour after receiving notice, to a place where it would be dangerous to allow it to remain. They must have meant that it was to be put on board as soon as possible, and accordingly the jury have found that Monday, 20th April, was a working day. If the charterers had the benefit of the timber being put on board or agreed that it should be, they would be liable. I cannot suppose that they intended it to remain in the river.

QUAIN, J.—I am of the same opinion.

The question as to the *Brighton* seems perfectly clear. She got into dock on the 12th, and was ready to discharge when she could get to her berth. She discharged from eight a.m. on Wednesday, the 13th, till eight p.m., and there is no evidence to show that that is not a fair good working day. If the charterers get into the second day, they are liable to pay demurrage. I think on this charter-party that they cannot divide a day. The contention is that they are not liable at all for the day, or at any rate only for a proportionate part, but there is no authority for that view. The defendants want to set-off the four hours occupied in discharging on the Thursday, against four hours said to have been lost on the Wednesday; but there is no evidence to show that they are entitled to this. The shipowners were not in fault if there was a loss of four hours.

As to the *Boston*, a more difficult question arises, whether a working day can be counted where only part of a day has been used. I agree that the charterers are entitled to a fair working day, but if for the convenience of all parties a portion of a day is used, it may be counted. It was a question for the jury, and if there was any evidence the jury were entitled to find as they did. The evidence is that notice was given at eleven a.m., and a portion of the timber was then sent down, and was loaded on the same day, the charterers or their agents being present and consenting. I think on this evidence the jury were justified in finding that this was to be counted as a working day.

Rule discharged.

Attorneys: *Maples, Teesdale*, and *Co.*, for *Lietch, Dodd*, and *Bramwell*; *Wild, Barber*, and *Browne*.

Judicial Committee of the Privy Council.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF NEW ZEALAND.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

Dec. 7 and 8, 1875.

(Present: The Right Hon. Sir R. J. PHILLIMORE, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.)

THE STRATHNAVER.

Salvage—Towage—Danger—No tender—Award—Detention—Demurrage—Damages.

Towage services (as distinguished from salvage services) are work done by one vessel in towing another to expedite her voyage, where nothing more is required than the accelerating her progress.

Where a vessel is in neither actual nor imminent probable danger, a vessel engaged to tow her renders towage and not salvage services.

In a salvage suit, in which there has been no tender made by the defendants, a Court of Admiralty cannot, on finding that no salvage service has been performed by the plaintiffs, and their service was mere towage, make a decree for the amount of towage due to the plaintiffs.

Defendants in a salvage suit have no right to recover damages for demurrage against plaintiffs, who, having bonâ fide and through mere error of judgment arrested the defendants' vessel, and carried on the suit to recover reward for their alleged salvage services, are held to have performed no salvage, but mere towage, services.

THIS was an appeal from a decree of Alexander James Johnson, Esq., the deputy judge of Her Majesty's Vice-Admiralty Court of New Zealand, in a cause of salvage lately pending in that court, instituted and promoted by the appellants as the owner, master and crew of the steam ship *Storm Bird*, against the ship or vessel *Strathnaver*, her cargo and freight, for the recovery of salvage in respect of certain services rendered to the *Strathnaver*, her cargo and freight.

In their libel the plaintiffs (the appellants) among other things averred:

1. That at a quarter past eight p.m on Monday, the 31st Aug. 1874, the steamship *Storm Bird*, of sixty-eight tons register, and manned by a crew of twelve hands, while proceeding out of the harbour of Port Nicholson, New Zealand, in the execution of a voyage from Wellington to Wanganui, with cargo and seventy passengers, observed the *Strathnaver*, a wooden ship of 1071 tons, with cargo and 391 emigrants in a position of danger, close to and running towards a reef of rocks, known as the West Ledge, at the entrance of Port Nicholson harbour.

2. That blue lights were burnt by those on board the *Storm Bird* to indicate to the *Strathnaver* the proper channel for her to enter the harbour, and that the *Storm Bird*, putting on all steam, passed round under the stern of the *Strathnaver* and hailed those on board to port their helm, as they were running on to a reef.

3. That the *Strathnaver's* course, a continuance of which, for a few minutes longer, would have caused her destruction, was altered in accordance with the directions of those on board the *Storm Bird*, but, the wind then dropping, and the *Strathnaver* drifting with the set of the sea on to Barrett's Reef, was taken in tow by the *Storm Bird* and towed safely to the Port of Wellington.

4. That by the services of the plaintiffs the *Strathnaver* was rescued from total loss, and her cargo and the lives of those on board were saved.

Separate responsive allegations were filed by the owners of the *Strathnaver* and her cargo similar in substance, and averring among other things:—

1. That the *Strathnaver* when seen from the *Storm Bird* was three-quarters of a mile to the southward of the outer rock of Nicholsons' harbour, and steering by the harbour light on Somes Island.

2. That the *Strathnaver* was never in danger, or in any unsafe or improper proximity to the West Ledge, and before she had been hailed by those on board the *Storm Bird* a pilot had taken her in charge, by whose directions her helm had been ported, additional canvas set, and her course shaped towards the eastern side of the harbour.

3. That there was no sea which would have set the *Strathnaver* in the direction stated in the libel against an ebb tide.

4. That the service rendered by the *Storm Bird* was ordinary towage service, and was not necessary by reason of any danger to the *Strathnaver*.

No tender was made by the respondents.

Three witnesses were examined by the appellants before the Judge in Chambers, and other evidence on both sides was taken orally in open court before the learned Judge.

The learned Judge of the court below, by an interlocutory decree on Dec. 3, 1874, dismissed the suit and condemned the plaintiffs in costs.

The learned Judge in his judgment, went minutely into the facts, and ultimately came to the conclusion that, although the plaintiffs had acted *bonâ fide* in making their claim, there had been no salvage, but a mere towage service. The judgment concluded as follows: "In concluding my observations on the evidence, I desire to express my sincere hope that the result of this case, in which the claim of salvage has been based on what may originally have been a mere mistake (though, unfortunately, a mistake entailing most serious consequences) will not discourage the owners and masters of steam vessels engaged in the ordinary trade of the colony from being ever ready to lend assistance to vessels really or apparently in danger, but will only induce them to restrain their claims for remuneration beyond the value of towage service to cases where they can establish the existence of actual danger to the vessels assisted, and in which, therefore, they have a right to expect a liberal salvage remuneration. In the absence of any precedent showing that the court may make a decree for ordinary towage in what is substantially a suit for salvage, and in which no tender has been made, and considering that, as far as authorities have been brought before me, the cases in which decrees have been made for sums in addition to sums tendered on the footing of ordinary towage, have proceeded on the ground that the services were of salvage character, and not mere towage services, I do not see my way to make a decree for the amount of towage earned by the steamer, and therefore, feel it my duty to dismiss the suit; and, as there is no foundation laid for making the case an exception to the general rule, the costs must follow the judgment."

Upon this decree being given, the respondents claimed demurrage for the detention of the *Strathnaver* whilst under arrest in the suit, from

12th Sept. to Dec. 3rd, 1874; and on 11th Dec., moved the court below to make a decree for demurrage as claimed. In support of their claim witnesses were called to show the amount of demurrage payable in respect of ships of that class, and the master of the *Strathnaver* said that he had never attempted to get bail because he had not been accredited to any one for that purpose. For the appellants, evidence was given that the master might, if he had made application, have obtained bail at comparatively small cost. The appellants contended that they were not liable under these circumstances for any demurrage, but the court below nevertheless made a decree dismissing the suit with taxed costs, and pronouncing a sum of 600*l.* to be due to the defendants as demurrage or damages in respect of the detention of the *Strathnaver* under arrest.

From this decree the appellants (plaintiffs below) appealed for the following amongst other reasons:

First, because the evidence proved that the *Strathnaver* and her cargo were in a position of considerable danger, from which they were rescued by the services of the appellants; secondly, because the *Storm Bird* went out of her course to render assistance to a vessel in a position of danger, and her services being accepted must be regarded in the nature of salvage services; seventhly, because under the admitted facts of the case, the services of the *Storm Bird* were in the nature of salvage services, and entitled to be remunerated as such; eighthly, because the court below had no jurisdiction to decree demurrage to be due from the appellants; ninthly, because the learned judge of the court below was wrong in awarding demurrage to be due for the detention of the ship under warrant of court; tenthly, because it appears upon the evidence that bail could have been obtained for the *Strathnaver* and her release effected.

Dec. 7 and 8, 1875.—The Admiralty Advocate (Dr. *Deane*, Q.C.) and *R. E. Webster* for the appellants.—First, we submit, that upon the facts, there was a salvage service; secondly, even if the court should be of opinion that the service amounted only to towage, the appellants are entitled to a decree. There is no reported case where a salvage suit has been instituted and no tender made, and an award of towage only has been made; but there are several cases where a tender having been made in a salvage suit and the proved facts having shown the service to be mere towage there has still been a decree for the plaintiffs. [Sir R. PHILLIMORE referred to *The Harbinger* (16 Jur. 279.] There have been unreported cases in which the Court of Admiralty has found that plaintiffs, although not entitled to salvage reward, were entitled to payment for towage, and that the cases were so little distinct that an award has been given for towage in a salvage suit. Thirdly, there was no foundation for the respondent's claim for demurrage. It is expressly found in the judgment below that the suit was commenced in the *bonâ fide* belief that salvage services had been rendered, and this in itself negatives anything like *mala fides* or *crassa negligentia*, which are necessaries before damages can be recovered:

The Evangelismos, Swab. 378; 12 Moore P.C.C. 352;
Mitchell v. *Jenkins*, 5 B. & A. 594;
Davies v. *Jenkins*, 11 M. & W. 755.

Cohen, Q.C. and *Clarkson* (*Butt*, Q.C. with them) for the respondents.—There was no salvage service, there being no actual damage to the *Strathnaver*. In a salvage suit such as this there can be no award for mere towage, because it is a suit against ship and cargo, and the owner of cargo is not liable for towage, and because towage is recoverable only by the owners of the towing vessel, not by her master and crew; the suit is instituted expressly for salvage services by owner, master, and crew. [Sir R. PHILLIMORE.—There have, no doubt, been cases where salvage suits have been instituted and a mere towage reward has been tendered; but, although it has been the practice to pronounce for the plaintiffs for the amount of towage rendered in such cases, it has never been the practice to decree salvage in a towing suit where no tender has been made, and the court would have no power to make such a decree. Hence their Lordships will not trouble you on that point.] Then the defendants are entitled to demurrage. *The Evangelismos* (Swab. 378) proceeded upon the ground that the plaintiffs there *bonâ fide* believed that the defendant's vessel was the wrongdoer; but here the plaintiffs could have had no *bonâ fide* belief that they had a claim for salvage; hence the decree for demurrage is right.

The *Admiralty Advocate* in reply.

The judgment of the court was delivered by

Sir R. PHILLIMORE.—This is an appeal from a decree of the deputy-judge of the Vice-Admiralty Court of New Zealand, in a case of salvage promoted by the appellants, the owner, master, and crew of the steamship *Storm Bird*, against the ship *Strathnaver*, her cargo and freight, for recovery of salvage in respect of certain services rendered to the ship, her cargo and freight.

It is hardly necessary that their Lordships should repeat what they have often had occasion to say with regard to cases of this description, namely, that where facts have been established by oral testimony before the court below, and the court has maturely deliberated, and formed its opinion as to the credence due to the witnesses on the one side and the other, this court rarely interferes with such a finding on the part of the judge, and never unless there has been a manifest miscarriage of justice.

It appears that at about a quarter past eight p.m. on Monday, the 31st Aug. last year, the steamship *Storm Bird*, of sixty-eight tons register, manned by a crew of twelve hands, was coming out of the harbour of Port Nicholson, New Zealand, on a voyage from Wellington to a place called Wanganni, with a cargo and seventy passengers. The *Strathnaver* was a wooden ship of 1017 tons, a sailing vessel, with a cargo and 391 emigrants. She was entering the harbour at the time the other vessel was going out. The captain of the *Storm Bird* says: "When abreast of the Steeple Rock"—the exact position has been much considered in the course of this debate, and is some way up the entrance of the harbour—"my attention was drawn by the chief officer to signals, blue lights, and rockets, bearing from us S.S.W., coming as from the direction of Chaffer's passage, and to the S. and W. of Barrett's Reef. I took my glasses and went on the bridge and saw the loom of a large vessel; I likewise saw a green light. Nearing the heads opposite Barrett's Reef, I made it out to be a ship. I was then about 100 yards N. of the Outer Rock. We were on a straight course. The

green light of the ship was almost south, about two and a half points before our starboard beam to the S.W. of the Outer Rock. I considered the vessel was running into danger by going into Chaffer's Passage. I burned a blue light; my object was to indicate the position of the safe channel. At the same time I steamed with all haste towards the ship, about eight miles an hour. It was just as we were abreast the Outer Rock, about 150 feet off, that I put on steam and altered course to S. and W. I could not see the green light except when she rolled. I steamed towards her bows." Then he says: "She was inside a line drawn from Pencarron Head to end of the West Ledge Reef, heading towards the old pilot station about two cables' length from the part of the West Ledge nearest to the Outer Rock of Barrett's Reef." He goes on to say, what is admitted, that the wind was very light from the south-east. He then says, when he came up to the bows of the vessel, he thought it unsafe to go round her bows; that he steamed under her stern, and came up again a second time, and then, when he got astern of the ship, he stopped his engine and called out, "port your helm;" that he was barely fifty yards from her stern, and he repeated the words three or four times, "port your helm; steer for the light; you are running on a reef." There is no doubt that when the *Storm Bird* came up the pilot was on board. Now it will be proper to refer to the evidence of the pilot of the *Strathnaver*, and to show what his account of the position of the vessel at this time is. The pilot first gives an account of where he was. He says:—"When I first got alongside, she was from half to three-quarters of a mile from the Outer Rock of Barrett's Reef, nearly due south. The red light of Somes Island was open all the time." A little lower down he says:—"I said from the boat, 'port your helm,' after that I had been a minute or two alongside. I did not see any reason at that time for being extremely expeditious. The proper course was to get the vessel into the white light. The steamer gained on us, but not much. We pulled our boat four and a half to five knots. We arrived at the ship before the steamer." That is an undoubted fact in the case. "After I got on deck, I braced the yards up, and set the upper mizen topsail, and loosed the main top-gallant sail. It was sheeted home, but I am not positive whether it was hoisted up. When the steamer came the first time she came from the direction of the lighthouse at right angles to us, and as she passed I heard Captain Doile singing out 'port.' I recognised his voice. I said 'all right.'"

Now their Lordships are of opinion, upon an examination of the evidence with regard to the situation of the *Strathnaver*, that at this time it is clear that she was not heading up channel as she ought to have been, but, owing to the ignorance of the captain as to the chart, she was crossing the mouths of both the channels, so to speak, and she was to the south of the Outer Rock about three-quarters of a mile to the southward. There is no dispute as to the fact that the pilot gave these orders, or that he was on board the vessel before the steamer came up. It appears to their Lordships that the evidence upon which the learned judge of the court below relied was perfectly credible, that these orders were those which enabled the ship to be rescued from a situation of danger,—or perhaps, to speak more accurately, of running into great danger,—because had she continued her course with the wind as it then was blowing lightly from the south-east, there is no doubt that she would have run upon the West Ledge; and the first question which is really to be determined in this case, when we are considering whether salvage remuneration is due, or whether the service was simply one of towage, is, whose advice or whose order it was that prevented this large ship from running upon the West Ledge Rock? There is no reason to doubt that the captain of the *Storm Bird* did what he says he did, namely, that he shouted out "port," and that he burned a light by way of a signal. At the same time there is equally no doubt that the pilot, when he came up—the exact time is difficult to ascertain, the learned judge thinks it was a short time, but it was an appreciable time before the arrival of the *Storm Bird*—he gave the order from his boat, being anxious no doubt that no time should be lost in order to port the helm, and to brace the yards on the starboard tack. It was the execution of that order which in the opinion of the court below,—and their Lordships on the whole see no reason to differ from it, and it is also the opinion of the nautical assessors by whom their Lordships are assisted to-day—it was the execution of that order which rescued the ship from running into the danger which she otherwise would have incurred. Their Lordships, therefore, cannot ascribe the character of a salvor to the steamer, on the ground that he also gave the advice which has been mentioned.

Now there is no doubt of this fact, that when the steamer did come up again, having crossed the stern of the other ship, and come up again on her port bows, she was engaged to take the vessel in tow, and the question then arises, which has been so much contested in the court below, and before their Lordships to-day, whether he may be considered, in a construction of law, to have been engaged as salvor, or to have been engaged merely to tow. Upon this point it may be well to refer to a very clear and precise statement of the law by Dr. Lushington, in the case of *The Princess Alice* (3 W. Rob. 138), in which he says, "without attempting any definition which may be universally applied, towage services may be described as the employment of one vessel to expedite the voyage of another when nothing more is required than the accelerating her progress." It is contended on behalf of the appellants that something more was required than the acceleration of her progress, and that she was still in danger after the pilot had given the order to port the helm, and to brace the yards on the starboard tack, and to put the head of the vessel exactly in the opposite direction from what it had been, and to direct the course of the vessel eastward instead of north-westward upon the rock.

Now this is a question upon which the learned Judge had a variety of conflicting testimony before him, and after most maturely and carefully deliberating upon it—and, it may be observed, in passing, it would be difficult to conceive a more accurate and careful note than the learned Judge seems to have been at the pains of taking—after mature deliberation on the subject, he came to the conclusion that the *Storm Bird* was not engaged as a salvor, but merely to tow the vessel. The facts stand in this way; they are thus described in the evidence of the pilot. He says: "After the

steamer passed she stopped. I thought she was going on her course. I had no thought of taking a steamer then. I then had a conversation with the captain"—that is, his own captain—"on the propriety of getting a steamer to tow us, not on account of danger, but on account of expedition." It may be observed, in passing, that this large vessel had a number of emigrants on board, who were naturally extremely anxious to arrive at the port. "I think the master of the steamer might have been deceived as to the position of our ship, because he came out on the bright light and saw the vessel under the red." In the lighthouse at Somes Island there are three lights, a green light, a white light, and a red light. The white light is the one which should be followed; it is the safe light leading to the central passage up the main entrance, and which ought to be followed. He goes on to say: "It might have appeared to him she was more to the west than she was. I know the position exactly from pulling from the Outer Rock to the ship. The captain hesitated about taking the steamer. I told the captain she belonged to a respectable firm. He asked the name and I told him. He said they corresponded with his owners or consignees. Something to that effect. I then hailed the steamboat." Now it is important to observe what he says passed. "I said '*Storm Bird* ahoy!' He said, 'What is it?' I said, 'Will you give us a tow?' He said, 'Yes.' I said, "What will you give us a tow for?' He said 'Leave that to the agent,' or to that effect. That did not satisfy the captain till I told him about Mr. Turnbull. I then said, 'All right, I will give you a tow line.' I said, 'If you will only tow me inside the Steeple Rock that will do.' I do not know whether he heard or not." Now the evidence establishes both these facts, first, that the pilot proposed to engage him merely to tow the vessel; and secondly, that the captain of the *Storm Bird* never accepted the proposal as a mere service of towage. Therefore the question must be determined with reference to the necessity of the ship at this time, because the captain not having accepted the offer to tow, if the vessel was in a state of danger at that time, and he had towed her, he would be entitled to be considered as salvor; but it has been already stated that the court below was satisfied that at this time there was no danger to the vessel.

Their Lordships think they ought not to disturb this decision, but, inasmuch as the learned Judge has used the words "actual danger" very often, although probably it received a restriction in his own mind which was not stated, it may be useful to state what is really the law with respect to services rendered to a vessel in danger, or apparent danger. The law is laid down in the case of *The Charlotte* (3 W. Rob. 71) by Dr. Lushington. He says, "It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute." Their Lordships are of opinion there was neither actual nor imminent probable danger at the time these services were rendered. The finding of the Judge to this effect, no doubt, depended upon his giving preference to the witnesses who were produced on behalf of the respondents over those who were produced on behalf of the appellants. If indeed the judge had been satisfied that what the appellants' witnesses asserted was true, namely, that the pilot said to them, "Will you tow her off this reef?" the case would have assumed a very different aspect, and it might have been fairly urged in that case that what the *Storm Bird* did was an act of salvage and not an act of towage. But in the circumstances which have been stated, the learned judge came to a different conclusion upon the facts before him, and their Lordships, on the whole, decline to set aside that decision. Therefore, upon that part of the case, their Lordships will humbly recommend Her Majesty to affirm the judgment.

There is another portion of the judgment, by no means immaterial, to which I must now advert. It appears that the learned Judge of the court below was of opinion that he could entertain in this case a claim for demurrage. The property was valuable, and worth in all about 40,000*l*. The action I think had been entered for 12,000*l*. The learned judge upon the whole thought he was justified in decreeing to the respondents damage to the amount of 600*l*. in the shape of demurrage.

Now it is to be observed that the learned judge himself more than once in the course of his judgment expressed his opinion that those on board the *Storm Bird*, and especially the captain of the *Storm Bird* conducted themselves *bonâ fide* throughout, and he ascribes no misconduct to him of any sort or kind, but simply an error in judgment in bringing the suit. Their Lordships think that the learned judge was well founded in that opinion. In this state of things their Lordships are at a loss to understand why any damages at all should have been granted against the appellants.

The law upon this was very carefully considered in the decision in the case of *The Evangelismos* (12 Moore P. C. C. 352; Swab. 378), by the very eminent judge who delivered their Lordships' opinion, Mr. Pemberton Leigh. In that case (as appears from the head note of the report) "the collision took place at sea. The vessel causing the damage got away. From the appearance of a vessel in port the owners of the damaged vessel caused her to be arrested to answer an action for damages. The vessel seized was a foreign vessel, and in consequence of the owner having no funds in this country, she was detained for some months before she was released on bail. The plaintiffs failed to identify the vessel seized as being the one causing the damage, and the Admiralty Court dismissed the action with costs, refusing to award damages." Then there was an appeal to their Lordships, and Mr. Pemberton Leigh in delivering the judgment of their Lordships said—"It is also said that it is the established rule of the Admiralty Court where a party brings an action and succeeds in upholding it, that he is entitled, unless there are circumstances to take it out of the ordinary rule, to have compensation for the loss he has suffered, which in some cases is very inadequate, but it is the only compensation the court can award. Their Lordships think there is no reason for distinguishing this case or giving damages. Undoubtedly there may be the cases in which there is either *mala fides* or that *crassa negligentia* which implies malice, which would justify a court of admiralty giving damages, as in an action brought at common law damages may be obtained. In the Court of Admiralty the proceedings are however more convenient, because in the action in which the main

question is disposed of, damages may be awarded," Their Lordships came to the conclusion, though the case was certainly a very strong one, inasmuch as the wrong vessel had been seized, that in the absence of proof of *mala fides* or malicious negligence, they ought not to give damages against the parties arresting the ship.

It appears to their Lordships that the general principles at law are correctly laid down in that judgment, and it is their intention to adhere to them. They will therefore humbly advise Her Majesty that that part of the learned judge's sentence be reversed.

Their Lordships think that inasmuch as the appellants have succeeded in part of their case, and as they have appealed from the whole judgment, they will follow the rule which they have usually adopted on these occasions, and leave both parties to pay their own costs of the appeal. But their Lordships think the appellants are entitled to have their costs in the court below, strictly confined to the costs incident to the decree as to demurrage, and that they must pay the costs of the salvage suit in the court below.

Solicitors for the appellants, *J.* and *R. Gole.*

Solicitors for the respondents, *Hollams, Son,* and *Coward.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Jan. 19, 1876.

(Before Lord Coleridge, C.J., Mellish, L.J., Baggallay, J.A., and Cleasby, B.)

Eastman *v.* Harry.

APPEAL FROM THE QUEEN'S BENCH.

Stevedore—Liability of shipowner to charter-party—Agent—Disclosed principal—Election.

The owner of a ship had chartered her to A. for the purpose of being loaded: the charter-party provided that the stevedore was to be nominated by the charterer, and be under the control of the captain, and was to be paid by the owner. A. sub-chartered the ship to B., entering into a charter-party with a similar clause. B. employed the plaintiff, who was a stevedore, to load the ship, and introduced him to the defendant as the person who was to load the ship. The defendant frequently came on board while the ship was being loaded, and superintended and gave certain instructions relative to the stowage of the cargo. In an action by the plaintiff against the defendant for non-payment of his charges.

Held (affirming the decision of the Queen's Bench), that there was evidence of a contract between the plaintiff and defendant.

On completion of the loading the plaintiff sent in his account to B., headed "To captain and owners," and pressed B. for payment. B. had sent in his account to A., and A. had sent in his account to the defendant, with the item "Stevedore's account" charged. The defendant had paid A.'s account, and A. had paid B.'s account. B. became bankrupt, and did not pay the plaintiff.

Held (reversing the decision of the Queen's Bench) that the defendant was liable to pay the plaintiff's account.

This was an action brought by the plaintiff, a stevedore. to recover from the defendant, a shipowner, a sum of 57*l.* 3*s.* 4*d.*, for the "stowage" of a ship called the *Caroline*, belonging to the defendant.

The facts, which were taken as they appeared from the Judge's notes at the trial, were as follows:

The defendant, who was owner of the ship *Caroline*, chartered the ship to one Adams, for the purpose of providing a cargo, and entered with him into a charter-party, which contained the following clause:

> The stevedore to be nominated by the charterers, but to be under the control of the captain and paid by the owners (charterers not being responsible for bad stowage); dunnage and ballast, if required, to be provided by the owners; 5*l.* 5*s.* gratuity to master.

Adams sub-chartered the ship to one Beckley. The charter-party entered into by Adams and Beckley contained a clause relating to the nomination and payment of the stevedore, similar to the former charter-party. Beckley, who was a ship and insurance broker, and who was in the habit of chartering ships, for which he usually employed the plaintiff as stevedore, thereupon engaged the plaintiff as stevedore to load the *Caroline*. Beckley had no communication with the defendant or Adams as to employing a stevedore, but employed his own stevedore in the usual way, by handing him a card with the barque *Caroline* on it, and afterwards introduced the plaintiff to defendant as the man to stow his ship. The plaintiff thereupon proceeded with the loading, and while so employed used to see the defendant three or four times a day, on occasions when the defendant used to come on board. This the defendant did every day, and on those occasions he superintended the loading of the ship, and gave directions regarding the stowing of the cargo The vessel was loaded, and the plaintiff sent in his account to Beckley, headed, "To captain and owners," and made several applications to him for payment. In the meantime Beckley sent in his account to Adams, and Adams forwarded his account to the defendant, stowage being charged 53*l.* 3*s.* 4*d.* The defendant, who did not know of the sub-charter to Beckley, paid Adams's account, and Adams paid Beckley's account shortly afterwards, and before paying the plaintiff Beckley became insolvent, whereupon the plaintiff sought to recover his charges from the defendant.

The action came on to be tried before Quain, J., at Westminster, on 17th April 1875; at the conclusion of the evidence the learned judge directed a verdict for the defendant, on the ground that there was no liability on the part of the defendant to discharge the plaintiff's claim, and leave was reserved for the plaintiff to enter the verdict for him in case the court was of opinion that there was such liability. The plaintiff moved accordingly, and obtained a rule, which came on to be argued before Blackburn, Quain, and Field, JJ., when the ruling of Quain, J. was upheld, and the rule was discharged.

Gates, Q.C. (*Ingham* with him), for the plaintiff, the appellant.—The stevedore is by the charter-party to be nominated by the charterer, but he is to be under the control of the captain, and to be paid by the owners; the charterer is only the agent

of the owner: (*Sandemann* v. *Scurr*, 15 L. T. Rep. N. S. 608; L. Rep. 2 Q.B. 86.) The point as to privity, which is the only point at issue between the parties, has been decided by the court below in favour of the plaintiff, but the court gave judgment against him on the ground that he had elected to give credit to Beckley, and had never applied to the defendant until Beckley failed.

The counsel for the plaintiff were here stopped by the court, and *R. E. Webster* and *Johnstone* for the defendant were called on. — The plaintiff was employed by Beckley, and there is no evidence that the defendant ever employed Beckley. The plaintiff gave credit to Beckley, and never sought to charge the defendant until after Beckley had failed. There is no privity between the plaintiff and defendant, nor is there any implied liability on the part of the owner to pay the stevedore. True, the charter-party says that the stevedore is to be paid by the owners, but he has no knowledge of the charter-party, and he cannot rely upon a clause of which he has no knowledge: (See *Blakie* v. *Stembridge*, 6 C. B., N. S., 894; 28 L. J. 329, C. P.). Then again, Beckley, though sometimes acting as broker, in this case acted as charterer, and the disputed liability on the part of the owner is rebutted. Assuming that the defendant appointed Beckley, who in turn appointed the plaintiff, then the defendant would be, as regards the plaintiff, in the position of an undisclosed principal. The plaintiff having elected to give credit to the agent after the principal was disclosed, must be bound by his election: (*Thompson* v. *Davenport*, 3 Sm. Lead Cases, 327).

Lord Coleridge, C. J.—The action in this case is brought by the plaintiff, a stevedore, who has been employed to load a ship, which ship was the ship of the defendant, and had been chartered by one Adams. In the charter-party which was entered into between the defendant and Adams was a clause by which the stevedore was to be nominated by the charterer, but was to be under the control of the captain and was to be paid by the owners, and the charterers were not to be responsible for bad stowage. Then a subsequent charter was entered into between Adams, the original charterer, and a person named Beckley, and in that charter-party the same clause relative to the nomination and employment of the stevedore occurs. This being the state of affairs, Harry, the defendant, having chartered the ship to Adams, and Adams having sub-chartered the ship to Beckley, Beckley then employed the plaintiff to load the ship; and while the plaintiff was loading the ship, Harry, the defendant, comes on board, and is on board several times a day, superintending the loading, and giving instructions respecting the stowage of the cargo. The cargo is loaded, and a bill for 57*l*., the amount of the stevedore's charges, is sent early in November, headed "To captains and owners," to Thomas Eastman, &c. That bill is given to Beckley, who was the sub-charterer, and the person who had been originally instrumental in putting the plaintiff on the ship. That being the case and the money not being paid, application is made by the plaintiff, and made several times, to Beckley to pay the amount. Beckley put him off repeatedly, and on the 7th Nov., not many days after, the plaintiff came to Beckley and applied for the money; a conversation ensued, in which Beckley said he had settled with the owner, that he had no money, and could not pay. Beckley next became a bankrupt, but before he was so, the account headed, "To captain and owners," had been sent in to the defendant; defendant does not pay, and the question is, is he liable?

Two questions arise. The first is, was there a contract between the plaintiff and the defendant? Upon that point the Court of Queen's Bench have decided that there was, though Quain, J., appears to have hesitated. We are of opinion that that decision was correct, upon principles which have several times been explained in the course of the argument. If Beckley stood in such relation to the defendant that Beckley was agent for the employment of the plaintiff, then the work was done by the plaintiff for the defendant, and the defendant must pay. Is there evidence of that? The Court of Queen's Bench have held that there was. It has been contended there was not, but I should think it difficult to contend that upon that point the conclusion of the Queen's Bench should be impeached. This was the plaintiff's evidence on that point: "I saw the defendant three or four times a day on board the *Caroline*; he was there seeing to the loading of the ship and superintending the loading, and he gave me instructions to put particular cargo here or there in the ship as we went on." There is no evidence in contradiction of this; and there is further the evidence of Beckley, who says, "I introduced plaintiff to Harry as the man to stow his ship." The evidence of the plaintiff that he looked to the owner is confirmed by two documents, namely, two accounts which he made out headed, "To captain and owner;" and this again is strengthened by the course of dealing which plaintiff always pursued, which was that the loading was paid for by the owners, and the stevedore is the person employed by the owners; therefore I should have thought, if the matter had stood upon the evidence in the case, that there was abundant evidence to warrant the Queen's Bench in coming to the conclusion they have come to on this point—a conclusion in which we concur.

But then arises the question on the two important documents in the case, namely, the two charter-parties, and the operation of the clause in those charter-parties relating to the employment of the stevedore. Now the importance of the passages in those two charter-parties is not so much in favour of the plaintiff as it is against the defendant, inasmuch as the plaintiff knew nothing about this proviso. The question whether Beckley was the agent of the defendant here becomes most important, because provision is that the stevedore is to be nominated by the charterer. It is so in the first charter from the defendant to Adams, as also in the second charter-party from Adams to Beckley; the stevedore is to be nominated by the charterer, and therefore he is to be nominated by the agent of the defendant; he is to be under the control of the captain, who is the owner's representative, and he is to be paid by the owner. The effect of this shortly is that the charterer was to have the nomination of the stevedore; he was but the agent of the shipowner to nominate the stevedore, who was to be the servant of the owner, for he was to be under the control of the captain, and the owner was to pay. Therefore, whether this matter is considered by oral evidence or by the two charter-parties, still by both the liability

to pay the stevedore is thrown on the owner of the ship. The owner in the second charter-party is the same as the owner in the first charter-party, and what to my mind is more important is that Beckley was the agent of the owner to appoint the stevedore; and, therefore, I am of opinion that, both from the two charter-parties and the evidence in the case, there is a contract between the plaintiff and the defendant.

On the second question, if I understand rightly from the judge's notes, the action was decided in favour of the defendant, because, this is a case of principal and agent, and within the case of *Thonpson* v. *Davenport* (*ubi sup.*); that, I understand, to have been the ground on which the Court of Queen's Bench decided in favour of the defendant. But, with unfeigned respect for their decision I am unable to see any facts here which bring the case within that principle.

As I understand the facts, the disclosure of the principal was at a very early period; the relation of the defendant as owner of the ship was disclosed to the plaintiff while the loading was going on; and directly the loading was over, the intention of the plaintiff to sue him was manifested by sending in an account to him through Beckley, the agent. If that was at once done, and the principal then disclosed was charged, I am at a loss to see how the principle of *Thompson* v. *Davenport* can apply. The plaintiff made his charge against the defendant as early as he could through the broker; applications were made through the agent—not directly to the owner, but to the well-known agent—with the object of first getting the money from the agent if he could; and failing that, then the plantiff does what his intention all along was to do, that is, holds defendant liable and sends in his account; and also does, what all along he had indirectly done, namely, sent his account to the defendant through the agent. The facts then do not raise the principle laid down in *Thompson* v. *Davenport*, and that case has no application. The plaintiff did all he could be expected to do; he knew that defendant was the principal, and he charged him as principal. Assume that the defendant has paid Adams, it is his own fault; if when he receives Adams' account he pays this item *inter alia*, it is his own fault; therefore, whether on the facts or on the principle, or on the substantial justice of the case, though agreeing on the first point with the judgment of the Court of Queen's Bench, I cannot come to the same conclusion as they have done on the second point, and the judgment must therefore be reversed.

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

In substance three questions arise: First, was Beckley the agent of the defendant to engage the stevedore? secondly, did the stevedore give credit to the defendant? and thirdly, if he did give credit to the defendant, is he discharged?

The first question turns upon the charter-party. No doubt the stevedore was ordinarily appointed by the shipowner; still there may be a contract between the shipowner and the charterer, by which the stevedore is to be appointed by the charterer. Now has the present charter-party that effect? "The stevedore is to be nominated by the charterers, but is to be under the control of the captain and paid by the owners." In the first place, he is to be "nominated" by the charterer, the charterer does not bind himself to employ. He might have fulfilled the clause by sending a letter to the defendant nominating the plaintiff. Then the plaintiff is to be under the control of the captain; how can he be under the control of the captain unless he is appointed by the owner. The real contract is, that the stevedore is engaged by the owner, and only nominated by the charterer. What the construction of the second charter would amount to might be doubtful if "the owner" meant Adams; but Adams is only the charterer, and clearly the owner is the shipowner. By the second charter Adams substituted Beckley for himself, who was to nominate the stevedore, and therefore I come to the conclusion that Beckley was agent to employ the stevedore.

Then on the second question, did the plaintiff give credit to the defendant (because he might have given credit to Beckley), and then Beckley would be liable; but he did nothing of the kind, he says, the ordinary practice is to trust the shipowner, and in order to do that I head all my bills "To captain and owners." In the course of the employment he finds out who the owner was. Having found who he was, he sends his bill to Beckley, heading it "To captain and owners:" that was an election to sue the owners. It amounts to this: I will endeavour to get payment of the account from Beckley, but if I cannot I will apply to the owner, and he thereby elects to sue the defendant.

Then comes the third question: Is the defendant discharged by any conduct on the plaintiff's part? The account is sent in November, and payment is requested, and on the 7th Nov. the account between Adams and Harry is settled. The defendant had done nothing which could discharge the plaintiff; how can the defendant discharge himself because he has paid Adams without seeing that Adams has paid the stevedore? Adams sends in an account to the defendant, without seeing if the stevedore is paid or not, and the defendant settles it. The plaintiff then goes on pressing Beckley; he gives no credit to Beckley, but he is willing to get payment if he can. The effect of the evidence is, not that the defendant allows Beckley to settle—and I do not think the Court of Queen's Bench thought that—But that on general grounds he was entitled to settle.

Baggallay, J.A.—*Primâ facie* the owner is liable to the stevedore, but this *primâ facie* liability can be modified by surrounding circumstances. In this case there were two charter-parties. Beckley acted as the broker, and "did the ship's business." The stevedore was employed by Beckley, and was introduced by Beckley to the owner as owner. The owner was often on board, superintending; he was there not only as actual owner, but as ostensible owner. There is nothing in the charter-parties themselves inconsistent with the defendant being the owner; on the contrary, the charter-parties are quite consistent with that fact. It has been suggested that, as the charterer was to provide the stevedore, therefore the charterer was to pay; that is to say, that the stevedore was to be nominated by the charterer and paid by the captain. But there is nothing in this to take away the *primâ facie* liability of the owner. Then it is said that the plaintiff is charged by the payment by the defendant to Adams; but if A. owes money to B. and pays C., relying on the fact that C. has paid B., he must take the consequences. I think that the short statement on the judge's notes shows the

nature of the transaction. No settlement has ever taken place which amounts to a payment of the plaintiff's claim, and there cannot be said to be any payment.

Cleasby, B.—Two questions have been stated. The first is the relation between the plaintiff and the defendant, and on this the evidence shows that the stevedore always looks to the owner and sends in the account to him, and independently of the charter-parties this would be proof of the plaintiff's case. It appears to me that the language of the charter-parties is immaterial, for the plaintiff might take no notice of them, and it would be a strong thing to hold that the effect of that clause was to alter the position of the parties; and the only remaining question then is, has the plaintiff elected to give credit to Beckley? If he has, the debtor under such circumstances is discharged, but there was no election to give credit to Beckley, and there was nothing to discharge the owner.

Solicitors for plaintiff, *Scard* and *Son.*

Solicitors for defendant, *Lowless* and *Co.*

Wednesday, Jan. 19, 1876.

Hutchinson *v.* Glover.

APPEAL FROM THE QUEEN'S BENCH.

Discovery—Compromise of suit between defendant and third party—Plaintiff's right to inspect terms of compromise.

In an action by owner of cargo against shipowner, the plaintiff alleged damage in consequence of a collision with another ship, caused by defendant's negligent navigation. A compromise of cross-suits in the Admiralty Court in respect of the collision had been entered into by the respective owners of the two ships.

Held (affirming the decision of the Queen's Bench) that the plaintiff had a right to inspect the terms of this compromise.

This was an appeal from the judgment of the Court of Queen's Bench, affirming an order made by Quain, J., at judge's chambers, reported *ante* p. 85.

The plaintiffs were owners of certain bales of hemp, laden on board the ship *Burlington*, belonging to the defendants. The cargo had been damaged on the voyage, and the plaintiffs now sued in respect of such damage. The cause of damage was that the *Burlington* had come into collision with another vessel called the *Hakon Adelsteen*, and had sunk. After the collision cross suits between the owners of the two vessels were commenced in the Admiralty Court, which were finally settled by a compromise. The terms of compromise had been drawn up and settled by the parties, and the plaintiff now sought to obtain inspection of the document embodying this compromise. It appeared, however, that in the present case the former suit in the Admiralty Court was by the owner of the same ship for the damage to the goods as well as the ship. This was not mentioned in the court below before their decision, the decision did not proceed upon it, and the fact was now brought before the court upon an affidavit.

Butt, Q.C., *Clarkson*, and *Witt*, for the defendants.—The question is whether it is desirable to enforce production of this document. The original suit was brought for damage to ship and cargo. [Mellish, L.J.—The production of this document will not prevent you from objecting at *nisi prius* to its being evidence against you.] True, but it is undesirable to allow A. to produce to C. a compromise between A. and B. [Lord Coleridge, C.J.—I do not see how you are to get over the fact that the original suit was brought for damage to the ship as well as to the goods, which is the substance of this action.] *Butt*, Q.C.—I do not see how I am to argue against that fact.

Cohen, Q.C. and *Phillimore* for the plaintiff.

Per Curiam.—The judgment of the Court of Queen's Benth must be affirmed.

Solicitors for plaintiffs, *Druce, Sons* and *Jackson.*

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

Tuesday, Feb. 1, 1876.

(Before the Lord Chancellor (Cairns), Lord Coleridge, L.J., and Mellish, L.J.)

Gambles and others *v.* The Ocean Marine Insurance Company of Bombay.

Shipping—Policy of Insurance—Insurance of ship and cargo to port, "and for fifteen days whilst there after arrival"—Construction of—Deviation.

G. and others effected with the O. company a policy of insurance for 600l. on a ship. By this policy the ship was insured from the port of "Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival." The stamp was sufficient to cover a voyage and time policy.

Having arrived safely at Newcastle-on-Tyne the ship discharged her cargo, and being chartered to carry a cargo of coals to Gibraltar, she received a small quantity as stiffening, and was moved to another place within the port of Newcastle in order to complete her loading; whilst there and within the fifteen days after her arrival at Newcastle she was seriously damaged in a storm.

Held (reversing the judgment of the Exchequer Division), that the defendants were liable, as the policy was a time as well as a voyage policy, and that the loss sustained was within the risks covered by the policy.

Appeal from Exchequer Division.

The action was upon a policy of insurance, effected by the plaintiffs with the defendants, for a sum of 600*l.*, upon a ship of the plaintiffs', from "Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival,"

A case was stated, without pleadings, for the opinion of the Court of Exchequer, and was argued in Nov. 1875.

The question for the opinion of the court below was, whether the plaintiff was entitled to recover on the policy for damage sustained by the ship within the fifteen days after arrival at Newcastle, but after discharge of her cargo, and whilst loading another cargo in another part of the port.

The court below (Kelly, C. B. and Amphlett, B.) gave judgment for the defendants (Cleasby, B. dissenting), and from this judgment the plaintiffs now appealed.

The case below, with the arguments and judgments, will be found fully reported *ante*, p. 92.

Herschell, Q.C. (with him *Rolland*), for the appellants, the plaintiffs below.—There is nothing in the case to cut down the plain meaning of the words the parties used. The very object of in-

serting the words "and for fifteen days whilst there after arrival" was to cover what really happened. There is nothing to show that the ship carried cargo at all. She might have been in ballast. He cited

Mercantile Marine Insurance Company v. *Tithering-ton*, 11 L. T. Rep. N. S. 340; 34 L. J. 11 Q.B.; 6 B. & Sm. 755;

Haughton v. *Empire Marine Insurance Company*. 2 Mar. Law Cas. O. S. 406; 15 L. T. Rep. N. S. 80; L. Rep. 1 Ex. 206;

1 Phillips on Insurance, p. 950.

The cases on deviation referred to by the Lord Chief Baron below do not apply to the present case.

Cohen, Q.C. (with him *Crawford*) for respondents, defendants below.—The policy contains words which show clearly that cargo was to be on board. Words referring to general average necessarily imply cargo. The usual policy covers the voyage, and twenty-four hours after, and this additional period of fifteen days, which has been added in this case, was intended to apply "whilst there," which means, whilst at the place where she was discharging her cargo. She must remain there until she has discharged her cargo, or she may move from place to place in that port, and discharge her cargo in parcels; but she must not undertake any new adventure, or do anything, as she did here, unconnected with the voyage for which she is insured: (Arnould on Insurance, 3rd edit. 472: *The Company of African Merchants (Limited)* v. *The British and Foreign, &c., Company, ante*, vol. 1 p. 558; 28 L. T. Rep. N. S. 233; L. Rep. 3 Ex. 154; 42 L. J. 6, Ex.) Suppose an ordinary Lloyd's policy, making it "lawful for the ship to stay at any port." It is settled that she must stay for a purpose connected with the voyage to be within the policy, add fifteen days, and the maxim that the accessory follows the principal applies.

Herschell, Q.C. replied.

The Lord Chancellor (Cairns).—In this case there is a policy of insurance upon a ship "from Pomaron to Newcastle, and for fifteen days whilst there, after arrival." The ship arrived at Newcastle, unloaded her cargo, and, having moved afterwards to another part of the harbour, took in stiffening for her fresh voyage, and was lost in the harbour. The question for our consideration is, are the underwriters liable? This ship was unquestionably lost whilst at the port of Newcastle within the fifteen days, and under circumstances within the words of the policy. But it is contended for the defendants, and the grounds of the decision of the learned judges below are, that this was a voyage policy, and therefore everything in the policy must be construed so that the risk may be considered to cover all that is done with reference to the voyage and nothing more, and that the fifteen days must be construed with reference to the voyage only; and if during those fifteen days the ship was doing anything with reference to the voyage, the underwriters are liable, otherwise not. Now that I think is assuming the whole case. Is this purely a voyage policy? Undoubtedly, so far as the voyage from Pomaron to Newcastle is concerned, it is a voyage policy; but unless the words immediately following, "and for fifteen days, whilst there, after arrival," have obtained some peculiar mercantile meaning, the addition of these words carries the persons interested in the policy over a further period of fifteen days, and then as to that period it is not a voyage policy, but a time policy. It appears to me that there is no authority for the view of the judges below, and that their judgment was founded upon no hypothesis except that of this being a voyage policy only. Unless that hypothesis is conceded, the authorities to which the Chief Baron referred do not apply, and I think the hypothesis cannot be conceded. The case of the *Mercantile Marine Insurance Company* v. *Etherington* (*ubi sup.*), where the ship was insured "at and from Liverpool to any port or ports in the North and South Pacific Oceans, and during thirty days' stay in her last port of discharge," with a clause that the insurance should continue until "she hath moored at anchor twenty-four hours in good safety"—is much more applicable to the present case than the other authorities, because there the voyage was treated as one separate thing to this extent, that the twenty-fours, the usual time, was added after the arrival of the ship at the termination of her voyage, and then upon that was engrafted the stipulation her safety for thirty days. Surely in that case the two things must be treated as being separate, and I think so here. I am of opinion that the appellants are entitled to recover.

Lord Coleridge, C.J.—I am of the same opinion. The argument of Mr. Cohen impressed me at first that the case of *The Company of African Merchants* v. *The Bristol and Foreign, &c., Co.* (*ubi sup.*), where the words "stay and trade," were in a policy, and it was held to be a deviation to undertake any adventure unconnected with the trade of the African coast, applied here, and that, on that principle, in the present case any risk unconnected with the object of the voyage is a deviation from the risks covered by the policy; but that view assumes this to be a voyage policy, and a voyage policy only. Another point is that the usage, as to policies covering the risks incurred twenty-four hours after the ship's arrival in port, should be extended to the fifteen days in this case. I do not take this view. We must give the ordinary meaning to words unless it is shown that there is some usage which has deprived those words of their ordinary sense. Here the words are that the insurance is to last "for fifteen days whilst there after arrival," and there is no usage to restrict their meaning. The loss happened within the fifteen days in the port, and hence was within the policy. I am of opinion that the risk was covered by the policy.

Mellish, L.J.—I am of the same opinion. I think there is no sufficient reason to depart from the plain meaning of the words used in the policy. If the words had been simply "for fifteen days after arrival" it might be necessary to limit the construction to be put upon them, because the underwriters could hardly have intended to be liable for a ship going out to sea within that time; but the express words, "whilst there," show that the stipulation is that the underwriter is to run the risk of what may happen to the ship whilst in the port. If we held otherwise, we should defeat the object of the shipowner in insuring in these terms, because what he wants is that his ship may be always covered. In the usual way a shipowner insures until a ship arrives and twenty-four hours afterwards, and then insures "at and from for the next voyage," and so keeps his ship always in-

sured. But to do this he must know what his next voyage will be. If he does not know it may be convenient to him to insure so that his ship may be covered for a time certain, so that he may know when the risk will terminate. If we should make that time uncertain by deciding that it meant that it terminated on the completion of the delivery of the cargo, the shipowner's object would be defeated. I think the words used here were intended to meet this particular case.

Judgment for appellants. Judgment below reversed.

Solicitors for plaintiffs, *W. W. Wynne*, for *H. Forshaw* and *Hawkins*, Liverpool.

Solicitors for defendants, *Freshfield* and *Williams*.

Monday, Feb. 7, 1876.

(Before James and Mellish, L.JJ.; Baggallay, J.A.; and Mellor, J.)

The Sisters.

Collision—Appeal—Nautical assessors—Credibility of witnesses—Contributory negligence—Act causing collision—Must be negligent.

On an appeal from the Admiralty Division, the Court of Appeal, when unassisted by nautical assessors, will not reverse a finding of the court below upon a question of fact depending upon the credibility of witnesses regarded from a nautical point of view, provided that there is evidence in support of that finding.

Before a plaintiff in a collision cause can be deprived of his right of recovery against a negligent defendant by reason of an act done by the plaintiff, without which the collision would not have occurred, it must be shown that such an act of the plaintiff was negligent.

This was an appeal from a decree of the Right Hon. Sir R. Phillimore, Judge of the High Court of Admiralty, in a cause instituted on behalf of the respondents, the owners of the sailing barge *Alfreda*, against the sailing barge *Sisters*, belonging to the appellants, for the recovery of damages arising from a collision which occurred between a screw steamship called the *Thames* and the barge *Alfreda*.

The collision occurred at about noon on the 15th Oct. 1874, off Jenning-tree Point, in the river Thames.

The respondents in their petition stated that the *Alfreda*, a sailing barge of 40 tons registrar, was proceeding from Elmley, in Kent, to Millwall, with a cargo of cement, and was at the entrance of Halfway Reach; that the wind was about S.W., blowing a fresh breeze; that the weather was fine and the tide nearly half flood, and of the force of about three to four knots per hour; that the *Alfreda* was under sail, and was making about six knots an hour, heading about north; that another sailing barge, called the *Volunteer*, was also sailing up, and was on the starboard side of the *Alfreda*, and a short distance from her; and that the *Sisters* was also sailing up ahead of and distant three or four lengths of the *Alfreda;* that at such time the *Sisters* improperly starboarded her helm, and threw herself across the bows of the *Thames*, which was coming down the river near the south shore, and compelled the *Thames* to starboard her helm, in order to avoid running over the *Sisters;* that thereby immediate danger of collision between the *Thames* and the *Alfreda* was occasioned, and although the helm of the *Alfreda* was put hard a port, the *Thames* with her stern struck the *Alfreda* on her port quarter, causing her to sink.

The appellants in their answer alleged the same facts as to the time, speed, wind, and as to the relative position of the barges, and that the *Sisters*, the *Alfreda*, and the *Volunteer*, were all keeping as close to the south side of the river as they could get, and the *Sisters* had her head looking in towards the south shore, to counteract the effect of the flood tide, which sets strong from off Jenning-tree Point over towards the north side of the river; that there was some barges at anchor on the south side of the river near Jenning-tree point; that the *Thames* was seen by those on board the *Sisters* on the starboard bow of the *Sisters*, rounding the point on the south side of the river; that the *Thames* approached the *Sisters* rapidly, and in a direction to run into the *Sisters* on her starboard side, and rendered a collision inevitable, when the master of the *Sisters*, as the only means of saving his vessel from being sunk by the *Thames*, put his helm hard to starboard; that this caused the *Sisters* to strike the sand barge *Emma*, one of the barges at anchor before mentioned, and drove the *Emma* a short distance in shore; that the head of the *Sisters* being held by the *Emma*, the *Sisters* swung round with her stem towards the north, and as she was swinging round the steamship *Thames* passed astern of her, slightly touching her rudder and carrying away her boat, which was towing astern. The answer then denied the allegations of the petition, and alleged that even if there was negligent navigation on the part of the *Sisters*, it was not such as to cause the collision between the *Thames* and the *Alfreda;* that the collision was caused by the improper navigation of the *Thames*, which neglected to keep out of the way of the *Sisters;* that the *Thames*, by the exercise of reasonable skill and care, might have avoided the collision with the *Alfreda;* that the *Alfreda* improperly ported her helm; that the *Alfreda*, by the exercise of reasonable skill and care, might have avoided the collision with the *Thames*.

The main questions of fact at the hearing were, whether the *Thames* was coming down on the port or the starboard bow of the *Sisters;* whether there was room for the *Thames* to go between the *Sisters* and the south shore; and whether the *Alfreda* in any way contributed to the collision. These questions had been before the court in another action brought by the owners of the barge *Volunteer* against the *Thames*, in which the latter vessel had been held not to blame for the collision. (See *ante*, Vol. 2, p. 512; 32 L. T. Rep. N. S. 343)

The findings of the court below on the questions of fact will be found in the following judgment of

Sir R. Phillimore.—This is a case of collision which happened on the afternoon of the 15th Oct. 1874, in the entrance to Half-way Reach, in the river Thames, and off that point that is called Jenning-tree Point. The tide at the time was running about half flood, and from three to four knots an hour. The vessel who brings the action on the present occasion is a sailing barge called the *Alfreda*, of 40 tons register. She had three persons on board; two of them unfortunately were drowned at the time of this collision. The wind, I should observe, was about S., or S. by W. Now there is a peculiarity in this case which I will mention. The suit is not brought against

the actual wrong-doer, but it is brought against the vessel which caused the actual wrong-doer to do the wrong, and that vessel is the *Sisters*, a sailing barge of about 42 tons. Now I must observe that this is not the first time that this case has been before the court, because on the 29th Jan. a vessel called the *Volunteer*—which was side by side with the *Alfreda*, and practically considered by the court then and now as being almost one vessel—brought her action against the *Thames*, and the *Thames* was dismissed, on the ground that the wrong that she did she was forced to do—namely, that she was compelled to starboard, and that starboarding caused her to run into the *Volunteer* after cutting through the *Alfreda*. It has been very truly remarked by Dr. Spinks, who appears on behalf of the *Sisters*, to-day, that the *Sisters* is not concluded by that judgment. She was not heard then; she had no witnesses produced; she was neither plaintiff nor defendant, and she has a right to be heard to-day. The first question which the court has to decide is, whether the steamer was compelled by the *Sisters* to starboard. Now in this case there were a great many barges, a small fleet of barges, going up the river, round Jenning-tree Point when the steamer was coming down, and I am satisfied upon the evidence that the steamer did not pass Jenning-tree Point rashly; but I think, as I thought on a former occasion, with the advice of the Elder Brethren of the Trinity House, that she was in her right in what she did. She was on the south side of the river—she was going down—she had a clear eye, as sailors say, before her at the time, and there was a considerable distance, having regard especially to the steamer herself, which was not a very large one; there was sufficient space for her between the barge and the land to go without danger of collision. The point of the greatest importance to decide in this case, as I must say it was on the former occasion, is, whether on the present state of the evidence, and taking duly into my consideration the further testimony produced on behalf of the *Sisters*, whether the conclusion be that the steamer was on her starboard or on her port side. Now I am satisfied myself that the witness who was the mate of the steamer, namely, Smith, has given a truthful account to the court. I thought so on the last occasion, and I think so now. He was forward at the time of the collision. He says he expected the vessels to pass port to port, and there was in his judgment no danger if they had so done, and he says that the *Sisters* starboarded when two points on the port bow. That is the evidence which, after examining the testimony given by the other witnesses, I rely upon; and not the less so, because I think it is confirmed by some of the witnesses produced on behalf of the *Sisters*, more especially by the witness Bailey, who was master of the barge *Christiana* which was sailing up—and this is a fact which never came to the knowledge of the court before—which was sailing up ahead of the *Sisters*, as several other barges were. He said that if both vessels had kept their course the *Thames* would not have touched the *Sisters;* and he said that he passed her himself on the outside—that is, on her port hand; and that there were other barges between him and the *Sisters*, all of whom passed on the port side and outside the steamer. Now, the defence of the *Sisters* is as follows:—It comes, I think, under three categories. The first appears to me this category—that there is evidence which negatives her having caused the collision. She says, "I was not on the port bow, I was on the starboard bow; and if I had not starboarded and run into this other vessel, I should have been run into and cut to pieces." I do not believe that evidence, and that disbelief is the necessary consequence of my belief in what I have already stated, namely, the evidence of the mate and the other witnesses who support him, that she was on the port bow and not on the starboard bow at the time she starboarded. I believe that in the hurry and alarm she starboarded her helm and threw herself across the bows of the steamer. Well, the next defence is that the *Thames* herself, the steamer, was improperly navigated. I have already expressed my opinion upon that point. I do not think she was, nor do the Elder Brethren of the Trinity House think she was, improperly navigated. The third category of the defence is that the *Alfreda* herself, by improper conduct either caused entirely or contributed to this collision. When it is remembered that from the time the *Thames* had put her helm a-starboard, as compelled to do by the action of the *Sisters*, to the time of her running into the *Alfreda*, not more than two or three minutes elapsed at the very most, the Elder Brethren agree with me in thinking that whether the *Alfreda's* manœuvre was proper or improper in porting instead of starboarding (we by no means say it was the latter), but whether it was proper or improper, it cannot be holden in any fair sense to have contributed to this collision. I therefore am of opinion that the collision was caused by the starboarding of the steamer; that the starboarding of the steamer was caused by the improper manœuvre of the *Sisters* in crossing the bows of the steamer; and, therefore, that the real wrong-doer in this case is not the steamer, which dealt the blow, but the barge, the *Sisters*, which caused that blow to be dealt; and therefore I must pronounce that the *Alfreda* has made out her case, and that this collision was owing to the improper navigation of the *Sisters*.

From this judgment the owners of the *Sisters* appealed.

Dr. *Spinks*, Q.C., *Butt*, Q.C. (*G. Bruce* with them) for the appellants.—The evidence shows that the *Sisters* was obliged to starboard to avoid collision with the *Thames*. But even if there was negligence on the part of the *Sisters*, there is not liability because the *Alfreda's* act brought about the collision. If but for the act of the *Alfreda* in porting no collision would have occurred, then there can be no liability on the part of the *Sisters;* and this would be the case although the *Alfreda* was doing nothing wrong or negligent because, as her porting brought about the collision, the negligent act of the *Sisters* was not the proximate cause of the damage. If the *Alfreda* could have avoided the collision by starboarding she ought to have done so or at least to have kept her course; it must have been wrong to port; there was no danger until she did port, and she therefore brought about the collision, and, as matter of law, we submit that the *Sisters* cannot be made responsible for the ensuing damage. Further we submit that the *Thames* is not absolved from liability, because in order to avoid sinking one vessel she takes a step by which she avoids that one and sinks another.

Dr. *Deane*, Q.C., and *E. C. Clarkson*, for the respondents, were not called upon.

JAMES, L.J.—I am of opinion that no sufficient ground has been shown for supporting this appeal. The question is whether the *Sisters* was the actual cause of the mischief done? There is abundant evidence in support of the contention that she did cause that mischief. There is, no doubt, counter evidence; and, although I cannot say what I might have decided if I had tried the action in the first instance, I can see no sufficient ground for disturbing the finding of the court below. The case was heard by the learned judge of the Admiralty Court assisted by nautical assessors, and they, proceeding very much upon the ground of the credibility of witnesses regarded from a nautical point of view, arrived at the conclusion that the cause of this collision was the improper starboarding of the *Sisters*, and there is nothing to show that the finding was against the evidence.

The other question raised before us is whether, it having been found that the *Sisters* was the cause of the collision, there was any contributory negligence on the part of the *Alfreda*. To disentitle the *Alfreda* to her right of recovery there must have been contributory negligence, that is to say, an act of negligence on her part contributing to the collision. Therefore the question is whether there was any act on the part of the *Alfreda* which would come within the meaning of the word "negligence?" It is not enough to show that the *Alfreda* did some act or did not do some act by reason of the commission or omission of which the collision actually occurred. It is impossible to hold that the *Alfreda* is guilty of negligence, because she might have avoided the collision if she had done something other than she actually did unless that omission was negligent, and I am of opinion that she has been shown to be guilty of no negligence. I am therefore of opinion that the appeal must be dismissed with costs.

MELLISH, L.J. and BAGGALLY, J.A. concurred.

MELLOR, J.—I am of the same opinion. I feel the greatest difficulty sitting here in the Court of Appeal in dealing with a mere question of evidence. We are not assisted by nautical assessors, and cannot therefore judge whether the evidence as it stands ought from a nautical point of view to have led to a different conclusion. I do not see how the court can in such a case upset a judgment where the matter has been fully dealt with with reference to the credibility of witnesses in the court below. *Appeal dismissed.*

Solicitors for the appellants, *Deacon*, *Son*, and *Rogers*.

Solicitors for the respondents, *Keene* and *Marsland*.

HIGH COURT OF JUSTICE.

ADMIRALTY DIVISION.

Reported by JAMES P. ASPINALL, Esq., Barrister-at-Law.

Jan. 11 *and* 12, 1876.

(Before Sir R. PHILLIMORE.)

THE POLYMEDE.

Proceeding in rem by default—Rules in force—Supreme Court Rules, Order XIII., r. 10*—Supreme Court Rules, Dec.* 1875*—Admiralty Court additional rules,* 1871.

Order XIII., rule 10 *of the rules of the Supreme Court as to proceedings in rem by default being annulled by the rules of the Supreme Court, Dec.* 1875, *the effect of such annulment is to bring into force, under and by virtue of the Supreme Court of Judicature Act* 1875, *sect.* 18, *the Admiralty Court additional rules,* 1871, *as to proceedings in rem by default.*

THIS was an action commenced on 3rd Nov. 1875, on behalf of the mortgagees of eight sixty-fourth shares of the *Polymede* against the owner of those shares. The action was *in rem*, and a writ was issued under Order II., rule 7, of the rules of the Supreme Court, and was duly served upon the vessel, and the vessel was arrested. No appearance was entered by any person. After the time limited for appearance had expired, the plaintiff's solicitors, on 17th Nov. 1875, filed in the registry an affidavit of service of the writ, a statement of the particulars of the plaintiffs' claim, and on 28th Dec. 1875, entered final judgment for the amount of the plaintiffs' claim, and taxed costs in accordance with the provisions of Order XIII., rule 5 of the rules of the Supreme Court. The cause now came before the court upon motion on behalf of the plaintiffs for a decree for the appraisement and sale of the eight sixty-fourth shares.

By the rules of the Supreme Court (in the schedule to the Judicature Act 1875), Order XIII., rule 10, it was in effect provided that the practice in existence under the Admiralty Court Rules 1859, in respect of proceedings by default, should be in force under the Judicature Act (see Admiralty Court Rules 1859, rr. 18, 19, 20, 21, 22, 23, 24, 25, 26, Williams and Bruce, Admiralty practice, pp. xxix., xxx.) By the rules of the Supreme Court, December 1875, made on the 1st Dec. 1875, Order XIII., r. 10 of the rules of the Supreme Court, was annulled, without any rule being expressly substituted for it. By the 18th section of the Supreme Court of Judicature Act 1875, it is provided that "all rules and orders in force at the time of the commencement of this Act in . . . . the Admiralty Court . . . . except so far as they are expressly varied by the first schedule hereto or by rules of court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively, until they shall respectively be altered or annulled by any rules of court made after the commencement of this Act." The rules as to proceedings by default in the Admiralty Court Rules 1859, were repealed by the Admiralty Court additional rules 1871 (see L. Rep. Adm. and Ecc. 612), and the following rules were thereby substituted:

4. If within twelve days after service of a warrant or citation no appearance shall have been entered in the cause, the proctor for the plaintiff may file his petition; and if within twelve days from the filing of the petition no appearance shall have been entered, the plaintiff's proctor may, on bringing in his proofs, set the cause down for hearing.

5. If, when the cause comes before the judge, he is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim with or without a reference to the Registrar, or to the Registrar assisted by merchants, and may at the same time order the property to be appraised and sold, with or without previous notice, and the proceeds to be paid into court, or may make such order in the premises as to him shall seem just.

E. C. Clarkson in support of the motion.—Order XIII., rule 10 having been annulled, there

is no special mode of procedure provided by the Judicature Acts for proceedings *in rem* by default. Hence the general rules of Order XIII. are applicable, and as the writ in the case is not specially indorsed, and the demand is liquidated, the plaintiff has complied with the provisions of Order XIII., rule 5, and was in consequence entitled to sign judgment. Having judgment, the plaintiff asks the court to enforce it according to the ordinary process of the court in proceedings *in rem*, namely, by appraisement and sale. [Sir R. PHILLIMORE—Is not the effect of the annulment of Order XIII., rule 10, to revive the practice of the Admiralty Court under the rules of 1871?] I submit not, as the mode of proceeding is sufficiently provided for in the other parts of the order.

Cur. adv. vult.

Jan. 12.—Sir ROBERT PHILLIMORE—This is the first case in which the question has had to be considered by the court whether the rules of court, which form part of the Judicature Act 1875, apply to an action *in rem* when the proceedings are by default. What the court really has to decide is this: Are the rules of Order XIII., in the schedule annexed to the Judicature Act 1875, applicable to a cause *in rem* in default; or ought the practice prevailing in the Court of Admiralty immediately before the coming into operation of the Judicature Acts, still to be enforced in such cases?

Now Order XIII. in the schedule of the Judicature Act 1875, is headed "default of appearance," and consists of ten divisions or paragraphs, of which the tenth, or last, is subdivided into a great many sections relating exclusively to the proceedings in Admiralty actions *in rem* in which an appearance has not been entered. It is to be presumed, therefore, that the framers of the rules were of opinion that the first nine paragraphs of this order were not to be applied to Admiralty proceedings *in rem*. Now, at a meeting of the judges of the Supreme Court, held on the 1st December last, in pursuance of the Judicature Act 1875, the tenth paragraph of Order III. was annulled, and no other rule was substituted for it. In these circumstances it has been suggested to me that the fifth paragraph of the order, being sufficient on its face to apply to a judgment by default in an Admiralty action similar to that before me, has been rightly followed in this case, but I am of opinion that that is a position which cannot be successfully maintained.

In the first place, as I have already said, the insertion of the paragraph which has now been annulled shows that the framers of the rules did not consider that the previous paragraphs of the order were sufficient for the purpose of laying down any rules with regard to proceedings *in rem*, and, in fact, it was admitted by Mr. Clarkson that neither the fifth paragraph, nor any other of the paragraphs which remain unannulled, could be said to apply to all cases of proceedings *in rem* by default; and, in the second place, the 18th section of the Judicature Act 1875, provides that "All rules and orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in bankruptcy matters, except so far as they are expressly varied by the first schedule hereto, or by rules of court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively, until they shall be respectively altered or annulled by any rules of court made after the commencement of this Act." In my judgment, the effect of the annulment of the tenth paragraph of the order as to default of appearance, Order XIII. is to revive the practice previously existing in the High Court of Admiralty with regard to proceedings by default *in rem*, and I must, therefore, pronounce that such practice must be followed in the present case.

I shall make no order on the motion, but I shall direct the costs of the motion to be costs in the cause.

Solicitors for the plaintiffs, *Ingledew, Ince*, and *Greening*.

Tuesday, Feb. 1, 1876.

(Before the Right Hon. Sir R. PHILLIMORE.)

THE BIOLA.

Discovery — Interrogatories — Collision—Preliminary acts.

In an action of damage by collision in the Admiralty Division, interrogatories which seek to obtain information given in the preliminary act of the party interrogated are inadmissible, and will be struck out on the application of the party sought to be interrogated.

THIS was an action of collision, instituted on behalf of the owner of the brigantine *Carthagenian* against the Swedish barque *Biola* and her owners intervening, and preliminary acts had been filed as usual. The plaintiff had delivered his statement of claim, and the defendant had delivered his statement of defence and counter claim, and before the close of the pleadings the plaintiff delivered to the defendants, under the provisions of the rules of the Supreme Court, Order XXXI., rule 1, the following interrogatories:—

1. Were you, in the month of November, 1874, acting as master of the Swedish vessel *Biola*?

2. Did you, on the morning of the 30th November, come into collision with any ship or vessel; if yea, what was the state of the weather and tide at such time?

3. Did you, at that or any other time, send away any boats, or do any and what other acts to ascertain the damage sustained by the other vessel?

4. What was done on board your vessel when the other vessel was first seen? On what tack was your vessel when the other vessel was first seen, and state whether your vessel held her course or whether her course was altered? If it was so altered, say how it was altered, and to what extent, and how soon after the other vessel was first seen?

5. Did you see the other vessel before the collision, and if you did for how long a time, and at what distance from you was she when you first saw her, and did you see any lights on board the other vessel, and if you did, say what lights you first saw, and whether any other lights on board the said vessel were afterwards seen by you and when?

6. What lights had you (if any) burning on board the *Biola* at the time of the collision, or at any time shortly previously to the collision, or shortly subsequent thereto; state accurately two positions and colours of the set lights, and the dimensions of the lanterns (if any) in which they were contained. Had you any white or bright lights exhibited on board the *Biola* shortly before the collision?

7. If any damage was done to the *Biola* by the collision, state to what extent, and say what part of the *Biola* was damaged by the collision.

8. Were you, at the time of the said collision, on a voyage to Fleetwood and off the coast of Wales, and if so, state how far off the coast you were at the time, and what course you had been steering immediately before the collision, and before you saw the vessel with which you came into collision.

9. Did you, at the time of the collision, or shortly before, or after that time, take any and what steps to ascertain the exact position of the *Biola*. If so, state by means of crossbearings or otherwise what such position was, and did you take any and what steps between the time of the collision and the time of sunrise to ascertain what had become of the other vessel. Did you see her after the collision, and if so say in what direction you saw her, both as to bearing by compass and relating to your own vessel?

The said John Bergland, one of the defendants, is required to answer all the above interrogatories.

The defendants thereupon took out a summons calling upon the plaintiffs to show cause before the Registrar why the interrogatories should not be struck out. On the summons coming on, the Registrar referred it to the court.(*a*)

Clarkson, for the defendants, now moved to strike out the interrogatories, contending that before the passing of the Supreme Court of Judicature Acts they would not have been allowed in this court, and that there was nothing to alter the practice in those Acts or the rules thereto; every question asked was answered by the defendant's preliminary act or his statement of defence. [Sir R. PHILLIMORE.—Before I can allow these interrogatories the plaintiff must show me some good reason; I shall, therefore, not trouble you further until I have heard your opponent.]

Gainsford Bruce for the plaintiffs.—By the rules of the Supreme Court a party acquires a right to deliver interrogatories; formerly the parties had to obtain leave, now it may be done without leave. [Sir R. PHILLIMORE.—There is not an absolute right to deliver any interrogatories a party chooses.] Subject to rule 5 of the same order, by which any party may apply to strike out any interrogatory "on the ground that it is scandalous or irrelevant, or is not put *bonâ fide* for the purpose of the action, or that the matter inquired after is not sufficiently material at that stage of the action, or on any other ground." These are the only grounds upon which interrogatories can be struck out. [Sir R. PHILLIMORE.—If I can strike them out upon "any other ground," that surely gives me the widest discretion.] "Any other ground" must be some similar ground to those mentioned before, and no such ground can be suggested. If we do not get these interrogatories answered, we may be compelled to call evidence on points which would be admitted in the answers. [Sir R. PHILLIMORE.—All the facts you interrogate about will appear stated upon the defendant's preliminary act, and this will be the strongest admission against the defendants.] But the preliminary act would not in itself be evidence on which we could go to trial. [Sir R. PHILLIMORE.—It certainly would as against the defendants, and you can get no more information out of these interrogatories.] These are interrogatories which would be allowed in any other division. [Sir R. PHILLIMORE.—Has there been any instance since parties were bound to file preliminary acts in all the divisions?] I know of no instance, but in the other divisions interrogatories supporting the plaintiff's case are always allowed.

Sir R. PHILLIMORE.—Exercising the discretion I have under Order XXXI. rule 5, I shall certainly strike out these interrogatories. The plaintiff has the information sought in the defendant's preliminary act.

Solicitors for the plaintiff, *Stocken* and *Jupp*.

Solicitors for the defendants, *Ingledew*, *Ince*, and *Greening*.

(*a*) It is questionable whether the Registrar of the Admiralty Division can hear summonses relating to interrogatories except by consent; nevertheless it constantly happens that such matters are brought before him. His powers are mainly derived from the Rules of the Supreme Court, Order LIV., rule 2; but it is also contended that he can exercise all the powers of a judge of this division because he was a surrogate of the judge of the High Court of Admiralty.—ED.

QUEEN'S BENCH DIVISION.

Reported by M. W. MCKELLAR, J. M. LELY, and R. H. AMPHLETT, Esqrs., Barristers-at-Law

Jan. 18 *and Feb.* 8, 1876.

HINGSTON v. WENDT.

Shipping—Average—Services to cargo only—Lien for charges—Agent's promise to pay.

Plaintiff, a shipping agent, was put into possession of a stranded vessel by the master, and by his order rendered services to, and paid money for the cargo, placing it in a warehouse under lock and key. The vessel broke up and was sold as a wreck. Defendant obtained the bill of lading, and through his agent claimed the cargo. Plaintiff, upon a promise of the agent that defendant would pay all his costs and charges, delivered up possession; but defendant afterwards refused to pay more than his general average of discharging expenses, and plaintiff brought this action in the County Court for the balance.

Held, upon appeal, that, under the circumstances, just as in general average and salvage, the plaintiff had a lien on the cargo for his charges, and that therefore the defendant was liable upon his agent's promise to pay the whole of plaintiff's claim.

APPEAL from Devon County Court, holden at Kingsbridge.

This was an action wherein the plaintiff sought to recover 48*l.* 1*s.*, being the balance of the following particulars of work done and payments made in respect of the cargo of the German brigantine *Theodor*, which went ashore at Hope Cove, between Dartmouth and Plymouth, on the 14th Feb. 1874.

1874.		£	s.	d.
Feb.	To paid labourers discharging cargo and allowance	35	12	0
	Cartage	0	16	0
	Labour about cotton seed, one week per your special order	0	18	0
	Your proportion of account paid cottager for attendance, use of cottage and refreshments during wreck	0	13	9
	Cartage of cargo	1	7	0
	Do. do.	1	4	0
	Proportion of posting charges, say	3	3	0
	Do. of telegrams and porterage thereof, and messengers	1	10	0
	Labour about cargo to 28th Feb., by your order	0	18	0
	Your proportion of personal expenses till we were able to deliver the cargo to you	4	4	0
		50	5	9
	Commission on above advances	2	10	0
	Our agency and superintending discharge of cargo and trouble on this business	10	10	0
		63	5	9
June,	By cash of E. E. Wendt, Esq., say his cheque	21	17	0
		41	8	9

It was proved, on behalf of the plaintiff, a ship agent, living at Dartmouth, Devon:

1. That the plaintiff was put into possession of the vessel and cargo by the master of the said vessel, *Theodor*, almost immediately after she was stranded.

2. That whilst in such possession the plaintiff rendered the services to the cargo and paid, by order of the master, such moneys in respect thereof as is stated in the said particulars, and the plaintiff placed the cargo in a warehouse in safety under lock and key.

3. That the defendant afterwards, as the holder of the bill of lading of the said cargo, claimed to be entitled thereto, and presented such bill of lading to the said plaintiff, and demanded possession thereof by his agent, Julian Slight, R.N.

4. That the said Julian Slight, by a verbal promise, expressly promised the said plaintiff that he should be paid his costs and charges for the services so rendered to the cargo, whereupon the said plaintiff delivered up the possession of the said cargo to the said Julian Slight.

5. That the charges of the plaintiff were fair and reasonable.

6. That the plaintiff, having subsequently forwarded the particulars of his charges as above stated to the said Julian Slight, received from him a letter, dated 26th May, 1874, of which the following is an extract:—

I forwarded your letter to London the same day I received it. Mr. Wendt came to Plymouth the next day, when I particularly asked him to settle your account, and he promised me he would give it his best attention immediately he arrived in town; so I was in hopes you had received your money.

7. Subsequently the defendant wrote to the plaintiff on the 16th June 1874, as follows:—

I have now before me your note of charges, and in the first place must at once say that I have no funds out of which to pay you agency or commission. I need not, therefore discuss the question as to whether you could, under the circumstance, have been entitled to charge such. From your account of:

	£	s.	d.	£	s.	d.
				50	5	9
I therefore deduct the personal expense	4	4	0			
And the discharging	35	12	0			
				39	16	0
Passing the remainder without comment ...				10	9	9
Of the discharging I credit you				11	8	0
And I enclose cheque for				21	17	9

The receipt of which please acknowledge. The latter figure, 11*l.* 8*s.*, I arrive at by treating the discharging expenses as general average, which they undoubtedly are, and as you hold net proceeds of ship, 64*l.*, while I hold net proceeds of cargo, 30*l.*, it follows that my contribution to the 35*l.* 12*s.*, is the sum herewith paid to you.

8. To which the plaintiff, on the 17th June 1874, replied,

We have your favour of 16th instant, enclosing cheque, 21*l.* 17*s.* 6*d.*, for which we thank you. We must regret the view you take of our disbursements *re Theodor*, with which, of course, we do not agree. We trust that you and Captain Slight will reconsider your determination, as we did everything in our power to meet his and your wishes, which we think he is bound to confirm. As the matter stands at present, without speaking of agency and interest, we are actually 28*l.* 8*s.* out of pocket in preserving the cargo of *Theodor*.

And in a subsequent letter, dated 26th June 1874, the plaintiff further wrote to the defendant,

We hope and believe that, after your getting full particulars from Captain Slight, the matter will be amicably settled. The stores were landed before the cargo, and the vessel, after discharge, was sold for 95*l.* or 100*l.*, and she broke up where she lay.

And the correspondence terminated by the two further letters from defendant to plaintiff, dated 3th June 1874, and 4th July, 1874, respectively, as follows:—

Theodor. Your letter of the 26th inst. is to hand, and in reply I may mention that the buyer of the hull would evidently in the first instance have been obliged to discharge the cargo. Still, your information as to the fate of the vessel makes the case appear in a somewhat different light, and although I cannot meet you in the way you desire, I will, to cut the matter short, make you the following offer. The proceeds in hand are 19*l.* 1*s.* 9*d.*, and I am prepared to pay you one half thereof, viz., 9*l.* 10*s.*, in full, taking for my trouble in the case no remuneration whatever. Beyond this I cannot go, and I shall be glad if you will accept this proposal.

Your letter of yesterday is to hand, and I hasten to say in reply that if you do not choose in course of post to accept the *ultimatum* transmitted to you in my previous one, I shall remit the balance to my clients, and leave you to take any further course you please.

9. It was proved on behalf of defendant that the said Julian Slight had no general authority from him to undertake for the payment of expenses, and that he had no special authority to do so in this case.

10. It was contended by the plaintiff's attorney that the plaintiff had a lien upon the cargo for the said costs and payments, and that the defendant was bound by the verbal promise of the said Julian Slight for the payment thereof, and also that the defendant was liable to the plaintiffs on the letters above set out.

11. It was contended by the defendant's attorney that the plaintiff had no lien upon the cargo for the expenses of discharging the same, and that the work was done and money paid by the plaintiff without any request or authority from the defendant, and that the plaintiff's charges were payable by the master or owner of the vessel, and that the defendant had not rendered himself liable to say the same by his letters above set out, because such letters were not a promise to pay the plaintiff's charges, but admitted only the defendant's liability to contribute to the same as a general average charge.

12. The learned judge gave a verdict for the plaintiff for the full amount claimed, 41*l.* 18*s.*

Plaintiff's attorney asked his Honour whether he gave his judgment on a question of fact or on the point of law.

His HONOUR.—My judgment is that there was a contract not merely implied, but expressed, to pay the charges on the delivery of the cargo; and that, whatever private rights the parties may have had, it was their duty to have given notice of them.

The question for the opinion of the Court of Queen's Bench is whether the learned judge of the County Court was right in point of law in deciding for the plaintiff.

Phillimore argued for defendant, the appellant.

Bullen, contra.

The arguments are sufficiently stated in the judgment of the Court, *Cur. adv. vult.*

Feb. 8.—BLACKBURN, J., delivered the judgment of himself and Lush, J.—The case is not stated so explicitly as we could wish, but the material facts as we understand them are as follows: The German brigantine *Theodor* had gone ashore near Dartmouth, with cargo on board of her. The plaintiff, a ship agent at Dartmouth, was

put in possession of the wrecked vessel and cargo, by the captain, with, as we understand the case, authority from the captain as his agent, to do what was for the benefit of all concerned. The plaintiff did the work and expended the money sued for in discharging the cargo, and he brought it to a place of safety where he kept possession of it. The hull remained on shore and ultimately broke up, and was sold as a wreck.

We think we must take it on the statement to be fact that this expenditure was not incurred on behalf of the master as agent of the shipowner performing his contract to carry on the cargo to its destination and earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk, and had the expenditure been for the purpose of saving the whole venture, ship as well as cargo, it would have constituted a general average to which the owners of each part of the property saved must have contributed rateably, and the captain, and the plaintiff, as his agent, would have had a lien or right to retain each part of the property saved till the amount of the contribution due in respect of it was paid or secured. But this right would have been only in respect of the contribution due in respect of that part. He would have had no lien on the cargo for the contribution due, if any, in respect of the hull.

But as we understand the facts, there was in this case no contribution due in respect of the hull, for the expenditure was not for the purpose of saving, nor did it save, the vessel. It was an extraordinary expenditure for the purpose of saving the cargo alone, and which did save the whole cargo. And the question—the answer to which will decide this appeal—is, whether the captain and the plaintiff, as his agent, had a right to detain the whole cargo if it belonged to one owner, till the whole was paid or secured, or if the cargo belonged to several owners, to detain each part of the goods so saved till the contribution in respect of that part was paid or secured?

This is the point on which the case turns, for the defendant was not the owner of any part of the cargo at the time when the expenditure was made, and cannot therefore be made liable as having his credit pledged by the captain as his agent of necessity. He appears to have been a mercantile agent to whom the owner of the cargo had transmitted the bill of lading to enable him to obtain the cargo on his behalf, and he did so obtain the whole of it. The defendant did not become liable to pay any contribution merely by the receipt of the goods, unless there was a promise express or implied to pay it in consideration of the person who had a right to detain the goods till it was paid or secured, parting with the possession: (*Scaife* v. *Tobin*, 3 B. & Ad. 523.) In the present case there was an express promise by Capt. Slight, the agent of the defendant, who obtained possession of the goods for the defendant from the plaintiff, that the plaintiff's charges should be paid, and though it was proved that Capt. Slight had no special authority to make this promise, we think the County Court Judge was right in holding that his employment to obtain possession of the goods gave him authority to give security for any charges for which there was a lien on the goods. But we do not think his authority would extend to bind the defendant further than there was a lien.

As to the question whether there was a lien on the cargo for the expenses successfully incurred for the purpose of saving it alone, there is, considering how often the case must have occurred, a remarkable dearth of authority. In insurance law the phrase "general average" is commonly used to express what is chargeable on all, ship, cargo, and freight, and "particular average" to express a charge against some one thing. In Phillips on Insurance, § 1273, it is said, "General averages are usually cases of sacrifice for the entire interest at risk in ship, freight, and cargo, and hence called general. But a contribution may be by a part of those interests, where only a part is in peril, and benefited by the expenses and sacrifices;" and again in § 1470, "Where expense is incurred on divers articles in common, the adjustment is made by an average on the respective articles according to their value." In *Moran* v. *Jones* (7 E. & B. 523), this court held that the cargo, ship, and freight, were in that case all saved by one continuous operation, but they expressed a decided opinion that if the expense had been incurred after the cargo was safe for the benefit of ship and freight alone, they would as between the two, have been general average to which the ship and freight were to contribute rateably. This, we think, confirms the opinion expressed in Phillips. It may be said that these are only authorities that expenses of this kind are so far in the nature of general average that they can be charged against the articles saved, and must be paid for by the underwriters, and that it does not follow that the lien which is given for general average, strictly so called, also exists for the particular average chargeable against several articles in common, and so in the nature of general average. That may be true, but every reason for giving a lien for the contribution, when all are to contribute, exists for giving it where several articles are to contribute, and if where the cargo belongs to several owners there would be a lien on each part of the cargo for contribution from the owners of that part, it follows that there must be a lien on the whole cargo where it belongs to one only. The captain is entitled in case of need to incur extraordinary expenses for the protection of a particular article, and in some cases he is compellable to do so; see *Notara* v. *Henderson* (1 Asp. Mar. Law. Cas. p. 278; L. Rep. 5 Q B. 346; Id. 7 Q.B. 225). In practice such expenses are always in this country charged on the adjustment against the articles in respect of which they are incurred, and in the judgment of the Exchequer Chamber in the case just mentioned, delivered by Willes, J., at p. 233, there are authorities cited to show that such is the law in many foreign states. It is not expressly said that there is a lien on the goods for such a particular average, but the hardship would be very great, if a master was bound to make a disbursement for the benefit of the goods and had no remedy if the goods owner transferred the property and then became insolvent. And as Willes, J., cites those authorities with a view to show that there was no hardship in holding the master bound to make such disbursements, we think it not too much to infer that this very learned judge thought there was such a lien, though it certainly was not decided that there was one. The case is very analogous to general average and to salvage, in both of which there is a lien. It is just and convenient that there should be such a lien, and what

scanty authority we can find all points in the direction of there being a lien, and we think we must hold that there is one. We could have wished that the necessity for the first time, as far as we can find, of expressly deciding this point had arisen in a case of more importance in order that our opinion might be reviewed on appeal.

Two cases were referred to in the argument which have no bearing on the point, and we mention them only to show that we have not overlooked them. They are *Nicholson* v. *Chapman* (2 H. Bl. 254), and *Castellian* v. *Thompson* (13 C. B., N. S., 105). In the former case the plaintiff was a mere volunteer in saving the goods, in the latter the defendant was employed by a third person who had no authority to incur expense for the owner.

Judgment affirmed.

Solicitors: *F. J.* and *G. J. Braikenridge*, for *W. Smith*, Dartmouth; *Druce Sons* and *Jackson*, for *John Shelly*, Plymouth.

Jan. 15 *and Feb.* 21, 1876.

MEIKLEREID (app.) *v.* WEST (resp.).

Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 169 — *Allotment note* — *Registered owner* — *Demise of ship.*

The respondent was wife of a sailor serving abroad on board a ship of which appellant was sole registered owner. The appellant had demised the ship to a charterer for his sole use by a charter which required the charterer to find stores, pay crew's wages, and do repairs, the appellant paying his insurance on the vessel only, but having a lien upon cargo and freight for arrears of hire. The charterer appointed the master of the ship, who engaged respondent's husband as one of the crew. Respondent received an allotment note signed by the master and her husband, requiring the charterer to pay her 6l. a month during the voyage, and three monthly instalments were duly paid. Upon liquidation of the charterer's affairs, however, the respondent obtained a summary order for payment, under sects. 169 *and* 188 *of the Merchant Shipping Act* 1854, *against the appellant.*

Held, upon a case stated, that appellant was not, under the circumstances, the owner or any agent who had authorised the drawing of the note; and that he could not be liable upon the allotment note.

THIS was a case stated by Sir Robert Walter Carden, Knight, one of the aldermen of the City of London, being one of Her Majesty's justices of the peace for the said City.

Upon the hearing of a certain complaint preferred by the respondent, the wife of Henry James West, a seaman lawfully engaged and serving on the British ship *Sydney Hall*, and the holder of the allotment note (hereinafter referred to) against the appellant, the owner of the said ship, under sect. 169 of 17 and 18 Vict. c. 104 (The Merchant Shipping Act 1854) for non-payment of arrears due under such allotment note, the said justice (having, by virtue of the statute 11 & 12 Vict. c. 43, s. 34, the authority of two or more justices, as required by the Merchant Shipping Act 1854), ordered the appellant to pay to the said respondent the sum of 18*l.*, being the amount due to her at the time of his adjudication under such allotment, and including the sum of 6*l.* for which the summons originally issued, and 12*l.* which had accrued due since the issuing of the summons, and which the said appellant consented to being included in such order.

The 169th section of the Merchant Shipping Act 1854, is as follows:

The wife, or the father or mother, or the grandfather, or grandmother, or any child or grandchild, or any brother or sister of any seaman, in whose favour an allotment note of part of the wages of such seaman is made, may, unless the seaman is shown in manner hereinafter mentioned, to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, and subject, as to the wife, to the provision hereinafter contained, sue for and recover the sums allotted by the note when and as the same are made payable, with costs, from the owner or any agent who has authorised the drawing of the note, either in the County Court or in the summary manner in which seamen are by this Act enabled to sue for and recover wages not exceeding 50*l.*; and in any such proceeding it shall be sufficient for the claimant to prove that he or she is the person mentioned in the note, and that the note was given by the owner or by the master or some other authorised agent; and the seaman shall be presumed to be duly earning his wages, unless the contrary is shown to the satisfaction of the court, either by the official statement of the change in the crew caused by his absence, made and signed by the master, as by this Act is required, or by a duly certified copy of some entry in the official log book to the effect that he has left the ship, or by a credible letter from the master of the ship to the same effect, or by such other evidence, of whatever description, as the court in its absolute discretion considers sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid. Provided that the wife of any seaman who deserts her children, or so misconducts herself as to be undeserving of support from her husband, shall thereupon forfeit all right to further payments of any allotment of his wages which has been made in her favour.

It was proved or admitted that the appellant was, at the date of the signing of the said allotment note, and at the time of the said justice's adjudication, the sole registered owner of the British ship *Sydney Hall*; that the said Sarah West was the wife of the said Henry James West, a seaman, who had lawfully entered into articles of agreement to serve on board the said ship and who was then, as last aforesaid, serving on board such ship; and that in the said agreement was inserted and allotted to the said respondent Sarah West, as the wife of the said seaman, the sum of 6*l.* monthly of the wages of the said seaman; that an allotment note, in the form sanctioned by law, was given to her the said Sarah West, upon which there became due the said sum of 18*l.*, so by the said justices ordered to be paid.

The said allotment note is in the words and figures following:—

Notice to owners or agents. Seamen's allotments of wages may be remitted from port to port, free of expense, by means of seamen's money orders, to be obtained at the Mercantile Marine Offices.

SEAMAN'S ALLOTMENT NOTE.

Name of Ship.	Official Number. Now bound on a voyage to
Sydney Hall. No.	Monte Video, Dated at London, this 13th day of Feb. 1875.

Sanctioned by the Board of Trade, Feb. 1868, in pursuance of 17 & 18 Vict. c. 104.

One month after date, pay the sum of 6*l.*, part of the wages of Henry West, engaged to serve as assistant engineer in the above-named ship to Sarah his wife (1), and continue to make such payment until duly stopped according to law (2).

£6. WM. FAWENS, Master (3).
HY. WEST, Seaman.
To WM. POWELL, Witness.
W. T. Henley.
Payable at 110, Fenchurch-street, E.C.
Supt. Mer. Marine Office.

(1.) Here insert the word wife, sister, or other description of relation, if any. In case of a wife the marriage certificate must be produced, if required, when payment is demanded. (2.) Security for repayment, in case of desertion, if required, is to be given by the seaman when this allotment note is granted. (3.) If the owner or agent give the note, this must be altered accordingly. Caution.—The Act provides a summary remedy under certain conditions for the recovery of sums allotted when the notes are made in favour of the wife, father, mother, grandfather, grandmother, child or grandchild, brother or sister of the seaman, but provides no remedy whatever in the case of notes given in favour of other persons.

Endorsed on the back of the said note was

Received on the within written note,

Date.	Sum received.	Signature of payee.
March 13, 1875.	£6	SARAH WEST.
April 13, ,,	£6	SARAH WEST.
May 13, ,,	£6	SARAH WEST.

It was further proved or admitted that the said W. T. Henley had chartered the said ship from the said appellant, the owner, on a time charter-party, a copy of which said charter-party was annexed, and that the said W. T. Henley as such charterer had appointed the captain of the said ship, who subsequently engaged the crew thereof and issued the said allotment note, and that he the said W. T. Henley had paid several of the amounts due on the said allotment notes.

It was further proved or admitted that all payments due on the said allotment note to the said Sarah West had been paid by the said W. T. Henley up to the 13th May 1875, and that the affairs of the said W. T. Henley are in liquidation.

It was stated on the part of the appellant that the said ship was then in the possession of his mortgagees, and that he then had no pecuniary or beneficial interest in the said ship, and had not had any interest in her since the month of February 1875, beyond his interest under the said charter-party.

The appellant tendered his evidence and proved that he never authorised Mr. Henley or anyone else to issue this allotment note on his behalf.

It was contended by the attorney for the appellant, that although the appellant was the sole registered owner, yet as he had (as was alleged) no beneficial interest in the ship, and had not authorised the issuing of the said note, therefore he was not liable as owner to pay such allotment note under sect. 169; but that the respondent's remedy was against Mr. Henley, the charterer, whose captain had issued the said allotment note, and who it was alleged was now under the said charter-party the "owner," within the meaning of the statute.

The said justice over-ruled these objections, and held, that under sect. 169 the respondent was entitled to two remedies, "one enabling her to sue for and recover the sum allotted by the note from the owner," or at her option "from any agent who had authorised the drawing of the note."

It being proved that the appellant was the sole registered owner, and the respondent having elected (the agent who authorised the "drawing of the note" being insolvent) to sue the appellant as such owner, the said justice held that the appellant was the only person who could be sued as owner, and that he could not avoid his statutory liability by chartering or mortgaging his vessel to a third party, and he made an order against him accordingly.

The question of law for the opinion of this honourable court is, was the appellant the owner within the meaning of sect. 169 of the Merchant Shipping Act, and had the respondent a right to recover from him as such owner?

The following, with the exception of an immaterial clause in the margin, was the charter-party appended to the case:

London, 29th October, 1874.
Steam Charter-party.

It is this day mutually agreed between G. B. Meiklereid and Co., owners of the good steamship or vessel called the *Sydney Hall*, of the measurement of 514 tons gross and 376 tons net, and carrying 700 tons dead weight, or thereabouts, inclusive of fuel and stores, now at Lisbon, and W. T. Henley, Esq., of 110, Fenchurch-street, charterer.

Witnesseth, that the said vessel or steamer, being tight, staunch, and strong, and in every way fitted for the voyage or service, shall be placed under the directions of the said charterer or merchant, or his assigns, not later than the 10th Nov., at his works at North Woolwich, to be by him or them employed for the conveyance of lawful merchandise or on cable service between good and safe ports in the United Kingdom and Continent of South America (no salt or injurious cargoes to be shipped), as ordered by the charterer, the cargo to be laden in any dock or discharged in any dock the charterer may order, provided the vessel is always afloat.

The said steamer is let for the sole use of the said charterer, and for his benefit, for the space of three or more calendar months, at charterer's option, commencing from the date the vessel is placed at the disposal of the charterer, at London, as above, he having the whole reach and burthen of the vessel; and she is not to be required to load more than she can reasonably stow and carry, over and above her tackle, provisions, and stores, &c.

The freight for the hire of the said steamer shall be as follows:—

At and after the rate of 350*l.* per calendar month, payable bi-monthly as due, until the vessel is again returned by the charterer, of which seven days' notice in writing is to be given to the owners.

The coals for the steam engines shall be supplied by and at the cost of the charterer, who shall also pay all port and dock charges, pilotages, delivery as well as labourage and other duties, &c., also finding all ship's stores, paying crew's wages, repairs of engines and boilers, if required, and necessary stores for the engine room—that is oil, tallow, and waste, owners paying insurance on the vessel only.

Should any difference arise between the parties to this contract, either in principle or detail, the same shall be referred for arbitration at London to two persons, one to be chosen by each contracting party, with power for them to call in a third, and the decision of a majority shall be final and binding. The acts of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, navigation, of whatever nature and kind, always excepted.

The owners to have a lien upon the cargo and freight for arrears of hire, and the charterers to have a lien on the ship for the monthly freight paid in advance.

The vessel to be delivered up to the owners on the termination of this charter-party, at London, in the same good order and condition as when delivered, fair wear and tear excepted.

All derelicts, towages, and salvage, for owner's and charterer's equal benefit.

Failing the payment of the monthly hire as stipulated, the owners to be at liberty to withdraw the vessel from the service of the charterer, and claim the penalty, with any hire that may be due.

Penalty for non-performance of this agreement, estimated freight.

(Signed) G. B. MEIKLEREID, and Co.
29/10/74.

,, p. pro. W. T. HENLEY.
G. F. ROGERS.
29/10/74.

Witness to the signature of both parties,
W. D. HANDLEY.

A. L. Smith argued for the appellant.—The appellant does not come within either of the descriptions of persons from whom these notes may be sued or recovered; the words are "from the owner or any agent who has authorised the drawing of the note." The case finds that he did not authorise the note; unless, by effect of the statute, the law is clear that a registered owner, merely as such, is not liable for charges incurred about a ship. *Reeve* v. *Davies* (1 A. & E. 312), decided that no action lay in respect of repairs against registered owners, where under a time charter-party, the charterers bound themselves to do repairs. So in *Hibbs* v. *Ross* (L. Rep. 1 Q. B. 534; 2 Mar. Law Cas. O. S. 397), although the majority of the court held the register to be *primâ facie* evidence of the persons who employed the shipkeeper, it does not seem to have been suggested that they could have been on any other ground liable for damage incurred by the plaintiff who was lawfully on board. In the same way, where the owner absolutely demises the ship, and thus parts with the possession of her and her cargo, he can have no lien for her earnings: Maude and Pollock's Law of Merchant Shipping, 3rd edit., p. 296. [FIELD, J.—*Sandemann* v. *Scurr* 2 Mar. Law Cas. O. S. 446; L. Rep. 2 Q. B. 86, discussed all those authorities.] The result is that the charterer, upon such a charter as this, is the owner for all purposes.

Poland, contra.—The word "owner" in sect. 169 has no limitation, the words "who has authorised the drawing of the note," applying only to the agent who is made responsible. Throughout the provisions of the Act concerning registry, the register is made *primâ facie* the proof of ownership. By sect 70 it is expressly provided that a mortgagor of a ship shall not cease to be owner by reason of his mortgage. And as by the charter the owners are to have a lien upon the cargo and freight for arrears of hire, it is reasonable that they should be liable for wages which produce the freight. This is a liability imposed by statute upon the owner, and he has a remedy over against the charterer, and it can be no greater hardship upon the owner than upon the agent who authorised the note. Both can protect themselves [FIELD, J.—Could West, the sailor, sue the appellant for his wages?] No, but the statute alters the common law with respect to his wife's remedy whilst the ship is abroad. The sailor has a lien upon the ship for his wages (sect. 182), and the law has created this security of a similar nature for the recovery upon allotment notes.

A. L. Smith in reply.

Feb. 21.—FIELD, J., delivered the judgment of Mellor, J., and himself.—This was an appeal from an order of Sir Robert Carden made under the 169th section of the Merchant Shipping Act of 1854, whereby he ordered the appellant to pay to the respondent the sum of 18*l.*, being the amount of three monthly instalments due under an allotment note of the 13th Feb. 1875, by which the master of the *Sydney Hall*, and the respondent's husband Henry West (who was a seaman serving on board), directed Mr. W. T. Henley, to pay to the respondent a monthly sum of 6*l.*, as part of wages agreed to be paid to her husband for his services.

Upon the facts of the case it appeared that the appellant was the registered owner of the ship *Sydney Hall*, and that in Oct. 1874 (she then being at Lisbon), he entered into a charter-party with Mr. Henley, to whom the allotment note was directed, for her hire at a lump payment of 350*l.* per month. By the terms of the charter the ship was to be placed under the direction of the charterer to be employed by him for the conveyance of merchandise or cable service. By another clause of the charter, the steamer was let for the sole use of the charterer for three or more calendar months at his option, and he was to pay the stipulated freight until the ship was returned by him; the charterer was farther to find all ship's stores, to pay crew's wages, repairs of engines and boilers, &c., the appellant paying his insurance on the vessel only. The vessel was to be delivered up by the charterer to the appellant on the termination of the charter, fair wear and tear excepted. The charterer, having taken possession of the ship under the charter, appointed one Fawcus as master, and the latter engaged the respondent's husband as one of the crew. In the articles of agreement entered into between them the sum of 6*l.* monthly of his wages was allotted to the respondent, and the allotment note in question was thereupon given to her, by which the master and the seaman required the charterer to pay to her the allotted sum. The note having been presented to Mr. Henley, he acted upon it, and paid the respondent several of the instalments due under it, but in or after May 1874, his affairs went into liquidation, and some of the subsequent instalments having fallen into arrear, the respondent commenced summary proceedings under the 169th section against the appellant, as registered owner to recover the arrears. Upon the hearing of the summons the magistrate held in accordance with the contention before him, that the appellant, being the *de facto* registered owner of the *Sydney Hall*, was liable to the respondent for these instalments; and it is the appeal from that order which we have now to decide.

We are of opinion that the order cannot be supported. Nothing can be clearer than that for the whole amount of wages, of which these allotted sums formed part, the respondent's husband had no remedy against the appellant. It was not and could not be reasonably contended that he by himself or by any authorised agent had entered into any contract with the respondent's husband, or given any authority, expressed or implied, for the drawing of the note in question. The only serious contention upon which his liability was sought to be rested before us was that, inasmuch as he was the *de facto* registered owner of the *Sydney Hall*, he was the owner within the meaning of the 169th section; and it was urged that by that section a special and peculiar right and remedy are given to the wife to sue and recover against the appellant under her husband's contract with the master, although the husband could not himself have recovered as against the appellant.

Now, in order to dispose of this question, we must consider what were the respective positions of the

appellant and of Mr. Henley, the charterer and the master, in order to see whether the appellant can be truly said to have been such "owner" within the meaning of the section in question. The object of the section is to enable a seaman when about to leave home on a voyage to make provision for his wife during his temporary absence. The mode by which this is done is by enabling him to set apart in the hands of his employer a portion of the wages which he is earning on board, and to give his wife the power of receiving them.

Now, in the present case, although the appellant was in every sense before the execution of the charter-party the "owner" of the ship, he had by the execution of that instrument entirely divested himself not only of the possession of but also of all control over her. The charter-party, as is already stated, contains not only words of demise, which by themselves passed the possession of the ship for the stipulated time to the charterer, but also contained the other stipulations above set out carrying out the same object. The charterer, in fact, appointed the master, and the master so appointed paid the wages as the charterer's agent. The appellant had no control over either the ship, or the master, or the voyage, or the crew. Indeed, his rights in respect of the ship were limited to the bare right to receive the stipulated hire, and to take her back into his possession when the charter should come to an end. The appellant not only made no contract with the respondent's husband either himself or by any authorised agent, but the articles of agreement are made by the master, and the allotment is, by the express direction of the respondent's husband and the master, directed to the charterer, who acted upon it until his failure.

Under these circumstances, we cannot think that it was the intention of the Legislature to impose a liability upon a shipowner through the contract of third parties, and without any act or contract of his own, merely because he is registered as owner. The authorities are numerous which point to the distinction between those cases in which the effect of the charter is to retain the ownership in the owner, and those in which he parts with all possession and control, and they are vested in the charterer as temporary owner. The present case falls clearly within the latter branch, and we think that the meaning of the word "owner" in the 169th section at least must be restrained to such actual owner for the time being of the ship as either himself or by his master or other authorised agent manages and controls her, and enters into the agreement for the wages of which the allotment note is part. Mr. Poland was unable to point out any satisfactory reason for the alleged distinction between the rights of the seaman in respect of the wages themselves, and that of his wife in respect of the part advanced by means of the allotment note. It was urged before us that, as the appellant had the benefit under the charter of his time freight, which could not have been earned without the services of the seaman, it was not unjust to make him liable. It might as well have been said that because a person contracts with and pays a responsible builder for building a house, and the builder omits to pay his joiner or bricklayer, the person contracting has the benefit of their work, and ought to pay them for it.

Upon these grounds we come to the conclusion that the appellant is not liable for the arrears of the advance note, and that the order of Sir Robert Carden attempting to make him so must be quashed.

Judgment for appellant.

Solicitors for the appellant, *Ellis* and *Crossfiel.*
Solicitor for the respondent, *T. J. Nelson.*

Thursday, Feb. 17, 1876.

SAUNDERS AND ANOTHER *v.* BARING AND ANOTHER.

Marine insurance—Total loss—Sale of cargo—Notice of abandonment—Election by assured—Pro rata freight.

In an action against underwriters on a policy of insurance upon a cargo of coals to Yokohama, it was proved that the ship received such damage as to render it necessary to put into Hong Kong; and that when there competent persons decided that the cargo should be sold, as there would be great danger of spontaneous combustion if it were conveyed to its original destination. No notice of the abandonment of the cargo was given to the underwriters, until the claim was made for the total loss, but the coals had been publicly sold at Hong Kong. The proceeds of the sale had been handed over to the shipowners, and they had offered them to the charterers, less a considerable sum which they withheld in payment of pro rata freight, on condition that they should receive a receipt in full of all demands. This the charterers declined to give. The underwriters now refused to pay, upon the ground that the charterers had not abandoned the cargo.

Held, that the public sale, per se, vested the proceeds of the sale in the underwriters, and that the charterers had done nothing subsequently which showed an election on their part to take the proceeds.

THIS was an action on a policy of insurance tried before Lord Coleridge and a special jury, at Guildhall, on the 16th Dec. 1875, when the jury found a verdict for the plaintiff, but leave was reserved for the defendants to move to have the verdict entered for themselves.

Defendants now moved in accordance with the leave reserved.

The facts as they appeared at the trial were as follows: The plaintiffs were merchants, carrying on business in Liverpool and London, and the defendants were directors of a marine insurance company. On the 19th Dec. 1872, the plaintiffs entered into a charter-party with the owners of a German ship, the *Mary Anna*, for the conveyance of a cargo of coals from Cardiff to Yokohama. On the 6th Feb. 1873, the plaintiffs effected with the defendants the policy which is the subject of this action, for the sum of 1650*l.* on the said cargo of coals.

The *Mary Anna* sailed from Cardiff on the 20th Feb. 1873. In the June, and again in the September following, the ship experienced very severe weather, lost her masts, and it became necessary to jettison a portion of the cargo. As she was in great danger the captain made for Hong Kong, which was the nearest port of refuge, and arrived there on the 5th Oct. He then made the usual protest, and the ship was surveyed and condemned

When the cargo was unshipped it was found to be so much damaged that there would be very great danger of spontaneous combustion if it were taken on to Yokohama, and the surveyor recommended that they should be sold by public auction. This was done, and the sum realised was considerably over the insured value, but the average adjusters at Hong Kong deducted a sum for *pro ratâ* freight, on the ground that the vessel was a German one, which reduced the net proceeds of the cargo to 583*l*. This was sent to the shipowners, and they offered it to the plaintiffs on condition that they should give a receipt stating that it was on settlement of all questions with the owners of the ship. This would have precluded any future question as to the *pro ratâ* freight, and was in consequence declined by the plaintiffs though without consulting the underwriters, and the plaintiffs then sent in a claim to the defendants for a total loss. This the defendants declined to pay.

Butt, Q.C. and *C. J. Mathew* for the defendants.—The first substantial question is, Who is to bear the loss caused by the deduction of the *pro ratâ* freight? [BLACKBURN, J.—If it is proved to be a total loss, you must decide that question with the shipowners.] In reality this question will turn upon the effect of the sale of the cargo at Hong Kong; and as to this the decision in the Common Pleas in the case of *Farnworth* v. *Hyde* (2 Mar. Law Cas. O. S. 187, 429; 18 C. B., N. S., 835; 12 L. T. Rep. N. S. 231) is against us, for there it is stated that the sale having been properly made was an actual total loss. But in the present case we must go a step further than that, and consider whether the sale itself without anything more whatever vests the proceeds immediately in the underwriter, or must there be some election on the part of the assured to do so? It is admitted that notice of abandonment could not be given before the sale, but does the sale *per se* vest at once the proceeds in the underwriter? [BLACKBURN, J.—The party insured is never obliged to claim indemnity; but the act of claiming the indemnity at once vests the proceeds in the insurers.] Suppose the property sold for a considerable sum more than the insured value, it is evident that in that case the sale will not *per se* vest the proceeds in the insurers. [LUSH, J.—Supposing that some election is necessary, surely the presentation of the claim is sufficient.] It appears from the correspondence that the plaintiffs were offered a sum of 583*l*. for the loss they had sustained, but they declined to receive it because the form of receipt was not satisfactory to themselves; they gave us no opportunity of accepting or rejecting this lump sum, and that clearly indicates that they never did any act which amounted to an election to consider the proceeds not their own; and it is sufficient that they did not elect to say that the proceeds were ours. There are authorities to show that some act was necessary on the part of the assured to divest themselves of the proceeds. The judgment of Lord Chancellor Cottenham in *Fleming* v. *Smith* (1 H. of L. Cas. 513), commented on by Blackburn, J., in *Rankin* v. *Potter* (2 Asp. Mar. Law Cas. 65; L. Rep. 4 Eng. & Ir. App. 123), says, "They were sufficiently informed of what had taken place to enable them, if they thought proper, to take upon themselves the chance of the benefit of retaining the ownership of the property, instead of taking the sum which was secured to them by the policy effected with the underwriters on the vessel; and if they acted upon that opportunity of election they surely cannot afterwards turn round and go against the underwriters as for a total loss." No doubt the point at issue in that case was as to whether formal notice of abandonment was necessary, but the passage cited shows that there must be some election on the part of the assured. That being so the question arises on whom does the burden of proof lie to show that the proceeds are treated by the assured as their own and not as belonging to the underwriters. [LUSH, J.—That is, are they to be considered as belonging to the assured until they repudiate them, or do they belong to the underwriters until the assured elect to take them? *Farnworth* v. *Hyde* (*ubi sup.*) seems to settle the point that the sale immediately vests the proceeds in the underwriters. BLACKBURN, J.—The question of election was discussed in *Stringer* v. *English and Scottish Marine Insurance Company* (2 Mar. Law Cas. O. S. 440; L. Rep. 4 Q. B. 676), but the question as to the time of election or which side must prove it did not there arise; the decision was that the assured having elected was bound by such election.] It is clear from the cases cited that notice of abandonment is not necessary, still the mere sale does not divest the proceeds from the owner. In *Roux* v. *Salvador* (3 Bingham N. C. 266) Lord Abinger, in giving judgment, says, "The assured may preclude himself from recovering a total loss if, by any view to his own interest, he voluntarily does, or permits to be done, any act whereby the underwriter may be prejudiced in the recovery of that money. Suppose, for example, that the money received upon the sale should be greater than, or equal to, the sum insured; if the insured allows it to remain in the hands of his agent, or of the party making the sale, and treats it as his own, he must take upon himself the consequence of any subsequent loss that may arise of that money, and cannot throw upon the underwriter a peril of that nature" (p. 288). This case implies clearly that it rests with the assured to make an election after the sale. In the present case it is contended that the plaintiff has voluntarily left the proceeds in the hands of another party. Then as to the question of *pro ratâ* freight, that it is entirely a matter for the assured—with that the underwriters have nothing to do. *Baillie* v. *Mondigliani* (Park on Insur., vol. 1 p. 116; 6 T. R. 421). [BLACKBURN, J.: If the goods have increased in value by being carried to Hong Kong and the shipowner has a lien upon them, surely the underwriters cannot avail themselves of the increased value and not pay *pro ratâ* freight.]

Knight v. *Faith*, 15 Q. B., 649;
Lloyd v. *Guibert*, 2 Mar. Law Cas. O. S. 26, 283; L. Rep. 1 Q. B. 115; 13, L. T. Rep. N. S. 602;
Arnould Mar. Insur. vol. 2, pp. 878, 884.

Cohen, Q.C., and *F. W. Hollams*, for the plaintiff, were not called upon.

BLACKBURN, J.—The mere fact that this cargo of coals had been so damaged by the perils of the seas as to render an immediate sale necessary, and that they were so sold, sufficient to constitute a total loss. See *Roux* v. *Salvador* (*ubi sup.*). It is not necessary to say more on the point than is there said by Lord Abinger, "When the subject matter insured, has by a peril of the sea lost its form and species, where a ship, for example, has become a wreck,

or a mere congeries of planks, and has been *bonâ fide* sold in that state for a sum of money, the assured may recover a total loss without any abandonment. In fact, when such a sale takes place, and in the opinion of the jury is justified by necessity, and a due regard to the interests of all parties, it is made for the benefit of the party who is to sustain the loss; and if there be an insurance the net amount of the sale after deducting the charges, becomes money had and received to the use of the underwriter, upon the payment by him of the total loss." The goods in this case having of necessity been turned into money, there is a total loss; and for this the underwriters are liable, with, however, the right to receive the money from the hands of those who received it. If the assured had possession of it, it would be deducted from the total loss, but where the money is in the hands of a third party, the assured is entitled to be paid the total loss, and they may treat the amount as a debt due to them, but subject, of course, to a liability in case they have done any act which would lessen the chance of its recovery by the underwriters. This becomes extremely important where the holder of the money becomes bankrupt, and Lord Abinger rightly explains the law in commenting on *Mitchell* v. *Eadie* (3 Bing. N. C. 290) that "even when a total loss has occurred by a sale of the goods, the assured may, by his own conduct in electing to take the proceeds instead of making his claim on the underwriter, if he thereby alters the facts so as to affect the interest of the underwriter, forfeit his claim to recover a total loss." That clearly shows that if anything in this case justified us in inferring that the insured had said, "We prefer to keep the proceeds" (and it has been shown that they amounted to 1900*l.*, whereas the insured value was 1650*l.*), they would be bound by their election. And the fact of this balance arising would have inclined us to think that the plaintiffs might have wished to claim the proceeds, but we find no trace of anything of the kind. They heard of the value realised by the sale, and of the claim for *pro ratâ* freight at the same time; then they were offered a sum of 583*l.* in full satisfaction, but this they declined. At that time they were evidently fully aware that if they took the proceeds they would be most probably involved in a law suit, and so they would be less inclined to elect to take the proceeds. However that may be, we find no trace whatever of such an election on their part. If in declining the 583*l.* they were acting as agents of the underwriters, their refusal may have raised the question of negligence, but I feel absolutely certain the insurance company would have told them to do what they did. The underwriters must pay the total loss, and they will then be entitled to take all such steps to get all the proceeds from the hands of third parties, as the plaintiffs themselves could have taken.

LUSH, J., concurred.

Judgment for the plaintiff.

Solicitors for plaintiffs, *Hollams, Son,* and *Coward.*

Solicitors for defendants, *Walton, Bubb,* and *Walton.*

Saturday, Feb. 12, 1876.

STRIBLEY *v.* IMPERIAL MARINE INSURANCE COMPANY.

Marine insurance—Concealment of material facts—Average loss—Non-communication by captain—Fraud—Principal and agent.

On the 11th Feb. 1874, *two policies were effected upon a ship and freight "at and from Mazagan to a port or ports in the United Kingdom." The ship arrived at Mazagan on the 27th Dec.* 1873. *On the last night of the year a gale sprang up, and the ship lost an anchor. On the 1st Jan. the captain went before a notary and made a protest as to the loss of the anchor by reason of boisterous weather. On the 9th Jan. he wrote to his owners, but did not mention the loss of the anchor. In an action to recover for the subsequent total loss of the ship.*

Held, that as the captain did not wilfully or fraudulently conceal the fact of the loss of the anchor for the purpose of enabling him to insure, the policies were not avoided.

THIS was an action on two policies of insurance brought to recover for the loss of the ship *Jessie,* and was tried before Grove, J., at Guildhall, on the 4th Dec. 1875, when a verdict was given for the plaintiff with damages 850*l.*

It was now moved to enter judgment for the defendant.

The facts of the case, which appeared from the evidence at the trial, were as follows:—

On the 11th Feb. 1874, the plaintiffs effected an insurance with the defendants upon the ship *Jessie,* at and from Mazagan, a port in Africa, to a port or ports in the United Kingdom. The *Jessie* arrived at Mazagan on the 27th Dec. 1873, and anchored in the roadstead. On the night of the 31st a gale sprung up, and the *Jessie* lost her starboard anchor, but was otherwise not materially damaged. On the 1st Jan. 1874, the captain made a protest of the fact, and on the 3rd the loading of the vessel commenced. On the 9th Jan. the captain wrote to his owners a letter that was received on the 21st Jan., and this was the only communication they received from the captain. This letter was lost. Plaintiff swore that no mention had been made in it of the loss of the anchor, although the captain did say that the weather had been boisterous. This letter was not communicated to the underwriters. The loss of the anchor and cable, it was admitted, would be a material fact, but the question was whether the plaintiff could be said to have concealed a thing not within his knowledge. The ship was subsequently lost, and this action brought to recover for such loss. The defendants disputed their liability on the ground that the plaintiff had concealed from them the loss of the anchor, which was a material fact.

Russell, Q.C. and *French,* for the defendants.—It is clear from the case of *Fitzherbert* v. *Mather* (1 T. Rep. 12), that if the captain does not disclose a material fact, the owner must be held not to have disclosed it. In his judgment Lord Mansfield says: "Now whether this happened by fraud or negligence (of the agent) it makes no difference, for in either case the policy is void." But the present case is much stronger than that, for there "the agent acted honestly when he wrote the letter" (see 1 Term Rep. 15), but here the

captain, writing on the 9th, deliberately suppresses any mention of the cable and anchor. [BLACKBURN, J.—You are not entitled to say deliberately.] At all events he considered it of so much importance that he made a protest on the subject on the 1st Jan. Again, the case of *Proudfoot* v. *Montefiore* (L. Rep. 2 Q.B. 511; 16 L. T. Rep. N. S. 585; 2 Mar. Law Cas. O. S. 572) recognises the same principle. There Cockburn, C.J., quoting Buller, J., says: "It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. Here it appears that the plaintiff trusted Thomas (the agent), and he must, therefore, take the consequences." And, further on, he says: "If an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of any information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation." The case of *Gladstone* v. *King* (1 M. & S. 35), is also in point. There the master of a ship had omitted to communicate to his owners the fact of the ship having been driven on a rock, and they, in ignorance of the accident, had effected an insurance. It was held that the captain was bound to communicate the fact, and, for want of such communication, the antecedent damage was an implied exception from the insurance. [BLACKBURN, J.—That only amounts to this, that plaintiffs cannot recover the value of the anchor. In both *Proudfoot* v. *Montefiore*, and *Gladstone* v. *King*, the information was intentionally kept back.] The cases were not decided on that ground, and in *Fitzherbert* v. *Mather (ubi sup.)*, Lord Mansfield expressly says, "it makes no difference whether this happened by fraud or negligence." [LUSH, J.—In *Proudfoot* v. *Montefiore* there was fraud as a fact.] No doubt, but the judgment does not proceed on that ground. Duer, in commenting on these cases (Duer on Insurance, vol. II., p. 420), says, "it certainly appears that the weight of authority is greatly in favour of the doctrine that the omission of an agent, whether proceeding from fraud or neglect, to give intelligence of a loss which he is bound to communicate, may operate as a fatal concealment." Again, "the concealment by an agent of material facts which he is bound to communicate, is alone sufficient to avoid the insurance, which it alone enabled his principle to procure. It is the wrongful act, or omission of the person, whom he trusted and employed." In the present case, then, as a material fact known to his agent has been concealed by the owner, the verdict should be entered for the defendants.

Aspland (with him *Day*, Q.C. and *Benjamin*, Q.C.), was proceeding to argue this point when he was stopped by the court.

BLACKBURN, J.—On the first point it certainly would be very difficult for us to say that the verdict should be entered for the defendants. Mr. Russell says that the captain of the vessel was aware that she had lost an anchor and cable, and did not communicate that fact to the plaintiff, and upon this bare statement he argues that the judgment should be entered for the defendant—that as policy was "at and from" Mazagan, the loss of the anchor and the boisterous weather were material facts, and they must be held to be known to the plaintiff under the rule laid down in *Proudfoot* v. *Montefiore*, and *Fitzherbert* v. *Mather*. These two cases, however, only go so far as to say that where the agent with a view to enable his principal to insure, conceals a material fact, then the policy is avoided; but whether gross negligence on the agents' part would do it they don't say. In *Gladstone* v. *King* (*ubi sup.*), where the intention was not to enable the owner to insure, it was held that the policy was not avoided, but only that there was an exception out of the policy. I cannot think that every concealment by a captain, of however slight a matter, would prevent an owner effecting a good insurance. I should much prefer the doctrine laid down in Phillips on Insurance (vol. 1, p. 299 s. 564, 5th edit.), that where the concealment is fraudulent then the policy is avoided. We cannot, therefore, enter a verdict for the defendant.

LUSH, J.—The first question we have to dispose of is a most important one, and one on which we have had no case in this country to guide us. It is evident that the ship did not suffer from the loss of her anchor so as to affect the risk, as she must have had another before sailing homeward. She subsequently sailed, and was lost; are we to say that the underwriters are not responsible for the total loss because of the omission to make known the fact of the loss of the anchor? That decision would be so startling that I shrink from it. It would be obviously unjust to make the underwriter liable for the anchor, but it would be equally unjust that he should not be liable for the total loss. Where a master of a ship, or other responsible agent, wilfully withholds any information, or by culpable negligence withholds any material fact, it is quite right to hold the owner to be so far identified with his agent as to forfeit the policy. In *Fitzherbert* v. *Mather* and in *Proudfoot* v. *Montefiore* there was a total loss in each case, and the agent had wilfully withheld information from the owner to enable him to insure. But in *Gladstone* v. *King* the decision was only as to a partial loss. The owner sought to make the underwriter liable for damage which had been done to the ship before the policy was effected, and the court held that quoad that damage the policy was void; but not so with regard to the whole risk. In this case the underwriter is not responsible for the cable and anchor, but the loss of the cable had nothing to do with the loss of the ship, and that loss is the one both parties contemplated when the insurance was entered into. Following the decision in *Gladstone* v. *King* the policy here remains good, as there has been no fraudulent or wilful concealment of a material fact.

QUAIN, J. concurred. *Motion refused.*

A rule *nisi* had also been obtained to show cause why there should not be a new trial on the ground of misdirection, and also that the verdict was against the weight of evidence, which was made absolute on both grounds.

Solicitor for plaintiff, *J. McDiarmid.*

Solicitors for defendants, *Argles* and *Rawlins.*

COMMON PLEAS DIVISION.

Reported by P. B. Hutchins and Cyril Dodd, Esqs., Barristers-at-Law.

Tuesday, Jan. 25 1876.

Lewis *v.* Gray.

Merchant Shipping Amendment Act 1873 (36 & 37 *Vict. c.* 85, *secs.* 12, 13, 14)—*Detention of ship by Board of Trade—Board of Trade—Ship and shipping.*

It is not necessary that the complaint made to the Board of Trade, as to the condition of a ship under sect. 12 *of the Merchant Shipping Act* 1873 (36 & 37 *Vict. c.* 85), *should state that the ship "cannot proceed to sea without serious danger to human life," but it is sufficient if by reasonable inference it can be ascertained from the wording of the complaint that this in fact is the case. Neither is it necessary that the report made upon a survey ordered by the Board should so state, but it is sufficient if it can be ascertained by reasonable inference therefrom that this is in fact the case.*

Semble.—If the first survey held by the Board under this Act is unsatisfactory or insufficient a second survey may be held.

Semble, also, that the Board cannot upon an order for the detention of a ship for the purpose of holding a survey, justify a detention beyond what is reasonably necessary for that purpose.

This was an action brought to recover damages from the Board of Trade by reason of the detention by the officials of the Board of the plaintiff's vessel. It had been agreed (before the passing of the Merchant Shipping Act 1875, which has a provision to that effect) that the principal secretary (Mr. Gray) of the Board should represent the Board, and be sued in the action as a nominal defendant.

In November 1873, the plaintiff's vessel the *Mary Ann* arrived at Hull with barley from St. Malo.

On the 7th Nov. 1873, the Board of Trade received the following letter relative to the plaintiff's vessel from their surveyor at Hull:

Board of Trade Surveyor's Office, Customs House, Hull, 6/11/73.

Sir,—Mr. McKenzie having called my attention to the brigantine *Mary Ann*, of Maldon, official No. 2817, we have examined her lights, &c., and from the defective state of her decks, and the general appearance of the vessel, I am of opinion that she should be examined with the cargo out before being allowed to proceed to sea. She is at present loaded with grain which she is about to discharge.

From the *Mercantile Navy List* it appears that this vessel was built at Walker's Northumberland, in 1831.

The Board in reply ordered the vessel to be detained for the purposes of survey, and on the same day wrote to the plaintiff as follows:

7th Nov. 1873.

Sir,—I am directed by the Board of Trade to inform you that they have reason to believe that the British ship named at the foot hereof now or recently lying at the place named is, for the reasons stated, unfit to proceed to sea without serious danger to human life. The Board of Trade have, therefore, ordered her detention by the proper authority, until she can be surveyed. . . . A copy of the surveyor's report will be sent you on the completion of the survey. Your obedient servant,

(Signed) Thomas Gray.

The owner or master of the *Mary Ann*, of Maldon.

Ship Referred to in the above Letter.

Name and Port of Registry.	Where Lying.	Here insert whether by reason (1) of the defective condition of her hull, equipments, or machinery, or (2) of overloading, or (3) of improper loading.
Mary Ann, of Maldon.		Hull, &c.

On the 12th Nov. 1873, the surveyors appointed by the Board of Trade inspected the vessel and reported as follows to the Board:

Sir,—I have the honour to report that we have examined the vessel to-day, and find that thorough repair will be required to render her seaworthy. The decks are quite worn out, the deck beams and knees are defective, and the timbers, where we had the ceiling removed, are found to be rotten.

As the vessel belongs to Sunderland the owner wishes to take her there for repairs, and we see no objection to her being towed there for that purpose.

The plaintiff, on the same day, the 12th Nov. 1873, telegraphed to the defendant asking him to allow the *Mary Ann* to proceed to Sunderland in ballast and be repaired there, according to the report. On the 15th Nov. the defendant wrote to the plaintiff the following letter, enclosing a copy of the above-mentioned report:

Sir,—I am directed by the Board of Trade to inclose for your information the accompanying copy of a report of the survey of the *Mary Ann*, of Maldon, and to state that they are prepared to allow her to be towed round to Sunderland for the necessary repairs provided she starts early on a fine morning, and that the crew knowing the case are willing to go in her. Upon hearing from you that the repairs indicated in the accompanying report have been sufficiently and completely carried out they will direct a re-survey of the vessel to be made, and will inform you of the result. All expenses will have to be defrayed prior to the vessel leaving Hull.

(Signed) Thomas Gray.

On the 14th Nov. 1873, the plaintiff wrote to the defendant the following letter:

Sir,—I take the liberty in writing you respecting my vessel the *Mary Ann*. The captain sent you a telegram to be allowed to proceed to Sunderland in ballast to have the necessary repairs done as ordered by your surveyors. Being a stranger here I cannot get the credit I require here, as I can at my place of residence, Sunderland. The ship loaded a cargo of barley at St. Malo, and we have discharged it here, and had not a single bushel damaged, as such I trust you will grant permission for her to proceed.

On the 9th Dec. 1873, the plaintiff wrote to the defendant the following letter:

Sir,—Since my return from Hull, in which port the above-named ship now lies, I regret that my circumstances compel me to request of your Board of Trade to allow me to sail the ship in ballast about sixteen or eighteen hours sailing from there to here to have the repairs done in accordance with your survey. The *Mary Ann* recently had heavy repairs to her hull, a new keel, and in ballast makes no water, or if any, only a few inches when in dock, and has delivered 900 quarters of wheat without a bushel of it being damaged by water, bringing it 600 miles, during the voyage, by the log book, encountering severe gales until she reached Hull. I believe if you can or will take this into consideration when I inform you I cannot afford to have her towed down under your restrictions as stated in yours of the 15th Nov., viz., "that you are prepared to allow her to be towed round to Sunderland for the necessary repairs provided she starts early on a fine morning, and that the crew are willing to go in her"—had her deck proved faulty in discharging her cargo. I think at present she would not wet half a ton of her ballast. She was built near Sunderland, &c. I now leave it to your consideration to decide this my application.

On the 17th, the defendant replied as follows:

Sir,—I am to inform you that the Board are unable to depart from the conditions laid down in their letter of the 15th ulto.

On the 29th Dec. 1873, the solicitors to the plaintiff (Messrs. Oliver and Botterill of Hull) wrote to the Board of Trade on behalf of their client, the plaintiff.

On the 1st Jan. 1874, the defendant or the Board of Trade telegraphed to Messrs. Oliver and Botterill, the plaintiff's solicitors, as follows:

The Board of Trade will allow the *Mary Ann* to sail to Sunderland on certain conditions, which will be sent to you by post.

On the same day, the 1st Jan., the following letter was sent by the Board to the plaintiff containing as will be seen, the conditions referred to in the telegram.

Unseaworthiness.

Gentlemen,—In reply to your letter of the 29th, in which you request that the *Mary Ann*, of Maldon, may be permitted to sail from Hull to Sunderland instead of being towed to the latter port, I am requested to state that this Board will accede to your request on the condition that both master and owner sail in her; that she carries a boat fitted after the manner of a life-boat to the satisfaction of this Board's surveyor; that she proceeds direct to Sunderland, and that a bond with two sureties in the sum of 200*l*., conditioned as above, be handed to the collector of customs at Sunderland before the vessel starts.

To this Messrs. Oliver and Botterill replied, repudiating the right of the Board to impose conditions, and stating that the plaintiff claimed damages for the detention of his vessel.

On the 7th Jan. 1874, the defendant wrote to Messrs. Oliver and Botterell setting out his view of the facts, and then continuing as follows:

The Board of Trade could only accept and act on the report which stated that the decks were quite worn out, and that where the ceiling was removed the surveyor found timbers to be rotten, as a report showing that the ship was unfit to proceed to sea without serious danger to human life. . . . The fact remains that the ship is detained, that a partial survey only has been held on her, and the negotiations with the owner for removing her to Sunderland have fallen through. The Board of Trade now withdraw the modification of their order by which she could have been allowed to proceed to Sunderland, and under the powers given by the Act they vary their orders as follows viz.: that as in their opinion the ship cannot proceed to sea without serious danger to human life she shall be detained at Hull for further survey and repairs.

(Signed) Thomas Gray.

The plaintiff's solicitors then write and protest. The surveyors of the Board of Trade in spite of the protests of the plaintiff then survey the vessel, and on the 14th Jan. report to the Board as follows:

It is very evident from what we saw during our survey that for a long time this vessel has been in a very unsatisfactory condition. There was scarcely a crevice in the ceiling, pump, well, or chain locker, but that was crammed or covered with pieces of old sail cloth to prevent the corn from getting between the timbers and into the timbers. . . . We find that many of the rough trees are rotten . . . the deck is much worn in some places, it is not much more than one inch thick, in fact it is quite done for, the oakum is generally through the seams, the port knight head is rotten . . . there are indications of considerable leakage . . . We are unable to ascertain the extent of the decay on board this vessel, but from what we have seen and tested we are of opinion that at the time of survey this ship was, having regard to the nature of the service for which she was intended, unfit to proceed to sea without serious danger to human life.

This report was sent to the plaintiff by the Board of Trade accompanied with the following:

The order made by this Board thereon is that the vessel be detained at Hull until repaired to the satisfaction of this Board's surveyors.

The plaintiff, after several further letters had passed, instituted the present proceedings:

As nothing turned upon the form of the declaration or of the pleas it is unnecessary to set them out here.

The action was tried before Brett, J., in Middlesex, at the sittings after Hilary term 1875, who directed a verdict to be taken for the plaintiff for the damages claimed in the declaration, giving to the defendant leave to move to enter the verdict for him, or to reduce the damages to whatever amount the court should direct.

The case depended mainly on the construction of the Merchant Shipping Act 1873.

Sect. 12 of that Act is as follows:

Where the Board of Trade have received a complaint, or have reason to believe, that any British ship is by reason of the defective condition of her hull equipments or machinery, or by reason of overloading, or improper loading unfit to proceed to sea without serious danger to human life, they may if they think fit appoint some competent person or persons to survey such ship and the equipments, machinery and cargo thereof, and to report thereon to the Board . . . The Board of Trade may if they think fit order that any ship be detained for the purpose of being surveyed under the section, and thereupon any officer of customs may detain such ship until her release be ordered either by the Board of Trade or by any court to which an appeal is given under this Act.

Upon the receipt of the report of the person making any such survey, the Board may, if in their opinion the ship cannot proceed to sea without serious danger to human life, make such further order as they may think requisite as to the detention of the ship or as to her release, either absolutely or upon the performance of such conditions with respect to the execution of repairs and alterations, or the unloading or reloading of cargo, as the Board may impose. They may also from time to time vary, or add to, such order.

A copy of any such order and of the report upon which it was founded, and also of any variation of or addition to such order shall be delivered as soon as possible to the owner or master of the ship to which it relates . . .

Sect. 13, *inter alia*, provides that

If upon such survey the ship is not reported to have been unfit to proceed to sea, having regard to the nature of the service for which she was intended, the Board of Trade shall be liable to pay compensation to any person for any loss or damage which he may have sustained by reason of the detention of the ship for the purpose of survey, or otherwise in respect of such survey.

Sect. 14 provides that

If the owner of any ship surveyed under this Act is dissatisfied with any order of the Board of Trade made upon such survey, he may apply to any of the followin g courts having jurisdiction in the place where such shi p was surveyed, that is to say: In England to any court having Admiralty jurisdiction. In Ireland, &c. In Scotland, &c. The court may upon such application, if they think fit appoint one or more competent persons to survey the ship anew . . . The court to which such application is made may make such order as to the detention or release of the ship, as to the payment of any costs or damages which may have been occasioned by her detention, &c., as to the court may seem just . . .

The *Solicitor-General* (Sir J. Holker, Q.C.), having moved for and obtained a rule *nisi* in the terms of the leave reserved.

C. Lanyon now showed cause.—The object of the Merchant Shipping Act, 1873 is the protection of human life not the preservation of cargo. As to the first survey, the board had no jurisdiction to make it, because they had received no complaint stating that the vessel was unfit to proceed to sea without serious danger to

human life, neither could they have any ground for believing that there was such danger, as when they ordered the survey they had received nothing but the letter from the surveyor of the 6th Nov. 1873. Next, even if they had jurisdiction to order a survey, the survey resulted in a report of the 12th Nov., which does not state or show that the ship could not proceed to sea without serious damage to human life; it stated nothing more than that she was "unseaworthy," which means unfit to carry cargo. Therefore, the report, if it was a report made upon a proper survey, justified no further detention of the ship. If the survey was, either because not founded on a sufficient complaint, or for any other reason a bad survey, then it follows that the report consequent on it would be a bad report. If the report affords no justification for the detention the plaintiff is entitled to damages. It cannot be that the board can justify under sect. 12, sub-sect. 4, and say that there was no survey then made, for that sub-section must give a right only to detain for a reasonable time, and really for the purpose of having a survey made. As to the last report that was correct in point of form, but made, it is submitted, when the board was *functus officio*, either because they had already exhausted their powers, or because the reasonable time had elapsed. The board have no power to make two surveys, and have two reports, therefore they cannot justify the earlier detention under the earlier report, and the later detention under the later report. [Lord COLERIDGE, C.J.—Why should not the plaintiff have appealed under sect. 14? If he could have appealed, may it not be that he was bound to do so?] Because, as to the first order, it was not made "upon such survey;" it was made on an improper survey. The plaintiff's case is that no order was ever made, so that from that point of view there is nothing to appeal from. The words of the section giving the appeal are "he may apply," not "he must apply." In the case of a void act the party is not bound to appeal; although an appeal is given him he may treat the act as a nullity:

Churchwardens of Birmingham v. *Shaw*, 10 Q. B. 880; 18 L. J. 89, Mag. Cas.;
Pedley v. *Davis*, 10 C. B., N. S., 492; 30 L. J. 379. C. P.

It is admitted by the board that on the first occasion only a partial survey was made, and it does not appear from the report that they had arrived at the conclusion that there was serious peril to life. The order made on the first survey and report was bad, there was no power to send the ship to Sunderland under certain conditions, there was no power to impose any condition, and the board have exceeded their powers, powers given in derogation of common law rights, and the plaintiff is by the words of the statute entitled to compensation. Summing up my points, they are these:—The complaint contained no information to justify the board in taking action; supposing the complaint did justify the board in taking action upon it, the survey then held was not in accordance with the provisions of the Act; even if the survey was properly held, it did not entitle the board to make an order for the detention of the ship; even if everything was correctly done up to the order, the order made upon the first survey was itself bad; and, lastly, they had no right to make any second survey.

The *Attorney-General* (with him *Aspinall*, Q.C., *Herschel*, Q.C., and *Beasley*).—The Board of Trade have by statute a duty imposed upon them to interfere for the protection of human life, when they have received a complaint, or have reason to believe that any British vessel, is, by reason of the defective condition of the hull, &c., unfit to proceed to sea without serious danger to human life. [Lord COLERIDGE, C.J.—You need not argue the question of the sufficiency of their surveyor's letter to set them in motion; we are satisfied that the letter gave them reason to believe that there was danger to life.] That being so, it was the duty of the board to appoint competent persons to survey the ship. Then we come to the 3rd paragraph of the section, which provides that the board may order the detention of the ship for the purpose of being surveyed and thereupon any officer may detain such ship until her release be ordered. Here they did order the ship to be detained, and her release never has been ordered, either by the board, or by the court to which, by the provisions of the Act, the plaintiff might have gone if he objected to the action of the board. The order for the detention is still standing, and affords a justification. If it is necessary to go further, I can do so; the section goes on: "Upon the receipt of the report of the person making any such survey the board may, if in their opinion the ship cannot proceed to sea without serious danger to human life, make such further order as they may think fit as to the detention of the ship, as to her release either absolutely or upon the performance of such conditions with respect to the execution of repairs or alterations as the unloading or reloading of cargo as the board may impose. They may from time to time vary or add to such order." [Lord COLERIDGE, C.J.—Is it not that they can detain only for a particular purpose?] No limit is put by the Act on the detention; the order stands until the ship is released. If the board acts unreasonably, there is an appeal given, but if a man does not appeal, but leaves the order to stand, the fault lies in him. [Lord COLERIDGE, C.J.—Surely, when the purpose of the detention for a survey has been satisfied by the holding of a survey, the order for detention is gone.] The officer who detained would have no authority to give up the ship. [Lord COLERIDGE, C.J.—Perhaps that might justify the officer, but afford no justification to the board, assuming that an action can lie against the board.] If the Board of Trade have acted wrongly in detaining the ship upon the order first made for detention, the plaintiff could have gone to the Court of Appeal created by the Act. [Lord COLERIDGE, C.J.—I doubt that the only appeal is from an order founded on a survey, and this would be a detention preliminary to the survey.] I have thought the point worthy of your Lordship's consideration, but as it is unnecessary in the present case to insist upon it, I will pass to the other branch of the section; first premising that it is competent for the board to add to and vary their orders, so that the ordering of two or more surveys seems perfectly legitimate; there is nothing that says that a survey once made is made once for all and for ever. The section goes on: "Upon the receipt of the report of the person making any such survey, the board may, if in their opinion the ship cannot proceed to sea without serious danger to human life," make such further order as they may think requisite as to the de-

tention of the ship, &c., so that the board are to act on their own opinion after they have received a report. Now, upon the facts, all the correspondence after the letter of the 7th Nov. formed a negotiation between the board and the owner of the ship, which came to an end about the 7th Jan., and then the board said, we will detain your ship, and upon that an order was made. There is another point of view in which the case may be looked at, and that is that the letter of Nov. 15 was an order. Then it is said that the board had no power to have the ship surveyed twice; but if a ship is legally detained, and there is a survey which, on the face of it, is only partial, and the detainer is never taken off, and in consequence of the request or representations of the owner a second and fuller survey is made, what is there to render this second survey illegal, or to allow the owner to find fault with the board for having done that which he invited them to do? [The Attorney-General was then stopped.]

Lord Coleridge, C.J.—This is an action brought by Mr. Lewis against Mr. Gray, who by agreement stands in the position of the Board of Trade, for damages said to have occurred to him in consequence of the board having detained his ship when not warranted in so doing. This case raises, I believe for the first time, the important question as to the true construction of the Merchant Shipping Act 1873 (36 & 37 Vict. 85).

Now several points have been taken in this case which are not necessary to be decided, and for my part, as at present advised (and I say no more than as at present advised) I am inclined to think that the wrong remedy has been pursued. I admit that there is a great deal to be said on both sides, and it is quite possible that on further consideration I might alter my mind upon it. I only say then that as my present impression stands the wrong remedy has been pursued.

The plaintiff was the owner of a merchant ship which traded between the French coast and the east coast of England, and, on the last voyage before these proceedings, had arrived in Hull from St. Malo with a cargo of grain. The Board of Trade then received from their own surveyor at Hull a notice, which, we are all of opinion, coming as it did from their surveyor, was sufficient to set them in motion under the Act of Parliament. It was sufficient to induce the board reasonably to believe that the ship was unfit to proceed to sea without serious danger to human life. The board thereupon ordered in the first instance the detention of the vessel for the purpose of being surveyed, and that they had power to do. The ship was so detained; so far the board acted clearly within their authority. The fact of the detention of the ship is notified to the owner by the letter of 7th Nov., and in it the Board of Trade inform him that they have reason to believe that his ship is unfit, for the reasons stated, to proceed to sea without serious danger to human life. The board, therefore, order her detention until she shall be surveyed. On the 12th of Nov. the surveyors appointed survey the ship, and report as follows: [His Lordship read the report.] That report is communicated by the board to the owner. Now, the next document is a telegram which is followed by a letter substantially the same as the telegram. It is a telegram from the owner of the ship to the board asking that the ship may be allowed to go to Sunderland for repairs. Upon that the letter of the 15th Nov., upon which so much stress has been laid, was written to the owner. It is as follows: [His Lordship read the letter.] Now in continuing the summary of the facts it is not necessary to read the whole of the somewhat voluminous correspondence. I think, and indeed we all think, that the view presented by the Attorney General of that correspondence, as a whole, is correct. That is, that negotiations took place between the parties as to when, and where, and under what circumstances, the repairs required by the board to be executed should be executed. I think it correct to state that from the 15th Nov. there was a negotiation going on. In the result the Board of Trade sum up in a letter the whole case. They say, I think, in substance, "There is a duty cast upon us by Act of Parliament to prevent ships going to sea in such a state as to imperil human life; upon the 12th Nov. we had a report which justified us in our view, and you in fact agreed that certain necessary repairs should be done; we then got into correspondence and could not agree upon some minor points, and that matter fell through, you persisting that your ship was an extremely good one, and that the survey was a partial survey. Be it so, we said; whether we gave an order on the 15th or not we will not now seek to inquire; our duty is to prevent a ship going to sea which cannot go without imperilling human life; and as we cannot agree as to the terms on which she is to go to Sunderland, we will, as a final conclusion of the correspondence, order that, as in our opinion the ship cannot proceed to sea without serious peril to human life, she shall be detained at Hull for further survey and repairs." Now that is the letter of the 7th Jan. On the 14th there is a survey, and an order made afterwards upon that survey, against which, in point of form, Mr. Lanyon has nothing to urge.

These being the facts, we have to consider whether the board have acted in a manner justified by the Act of Parliament. It is an Act which creates a duty in the Board of Trade. The first duty of the board under this Act is, if they are satisfied that human life is in danger, to endeavour to protect it, so far as the statute gives them power to interfere. I am of opinion that in taking into account that which is ground for believing that a British ship cannot go to sea without serious danger to human life, it is by no means necessary that the complaint, or report, or letter, upon which the Board of Trade proceed should contain these words; it is sufficient if to ordinary men it conveys the idea that the ship is unfit to go to sea without serious peril to human life.

It has been suggested that there can but be one survey, that there must be one survey, and one only, and that the Board of Trade cannot supplement any imperfect or incorrect details. I think it would be utterly unreasonable to construe this Act of Parliament in any such way.

Then it is said that the report must in actual terms find that the ship is unfit to go to sea without danger to human life. Now I find nothing in the Act requiring this. The fair meaning of the Act of Parliament is this, that if by a fair and reasonable inference it can be derived from the report, that the ship cannot proceed to sea without serious danger to human life, the Board of Trade may, if they act *bonâ fide*, draw the inference and stop the ship.

I therefore come to the conclusion that the Board had upon the 12th Nov. received a report, which would quite warrant them in thinking that the ship could not proceed to sea without serious danger to human life.

The question then is, what in point of fact was the course adopted by the board? I am inclined to think that the letter of the 15th of Nov. was an order, but I do not think it is necessary to decide that question, because whether the letter of the 15th Nov. was an order or not, the letter of the 7th Jan. undoubtedly was an order, as it seems to me, and was an order which, for the reasons I have given, the board were perfectly competent to make. I think, therefore, that the board have acted well within their powers.

It is perhaps not necessary to say more, but I will add that, as at present advised, as the matter has been raised (though I quite feel that there are certain difficulties in the way of the opinion that I have formed by reason of the wording of the 4th sub-section) I do not assent to the interpretation suggested by the Attorney General of the 4th sub-section. I think the 4th sub-section must be confined to the object of the act, and that the board, having detained a ship for the purpose of being surveyed, cannot detain *ad infinitum* a ship originally detained merely for a survey. They cannot detain her after the purpose has been satisfied by a proper survey. This point, however, was not fully argued, as the learned Attorney-General, having a strong case on other grounds, did not think it necessary to press this upon us.

This is no doubt a very important matter to private persons. It is also a very important matter to the public, and I think we should not discharge our duty if we allowed it to be supposed that objection of a technical kind, or of a formal nature, can prevail when the power entrusted to the Board of Trade has been substantially well and properly used.

DENMAN, J.—I am of the same opinion.

I think that on the 7th Nov. a valid order was made by the Board of Trade, and that that order was in fact the order under which the vessel was detained. The statute enables the board when they have reason to believe that any British ship is by reason of the defective condition of her hull, or for other reasons, unfit to proceed to sea without serious danger to human life, to appoint a surveyor to survey such ship, and to order, if they think fit, that such ship shall be detained for the purpose of being surveyed, and, thereupon any officer of customs may detain such ship until her release be ordered, either by the board, or by any court to which an appeal is given by the Act. The Act goes on to enact that upon receipt of the surveyor's report, the board may, if in their opinion the ship cannot proceed to sea without serious danger to human life, make such further order as they may think requisite as to the detention of the ship or as to her release. The letter from Mr. Spear was ample justification for the holding by the Board of Trade of the opinion that this vessel could not proceed to sea without serious danger to human life. On the 7th Nov., acting upon their opinion, the Board write to the owner and inform him that they have reason to believe that the ship cannot proceed to sea without serious danger to human life, and that they have ordered her detention for the purpose of holding a survey. On the 12th a survey is made, and a report is made by the surveyors.

It is contended that this report was insufficient. Now what is the report? [His Lordship read it.] Looking to the very purpose for which the survey and the report were made, I think the report sufficiently shows that the ship was unfit to proceed to sea, and could not do so without serious danger to human life. Reports of this kind are not to be construed like special demurrers of former days, but sensibly and by the light of practical understanding. On the 15th Nov. the Board gave a notice in a letter to the plaintiff, which has been treated as an order, and to a certain extent it was so regarded by the plaintiff himself; but for myself I do not regard it as an order; it was, I think, rather a letter written in anticipation of an order which might at any moment be made. That letter is thoroughly informal, and contains terms which are of the character of a negotiation rather than of an order. I put upon it this construction, that it comes to this, "If you choose to come to our terms, we will make an order to such and such an effect." Then a negotiation takes place, and on the 7th Jan. a final order is made that the ship should be detained and a full survey made. I can find nothing to render that further and fuller survey illegal or improper. It is made, and it proves that the ship is in fact unfit to proceed to sea without serious danger to human life.

LINDLEY, J.—I am of the same opinion.

I agree with Mr. Lanyon that the duty of the Board under this statute is to protect human life and not to see after cargoes. I do not think any one denies that a ship may be unseaworthy as to a particular cargo, or for a particular voyage, and yet fit to go to sea without danger to life. But with the rest of his argument I cannot agree. I think his criticism upon the form of complaint, and of the first survey, without warrant. I apprehend that it is sufficient if a report show upon the face of it by reasonable inference that the ship is unfit to proceed to sea without serious danger to human life. That being so, I am unable to see that the board have in any respect exceeded their powers. Now with reference to the question of whether the letter of the 15th Nov. is to be considered as an order or not, I am inclined to think it was not. I think it was part of the correspondence. Let us test it in this way. Supposing an appeal under the Act had been brought against that letter, it seems very doubtful whether such an appeal could be sustained. The answer would be, it is not an order against which an appeal lies. From the correspondence it is plain there was no unreasonable delay, the plaintiff has no one but himself to blame for the delay that took place.

With reference to the question raised by the Attorney-General as to the 4th clause of sect. 12, namely, that the short answer to their question would be to rely upon the words, "And thereupon any officer of the customs may detain such ship until her release be ordered either by the Board of Trade, or by any court to which the Act gives an appeal," I am of opinion that the construction he suggested is erroneous. I think the true construction is tolerably plain, if the whole of the words are looked at, and the whole of the language of the clauses. The power conferred by that clause is this, that the Board of Trade may order that any ship shall be detained for the purpose of being

surveyed; then the language is changed, and, as I apprehend, not without reason. It is not the board may detain such ship, but that any officer of the customs may detain until, &c. It appears unreasonable to say that because the Board has power to detain for the purpose of holding a survey, they may detain as long as they please.

Upon the question whether this is a case in which an action will lie in this court for wrongful detention, it follows at once that if the board is not acting without jurisdiction no action can lie; but supposing all they did was in excess of jurisdiction, the common law remedy by action is not taken away, and though the plaintiff might have applied to the Appeal Court, he was not bound to do so. That point, however, does not arise in this case, nor is there any question for us as to whether a petition of right, or action against the board, is the proper form of proceeding.

DENMAN, J.—I expressed no opinion on any matters which I thought were not in question in this case, but it must not be supposed that I refrained because of any dissent from the opinions of the rest of the court.

Solicitors for plaintiff, Messrs. *Oliver* and *Botterill*, Hull.

Solicitor for defendant, *The Solicitor to the Treasury.*

ADMIRALTY DIVISION.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

Tuesday, Dec. 14, 1875.

THE CAROLINA.

Seaman's wages—Wages earned after suit commenced—Right to and mode of recovery.

A seaman who commences a suit in rem for the recovery of his wages cannot have a decree for wages or subsistence money after the date of the commencement of his suit, although he is retained in the service of the ship by the master; but he will be entitled to an allowance in the way of costs for detention and subsistence money from the date of the institution of the suit to the date of decree.

THIS was a motion in objection to the registrar's report made in a cause of wages instituted on behalf of the first and second mates and a seaman of the American ship *Carolina.*

The plaintiffs had been engaged to serve on board the *Carolina*, on a voyage from Grimsby to Cardiff, and thence to Buenos Ayres; but whilst the ship was at Cardiff she was arrested in a cause of necessaries, and no appearance being entered on behalf of her owners or any other persons, the master dismissed the remainder of the crew, but retained the plaintiffs on board until he could have an opportunity of hearing from his owners, and they remained on board until 2nd Sept. 1875, when the master, without dismissing them, told them to board themselves ashore, as he had no credit, and could not provide them with food. They did so, remaining, however, on board the ship at other times and in her service until she was sold after the decree (2nd Nov. 1875). On 5th Sept. 1875 the plaintiffs instituted a cause of wages against the ship, and no appearance having been entered their petition was filed on 12th Oct., and a decree was obtained on 2nd Nov., 1875, pronouncing for the claims. The petition claimed wages and subsistence money up to the date of the decree, and the whole question of the amount due was referred to the registrar, who reported that the plaintiffs were entitled to their wages and subsistence money up to the date of the commencement of the suit, but disallowed all wages, &c., subsequent to that date. To this report the plaintiffs now objected.

W. G. F. Phillimore, in support of the objection.—The question is whether wages and subsistence money should be given up to Nov. 2 or only to Sept. 5. [THE REGISTRAR.—The claim from Sept 5 to Nov. 2 was disallowed, because it has always been the practice in the registry to give subsistence money and compensation for detention from the date of the institution of the suit in the way of costs; and because plaintiffs in wages suits cannot get wages for a period after they have left the service of the ship, which they practically do before instituting their suit.] There is no reason why a servant should not continue in a person's service, and yet sue that person for his wages; the commencement of the action does not terminate the contract of service. [Sir R. PHILLIMORE.—Practically, however, the commencement of an action would operate as the termination of the contract.] Here, however, the plaintiffs actually remained on board and in the service of the ship after the institution of the suit, and did not terminate their contract. They remained in the service of the ship until she was sold. It is constantly the practice to allow wages to foreign seamen after the institution of their suit when they are sent home from this country: Williams and Bruce, Admiralty Pratice, p. 165. On taxation of costs the plaintiffs would not get the same amount as they would for wages.

Sir R. PHILLIMORE.—I should be loth to alter the established practice of the court, which unquestionably does exist, without some very strong authority being shown to me. The practice of the registry in this respect is founded upon the principle that when a seaman institutes a suit for wages he ceases to have any claim for subsequent wages upon the ship, and that principle has been acted upon in a great variety of cases. It is said that there is a great hardship in the mariner being left without any claim for support after he has left the ship, in the interval between the institution of the suit and the hearing of the cause. But, substantially, he would receive a sum of money for his maintenance and detention when the question of costs came to be decided. It is said that these men stayed on board after the institution of the suit, and at the request of the master. Those are circumstances to be brought before the taxing officer, and I should surmise that the registrar would pay considerable attention to an affidavit with regard to the employment of seamen on board the vessel after the institution of the suit. There would be a ground of appeal if it were not given due weight to, and a proper allowance not made to the seamen. I decline to vary the registrar's report, as such a variation as that asked for would be a subversion of the practice of the court, which has existed for a very long period.

Solicitors for the plaintiffs, *Fielder* and *Sumner.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by W. Appleton, Esq., Barrister-at-Law.

Wednesday, Feb. 2, 1876.

(Before the Lord Chancellor, Lord Coleridge, C.J., and Mellish, L.J.)

Hickox and another *v.* Adams and another.

Contract for sale of goods—Cost, freight, and insurance—Construction of—Policy of insurance—Delivery of to vendee—"Memorandum Articles."

The plaintiffs, at New York, contracted to sell and deliver 1000 *quarters of wheat to the defendants at Bristol, upon the terms, "cost, freight, and insurance." Through a mistake the plaintiffs shipped, by a sailing vessel, a cargo of* 2000 *quarters of wheat to K. at Bristol. They also forwarded to K. by steamer a bill of lading and a policy of insurance of the whole cargo of wheat shipped. This policy was "free from particular average."*

K., at the request of the plaintiffs, accepted a bill of exchange drawn upon him by them for the price of the 2000 *quarters. The defendants afterwards refused to accept the* 1000 *quarters from K.*

Held (reversing the judgment of the Exchequer Division), that in an action against the defendants for breach of a contract to accept the 1000 *quarters, the plaintiffs were not "ready and willing" to deliver the* 1000 *quarters to the defendants within the terms of their contract.*

Appeal from Exchequer Division.

The action was brought to recover damages for breach of a contract by the defendants to accept goods which the plaintiffs alleged they had sold and were ready and willing to deliver to the defendants.

The first count of the plaintiffs' declaration was, "for that it was agreed between the plaintiffs and the defendants that the plaintiffs should sell and deliver to the defendants, and the defendants should buy and accept from the plaintiffs, 1000 quarters Millwaukie wheat, at the price of 2*l.* 13*s.* 6*d.* per quarter; the said price for the said goods to be paid by the defendants' acceptance of the plaintiffs' bill of exchange for the price thereof, payable to the plaintiffs or order at sixty days."

Averment of fulfilment of conditions precedent.

Breach, that the defendants "did not nor would accept the said goods or any of them, and did not nor would pay the plaintiffs for the same goods by accepting the said bill of exchange as aforesaid, whereby," &c.

The second count set out an agreement between the plaintiffs and the defendants that "the plaintiffs should sell to the defendants, and the defendants should buy from the plaintiffs, 1000 quarters Millwaukie wheat, at the price of 2*l.* 13*s* 6*d.* per quarter, upon the terms that the plaintiffs should deliver the said goods to the defendants, and the defendants should accept and pay for the same."

Averment of fulfilment of conditions precedent.

Breach: That the defendants would not accept the said goods from the plaintiffs, nor pay them for the same, whereby, &c.

There were also the usual money counts.

Pleas: 1. To the first and second counts of the declaration, denial of agreements as alleged. 2. As to the said first two counts, that the plaintiffs were not ready and willing to deliver the said goods as alleged. 3. A denial of the breaches alleged. 4. Rescission of the contracts set out by the declaration. 5. To the money counts never indebted.

Issue was taken by the plaintiffs on these pleas.

The action was tried at the Bristol Spring Assizes in 1875, when a verdict was found for the plaintiff for the damages, 3000*l.*, claimed by the declaration, leave being reserved to the defendants to move to enter a verdict for them, or nonsuit, or to reduce the damages. The court to have power to draw inferences of fact.

The following were the material facts given in evidence at the trial:

On the 22nd May 1874, the plaintiffs, Messrs. Hughes, Hickox, and Co., who are large commission merchants at New York, sent a cable message to the defendants, Messrs. Henery, Adams, and Co., who carry on their business at Gloucester, offering them a load (about 1000 quarters) of Millwaukie wheat, at 53*s.* 6*d.* per quarter. The plaintiffs also sent, at the same time, a cable message to Messrs. Kruger and Co., of Bristol, with whom they had been accustomed to do business largely, offering them two loads or 2000 quarters of the same wheat at "53*s.* 3*d.* per quarter, in bags direct to Bristol. C. F. I." (*i.e.*, cost, freight, and insurance). The defendants in reply to the message they had received from the plaintiffs, sent back a reply, which was simply, "To Hickox, New York, accept," the sender's name being omitted in order to save expense.

The plaintiffs assumed that this reply came from Kruger and C., and they accordingly shipped the wheat by sailing vessel for Bristol; and on the 5th June 1874, they wrote to Messrs. Kruger and Co., informing them of the fact, and that the plaintiffs had drawn upon Kruger and Co. for 4597*l.* 18*s.* 9*d.* (the price of the two loads of wheat), at three days' sight. The plaintiffs with this letter, forwarded by steamer an invoice of the wheat sold, and a certificate of insurance of the Oriental Mutual Insurance Company, which certified that the company had insured, under a policy made for the plaintiffs, "23,900 dollars in gold on 15,786 bushels of wheat, in 5311 bags, free of particular average (unless the vessel be stranded, sunk, burned, or in collision), valued at sum insured, shipped on board of the ship *Thomas Baynes* at and from New York to Bristol; and it is hereby understood and agreed, that in case of loss, such loss is payable to the order of Hughes, Hickox, and Co., on surrender of this certificate. This certificate represents and takes the place of the policy," &c.

The plaintiffs also forwarded the bill of lading of the wheat to Kruger and Co., and a bill of exchange signed by the plaintiffs, and drawn upon Kruger and Co. for 4597*l.* 18*s.* 9*d.*, payable three days after sight to the plaintiffs' order.

On the 23rd May 1874, the defendants wrote to the plaintiffs:

We have to acknowledge the receipt of your cable message of yesterday's date, as follows, "offer load Millwaukie fifty three six sail Bristol," to which we replied "accept," and which we now beg to confirm. We suppose terms are sixty days on bankers; however, no doubt you are writing fully on this point.

The plaintiffs received this letter at some time after the 5th, and before the 8th June.

On the 8th June the plaintiffs wrote to the defendants explaining the mistake which had been made, and saying:

We have therefore written Messrs. Kruger and Co., inclosing our draft on you at sixty days, for the amount of the inclosed invoice [for one load], say 2340*l.* 15*s.* 10*d.*, instructing them to attach bills of lading for property described therein, and present for your acceptance. We trust, with the above explanation, you will duly honour the same, &c.

The plaintiffs forwarded to the defendants, with this letter, an invoice for one load of wheat, consisting of 7994 bushels, at 53*s.* 6*d.* per bushel.

On the same day the plaintiffs wrote to Kruger and Co., explaining what had occurred, and going on to say:

Draft and documents having gone forward to you by steamer of the 6th, we shall request you by cable to honour same for our account. We now inclose our draft at sixty days on Messrs. Adams for 2340*l.* 15*s.* 10*d.*, which we request you to attach to bill of lading for 7994 bushels wheat, and present for acceptance, which, if duly honoured, as we trust it will be, will reimburse you for one load. The other parcel you will please to dispose of to best advantage, rendering account sales to us, *&c.*

The draft drawn upon the defendants by the plaintiffs for 2340*l.* 15*s.* 10*d.*, payable sixty days after date to the order of the plaintiffs, was forwarded to Kruger and Co. with this letter, and was endorsed "Pay Messrs. Kruger and Co. or order—Hughes, Hickox, and Co."

On the 10th June 1874, the plaintiffs sent the following telegram to Kruger and Co.: "Honour draft 5th June for our account, letter 8th explains answer."

On the 20th June the defendants wrote to the plaintiffs a letter beginning, "We have none of your favours to reply to," and after stating that the markets were dull, &c., the letter concluded, "Sorry an effort to do business in the Bristol wheat fell through."

On the 24th June the defendants wrote to Kruger and Co., "Without prejudice we will accept the boatload of wheat shipped per *Thomas Bayne*, if they, Messrs. Hughes, Hickox, and Co., will consign to our care the other boatload for sale on their account. If you are not in a position to make this arrangement we leave it in your hands to cable out this offer for their reply to-morrow."

On the same day the defendants refused to accept the bill of exchange which the plaintiffs had drawn upon them, and which was presented for their acceptance by Kruger and Co., and accordingly protested. Messrs. Kruger and Co. had duly accepted the bill of exchange drawn on them by the plaintiffs.

On the 27th June the defendants wrote to the plaintiffs expressing surprise that the plaintiffs had shipped wheat to them, and saying that, having heard nothing from the plaintiffs for a month, they had bought elsewhere; but that, in order to carry out the transaction, the defendants had offered Kruger and Co. to take one load of wheat on condition of having the other load consigned to them, but that the defendants had heard nothing more from Kruger and Co.

On 9th July 1874, immediately after the receipt of the last-mentioned letter, the plaintiffs telegraphed to the defendants, "Accept your proposition; have ordered Kruger to deliver your wheat."

On the 11th July 1874 the defendants wrote to the plaintiffs refusing to take the wheat. The price of wheat had fallen considerably between the date of the plaintiffs' first order of the 22nd May and the refusal of the defendants to accept the goods.

On the 19th April 1875, a rule was obtained by the defendants ordering the plaintiffs to show cause why the verdict for them should not be set aside, and a verdict for the defendants or a nonsuit entered on the grounds that there was no memorandum of the contract within the Statute of Frauds, that the plaintiffs had not performed the contract on their side; that the tender was not one which the defendants were bound to accept, no policy of insurance having been tendered, or why the damages should not be reduced pursuant to leave reserved.

On the 16th November 1875, the Exchequer Division made an order that the damages found for the plaintiff on the trial be reduced to 150*l.*, and as to the residue of the rule that it be discharged.

It was against this order that the defendants now appealed.

Benjamin, Q.C. (with him *Cole*, Q.C. and *Petheram*) for the appellants.—The plaintiffs were never in a position to carry out their contract with the defendants. The letter of the 8th June from Hickox to Adams, announcing the mistake, reached Adams on the 23rd or 24th. The terms of the contract then were, "cost, freight, and insurance." The defendants were entitled to have a transfer of the policy of insurance at the same time that the bills were presented for their acceptance. The actual policy would have been no use to the defendants. It was of use to Kruger and Co., who had a lien upon it. It is true that it might have been endorsed with a notice that Kruger held it for the defendants: but that would have been of no service to the defendants, who could not have delivered it to a purchaser of the goods. Besides, the policy covered the whole quantity of wheat shipped in the *Thomas Bayne*, and was warranted "free of particular average," so that the defendants could not have recovered upon the policy if there had been a total loss of their load of wheat. The plaintiffs were never ready and willing to deliver the policy to the defendants.

Lopes, Q.C. (with him *A. Collins*), for the respondents, the plaintiffs below.—It is admitted that there was no actual delay in forwarding the goods, and there is no dispute as to the quality of them. We were ready and willing to deliver the policy within the terms of the contract. Those terms were "cost, freight, and insurance." The plaintiffs did insure—not the one load separately, but the two loads, one of which Kruger was to hand over to the defendants, and the other to sell and account for to the plaintiffs. Assume that Kruger and Co., when they offered the draft to

the defendants for acceptance, had offered also the policy covering both the loads; the defendants could have then gone into the market with their policy, and no objection could be made by a purchaser that the policy covered more than the quantity offered. Kruger and Co. were the plaintiffs' sole agents in England, and it must be assumed that they would have done everything possible to help their principals. Kruger and Co. would not have been damnified if they had passed the policy on. If the excepted risk of particular average had been inserted, the defendants would have been entitled to complain that the goods had not been insured according to the contract. The Lord Chancellor. — A purchaser might be willing to take the goods upon having the policy covering the whole quantity handed over to him, and it may be that he then might have recovered upon a loss, but would Kruger and Co. have handed over the policy under these circumstances?] We were in a position to do it, and I ask your Lordships to infer that we would have done it.

Benjamin, Q.C. in reply.—It is now admitted that we had a right to have the policy of insurance delivered with the shipping documents, but the defendants could have recovered nothing upon the policy covering the two loads, if any part of them remained upon the ship's arrival in port. If all our load had been lost, we could not have recovered a penny. It is a peculiarity under policies to insure what are termed "memorandum articles" that no partial loss can be recovered, for wheat is one of those articles. It is asking the court to infer a violent improbability, that Kruger and Co, would have given up the policy—their only security whilst the goods were at sea—for the advance of 4597*l.* to the plaintiffs. The plaintiffs assumed that Kruger and Co. would have given it up, but there is nothing to show that they would have done so.

The Lord Chancellor.—There are some of the questions in this case which I shall put aside. As to the question of whether there was a contract in writing in order to satisfy the Statute of Frauds, that has been given up. Both parties seem to be agreed that the case is to be taken as if there was a valid contract for sale "cost, freight, and insurance." and that the ordinary shipping documents were to be delivered to the purchaser. I also put aside the mistake as to the telegrams. It is immaterial to follow the history of it, because the mistake was found out in time to have had the 1000 quarters of wheat delivered to the defendants, if the plaintiffs could have carried out their contract in other respects.

Now, when the mistake was found out, Hickox and Co. had sent forward to Kruger and Co. a cargo consisting of two loads of wheat, the bill of lading and a policy of insurance upon the whole of the parcels. The ship, in which the wheat was, being still upon her voyage, Hickox and Co., the plaintiffs, wrote to Adams and Co., telling them of the mistake, and that Kruger and Co. would deliver to them (the defendants) 1000 quarters of wheat, and present a draft for the price of these 1000 quarters upon the defendants payable in sixty days. At that time the draft which the plaintiffs had drawn upon Kruger and Co. for the price of the whole shipment was just coming due. The defendants refused acceptance of the draft upon them when it was presented to them, and refused, in fact to accept the goods.

The question for us is, upon the whole facts of the case, are we to hold that Hickox and Co. were then ready and willing to fulfil their contract with Adams and Co.? In my opinion they were not. It is an essential element in their being ready and willing to fulfil their contract that they should be able to put Adams and Co. in a similar position, as to insurance of their own load, as Kruger and Co. were in respect of the whole quantity.

Now, the insurance of the goods, being what I have described it to be, assuming that the policy was a proper one, and would have been a good and sufficient one to satisfy a purchaser from the defendants of the one load, if that policy had been handed over to him, I cannot see anything from which to infer that Kruger and Co. would have been ready to hand over that which was their only security for the bill which they had accepted. Then, supposing that they had been willing to do so, would that have been a sufficient protection for Adams and Co.? I think not, for under the particular terms of the policy, unless there was a total loss of the goods, no loss could have been recovered upon it. It is, therefore, impossible to say that Adams and Co. would have been in the same position as if they had had a separate policy covering the 1000 quarters which they had purchased.

I am of opinion that our judgment must be for the defendants.

Lord Coleridge, C.J. concurred.

Mellish, L.J.—I am of the same opinion. In this case there was a contract to sell and deliver goods between a firm carrying on business at New York and a firm at Gloucester. Is the English firm bound to accept the bill of lading of the goods without the policy of insurance? I think they are certainly not so bound. It is clear that the goods could not be sold under the bill of lading without a security in case of their total loss at sea. Now there was, in fact, no policy on this wheat alone, but there was one on the whole quantity consigned to Kruger and Co. I am of opinion that we must find that Kruger and Co. were not ready and willing to deliver that policy to the defendants; and if Kruger and Co. had been, the plaintiffs would not have been carrying out their contract with Adams and Co., the defendants, in delivering to them a policy covering the whole quantity of wheat.

Judgment for appellants

Solicitors for the appellants, *Whites, Renard,* and *Co.*, for *Henry Brittan, Press,* and *Inskip,* Bristol.

Solicitors for the respondents, *Clark, Woodcock,* and *Ryland,* for *Fussel* and *Co.*, Bristol.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKellar, J. M. Lely, and R. H. Amphlett, Esqrs., Barristers-at-Law.

Friday, Feb. 11, 1876.

LISTER *v.* VAN HAANSBERGEN.

Charter-party—Undue detention in loading—Exemption of charterer—Lien of owner.

In an action by shipowner against charterer, there was a claim for undue detention in loading the ship. The charter-party contained a stipulation that as the defendant was acting on behalf of another party, his liability should cease as soon as the cargo was shipped, loading excepted, the owner and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage and all other claims; which lien it was thereby agreed they should have.

Held upon demurrer that, whether the owner's lien covered the claims in the action or not, the defendant was liable for all damage incurred before the cargo was completely shipped; and that the action was maintainable.

THIS was an action by shipowner against charterer upon a charter-party in the following words:—

Newcastle-upon-Tyne, 14th June, 1875.

It is this day mutually agreed between Mr. John Lister, owner of the British or privileged good ship or vessel called the Antias of Hartlepool, of the burden of 13½ keels or thereabouts, now in the river Tyne, and Messrs. Van Haansbergen and Usher of Newcastle-upon-Tyne, as agents to the freighters of the said ship, Messrs. A. Vander Leems, Son, and Co., for one voyage from the river Tyne to Rotterdam. That the said vessel, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed as directed by the said freighters and there load from the factor of the said freighter a full and complete cargo, consisting of four to five keels firebrick, and load up with Ramsay's Garesfield coke not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed with the first opportunity and all possible dispatch to Rotterdam, and there deliver the same alongside any vessel, wharf, or warehouse as ordered, where she can safely deliver on being paid freight at and after the rate of 6*l.* 5*s.* sterling per keel of 16 tons for the coke, at 7*l.* 10*s.* sterling per keel of 21 tons for the bricks for the quantity taken on board as aforesaid, and 2*l.* 2*s.* gratuity; the freighter paying all dues and duties on the cargo, and the ship all other charges. As soon as the cargo is shipped, the master to sign the bills of lading as presented without prejudice to this charter. The charter being concluded by the said Messrs. Haansbergen and Usher for and on behalf of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted, the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight demurrage, and all other claims, and which lien it is hereby agreed they shall have, and that the vessel is to be reported and cleared at the custom house at Newcastle by the said Messrs. Haansbergen and Usher, and all money for charges or otherwise due by the owners or master shall be paid on the captain receiving despatches (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted). The freight to be paid on unloading and right delivery of the cargo in cash for ship's use, and the remainder by an approved bill on London at two months' date or all in cash equal thereto at master's option. Seven working days are to be allowed the said merchants for unloading (if the ship is not sooner despatched) and demurrage to be paid over and above the said lying days at 2*l.* per day penalty for non-performance of this agreement, amount of freight. The vessel to be addressed to the charterer's agent at port of discharge paying the usual brokerage only.

By authority of owner.

ppro JAMES THOMPSON.

J. KNOTT,

As agents VAN HAANSBERGEN and USHER.

Witness, J. A. HAVELOCK.

The declaration set out the material parts of the charter-party, and averred that the plaintiff carried the said cargo in the said ship to Rotterdam aforesaid, and there delivered the same in accordance with the said agreement, and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to have the said charter-party performed by the defendants on their part, and the defendants in loading the said ship unduly detained the same beyond the proper time provided for the loading thereof, whereby the plaintiff was deprived of the use of the same, and incurred expense in keeping the same and maintaining the crew thereof. And for a second breach the defendant kept the said ship on demurrage fourteen days over and above the said periods so agreed upon for loading as aforesaid, and thereby became liable to pay to the plaintiff 28*l.* for demurrage as aforesaid, and has not paid the same.

In the 4th plea the defendant set out the charter-party verbatim, and said that at the time of the making of the said charter-party he, the defendant (therein described as Messrs. Van Haansbergen and Usher), was agent for the said Messrs. A. Vander Leems and Co., therein mentioned, and that he (the defendant) loaded the said agreed cargo on board the said ship.

The second breach of the charter-party alleged in the declaration was demurred to on the ground, amongst others, that no demurrage was chargeable for delay beyond the time for loading.

And the fourth plea was demurred to on the grounds, amongst others, that the exemption of liability clause in the charter-party did not apply to loading and liabilities incurred in respect thereto; and the plea, whilst affirming that the defendant loaded the said ship, did not allege that he loaded it within the proper time and without delay; and the fact that the defendant was acting as agent did not, under the wording of the charter-party set forth, release him from the above-mentioned liabilities.

Watkin Williams, Q.C. (with him *Wright*), argued for the plaintiff.—The exemption of the charterer's liability is expressly barred with respect to loading; he must, therefore, be liable for all matters connected with the loading. It is not sufficient that he has completed the loading; he must have done it without delay and in reasonable time. Clauses of this kind have been discussed and interpreted in

Bannister v. *Breslauer*, L. Rep. 2 C.P. 497;
Gray v. *Carr* L. Rep. 6 Q.B. 522; *ante*, vol. 1, p. 115;
Francesco v. *Massey*, L. Rep. 8 Ex. 101: *ante*, vol. 2, p. 594;
Kish v. *Cory*, L. Rep. 10 Q.B. 553; *ante*, vol. 2, p. 593.

Herschell, Q.C. contra.—The charterer apon this agreement is responsible only for the loading of the cargo, so that the shipowner may have an effectual lien to cover all his claims. The owner may satisfy the claim based upon the alleged breach of the charter-party by recouping himself upon his lien, and the charterer is not liable for delay or demurrage in loading.

BLACKBURN, J.—I do not think we require a reply from the plaintiff. The words upon which

this question is raised seem to me to have but one meaning. The defendant has engaged that the vessel shall be loaded with a full cargo within a reasonable time; or if a particular time be actually specified, then within that time. There is a two-fold obligation—first, to load a full cargo; secondly, to do so within the time agreed. It is contended on the defendant's behalf that the charter-party gives a lien to the shipowner for every kind of claim, both liquidated and unliquidated; the words are "the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage, and all other claims, and which lien it is hereby agreed they shall have." I have some doubt whether "all other claims" can be held to cover the unliquidated claim for unreasonable delay; but whether they do or not, the previous words do not exempt the freighter from liability for such delay; they are, "This charter being concluded by the said Messrs. Haansbergen and Usher, for and on account of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted." This means that, with respect to the loading, the freighter's liability remains as if there were no exemption, and it includes the delay which takes place before the cargo is completely shipped. It is not necessary to say whether this meant to exempt the freighter from liability for every claim which the owner can enforce upon his lien, for the simple and natural interpretation of the words clearly gives the owner a remedy against the freighter for loss incurred during the shipping of the cargo. The declaration, therefore is good, and the plea is not a sufficient answer to it. Our judgment must be for the plaintiff.

LUSH and QUAIN, JJ. concurred.

Judgment for plaintiff.

Solicitors for plaintiff, *Gold* and *Son.*

Solicitors for defendant, *Williamson, Hill,* and *Co.*, for *Ingledew* and *Daggett,* Newcastle.

Monday, Feb. 14, 1876.

OPPENHEIM *v.* FRASER.

Ship and shipping—Sold note—Warranty—Condition precedent—"Ship now at Rangoon."

In an action brought by the vendors against their vendees for refusal to accept, evidence was given to show the circumstances under which the contract was made, and that it was of vital importance that the vessel should be in the port named at the time of making the contract. The jury found, that the condition "ship now at Rangoon," had not been fulfilled, and that it was a condition absolutely vital.

Held, that it was rightly left to the jury to say under what circumstances the contract was made, and that the words "ship now at Rangoon" amounted to a warranty justifying the defendant in saying that there had been a failure of performance of a condition precedent and in refusing to carry out the contract.

Held further, that the finding of the jury was rightly taken as an element in enabling the court to say that the words amounted to a condition precedent.

THIS was an action tried before Blackburn, J. and a special jury, at the Guildhall sittings after Trinity Term on the 26th Nov. 1875, for non-acceptance by the defendant of a cargo of rice according to contract, and brought by the plaintiffs as vendors. The contract was made on the 12th Dec. 1873 for the purchase of 1500 tons of rice. At this time intense anxiety prevailed in India, and in consequence of the famine in Bengal, and the expected prohibition of exports from Rangoon to Europe, merchants would only buy such cargoes as were then being landed in Rangoon, or were prepared with ships then at that port for the purpose of loading. So much of the contract as is material to this case was as follows:

London, 12 Dec., 1873.

Sold for account of Messrs. Oppenheim and Schrader to our principals, the cargo of rice consisting of about 1500 tons in bags, or such portion thereof as may arrive by the vessel, new crop, Rangoon per *Coldinghame* about——tons register———Captain, now at Rangoon, to be shipped during Dec. 1873, or Jan. 1874, on the following conditions, &c.

The *Coldinghame* was not at Rangoon at the time of the contract being entered into, but was then upon a voyage going to Rangoon. The defendants pleaded that it was a condition precedent that the ship should be at Rangoon on the date of the contract, and evidence was given on their behalf as to the then state of trade at Rangoon, as stated above.

The jury returned a verdict for the defendants, intimating that the condition as to the ship being at Rangoon at the date of the contract not having been fulfilled, and that being absolutely vital, the verdict must be for the defendants.

Blackburn, J. however gave the plaintiffs leave to move to enter judgment for them, taking the finding of the jury as one of the elements on which the motion was to be made.

J. C. Matthew (with him Sir *H. James*, Q.C., *Watkin Williams*, Q.C., and *Myburgh*), moved accordingly.—You are not entitled to incorporate the finding of the jury with the contract for the purpose of construing it. There is no authority for saying that what is found by the jury as to the importance of the vessel being at Rangoon can be so incorporated. The evidence tends to leave the construction of the contract with the jury, and however important it might be that the vessel should be at Rangoon, it is not that which indicates whether that is a condition precedent or not. The question is, what did the parties really agree upon according to the words of the contract apart from the evidence? [BLACKBURN, J. cited *Graves* v. *Legg* (23 L.J.228, Ex.; 9 Ex. 709.] The evidence does not bring the case within *Graves* v. *Legg* (*ubi sup.*), in which case the name of the ship was the condition precedent; and an averment of the fact of the materiality of the name of the ship appeared on the pleadings. Evidence to show that "ship now at Rangoon" was of special and specific significance at this particular juncture is inadmissible—it is purely a question of construction for the court, and there is no evidence of the purpose for which the contract was made. [LUSH, J.—Here there was express evidence of particular and exceptional circumstances; surely they could be brought forward to show the nature of the contract. [BLACKBURN, J. cited *Behn* v. *Burness* (3 B. & S. 751; 8 L. T. Rep. N. S. 207; 1 Mar. Law Cas. O. S. 178, 329; 32 L. J. 204, Q. B.)] There was no agreement between the parties that the words should be a condition precedent: (*Jackson* v. *The Union Marine Insurance Company, ante,* vol. 2, p. 435; L. Rep. 8 C. P. 572; 31 L. T. Rep. N.S. 789; 44 L. J. 27, C. P.) If

evidence was admitted to show the intention of the parties the document itself would be of no use, the same printed form of words between A. and B. would bear a different meaning than the same form between C. and D. The words themselves are not ambiguous, but the effect of them is. [BLACKBURN, J.—It is never a fact to go to the jury what the words of a contract mean, but it is a fact to go to them under what circumstances are they made, and to what do they relate.] You cannot, by evidence make words a condition precedent, and there being no ambiguity what evidence was admissible? If it were mere matter of description you could not admit such evidence; for instance if a ship were described as having a figure head painted red. [LUSH, J.—That would be a condition precedent if it were shown that she was going among pirates who had a superstition never to attack ships with a red figure head.] The contract must be read in the writing in which it is expressed, and you cannot have the writing plus parol evidence. The question, too, is independent of whether the words may or may not be a condition precedent; the parties would have gained advantage by the resale of the rice whether this particular ship was in a port or not, and if the price had not gone down these words would not have been material: (*Corkling* v. *Massey*, *ante*, vol. 2, p. 18; L. Rep. 8 C. P. 395; 27 L. T. Rep. N. S. 636; 42 L. J. 153, C. P.)

Benjamin, Q.C. (with him *Cohen*, Q.C. and *Patchett*) were not called upon for the plaintiffs.

BLACKBURN, J.—The judgment must stand.

In all cases we must consider the intention expressed by the words, and this must depend on circumstances. In construing a will you inquire into all the circumstances, and not what the testator means to say, but what does he mean under the circumstances. The same rule applies to contracts, with this difference: everything, all the circumstances of the testator's life, are relevant in the case of a will, but in a contract only those circumstances are relevant which both parties are speaking of at the time. The question is, what the facts are, of and concerning which they are speaking in using those words, and the question must be put what are the facts?

In this case the stipulation was made that the ship was "now at Rangoon." Now is this a mere stipulation or a condition precedent which would put an end to the contract? We must construe the contract according to the state of things known; we might differ as to whether there was reference to an ordinary state of things or not. I am not sure that I should have said under other circumstances that this was not a condition precedent; but, with the evidence and considering the state of the market, the prohibition expected against the import of rice, and other things, it is important to consider these. The ship being in the port at that time is all important; they wanted rice, they did not want a right of action.

In *Graves* v. *Legg* (*ubi sup.*) the question was raised by pleading the material circumstances, and the object with which the contract was entered into was in the knowledge of both parties. Baron Parke there said it was material and essential to the case. In *Behn* v. *Burness* (*ubi sup.*) Williams, J. says the "question appears to be properly raised by the averment in the plea that the time and situation of the vessel were essential and material parts of the contract. On the trial of the issue joined thereon, it was no part of the judge's duty to leave to the jury any question as to the construction of the contract, or the materiality of any of its statements. It was his function to construe the contract with the aid of the surrounding circumstances found by the jury, and to decide for himself whether the statement that the ship was in the port, supposing it to be untrue, was an essential part of the contract, or a mere representation, and to direct the jury to find for the defendant or plaintiff accordingly. The question it would seem might also be raised by pleading the material circumstances (as was done in *Graves* v. *Legg*, 9 Ex. 709), on which the defendant relies as leading to the construction which the plea seeks to put in the instrument. Unless one or other of these modes were adopted, the court, in case there should be a demurrer to the plea, or on an application for judgment *non obstante veredicto*, would be precluded from taking the surrounding circumstances into consideration in aid of the construction. It is plain that the court must be influenced in the construction not only by the language of the instrument, but also by the circumstances under which and the purposes for which the charter-party was entered into." The course taken in *Graves* v. *Legg* (*ubi sup.*) was not adopted here, the circumstances not having been pleaded; but it was left to the jury to find those circumstances, and they did find that it was absolutely vital that the ship should be at Rangoon on the 12th Dec. and that the defendants' evidence upon this point was true. Hence the verdict was entered for the defendants.

The case is governed by *Behn* v. *Burness* (*ubi sup.*); this is in point, and we can not overrule it.

MELLOR, J.—I am of the same opinion.

In this case *Behn* v. *Burness* (*ubi sup.*) is in point. Evidence is not admissible to show that the parties meant something not expressed, but the circumstances under which the contract was made must be known. We do not admit the evidence to show what the parties intended, but to show what the words mean in reference to the circumstances. I think the judgment must stand.

LUSH, J.—The words "now at Rangoon" are capable of being construed in two ways, but they must refer to the circumstances under which the contract was made. It was for the jury to say what they were, and they have done so, and said they were of the last importance. The selling value of the rice was much affected by the fact of the vessel being at Rangoon or not, and the words must apply to the particular circumstances. Sir H. James says different words receive different interpretations in different contracts. This is so, and *Behn* v. *Burness* shows it. The verdict must stand.

Judgment for the defendants.

Solicitors for plaintiff, Messrs. *Hollams, Son, and Coward.*

Solicitor for defendants, *W. J. Foster.*

Feb. 16 *and March* 6, 1876.

THIIS AND OTHERS *v.* BYERS.

Ship and shipping—Liability of charterer for delay in unloading caused by foul weather.

Where a given number of days is allowed to a charterer for unloading, a contract is implied on his part that from the time when the ship is at the usual place of discharge he will take the risk

of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay days.

By the terms of a charter-party a vessel was to proceed for a voyage from P. to a safe port in the United Kingdom with a cargo of timber, "sixteen working days to be allowed the merchants for loading the ship at P., and to be discharged at such wharf or dock as the charterer may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the said laying days at 10l. per day." The ship was loaded and ordered to M.; and, having arrived at the usual place of discharge, commenced the unloading. It was the duty of the master to put the timber over the ship, and form it into rafts, so that it might be conveyed away by the charterer. In the course of unloading bad weather came on, and as the rafts could not be formed, the charterer could not convey the timber away. A delay of four days was thus caused in discharging the ship, and the shipowners claimed 40l. for demurrage:

Held, that, as by the charter-party a given number of days was allowed for discharging the cargo, the charterer was, under the circumstances, liable for the delay in unloading the vessel, notwithstanding such delay was occasioned by bad weather.

THE declaration alleged that in consideration that the plaintiffs would deliver to the defendant certain timber forming the cargo of and carried by a certain ship of the plaintiffs then lying and being at a certain port, to wit, Stockton-on-Tees, and would allow the defendant fourteen laying days for the unloading of the same, and ten days on demurrage over and above the said laying days; the defendant promised the plaintiffs to pay to the plaintiffs freight on the carriage of the first timber from Pensacola to Stockton-on-Tees aforesaid at certain dates agreed on between the plaintiffs and defendant, and to discharge and unload the said ship within fourteen days from the day on which the master of the said ship should signify his readiness and willingness to unload, and to pay 10*l.* per day demurrage for each demurrage day that the said ship should be detained by reason of the defendant not unloading the same over and above the said fourteen laying days.

Breach that the defendants did not unload and discharge the said ship within the time so agreed upon as aforesaid, but kept the same on demurrage over and above the said fourteen days for a long time, to wit ten days, on demurrage, and the defendant thereby became liable to pay, but has not paid, to the plaintiffs demurrage at the rate aforesaid for ten days, and the defendant also detained the said ship one day without any payment or satisfaction to the plaintiffs on that behalf, whereby the plaintiffs were deprived of the use of the said ship during that time, and incurred expense, &c.

There was also a count for money payable for demurrage of a ship.

Fourth plea to first count.—That defendant was prevented from unloading and discharging the ship solely by the acts and defaults of the plaintiffs and their agents on that behalf.

The case came on for trial before Grove, J., and a special jury, in London, during the Michaelmas Sittings, 1875, when the following facts were proved. The plaintiff was a shipowner, and the action was for eleven days' demurrage, and 1*l.* 14*s.* 6*d.* for extra dock charges. By the charter-party dated Jan. 31st, 1874, the Norwegian vessel *Singleton*, chartered by Messrs. Price and Pierce as agents, was to proceed to Pensacola with all convenient speed to load a full cargo of timber, and being so loaded to proceed to any safe port in the United Kingdom; sixteen working days to be allowed for loading, "and to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days. and ten days on demurrage, over and above the said laying days at 10*l.* per day." The bill of lading incorporated the terms of the charter-party, and was indorsed by the captain. In pursuance of the charter-party the vessel proceeded to Pensacola, and was there duly loaded (bills of lading being presented and signed by the captain), after which she proceeded by order of the defendants with the cargo to Middlesborough. She arrived at the usual place of discharge on Sunday, the 28th of June, 1874, and was ready to discharge her cargo to the defendants, by whom the freight was paid the following day—viz., the 29th. The time for discharging expired on the 14th of July, but the vessel was not in fact discharged till the 25th. The vessel was thus kept eleven days beyond the time; but, as the delay of three of these days was admitted to be due to default on the part of the plaintiff, a verdict was ultimately found for the plaintiff for 8l. 14*s.* 6*d.*, being eighty days' demurrage at 10*l.* per day, and 1*l.* 14*s.* 6*d.* for extra dock charges. As regards four of these days it was admitted that the delay in unloading was occasioned by bad weather which prevented the master, as was his duty, from putting the timber over the ship and forming it into rafts, and that the charterer was in consequence unable to take the timber away. The learned judge accordingly gave leave to the defendant to move to reduce the verdict by 40*l.*, if the court should be of opinion that on the true construction of the charter-party the defendant was not responsible for delay occasioned by bad weather. The case now came on for argument.

Russell, Q.C. and *E. Pollock* for the defendant (the charterer).—There is not an absolute contract in the part of charterers or consignees to unload within a stipulated time where they are prevented therefrom by something beyond their control. Here the inability to unload arose from something which prevented the plaintiffs themselves from performing their duty of putting the timber over the ship's side.

Ford v. *Cotesworth*, L. Rep. 4 Q. B. 127; *Ib.* 5 Q. B. 544; 38 L. J. 52, Q. B.; 39 *ib.* Q. B. 188; 19 L. T. Rep. N. S. 634; 23 L. T. Rep. N. S. 165; 3 Mar. Law Cas. O. S. 190, 468;
Abbott on Shipping (11th edit.), 269;
Randall v. *Lynch*, 2 Camp. 356; 12 East, 179;
Lee v. *Yates*, 3 Taunt. 387;
Dobson v. *Droop*, 4 C. & P. 112.

Herschell, Q C. and *Webster* for the plaintiffs.—Where the number of lay days is fixed the discharge must take place within those days, or the consignee or charterer is responsible, unless the delay was occasioned by the default of the shipowner. The delay here was delay out of the control of either party, and for this the defendant must pay.

Brown v. *Johnson*, 10 M. & W. 331; 11 L. J. 373, Ex.;

Fenwick v. *Schmalz*, L. Rep. 3 C. P. 313; 18 L. T. Rep. N. S. 27; 37 L. J. 78, C. P.; 3 Mar. Law Cas. O. S. 64;
Tapscott v. *Balfour*, *ante*, vol. 1, p. 501; L. Rep. 8 C. P. 46; 42 L. J. 16, C. P.; 27 L. T. Rep. N. S. 710;
Ashcroft v. *Crow Orchard Colliery Company* (*Limited*), *ante*, vol. 2, p. 397, L. Rep. 9 Q. B. 540; 43 L. J. 194, Q. B.; 31 L. T. Rep. N. S. 266;
Barker v. *Hodgson*, 3 M. & S. 267;
Barrett v. *Dutton*, 4 Camp. 333.

Cur. adv. vult.

March 6.—The judgment of the court (Blackburn, and Lush, JJ.) was delivered by

LUSH, J.—This is an action for demurrage. The verdict was entered for the plaintiff for 81*l.* 14*s.* 6*d.*, leave being reserved to the defendant to reduce the amount by 40*l.*, being for four days detention at the stipulated rate of 10*l.* per day; and the question is whether, when a charter party allows a given number of days for discharging the cargo, the charterer or the ship's owner takes the risks of casualties in the weather, which interrupt the process of unloading.

The charter-party was for a voyage from Pensacola to a safe port in the United Kingdom, as ordered, with a cargo of timber. The clause upon which the question turns is in these words: "Sixteen working days to be allowed the said merchants (if the ship is not sooner dispatched) for loading the ship at Pensacola; and to be discharged at such wharf or dock as the charterer may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the said laying days, at 10*l.* per day."

The ship having been ordered to Middlesborough, arrived at the usual place of discharge in the river, and commenced the unloading. It was the duty of the master to put the timber over the ship, and form it into rafts; and the charterer was to take the rafts away.

In the course of unloading bad weather came on, and though the ship did not leave her anchorage the rafts could not be formed, and the charterer could not consequently do his part in taking the timber away. The bad weather caused a delay of four days in discharging the ship; and the contention of the defendant was, that as he was not in default, but was ready to receive the timber, but the master was not ready to deliver it, the time lost in consequence of the bad weather ought not to be reckoned as part of the fourteen days.

We took time to look into the authorities, and are of opinion that where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay days. This is the doctrine laid down by Lord Ellenborough in *Randall* v. *Lynch* (*ubi sup.*), which was upheld by this court; and it has been accepted as the guiding principle ever since: (see *Leek* v. *Yates*, *ubi sup.*; *Harper* v. *M'Carthy*, 2 W. R. 258; *Brown* v. *Johnstone*, *ubi sup.*, and the other cases cited in the argument.)

The obvious convenience of such a rule in preventing disputes about the state of the weather on particular days, or particular fractions of a day, and the time thereby lost to the charterer in the course of the discharge, makes it highly expedient that this construction should be adhered to whatever may be the form of words used in the particular charter.

The judgment of the court will therefore be for the plaintiffs for the full amount.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Ingledew*, *Ince*, and *Greening*.

Solicitor for the defendant, *Cree*.

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS and CYRIL DODD, Esqs., Barristers-at-Law.

Wednesday, Feb. 23, 1876.

HOPPER *v.* BURNESS AND OTHERS.

Charter-party—Sale of cargo at intermediate port—Freight pro ratâ itineris.

Plaintiff chartered a ship to defendants to carry cargo for freight payable on delivery at the port of destination. The captain was obliged to sell part of the cargo at an intermediate port for necessary repairs. The price obtained was higher than it would have been at the port of destination. Plaintiff, having paid the proceeds of the sale to defendants under an average statement, claimed freight pro ratâ itineris on the cargo sold.

Held, that defendants were entitled either to demand an indemnity for the sale of the cargo, or to treat the transaction as a forced loan, and demand the proceeds of the sale, and that having treated it as a loan, they were not liable to pay freight pro ratâ itineris.

THE plaintiff's claim was for freight and money received. The plaintiff was the owner of the ship *Verena*, and he chartered her to the defendants to carry a cargo of coals from Cardiff to Point de Galle, in Ceylon. The freight was to be 21*s.* a ton on the quantity of coals delivered at Point de Galle, and if the quantity delivered should be less than the amount named in the bill of lading, the defendant might deduct the cost of the coals so deficient from the freight due. The defendants shipped a cargo of 704 tons of coal at Cardiff; the coals were by the bill of lading to be delivered to the order of the defendants. The invoice price was 1*l.* per ton. The ship sailed for Point de Galle, but met with bad weather off the Cape of Good Hope, and put in disabled. The captain, being unable to raise money on bottomry for the necessary repairs of the ship, sold 470 tons of coal at the Cape of Good Hope, which fetched 3*l.* 3*s.* 6*d.* a ton, a considerably higher price than they would have fetched at Point de Galle. Forty-two tons of coal were jettisoned, and the ship, having been repaired, proceeded on her voyage, and the remainder of the cargo, 192 tons, was delivered at Point de Galle. The defendants afterwards employed Messrs. Davidson and Lindley, average staters, to draw up an average statement, and the plaintiff paid the amount which the average statement showed to be due from him to the defendants. The statement debited the plaintiff with the amount of the net proceeds of the coals sold at the Cape of Good Hope, but made no allowance to him for freight in respect of these coals. The plaintiff claimed to be entitled to freight *pro ratâ itineris*, in respect of the coals sold at the Cape of Good

Hope, and sought to recover back from the defendants the amount of such freight, which, he contended, ought to have been allowed to him in the average statement, and also to recover the amount for which the coals sold at the Cape over the cost price. At the trial, before Huddleston, B., at the Liverpool Summer Assizes, 1875, the verdict was entered for the plaintiff, with leave to the defendants to move to enter a verdict for them or a nonsuit, on the ground that the defendants were not liable to pay the freight claimed. A rule *nisi* was obtained during the Michaelmas sittings.

Herschell, Q.C. and *Crompton* showed cause.—It cannot be that the defendants are entitled to keep all that was received as the price of the coal sold at the Cape of Good Hope, and pay nothing to the plaintiff, who took it there, for freight. The money was paid to the defendants under a mistake of fact, and can therefore be recovered as money received to the use of the plaintiff. If the charterer takes the goods from the shipowner at a point short of the port of destination he is bound to pay freight *pro ratâ itineris*, and if he takes the produce of the goods it comes to the same thing. Taking the money which the coal sold at the Cape of Good Hope produced is the same as if the defendants had taken the coal itself there. In *Baillie* v. *Mondigliana* (1 Park on Marine Insurance, 116, 8th edit.), there is an express opinion of Lord Mansfield in favour of the plaintiff's contention. He says, "In this case the value of the goods was restored in money, which is the same as the goods; and therefore freight was certainly due *pro ratâ itineris*." In 2 Arnould on Marine Insurance, 803, 4th edit., the law is stated as follows: "Goods sold for the general benefit are to be paid for in contribution, if the adventure reaches its destination, at the net value they would have fetched at the port of discharge, or at the sum they actually brought at the intermediate port, deducting freight, duty, and landing expenses. If the adventure does not reach its destination, the amount of contribution is the price obtained for the goods at the port of distress, less freight *pro ratâ*, duty, and landing expenses. The shipowner in the former case would seem to be entitled to full freight, and in the latter to freight *pro ratâ* to the port of sale." For this proposition *Atkinson* v. *Stephens* (7 Ex. 567) is cited.] [*Benjamin*, Q.C. for the defendants, referred to *Campbell* v. *Thompson* (1 Starkie, 490.)] That does not touch the present case, for the sale there was wrongful; there was no urgent necessity for it. ARCHIBALD, J., referred to *Hunter* v. *Prinsep* (10 East, 378).] In that case also the act of selling was tortious. [BRETT, J.—In Maclachlan on Merchant Shipping 449, second edition, it is stated that "where the master sells the cargo in the course of the voyage, although properly, and to prevent its entire loss in consequence of damage by perils of the sea, he is not entitled to freight for carriage to the port of sale," and *Vlierbloom* v. *Chapman* (13 M. & W. 230), and *Hunter* v. *Prinsep* (*ubi sup.*) are cited.] If the sale is justifiable, it is the same as if an express authority to sell had been given; there is an implied authority to sell if it is necessary for completing the adventure. It is reasonable to imply that the defendants are not to be benefited more under the existing circumstances than they would have been if the contract had been completed. [BRETT, J.—The shipowner would be entitled to recover on a policy of insurance on freight.] Lord Mansfield's doctrine in *Baillie* v. *Mondigliana* (*ubi sup.*) has only been overruled in the case of a wrongful sale, as in *Hunter* v. *Prinsep* (*ubi sup.*); *Vlierbloom* v. *Chapman* (*ubi sup.*) was a different kind of case from the present. It would seldom happen, as here, that the forced sale produced gain instead of loss, and this is a material element of difference between this case and most others. A contract to pay freight *pro ratâ* ought to be implied as against the defendants from their having taken the proceeds of the sale. As to the claim for money received, *Kelly* v. *Solari* (9 M. & W. 54) shows that money paid under *bonâ fide* forgetfulness of facts disentitling the other party to receive it, can be recovered. The average statement is not binding on the plaintiff. It does not amount to an award, and it is made with a different object from that of fixing the position of the parties, viz., to settle what claims should be made on the underwriters.

Benjamin, Q.C. (*Myburgh* with him) in support of the rule.—The correspondence shows that the plaintiff agreed to be bound by the average statement, and this was a voluntary payment made after full examination of the facts. The entire argument for the plaintiff is based on Lord Mansfield's dictum in *Baillie* v. *Mondigliana* (*ubi sup.*), which is shown not to be law by the later decisions which have been referred to. The true principle is that the master has a right to borrow money or goods from the owner of the cargo to repair the ship, and when he sells it is a forced loan by the owner of the cargo to the owner of the ship. The shipowner is only entitled to freight on the goods delivered, and the owner of the cargo is entitled to have the amount of the forced loan repaid. [BRETT, J.—But if the goods were sold for less than they would have fetched at the port of destination, he would not be content with that.] He has an option either to treat it as a loan or to demand an indemnity. Here the defendants asked for the proceeds of the sale, which is in effect asking for repayment of the money lent. In *Atkinson* v. *Stephens* (*ubi sup.*), Pollock, C.B., puts the right of the master to sell cargo on the ground of being "a lawful mode of borrowing money for the necessary purposes of the ship," and the same learned judge expresses the same view in *Duncan* v. *Benson* (1 Ex. 537, affirmed 3 Ex. 644), where he says, "To accomplish the object of repairing the vessel, the master is authorised to bind his owner . . . by selling a portion of the cargo, which is in effect borrowing from the shipper through the medium of a sale." (1 Ex. 555.) [BRETT, J. referred to *Richardson* v. *Nourse*, 3 B. & A. 237.] If the owner of the cargo asks for an indemnity, he must allow what he would have had to pay for freight if the goods had been carried on, but not if he asks for repayment of the loan. The principles applicable to the case are clearly explained by Lord Ellenborough, delivering the judgment of the court in *Hunter* v. *Prinsep*, 10 East, at p. 394. [He was then stopped by the court.]

BRETT, J.—In this case the plaintiff brought an action, first to recover freight, and secondly for money received. He says that the money was inadvertently paid, and claims to recover it back on the ground that he has paid the defendants without deducting payment for freight. It is obvious that he cannot recover, unless he is entitled to

the freight, so the main question is as to the claim for freight.

The plaintiff is a shipowner, and he made a charter-party, by which he chartered his ship to the defendant for a voyage from Cardiff to Point de Galle; the freight was 21s. per ton of coals (of which the cargo consisted), payable upon the quantity delivered at Point de Galle. The rest of the charter-party is immaterial. The ship was disabled by perils of the sea, and put in at the Cape of Good Hope, and there the captain was unable to borrow money on bottomry or otherwise. Under these circumstances the maritime law gives a title to the captain to sell part of the charterer's cargo to realise money to repair the ship; and he can sell without doing a wrongful act, though it is the duty of the shipowner to repair the ship at his own expense. The captain sold a portion of the coal, and having expended the amount realised upon the repairs of the ship, he proceeded to Point de Galle, and delivered that part of the cargo which remained.

Now, it so happened that the coals which were sold at the Cape of Good Hope fetched more than those which were taken on and sold at Point de Galle, and it is suggested that, therefore, the plaintiff is not only entitled to freight on the coals delivered at Point de Galle, but also to other freight for the coals which were sold at the Cape of Good Hope.

According to the charter-party freight was obviously only to be paid on coals delivered at Point de Galle, and if the plaintiff is entitled to freight on the coals sold at the Cape of Good Hope, it must be on some other ground. If he is entitled on any ground it would be that he had become entitled to freight which was earned at the Cape of Good Hope. I know of no mode by which the shipowner can become entitled to freight on such a charter-party as this, where the goods are not delivered, unless he becomes entitled to freight *pro ratâ*. The principle of *pro ratâ* freight is, that it is payable where there is a mutual agreement to do certain things, on which the law will imply an undertaking to pay, not the stipulated freight, but freight *pro ratâ*. The only case in which it can become payable is where the captain is able and willing to carry on the cargo, but the charterer or shipper desires to have the goods at an intermediate port, and the captain gives them up at the owner's request, express or implied. There is an implied promise to pay freight. Here the captain sells the goods, and by that very act puts it out of his power to say that he was ready to carry them on to the port of destination, for he was not able to do so. Therefore one ground on which the liability to pay freight *pro ratâ* depends does not exist.

It has been said that the charterer has an option, and Mr. Crompton said that here the charterers have exercised that option, and therefore by implication they undertook to pay *pro ratâ* freight. It is said that the charterer has an option to treat the proceeds of the sale as a loan, or to say "you sold my goods against my will; I cannot say that you did wrong, because the law allows it under the circumstances, but I insist on an indemnity"—not treating it as a mere loan; in fact, that he has an option either to treat it as a loan or to require an indemnity. If it is treated as a loan, it does not come within the rule; it gives no claim to *pro ratâ* freight. If the charterer is of opinion that the goods have fetched more at the intermediate port than they would have fetched if they had been carried on to the port of destination, he may treat the transaction as a loan at once, and may sue for the amount of the proceeds of the sale before the ship has arrived at her port of destination. If the ship is lost between the intermediate port and the port of destination, he cannot ask for an indemnity on the footing that the goods would have fetched more at the port of destination. If the ship had been lost between the intermediate port and the port of destination, he never would have been able to insist—it would not have been in his power to insist—on an indemnity. He could say that it was a loan, and that as the shipowner had sold part of the cargo he must pay the price of it to the charterer. If the goods fetch more at the intermediate port than they would have fetched at the port of destination, the owner of the cargo insists upon treating the transaction as a loan, as is the case here. If he had insisted on an indemnity on the footing that if the goods had been carried on they would have fetched more, he would have been entitled to claim the difference between the price at the intermediate port and the price at the port of destination, but he would have had to allow for freight. But he has a right to treat it as a loan, and if it is treated as a loan the claim to *pro ratâ* freight cannot arise, and the shipowner cannot add *pro ratâ* freight to the charter-party freight.

It is a hardship arising from the form of the contract and from the nature of maritime perils. The proper remedy would be for the shipowner to insure the freight, and if he did I have no doubt that under such circumstances as these he could recover. The rule must be made absolute.

ARCHIBALD, J.—The question is whether the plaintiff is entitled to *pro ratâ* freight for the conveyance of goods to an intermediate port. I am of opinion that under the circumstances he is not.

The charter-party gives no right to freight unless the goods are delivered at the port of destination, or a new contract is made, or there are facts from which we should imply a new contract. We are asked to imply a new contract because the goods were sold and the proceeds of the sale was paid to the defendants, but this is not sufficient to make it right to imply such a contract. It is possible that there may sometimes be circumstances which would raise that implication but the facts here do not make it out. We have been referred to *Baillie* v. *Mondigliani (ubi sup.)*, as establishing that the produce of the goods is equivalent to the goods themselves, but that view is corrected by *Hunter* v. *Prinsep (ubi sup.)*, which shows that one can imply a contract in that way only where the captain is able and willing to carry on the cargo, but the charterer accepts it short of the port of destination.

There was no option in the charterer here. The shipowner has disposed of the charterer's property, and I think the true view is, as Mr. Benjamin contends, that it is a forced loan—that the money for which the goods were sold is to be regarded as a loan, which the charterer is entitled to recover, if he chooses to take it in that shape. The cases show that in the event of the ship reaching the port of

destination the charterer could claim an indemnity, but he only would do so where the goods would have fetched more if they had been carried on to the port of destination and sold there. Receiving the money does not amount to the same thing as receiving the goods, or establish an implication that the charterer is bound to pay freight *pro ratâ*. On the other point, it is unnecessary to say more than that I agree with the views which Mr. Benjamin has put forward in his argument. The rule must be made absolute.

Lindley, J.—I am of the same opinion.

In the first place, the goods were never delivered to the defendants at all, but were dealt with in another way, being sold by the captain in order to provide for the cost of repairing the ship. If receiving the money by the captain amounted to a loan by the defendants to the plaintiff, the plaintiff's case fails. We cannot consider where the money came from; but if we get at the principle of the thing, the transaction is a loan, and there is an end of the plaintiff's case. I think this is the true view, and that the rule ought to be made absolute.

Judgment for the defendants.

Solicitors for plaintiff, *Oliver* and *Botterill*.

Solicitors for defendants, *Hollams, Son,* and *Coward*.

EXCHEQUER DIVISION.

Reported by H. Leigh and Pawson, Esqrs., Barristers-at-Law.

Wednesday, Jan. 19, 1876.

Stone and others v. The Ocean Marine Insurance Company (Limited) of Gothenburg.

Marine insurance—Voyage policy—Leave to go to—Change of destination—Termination of risk—Return of premium.

A ship was insured for a voyage from Liverpool to Philadelphia and the United Kingdom. Subsequently by a memorandum endorsed upon the policy, leave was given to proceed to Baltimore instead of Philadelphia. The ship discharged her cargo at Baltimore, and sailed with a fresh cargo for Antwerp. After she had so sailed a further memorandum was endorsed upon the policy, stating that in consideration of an additional premium it was agreed that the ship should go to Antwerp. Orders were received by the captain when in the outer dock, on her way to the inner dock, which is the usual place of discharge at Antwerp, ordering him to sail for Leith. Whilst on the latter voyage the ship was totally lost by perils of the sea.

Held, that under the policy and memorandum the ship had the option of going to Antwerp or the United Kingdom, or to the United Kingdom and then to Antwerp, and that the voyage from Antwerp to Leith was not within the risk.

Held, further, that the plaintiffs were not entitled to any return of premium.

This was an action upon a policy of reinsurance, in which a verdict was entered for the plaintiffs for 300*l.* subject to the following special case.

The plaintiffs are underwriters in London, and the defendants an insurance company established at Gothenburg, but carrying on business in London.

On the 18th March 1873 the owners of a vessel called the *Ravensworth Castle* insured her with the plaintiffs for twelve months.

Subsequently the plaintiffs effected a policy of reinsurance with the defendant's agents in London of the same vessel for "300*l.*, at 30s. per cent., 4*l.* 10s. on hull and machinery, subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon, including risk of craft to and from the vessel a sum of 300*l.* from Liverpool to Philadelphia and the United Kingdom against all risks which, according to Lloyd's rules, can fall upon the company, but subject to the conditions specially expressed and agreed upon in the policy."

After this policy of reinsurance had been made with the defendants' agents, the plaintiffs' agent heard that the ship was going to Baltimore instead of Philadelphia, and at his request the defendants' agents indorsed on the policy of reinsurance the following memorandum:—"It is hereby agreed to allow the vessel *Ravensworth Castle* to proceed to Baltimore instead of Philadelphia. London, 1st Nov. 1873."

After the making of the last mentioned indorsement the vessel sailed with a cargo for Baltimore. At the time she sailed her destination beyond Baltimore was not fixed. She duly arrived at Baltimore, and having discharged her cargo, she received from the charterer's agents a cargo of wheat.

The greater part of this cargo had been sold for Antwerp by the charterer, and was deliverable to his order at Antwerp.

On the 11th Dec. the vessel sailed from Baltimore to Antwerp without any intention on the part of the captain, owners, or charterers of proceeding to the United Kingdom on that voyage, and with the full intention of proceeding direct to Antwerp as her port of discharge in fulfilment of the charter-party. At the time she left Baltimore no destination further than Antwerp had been fixed upon, nor was any such destination fixed upon until the 1st Jan. 1874 when she had arrived at Antwerp, and while in the outer dock on her way into the inner dock the usual place for discharging her cargo.

On the 2nd Jan. the plaintiffs' agent learnt that the vessel and her cargo had sailed from Baltimore to Antwerp, and upon that same day the following memorandum was agreed upon between him and the defendants' agent, and indorsed on the policy of reinsurance, and initialled on behalf of the defendants.

"In consideration of an additional premium of 7s. 6d. per cent. being paid hereon, and which we acknowledge to have received, it is hereby agreed to allow the vessel the *Ravenswerth Castle* to go to Antwerp. 2nd Jan. 1874."

At the time of the making and initialling the memorandum, neither the defendants nor their agents had any knowledge of the destination of the vessel, or the route she had taken, except what they derived from the entries in Lloyd's lists, and the fact that they had learnt that the vessel might perhaps go to Antwerp, and the plaintiffs and their agents, and the defendants and their agents, believed that the vessel was then at sea. During the negotiation a conversation took place between the plaintiffs' and the defendants' agents which was tendered in evidence, but rejected subject to the opinion of the court as to its admissibility. The ordinary rates of insurance from American ports to Antwerp are the same as the rates from American ports to the United Kingdom.

The reception of this fact in evidence was

objected to by the defendants' counsel, and the fact was inserted in the case subject to the opinion of the court as to its admissibility in evidence.

Upon the 3rd Jan. a telegram was sent to the captain ordering the ship to sail for Leith. The telegram was received by the captain when the vessel was in the outer dock on her way into the inner dock, the usual place of discharge at Antwerp. On account of the state of the river at Antwerp, the vessel was unable to leave the dock until the 7th Jan. On that day she sailed from Antwerp for Leith, and while on the voyage to that place was totally lost by the perils of the sea. The plaintiffs paid to the owners of the vessel their proportion of the loss under the original policy of insurance.

The first question for the opinion of the court is whether or not the defendants are liable to pay to the plaintiffs the sum of 300*l.*

If the court should be of opinion that the defendants are not so liable, then a further question arises, whether the plaintiffs are entitled to a return of the premiums of 4*l.* 10*s.*, and 1*l.* 2*s.* 6*d.* or either of them.

Benjamin, Q.C. and *Gainsford Bruce* for the plaintiffs, contended that the effect of the policy and memoranda was that the vessel might go from Baltimore to Antwerp and thence to the United Kingdom. The words "go to" are larger words than the words "touch at." If Antwerp is to be taken as the final port of discharge then the vessel had arrived there and was in the outer dock before the memorandum was made, and the risk had then terminated, and the plaintiff is entitled to recover back the additional premium. And the fact that the premiums between Baltimore and Antwerp, and Baltimore and the United Kingdom are the same is favourable to my view. He cited

Duer on Insurance, vol. 1 p. 171.

Preston v. *Greenwood*, 4 Douglas, p. 28.

Butt, Q.C., *Mansel Jones* and *Stubbs* for the defendants, argued that the strict meaning of the policy was that the vessel might go to the United Kingdom or to Antwerp, or that it might possibly mean that she might go to Antwerp by way of the United Kingdom, but that it could not mean that she might go to Antwerp first and afterwards to the United Kingdom. Neither are they entitled to a return of the premium, for the voyage cannot be said to be at an end until the vessel has arrived at the usual place of discharge, which at Antwerp was in the inner dock. See Anonymous Case, Skinner, 343; Arnould on Insurance, 4th edit., p. 389.

Gainsford Bruce replied.

Bramwell, B.—I am of opinion that our judgment must be for the defendants.

It was at first contended that under these words "from Liverpool to Philadelphia and the United Kingdom" the ship might go on some independent voyage which had nothing to do with Philadelphia, as, for instance, to the Cape of Good Hope; but that point has been given up. The case really turns on the construction to be put on the policy and the two memoranda indorsed upon it. These in my opinion must be read together without reference to the conversation set out in the case; and without reference to the fact of the premium being the same to England as to Antwerp, for the argument attempted to be founded upon that has been answered, one answer being that it was intended that there should be a positive increase of risk. I am also inclined to doubt whether we ought to consider the amount of the premium at all in order to see what was the risk. I think, therefore that we must construe these three documents without any reference to evidence of that description.

Now several constructions have been put upon them. One is that the parties meant that the vessel might go to Antwerp instead of to the United Kingdom; another, that she might go to Antwerp by way of the United Kingdom. It is not necessary to discuss here which of these interpretations is right, because neither of them would protect the plaintiff. According to the plaintiff's counsel the vessel might go to Antwerp and afterwards sail for England, either having previously discharged her cargo at Antwerp and taken in ballast, or with her cargo, and that the voyage to England would be within the risk. I am quite certain that no such thing was in the contemplation of the parties, nor is it the proper meaning of the words. Vessels that are intended to discharge in England, very rarely, I should say, go to Antwerp for orders. All we have to do is to construe the memorandum which allowed this vessel to go to Antwerp when it was already open to her to go to the United Kingdom. I think this allowed her the alternative of going to Antwerp or of going to the United Kingdom, or possibly of going first to the United Kingdom and afterwards to Antwerp, but not to permit her to go to Antwerp first and sail thence to the United Kingdom. I think, therefore, that the plaintiffs are not entitled to recover on the policy.

Then the question is whether they can recover back their additional premium, and that to my mind must depend upon whether the voyage was continuing or had come to an end at the time of making the memorandum. In my judgment the voyage was not ended. The vessel's voyage was from the port of departure to her moorings at the port of destination. What is the end of a voyage may differ under different circumstances, but here there is a statement in the case that on the 3rd Jan. when the telegram was received by the captain the vessel was in the outer dock on her way to the inner dock. This to my mind is conclusive. If the policy is treated as an insurance to Antwerp it must surely be treated as lasting up to the time when she came to a state of rest. If she had arrived at the terminus and was waiting her turn to unload, she might have finished her voyage, but in this particular case I think the voyage was not finished. Something remained to be done which was part of the voyage or certainly part of the adventure. The matter may be tested in this way. Supposing the sailors had been hired for the voyage would they have been entitled to leave the vessel in the outer dock? I should say decidedly not. I quite agree with the statement in Arnould on Insurance (4th edit. p. 389) that where there is no clause as to mooring in good safety for any given time, if a vessel got to her port and was in moorings waiting her turn to unload, she would have finished her voyage; but that is not the case here. Further than this even if the voyage had finished, I do not think the plaintiffs are entitled to a return of the premium. The vessel may have been damaged on her voyage; if the facts had been known, it would have been

known that there was no risk, but they were not known, and therefore the underwriters took on themselves the hazard of an unknown matter.

I think, therefore, that the plaintiffs are neither entitled to recover on the policy nor to a return of the premium.

Amphlett, B.—I am of the same opinion.

There was originally a time policy covering voyages to any part of the world subject to certain restrictions. Before the re-insurance was made the places to which the ship was not to go were altered. That no doubt increased the risk and the plaintiffs were minded to decrease it by re-insurance. They did not, however, take the re-insurance to cover the same risk, but the risk so insured against was to cover a voyage policy only. Then a memorandum is introduced in which is is said that the vessel is to proceed to Baltimore instead of to Philadelphia; it still, however, remained a re-insurance for a particular voyage. Then it appears that the vessel was intended to proceed to Antwerp, and the plaintiffs having learnt this, determined to make a corresponding alteration in the counter insurance and they went to the defendants and got this memorandum. "It is hereby agreed to allow the vessel to go to Antwerp," and it is upon this the question turns. This appears to me to be different from liberty to touch at Antwerp, as was argued on behalf of the plaintiffs, for in that case the vessel might go beyond that port. The intention of allowing the vessel to go to Antwerp might be either that she should go there direct from Baltimore, or by way of the United Kingdom; most probably the latter. Either way, Antwerp is substituted for a port of the United Kingdon as the place at which her arrival terminates the risk.

Then on the question whether the additional premium ought to be returned because the vessel had arrived at the port of discharge before the additional premium was paid (like the case of insuring the life of a man who was dead at the time, where there is an entire failure of consideration) Antwerp being the port of discharge, the vessel cannot be said to have safely arrived at her port of discharge till she is safely moored in the dock at Antwerp for the purpose of discharging her cargo. It is found in the case that the captain was, in fact, in the act of moving to the usual place of discharge, and there was, therefore, some risk still remaining which prevents the plaintiff recovering the return of the premium. In Phillips on Insurance paragraph 969 it is said that "the risk on a vessel under a policy of insurance to a place generally without any provision as to her safety there, terminates on the vessel being safely anchored at her port of destination, in the usual place for discharging her cargo." And this I think is the correct rule. The defendants are, therefore, entitled to our judgment on both points.

Huddleston, B.—I am of the same opinion.

I think the insurance was from America to the United Kingdom and from thence to Antwerp, where it ceased.

Now as to the other point, the case of *Samuel* v. *The Royal Exchange Assurance Company* (8 B. and C. 119), which has been handed up to me, is almost conclusive. The question there was whether the voyage had terminated under a policy by which the vessel was insured until she arrived at London and was moored at anchor twenty-four hours in safety. The evidence was that she arrived at Deptford and was moored alongside a king's ship, near the dock gates of the King's Dock, where she was to deliver her cargo. There was evidence that many vessels laden with timber discharged their cargoes at the place where the vessel was moored, and upon this it was contended that the place where she was moored must be considered as the place of her destination, in which case she had been in safety for twenty-four hours before the loss. Lord Tenterden, however, said it was manifest that there never was an intention to discharge the cargo there, and so that ground of defence failed. That seems to me to be an authority distinctly applicable to the present case, to show that the voyage had not come to an end when the vessel was in the outer dock at Antwerp, as there was no intention to discharge there.

Judgment for the defendants.

Solicitor for plaintiffs, *W. Flux.*

Solicitors for defendants, *Druce, Son,* and *Jackson.*

EXCHEQUER CHAMBER.

Reported by M. W. McKellar, Esq., Barrister-at-Law.

May 10 *and* 11, 1875, *and Feb.* 26, 1876.

Edwards *v.* Aberayron Mutual Ship Insurance Society (Limited).

APPEAL FROM THE COURT OF QUEEN'S BENCH.

*Policy of marine insurance—Risk or adventure—Time policy—Member of society by estoppel—Agreement to decide disputes—Condition precedent—*30 *&* 31 *Vict. c.* 23, *s.* 7.

Plaintiff had an equitable interest in a ship, and afterwards received a transfer of the legal interest from the registered owner, who was a member of the defendant's society. The owner insured the ship with the defendants in the plaintiff's name by a policy incorporating the rules of the society, and providing among other things that every insurance effected should be valid and binding from noon on that day until noon of the 1*st January then next following. By the rules persons became members only by signing the articles, and none but members could insure their ships. The rules also required certain notice upon sale of a ship or shares thereof. The plaintiff had never signed the articles nor given notice of the transfer to him of the legal interest, but had paid contributions claimed from him as owner by the society. It was also provided by the rules that the directors should decide claims and disputes of members, and that aggrieved members might appeal for reconsideration of decisions, first to the directors themselves, and then to the whole society; and also that no member should be allowed to bring or have any action, suit, or proceeding, or other remedy against the society for any claims or demands upon or in respect of the society or the members thereof, except as therein provided. Upon loss of the ship plaintiff was refused his claim upon this policy by the directors twice, but made no appeal to the whole society.*

Held, by the Exchequer Chamber (affirming the Queen's Bench), that the policy incorporated the rules so as to be a sufficient compliance with sect. 7 *of the Stamp Act* 1867; *and that the defendants were estopped from disputing the plaintiff's*

interest in the policy, and his right as member to claim upon it.

Held, also, by the majority of the Exchequer Chamber (overruling the Queen's Bench), that the plaintiff was not bound by the decision of the directors; but that this action was maintainable.

This was an appeal from the unanimous decision in the defendants' favour of Blackburn, Mellor, and Lush, J.J. on a special case stated by order of Nisi Prius.

The special case and the exhibits are fully set out in the report of the case before the court below: (*ante*, vol. 2, p. 469.)

May 10 *and* 11, 1875.—*Cohen*, Q.C. (with him *Kenelm Digby*), argued for plaintiff, the appellant.

Watkin Williams, Q.C. (with him *C. T. Williams*), for defendants.

The arguments are sufficiently alluded to in the judgments of the court.

Cur. adv. vult.

Feb. 26, 1876. — Amphlett, B.—The facts are sufficiently stated in the case and exhibits.

Two points were relied upon in the argument before us on behalf of the defendants: First, that the plaintiff was insured, if at all, upon the terms of the articles; secondly, that under articles 39, 83, and 84, it was made a condition precedent to his right to bring an action that the amount of his claim should be determined by the directors.

On the first point, in my judgment, the defendants are right. The plaintiff knew that he was dealing with a registered society, and the articles are referred to in the contract signed by the directors in a manner which, I think, clearly shows that both parties intended to contract on the footing of the articles. In fact unless the articles are considered (as I think they ought to be) incorporated, the contract would be altogether invalid for (among other reasons) the omission therein of any enumeration of the perils insured against.

On the second point I think that, upon the true construction of the articles, it must be taken to have been the intention of the parties to give exclusive jurisdiction to the directors to settle all claims between the society and its members, and the question whether an agreement to that effect is void as being against the policy of the law is in my judgment concluded by the decision in the House of Lords in *Scott* v. *Avery* (5 H. L. Cas. 811). It is true that in the present case the directors are to decide not the mere amount of the claims, but also any dispute that might arise respecting insurances; but so they were in *Scott* v. *Avery*, and both the learned Lords who decided that case held such extension of the power of the directors to be immaterial. Under these circumstances it is not necessary to consider at length the subsequent decision of the inferior courts. I may, however, refer to *Tredwen* v. *Holman* (1 H. & C. 72), *Elliott* v. *Royal Exchange Assurance Company* (L. Rep. 2 Ex. 237), and *Dawson* v. *Fitzgerald* (L. Rep. 9 Ex. 7), the first of which is, in my judgment, undistinguishable from the present case.

I think, therefore, that this action cannot be maintained, unless it can be shown that the conduct of the directors in the (so-called) arbitration has rendered it inequitable to compel the plaintiff to submit his claim to their determination. Hence the conduct of the directors in this respect has become very material, and requires a minute examination. The facts are to be found in paragraphs 11, 12, and 13 of the case, which are as follows: (11) "On the 2nd Dec. 1870, the plaintiff sent in to the defendants a claim for the amount of the insurance of the *Hermione*, viz., 1000*l*., and soon after Daniel Davies (who was the master of the ship when she was lost) was requested to attend a meeting of the board of directors on the 6th Jan. 1871. He attended accordingly, and was questioned as to the circumstances of the loss of the vessel. The directors expressed to Davies their opinion that his account of the wreck was not satisfactory, and that the loss was not shown to have been caused by perils of the seas. When he had withdrawn from the room, they came to the resolution 'That the owners of the *Hermione* had no claim upon the society.' (12.) The plaintiff had no notice of the meeting, and neither Davies nor the plaintiff had notice of this resolution, or was required to attend the directors on any subsequent occasion. (13.) On the 6th April 1871 a notice signed by ten members of the association, but not signed by the plaintiff or Davies, was sent to the defendants' office. This notice was submitted to the next quarterly meeting of the directors. No notice to attend was given either to the plaintiff or Davies, and in their absence the directors, without further inquiry, came to the same resolution as before, viz., that the owners of the *Hermione* had no claim upon the society." In my opinion, these proceedings of the directors were unjustifiable, and can only be accounted for, consistently with honesty and good faith, by supposing that they had mistaken their real position, and that being agents of the society, they supposed they had no duty to perform towards the plaintiff. It is beyond doubt, however, that when they undertook the delicate task of adjudicating between their own society and a member, their functions, if not strictly the same, were analogous to those of an arbitrator, and they were bound to act judicially and with perfect fairness and impartiality between the parties: *M'Intosh* v. *Great Western Railway* (2 De G. & Sm. 758). To come to a decision, under these circumstances, in favour of their own society and against the plaintiff, without hearing him or giving him an opportunity of being heard, was contrary to every principle of justice, and ought not I think to be held by any court of law or equity to be binding upon him.

Moreover, I think that it would be unreasonable to compel the plaintiff now to submit his claim again to the directors, they having already prejudged the case in his absence. It is hardly likely that, after what has occurred, the directors could now approach the subject with that even and unbiassed mind which is, as the Vice-Chancellor said in *Kemp* v. *Rose* (1 Giff. 264), "essential to the validity of every judicial proceeding." If the matter had rested only on the first meeting of the directors on the 6th Jan. 1871, it might have been suggested that the directors, having had no notice of the transfer of the vessel to the plaintiff, considered Davies as the owner, and thought it sufficient to have him before them; but it did not rest there, for no notice of that resolution was ever given either to Davies or to the plaintiff, nor was any notice given to either of them of the subsequent quarterly meeting to which the notice signed by ten members was submitted, and at which the same resolution was confirmed in the

absence of both. I infer from these facts that the attendance of Davies, who, as I said before, was master of the lost vessel, was requested as a witness and not as the supposed owner, and his presence therefore at the first meeting does not alter the view I have taken of the directors' conduct in the matter.

But it is said that the determination of the directors having been made a condition precedent to bringing an action, a court of law at least cannot interfere, as that would be making a new contract for the parties. I think there is a fallacy in this argument. Courts of equity have no more power to make new contracts for parties than courts of law, and yet they could undoubtedly interfere when a contract is performed on one side, and the mode agreed upon for ascertaining the amount to be paid by the other has failed in any way without the plaintiff's fault. Put the simple case, which is in principle the same as that we are considering:—A. contracts to do work for B., the price to be determined by the engineer of B. The work is done, and before the price is determined, the engineer by some act of his own, not necessarily fraudulent, becomes incapacitated to act as arbitrator. I cannot persuade myself that courts of law are powerless to prevent the gross injustice of B. having the benefit of the work without compensation to A., except by the inconvenient and often ineffectual course of bringing an action for neglect of duty against the engineer and his employer. To give direct redress in such a case seems to me only another application of the well-known principle that a man shall not take advantage of his own wrong, under which even precedent conditions in their strictest sense have been held to be discharged where performance was prevented by the defendant himself. See Comyn's Digest, tit. "Condition," 1. 6, and the case of *Hotham* v. *The East India Company* (1 T. R. 638). Courts of equity have concurrent jurisdiction, even in respect of legal contracts, with courts of law in cases of fraud, and they appear to have assumed jurisdiction in the sort of cases we are considering, on the ground that where the acts of the defendants, which prevented the amount of the plaintiff's claims being ascertained in the agreed mode, were not in themselves fraudulent, yet they would become fraudulent if used for the purpose of defeating the plaintiff's rights. (See *M'Intosh* v. *Great Western Railway* (2 De G. & Sm. 758), and on appeal (2 Mac. & G. 74). It most frequently happens that the circumstances of these cases are complicated, and can be more conveniently investigated in a court of equity than a court of law; but in a case like the present, where a court of law can do complete justice by simply disallowing a defence founded on the failure of the agreed arbitration through the acts of the directors, the convenience is quite the other way; and I can see no reason why a court of law should not determine the matter themselves.

For these reasons, I think that the plaintiff can sustain his action, and there is no difficulty about the amount, as it is found in the case that the defendants now admit, contrary to what their directors had determined, a total loss of the vessel by perils of the sea. The decision of the court below is, therefore, in my opinion erroneous, and ought to be reversed; and judgment must be entered for the plaintiff for 1000*l.* with interest and cost of suit.

Pollock, B. delivered the judgment of Archibald, J. and himself.—This action is brought by the plaintiff as owner of a vessel called the *Hermione*, against the defendants, who are a limited company for mutual insurance of ships, to recover upon an insurance effected with the defendants, whereby the *Hermione* was insured from the 24th Feb. 1870 to noon of the 1st Jan. following.

The defendants admit that the *Hermione* was insured, and also that there was a total loss as above stated; but they contend that the plaintiff can maintain no action against the company until he has complied with the company's articles which relate to the adjustment and settlement of losses. The plaintiff alleges that the document by which the insurance was effected gives him a right of action independently of these articles. The *Hermione* was bought by one Daniel Davies in 1868, to whom the plaintiff made advances to enable him to purchase her; and in Jan. 1869 she was insured with the defendants by Davies, who directed that the policy should be made out in the name of the plaintiff, and handed to him. In Jan. 1870, Davies being absent with the ship, the plaintiff applied for a renewal of the insurance, and on the 24th Feb. he paid the annual premium and duty, amounting to 17*l.* 15*s.*, and obtained the document usually issued to members insuring. This document is headed "Aberayron Mutual Ship Insurance Society (Limited), registered pursuant to the Act 25 & 26 Vict. c. 89." It contains the rates for various insurances, rules as to periods of sailing, and other matters; and at the close of one relating to allowance for repairs is a reference, "*vide* article 70." It states also "That every insurance effected shall be valid and binding from twelve o'clock of the noon on that day on which the insurance shall be effected until twelve o'clock of the noon of the first day of Jan. next following." The document ends as follows:

This is to certify that Mr. Evan Edwards, as ship's husband for the *Hermione*, 162 tons, A 1 registered, whereof is master at the present time Daniel Davies, has this day paid 17*l.* 10*s.* for the insurance of 52 shares, 1000*l.*, on the said vessel. Value of whole ship, as per rule for this class, 17*l.* 10*s.* per ton, 12*l.* 15*s.* 1000*l.*

Signatures of Directors { J. N. Evans, Chairman. W. J. Rees. David Jones.

£1000.

	£	s.
Premium...	17	10
Duty.....	0	5
	£17	15

Secretary, John James.
Treasurer, Thomas Jones.

In March 1870 application was made to the plaintiff for a further sum of 17*l.* 10*s.*, being his contribution to the losses of the year 1869, payable in respect of the ship *Hermione* at the rate of 100 per cent. and this sum was paid by him; and in Oct. 1870 a further call was made, and paid by the plaintiff for losses of the year 1870. On the 14th May 1870 Davies, by bill of sale, duly registered, transferred the *Hermione* to the plaintiff, and notice of this transfer was given to the defendants. In Nov. 1870 the *Hermione* was wrecked and became a total loss. Except by the reference, "*vide* article 70," and the words "as per rule for this class," there is no allusion to any articles or rules other than those contained in the documents dated the 24th Feb. 1870, and the last-mentioned rule is contained in the articles and repeated in the document. The defendants' society was, however, governed by a memorandum of association, and by articles of association dated

Dec. 1864, which contained in all 98 articles. These provide for the constitution of the society, the duties of its directors, rates of insurance, and other matters usually found in the rules of a mutual insurance society; and many of those relating to the terms of insurance are repeated in the document which was given to the plaintiff on his paying his premium in Feb. 1870. Amongst those not so repeated are the following: Memorandum of Association, article 3 "The objects for which the company is established are the mutual insurance of ships belonging to members of the company, and the doing of all such other things as are incidental or conducive to the attainment of the above objects." Articles of Association, article 3: "Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship, in pursuance of the regulations hereinafter contained." Article 39: "That the directors shall have full power to enter into and execute, and also to modify, alter, or release any contract or agreement respecting any matter in which the society may be interested, and to adjust, settle, and decide all claims and demands upon the society by the members thereof, or to decide and determine all disputes, controversies, and matters arising between the society and members of the society concerning insurances or claims upon or liabilities by or to the society, and concerniug the laws, rules, regulations, and bye-laws of the society; and the decision of the directors shall be final and conclusive, as well upon the society as the members thereof; and no member of the society shall be allowed to bring or have any action, suit, or proceeding or other remedy against the society or the members thereof for any claims or demands upon or in respect of the society or the members thereof, except as is provided by these presents." Article 83: "That in all cases of any vessel or share thereof insured by the society being lost, wrecked, stranded, burnt, abandoned, captured, damaged, or injured by being run down or otherwise injured by any other vessel, the owner, master, or mate or some of the crew shall, as soon as circumstances will permit, give notice thereof to the secretary of the society, who shall thereupon by letter to the several directors summon a board of directors on the first convenient day, not exceeding seven days from the receipt of such notice, and the directors shall proceed to examine the owner, master, and mate, and such of the crew as they shall think necessary, as to the cause of such loss or damage, and shall make such further inquiries and take such measures and make such decisions and regulations thereon as in their judgment the case shall require; and the owner or master of any vessel so lost, wrecked, stranded, burnt, abandoned, captured, damaged, or injured, shall not commence any repairs except such as shall be deemed necessary for the immediate safety of such vessel, or settle or compromise any claims or disputes, or prosecute or defend any action or suit in relation thereto, without the previous consent of the directors." Article 84: "That if any member of the society shall be dissatisfied with the decision of the directors, as to the settlement of any loss or damage sustained by such member, or as to any claim or other matter settled, adjusted, or decided by the directors, and such member so dissatisfied shall procure ten other members of the society, not being directors, to join with him in a written requisition to the directors to reconsider and revise their decision, the directors shall thereupon call a board of directors of not less than ten, and reconsider and revise such decision; and in case such member shall be dissatisfied with the further decision of such board of directors, such member so dissatisfied, together with twenty other members of the society, may by writing under their hands require the secretary to summon a special general meeting of the society to be held at any time not exceeding fourteen days from the receipt of such writing by the secretary; and such special general meeting shall have full power to confirm or vary the decision of the directors, and whatever shall be decided by the special general meeting shall be final and binding as well upon the society as upon all the parties interested in the decision." No copy of these articles was furnished to the plaintiff; he had not read them, nor did he know their contents. It was contended for the defendants that this was immaterial, because, by the Companies Act 1862, s. 16, the articles of association, when registered, are binding on members as if each member had signed and sealed them, and there was a covenant contained in this on his part to conform to all the regulations contained in them. This contention in my judgment fails, for sect. 23 defines members to be persons who have agreed to be members, and whose names are entered on the register of members. The plaintiff's name was not so entered, and he is not made a member by the statute.

Under these circumstances the first question that arises is, what was the contract between the plaintiff and the defendants? and I will consider this at present apart from the Stamp Act. It appears to me to be extremely doubtful whether a complete contract of insurance could, under any circumstances, be gathered from the document dated 24th Feb. 1870, taken by itself. At best it is rather in the nature of a receipt for premium than a policy, and it contains no covenant or contract for payment. But, however this may be, it is, I think, clear that those who signed it had no authority to bind the company to any contract of insurance other than what is contemplated and provided for by the articles. If, therefore, the document in question stood alone, the result would be that there would be no contract with the company. The document is, however, headed "Aberayron Mutual Ship Insurance Society (Limited)," and, therefore, denotes that the object of the society is the mutual insurance of ships belonging to members. It has reference to one article not contained in it, and in its form it resembles rather a certificate that a contract exists than a contract itself. From what is expressed, and also from what is absent, the plaintiff must, I think, have been aware that it did not contain all the terms of the proposed insurance as to adjustment and settlement, and the defendants are entitled to present to the plaintiff the dilemma that either there is no contract, or the contract is that which they admit, viz., an insurance subject to the articles. We have power to draw inferences of fact, and the proper inference appears to me to be, that the plaintiff has entered into a contract, which is evidenced by the document dated the 24th Feb 1870, and the articles of association. When the latter are referred to, what

is deficient in the certificate is supplied, for although there is no undertaking to pay to the assured upon a loss so as to give an immediate right of action, as indeed there never is by the rules of a mutual insurance society; Articles 39, 83, and 84, provide for a member who has any claim giving notice thereof, for the summoning of a board of directors to examine into it, and for their decision thereon; and, further, that if the member is dissatisfied, he may, if ten other members will join him, summon a second board of directors to reconsider their decision, and if he is dissatisfied with the decision on appeal, he may, if twenty members will join him, appeal to a special general meeting, who may confirm or vary the decision.

It was strongly argued on behalf of the plaintiff, that the effect of the decision of the court below would be to deprive the plaintiff of his right to resort to the courts of law to enforce his rights, and the well-known arguments against ousting their jurisdiction were resorted to. If, however, the view I take of the articles be correct, no such objection arises, because their effect is not to substitute a special tribunal to deal with an existing cause of action, but to provide by the contract between the parties, upon which alone any claim of the plaintiff is based, a mode by which that claim shall be established, and which must be pursued as a condition precedent to any right to payment arising. There is no more displacement of a cause of action or ousting of jurisdiction than there is when parties agree that a builder shall be paid such a sum as an architect shall name, and the case comes within the principle acted on in *Scott* v. *Avery* (5 H. L. Cas. 811), *Tredwen* v. *Holman* (1 H. & C. 72), and *Elliott* v. *Royal Exchange Assurance Company* (L. Rep. 2 Ex. 237), and not within that by which the court was governed in *Horton* v. *Sayer* (4 H. & N. 643). The distinction between these cases is well pointed out by Bramwell, B., in *Tredwen* v. *Holman*, where he says: "If a tenant covenants that he will cultivate the devised land in a husbandlike manner, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until the arbitrators have given their decision." And, again, in similar language in *Dawson* v. *Fitzgerald* (L. Rep. 9 Ex. 10).

Before leaving this part of the subject, I must not omit, however, to notice the construction of article 39, that was pressed upon us by Mr. Cohen, as counsel for the plaintiff. The article provides that no member shall be allowed to bring any action, suit or proceeding, or other remedy against the society or the members thereof for any claims or demands upon or in respect of the society or the members thereof, "except as is provided by these presents." He argued that these words were intended to preclude a member from bringing any action against the society, even where his loss has been adjusted by the directors, and they decline to pay. It appears to me that, although the language used is not very clear or accurate, the intention of the parties is limited to requiring that members having claims on the society shall proceed according to the mode of proof pointed out by the articles, and that if all conditions precedent were fulfilled, and the decision of the directors was obtained in favour of the claimant for a specific amount, an action would well lie against the society if they refused to pay it.

I have hitherto dealt with the question apart from the Stamp Act, 30 & 31 Vict. c. 23. Section 7 of this Act provides that "no contract or agreement for sea insurance shall be valid unless the same is expressed in a policy, and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured." And by sect. 4 the word "policy" is declared to mean "any instrument whereby a contract or agreement for any sea insurance is made or entered into." The object of this enactment is to prevent persons obtaining the benefit of a marine insurance without paying stamp duty. It clearly does not make any particular form of policy compulsory, else it would have referred to as essential the form mentioned in sect. 5 and schedule E, which the Commissioners of Inland Revenue are thereby bound to provide; nor does it forbid companies or underwriters importing into their stamped policies, by reference or otherwise, terms which are not expressed in them, provided the risk and other matters mentioned in sect. 7 are contained in a stamped policy. It seems to me, therefore, that the document dated the 24th Feb. 1870, satisfies the requirements of and is sufficient as a policy within the Stamp Act, although terms exist relating to the adjustment and settlement of any loss that may arise under it which are not contained in it, and yet are binding on the plaintiff. To apply to this case the well-known principle acted on in *Boydell* v. *Drummond* (11 East, 142) would be, I think, unnecessary and unreasonable, for there is no such reason for the exclusion of parol evidence to connect the various documents which are intended together to constitute the contract or policy of insurance, as there is in the case of contracts within the Statute of Frauds.

Although, therefore, the inartificial manner in which the policy and rules are drawn creates some difficulty, I find it satisfactory to arrive at a conclusion which supports what was the substance of the transaction, and prevents the plaintiff setting up a contract which it is obvious he could not himself have contemplated, and which certainly could never have been intended by the defendants, as it would have been a departure from the fundamental principles and the daily practice of the company.

For these reasons the judgment of the Queen's Bench should, in my opinion, be affirmed.

Brett, J.—This was an action to recover a total loss on the vessel *Hermione*.

The vessel was originally purchased by Daniel Davies, the plaintiff's brother-in-law, in Dec. 1868. She was mortgaged to the plaintiff, who eventually, in May 1870, became the registered owner. In Jan. 1869, Davies effected an insurance on the vessel with the defendants, directing that the policy should be made out in the plaintiff's name and should be handed to him. The document sued on as a policy was forwarded by the defendants to the plaintiff. It was stated in the case to be "the usual form of policy issued by the defendants to their members." In Jan. 1870 the plaintiff applied for a renewal of the insurance, paid the premium, and received an acknowledgment in his own name. In March 1870, the defendants applied to the

plaintiff by way of call for the contribution in respect of the *Hermione* to the losses of the year 1869, and the plaintiff paid the call. The same occurred in Oct. 1870. The vessel was registered in the plaintiff's name in May 1870. She was wrecked and became a total loss in Nov. 1870. In Dec. 1870 the plaintiff sent in his claim. On the 6th Jan. 1871, the directors of the defendants' company summoned Davies before them, who was captain of the vessel at the time of the wreck, and having heard his account, resolved that it was not shown that the vessel was lost by perils of the sea, and that the owners of the *Hermione* had no claim upon the society. No notice of this meeting or of the resolution was given to the plaintiff, and he was not heard, nor was anyone on his behalf, before the resolution was passed. In April 1871 ten members signed a notice as to this decision, which notice was referred to a quarterly meeting of the society. The meeting confirmed the resolution. No notice of this meeting or appeal was given to the plaintiff, and he was not heard upon it. The case then stated that the defendants now admitted the total loss of the vessel by perils of the seas, but contended that the document upon which the plaintiff brings the action does not specify the risk, and is therefore void as a policy of insurance under 30 & 31 Vict. c. 23, ss. 7 and 9. They further, as the case stated, contended that the rules and articles of the association are to be treated as incorporated with the policy, and that under the rules the resolutions come to by the directors were a decision upon the plaintiff's claim, and that not having been appealed from in the manner pointed out by rule 84, the decision had become final and binding. The court was to have power to draw all such inferences of fact as should have been drawn by a jury, and to amend so as to enable the plaintiff to recover all or any of the moneys paid by him to the defendants.

Upon the argument before us, it was contended on behalf of the plaintiff that there was a valid contract of insurance, that the contract was to be found solely in the document of March 1869, that such document did not incorporate the articles and rules of the association; that whether it did or not, the plaintiff's right to maintain the action was not abrogated, for that rule 39 was no answer to the action, being an attempt to set up a private tribunal to try a right of action accrued, and that no such decision by the directors or the meeting as was relied upon could affect the plaintiff, who had not been summoned or heard when it was arrived at.

It was admitted on behalf of the defendants that there was a contract of insurance contained in a valid policy, and that there was a total loss, and that the plaintiff was a member of the association; but it was argued that the policy consisted not only of the document of March 1869—which, if it stood alone, was no policy at all, because in it the risk was not sufficiently specified—but of that document and the articles and rules; that by the rules the plaintiff was bound to submit his claim to the decision of the directors, subject to an appeal to a quarterly and a general meeting; that no right of action accrued to any member in respect of a loss unless he could obtain from the directors or the association a decision in his favour that his claim was valid and to a certain amount; that the plaintiff had not obtained such a decision; that the adverse decisions of the directors and the quarterly meeting were final; and that the plaintiff therefore never had a cause of action against the defendants.

Several points argued in the Court of Queen's Bench were not argued before us.

The questions before us are: First, is the document of March 1869 to stand alone as the policy, or are it and the articles and rules, or some of them, to be read together, and so to form a policy in writing? Secondly, if the document of March 1869 is to stand alone, is it a valid policy in writing? Thirdly, do the rules, if they are to be considered as no part of the policy, prevent the plaintiff from maintaining this action? Fourthly, do they prevent the plaintiff from maintaining the action, if they are to be considered as part of the policy?

As to the first question, it was argued that there is no contract of insurance here, unless it be formed by the document of March 1869; that such document contains no reference to the rules which are said to prevent the plaintiff from maintaining the action, and therefore does not incorporate them. And the case of *Boydell* v. *Drummond* (11 East, 142) was cited. That case was decided on the Statute of Frauds. The ground of decision was that separate documents in writing could not be joined together to make a memorandum in writing within that statute unless there was a sufficient reference from one writing to another contained in the documents themselves to show that they were intended to be jointly the memorandum, without being obliged to have recourse to parol evidence to show such intention; for otherwise the danger from parol evidence would arise, which it was the intention of the statute to obviate. That ground of decision is applicable only when the question is, whether there is or is not a sufficient memorandum within the Statute of Frauds. It does not seem to me to be applicable to a question whether there is a sufficient policy of insurance in writing, or as to what documents form that policy. I see no reason why parol evidence should not be admitted to show what documents were intended by the parties to form an alleged contract of insurance. It seems to me in the present case obvious, as an inference of fact from the whole relation between the parties (and we have power to draw inferences of fact), that the intention was that the contract of insurance should be found not alone in the document of March 1869, but in it and such of the rules as are applicable to a contract of insurance.

Such being my opinion, it is unnecessary to determine the second question. Still my opinion is, that there is nothing in the Stamp Act to prevent the document of March 1869 from being considered as a valid policy. I agree with the interpretation of the Stamp Act contained in the judgment of Blackburn, J. in this case in the Queen's Bench.

Neither is it necessary to determine the third question. Though here, again, I should think it plain that if the articles and rules are a separate contract from the policy, no agreement in them, however strong and absolute not to sue, could prevent the plaintiff from maintaining an action on the separate policy or contract of insurance.

The fourth is therefore the main question in this case. It seems to me to raise these questions: What is the contract as to payment in case of loss? What is the stipulation as to the assured suing in a

court of law or equity? What is the limit of the rule of law established by the case of *Scott* v. *Avery*? Does it prevent the maintenance of the present action?

Now, as to the first there is no express stipulation as to any payment being due in case of loss in the document of March 1869. Neither is there any in the articles of association. Those articles contain rules for the management of the society, and rules as to the making of contracts of insurance, and rules which, as I have said, form, in my opinion, parts of the contract of insurance. With the rules which deal solely with the management of the society we are not concerned. Those which are applicable to the making of contracts of insurance are rule 28, which primarily gives the power of making such contracts to the directors; rule 40, which gives authority to the directors to delegate the power of signing policies to two directors and the chairman, and enacts that no policy but one so signed shall be binding on the society; and rule 53 which adds further restrictions. These rules show that there would be no valid insurance in this case without the document of March 1869, but do not, in my opinion, prevent the incorporation into or adjunction to that document as part of the contract of such rules as are applicable to the contract. Rules which thus form part of the contract are, amongst others, rule 61, which shows that the society insures not only against total loss, but also against partial loss or damage, if to a certain amount: and rule 83, which by a necessary implication discloses the perils insured against, including loss or damage by collision. I do not doubt that rules 39 and 84 are also included in the contract, and form part of the policy. What, in my opinion, is the true construction of them I will presently state. But for the present I observe that neither of them contains any express undertaking to pay in case of loss, or to pay at any specified time. There is no rule which has any express stipulation to pay anything in case of loss. But then there never is any such express stipulation in any policy of marine insurance in ordinary form. A Lloyd's policy contains no such express stipulation. It has always been implied that a liability to indemnify arises directly there is a loss or damage by a peril insured against, unless such liability is prevented by some stipulation or condition expressed or implied in the policy. In the policy, therefore, in this case, it is to be implied that such liability to indemnify arises directly a loss or damage is caused by a peril insured against unless the true construction of sect. 39 is that it postpones the attaching of liability to a later time, or makes it depend upon another event than a loss or damage caused by a peril insured against. The first rule applicable to events in order of time after an alleged loss or damage is rule 83. "In all cases of any vessel &c., being lost, &c., the owner, master, or mate, or some of the crew shall, as soon as circumstances will permit, give notice thereof to the secretary, &c.; and the directors shall proceed to examine the owner, master and mate, and such of the crew as they shall think necessary, as to the cause of such loss or damage, and shall make such further inquiries, and take such measures, and make such decision and regulations thereon as in their judgment the case shall require." There is to be inquiry and decision, not merely as to the amount of loss or damage, but as to the cause of loss or damage. This seems to me to assume to give power to decide whether the loss was or was not caused by a peril insured against, so as to decide whether the society is or is not liable for the loss or damage in respect of which a claim was made. By rule 84, "if any member shall be dissatisfied with the decision of the directors," amongst other things, "as to any claim or other matters decided by the directors," he may appeal to a special general meeting. And by rule 39 the directors shall have full power, amongst other things, "to decide and determine all disputes, controversies, and matters arising between the society and members of the society concerning insurances, or claims upon, or liabilities by the society." These confirm and strengthen the view that it was intended that the directors should decide and determine not only the amount for which the society should be liable if a liability could be proved, but the question whether there was or was not any liability. And it was upon the latter view that the directors in the present case assumed to decide and determine that the society was not liable to the plaintiff.

The next question is, what is the effect endeavoured to be given by the rules to the decision of the directors or of the general meeting of the society? By rule 39, "And the decision of the directors shall be final and conclusive, as well upon the society as the members thereof." That is to say, a decision as to whether the society is or is not liable at all, is to be final and conclusive. Then the rule continues, "And no member of the society shall be allowed to bring or have any action, suit, or proceeding, or other remedy against the society, or the members thereof, for any claims or demands upon or in respect of the society or the members thereof, except as is provided by these presents." The rule then provides that the directors may, if they think fit, cause "any of such claims"—*i.e.* any claim upon the society concerning insurance, *i.e.* the whole claim—to be referred to the decision of any person practising as an average adjuster. The powers given to this person are clearly to be exercised judicially, as if by a tribunal. "And the decision or award of such average adjuster shall be final and conclusive on the society and claimant, and no appeal shall be allowed therefrom." And so by rule 84, "Whatever shall be decided by the special general meeting shall be final and binding, as well upon the society as upon all the parties interested in the decision." These inquiries and decisions are not confined to the question of amount contingent on a liability being admitted or established. They may, so far as I can see, take place where the amount is not in dispute, if a liability be established; but where the liability is disputed, the terms are certainly wide enough to include every question which may arise upon any claim by a member for any alleged loss under a policy. They assume a claim in respect of an alleged right, a dispute as to the validity of such claim, an inquiry into such dispute, and a decision which shall be final and conclusive. If the decision ought to be arrived at after hearing evidence and the parties, it is a judicial decision. If so, it seems difficult, if not impossible to say that there is not an attempt and intention to form a private tribunal which is to replace the ordinary tribunals of the country. The stipulations as to the procedure before the average adjuster show

that those who drew the rules intended that there should in all the inquiries be a judicial investigation before a tribunal, which is therefore a judicial tribunal. These rules do not seem to me to confine the inquiry and decision of which they treat to the amount to be paid, leaving the liability to pay to be established before the ordinary courts, or merely to postpone the liability to pay until the amount to be paid has been determined by the directors or an arbitrator; they do not affect the time of payment in respect of a loss; they do not therefore alter the implied contract to indemnify directly a loss arises; they leave that contract to be independent, they deal no more with that than with any other stipulation in the contract of insurance; but they are, as it seems to me, intended to create a tribunal to hear and determine every question which may arise in respect of a policy made with the society, and to determine everything finally and compulsorily, so as to prevent any application to the ordinary courts.

Then arises the question, what is the law? I agree with Martin, B. in *Horton* v. *Sayers* (4 H. & N. 650), that if the decision in *Scott* v. *Avery* in the House of Lords is to be interpreted according to the opinion expressed therein of Lord Campbell, the former cases are overruled, and the doctrine previously maintained with regard to ousting the jurisdiction of the ordinary courts is exploded. But I do not think it is possible to say that the decision of the House of Lords did overrule the former decisions. Baron Martin thought it did. He so stated in *Horton* v. *Sayers*, and so in terms ruled in *Tredwen* v. *Holman* (1 H. & C. 72). The facts in *Scott* v. *Avery*, as interpreted, did not make it necessary to decide more than this, that there may be a valid and binding contract that no action shall be maintained until the amount of damage, if any, has been ascertained in a specified mode. "It appears to me perfectly clear," said the Lord Chancellor, "that the language used indicates this to have been the intention of the parties: that, supposing there was a difference between the person who had suffered loss or damage, and the committe, as to what amount he should recover, that was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words that the right of action should be not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say." This ruling, as it seems to me, in no way conflicts with the right in either party to litigate before a court of law or equity any other question than the amount of damages which might arise under or in respect of the contract. The terms of the rules in that case were not the same as in this. They were, first, "that the sum to be paid to any suffering member for any loss or damage shall in the first instance be ascertained and settled by the committee." And then "that no member who refuses, &c., shall be entitled to maintain any action at law or suit in equity on his policy until the matters in dispute shall have been referred, &c., and then only for such sum as the said arbitrators shall award, and the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit." These terms seem rather to assume than to forbid the possibility of an action or suit upon questions other than the amount. There is no dispute as to the principle, says Coleridge, J. in the Exchequer Chamber, 8 Ex. 500. "Both sides admit that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damage, or the time of paying it, or any matter of that kind which do not go to the root of the action. On the other hand it is conceded that any agreement which is to prevent the suffering party from coming into a court of law, or in other words which ousts the courts of their jurisdiction cannot be supported." And in order to found or support the judgment the large terms in that case were by reference confined so as to be applied to a reference of the amount only and not of the liability. In *Horton* v. *Sayer* (4 H. & N. 643), the stipulations in the lease were "that if at any time during the said term, or at or after the expiration thereof, any difference should arise touching or concerning any covenant, &c., all and every the matters in difference should be finally settled by arbitrators, and every such award should be binding and conclusive, and that the parties should not commence or prosecute any action or suit, or seek any remedy either in law or equity, for relief in the premises without first submitting to such arbitration as aforesaid all matters in difference, &c." It is obvious that in those stipulations the arbitration was not confined to settling an amount of damages, but was general. "In this case," says Pollock, C.B., "the deed discloses nothing more than an agreement generally to refer all disputes to arbitration, and that does not prevent the plaintiff from maintaining this action." And Bramwell, B. says, "I think *Scott* v. *Avery* was rightly decided, though perhaps I may have some bias in consequence of having been counsel for the plaintiff. The principle of that decision is very intelligible. If a man covenants to do a particular act, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, that is the case with reference to which the courts have used the unfortunate expression that their jurisdiction is ousted by the agreement of the parties. On the other hand, if a man covenants to do a particular act, and that in the event of his not doing it the other party shall be entitled to receive such a sum of money as they shall agree upon, or if they cannot agree such an amount as shall be determined by an arbitrator, there is no debt which can be sued for until the arbitrator has ascertained what sum is to be paid." He then decides in favour of the plaintiff, because "there is a distinct and unqualified covenant by the defendant that he will do a particular act, and also a covenant that if any difference shall arise it shall be referred to arbitration." It is impossible, as it seems to me, to have a more clear statement that *Scott* v. *Avery* did not overrule the former decisions, and the case is an authority that the distinction is between an agreement to refer a particular point as a condition precedent to an action, and to refer all matters in dispute so as to have no action. In *Roper* v. *Lendon* (1 E. & E. 825), the 10th condition in a fire policy was, "the amount of every loss will be paid immediately after the same shall have been

established to the satisfaction of the directors." The 15th condition was, "in case any difference or dispute shall arise between the insured and the company touching any loss, &c., or otherwise in respect of any insurance, such difference shall be submitted, &c., and the award shall be conclusive and binding on all parties." The 6th plea relied on the 15th condition; Mr. Lush arguing for the defendants admitted that the 6th plea was bad. This of itself is high authority. Lord Campbell giving judgment said, "the 6th plea is clearly bad. The agreement to refer contained in the 15th condition is merely collateral to the agreement to pay. The courts will not, therefore, treat the agreement to refer as ousting their jurisdiction until there has been a reference. The distinction between the present case and cases like *Scott* v. *Avery* is plainly pointed out in the judgment there delivered in the House of Lords: "The present case does not fall within that decision, &c." And Hill J.: "The 6th plea is bad. The case is clearly not within the decision in *Scott* v. *Avery*. Here the agreement to refer is collateral to the agreement to pay. There the agreement was to pay only such a sum as the arbitrators should award." This seems to me a conclusive statement by or with the assent of Lord Campbell, on whose judgment in the House of Lords reliance was placed for the proposition that the doctrine as to ousting the jurisdiction of the courts is abrogated, that *Scott* v. *Avery* did not overrule that doctrine, that it still exists, and that the test is whether the agreement to refer applies only to the ascertaining a particular fact, or to the decision of every dispute which may arise. In *Cooke* v. *Cooke* (L. Rep. 4 Eq. 77), Sir W. Page Wood, at p. 85, thus discusses *Scott* v. *Avery*: "These observations of Lord St. Leonards have been commented on by the present Lord Chancellor in *Scott* v. *Corporation of Liverpool*, which fell within the principle of *Scott* v. *Avery*, a simple case where a contractor had agreed that he should be paid only what the engineer should certify, and it was held that there was no right of action until the certificate was made. But the Lord Chancellor distinguishes that simple class of cases from the other, where a distinct right, such as a debt or an obligation to account, has arisen, and the parties have agreed upon a particular private tribunal, which shall adjust the right for them. Speaking of the latter class of cases the Lord Chancellor says, 'A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals.'" But the case of *Tredwen* v. *Holman* (1 H. & C. 72) is said to be contrary to these views. The stipulation in the policy was "and all other cases of dispute of whatever nature shall be referred in like manner, and no action at law shall be brought until the arbitrators have given their decision." The court decided in favour of the defendants. Martin, B. in delivering the judgment said, "The case of *Scott* v. *Avery* decided that the insurer and the underwriter may contract that no right of action (to be enforced in a court of law) shall accrue until an arbitrator has decided not merely as to the amount of damages to be recovered, but upon any dispute that may arise upon the policy. The agreement is clear and unambiguous, and the parties probably meant to act upon *Scott* v. *Avery*, and excluded the jurisdiction of the courts of law except for the purpose of enforcing the award to be made by the arbitrator." This judgment seems to me to be founded upon the view entertained by Martin, B. that the judgment in the House of Lords in *Scott* v. *Avery*, which was contrary to the opinion given by him in that case, overruled all the previous decisions on the subject. "It seems to me," he said, in *Horton* v. *Sayers* (4 H. & N. 650) "that *Scott* v. *Avery* has overruled all the previous decisions on the subject." As I cannot accede to this view I venture to say that *Tredwen* v. *Holman* cannot be supported. The true limitation of *Scott* v. *Avery* seems to me to be that which was expressed in it, and which, as I have pointed out, has so often been expressed about it, that if parties to a contract agree to a stipulation in it which imposes as a condition precedent to the maintenance of a suit of action for a breach of it, settling by arbitration the amount of damage or the time of paying it, or any matters of that kind which do not go to the root of the action, *i.e.*, which do not prevent any action at all from being maintained, such stipulation prevents any action being maintained until the particular fact has been settled by arbitration; but a stipulation in a contract which in terms would submit every dispute arising on the contract to arbitration, and so would prevent the suffering or complaining party from maintaining any suit or action at all in respect of any breach of the contract, does not prevent an action from being maintained; it gives at most a right of action for not submitting to arbitration and for damages probably nominal. And the rule is founded on public policy. It in no way prevents parties from referring to arbitration disputes which have arisen, but it does prevent them from establishing as it were before they dispute a private tribunal which may from ignorance do what the invented tribunal here did, viz., act in contravention and insist on acting in contravention of the most elementary principle of the administration of justice.

In this case, upon a careful consideration of such of the rules in the articles of association as are in my opinion parts of the written contract of insurance, I come to the conclusion that there is nothing to postpone the attaching of the implied liability to indemnify for a loss to any time subsequent to the loss, that the stipulations as to arbitration by the committee or meetings would, if carried out according to their terms, prevent the assured under any policy of the society from maintaining any suit or action at all in the ordinary courts of the country in respect of any dispute arising on the policy; and therefore that such stipulations do not prevent the plaintiff from maintaining this action.

I am consequently of opinion that the judgment of the Court of Queen's Bench should not be supported, and that judgment should be given for the plaintiff.

Kelly, C.B.—I agree in opinion with Mr. Justice Brett, and chiefly upon the grounds upon which he has delivered that opinion.

It seems to me impossible to deny that inasmuch as by the contract between the parties the defendants have agreed that an insurance has been effected, and as they now admit that a total loss has been sustained, the plaintiff is entitled to recover the amount of that loss. If there be no policy and no insurance, for what can they pretend that they

have received the different premiums and the contribution of the plaintiff to losses sustained by other members? This reduces the case to the single question whether the 39th and some other articles are a bar to the action on the ground that the decision of the directors is final and conclusive. If it be so, it can only be because the parties have contracted that there should be no remedy by action upon any claim upon any policy of insurance, and this would be not only to oust the courts of their jurisdiction to entertain an action upon a policy of insurance, but looking to the terms of the 39th article would be to hold that no action at all is maintainable under any circumstances by a member against the company. For we find that the directors "have full power (*inter alia*) to release any contract or agreement respecting any matter in which the society may be interested, and to decide all claims and demands upon the society by the members thereof, and all controversies and matters arising between the society and the members of the society, concerning insurances or claims upon or liabilities by or to the society: and the decision of the directors shall be final and conclusive, and no members of the society shall be allowed to bring any action suit or proceeding or other remedy against the society or the members thereof for any claims or demands upon or in respect of the society or the members thereof except as therein provided." And no provision is to be found qualifying this part of the articles. If this provision be of legal validity, the effect would be that had the decision been in favour of the plaintiff that he was entitled to recover the sums insured, he could have maintained no action to enforce it.

The case of *Scott* v. *Avery* has been quoted, and undoubtedly there is much in the language of Lord Campbell in his judgment which, taken by itself, might seem to show, as Baron Martin (I think incorrectly) held, that it put an end to the doctrine against the ousting of the jurisdiction of the courts. But when we look to the facts of the case, and to the more cautious and I think accurate language of the Lord Chancellor, the decision may well be construed to amount to no more than that where the recovery upon a policy of insurance is made expressly dependent upon the amount of the loss having been ascertained by arbitration or upon the performance of some other legal condition, and when other subjects of controversy are also to be submitted to arbitration, no action lies until the amount of the loss is so ascertained, or that the condition upon which the action may be brought has been performed. The language also of the judges, on whichever side their opinions were pronounced, is uniformly to the effect that the jurisdiction of the courts cannot be ousted by the contract of the parties, though the maintaining of the action may be made conditional upon the amount of loss or damage being previously ascertained, or upon some other conditions not applicable to the present case. I must add that the resistance of the defendants to this demand appears to me so extremely unconscientious and unjust, that, speaking for myself, I should not hesitate to hold under the leave reserved for that purpose, if it be held that the plaintiff cannot recover upon the policy, that a count for money had and received should be introduced, under which he may recover the amount of premiums paid in respect of this policy, and possibly his contribution to the losses incurred by the society.

Here no question arose about the amount of the loss, nor was it ever required or proposed by the society or directors before whom the case was brought that the amount should be referred, but they decided at once, and without raising or suggesting any other question, that there was no loss at all by the perils of the sea.

As to the point upon the Stamp Act, it is well disposed of by my brother Blackburn, and indeed appears to have been abandoned.

Judgment for plaintiff, the appellant.

Solicitors for plaintiff, *Paterson, Snow* and *Burney*.

Solicitors for defendants, *Hayes, Twisden, Parker* and *Co.*

QUEEN'S BENCH DIVISION.

Reported by M. W. McKellar, J. M. Lely, and R. H. Amphlett, Esqrs., Barristers-at-Law.

Dec. 14, 1875; *Jan.* 11 *and Feb.* 23. 1876.

KOPITOFF *v.* WILSON.

Shipping—Contract of carriage—Implied warranty of fitness of ship for voyage.

In whatever way a contract for the conveyance of merchandise be made, if there is no agreement to the contrary, the shipowner is by the nature of the contract impliedly and necessarily held to warrant that the ship is good and in a condition to perform the voyage then about to be undertaken, that is to say, that she is seaworthy or fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage.

Plaintiff delivered iron armour plates to be carried by the defendant's ship, and they were stowed on board by the defendant's servants. During rough weather one of the plates broke loose, and went through the ship's side, thereby causing her loss.

In an action to recover the value of the plates, the jury were told that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and bonâ fide endeavour to make her fit; and the two questions left to them were, whether the vessel at the time of sailing was in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season; and whether, if she was not in a fit state, the loss was occasioned by her unfitness.

Held, that this was a proper direction concerning the liability of a shipowner, even though not holding himself out as a common carrier.

THIS was an action tried before Blackburn, J., at Guildhall during the Sittings after Hilary Term, 1875.

The plaintiff sought to recover for the loss of certain armour plates and bolts delivered by him, to be carried on board the defendant's ship *Walamo*, from Hull to Cronstadt.

At the trial the verdict was directed for the plaintiff, leave being reserved to the defendants to move to enter a nonsuit.

The defendants accordingly obtained a rule *nisi* for this purpose, on the ground that the defendant was relieved from liability by the terms of the bill of lading. The rule also called upon the plaintiff to show cause why a new trial should not be had

on the ground that the learned judge misdirected the jury by laying down that there was an absolute obligation on the shipowner to make his ship seaworthy as regards the stowage, and that he would be liable if, in consequence of the non-performance of that obligation, the goods should be lost.

Dec. 14 and *Jan.* 11.—*Cohen*, Q.C. (with him *Butt*, Q.C. and *Mathew*) showed cause.

Thesiger, Q.C. (with him Sir *H. James* and *Webster*) supported the rule.

The pleadings, facts, and arguments sufficiently appear in the judgment of the court.

The following authorities were cited and discussed:

Lyons v. *Mells*, 5 East, 428;
Gibson v. *Small*, 4 H. L. Cas. 353;
Stanton v. *Richardson*, *ante*, vol. 1, p. 449; vol. 2, p. 228; L. Rep. 7 C. P. 421; and 9 C. P. 390;
Readhead v. *Midland Railway Company*, L. Rep. 4 Q. B. 381; 20 L. T. Rep. N. S. 628;
Worms v. *Storey*, 11 Ex. 427;
Davis v. *Garratt*, 6 Bing. 716;
Thompson v. *Hopper*, 6 E. & B. 172, 937; E. B. & E. 1038;
Lloyd v *General Iron Screw Collier Company*, 3 H. & C. 284;
Dixon v. *Sadler*, 5 M. & W. 405;
The Freedom, *ante*, vol. 1, p. 28; L. Rep. 3 P. C. 594;
Notara v. *Henderson*, *ante*, vol. 1, p. 278; L. Rep. 7 Q. B. 225;
Laurie v. *Douglas*, 15 M. & W. 746;
Phillips v. *Clark*, 2 C. B., N. S. 168;
Montoya v. *London Assurance Company*, 6 Ex. 451;
Redman v. *Wilson*, 14 M. & W. 476;
Abbott on Shipping (3rd edit.), p. 229;
Maude and Pollock on Merchant Shipping (3rd edit.), p. 263;
Emerigon Traité des Assurances, s. 4, pp. 372—375;
Roccus, Not. 19, pp. 57. 69;
Molloy, book ii. c. 2, s. 10;
Wellwood's Sea Laws, t. 7, p. 22,
Trooplong, Contrat de Louage, book i, p. p. 335;
Parsons on Shipping, p. 171.

Cur. adv. vult.

Feb. 23.—The judgment of the court (Blackburn, Quain, and Field, JJ.) was delivered by—

FIELD, J.—This is an action in which the plaintiff seeks to recover damages for the loss of a large number of iron armour plates and bolts which were lost on board the defendants' ship *Walamo*, on a voyage from Hull to Cronstadt. The cause was tried before Blackburn, J. at Guildhall at the Sittings after Hilary Term 1875.

The declaration contained several counts, and amongst them was a count alleging that the defendants had warranted that the ship should be seaworthy and reasonably fit to carry the goods in question, and alleged that by reason of a breach of such warranty the goods were lost. There was also a count upon the bill of lading, alleging a promise to deliver, with the exception of certain perils, &c., and a loss not within any of the exceptions. The defendants denied the warranty, and also alleged that the cause of loss was within some of the exceptions.

On the trial it appeared that the plaintiff, who was an agent of the Russian Government, had entered into a contract with the defendants, who were shipowners at Hull, by which the defendants undertook to ship for Cronstadt from time to time large quantities of armour plates, which the plaintiff was having manufactured in this country, at agreed rates of freight, varying according to the season of the year. The other terms of the contract are not material to the points raised before us.

Three armour plates, of great weight, from eighteen to fifteen tons weight each, were delivered by the plaintiff to the defendants for shipment, and were by them shipped on the 15th Sept. in the defendants' own steamship *Walamo*, under a bill of lading containing many exceptions. The defendants themselves, by their own servants, stowed the ship. The armour plates were by them placed on the top of a quantity of railway iron, and then secured there by wooden shores. There was a conflict of testimony as to whether this was or was not a proper mode of stowing them. It was not disputed that the steamship was in herself a good ship, but it was contended, on behalf of the plaintiff, that the mode of stowing these plates adopted by the defendants made her unseaworthy on this voyage. On getting out to sea she encountered bad weather, the wind being high and the sea rough, and she rolled heavily. There was conflicting evidence as to the degree of this bad weather, and the cause of this rolling; the plaintiff contending that the wind and sea were no more than at that season was to be expected, and that the rolling was owing to the improper stowage of the vessel; the defendants contending that there was an unusual storm, which would have made any ship, however well stowed, roll. After the ship had been out at sea for some hours one of the armour plates broke loose, and went through the side of the ship, which in consequence went down in deep water, and was totally lost, with all her cargo on board.

The plaintiff's contention was, that the breaking loose of the plate was because it was improperly stowed and secured; the defendants' that it was a direct consequence of the roughness of the sea, which was a peril excepted in the bill of lading. These contentions raised questions of fact for the jury. Leave was reserved at the close of the case to enter a nonsuit, if the exceptions in the bill of lading protected the defendants under the circumstances.

The case was thus left to the jury. The learned judge told the jury as a matter of law, and not as a question for them, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and *bonâ fide* endeavour to make her fit; and after explaining to the jury what reasonably fit meant with reference to a North Sea voyage, and the other facts in the case, left the following questions to the jury:—

First, was the vessel at the time of her sailing in a state, as regards the stowing and securing of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season from Hull to Cronstadt?

Secondly, if she was not in a fit state, was the loss that happened caused by that unfitness?

These questions were put in writing, and handed to the jury, and on that paper the judge put in writing what he had previously stated in his summing up, that they were "to understand (in answering this second question) that though the disaster would not have happened had there not been considerable sea, yet it is to be considered as caused by the unfitness, if they (the jury) think that the plates would not have got

adrift when they did, had the stowage been such as to put the ship in a fit state."

The jury answered the first question in the negative, and the second in the affirmative. No complaint has been made as to these findings not being justified by the evidence. Upon these findings the learned judge directed a verdict to be entered for the plaintiff for the agreed amount, 655*l.*; and in Easter Term 1875, the defendants obtained a rule to show cause why a non-suit should not be entered pursuant to the leave reserved, or why there should not be a new trial on the ground "that the learned judge misdirected the jury, in directing them there was an absolute obligation on the shipowner to make his ship seaworthy as regards the stowage, and that he would be liable if, in consequence of the non-performance of that obligation the goods should be lost." That part of the rule which prayed for a non-suit, although not expressly abandoned for any future purpose, was not attempted to be supported before us; and with regard to the remaining portion of the rule, we took time to consider our judgment; not because we entertained any doubt as to the correctness of the direction of the learned judge, but because the case involved considerations which rendered it desirable that our reasons should be fully and explicitly stated.

We think that the rule must be discharged. We hold that, in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is by the nature of the contract impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or in ordinary language is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage. For this proposition we have the high authority of Lord Tenterden, who lays it down in the first edition of his book published in 1802, and for the correctness of which he vouches Emerigon and other eminent writers or commentators upon the subject: (Abbot on Shipping, 1st edit. p. 146). The accuracy of the proposition thus stated in 1802 has not, that we are aware of, ever been brought into question in any of the subsequent editions, or of the numerous text books since published on the subject. In further support of the implication of such a warranty, we have the authority of Lord Ellenborough, who, in the case of *Lyon* v. *Mells* (5 East, 428), lays it down that it is a part of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers it; and although it is true, as was pointed out by Mr. Thesiger in his argument before us, that the warranty thus expressed by Lord Ellenborough is expressed in terms limiting it to a contract for the carriage of goods by a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, the measure of liability thus laid down by him has been considered generally applicable to any contract for carriage (per Blackburn, J. in *Readhead* v. *The Midland Railway Company*, L. Rep. 2 Q. B. 434) and in the cases of *Havelock* v. *Geddes* (10 East. 536), *Stanton* v. *Richardson* (*ante* vol. 1, p. 449; vol. 2, p. 228, L. Rep. 7 C. P. 421; and in the Ex. Ch. 9, *ib.* 390); the judgment in which latter case has recently been affirmed in the House of Lords, was actually applied to contracts for carriage by charter-party.

In further support of this proposition, the existence of such a warranty as a general implication arising in all contracts of shipment was universally recognised or assumed in the opinions expressed in the case of *Gibson* v. *Smith* (4 H. of L. Cas. 353).

We further find that the same doctrine obtains in the American courts (1 Parsons on Shipping, 171). It appears to us, also, that there are good grounds in reason and common sense for holding such to be the law. It is well and firmly established that in every marine voyage policy the assured comes under an implied warranty of seaworthiness to his assurer. If we are to hold that he has not the benefit of a similar implication in the contract which he makes with a shipowner for the carriage of his goods, the consequence would be that he would lose that complete indemnity against risk and loss which it is the object and purpose to give him by the two contracts taken together. Holding as we now do, the result is that the merchant by his contract with the shipowner having become entitled to have a ship to carry his goods warranted fit for that purpose, and to meet and struggle against the perils of the sea, is by his contract of insurance protected against the damage arising from such perils acting upon a seaworthy ship.

The main argument addressed to us on the part of the defendants, however, was that it was not intended, by the propositions and authorities which we have above referred to, to assert the existence of an independent implication of warranty applicable to every contract of carriage by water, but that the doctrine thus asserted was a subordinate part of the more extensive liability attaching to carriers, and that inasmuch as the latter were bound to carry safely and securely, the act of God and the Queen's enemies only excepted, it was by virtue of that obligation, and not by any specific contract to be implied, that the duty arose. It was therefore said that the defendants not being common carriers, there was no room for any such implication in the present case.

But we have already pointed out that, although it is strictly true that Lord Ellenborough's proposition in *Lyon* v. *Mells* is in its terms confined to carriers or persons holding themselves forth as ready to carry, the principle itself has always received a wider application; and in the cases of the *Liver Alkali Company* v. *Johnson* (*ante* vol. 1, p, 380; L. Rep. 7 Ex. 267; and on appeal, *ante* vol. 2, p. 332; L. Rep. 9 Ex. 338); and *Nugent* v. *Smith* (L. Rep. 1 C. P. Div. 19), in the observations of the courts the existence of the warranty in question on the part of a shipowner is asserted with reference to his character as such, and not as existing only in those cases in which he is also acting as a public carrier.

Mr. Thesiger, however, in his able argument, mainly and very properly relied on the judgment in the Exchequer Chamber in *Readhead* v. *Midland Railway Company* (L. Rep. 4 Q. B. 381). The point decided in that case was that the obligation of the carrier of passengers by land did not extend so far as to warrant the roadworthiness of the carriage sup-

plied by him against latent effects, and did not therefore directly decide anything as to the obligation of a carrier by sea of goods to warrant the seaworthiness of his ship even against latent defects; but we think Mr. Thesiger was justified in saying that the reasoning of the judgment threw doubt upon that position. The more recent case of *Francis* v. *Cockerill* (L. Rep. Q. B. 501) in the Exchequer Chamber) we think, establishes that the obligation or warranty even on land extends to everything except latent defects which could not by any reasonable diligence or skill be discovered. In the case now before us there was no necessity to consider the law as to latent defects, or to direct the jury on that point, for nothing of the sort was suggested.

We think that it is not a misdirection entitling the party against whom the verdict passes to a new trial, if the judges make an inaccurate statement of the law on some point not involved in the issue, and on which the jury required no direction, and consequently we need not express any opinion on this point. We are not, however, to be understood as intimating that the ruling in this respect was wrong.

Rule discharged.

Solicitors for the plaintiff, *Hollams, Son,* and *Coward.*

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

Tuesday, April 11, 1876.

SWANSEA SHIPPING COMPANY (LIMITED) *v.* DUNCAN.

Question between defendant and third party — Notice to third party—Determination of question —Judicature Act 1875, *Order XVI., rules* 17 *and* 18*—Shippers and consignees—Demurrage.*

Shipowners brought an action for demurrage against their charterers. Defendants by the charter-party had agreed to discharge the cargo as fast as the custom of the port should allow; and if the ship should be detained by the defendants or their agents beyond the time specified for discharging the cargo, demurrage was to be paid by the defendants at the rate of 12*l. or equivalent per day. Before arrival of the ship, the defendants sold the whole cargo to be delivered at the port of arrival; but the agreement for sale made no terms as to time of discharging cargo nor amount of demurrage. Defendants obtained an order from a master under Order XVI., rules* 17 *and* 18 *of the Judicature Act,* 1875, *that notice be given to the purchasers of the cargo that the question in the action should be determined between them, the plaintiffs and the defendants.*

Held, upon appeal, that the proceedings under these rules are only applicable where the question between the defendant and the third party is identical with that between the plaintiff and defendant; and that the master's order in this case could not be maintained.

THIS was an action for demurrage upon a charter-party entered into abroad, by which the plaintiffs, the owners of the ship *Helen Burns,* agreed with the defendants, Messrs. Duncan, Fox, and Co., the charterers, that the ship and cargo should go to Queenstown or Falmouth for orders, and thence to a specified port of discharge and deliver the whole of her cargo which the defendants agreed to discharge as fast as the custom of the port should allow; and if the said ship should be detained by the defendants or their agents beyond the time specified for discharging the said cargo, demurrage was to be paid by the defendants at the rate of 12*l.*, or equivalent per day for each day of detention afterwards. The defendants, through their brokers, sold the entire cargo expected to arrive by the *Helen Burns* to the British Agricultural Association carrying on business in Scotland. The sold-note to the said association stated that the cargo was to be delivered at a safe port in the United Kingdom, but made no terms as to the time to be allowed for discharging the cargo, nor as to the demurrage in case of detention of the vessel.

The *Helen Burns,* when she arrived at Falmouth for orders, was sent by the British Agricultural Association to discharge her cargo at Leith. She duly reached that port on the 8th Oct., but was kept there thirty-one days before her cargo was discharged. The defendant's answer to the claim for this demurrage was, that if the plaintiffs were entitled to it, the delay beyond the custom of the port was caused by the fault of the British Agricultural Association, whose business it was to discharge the cargo, and who would be liable to the defendants for the damages which the plaintiffs might obtain.

An order was accordingly obtained from a master at the instance of the defendants, by which the defendants were at liberty to serve notice on the British Agricultural Association under Order XVI., rules 17 and 18 of the rules of the Supreme Court. From this order the British Agricultural Association appealed to the judge in chambers (Archibald, J.), who referred the matter to the court.

By rule 17, "Where a defendant is, or claims to be, entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the court or a judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the court or a judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined." And by rule 18, "Where defendant claims to be entitled to contribution, indemnity or other remedy or relief over against any person not a party to the action, he may, by leave of the court or a judge, issue a notice to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer, and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court or a judge, be served within the time limited for delivering his statement of defence. Such notice may be in the form No. 1 in Appendix B. hereto, with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim then a copy of the writ of summons in the action."

Rules 20 and 21 of the same order relate to the point in dispute: by rule 20, "If a person not a party to the action, who is served as mentioned in rule 18, desires to dispute the plaintiff's claim in this action as against the defendant, on whose

behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise. Provided always that a person so served and failing to appear within the said period of eight days may apply to the court or a judge for leave to appear, and such leave may be given upon such terms, if any, as the court or a judge shall think fit." And by rule 21, "If a person not a party to the action served under these rules appears pursuant to the notice, the party giving the notice may apply to the court or a judge for directions as to the mode of having the question in the action determined; and the court or judge upon the hearing of such application may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions as to the court or a judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the the person so served shall be bound or made liable by the decision of the question."

Castle, on behalf of the British Agricultural Association, now moved by way of appeal from the master's order, that the notice of the defendants under Order XVI., rule 17, should be set aside on two grounds. First there is no provision in any of the Orders for service of a notice of this kind out of the jurisdiction. Rule 18 certainly provides for service of notice according to the rules relating to the service of writs of summons; but the service of such writs out of the jurisdiction is limited by Order XI., rule 1, to where the contract ought to be enforced or otherwise affected, or for the breach whereof damages or other relief are or is demanded, was made or entered into or broken within the jurisdiction. And even if this objection could be overcome, rule 4 of the same order provides that "Any order giving leave to effect such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given." This is quite inconsistent with the provision in Order XVI., rule 18, that the person shall be served with notice by the defendant within the time limited for service of statement of defence; and, secondly, this is not a case in which the defendants claim to be entitled to contribution or indemnity or any other remedy or relief over against the British Agricultural Association, within the words of rules 17 and 18 of Order XVI. There is no privity of contract between the latter and the plaintiff, and the measure of damages between the defendants and the association is not the same as between the plaintiffs and defendants. Moreover, the same questions do not arise between the various parties, and the question determined between plaintiffs and defendants can be in no way binding upon this association:

Chappel v. *Comfort*, 10 C. B., N.S., 802;
Sims v. *Bond*, 5 B. & Ad. 389.

Sect. 24 sub-sect. 3 of the Judicature Act 1873 gives power to grant relief to a defendant against a plaintiff in respect of any equitable or legal right claimed in the pleadings, which might be granted in a separate suit; "and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause, or matter, or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court, or any Order of the Court, as might properly have been granted against such persons if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant." In *Treleaven* v. *Bray* (45 L. J. 113, Ch.), Mellish, L.J., said, "The meaning of sect. 24, sub-sect. 3, was very carefully considered by the judges. We came to the conclusion that it was not advisable to make any rules which would enable one defendant to obtain relief against his co-defendant without an independent action against him. We considered that we had power to do so, but we thought that it would be intolerable that a plaintiff who might have a good case against the original defendant, should be compelled to wait for his remedy while the defendants were fighting *inter se*. The only object of the rules was to bind the third party conclusively by the judgment given as between the plaintiff and the original defendant, but if he wants to get an indemnity or other relief against the third party he must bring an action of his own."

J. C. Mathew showed cause for the defendants against this appeal motion. There is nothing in the facts of this case to prevent the writ of summons from being served upon the defendants if they were out of the jurisdiction, and Order XI., rule 1, is to be read together with and as part of Order XVI., rule 18. [QUAIN, J.—Order XI., rule 1, which allows service of a writ out of the jurisdiction, is applicable only when the original contract, upon which the action is brought, is made or broken within the jurisdiction. It does not follow from the words of Order XVI., rule 18, that service of a notice may be similarly performed upon a bye contract with which the plaintiff had nothing to do.] As to the second point, the main issue in the action is whether the cargo was discharged as fast as the custom of the port of Leith allowed, and that would be the issue in an action between the defendants and the British Agricultural Association. The association therefore ought to be bound by the determination of this action; this is "a question in the action," which, in the words of Order XVI., rule 17, "should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them."

Castle was not heard in reply.

COCKBURN, C. J.—I have felt some hesitation, but I think the proceedings under Order XVI., rules 17-21, which were allowed to be taken by the master, are not in this case open to the defendant. I think it was the intention of the Legislature to limit the application of these rules to cases in which the claim of the defendant against the

third person is identical with that of the plaintiff against the defendant. Unless that be so, the allowing of the introduction of such third person into the cause would be extremely embarrassing to the plaintiff and to the trial of the action, and it would also be hard on such third person if he could not, by refuting the claim of the plaintiff, put himself in a position not to be liable when the defendant's time should come to enforce his, the defendant's claim against him. I think there is great force in what has been said as to rules 20 and 21; they show that the question between the defendant and the third party should be the same as the question in the action, and on the whole I am of opinion that the proceedings under rules 17 and 18 are only applicable where the questions are identical. Then what we have to see is, whether they are so applicable in the present case. Now I am not satisfied that the question between the defendants and the British Agricultural Association would necessarily be the same as that between the defendants and the plaintiffs. The association might defend itself in an action by the defendants for some other reason than the discharging the cargo according to the custom of the port. That being so, the order of the master must be set aside, and it is unnecessary to give any opinion on the other point as to whether, being out of the jurisdiction, the association can be served with a notice.

Quain, J.—I am of the same opinion. With respect to the service of a notice under rule 18 out of the jurisdiction of the court, there is very great difficulty in applying rule 1 of Order XI., which relates to the service out of the jurisdiction of a writ of summons, and I think under the circumstances it is better to give no opinion on the subject. Now I agree with my Lord that in the present case there is a distinctly different question between the defendants and the Agricultural Association to that between the defendants and the plaintiffs, and I do not think that such a case as this is one to which it was ever intended rules 17 and 18 of Order XVI. should apply. They contemplate the case of an indemnity or suretyship where the only thing which the third party, who was liable to the defendants on the indemnity or suretyship, could do would be to fight out the original cause of action; and if the defendants were liable in the action, so he would be liable to the defendants. So far from this being the case here under this charter-party, the defendants are bound to discharge as fast as the custom of the port should allow, and it is agreed that the charge for demurrage is to be at the rate of 12*l.* for each day of detention of the vessel beyond the time there specified for discharging the cargo. Now that is the only question between the parties to the original action. The British Agricultural Association, who are the third parties, are not parties indemnifying the defendants from liability under that contract but are parties who have entered into a separate and distinct contract with the defendants for the cargo to be delivered at any safe port in the United Kingdom, and the only thing which they are bound to do is to take delivery of the cargo within a reasonable time. The measure of damages under the first contract is distinct from that under the second contract, and the causes of litigation was also distinct; and I think it never was intended to bring these together when there is no privity between the parties. Rules 20 and 21 of this same Order point to the matter in dispute in the original action, and evidently never contemplated a case in which the matter in dispute is under a separate and different contract from that in the original action, and to which the plaintiff is no party.

Pollock, B.—I also think that the order of the Master in this case should be set aside. The objection to the order which has been made is this, viz., that the case is not one contemplated by the rules 17 and 18 of Order XVI. My impression is, that it was intended to give to the Common Law Divisions the same advantage which the courts of equity alone possessed before the Judicature Acts, by which all the parties might be brought before the court who should be necessary for the purpose of having the contract completely worked out. Instances are given in form 1 in Appendix B to the Act, in which it would be for the benefit of the suitors that there should be this power of bringing in a third party, and in which there would be no difficulty in applying the Act; and there are other cases, where the same fact being in question between all the parties, it would be desirable to have the matter determined once for all. The present, however, is not one of those cases. The facts in dispute between the parties are different, and if the third party were brought in it would involve the necessity of various separate enquiries, as well to the evidence as to the damages arising out of these different contracts, with a separate direction as to each by the judge at the trial. Such a case was never contemplated by the rules, and this order of the Master must therefore be set aside.

Judgment for the British Agricultural Association.

Solicitors for the British Agricultural Association, *Simson* and *Co.*

Solicitors for defendants, *Field, Roscoe,* and *Co.*, for *Bateson* and *Co.*, Liverpool.

ADMIRALTY DIVISION.

Reported by J. P. Aspinall, Esq., Barrister-at-Law.

Tuesday, Jan. 11, 1876.

(Before the Right Hon. Sir R. Phillimore.)

The Wetterhorn.

Damage to cargo—Particulars—Practice.

In a cause of damage to cargo the court, contrary to the practice of the High Court of Admiralty, made an order for particulars of the plaintiff's claim so as to enable the defendants to pay into court in respect of those items of the claim for which he was prepared to admit liability.

This was a motion on appeal from an order of the registrar refusing an application made on summons on behalf of the defendants, the owners of the barque *Wetterhorn*, for particulars of the plaintiff's claim. The action was brought by the plaintiff as indorsee of a bill of lading of the cargo of the *Wetterhorn* for damage done to the cargo. The statement of claim alleged that the cargo consisting of 17,102 sacks of wheat was shipped in good order and condition on board the *Wetterhorn* at Astoria, Oregon, and that the master gave a bill of lading for the same, by which it was acknowledged that the wheat was in good order and condition and was to be delivered to the

order of the consignees at a safe port in the United Kingdom, or on the continent between Havre and Hamburg (the dangers of the seas and fire only excepted); that the bill of lading was duly indorsed and delivered to the plaintiff in whom the property in the wheat thereby became vested; that the barque arrived at the port of Hull, whither she had been ordered, on the 12th Oct. 1875; that the plaintiff was entitled to have the 17,102 sacks of wheat delivered to him in like good order and condition as the same were in when shipped as aforesaid on board the said barque at Astoria; that (par. 7) "the said 17,102 sacks of wheat were delivered to the plaintiff, but not in such like good order and condition, but in a wetted, damaged, and deteriorated condition; many of the said sacks had been cut open and the contents started, and thereby further damage and deterioration had been caused to the said cargo;" that the defendants were not prevented by the expected perils from delivering the cargo in good condition; that the barque was unseaworthy, and that (par. 10) the plaintiff had lost part of the value of the wheat, and had been put to great expense about taking care of and improving the same, and having the same surveyed and otherwise; and the plaintiff claimed a declaration that he was entitled to the damage proceeded for and a reference to the registrar and merchants to report the amount thereof.

The defendants' notice of motion asked for particulars (under par. 7) of the number of sacks alleged to be delivered, wetted, damaged, and deteriorated, and of the quantity of wheat delivered, wetted, damaged, and deteriorated, and the loss claimed by the plaintiffs in respect thereof; particulars of the number of sacks alleged to be cut open and their contents started and the further damage to the said cargo by reason thereof and the loss claimed by the plaintiffs in respect of such further damage; also particulars of the expenses referred to in the 10th paragraph of the statement of claim.

James P. Aspinall, in support of the motion, contended that the defendants were entitled to particulars in order to enable them to pay money into court if they should be so advised. Without knowing the items of the plaintiff's claim the defendants might try the cause, and, after incurring great expense, go before the registrars and merchant, and then for the first time discover that they had been contesting items, in respect of which they had no possible defence. By means of the particulars they would be able to judge whether they were liable in respect of any and what part of the plaintiff's claim. They were specially desirous of obtaining particulars of the number of sacks which had been cut open, and had had their contents started and the amount of damage sustained thereby and of the expense the plaintiff had sustained in respect of this portion of the cargo. For this damage the defendants would probably have to admit liability, and without particulars it was impossible for them to plead or to be prepared to pay into court.

E. C. Clarkson, for the plaintiff, *contra*.—It is wholly contrary to the practice of this division to give particulars in these cases. The question of liability is determined first and the items of the plaintiff's claim are only delivered when the reference to the registrar and merchants is ordered. This naturally follows from the practice of the court itself in never assessing damages, and a defendant is always protected against costs by the practice of disallowing them unless a plaintiff recovers a certain proportion of his claim. The only case where a defendant is entitled to particulars is where he admits liability.

Aspinall in reply.—The defendants are prepared to admit liability in respect of the damage sustained by cutting open the sacks, &c., provided the plaintiff shows damage to have been sustained on his particulars; and they must admit it because it could only have been done by the negligence of their crew. As to the rest of the claim there is a good defence.

Sir R. PHILLIMORE considered that the defendants were entitled to be put into a position to admit liability and pay into court, and ordered the plaintiff to deliver to the defendants particulars in writing of the number of sacks alleged to have been cut open and their contents started, and of the amount of damage occasioned thereby and claimed by the plaintiff.

Solicitors for the plaintiff, *Hollams, Son*, and *Coward*.

Solicitors for the defendants, *Stibbard* and *Cronshey*.

Jan. 25 *and* 26, 1876.

(Before the Right Hon. Sir R. PHILLIMORE).

THE N. P. NEILSEN.

Collision — Damage — Particulars — Total loss — Practice.

Where a ship was totally lost in a collision, the court, contrary to the practice of the High Court of Admiralty, made an order, in an action by the shipowners against the vessel doing the damage, for particulars of the plaintiff's claim to be delivered to the defendants.

THIS was a motion on appeal from an order of the registrar refusing an application made on summons on behalf of the defendants for particulars of the plaintiff's claim. The action was instituted on behalf of the owner of the schooner *Burfield Brothers* against the *N. P. Neilsen* to recover damages for a collision. In the plaintiff's statement of claim it was alleged that the *Burfield Brothers*, in consequence of the collision, sustained so much damage that she sank almost immediately and was lost together with her cargo and everything on board of her.

R. E. Webster, for the defendants in support of the motion.—In the other divisions of the court this order would be made as a matter of course, so as to enable the defendant to pay into court, and such an order has been made here in the case of *The Wetterhorn*, *ante*, p. 168

E. C. Clarkson, for the plaintiff, *contra*.—In the *Wetterhorn* special cause was shown for particulars because there were two heads of claim, and the defendants were prepared to admit liability and pay into court under one of the heads. The question here is whether the practice of the High Court of Admiralty or of other courts is to be followed? Hitherto liability and amount have been kept apart in this court. [Sir R. PHILLIMORE. Actions have always been instituted at once and before any repairs have been executed to damaged vessels and before expenses ascertained, and if this application were granted generally causes would

be delayed and witnesses would disperse.] The defendants are attempting to tie the plaintiffs down as to the amount of their claim, but this is sufficiently provided for by the rule which disentitles the plaintiffs to their costs if they claim too much.

R. E. Webster in reply.—In this case the plaintiff's ship was totally lost; if she had been only damaged it might be said that particulars need not have been given because there had not been time to ascertain the extent of the damage till repairs were completed. But where a ship is lost her value must be within the knowledge of her owners as well at the commencement of the action as when the reference takes place.

Cur. adv. vult.

Jan. 26.—Sir R. PHILLIMORE.—This action is brought to recover damages for the total loss of an English schooner which has gone to the bottom with everything on board of her. Without interfering with the usual practice in causes of damage where a vessel is partially damaged only, I think I ought to make the order as prayed, subject to the power being reserved to the plaintiff to amend their values if necessary.

Solicitor for the plaintiff, *Thomas Cooper.*
Solicitors for the defendant, *Plews* and *Irvine.*

March 21 *and April* 4, 1876.

(Before the Right Hon. Sir R. PHILLIMORE).

THE CATTARINA CHIAZZARO.

Collision — Lis alibi pendens — Irish Admiralty Court—Stay of proceedings—Practice.

Where a plaintiff in a cause of damage has commenced two actions; one, first in order of date, in the High Court of Admiralty of Ireland, and a second in the High Court of Justice in England, he would not be allowed to proceed with the latter until he has abandoned proceedings in the former. It is not sufficient that he is desirous of abandoning proceedings in the former, and that he is not allowed to do so by the Irish court; such refusal should be corrected by appeal.

THIS was an action of damage instituted on behalf of the owner of the British brigantine *Harriett Williams* against the Italian barque *Cattarina Chiazzaro* to recover damages for a collision between the two vessels, and the case now came before the court upon motion by the owner of the *Cattarina Chiazzaro* to dismiss the action with costs and condemn the plaintiff in costs.

The collision occurred on the 9th Dec, 1875, close to the harbour of Queenstown, in Ireland, and the owner of the *Harriett Williams* on Dec. 20 instituted a suit *in rem* in the High Court of Admiralty of Ireland in the sum of 900*l.* against the *Cattarina Chiazzaro.* The latter vessel was arrested in this action by warrant under the seal of the High Court of Admiralty of Ireland on 21st Dec. 1876; but an appearance was subsequently entered for her owner, and she was released on 24th Dec. on bail being given on their behalf. On Dec. 23 a cross cause was commenced by the owners of the *Cattarina Chiazzaro* against the *Harriett Williams* in the High Court of Admiralty of Ireland, and the owners of the latter vessel appeared in that suit and gave bail. On Jan. 26 the owner of the *Harriett Williams* commenced this admiralty action *in rem* in the sum of 1000*l.* against the *Cattarina Chiazzaro* in the High Court of Justice in England, and claimed damages for a collision on 9th Dec., being the same collision in respect of which they had proceeded against the *Cattarina Chiazzaro* in the Irish Admiralty Court. The *Cattarina Chiazzaro* was arrested in this action on 27th Jan. 1876 by the Marshal of the Admiralty Division. An appearance under protest was entered by her owners. The above facts appeared from an affidavit of the defendants' solicitor filed in support of the motion, which continued (so far as material) as follows:

7. The aforesaid action and cross-action are still outstanding and pending in the said High Court of Admiralty of Ireland, and the owners of the *Cattarina Chiazzaro* are desirous that the proceedings therein should be taken to judgment and conclusion in the said High Court of Admiralty of Ireland.

8. The High Court of Admiralty of Ireland is a court of competent jurisdiction to hear and determine the said action and cross-action.

10. The owners of the *Cattarina Chiazzaro* are advised that in actions *in rem* brought between the same parties and for the same cause of action in two different courts having co-ordinate jurisdiction, that the court which has possession of the case when the second action is commenced, and has powers adequate to the administration of justice therein, is entitled to retain jurisdiction in the action first commenced.

11. The High Court of Admiralty of Ireland has co-ordinate jurisdiction with the Admiralty Division of the High Court of Justice.

The owner of the *Harriett Williams* brought in an affidavit alleging that he had applied to the High Court of Admiralty of Ireland to dismiss the principal cause of damage instituted there against the *Cattarina Chiazzaro* but that the application had been refused; that the officials in the Registry of the Irish Admiralty Court had refused to file a declaration of the non-prosecution of the principal cause, and of the consent of the owner of the *Harriett Williams* to the dismissal of the bail given therein; that the owner of the *Harriett Williams* was desirous that the action commenced in the Admiralty Division should be heard out: that all possible means had been taken on his part to abandon and put an end to the action commenced by him in the Irish Admiralty Court, and that he was still willing that the same should be dismissed, and would pay the costs incurred therein.

R. E. Webster for the defendant under protest in support of the motion—I ask the court to dismiss the action and to stay proceedings. The point has already been decided.

The Lanarkshire, 1 Spinks, A. & E., 189;
The Mali Ivo, L. Rep. 2 Adm. & Ecc. 356; 20 L. T. Rep. N. S. 681; 3 Mar. Law Ca. O. S. 244;
Walsh v. *The Bishop of Lincoln*, L. Rep. 4 Adm. & Ecc. 242.

E. C. Clarkson, for the plaintiff.—It must be admitted that a plaintiff cannot keep up two actions at the same time, but where he is willing to abandon one, and pay all costs occasioned thereby, I submit that the court will not stay his proceeding in the action in which he elects to proceed. The plaintiffs have a right to choose their forum, and it is not because an action has been commenced elsewhere, that they can be debarred from the right of proceeding in this court even after verdict.

The Velocity, L. Rep. 3 P. C. 44.
The Orient, L. Rep. 3 P. C. 165.
R. E. Webster in reply.

Cur. adv. vult.

April 4, 1876.—Sir R. PHILLIMORE.—In this case an action has been entered on behalf of the owner of a vessel called the *Harriett Williams*. The facts of the case, which it is necessary to state, appear to be these. The *Cattarina Chiazzaro* is an Italian barque, and the owners reside at Genoa. The owner of the brigantine, *Harriett Williams*, resides in the city of Cork, in Ireland. On the 19th Dec. of last year, the two vessels came into collision near Roche's Point, near to the harbour of Cork, in Ireland; and the owner of the *Harriett Williams* instituted a suit in the High Court of Admiralty of Ireland against the *Cattarina Chiazzaro*, and the action was brought for 900*l*. A warrant under the seal of the court issued, and upon Dec. 21 the *Cattarina Chiazzaro* was arrested. An appearance was duly entered for her, and on Dec. 24 a bail bond was entered into on behalf of the owners in the sum of 900*l*.; and on Dec. 31 the vessel was released by the High Court of Admiralty in Ireland, and proceeded to her final port of discharge, Liverpool. On Dec. 23 a cross-action was entered into the High Court of Ireland on behalf of the *Cattarina Chiazzaro* against the *Harriett Williams* for the damages occasioned by the collision, and I think it was in the month of Feb. that the owner of the *Harriett Williams*, the first plaintiff in the High Court of Admiralty in Ireland, gave notice that no further proceedings be taken in the suit against the vessel, and that the plaintiff would be at the costs which at that time had been fixed. The court in Ireland had already stated that it was not competent to the plaintiff to abandon the action until he had first released the vessel from the English jurisdiction. Now, the suit in England was instituted on Jan. 26, and on March 14 an appearance, under protest, was entered on behalf of the owners of the *Cattarina Chiazzaro*, and the petition then produced was handed in.

Now, the objection and protest is to the effect that there is a *lis alibi pendens* between these two vessels in the court in Ireland; and it appears that an application has been made to the Judge of the High Court of Admiralty in Ireland to dismiss the suit on behalf of the original suitor, the owner of the *Harriett Williams*, and the court refused to do so. Therefore the state of things is this: that there was a suit instituted in the High Court in Ireland by the same plaintiff who now institutes a suit in this court, there being a cross suit in Ireland; and the judge having refused to dismiss the plaintiff on his application from the suit, it is contended that it is competent to me to meet the matter by dismissing the proceedings instituted in the suit in this court.

I am of opinion that I ought not to allow this suit to be proceeded with at present. I think that it is shown that there is a case pending before the High Court of Admiralty in Ireland between the same parties, for the same object, and arising out of the same cause of action, and that, no doubt, apart from technical considerations, it would be a most inconvenient course of proceeding to allow the same case to be heard at the same time in two different courts.

What I have had to consider is, what the other courts have decided. The law as to *lis alibi pendens* is laid down in *Walsh* v. *The Bishop of Lincoln* (L. Rep. 4 Adm. & Ecc. 242), and it is clear from that decision that a plaintiff bringing two actions in different courts for the same cause, and that if he does not elect he will be restrained from proceeding with the one which is last begun. I think that the plaintiff here has lost his way. I think that he should have applied to the High Court of Admiralty in Ireland to dismiss the suit as he did, and if that was refused, as it was refused, to have appealed from that refusal.

At all events, in the present state of things, I shall order the proceedings in this court to be stayed.

E. C. Clarkson.—We shall appeal, and I shall ask for stay of execution.

R. E. Webster.—It must be under terms.

Sir R. PHILLIMORE.—I shall not allow the vessel to remain under arrest. I order the proceedings to be stayed in this court, and the ship to be released.

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

Solicitor for the defendants, under protest, *Thomas Cooper*.

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS and CYRIL DODD, Esqrs., Barristers-at-Law.

Thursday, Feb. 10, 1876.

MORRIS *v.* LEVISON.

Charter-party—"Say about 1100 *tons"—Construction of charter-party—Words of contract—Words of expectation.*

By a charter-party the defendant agreed to load "a full and complete cargo, say about 1100 *tons." The actual capacity of the chartered vessel was* 1210 *tons, the defendant loaded only* 1080 *tons:*

Held by the court (Brett, Archibald, Lindley, JJ.), that the words "say about 1100 *tons," were words of contract, and not merely words of expectation, and that the defendant did not undertake to load the vessel up to her full capacity, but only to load as fully as could be done by providing a cargo of "about* 1100 *tons."*

Held also by the court, drawing inferences of fact, that if the defendant had provided a cargo of 1133 *tons, he would have performed his contract, and that he was liable to pay damages for* 53 *tons short cargo,* 3 *per cent. being a reasonable excess to require over the* 1100 *tons.*

THE facts in this case were stated for the opinion of the court in the form of a special case. It is not necessary to set out the whole of the facts for the purposes of this report, but so far as the facts were material to the determination of the point upon which the case is reported, they were as follows:

The defendant chartered from the plaintiff a vessel. The charter-party, so far as is material, was as follows, that the ship "should proceed with all possible despatch to Porman, and there load in the customary manner, where ordered by the shipper's agent, a full and complete cargo of iron ore, not exceeding what she could reasonably stow and carry, over and above her ordinary tackle, apparel, provisions, and furniture, say about 1100 tons, and being so loaded should therewith proceed to West Hartlepool and there deliver the same."

The carrying capacity of the ship was 1210 tons. The cargo which the defendant provided was 1080 tons.

The court had power to draw inferences of fact, and the question was whether the defendant, in providing a cargo of 1080 tons had performed his contract, or if not what amount he was legally bound, under the circumstances, to have provided.

Butt, Q.C., (*J. C. Mathew* with him) for the plaintiff, contended that the defendant was bound to load a full and complete cargo, and that the words "say about 1100 tons" did not relieve him from his obligation to do so, that such words were not words of contract, but merely words expressing the opinion or the expectation of the parties, or that even if these words were words of contract, still the obligation was not fulfilled, since the obligation then would be to load a full and complete cargo, so far as it could be done by providing a quantity about 1100 tons, and that the contract meant that if anything like 1100 tons was required to fill the ship, the defendant was to provide it—he was not to hesitate about a few tons more or less. The case of *Gwillim* v. *Daniel* (2 C. M. & R. 61) he contended was an authority to show that words such as these are not treated in law as words of contract. Lord Abinger there said of the words "say from 1000 to 1200 gallons" that they mean merely that in all probability the quantity produced will amount to 1000 to 1200 gallons, and do not amount to a warranty. The most recent case was *McConnell* v. *Murphy* (L. Rep. 5 P. C. 202; 28 L. T. Rep. 713); the agreement there was for a sale of "all of the spars manufactured by McConnel, say about 600 red pine spars," and only 497 spars were tendered, no more being manufactured by McConnell of the agreed dimensions, yet the court held that the agreement had been complied with by the tender of the 497 spars, and that the words "say about 600," were words of expectation and estimate only, and did not amount to an undertaking. He also referred to *Lieming* v. *Snaith* (16 Q.B. 275)

Cohen, Q.C. (*Wood Hill* with him), for the defendant, contended that the words, "say about 1100 tons," were inserted to relieve the defendant from any obligation to load a full cargo, if it could not be done with about 1100 tons, and if the defendant put on board a quantity which was substantially about 1100 tons, he did all that he need do. That about 1100 tons meant something a little more than 1100 tons, or something a little less, and that whether the defendant put something a little more, or something a little less than 1100 tons on board, he fulfilled his contract. That, consequently, the contract was fulfilled by the defendant when he provided 1080 tons. The shipowner, who knew the capacity, or ought to know it, inserted those words in order to let the charterer know beforehand what quantity to provide, and to relieve him from the expense of providing a quantity that might turn out too great, or from the expense of having to obtain a further supply of ore, if what he had at first provided turned out too little. The word "about" was considered and commented on in the case of *Croes* v. *Eglin* (2 B. and Ad. 106), and there it was shown that it gives a very considerable latitude.

BRETT, J.—I have felt some difficulty in deciding the question now before us, but I do not think that any advantage will be gained by taking further time for the consideration of the matter. It is a question which depends upon the proper construction to be given the charter-party. The defendant undertook by the charter-party to load a "full and complete cargo of iron ore, say about 1100 tons." Now, the cargo actually loaded by the defendant upon the chartered vessel amounted only to 1080 tons, whilst the ship required a cargo of 1210 tons in order to be fully and completely laden. It is obvious, then, that the defendant did not load a "full and complete cargo of iron ore," according to the ordinary sense of those words. The plaintiff seeks to recover for the whole difference between what would constitute a full and complete cargo and the cargo actually shipped.

In order to construe this contract the relationship of the parties must be borne in mind. The shipowner undertakes to have the ship ready at the port of loading to receive the cargo by the specified time, he, rather than the charterer, ought to know the capacity of the ship which he lets out to the charterer. The charterer undertakes to have the cargo ready for loading at the specified time and place, and to pay demurrage if, by reason of his default in that respect, the ship is detained beyond the lay days.

Now, what is the law as laid down by the courts applicable to statements made as to the capacity of ships in charter-parties? for parties must be taken to make, as in fact they do make, their contracts with reference to the construction which has been put upon similar instruments in courts of justice. The cases of *Thomas* v. *Clarke* (2 Stark. 450) and *Hunter* v. *Fry* (2 B. & Ald. 421) decide that where, in the commencement of a charter-party, a ship is described as of the burden of so many tons, and in the body of the charter-party the charterer agrees to load a full and complete cargo, the description has no effect upon the agreement to load a full and complete cargo, and however much the actual capacity of the ship exceeds the capacity so stated, the charterer is bound to load a full and complete cargo. Instead of a statement similar to the one in the cases mentioned, made at the beginning of the charter-party, we find now that it is usual to insert in the clause itself, by which the charterer agrees to load a full and complete cargo, the words "say about" so many tons. This alteration in the form of charter-parties must be considered by the light of the cases I have mentioned, and so considering it, it is, in my opinion, plain that the words "say about" so many tons are intended to have some effect on the agreement to load a full and complete cargo, and are not mere "words of expectation." It seems to me that we give proper effect to these words if we hold the meaning to be that the shipowner will be content with a cargo of about 1100 tons if the ship will hold more than that quantity, and that if she will only hold less than that quantity, then a full cargo, whatever that may be, must be shipped. If the words are mere words of expectation they may have the effect of deluding charterers, by causing them to bring down for shipment cargoes of about the specified quantity, only to find that they have brought down much too small cargoes, and that they have to incur fresh expenses and bring down further quantities, paying, perhaps, demurrage on the ship the while.

Construing the words, then, as I have suggested, it becomes necessary in this case for us to determine what we will say is the quantity required to fulfil an agreement to provide about 1100 tons. If

the present had been a case in which the jury had to decide upon this point, the proper direction to them would have been that the deviation from 1100 tons must not be a very large one, that they must say what deviation would ordinarily be understood as allowed by the word "about." There can, of course, be no exact rule of law as to this, but as we have to decide it we must do so, and we think that 3 per cent. above the 1100 tons is somewhere about a fair allowance. We, therefore, for the purpose of this particular case, find that the shipowner ought to have had a cargo of 1133 tons loaded, and that he is entitled to damages for the short loading, 1080 tons only having, in fact, been loaded. Then he will not be entitled to quite the full freight on these 53 tons, because it would have taken longer to load the ship if the additional quantity had been loaded, he will be entitled to the freight which he would have received on these 53 tons, had they been duly shipped, minus the cost of earning it.

Archibald, J.—I am of the same opinion, though I have during the course of the argument felt some difficulty in arriving at the true construction of this charter-party. The cases of *Gwillim* v. *Daniell* (2 C. M. & R. 61) and *Lieming* v. *Snaith* (16 Q. B. 275; 20 L. J. 164, Q. B.), which have been cited, were cases in which the contracts upon which the courts had to place a construction were contracts for the sale of goods. In the former of these cases the words "say from 1000 to 1200 gallons" were held to be words merely of expectation, whilst in the latter the words, "say not less than 100 packs," were held to be not mere words of expectation but words of contract. The subject-matter of each contract must be looked to in dealing with phrases of this kind, and the nature of each contract and the form and object of it. Cases relating to sales of goods do not throw much light on the present case. This is a case of a contract for the charter of a ship, and in considering its construction we must not forget the relative positions of the charterer and the shipowner. The charterer cannot be expected to know the capacity of the ship he is about to charter so well as the owner of the ship knows it. The words "say about 1100 tons" seem to me, when considered by the light of the relationship of the parties, and the nature of the contract, to be words of contract. We give, it seems to me, an effect to all the terms used by the parties by holding that the charterer's obligation was that he should load the ship up to her actual capacity, if it could be done by loading a quantity about 1100 tons, but that, if it required a greater quantity, then that the shipowner would be satisfied with about 1100 tons. He was bound, then, to load a full cargo of "about 1100 tons" in the present case. This he has not done. I agree with the rest of the court as to three per cent. being a reasonable percentage to allow, and also as to the damages to be awarded.

Lindley, J.—I am of the same opinion. The words "say about 1100 tons" were meant, I think, to guide the charterer as to the amount of cargo which he was to be prepared with. One construction sought to be given to them was that the words "full and complete cargo" governed them, and they were mere words of expectation, or, in other language, words which had no effect whatever. This cannot be so; it would be a construction giving no meaning to part of the language used. Another construction suggested was that the charterer could not be bound to load more than 1100 tons at the most. This seems to me to be a construction open also to the objection of giving no meaning to part of the language used. It gives no meaning to the words "full and complete cargo." The true construction must be one giving effect, if possible, to all the words used, and this I think the construction which we adopt does—that is, that the charterer is to load a full and complete cargo, provided that such cargo shall not exceed a quantity about 1100 tons. Then as to what cargo does not exceed a quantity "about 1100 tons," I think the suggested 3 per cent. is a fair amount to require.

Solicitors for plaintiff, *Waltons, Bubb,* and *Walton.*

Solicitors for defendant, *Ingledew, Ince,* and *Greening.*

Judicial Committee of the Privy Council.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Reported by J. P. Aspinall, Esq., Barrister-at-Law.

March 17, 18, 23, *and* 24, *and April* 7, 1876.

(Present: The Right Hons. Sir James Colvile, Sir Barnes Peacock, Sir M. Smith, and Sir Robert Collier.)

Moore *v.* Harris.

Bill of lading—Exceptions—Place of destination—Latent and apparent damage—Removal of goods—Canadian law.

By a bill of lading it was agreed that certain goods were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of M., unto the G. Railway Company, and by them to be forwarded to T., and at the aforesaid station delivered to A. . . . . No damage that can be insured against will be paid for, nor will any claim whatever be admitted, unless made before the goods are removed."

The goods arrived in a damaged condition, but the damage was not discovered till they arrived at A.'s warehouse, though there was evidence that it might have been discovered by a careful examination on the wharf at M. or at the station at T. In an action brought by the consignee against the shipowner to recover such damage:

Held, that the "removal" contemplated by the bill of lading was removal from the railway at T., the ultimate destination, not only from the ship at M.; that the exception covered latent as well as apparent damage, and that the plaintiff could not recover.

Held further, that the bill of lading, having been made in England by the master of an English ship, was a contract to be governed and interpreted by English law, and that principles derived from the maritime law of France and the Canadian civil code could not be applied to it.

Judgment of the court below affirmed.

This was an appeal from the Court of Queen's Bench for Lower Canada, affirming a decree of Mackay, J. in favour of the respondent.

This was an action brought by Charles Moore and Berry Moore, of the city of Toronto, merchants, and co-partners, carrying on trade under the name or firm of "Charles Moore and Co.," against David Harris, of the city of Montreal,

master of a certain screw steamship called the *Medway*, then lying in the port of Montreal to recover the sum of 9553 dollars and 5 cents. as the value of 306 packages of tea, shipped at London on board the said ship *Medway*, of which the respondent was then master. On the 12th April 1870, a writ of attachment on the said ship *Medway* was issued in the said superior court for the district of Lower Canada on the 6th July 1870, and annexed to the writ was the declaration, dated the same day. In the declaration the appellants alleged that certain persons named Torry, Paget, and Co., at London, had shipped on board the said ship *Medway*, in good order and condition, certain packages of tea, marked as per margin of bill of lading, to be delivered as per bill of lading, signed by the defendant, at the port of Montreal unto the Grand Trunk Railway Company, to be by the latter forwarded thence by railway to Toronto to the plaintiffs, the consignees of the said packages. That about the beginning of the month of May the *Medway* arrived at Montreal with the 306 packages on board, which were then delivered to the Grand Trunk Railway Company, and by them forthwith conveyed to Toronto and delivered to the plaintiffs about the 15th May. The declaration further alleged that the said packages of tea on the voyage between London and Montreal, through the mere carelessness, negligence, and improper conduct of the said defendant and his mariners in scattering about chloride of lime and other substances, became so impregnated and affected by the smell and taste of chloride of lime as to be utterly valueless, and the plaintiffs claimed from the defendant for damages 9553 dollars 5 cents. as the value of the said packages.

The defendant by his plea denied the allegations in the declaration, and further set forth the exception clause and certain other conditions of the bill of lading, and alleged that the said bill of lading and the exception clause and conditions thereof relieved the defendant from liability.

1. Because no damage was caused to the said packages by any cause not excepted in the bill of lading.

2. Because the defendant delivered the said packages to the Grand Trunk Railway Company at Montreal, and no claim was then or before, or for a long time afterwards, made by the said railway company or by the plaintiffs or the defendant.

3. Because the plaintiffs accepted and received the said packages at Toronto, and for a long time made no claim on the defendant.

4. Because the invoice value of the said tea was equal only to 6132 dollars, and that even supposing the goods were damaged by a cause not excepted in the bill of lading, the defendant could not be held responsible or made liable for such damages to a greater extent than such invoice value.

The plaintiffs by their replication and answer took issue on the facts alleged in the defendants' plea, and the parties proceeded to evidence; and on the 30th Dec. 1872, the Superior Court gave judgment for the defendant and dismissed the case of the plaintiffs. The judgment of the court was delivered by Mackay, J., before whom the case was, as follows:

The court having heard the parties by their counsel, as well upon the motion by defendant to reject evidence in rebuttal of plaintiff's, and to which said motion due regard has been had as on the merits of this cause, having examined the proceedings, proofs of record, and evidence adduced, and having maturely deliberated.

Considering that plaintiffs have failed to establish right to a judgment against defendant in the present cause or action.

Considering that some of the material allegations of their declaration are unproved and some of them disproved:

Considering that the conduct of consignees of goods carried by common carriers ought to be frank and loyal towards the carriers in all cases in which it is claimed against them that goods carried have been lost or damaged during the carriage:

Considering that the defendant was bound to deliver all the teas he got to carry for plaintiffs in the condition in which he got them, and if they be damaged must pay damages according to their value, and that plaintiffs were bound to receive said teas if not totally unmerchantable and good for damages (proper indemnity), and if meaning to take the position that the teas were totally unmerchantable ought to have offered to give them up to defendant for his own account, and to have notified him to that effect, and thereafter charge him as in case of total loss:

Considering that plaintiffs by their declaration charge defendant as for total loss of the teas referred to, which are said to be lost and "utterly worthless," that the plaintiffs nevertheless received the teas which have not even yet been fairly enough examined to warrant plaintiffs charging defendants as they do:

Considering that plaintiffs have never abandoned said teas to defendant, nor notified him to that effect, but have actually refused to allow him (by his agents and servants in that behalf) to take samples of them as he wished, the plaintiffs so retaining (even after the institution of the present action) a possession of said teas adversely to defendant.

Considering it plain that the said teas, instead of being "utterly worthless" have a material value, and would sell for a large sum of money, probably over six thousand dollars.

Considering plaintiffs' treatment of defendant arbitrary, and that their present suit or action cannot be maintained, doth dismiss said plaintiffs' action, and doth declare the attachment in this cause dissolved, the whole with costs.

The plaintiffs appealed from the judgment to the Court of Queen's Bench for Lower Canada, and on the 22nd Sept. 1874, that court consisting of Mr. Chief Justice Dorion, Mr. Justice Monk, Mr. Justice Taschereau, Mr. Justice Ramsay, and Mr. Justice Sauborn, confirmed the decision of the court below, holding that the appellants had failed to establish by proof the allegations of their declaration, and particularly the quality of the tea when shipped, or that the said tea was damaged while on board the *Medway*, and, further, that the appellants did not use due diligence in notifying the defendant of the alleged damage to the said tea. They, therefore, confirmed the said judgment, with costs, and ordered remission of record to the court below. From this decision Mr. Justice Monk dissented.

From this judgment the consignees appealed.

The facts and arguments appear fully in their Lordships' judgment.

Cohn, Q.C. and *R. Vaughan Williams* appeared for the appellants.

Watkin Williams, Q.C. and *Lumley Smith* for the respondent.

April 7.—Sir MONTAGUE SMITH delivered the judgment of the court:

This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, affirming a decree of the Superior Court, which dismissed the plaintiff's action.

The appellants, who are merchants in Toronto, brought the action against the respondent, the owner of the steamship *Medway*, one of a line of steamers between London and Montreal, for the value of the damage alleged to have been done to 306 packages of tea on the voyage from London to Montreal.

By the bill of lading, signed in London by the master's agent on the 12th April 1870, the 306 packages were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of Montreal," . . . . "unto the Grand Trunk Railway Company, and by them to be forwarded thence per railway to the station nearest to Toronto, and at the aforesaid station delivered to Messrs. Charles Moore and Co., or to their assigns." The exception contains a long list of special risks, besides general perils of the sea, whether arising from negligence or otherwise. The instrument also contains the following condition, upon the last clause of which a material question arises:—

"No damage that can be insured against will be paid for, *nor will any claim whatever be admitted unless made before the goods are removed.*"

The case of the plaintiffs as stated in their declaration, was that during the voyage the tea "had become impregnated and affected with the odour and taste of chloride of lime and other injurious substances," and that the damage so occasioned was not within any of the exceptions of the bill of lading. The defence, stating it generally, was first that the tea was not damaged on board the ship; and if it was, that in one way of accounting for it, the injury was within the excepted risks; and secondly, that the claim was barred by the delay which occurred in making it.

The evidence for the plaintiffs was to the effect that, during the voyage, scarlet fever broke out among the steerage passengers, and, under the advice of the surgeon, chloride of lime and carbolic acid were employed as disinfectants. That the chloride was thrown in large quantities about the fore cabin and other parts of the ship occupied by the passengers, and carbolic acid sometimes used in the same places, appears to have been satisfactorily proved. The plaintiffs' packages—how many of them did not appear—and packages of tea belonging to other consignees were stowed in the hold under this cabin, and the passengers' trunks were in a place near them. The passengers, it is said, suffered greatly during the voyage from the smell of the disinfectants, and when their trunks were opened on shore the clothes contained in them were found to be strongly impregnated with the same odour. The ship arrived at Montreal on the 2nd or 3rd May, having sailed from London on the 14th April.

There were, in all, 4000 or 5000 packages of tea on board dispersed in various parts of the ship. The plaintiffs' were landed with the others, and all were placed in shipping sheds, where they were sorted, and then taken to the freight sheds of the Grand Trunk Railway Company. From thence they were carried by railway to Toronto, and deposited in the railway company's bonded warehouses there. After lying a day or two in these warehouses the packages were carried in the railway company's wagons to the plaintiffs' own warehouse.

The unloading of the ship occupied several days, and the plaintiffs' packages were forwarded in three lots. These lots were removed from the shipping sheds to the railway freight sheds in Montreal on the 6th, 9th, and 12th May, and were respectively delivered at the plaintiffs' warehouse in Toronto on the 13th, 16th, and 17th May.

Much evidence was given as to to the storing and transport of the packages after they left the ship, to exclude the supposition that they were damaged in their transit from the ship to the plaintiffs' warehouse.

It appears that upon the arrival of some of the packages at the plaintiffs' warehouse, their shipping clerk and foreman (Macfarlane) perceived a peculiar smell in them, and called the attention of the carmen to it.

On the 18th May the plaintiffs called in four persons, viz., two grocers, a merchant, and a tea broker to examine the tea, and obtained from them the following report, which was sustained by their evidence given in the cause: "We find the entire lot damaged and unmerchantable. The damage appears to have been caused by chloride of lime, or some other chemical. We find the packages impregnated with the odour, as also the contents."

On the 27th May another survey of the tea was held for the purpose of obtaining a return of duty, and the surveyors then called in reported damage to the extent of 99 per cent.

No notice whatever of the damage or of these surveys was given to the captain or agent of the ship until the 30th May, when the solicitors of the plaintiffs wrote to Mr. Shaw, the agent of the ship at Montreal, informing him that "the tea upon its arrival was found to have been spoiled and rendered almost worthless by reason of its having been improperly carried," and inviting him to be present at a survey of the tea proposed to be held on the 9th June. To this letter, which was received by Mr. Shaw on the 3rd June, no answer was returned. The survey, however, took place, and a report, in substance the same as that of the 18th May, was made. Other evidence was given by the plaintiffs, but none as to the condition of the tea when shipped.

The defendant called witnesses to rebut the presumption that the damage was done in the ship, and among them stevedores and others who were present when the cargo was discharged, and say that as far as they observed, the floors over the hold were tight, and the packages undamaged; but it is remarkable that none of the officers or crew of the ship were examined.

Mr. Justice Mackay, the Judge of the Superior Court, who tried the cause, does not seem to have grappled with the question, whether the tea was damaged in the ship. The "considerants" of his judgment are principally directed to the conduct of the plaintiffs in delaying to make their claim, and in exaggerating the extent of the damage; and it can only, if at all, be inferred that this question was decided by him in the negative from the general "considerant," that some of the material

allegations of the declaration are unproved, and some of them disproved.

Their Lordships, however, have had the advantage of seeing the reasons given by the Judges of the Court of Queen's Bench, and the majority certainly find the question of fact against the plaintiffs. But the judges, in dismissing the action, rest their decision principally upon other grounds, and their opinion on the question of fact is evidently not a firm one. It is based on what they consider the insufficiency of the evidence, and especially in the absence of proof of the condition of the tea when shipped.

Their Lordships cannot but think that the plaintiffs' evidence, although on some points open to unfavourable comment, does, on the whole, make out a strong *primâ facie* case that the damage was done in the ship, and that the presumption arising from it is greatly strengthened by the conduct of the defendant in declining to call any of the officers or crew of the ship to explain in what manner and under what conditions the chloride of lime and carbolic acid were used, and the state of the ship during the voyage.

They also think that the judges gave undue weight to the consideration that the plaintiffs offered no proof of the condition of the tea when it was shipped. There is not, and, in the nature of things, cannot be, any general rule of law or evidence on the subject. It must depend on the circumstances of each case, how far such proof is necessary, and the case is to be regarded as inconclusively proved without it. Where, for instance, a cargo of grain is found to be heated—a damage which may arise either from its bad condition when shipped, or from some cause existing in the ship—it may be essential to prove the state of the cargo before its shipment. But where, as in this case (supposing, of course, the evidence to be believed), noxious substances, calculated to produce the peculiar damage actually present, are found to have been used in close proximity to the tea, cause and effect are so nearly brought together that a conclusion can be reached without proof of its condition at the time of shipment.

Their Lordships would have thought it right to discuss the evidence with greater minuteness, if overruling the finding of the judges on the question of fact would have lead to the reversal of the judgment under appeal. But their opinion being adverse to the appellants on another part of the case, it is enough to say that they are not so satisfied of the correctness of the conclusions of the judges below on that question as to be able to advise Her Majesty to rest her affirmance of the judgment appealed from upon them.

It is also unnecessary, after what they have just intimated, for them to consider the point raised by Mr. Watkin Williams, that in one way of accounting for the damage, the injury, if done in the ship, would fall within the excepted points mentioned in the bill of lading.

Their Lordships will now proceed to the defence founded on the condition in the bill of lading, that no claim whatever for damage will be admitted unless made before the goods are removed.

It was not, and could not be denied, that this condition, stringent as it is, was binding on the consignees; but its application to the claim in question was disputed. It was contended that, "before the goods are removed" meant removal from the ship at Montreal, and not from the railway station at Toronto; and that the condition applied only to apparent damage, and the injury sustained by the tea was not such damage

There is undoubtedly difficulty, owing to the ambiguous language and inconsistent provisions of the bill of lading, in determining whether the removal referred to was that from the ship or the railway station. The construction most consistent with the rest of the instrument seems to point to the latter place. It was at the railway station that in express terms the goods were to be delivered to the plaintiffs, "freight being payable by the consignees as per margin;" this freight being, as it was admitted, a through freight from London to Toronto. By another clause it is provided that "goods must be taken away within twenty-four hours after arrival at the railway station to which they are destined." Again, freight is made due if payable by consignees, "on arrival at the place of destination." On the other hand it was pointed out that it is provided that the goods are to be delivered from the ship's deck, where the ship's responsibility shall cease, and this delivery is to be to the railway company; but, although the liability of the ship for the subsequent damage then ceases, it would be the duty of the ship to contract with the railway company to carry on the goods to Toronto, and, as already observed, the railway station is spoken of as the place of destination, and it is there the goods are to be delivered to the plaintiffs.

The clause: "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored at the expense of the consignee, and at his risk"—is no doubt opposed to the above construction, but this clause is inconsistent with the engagement of the shipowner to send on by railway at a through freight to Toronto. It is evidently one of the printed clauses, and cannot control the specific undertaking to forward the goods to Toronto.

Mr. Cohen, in insisting that the condition referred to the removal from the ship, desired to assist his main contention that the condition should be confined to claims for apparent damage, since there being, as he said, little opportunity for examination on a delivery from the ship's side, it would be unreasonable to suppose the parties intended it to apply to claims other than for such damage. Supposing, however, removal from the ship was meant, that construction would not, in their Lordship's view, materially assist his contention; for in that case the railway company would be the agents of the plaintiffs to receive the goods from the ship, and if the plaintiffs, who had come under this stringent condition, were not content to leave the examination of the packages to the officers of the company, they should have taken care to employ a competent agent for that purpose. There were shipping sheds on the wharf alongside the ship in which the packages on being landed were placed, and where the goods remained in charge of the agents of the ship, who sorted and afterwards delivered them to the railway company's servants. There is no reason for supposing that opportunity would not have been

afforded in these sheds for inspecting and examining the packages.

But the principal contention on behalf of the plaintiffs was that, whichsoever was the place of removal referred to, the condition should be confined to apparent damage. Now, its language is plain, and without any ambiguity. The first branch of it, "no damage that can be insured against will be paid for," although limited to insurable damage, clearly applies to such damage, whether apparent or latent. The words of the last branch are unlimited and universal, "any claim whatever." It was not, indeed, denied that these words would, in their natural sense, include all damage, but it was said they should be construed as the usual acknowledgment found in bills of lading, "shipped in good condition," has been, and confined to external and patent damage. It is to be observed, however, that, although the general understanding may have been so to limit the words of this acknowledgment, it is not an uncommon practice to qualify them by such expressions as "weight, value, and contents unknown."

But in truth the supposed analogy does not exist. This is a condition for the shipowners' benefit, and it may well be, that stale claims for latent damage were those against which he most desired to guard. Tea is an article peculiarly liable to such damage. It may be injured not only by contact with, but by the vapours or odours arising from, other substances, as in this case from chloride of lime. In the long voyage from China, even if sound when shipped, and in the removal and storage of it in England, it may have been subjected to noxious influences, which would spoil or deteriorate its condition without any external appearance of damage. Its susceptibility to similar injury would, of course, also exist after it was taken from the ship, and stored or otherwise dealt with by the merchant. A shipowner may choose to say, I will not be liable for any damage to an article of this kind, unless a claim is made so that it may be looked into and checked by my agents before the goods are removed from their control. And when a condition to this effect is found in a bill of lading, expressed in language which, in its ordinary and natural sense, includes all damage, whether latent or not, can the courts undertake to say it is so unreasonable that the parties could not have meant what they have said? No doubt this condition may bear hardly on consignees, but so also may the very large exceptions to the responsibility of the shipowner inserted in the body of this bill of lading. Certainly, no reasons for narrowing the scope of the condition can be gathered from the general tenor of the instrument, which is manifestly framed throughout with a view to exempt the shipowner (as far as could be foreseen) from liability for damage. It may be that this has been done to an unreasonable extent, but the plaintiffs are merchants and men of business, and cannot be relieved from an improvident contract, if it really be improvident. Possibly, in shipping under bills of lading thus framed, the merchant gets a corresponding advantage in a lower rate of freight.

None of the cases cited at the bar bear a close analogy to the present. The decisions relating to conditions common in the sales of horses, providing that the liability on the warranty shall cease at a certain date, were referred to, in which it has been held that latent defects are within them: (see *Smart* v. *Hyde*, 8 M. & W. 723; *Chapman* v. *Gwyther*, 14 L. T. Rep. N. S. 477; L. Rep. 1 Q. B. 463.)

Reference was also made to a well-known class of decisions on policies of fire insurance, in which conditions, requiring claims to be sent in within specified periods, having been strictly construed. In a recent appeal before this tribunal from the Court of Queen's Bench in Canada (*Whyte* v. *The Western Assurance Company*, not reported) (*a*), in which a question arose, whether the period of thirty days for sending in proofs of the claim was a material part of the condition, Lord Justice Mellish, in delivering the opinion of the committee, observed: "It was said that, although it was a condition precedent that the proofs should be sent in, yet the period of thirty days was not material; but if that were so, then there would be no time at all appointed within which the proofs were to to be sent in, and the assured might wait one or more years before he sent in his proof, and still be entitled to recover, which would appear to be entirely contrary to the true meaning of the condition." Exactly the same consequences, if the plaintiff's construction of the condition were to prevail, might happen in this case, and would be equally opposed to its meaning.

But if any limitation of the condition could be implied, it could not reasonably go further than to exclude such damage only as could not on an examination of the packages, conducted with proper care and skill at the place of removal, have been discovered, and their Lordships think it appears upon the evidence that if such an examination had taken place, either at the shipping sheds at Montreal or the railway station at Toronto, the damage complained of might have been discovered. The odour of chloride of lime, even from the packages themselves, was very strong. A peculiar smell was perceived by MacFarlane, the plaintiffs' foreman, as soon as they were delivered, and he not only called the attention of the railway carmen to it, but made a memorandum on some of the receipts that the packages were damaged.

Again, Mr. Mills, a witness, whose tea formed part of the *Medway's* cargo, upon examining his packages on the wharf at Montreal on the day they were landed, discovered that they were damaged by chloride of lime and carbolic acid. He says the smell was quite perceptible.

The surveyors also, who examined the plaintiffs' tea on the 18th May, report that they found "the packages," as well as the contents, impregnated with the odour of chloride of lime. It is true the stevedores employed in unloading the ship say they did not observe any smell about the packages; but they do not appear to have examined or even handled them. Their Lordships cannot doubt that if a competent agent of the plaintiffs, like MacFarlane,

(*a*) This was an action on a policy of fire insurance. The appeal was heard in March 1875, before Sir James Colvile, James and Mellish, L.JJ., and Sir M. Smith, and dismissed with costs, on the ground that it was a condition precedent in the policy that proofs of the loss sustained should be sent in within thirty days, and this condition had not been complied with by the appellant, and there was no waiver by the respondents, as contended.

had been ready to receive the packages, either at the shipping sheds or the railway station, the smell would have been at once detected by him, and, having detected it, he might, without difficulty, have further examined the tea by taking and testing samples from the packages in the simple and usual manner described by the surveyors. The damage would then have been fully disclosed, and a claim in respect of it might have been made before the packages were removed.

The opinion of their Lordships, whilst it sustains the second "considerant" of the judgment under appeal, rests entirely on the express condition in the bill of lading. Some of the learned judges below gave the same effect to it; but all of them found their decision, in part at least, upon the maritime law of France, and Article 1680 of the Canadian Civil Code, applying the principles derived from these sources to what, upon the evidence, they deem to be unreasonable and unfair delay on the part of the plaintiffs. It is often useful, especially in mercantile cases, to refer for illustration to the laws and usages of countries other than that whose law governs the particular case. But the judges seem to have gone further, and to have thought that a substantive defence arising from the delay might be founded upon their own law. Their Lordships, therefore, think it right to observe that, in their opinion, the bill of lading, having been made in England by the master of an English ship, is a contract to be governed and interpreted by English law, and that, whilst the presumptions arising from the conduct of the plaintiffs may properly be regarded in determining the question whether the damage was in fact done, as they assert, in the ship, neither their conduct, nor the delay in making the claim, would constitute, by English law, an answer to the action, apart from the express condition in the bill of lading: (See *Peninsular and Oriental Company* v. *Shand*, 2 Mar. Law Cas. O.S. 244; 3 Moo. P. C., N. S., 272; 12 L. T. Rep. N. S. 809; *Lloyd* v. *Guibert*, 2 Mar. Law Cas. O. S. 26, 283; 4 B. & S. 100; 13 L. T. Rep. N. S. 602).

In the result their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellants, *Ingle, Cooper*, and *Co.*

Solicitors for the respondent, *Parker* and *Clarke*.

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

July 2, 1875; *Feb.* 25 and *March* 30, 1876.

(Before Lords CHELMSFORD, HATHERLEY, PENZANCE, O'HAGAN, and SELBORNE).

ALLISON v. THE BRISTOL MARINE INSURANCE COMPANY.

ON APPEAL FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Marine Insurance—Policy on freight—Freight payable in advance—Total loss.

When by the terms of a charter-party a part of the freight is made payable and is paid in advance, the charterer has a right to deduct the whole amount so paid by him from any freight which may actually be earned, in case of a loss of part of the cargo, and not only a proportionate part of it.

The appellant, a shipowner, chartered his ship for a voyage from Greenock to Bombay. The charter-party provided that freight was to be paid on unloading, and right delivery of the cargo at the rate of 42s. per ton on the quantity delivered, "such freight to be paid one half in cash on signing bills of lading, the remainder on right delivery of the cargo." Half of the estimated amount of freight was paid on shipment, and the appellant insured the unpaid freight with the respondents. The ship was lost, but half the cargo was saved, and delivered without any additional payment by the charterer. The appellant then claimed as for a total loss of the unpaid half of the freight.

Held (*reversing the judgment of the court below*) *that on the proper construction of the charter-party and policies he was entitled to recover as for a total loss of half the freight.*

Dictum of Lord Kingsdown in Kirchner *v.* Venus (12 *Moo. P. C.* 361), *explained.*(a)

THE appellant in this case was the owner of the ship *Merchant Prince*, and he chartered her to one De Mattos for a voyage from Greenock to Bombay, with a cargo of coals, freight to be paid at the rate of 42s. a ton on the quantity delivered. The freight was to be paid one half in cash on signing bills of lading, and one half on delivery of the cargo at Bombay. A cargo of 2178 tons of coals was loaded, and bills of lading signed, and 2286*l.* was paid on account of freight. The appellant insured the freight under the charter-party with the respondents. The ship was lost within a short distance of Bombay, but about half the cargo was saved, and delivered to the consignees of the charter free of freight.

The appellant then brought this action on the policy seeking to recover as for a total loss of the unpaid half of the freight, but the respondents contended that he was only entitled to recover half of the unpaid freight, and they paid that amount into court.

(a) This decision firmly establishes the doctrine of English law that freight paid in advance cannot be recovered back by the consignee on the failure of the shipowner to perform his contract of carriage. Doubt has sometimes been thrown upon this doctrine, but after the present decision it will be impossible for our courts to hold otherwise. This, of course, applies only to those cases in which the advance by the charterer is in the nature of freight, and is not a mere loan. The decision also puts an end to the argument often raised that the word "freight" may bear different meanings in the same charter-party. It has long been a favourite contention that where an advance is made by the charterer to the shipowner before the sailing of the ship, such advance is not freight properly so called, nor a payment made in consideration of the carriage of the goods, but is a payment made in consideration of the taking of the goods on board. This contention their Lordships have refused to adopt, pointing out that there can be no reason for placing different meanings upon the same word in the same mercantile instrument, and that the time of payment cannot really affect the nature of the payment made. Hence an advance of freight must be considered as "freight" in the ordinary sense of that word, except in so far as it cannot be recovered back. Nor, unless there be an express stipulation to that effect, can an advance be treated as other than a part of the whole sum to be ultimately paid as freight, and consequently to be deducted from that whole sum, whatever it may be. An insurer or shipowner is not entitled to divide an advance into so many parts, and treat each part as a separate advance on each proportionate part of the cargo. This decision finally settles one or two points of considerable importance in mercantile law.—ED.

The case was tried before Brett, J. and a special jury in December 1872, when a verdict was found for the plaintiff, leave being reserved to the defendants to move to set it aside, and to enter a verdict.

A rule was accordingly obtained, but it was discharged by the court of Common Pleas (Bovill, C.J., Brett and Grove, JJ.) as reported *ante*, vol. 2, p. 54.

The case was then taken on appeal to the Exchequer Chamber, where the judgment of the Court of Common Pleas was reversed by Cockburn, C.J., Mellor, J. and Amphlett, B., Cleasby and Pollock, BB., dissenting (*ante*, vol. 2, p. 312).

This appeal was then brought to the House of Lords, 2nd July 1875. The judges were summoned, and Kelly, C.B., Mellor, Brett, and Grove, JJ., and Pollock B. attended.

Watkin Williams, Q.C. and *McLeod* (*Cohen*, Q.C. with them) appeared for the appellant.

C. Russell, Q.C. *Benjamin*, Q.C., and *Fullarton*, for the respondents.

At the conclusion of the arguments the following question of law was left by their Lordships to the learned judges, "Whether upon the circumstances of the case, there was a total or only a partial loss of the subject matter of insurance?"

Feb. 25*th*, 1876.—The learned judges, having taken time to consider, delivered their opinions as follows:—

Kelly, C.B.—My Lords, I venture to think that some topics have been introduced into the discussions which have taken place in this cause which are either immaterial altogether or irrelevant. The substance of the whole case is this: The plaintiff having granted a charter-party of his ship the *Merchant Prince*, to carry a cargo of coals from Greenock to Bombay, the freight upon which was estimated at some 4000*l.* and upwards, received under a provision of the charter-party 2000*l.* and upwards in advance of the freight; and he insured by policies, before and after the date of the charter-party and advance, "freight payable abroad" valued at 2005*l.* He had thus secured to himself one-half the freight by the payment in advance, and he secured himself by thus insuring the other half by the policies in question. The ship was lost, but one-half of the cargo arrived at Bombay, and was landed in safety. The freight on this was met in the strict terms of the charter-party by the advance made at its execution; and the other half freight, the cargo not having reached Bombay, was lost. And the plaintiff now claims the loss as a total loss under the policies. It was only this unpaid half that he insured, and this he lost, and this I am of opinion is a total loss, and that the plaintiff is entitled to your Lordship's judgment.

Brett, J.—In this case the action was brought by the plaintiff, a shipowner, on two policies of insurance, to recover an alleged total loss of freight. The first policy described the subject matter insured as "freight valued at 2000*l.*"; the second described it as "freight payable abroad valued at 2000*l.*" The plaintiff claimed for the total loss of freight, which he alleged would, if there had been no loss, have been payable to him under a charter-party made between him as shipowner, and one De Mattos as charterer. By the charter-party, dated March 7th 1867, the ship was to load at Greenock a cargo of coals, and proceed forthwith to Bombay, and there deliver the same." "The freight to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton on the quantity delivered," &c., and "such freight" is to be paid, say, one-half in cash on signing bills of lading, less four months interest, &c., 5 per cent. for insurance, and 2½ per cent. on the gross amount of freight in lieu of consignment at Bombay, and "the remainder" on delivery of the cargo agreeably to bills of lading, less cost of coal short delivered, in cash, &c. The vessel to be addressed to the freighter's agent abroad, free of commission, owners to have an absolute lien on the cargo for freight, &c. Under this charter-party the charterer loaded about 2000 tons of coal on board the ship, and paid the plaintiff about 2000*l.* The bills of lading were dated April 15th, 1867. A receipt was given by the plaintiff on the same date endorsed on the bills of lading, for the sum received, in the following terms, "being advance of half freight on within shipment, &c." The dates of the policies sued on were April 13th and April 22nd, 1867. There were four policies in all effected by the plaintiff, by which collectively the amount insured was 2000*l.* Upon the case as stated the court had power to draw inferences of fact. Half the cargo was lost, and half was delivered at Bombay.

In the Court of Common Pleas it was argued on behalf of the defendants that they had a right to treat the policies as insurances of the whole freight to be earned by the ship; because the policies were in general terms "on freight," and there was no notice of any other than the whole freight. Upon this it was answered on behalf of the plaintiff, and determined by the court, that, as a matter of law, the policy in general terms must be held to take effect either upon such freight as the assured had at risk on the voyage insured, or as he had at risk, and intended to insure, and as matter of fact, by deduction, that in this case the assured intended to insure the freight which he supposed he had at risk, namely, about 2000*l.*, the amount which he would have to receive at Bombay if the cargo arrived safely, and which he supposed he would lose if the cargo was lost. This decision was founded on the facts in this case, and on the cases of *Irving* v. *Richardson* (2 B. & Ad. 193), and *Stephens* v. *The Australasian Insurance Company* (*ante*, vol. 1, p. 458; L. Rep. 8 C. P. 18; 27 L. T. Rep. N. S. 585). Those cases seem to me to justify a decision that by reason of the general understanding of merchants, which has been sufficiently made known to the courts, it is to be held as matter of law, without further proof, that wherever the subject-matter of a policy is described in it in general terms, it is to be taken to cover the interest which is within its terms, which the assured has at risk, unless the contrary appear to have been the intention of the assured from other parts of the policy, or other proof.

In this case, if the matter be not one of law, it seems to me clear upon the facts that the plaintiff intended to insure not the whole charter-party freight but the part which had not been paid to him when the ship sailed, and which he evidently estimated at 2000*l.* It will be observed that the judgment of the Court of Exchequer Chamber assumes that this was so, and that this point was not pressed before your Lordships. For it was admitted in argument by the counsel for the respondents that the whole question must ultimately depend upon the construction of the charter-party, whether

the shipowner could by virtue of it claim under the circumstances anything from the charterer. "I admit," he said, "that if he could claim nothing, there was a total loss." The question, therefore, is whether, upon the proper construction of the charter-party, the shipowner, could or could not have maintained a claim against the charterer for any amount of freight beyond the sum paid to him when the bills of lading were signed.

The first observation I will venture to make is that this question should be determined upon a consideration of the charter-party alone, that is to say, as if no policy had been effected. And, secondly, that the construction of it, as of any other mercantile document, should not be made to depend on its strict grammatical form, or on the apparent meaning of any one phrase in it taken by itself but on the apparent expressed meaning as to practical results of the whole. It should be construed by considering the terms of it, and the decisions in former cases of terms similar, though perhaps not identical. Upon charter-parties and bills of lading similarly framed, the disputes found in the books to have been raised have been whether the money advanced should be treated as a loan or as an advance of freight; if the first, whether it should be deducted from freight, if freight should be earned, or be paid back wholly or in part to the charterer, if no freight, or not a sufficient amount of freight should be earned by delivery at the port of discharge; if the second whether if in fact paid, it, or any part of it should be paid back; or, if not paid, whether it could be claimed by the shipowner where, in either case, by perils of the sea the cargo should not be delivered at the port of discharge. The first case on the subject is the *Anonymous case* (2 Show. 283): "Advance money paid before, if in part of freight, and named so in the charter-party, although the ship be lost before it came to a delivering port, yet wages are due according to the proportion of the freight paid before; for the freighters cannot have their money." As the terms of the charter-party are not given the case is of little assistance as to the construction of the present charter-party, but it suggests a distinction between charter-parties, namely, that by some the advanced payment is a payment in part of freight, and in others not, and if not the advance must be a loan; and it is an authority that in the reign of Charles II. the acknowledged understanding and rule was that money to be paid in advance of freight by the terms of the contract of carriage could not, if paid, be demanded back in consequence of the loss of the ship and cargo on the voyage. In *Blakey* v. *Dixon* (2 B. & P. 321), the declaration alleged a promise to pay the money due for freight, and a delivery of the bill of lading, and then alleged that "by reason thereof," the defendant was liable to pay the freight. There was no allegation of the arrival of the ship or of the delivery of the goods. Upon a special demurrer, Lord Eldon and others decided for the defendant; but the judgments obviously intimate that if the promise or contract to pay the freight on the delivery of the bill of lading had been set out with sufficient particularity, the claim might have been supported without alleging the arrival of the ship or the delivery of the cargo. Such intimation is authority for the proposition that if by the contract there is to be a prepayment of the freight, or part of it, an action may be maintained for such money before the cargo has arrived, or although it be lost. In *Mashiter* v. *Buller* 1 Camp. 84), the evidence consisted of the bills of lading, some of which stated that the goods were to be delivered at Lisbon, "freight for the said goods to be paid in London," and others "the shippers paying freight for the said goods in London." The ship sailed, but was lost in the Downs; and Lord Ellenborough held that the words in these bills of lading only meant that the freight should be paid in London instead of in Lisbon, and that they by no means dispensed with the performance of the voyage. He added that "if the defendants had paid the freight upon the shipment of the goods, they might have recovered every penny of it back again." The decision, it should be observed, is that by virtue of these bills of lading, expressed as they were, the only stipulation was that the freight should be paid in London instead of at Lisbon; that is to say that it did not alter the time of payment, but only the place. The freight, according to that construction, was not payable until after the ship had arrived at Lisbon, though it was to be paid in London instead of in Lisbon. The case is no authority upon any question of law arising where money to be paid for the carriage of goods in ships is by the contract to be paid before the delivery of the goods. In *Andrew* v. *Moorhouse* (5 Taunt. 435), the shipowners were held to be entitled to recover, after the loss of the ship on the voyage, the whole amount of freight for the whole cargo shipped, because the contract of carriage was found to be a contract to carry the goods to the Cape for 5*l.* per ton, and there to deliver them, "freight being paid," and also that "the 5*l.* was to be paid in London." The court held that if the true construction of the contract was that the freight was to be paid in London on the sailing of the ship, the shipowner was entitled to recover the whole of it, although none of the cargo had been carried to the port of delivery by reason of the whole having been lost at sea. No point was made of each party bearing half the loss; the charterer had to pay the whole of the freight after the loss, because he had agreed that the whole should be prepaid. In *De Silvale* v. *Kendall* (4 M. and S. 37). the action was brought by the charterer to recover money paid in advance. The charter-party was as near as possible in the same form as in the present case. It was, amongst other things, to convey cotton from Maranham to Liverpool, at and after the rate of 2½ annas per lb. weight, "for each and every pound of cotton which should be delivered at the King's Beam at Liverpool, such freight to be paid as follows," viz., as much cash as may be found necessary for the vessel's disbursements at Maranham to be advanced, &c., "free from interest and commission," &c., and the residue of such freight to be paid on the delivery of the cargo in Liverpool. The plaintiff advanced 192*l.* at Maranham for the ship's disbursements. A cargo was loaded, but the ship was captured on the voyage, and never arrived at Liverpool. It was argued that the advance was either a loan or an advance of part of the freight liable to be refunded if in the result no homeward freight should become due. It was held that the advance was a prepayment of freight, and that by the law of England prepaid freight is not to be returned because by accident the cargo is lost. In order to interpret the charter-party all the judges rely

upon the phrases, "such freight to be paid as follows," and "the residue of such freight to be paid," &c., which are the words used in the present charter-party. They also rely upon the stipulation that the advance is to be "free from interest and commission." In *Manfield* v. *Maitland* (4 B. & Ald. 582), the action was on a policy to insure an acceptance of 219*l*. The acceptance had been given by the plaintiff, the assured, in pursuance of a charter-party by which he had chartered a ship to carry deals from Quebec to Bridgwater, and there deliver them, being paid freight for the deals 10*l*. 8*s*. per 100, one-half the freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by bill in London at four months. The captain to be supplied with cash for the ship's use." The ship was lost. It was held that the plaintiff had no insurable interest under the policy, because, on a true construction of this charter-party the advance was not a prepayment of any part of the freight, but only a loan; and being a loan the plaintiff was entitled to deduct it from freight, if freight became payable, and to obtain its repayment if no freight became payable. In that charter-party the whole of the freight was made payable on unloading and right delivery, half of it in cash, and half by a bill to be then given. The stipulation as to the advance was not incorporated into a sentence headed "such freight to be paid," &c. There were no words such as "the residue of such freight to be paid on delivery," &c. In *Saunders* v. *Drew* (3 B. & Ad. 445), the action was brought to recover back money paid in advance. The charter-party was, in part, for the hire of the ship for an intermediate voyage at the rate of 1*l*. per ton per month for every ton of the ship's register tonnage, the charterer to pay four months "of such monthly hire" in advance, and the "balance that may be due at the termination of the period" for which she may be hired, in cash, at the port where she may be discharged. The ship was hired for the intermediate voyage, and the plaintiff paid in advance 1734*l*. for four months time. The ship was lost two months after the hiring. It was held that the plaintiff could not recover any part of the 1734*l*. because it was in terms a prepayment of part of the freight. There was no suggestion made in argument or judgment that the charterer and shipowner should each bear half the loss, and that, therefore, the plaintiff should recover the payment in respect of one of the two lost months. In *Hall* v. *Janson* (4 E & B. 500), a declaration on a policy was held good on general demurrer, because it alleged that the insurance was expressed in the policy to be on freight, and then alleged as a fact outside the policy "that E. S. was interested in the money so insured, as being money advanced to him as owner of the ship, on account of freight, and being subject to the risk of the said voyage." It was held that it was consistent with this allegation that although by the contract of carriage the advance was to be on account of freight, it was stipulated by the same contract that it should be returned if the ship were lost. The case suggests prepaid freight, but accompanied by an express stipulation that it should be repaid if the cargo should not arrive. It is, however, in truth, a case of pleading. In *Hicks* v. *Shield* (7 E. & B. 633; 26 L. J. 205, Q.B.), the charter-party was between the plaintiff as charterer, and the defendants as owners, to carry rice from Rangoon to London, and there deliver the same, on being paid freight as follows: 5*l*. 5*s*. per ton net rice delivered, &c., "cash for ship's disbursement to be advanced" to the extent of 300*l*., free of interest, but "subject to insurance." and 2½ per cent. commission in full of port and pilotage charges, &c. The freight to be paid on unloading and right delivery, &c. The plaintiff advanced 300*l*.; the ship was lost. The question was whether the defendant was bound to repay the whole or any part. It was argued that the advance was a mere loan, but it was held otherwise, because of the indication arising from the stipulation that the advance might be insured. In this case the stipulation as to the insurance was relied on in the absence of such phrases as "such freight to be paid as follows," and "the residue of such freight to be paid on delivery." It is an authority as to the effect of the stipulation as to insurance, and shows that it indicates that the advance is an advance of freight, and is not by way of loan. Again, there was no allusion to the idea of each party bearing half the loss. In *Jackson* v. *Isaacs* (3 H. & N. 405) the declaration was on a charter-party between the plaintiff as owner, and the defendant as charterer, by which the ship was to carry a cargo of salt to Fernando Po, and there deliver the same on being paid freight at 20*s*. per ton on the quantity shipped, "payable by charterer's acceptance at four months on ship clearing at the custom house, Liverpool, subject to insurance." Breach for not giving the acceptance. Plea, that the freight was to be paid in advance "subject to insurance," and that the plaintiff never did insure for the benefit of the defendant, or otherwise, and that the ship and cargo were wholly lost. Demurrer. The plea was held to be bad. This case shows the true meaning of the stipulation that the charterer will advance freight, or part of it, "subject to insurance" or "less insurance." If there were no advance the shipowner would have to insure. If the charterer were to advance without deduction the shipowner would obtain the whole freight without the burden of having to insure, and the charterer would pay the full freight, and besides have to insure. In order to restore the position of both to what it would be if the freight were paid at the end instead of at the beginning of the voyage, the advance is paid less insurance. The shipowner gets the freight at the beginning, less what he would have had to pay for insurance if he were only to get the full freight at the end; the charterer pays the freight at the beginning less the amount which he must, for doing so, have to pay for insurance against the risk cast upon him by the prepayment. This is precisely the explanation of the present charter-party given by Cleasby, B. in the Exchequer Chamber. In *Byrne* v. *Schiller* (L. Rep. 6 Ex. 20; 23 L. T. Rep. N. S. 741; 3 Mar. Law. Cas. O. S. 514) in error (*ante*, vol. 1, p. 511; L. Rep. 6 Ex. 319; 26 L. T. Rep. N. S. 211) the action was on a charter-party between the plaintiff as owner and the defendant as charterer, to recover a sum of 737*l*., alleged to be due for advance freight, although the ship was lost on the voyage. In the Court of Error it was argued that a prepayment of freight is not final, but can be recovered if the goods are lost, and the freight, therefore, never earned. In answer, Cockburn, C.J., said: "We are all agreed that the law is too

firmly settled for us to depart from it even in a court of appeal, that where freight is paid in advance it cannot be recovered." No one suggested that anything less than the whole advance freight was payable, although the whole cargo was lost. It becomes necessary in the next place to consider the true import of the often quoted words of Lord Kingsdown in *Kirchner* v. *Venus* (12 Moo. P. C. 361). In that case there was no dispute that the freight was payable by the shipper in advance. It was agreed that it should be paid by him in advance at Liverpool. The port of discharge was Sydney. The bills of lading were indorsed for value. The shipper did not make the stipulated payment in advance. The captain at Sydney, claiming a lien on the cargo for freight, refused to deliver to the assignee of the bill of lading. The Privy Council held that there was no lien. It was not necessary to say that advance freight was not freight at all, it was only necessary to say that the incident of lien did not attach to freight so to be paid, and I think that is all that is said by Lord Kingsdown. He does not say that the money payable in advance is not freight at all. The decision is that where the agreed time of payment of the freight is not contemporaneous with the time of delivery of the cargo, there is no implied right of lien. The observations of Lord Kingsdown are pointed to that question. The true meaning of them is, that so far as concerns a question of nothing being due until delivery, or a question of lien, it is the same in effect as if the money were to be paid for taking the goods on board, and as if it were not to be paid for carrying them. The case of *Tamvaco* v. *Simpson* (13 L. T. Rep. N. S. 160; 2 Mar. Law Cas. C. S. 249), in the Exchequer Chamber (14 L. T. Rep. N. S. 893; L. Rep. 1 C. P. 363; 2 Mar. Law Cas. O. S. 343), is in accordance with the case in the Privy Council. The case of *Watson* v. *Shankland* (*ante*, vol. 2. p. 115; L. Rep. 2 H. L. Sc. 304; 29 L. T. Rep. N. S. 349) was an appeal from Scotland. There is great doubt whether the English rule as to prepaid freight applies in Scotland. The decision, however, was that, assuming the advance to be a loan, it could not be recovered, If in the present case the advance could be treated as a loan, it might be necessary to consider that case with the utmost attention, but it would, as it seems to me, be impossible to hold that without overruling all the cases on this subject, or the doctrine assumed in them all, which have been decided since the time of Charles II.

I have drawn attention to all the cases in order to show how uniform the view has been as to what construction is to be put upon shipping documents in the form of the present charter-party, and as to the uniform, though perhaps anomalous rule, that the money to be paid in advance of freight must be paid though the goods are before payment lost by perils of the sea, and cannot be recovered if paid before the goods are so lost. Although this course of business may in theory be anomalous, I think its origin and existence are capable of a reasonable explanation. It arose in the case of the long Indian voyages. The length of voyage would keep the shipowner for too long a time out of money, and freight is much more difficult to pledge as security to third persons than goods represented by a bill of lading. Therefore the shipper agreed to make the advance on what he would ultimately have to pay, and for a consideration took the risk, in order to obviate a repayment which disarranges business transactions.

It seems to me that, on a review of all the cases, the true construction of the charter-party in this case is that the 2000*l.* which was to be paid, and was paid, in advance, was a prepayment of the freight payable under the charter-party, and that no part of it could be recovered by the charterer from the shipowner, and that the stipulation as to deduction for insurance did not alter this right. I do not understand that it is denied that the freight to be earned by the shipowner in this case was 2*l.* per ton on the amount of coal delivered at Bombay. Indeed, to hold otherwise would be flatly to contradict the charter-party. But it is suggested, and was held in the Exchequer Chamber, that the payment under such a contract is not in respect of the freight which is eventually earned, but of the freight which would be earned if the whole cargo should arrive and be delivered, so as to be a prepayment of so much per ton on every ton of cargo shipped. Let this be tested on the assumption that no part of the advance can be paid back, which, I submit, is conclusively proved to be a correct assumption by the cases I have cited, and that there is no insurance by either party. Taking the figures of the present case, the charterer must, upon the assumption, pay in effect more than 2*l.* per ton in every case, except where the whole cargo is delivered; and if the shipowner is to pay back a part, then either a part is mere loan, or money which as prepaid freight must be paid back, both of which views are contrary to all the cases. Whereas, on the contrary, if the amount of freight earned is set down according to the quantity of cargo delivered, and so debited to the charterer, and he is credited against it as a whole with the amount paid in advance, every word of the charter-party is satisfied, and nothing is done in conflict with any decided case. It follows that, in my opinion, the shipowner, the plaintiff in this case, could not have claimed anything more from the charterer than the 2000*l.* which had been prepaid; that the only freight which the plaintiff had at risk was the balance of freight, if any, to be received at Bombay if the ship with sufficient cargo arrived there; that the freight which was insured was that balance of freight which was to be received at Bombay if the cargo should arrive safely, and lost if it did not, and that there was a total loss of such insured freight.

I entirely agree with the judgment of Cleasby, B. in the Exchequer Chamber, and with the reasons given by him for it. I cannot agree with those judgments which seem to me to be rested on suggested equities between the charterer and shipowner which never existed, and on suggested equities between different underwriters, which, if they existed, should not be considered in this case.

I answer your Lordships' question by saying that, in my opinion, there was a total loss. In this opinion my brother Pollock agrees.

Grove, J.—I agree with the judgment of the Court of Common Pleas, and that of Cleasby and Pollock, BB., in the Exchequer Chamber. I can add nothing to the reasons given. I answer your Lordships' question by saying that, in my opinion, there was a total loss.

Mellor, J.—My Lords in answer to the ques-

tion propounded by your Lordships, I am of opinion that under the circumstances there was a partial loss only, and not a total loss of the subject matter of insurance. I expressed my opinion to that effect in the judgment which I delivered in the Exchequer Chamber, to which I venture to refer. I forbear to trouble your Lordships with any further observations on the case, especially as I entirely concur with the opinion of my brother Blackburn, expressed in the answer which he is prepared to give to the question propounded by your Lordships.

Blackburn, J.—My Lords, in my opinion there was only a partial loss of the subject matter of insurance. My reasons for this opinion are as follows:

Freight is the reward payable to the carrier for the safe carriage and delivery of goods; it is payable only on the safe carriage and delivery: if the goods are lost on the voyage nothing is payable, and in cases where the freight is made payable at so much per ton of the goods, and part of the goods only are delivered, a proportionate part only of the freight is payable. But a sum of money payable by the shippers of the goods at the port of shipment does not acquire the legal character of freight, because it is described under that name in a charter-party. It is, in effect, money to be paid for taking the goods on board, and undertaking to carry them, and not for carrying them. This, which I have taken with a slight alteration from the judgment of Lord Kingsdown in *Kirchner* v. *Venus* (12 Moore P.C. 361), in my opinion is an accurate statement of the law. A sum of money may be advanced as a loan on the security of the freight to be earned, and in such a case may be recovered though the freight is lost; but I think it has always been held that a stipulation which shows that the merchant is to insure the amount, is almost conclusive to show that it is not a loan on the security of freight to be earned, but an advance of freight (*Hicks* v. *Shield* (7 E. & B. 633), *Trayes* v. *Worms* (19 C. B., N. S., 159; 12 L. T. Rep. N. S. 548; 2 Mar. Law Cas. O. S. 209); and if it is an advance of freight, then by our law it cannot be recovered in whole or in part, though the ship, or the goods, or part of them are lost, and consequently the freight is in whole or part unearned: (*Byrne* v. *Schiller*, *ante*, vol. 1, p .511.) Merchants, according to my experience, attach very great weight to a stipulation as to who is to insure, as showing who is to bear the risk of loss; and I cannot doubt that both the plaintiff and De Mattos, the charterer, perfectly understood that the sum paid on signing the bill of lading under this charter-party was an advance of freight, which was to be at the risk of the owner of the goods, and could not be recovered though the goods were all lost; that it was in effect, to use Lord Kingsdown's language, not freight for carrying the goods, but money paid for taking the goods on board, and undertaking to carry them. It might be insured by the owner of the goods either under the description of "prepaid freight," or as "the increased value of the goods by prepayment of freight," which latter form was adopted in this case. Had the charter-party been expressed "freight to be at 42*s*. per ton, one guinea to be paid on the right and true delivery, and one guinea in advance on signing bills of lading," there could have been no dispute about the matter. The loss of a certain number of tons would have caused the shipowner to lose a proportionate number of guineas, because his freight, *pro tanto*, was not earned; and would also have caused the owner of the goods to lose an equal number of guineas, because he had lost the benefit of the number of guineas he had paid for the undertaking to carry his coals. The loss of each individual ton would have occasioned the same loss to each, and in the event that has happened there would be a loss of 50 per cent. on this policy on the freight, and also a loss of 50 per cent on De Mattos' policy on "the coals, and increased value thereof by prepayment of freight."

The defendants contend, and I think rightly, that on the true construction of the charter-party, the effect is the same as if it had been expressly stated as above, But the plaintiff puts a different construction on it, he contends that it was intended that the advance was to be against whatever freight was ultimately earned, and at the end of the voyage to be deducted from whatever freight was earned, and, consequently, that though it was in one sense the risk of the owner of the goods, as it could not be recovered in any event, yet he was to lose nothing in respect of the prepaid freight, or the enhanced value of the goods, until half or more of the goods were lost: that the loss of the first ton of coals was a loss to the shipowners of two guineas of freight, and no loss at all of the money paid in advance, nor of the increased value of the goods, and that so it continued till half of the coals were lost, and then that the loss of each ton above the half would be no loss to the shipowner at all, but a loss to the owner of the goods of two guineas out of the money paid in advance. That, in short under this charter-party, the loss of the freight was total as soon as half the coals were lost, and the risk to the owner of the goods, as far as regards the prepaid freight or enhanced value of the goods, did not commence till half the coals were lost.

Had the underwriters pleaded and proved that the insured did not disclose this peculiar nature of the charter-party, making the risk double what in ordinary circumstances it would have been, that would have been a good defence. They have not so pleaded, and therefore we must act on the supposition that the charter-party was disclosed, in which case if the underwriters misconstrued it, it was their own fault. But, as already said, I do not think they have misconstrued it; and what is the true construction of the charter-party is really the matter in dispute in this cause. It is very difficult to argue on the construction of such instrument, or to do more than state one's views of what it means. The words are, "freight to be paid on unloading, and right delivery of the cargo at and after the rate of 42*s*., per ton on the quantity delivered," and had it stopped there I think there would be no room for doubt that it meant 42*s*. per ton for each ton delivered, and nothing for those not delivered, so that a partial loss of the goods would be a loss of a proportionate part of the freight. But it goes on, "such freight to be paid, say, one half in cash on signing bills of lading, less certain deductions, including 5 per cent. for insurance. That clearly expresses that 21*s*. less these deductions was to be paid for every ton put on board, without reference to whether it was all delivered or not, "and the remainder on right delivery of the cargo." I think that means the remainder of the 45*s*. per ton on the right delivery

of each ton. Had the broker who drew up the charter-party adopted language similar to that used in *Byrne* v. *Schiller* (*ante*, vol. 1, p. 511), and said, "the amount paid on signing the bill of lading to be deducted from freight on settlement thereof," it would clearly have expressed what the appellants say was the intention. But in the absence of those or any similar words, I think that is not the meaning of the words used. The construction contended for by the appellant seems to me forced and unnatural, and not that which mercantile men would put upon such a contract. I do not like to make assertions as to what mercantile men would say, knowing as I do that other judges would make contrary assertions; and we have very little to assist us in ascertaining what merchants really would think. I see that my brother Cleasby, in his judgment in the Exchequer Chamber, attaches weight to the conduct of the master in delivering up the coals without payment of the 21*s.* per ton, as evidence of the understanding of merchants on the construction of the charter-party; and this was repeated on the arguments at your Lordships' bar. I am not sure that a legitimate argument as to the mercantile understanding can be deduced from the conduct of parties after the dispute has arisen, and in no case do I attach much weight to the conduct of a captain seeking to charge underwriters, whom all captains are too apt to think their legitimate prey; I should myself attach more weight to the conduct of the insurance brokers, who worded both policies as if they believed that the risk as to the freight and as to the enhanced value of the goods was the ordinary risk, subject to a partial loss or the loss of any part of the goods. Had De Mattos and his brokers thought that no part of the prepaid freight, which formed more than half of the value which he insured was to be lost till more than one-half of the goods were lost, so as to render the risk as to this much less than the risk as to the goods themselves, he would, I should think not have shaped his policy so as to lump these two unequal risks together. He would, I think, have severed the two in his policy, and have required that the premium for the smaller risks should be less, instead of insuring as he did, as if his risk as to the enhanced value of the goods was the same as that on the goods themselves.

I have only further to observe that the terms of the charter-party, "42*s.* per ton delivered to be paid one half in cash on signing bills of lading," are exactly equivalent to saying, "21*s.* to be paid on every ton put on board." If no disaster happened the number of tons delivered would be the same as the number of tons put on board, but I do not think it an accurate statement to say that the payment was to be one-half of the estimated freight, which is the phrase used by each of the judges in the Court of Common Pleas, and I cannot but think that a fallacy lurks under this, to my mind, inappropriate expression.

I have only to add that where there has been such a difference of opinion on the question of what is the intention of the parties as expressed in this charter-party, it is impossible to say that the meaning is clear. It will appear different to different minds. I can only say that to me the intention appears to be to express that which the respondents say has been expressed.

And, such being my opinion, I answer your Lordships' question by saying that there was only a partial loss of the subject matter of insurance.

Their Lordships took time to consider, and on

March 30.—Their Lordships gave judgment as follows:

Lord CHELMSFORD.—My Lords, this appeal is from a judgment of the Court of Exchequer Chamber in an action brought by the plaintiff on two policies of insurance to recover a total loss of freight. The Court of Common Pleas unanimously gave judgment in his favour, but the Court of Exchequer Chamber reversed that judgment by a majority of three to two, holding that there was only a partial loss of the subject matter of insurance, and the learned judges who have been summoned to assist your Lordships have differed in opinion; so that in the result there are five judges in favour of the plaintiff, and four in favour of the defendant. In this difference of opinion it is impossible not to feel that the question is one of some difficulty. It appears to me to depend altogether upon the proper construction of the charter-party. [His Lordship read the charter-party, and, after going through the facts of the case, continued:]

In considering the question it is necessary in the first place to determine the character of the payment which was made by the charterer at the time of signing the bills of lading. Was it an advance in the nature of a loan, or was it a prepayment of half the freight, the whole of which was to be earned by the unloading and delivery of the cargo at Bombay? It is unnecessary to consider the case of *Kirchner* v. *Venus* (12 Moo. P. C. 361), which was often referred to in the course of the argument, but which appears to me to have turned entirely upon the question of lien, so that the language used with respect to payments made by the shippers of goods at the port of discharge not acquiring the legal character of freight, must be received with some qualification. But this case is altogether removed from the authority of that case, because here the parties, by their charter-party, have agreed that the payment shall be the advance of half the freight, and that the shipowner shall have an absolute lien for freight. The charter-party contains a provision for the charterer to deduct from the payment of half freight five per cent. for insurance, and Blackburn, J. in his opinion delivered to the House, stated "that it had always been held that a stipulation that the merchant is to insure the amount, is almost conclusive to show that it is not a loan on security of freight to be earned, but an advance of freight." There can be no doubt, therefore that the sum paid by De Mattos was a prepayment of freight, and as such, according to settled authorities, could not be recovered again. That portion of the freight received by the plaintiff was, therefore, never at risk on the voyage insured.

But then the question arises, What was the portion of freight which was covered by this prepayment? On the part of the defendants it was contended that under the words of the charter-party the freight being payable not in a gross sum, but after the rate of 42*s.* per ton of coals on the quantity delivered, the freight must be distributed over the whole cargo at the rate of 42*s.* for each ton, which will be equivalent to the payment of 21*s.* on every ton of the cargo put on board, leaving 21*s.* to be paid for freight on the

entire cargo delivered. If this mode of calculating the freight is adopted, the plaintiff's loss would, of course, be only a partial one. But I am not disposed to take this view of the stipulation as to payment of freight in the charter-party. I think that the freight payable is the freight upon the whole quantity of coals delivered at the rate of 42*s.* per ton, and the part which was prepaid was assumed upon an estimate of half of that quantity. If the parties had intended that the prepayment should be calculated upon the footing of one half of the cargo at so much per ton, nothing would have been easier than to have expressed this in words. The bill of lading was signed for 2178 tons, the half freight was to be paid on signing the bill of lading, and the receipt was indorsed on the bill of lading. If the prepayment was meant to be applied to half the rate of freight over the whole number of tons of coal shipped, the amount could have been easily ascertained, and the intention clearly expressed. The manner in which the half of the freight was agreed upon satisfies me that the sum paid was taken generally as representing one half of the freight of the entire cargo at the rate of 42*s.* per ton. This being my view of the case, it follows that the plaintiff never had more than half the freight as a gross sum at risk on the voyage insured. If all the coals had been delivered he would have had to receive the amount of the whole agreed freight, minus the 2236*l.* already paid. In the event which occurred he had secured himself against the loss of one half of the freight by the prepayment; the only insurable interest in the freight which remained to him was the unpaid half, the whole of which he lost by the perils of the seas, and, therefore, his loss was a total loss.

I think the judgment of the Court of Exchequer Chamber ought to be reversed.

Lord HATHERLEY.—My Lords, I concur entirely in the view which has been taken of the case before us by my noble and learned friend who has preceded me in expressing his opinion upon it.

The two points to be considered are, first, what is the insurance that has been effected by the policy, and the subject matter thereby insured; and we are led in consideration of that point to the further question as to what was the contract between the insurer and the person with whom he bargained, as the charterer of the ship, in order to ascertain what were the perils of the sea against which the assured desired so to protect himself.

Now we must bear in mind in this inquiry, in the first instance, that if there be any question or doubt (I think in truth we shall find there is none) as to what the subject matter of insurance is, then on principle it is to be held in all cases that that in respect of which the insurance is made is that which is capable of being a subject matter of insurance, namely, that which is at risk; and that in regarding the contract of insurance, we must not assume, and we cannot in any way consistently with law assume, that the insured is endeavouring to effect a policy upon that which is at no risk whatever. Next, when we come to look at the contract itself, it being a contract of freight, we have to remember that for a very long time it has been settled in our maritime law that prepaid freight cannot be recovered. I think when we consider these two points we shall be led very easily and safely to the solution of the difficulty which appears to have arisen in the case before us. We have now had the advantage of hearing the opinions of several judges who, both in the court below and also in your Lordship's house, have expressed their opinions upon the matter; and we have had the benefit of hearing the arguments upon which these opinions were founded, as well as the arguments which were adduced at the bar. Therefore it may well be that a subject which has been one of considerable doubt, and has been supposed to be one of difficulty, before arriving at this stage of the argument, may, without presumption on my part, appear to me to be free from difficulty as regards the final conclusions we are bound to arrive at.

In the first place, the contract of insurance is an insurance of freight. The question is, what is that freight that was so insured? To answer that question we look at the charter-party which was entered into between the shipowner and the charterer; and that charter-party we find to be a contract or engagement on the part of the charterer with reference to a cargo of coals to be delivered at Bombay, that he will pay freight "on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton on the quantity delivered," neither more nor less. He is not to pay more freight than at that rate upon whatever is delivered. That is the sum and substance of his agreement. But then as to the mode of paying the freight, instead of waiting until the time of delivery as regards the whole cargo, he engages that he will pay "one half in cash on signing bills of lading, less four months interest." That is the discount on the payment in respect of its being made at once, and before the period of delivery at Bombay. "Less four months interest, and less 5 per cent. for insurance." Now what seems to have grown up to be the practice in shipping transactions of this character is founded very probably upon the determination of the courts of law that prepaid freight cannot be recovered. What seems to have happened is that the parties who are desirous of having the freight prepaid to a certain extent, in order to avoid being kept out of their money during a long voyage, have entered into an arrangement with the charterer to this effect: I shall wish to have my money in hand, to some amount at all events, upon this charter of freight, I therefore stipulate with you that some of this money shall be paid down (in this case one half), but I will give a rebate of interest, which is in effect discounting this prepayment; and I will give a further rebate of insurance, because, inasmuch as you are making this payment, and inasmuch as you cannot recover it in the event of there being a loss of the cargo, the risk becomes yours, not mine. What would ordinarily be the risk of the shipowner with regard to the freight so prepaid is transferred in this way to the charterer, and the shipowner has the money in his pocket; and having it in pocket, and seeing that it cannot be recovered, it is at no risk. Whatever loss happens at sea he retains that money, and therefore, if there be a total loss of the whole cargo, the loss in respect of this prepayment of freight falls upon the person who has so prepaid it. Consequently, a custom seems to have grown up of allowing a sum by way of insurance, in order to compensate the person making this prepayment for the risk he thereby runs, inasmuch as he cannot recover it if there be a total loss of the cargo. That being so, you find this state of things: as to a moiety of this freight the ship-

owner is quite safe; he cannot want to insure it, he has got it. But as to the other moiety, he is not safe as regards the perils of the sea, because if there should be a total loss, and if he should not be able to deliver any part of the goods, then he would get no more freight. He has got one moiety safe in his pocket; the other moiety is that which is at risk, and that he can insure. Therefore, when you look at the contract of insurance in this case, and ask as to which of the moieties of freight the insurance is effected, the answer must be that the shipowner has effected the insurance upon the unpaid moiety, which may be lost entirely to him. He cannot effect an insurance upon that which is at no risk; therefore he must be taken to have done that which only he rightly could do, namely, to have insured against that which is at risk, the other moiety of the freight, which may be lost to him in consequence of the perils of the sea. On the other hand, what is the position of the charterer? It is this: he has agreed to pay 42*s.* per ton only on whatever is delivered to him; he has paid down to the extent of 21*s.* per ton; he can have only 21*s.* per ton more to pay, if the whole of the cargo is delivered to him; but supposing there is no more delivered to him than the 21*s.* per ton would cover, what is then to happen? Why, he is entitled to say, you have delivered to me half the cargo, I was only to pay you 4000*l.* for the 2000 tons of coal, if you delivered the whole quantity; you have delivered to me, instead of 2000 tons, only 1000 tons. I have paid you for 1000 tons already, and I am not to pay more. Otherwise, if you were to say that the charterer is to pay in respect of the half of the cargo saved, that is 1000 tons, he would be paying 3*l.* for every ton of coal delivered. Would he not have a right to say, you have delivered to me 1000 tons; I paid 2*l.* per ton on 1000 tons before the ship started, under the contract I entered into, and now you ask for another 1*l.* in respect of the portion of the coals which has been saved, there being only one-half saved altogether; in that way you are making me pay 3*l.* per ton for the coals delivered as to which I entered into an agreement to pay you 2*l.* per ton, and no more. When we look at the case in that simple way, it appears to me that the whole difficulty is at once solved. On the one hand you have the charterer saying, I am not to be compelled to pay more than I agreed to pay; On the other hand you have the other party insuring, not the freight he has got in his pocket, but freight that is still at risk, and which he may lose by the loss of half the cargo.

Having said this much, I have very little more to add upon the subject. But, with regard to the view taken by Blackburn, J., for whose opinion I have the highest respect, it appears to me that he is under error when, in advising your Lordships, he thus states the case. He says that the contention of the plaintiffs in the cause is this: "That in short, under this charter-party, the loss of the freight was total as soon as half the coals were lost, and the risk to the owner of the goods, as far as regards the prepaid freight, or enhanced value of the goods, did not commence till after the coals were lost." But, as I said before, instead of being a total loss of freight to him he has got half the freight in his pocket. No doubt, when half the coals were lost he lost half the freight, but he had got the other half already in his pocket. I cannot conceive how by any process of reasoning, on the one hand, the shipowner can be taken to have insured what he had already got, or, on the other hand, how the charterer should be called upon to pay a higher freight than he had contracted to pay, namely, 42*s.* per ton. I do not think that the case of *Kirchner* v. *Venus* (12 Moore P.C.C. 311) has any bearing upon the case before your Lordships. Of course, any opinion of Lord Kingsdown is always cited by those who can cite it as an authority at all for their proposition, and it certainly carries with it great weight. But Brett, J., whose opinion is of very great value, I think, in assisting your Lordships to arrive at a correct view of this case, dealt with *Kirchner* v. *Venus* in the mode in which, in my opinion, it ought to be dealt with, and in which all judgments should be dealt with, namely, by taking it as applied to the subject matter. What Lord Kingsdown there says is this: In the first place, it is not that prepayments are not freight, but that they are not the same thing as freight, having all the legal incidents of freight; and, in the second place, there is the case of lien. Applying Lord Kingsdown's opinion to the subject matter, you will not find him saying that prepaid freight is not freight, because it *is* freight to all intents and purposes. In settling the account you say, "That is part of the freight," in this case and in every other case where freight comes to be adjusted. And what you find to be the course of shipowners and merchants dealing in this way with regard to the affreightment of vessels is this, the real transaction takes this form, the risk of so much as is prepaid is transferred to the charterer, instead of being at the risk of the shipowner, the latter taking the money and keeping it in his pocket under all circumstances, whatever may happen. In respect of that an allowance is made for insurance. When you come to look at it in this point of view, you see how this course of proceeding has naturally arisen. And in truth, if we were to say that the plaintiff had not insured this freight, which he has entirely lost, on account of the total freight earned not amounting to more than a set-off to the half that has already been paid, if we were to say that that was the result, we should, as it appears to me, disturb the whole of those contracts which are made in the form of the one we have now before us in this case, and which seem to have become tolerably frequent—we should be in effect saddling the charterer before us with regard to what was the position between him and the shipowner, with a greater payment than any that he had contracted to make.

Some difficulty, no doubt, arose in the mind of one of the learned judges in the court below, Amphlett, B., in consequence of the charterer having himself effected an insurance on the cargo of coals in the form of an insurance of the coals, value increased by freight prepaid; so that he said it appeared to him that the result would be to make the different underwriters by whom the insurance had been effected pay twice over in respect of this loss. Whether or not the underwriters could have resisted the claim I will not stop to inquire, because I think there is another answer to the argument. Brett, J. has pointed out that answer also, as he has dealt with almost every part of the case, with great clearness. He says the insurance so effected was effected on a valued policy, and if there be any apparent lack of justice towards the underwriters with reference to recovering upon that

policy, it arises from the law allowing these valued policies. This being taken as a valued policy payment had to be made, although it might possibly be that the insurer's interest was not such as, but for the law allowing valued policies, could have been made the subject of contract with the underwriter. We have nothing to do with that here. All we have to do in the present case is to consider what is the engagement which the assured (here the plaintiff) has entered into with those who accepted the risk, and for that purpose to look at the contract which was entered into between him and the charterer; and when we look at that contract the whole matter comes out plainly, that what was insured is exactly that which has been lost to him in consequence of the perils of the sea.

Lord PENZANCE.—My Lords, the appellant brings his action upon two policies of insurance, one on "freight valued at 2000*l*." the other on "freight payable abroad valued at 2000*l*.," and he claims a total loss. The answer of the underwriters is that the loss is only partial, as he might lawfully have claimed a part of the freight said to have been lost, from the charterer of his vessel, and whether he could do so or not depends on the terms of his charter-party. There is, therefore, in substance, but one question in this case, the proper construction of that charter-party as to the amount that became ultimately payable for freight in the events that happened.

It is admitted on both sides that freight was earned in respect of a quantity of coals delivered, to the extent of what may in round numbers be called half the cargo; but it is contended on the one side, that as freight to that amount had already been paid in advance there was nothing more for the merchant to pay; on the other, that the money so paid in advance was not all paid in discharge of such freight as might ultimately turn out to be earned, but was to the extent of a half only paid on that amount; and consequently that there still remained a quarter of the entire freight for the merchant to pay. This latter view has been upheld by the Exchequer Chamber in the judgment now under appeal, and I am of opinion that it cannot be sustained. I will test it in the first place by considering what results will flow from its adoption.

It is incontestable that if in accordance with this proposition the merchant should actually pay, in addition to the half freight previously advanced by him, another quarter of the entire freight, the result would be that the shipowner would have received three-quarters of the entire freight, though he had earned only half of that freight by carrying half the cargo safely to its destination. The result is so startling, and so irreconcilable, not only with apparent justice, but with all notions of freight as a payment earned and measured by the quantity of goods safely carried and delivered, that it challenges the closest attention to the proposition upon which it is based. But it is, moreover, directly opposed to the actual language of the charter-party itself. It is impossible that the shipowner should receive this three quarters of the entire freight for the carriage and delivery of half the cargo only, without doing violence to the express provision of the charter-party, by which the amount payable for freight is defined. That provision is in these words: "The freight is to be paid at and after the rate of 42*s*. a ton on the quantity delivered." There is no other provision in the charter-party defining the rate or amount of freight to be paid but this, and whatever time or times may have been by other provisions fixed for the payment of it, the amount itself is thus unquestionably fixed in plain language admitting of no two interpretations, at 42*s*. a ton, calculated not on the number of tons put on board, but on the number of tons actually delivered. If, therefore, the shipowner be really entitled to receive not 42*s*. but 63*s*. a ton on the quantity delivered, it cannot be as freight earned under the charter-party that he does so, but it must be under some other and different kind of obligation created by that instrument. And accordingly the learned counsel for the respondent, recognising the difficulty, ingeniously argued that though the advance of money made in this case was in the charter-party called "one-half of the freight," yet that it really was not freight at all, but something else, and cited expressions in other cases by which the sort of payment for which he was contending was variously described. I do not feel called upon to enter upon a review of those cases, because the decisions or expressions in them depended in each case upon the particular circumstances then existing, and because, whether those decisions were justified or not upon those circumstances, the language to be found in this charter-party excludes, in my opinion, the possibility of affirming that the word "freight," one-half of which was to be advanced, was intended to convey anything short of, or beyond, or different from, its ordinary meaning. In the first place it is, I think, difficult to maintain, when one and the same word is used several times within the short space of eight or ten consecutive lines of a written document, that it means one thing in one place, and a totally different thing in another. Nothing but the absence of any other reasonable construction ought to lead to such a result. But if, in any case, it could be permissible to deal with a word so used in such a manner, it is, I think, impossible to do so in this instance, because the expressions of this charter-party in relation to this word "freight" are so bound up and connected together as to make it plain that the "freight" spoken of is one and the same throughout. The mere grammatical construction, therefore, of the terms in which the charter-party is framed forbids the supposition that there are two sorts of freight spoken of, or that anything is intended by the word except that which is commonly known as "freight," which is to be earned only on safe delivery. It is not inconsistent with this that a part of what is thus to become due on delivery should, like any other payment due on a future day or event, be, by special arrangement, made payable by anticipation at an earlier period, and the effect of such a payment when made is simply to create a credit to that amount in favour of the person making it when the account is finally taken. The event upon which the right to freight is to accrue and its amount to be determined is one thing; the times at which it shall be paid is another. In this case a part of the payment is to be made by anticipation, but this is not inconsistent with the stipulation, in language perfectly unambiguous, that the entire amount of freight shall be calculated on the quantity delivered.

But then it is said a payment of freight in advance cannot be recovered if the goods do not

arrive, and that this has been held good law in successive cases. This at least shows that such an advance is not unfamiliar either to the commercial community or the courts of law, and as to the injustice of it, the provisions of the present charter-party show how easily and simply any injustice is practically avoided. An advance of freight is nothing more than arrangement for the convenience of the shipowner who wants an advance, and if the merchant will make it, is willing to pay the cost of insuring the advance when made, thus practically taking upon himself in another form the risk which properly belongs to him of the freight never being earned at all. It is no doubt true that it is impossible to know until the voyage is completed, and the cargo, or such part of it as arrives in safety, is delivered, what the actual amount due for freight, calculated at the stipulated rate, will turn out to be; and it is consequently impossible to calculate with accuracy, for the purpose of making the advance, what the half of that freight will amount to. But it is, I think, obvious enough that in speaking of "half the freight" being paid in cash on signing bills of lading, the parties intended "half the estimated freight," calculated on the quantities in the bills of lading at the rate named in the charter-party. The above mode of interpreting the charter-party, while it gives effect to the main and leading provision, that the entire freight shall depend on the quantity of goods delivered, treats the provision for an advance as meaning what it says, namely, as "freight to be paid one-half in cash." There seems little therefore to justify the conclusion that the shipowner could lawfully have demanded from the merchant a further payment of freight, notwithstanding that an amount equal to all the freight which had actually been earned had been already paid to him.

But the most plausible form in which that proposition is maintained remains yet to be stated. It has been said that the true meaning of this charter-party is the same as if the words had run thus: "Freight to be at 42*s.* a ton, 21*s.* to be paid on right and true delivery, and 21*s.* in advance on signing bills of lading," thus splitting up the freight into separate sums of 21*s.* on each ton put on board, and 21*s.* on each ton delivered. But such a mode of translating the charter-party is only arrived at by omitting the particular provision upon which, in my opinion, the whole matter turns, namely, that the freight is to be calculated not at 42*s.* per ton as suggested, but at 42*s.* per ton delivered. This brings into a prominent light the real difference upon which the two opposite modes of reading the charter-party are based. The view now under discussion is based upon the proposition that the number of tons upon which the 42*s.* are to be paid is the number of tons put on board, half to be paid at once, and half on arrival, not the number of tons which are put out at the port of destination. The contention of the appellant, on the contrary, is that the measure of freight intended is not the number of tons which the cargo may weigh when shipped, but the actual weight of the goods when they are delivered; although for the purpose of making a money advance, a probable estimate of the latter must be made from the amount of the former. I have already pointed out that the appellant has the express words of the charter-party in his favour on this point: "42*s.* a ton on the quantity delivered.

But there is another consideration which appears to me to place the matter beyond doubt. It is very well known that after a long voyage, even though the ship has met with no disaster, and the cargo has suffered nothing from "perils of the sea," the weight of the cargo when delivered will frequently differ, and sometimes very considerably, from its weight when shipped. Whether the weight, therefore, which is to be the criterion for calculating freight is to be the weight when put on board, or the weight when delivered cannot fail to be a matter of much importance. It is also to be observed that a a partial loss of his advance, in consequence of the cargo having decreased in weight, could not be covered by the merchant under any policy of insurance, for losses arising from the cause supposed are not caused by any of the perils insured against, and are not the subjects of marine insurance. And yet it is obvious that the sum allowed by the shipowner as premium for insurance was intended to keep the merchant free from risk.

Another reason against the adoption of this reading of the charter-party is that it would establish a distinction between an aliquot part, such as a half or a third of the freight being paid in advance, and a lump sum of money, such as 500*l.* or 1000*l.* being advanced, as is frequently the case in a similar manner. For it could hardly be said in the latter case that any particular sum was paid in respect of any particular part of the cargo.

One other argument only remains to be noticed. It has been said that the merchant in this case has by the policy which he opened to protect his advances, entitled himself to recover £1 per ton in respect of the coal which was lost, over and above the value of such coal, and that if the appellant's view of the charter-party be correct, this £1 per ton must be a profit beyond anything he has lost, a result so inequitable that the appellant's view of the charter-party must, it is argued, be mistaken. The answer to this seems to me to be twofold; first, that the consequences of any contract entered into between the merchant and third persons can hardly affect the true construction of the contract previously entered into between him and the shipowner; secondly, that on the assumption of the appellant's view of the charter-party being correct, the merchant ought not, upon the common principles of insurance law, to be able to recover either £1 per ton or any other sum from the underwriters. For the first principle of insurance is indemnity, and when no loss of the subject of insurance has been sustained, there ought to be nothing to receive under a policy. If the merchant in this case has had the full value of his entire advance by setting it off against the freight actually earned, as the appellant contends that he is entitled to do, he has suffered no loss in respect of that advance, and ought to have no legal claim for indemnity. If, therefore, it be true that under the particular policy which has been effected in this case any such claim arises, it must be by reason of the special form of that policy, which I observe is a valued one, the result of which may be that the insured can obtain compensation beyond the amount of any loss which he has really suffered.

Upon the whole, therefore, I think it is clear that

the appellant could not have lawfully demanded from the charterer any further freight beyond that which was covered by the previous advances; and, consequently, that he was entitled to claim of the respondents a total loss under their policy. The judgment of the Court of Exchequer Chamber ought, therefore, in my opinion, to be reversed.

Lord O'HAGAN.—My Lords, the question in this case is a short one; but the remarkable difference of opinion among the learned judges who have considered it, forbids us to regard it as free from serious difficulty. It arises really—extraneous and irrelevant matter being put out of account—on the construction of a single document, which is common and familar in its form. We have to decide on the effect of the charter-party, which was executed between the plaintiff, a shipowner and Mr. De Mattos, the charterer of the ship. And for that purpose we are not much assisted by authority, although many cases have been cited in the progress of the argument. We must deal with the document itself, having regard to the circumstances in which it originated, and the relation of the parties to it, and endeavouring to give a fair interpretation to its words in their natural and customary meaning.

The question arises, as I have said, on the construction of the charter-party, and not on the policy which is the direct foundation of the suit, but will be operative for the appellant or the respondent, according to the view we take of that construction. And for rightly ascertaining it I do not think your Lordships are at liberty to travel into considerations *dehors* itself, which have been pressed upon the House. For instance, we cannot properly consider the dealings of the charterer with other parties. Putting out of account all such irrelevant suggestions, I shall ask the attention of your Lordships for a very short time to the words of the charter-party. [His Lordship read the charter-party, and continued.]

The question is, half of the cargo having been lost by perils of the sea, and half duly delivered at Bombay, and the owner having received payment for the carriage of one half of it, had he any further claim upon the charterer, or was the money received in England applicable to discharge the freight which had been earned at Bombay? The captain thought it was, and delivered the cargo without claiming any further freight, and the plaintiff brought his action on his policy as for a total loss. I think he was warranted in doing so, and is entitled to recover. I should add, that in the receipt for the freight paid by the charterer it is described as "the sum of 2286*l.* 10*s.* being an advance of half freight on within shipment." It seems to me that the purpose of the charter-party is very clear. It was to secure to the owner an integral freight for the voyage, the amount of which was approximately fixed according to the value of the coals to be put on board, and intended to reach Bombay; but it was to be paid half in advance on signing bills of lading, and the remainder on right delivery of cargo.

What was the risk against which the owner insured? What was the purpose of his insurance? He received half of the freight, and having received it, it was his absolutely, and was irrecoverable under any circumstances by the charterer. The peculiar doctrine of the English law is abundantly established by *De Silvale* v. *Kendall* (4 M. & S. 37); *Byrne* v. *Schiller* (*ante*, vol. 1, p. 511; L. Rep. 1 Ex. 20, 319; 23 L. T. Rep. N. S. 741; 25 L. T. Rep, N. S. 211), and many other cases, to which full reference is made in the able opinion of Brett, J. The owner had thus got prepayment of a moiety of the entire debt which the charterer had contingently incurred for the hire of the ship or a portion of it, and which might be described, reversing our ordinary legal phrase, as "*Debitum in futuro, solvendum in præsenti.*" That prepayment was applicable generally to the freight, which, although a single liability, had been divided for the purposes of convenience into two halves, to be dealt with in different ways and at different times. And when by the perils of the sea the owner has been disabled from fully completing his part of the contract, and failed to earn more than one-half by delivery at Bombay, that being the express and essential liability of the charterer's liability, the prepayment became applicable to answer the only demand he could maintain, the charterer owed him nothing, and he fell back properly on his policy for the remainder of his freight, which not having earned it according to his bargain, he was unable to demand from the charterer. This appears to me to be a reasonable view of the matter, and the terms of the charter-party justify, I think, no other. The only thing at risk was the unpaid balance, and when that was hopelessly and totally lost the liability of the insurer was complete. There has been much discussion as to the meaning of the word "freight" in the charter-party, and it has been represented as having been in the nature of a loan, or of a payment not for the carriage of the goods, but for taking them on board the vessel and agreeing to carry them. But I see nothing to warrant the adoption of such a view. "Freight" has a definite meaning. It is described by Phillips on Insurance, c. 3, s. 2, in a passage cited by Bovill, C.J., as signifying "the earnings or profit derived by the shipowner from the use of it himself, or by letting it to others to be used, or by carrying goods for others;" and by Lord Tenterden in *Flint* v. *Flemyng* (1 B. & Ad. 45), as importing "the benefit derived from the employment of the ship." In this charter-party "freight" surely means nothing else. It is "the profit to be derived by the shipowner," on the delivery of the cargo at the end of the voyage, "for the use of the ship" in conveying the coals of the charterer. I agree with the clear words of Cleasby, B. in the Exchequer Chamber: "We cannot depart from the settled meaning of the word 'freight,' and the meaning expressly given to it in this charter-party, namely the amount to be paid at the end of the voyage for what is ready for delivery at the stipulated rate. This had been wholly satisfied by the advance made, and so the shipowner was entitled to receive no more, and the captain was right in delivering the half cargo free of freight." The charter-party speaks first of "freight" generally as to be paid "on unloading and right delivery," and it is "such freight" which it afterwards divides into the "one-half" and the "remainder." Why should we strive to put an unnatural and unaccustomed meaning on an ordinary word, which is accepted by the parties as it is commonly understood, when they give and take a receipt for the money paid, not as a loan, or a payment for putting the cargo on board, or for accepting the goods without delivery, but asking "advance of half

freight on within shipment," plainly pointing to an entire freight on the entire cargo to be fully or partially landed, and paid on the full or partial delivery of that cargo at Bombay. Reliance has been placed on some expressions of Lord Kingsdown in *Kirchner* v. *Venus* (12 Moore P.C.C. 361), in which he states that "freight is the reward payable to the owner for the safe carriage and delivery of goods," and that "a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not acquire the legal character of freight because it is described by that name in a bill of lading." Any opinion of Lord Kingsdown, even an *obiter dictum* like this, is entitled to high consideration, and I do not think it at all necessary to impeach the correctness of his words for the purpose of sustaining the view I am submitting to your Lordships. Immediately after using them he goes on to recognise the right and power of those who enter into shipping agreements, "to supersede by a special contract the rights and obligations which the law attaches to freight in its legal sense," and that, even assuming the accuracy of its definition, seems to me exactly what the parties have done in the present case. They have made a contract which unmistakeably deals with the prepayment as of "freight" and nothing else; and whatever might have been the legal force of the term if it stood by itself, and without the specific directions as to the "one-half" and "the remainder," those directions equally to give to both the character of "freight," although the first half is to be paid before delivery. So that I do not conceive the dictum of Lord Kingsdown to be adverse in reality to the contention of the appellant. And that contention on this particular point is strongly sustained by several cases, to two of which I shall briefly advert. In *De Silvale* v. *Kendall* (4 M. & S. 37), a charter-party provided that the charterer should pay "for the freight and hire of the vessel" a specified sum in advance, and "the residue on the delivery of the cargo." The provision in that instrument was substantially the same as that with which we are dealing, and it was contended there as here, that the advance was not freight, but in the nature of a loan. And there Lord Ellenborough said, "If the charter-party be silent the law will demand a performance of the voyage, for no freight can be due until the voyage be completed. But if the parties have chosen to stipulate by express words, or by words sufficiently intelligible to that end, that part of the freight should be paid by anticipation, which should not depend on the performance of the voyage, may they not so stipulate?" Every word is applicable to the circumstances of this case; and, as Lord Ellenborough insisted on deciding on the terms of the charter-party before him, and declined to consider other cases, applying as he said, "to other forms of covenant," so I think your Lordships may safely found your judgment upon the express words of this particular contract. In that case also the judges held expressly that there is no doubt of the competency of parties to stipulate for part payment of the freight before it can be known whether any freight will accrue or not. So in *Byrne* v. *Schiller* (*ante*, vol. 1, p. 511), the last case bearing on the present, the charter-party provides that a vessel is to be sent on a voyage at a specific rate of freight, "such freight," as here, to be paid partly in advance, and "the remainder on right delivery of the cargo at the port of discharge." And then the court dealt with the payments as "on account of freight." The circumstances of those cases make the observations of the judges directly applicable to the case before us, and they and others also show that a stipulation to pay freight in advance, and before delivery, is not only legal, but of common use amongst commercial people.

I might have been supposed to dwell on the inconvenience possible to arise in a case like this from the adoption of the view of the respondents, but this point has been so well put by my noble and learned friend who last addressed the House that I shall not occupy time by dwelling upon it. I am satisfied, with much deference to the adverse view that has been so strongly supported, that on the construction of the charter-party alone the plaintiff is entitled to recover, and I prefer to base my opinion upon that sufficient ground.

I think the judgment of the Exchequer Chamber should be reversed.

LORD SELBORNE.—My Lords, the difficulty in this case—for I certainly felt some difficulty during the argument, and it has been the subject of much difference of opinion between judges of high authority—arises out of the peculiar rule of English mercantile law, that an advance on account of freight to be earned, made at the commencement of a voyage, is, in the absence of any stipulation to the contrary, an irrevocable payment at the risk of the shipper of the goods, and not a loan repayable by the borrower if freight to that amount be not earned. The authorities referred to by Brett, J. certainly establish this general rule, whether reasonable in the abstract or not; and it must be taken that payments in advance, such as that which was made by the charterer in the present case, are in this country generally made and received, as between the parties to contracts of affreightment, upon this understanding.

It is, however, remarkable that none of the authorities seem to touch the precise question in this case, namely, whether the charterer under a contract like that before your Lordships, has a right to deduct the whole amount paid by him in advance from any freight which may actually be earned in case of a loss of part of the cargo; or whether such advance ought to be apportioned over the whole cargo delivered on board, so that the loss of a proportionate part of it will fall upon the charterer if part of the cargo is lost. In that case it does not seem to me to be material, or to create any difficulty in the application of the principle, whether the advance is of an aliquot part of the estimated freight or of a gross sum of money. Blackburn, J., if I understand him rightly, thinks that on principle the latter view is that most consistent with the rule established by the authorities, and that there is nothing in the express contract between these parties to justify a different conclusion. The actual settlement between the shipowner and the charterer did indeed take place upon the opposite view; but the insurer was no party to that settlement, and what was done *inter alios* could not enlarge his liability. It may be that the principle on which that settlement proceeded was according to a general usage of trade, but of this I find no proof. I am by no means clear that the reasoning of Blackburn, J. is fully met by the observa-

tion of Brett, J., that if this be not the correct principle, "the charterer must in effect pay more than 2*l.* per ton in every case except where the whole cargo is delivered." If the whole cargo is lost he must in "effect" pay 1*l.* a ton on the goods put on board, though under the contract no freight whatever has been earned. The introduction of the words "in effect," when the question is as to the legal consequences of an anomalous rule not expressed in terms by the contract may perhaps be fallacious. On the other hand the conclusion of Blackburn, J., rests entirely upon the ground that in a contract so worded as the present, a stipulation tantamount to that expressed by the words, "the amount paid in signing the bill of lading to be deducted from freight in settlement thereof," ought not to be implied if it is not expressed. I am unable to adopt that opinion, and upon the whole case, though I should have thought it more satisfactory if there had been some authoritative source of information as to the usage of trade, I think that the view of the proper construction and effect of such a contract taken by the majority of the learned judges, and by your Lordships, is the more reasonable, and that which is most in accordance with the natural meaning of the words of the charter-party, and with the probable intention of the contracting parties.

If so, there was clearly, in the case, a total loss of the whole interest of the assured in the whole subject matter of the insurance; and the judgment of the Court of Exchequer Chamber ought, therefore, to be reversed.

Judgment of the Court of Exchequer Chamber reversed, and judgment of the Court of Common Pleas affirmed.

Solicitor for the appellant, *W. Nash.*

Solicitors for the respondents, *Argles* and *Rawlins.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by W. Appleton, Esq., Barrister-at-Law.

Feb. 8 *and* 9, 1876.

(Before James and Mellish, L.J.J., and Baggallay, J.A.)

The M. Moxham.

Damage done by ship to realty abroad—Governing law—Jurisdiction—Pleading—Demurrer.

The question of the liability of a shipowner, proceeded against in the English Admiralty Court, for an injury done by his ship to a pier projecting into the sea, but attached to the soil of a foreign country is governed by the lex loci, and not by English law.

Where an English ship, by the negligence of her master and crew, ran into and damaged a pier on the coast of Spain, and the owners of the pier proceeded against the ship for the damage in the Admiralty Court, and the shipowner pleaded that by the law of Spain a shipowner is not responsible for the damage occasioned by the negligence of his master and crew:

Held (reversing the decision of the High Court of Admiralty), that the plea is a good defence to the action.

Quære, can an English court entertain an action for damage to realty in a foreign country, apart from some agreement or contract of the parties?

This was an appeal from an interlocutory decree of the High Court of Admiralty on a motion to strike out certain paragraphs in an answer, filed by defendants in a cause of damage, instituted on behalf of the Marbella Iron Ore Company, Limited, against the steamship or vessel the *M. Moxham*, her tackle, apparel and furniture, and the freight due for the transportation of the cargo now or lately laden on board thereof, and against the owners of the said steamship.

The plaintiffs' petition was, so far as material, as follows:

1. The plaintiffs are the Marbella Iron Ore Company, Limited, an English joint-stock company, established under the Companies' Act 1862, and the Acts incorporated therewith, for the purpose, among other things, of exporting iron ore from Marbella, in the country of Spain, to England and other places. The offices of the company are at No. 1, Crown-buildings, Queen Victoria-street, in the City of London. The plaintiffs were at the time of the grievances hereinafter mentioned, possessed of a pier, situate at Marbella aforesaid, for the purpose of shipping iron ore on board ships.

2. About 8.30 a.m. on the 5th Oct. 1874, the steamship *M. Moxham* came to Marbella for the purpose of loading iron ore from the said pier of the plaintiffs. There was scarcely any wind at the time, and the sea was perfectly smooth, and there was no current.

3. Those on board the *M. Moxham*, instead of keeping clear of the pier, as they could and might easily have done, so negligently navigated the said steamship that she approached and came into violent collision with the said pier, and carried away the whole head of the pier, causing enormous damage to it, and throwing several trucks laden with iron ore into the sea.

4. The aforesaid collision and the damages consequent thereon were occasioned by the negligence and improper navigation of those on board the *M. Moxham.*

5. The plaintiffs, in addition to the expense of repairing the pier, have sustained and will sustain considerable damages by reason of being called upon to pay demurrage to divers ships at the time of the said collision, under charter to load iron ore at the said pier, and by reason of extra expense incurred in the shipment of iron during the repair of the said pier, and extra freight in consequence of delay in loading vessels.

The answer filed on behalf of the owners of the *M. Moxham*, was as follows:

Parker and Clarke, solicitors for Ebenezer Cory, &c., the owners of the steamship or vessel *M. Moxham*, the defendants in this cause, say as follows:

1. They deny so much of the first article of the petition as alleges that the plaintiffs are possessed of the Marbella pier in the said petition mentioned.

2. They say that the said alleged collision was not a violent one, and that it took place owing to the current and the shallowness of the water near the said pier preventing the *M. Moxham* from answering her helm, as but for such matters she would have done, and that the said alleged collision was not occasioned by any negligent navigation of the *M. Moxham*, but was the result of inevitable accident.

3. They further say that the said pier was so weakly and insufficiently and improperly constructed and fastened, as not to be capable of sustaining contact from such ships as the *M. Moxham* necessarily incidental to their going alongside the said pier for the purposes in the said petition stated, and that the said alleged collision was a usual and ordinary contact necessarily incidental to the *M. Moxham* going alongside the said pier for the said purposes, and one which the said pier ought, if properly and sufficiently constructed and fastened, to have sustained without being damaged, and no more, and that the said alleged damage was wholly occasioned by the said pier having been so weakly and insufficiently and improperly constructed and fastened, and not otherwise.

4. They further say that the said alleged collision happened within the territory and jurisdiction of Spain, and that at the time of the said collision the said pier was annexed to and formed part of the land of Spain, and that if the said collision was occasioned by any negligence or improper navigation of those on board the *M. Moxham* it was solely occasioned by the negligence of the master or mariners of the *M. Moxham*, and not by the defendants or any of them; and that by the law of Spain in force at the time and place of the said collision the master and mariners of the ship, and not the ship or her owners, are liable in damages in respect of a collision occasioned as in the petition alleged, and by such law neither the *M. Moxham* nor the defendants nor any of them are or is liable in respect of the damages proceeded for in this cause.

5. They deny the truth of the fifth article of the said petition, and further say that the said article is irrelevant, as being matter only for the registrar in the event of a reference.

6. The defendants further say that by the law of Spain in force at the time and place of the said collision, whenever the owner of a ship has become liable in damages by reason of the act or default of the master of such ship, such owner is not liable in damages beyond the value of such ship and her freight being earned at the time of the commission of such act or default, and can fully discharge such liability by abandoning such ship and freight to the person claiming such damages, or by paying to such person the full value of such ship and freight; and the defendants say that if they are liable to the plaintiffs in respect of the collision in the said petition mentioned they have so become liable by the act or default of the master of the *M. Moxham*, and not otherwise, and that by the law of Spain in force as aforesaid they are not liable to the plaintiffs in respect of the said collision beyond the value of the *M. Moxham* and her freight being earned at the time of the said collision, and are entitled to fully discharge such liability by abandoning the *M. Moxham* and her said freight to the plaintiffs or by paying to the plaintiffs the full value of the *M. Moxham* and her freight being earned as aforesaid.

And the said Parker and Clarke pray the right honourable the judge to pronounce against the damage proceeded for, and to dismiss the defendants and their bail from all further observance of justice in this suit, and to condemn the plaintiffs in costs, or to pronounce that the defendants are not liable to the plaintiffs in respect of such damage beyond the value of the *M. Moxham* and her freight being earned at the time of the said collision, and that they are entitled to discharge such liability by abandoning the *M. Moxham* and her freight or by paying the full value thereof to the plaintiffs, and that further and otherwise right and justice may be administered to the defendants in the premises.

The plaintiff moved in the court below to strike out the fourth article of the answer upon the ground that the same formed no answer to the action. The defendants had originally pleaded that the court had no jurisdiction. on the ground that the injured property formed part of the land of Spain; but, it having been shown that the ship was arrested in Spain, and released by the plaintiff on the undertaking on the part of the defendants that liability of the defendants should be determined by the English courts, the defendants withdrew the plea as to the jurisdiction, and motion stood only to strike out the fourth paragraph of the answer.

The learned judge of the court below ordered the said fourth paragraph to be struck out, holding that English law governed the question: (See the report of the case in the court below, 33 L. T. Rep. N. S. 463; 3 Asp. Mar. Law Cas. p 95), and from this decree the defendant now appealed.

Watkin Williams, Q.C., and *E. C. Clarkson* (*J. C. Mathew* with them), for the appellants.—It is well established that in the case of contracts the law of the place where they were made governs the construction. So in cases of tort the question of liability for a wrong done must be governed by the law of the place where that wrong was committed.

Scott v. *Lord Seymour*, 32 L. J. 61, Ex.; 8 L. T. Rep. N. S. 511;
The General Steam Navigation Company v. *Guillou*, 11 M. & W. 877.

It is only where the *lex loci* sought to be applied is mere matter of procedure that the English courts set it aside and apply their own rules: (*Bullock* v. *Caird*, L. Rep. 10 Q. B. 276). Liability for a tort does not arise unless injury has been done to the person claiming; hence the act of negligence, in respect of which the plaintiff seeks to recover, is not the mere careless navigation which led to striking the pier, but the striking the pier resulting in damage; this act, for which the defendants are liable, was clearly done upon the soil of Spain, and not upon the high seas, and hence the liability of the defendants must be determined by the law of Spain; and if by the law of Spain the defendants are not responsible for negligence of the person doing the act occasioning the injury, the plea is good. Where the *lex loci* declares that a person is not responsible for an act done there, the English courts cannot hold him liable: (*Phillips* v. *Eyre*, L. Rep. 4 Q. B. 225; L. Rep. 6 Q. B. 1.) The ship in approaching and striking this pier was not using the sea as a public highway, but was within Spanish jurisdiction, and was coming alongside the pier for loading purposes, and as a matter of favour, and was hence amenable to the laws of the country within whose jurisdiction she then was.

The Schooner Exchange v. *McFaddon*, 7 Cranch 116; Twiss's Rights of nations, 209.

In a case of collision between an English and a Spanish ship, in a Spanish river, it is clear that the Spaniard could plead the Spanish law; can it be contended that the British ship could not claim exemption from liability if given to him by the Spanish law? The law of the place must govern both parties; one cannot have a right in respect of such law which the other does not equally possess; if such a collision occurred upon the high seas it would be determined by such as was binding upon both parties.

The Zollverein, Swab. 96;
R. v. *Coombe*, 1 Leech C. C. R. 338.

Where a wrong not actionable in a foreign country is committed there, no remedy can be obtained in this country: there must be a tort by the laws of both countries to give a remedy here (1 Smith's Leading Cases, 7th edit., pp. 700, 701). Even in the case of a collision on the high seas, it has been held that the Merchant Shipping Act 1854, as to limitation of liability, does not apply where the collision is between a British and a foreign vessel.

Cope v. *Doherty*, 4 K. & J. 367: 31 L. T. Rep. O. S. 173, 307; 4 Jur. N. S. 451, 699; 27 L. J. 600, Ch.;
General Iron Screw Colliery Company v. *Schurmans*, 4 L. T. Rep. N. S. 138; 1 Mar. Law Cas. O. S. 60; 29 L. J. 883, Ch.

Butt, Q.C. and *Benjamin*, Q.C. (*R. E. Webster* with them) for the respondents.—It is clear that in all questions of contract the English courts will apply the *lex loci*, but is this the case in questions of tort? By English law the master of an English ship is personally responsible for his own negligence in the navigation of his ship, but his owners are also responsible for his acts as their servant. The master's acts must be considered as done

upon British soil, because a British ship is a portion of British territory: (*Reg.* v. *Anderson*, L. Rep. 1 C. C. R. 161.) If, then, the master's acts are done upon British soil, the question of liability must be governed by British law. [Mellish, L.J.—Is there not a difference between an act done within the vessel and an act done by the vessel to an object external to it? In the criminal cases the tort committed has been done by one member of the crew to another.] The law which regulates the rights as between owner and crew and third parties is a personal statute, which is carried with the ship into whatever countries she may go. If it is the policy of the English law to render the owner responsible for the acts of his servant, the former cannot escape liability by alleging a foreign law which did not govern his relation to that servant. *Lloyd* v. *Guibert* (L. Rep. 1 Q. B. 115), lays down the principle in cases of contract that the law of the flag determines the responsibility, and there is no sound reason why the principle should not also apply to cases of tort. The court below was right in saying that it had jurisdiction independently of any agreement between the parties; venue is the only ground for excluding jurisdiction, and in Admiralty there is no venue and no such thing as a local action.

Doulson v. *Matthews*, 4 T. R. 503;
Mostyn v. *Fabrigas*, Cowp. 161.

James, L.J.—This case is the case of the owner or occupier of a piece of the Spanish soil bringing an action against the owner of an English ship, for damage done by that ship in knocking down a pier attached to the Spanish land. In this respect it is a very novel action, and very grave difficulties indeed might have arisen as to the jurisdiction of this court to entertain any action or proceedings whatever with respect to an injury done to the land of a foreign state. The question of jurisdiction has probably been successfully got over by what has been done in this case, that is to say that the ship in question—the owner of which is sued, and which by a figure of speech may be called the delinquent ship—having been sued in Spain, was released, upon an agreement between the parties that all remedies against the ship and against the owners of that ship should be tried in this country. Such an agreement would give jurisdiction by contract, not only jurisdiction by consent; and it must be taken that the parties agreed that their ship should be liable here in the same way as she would have been liable according to the law of Spain. Possibly this would get rid of the question, and the Court of Admiralty would have jurisdiction to enforce against the ship an equitable right arising from this equitable contract by virtue of which the ship was released from its liability under the jurisdiction in Spain.

It was properly conceded by Mr. Benjamin, in his argument, that the question must be tried exactly in the same way as if it were being tried in Spain, and he admits that he could not successfully argue in support of the decision of the court below, unless he could make out that it would be the duty of the Spanish Court, if the action had proceeded there, to apply the principles of the English law to the case. The principle of the English law applicable to the case according to him, is that the master and crew of the vessel being the servants of an English owner, are by the English law themselves liable, and on the principle of *respondeat superior*, make their principals responsible for their negligence; and, further, that they carry with them this doctrine, so that it extends to every foreign country, and every foreigner who is brought in any way into contact, whether by way of contract or tort, with the master and crew as the agents of the owner.

No authority was cited for that proposition, and I am really unable to follow the principle. One can understand that a contract between master and servant, or relations between principal and agent, may affect the contracts made by the agent, *qua* agent, with foreign people, that is to say, may affect the nature and extent of the agency; but the liability of one man to answer for the acts of another in matters of tort seems a thing which at least cannot be carried by the agent into a foreign country. If I take my coachman to France, and through his negligence an accident occurs, and damage is done, the doctrine of *respondeat superior* does not apply if that doctrine is unknown in France, the place where the damage was done. It appears to me, therefore, that the contention that the personal status, arising from the fact that the shipowner and his servants were virtually in England, was carried into Spain, cannot avail, as the wrong is done absolutely, according to the allegation in the plea, on Spanish soil; it was done within the Spanish territory; it was done by a vessel to something which is in Spain. Now it is the law of Spain, according to the allegation here, that where the wrong act is done by a servant of this particular kind, when it is done by the master and crew of a ship, the owner of the ship has not that wrong imputed to him, and the rule *respondeat superior* does not make him answerable for that which is the actual wrong doing of his servants, If that is so, why is he not entitled to the benefit of the Spanish law?

It is settled in all the cases, that if the act is lawful, even if the act is excusable, or if the act has been legitimatised by a subsequent act of the Legislature, in that case this court would take into consideration that state of the law, that is to say, if by the law of the country a particular person is justified or excused for the thing done, he is not answerable here. Why is he answerable if by the law of the country he never was answerable for it?

I ventured to observe to Mr. Benjamin in the course of the argument, that you do not talk of the thing that is wrong: it is the man that is wrong, and if he is not a wrongdoer according to the law of the country where the wrong is done, that is to say, if he is not answerable for his servant, he is not answerable according to the Spanish law, and it is our duty to give him the benefit of the Spanish law in this case.

Mellish, L.J.—I am of the same opinion. A great many cases have been cited in the argument in this case, but they almost all relate to actions respecting either wrongs to personal property or to actual personal injuries, and the law respecting personal injuries and respecting wrongs to personal property appears to me, in the result of those cases, to be perfectly settled, and that is, that no action can be maintained in the courts of this country on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of this country. The two cases of *The Halley* (L. Rep. 2 P. C. 193) and *Phillips* v. *Eyre* (L. Rep. 6 Q B.

1) seem to me, together with the other cases in conformity with them, to be conclusive upon the subject.

In the case of *The Halley* there was a collision with a ship in foreign waters. By the law of the foreign country the ship was liable; the owners were liable as owners of the ship; by the law of England the ship and owners were not liable, because there was a pilot on board, who was navigating the ship, and who was taken compulsorily on board, and the negligent act was his act. Beyond that it was held that, notwithstanding that the ship and the owners of the ship were liable according to the law of the country where the act was committed, yet, inasmuch as they were not liable by the law of England, no action could be maintained against them. Then in the case of *Phillips* v. *Eyre* (L. Rep. 6 Q. B. 1), which was an action brought for a crime committed in a foreign country, it was decided that the liability of the defendant had been taken away by the law of the country where the act was committed, and, therefore, that no action could be brought in this country. Therefore, if that is the rule respecting personal wrongs, and respecting wrongs to personal property, it seems to me *a fortiori* it must be the rule respecting wrongful acts to real property in a foreign country; whether the rule respecting wrong to immovable property in a foreign country does not go still further, and prevent an action being brought at all is not a question which it is necessary to determine in this case, because, having regard to the consent of the parties and the agreement that has been entered into, I do not think it is pretended that any objection could be taken in this case with reference to the jurisdiction; but it appears to me beyond all question *a fortiori* if the rule before mentioned is applicable to personal property and wrongs, it must be applicable to damage done to real property in a foreign country.

But then it is said that though that is the general rule, yet here the act was not done in the foreign country, because the wrongful act was committed on board an English ship on the high seas. I agree that for acts on board a ship itself, no doubt the English ship carries the English law with it, but I am not convinced that it carries the English law with it with reference to wrongful acts done by guiding an English ship against a pier which is part of a foreign country. It is unnecessary to consider what would be the rule in a case—though I do not think it would present any more difficulty—what would be the rule if the ship was outside the three mile limit, and they had fired a gun and caused damage within the foreign territory. Here the ship itself was really within the Spanish dominions at the time it committed the wrong, as Mr. Clarkson put it, she was just coming into a Spanish port where she had no right to go, except by licence given to her by the law of Spain, and where she was bound to obey the law of the country while she was there. In that position she comes in contact with that which is stated in the plea to be part of the soil of Spain, and so renders it necessary to apply the general rule that no action can be brought in this country in respect of an alleged wrongful act committed in a foreign country which is not wrongful by the law of that country.

Then it is said by Mr. Benjamin that although that is perfectly true as a general rule, and although, as I understand, he admits that if the act itself was not considered a careless act by the law of Spain, no action could be brought in this country; yet, that inasmuch as it is considered a wrongful act by the law of Spain as far as the master is concerned, then when you come to the question whether the master alone is liable, or the ship and the owner also, that question, he says, is not to be governed by the law of Spain but by the law of England.

I do not think any sufficient authority has been cited for that proposition, and it appears to me it would make a further distinction in the law, which would be very inconvenient in the result. There is a well known distinction between substantive law and mere procedure. If it could be proved that this question of liability turned upon mere procedure by the law of Spain, then that law would not be regarded in this country. It appears to me that the rule that a particular person is not to be liable at all, although somebody else possibly may be liable, is a part of the substantive law of the country where the act is committed, and that, therefore, if by the law of the country where the act is committed, by the substantive law which is to govern the case—the defendant is not liable, then he would be discharged altogether. If there is any authority wanted for that proposition it is laid down by Park, J., in *The General Steam Navigation Company* v. *Guillou* (*ubi sup.*) That was a case of an injury done on the high seas by a French ship, and there he says: "The injury complained of is averred to have arisen on the high seas, and out of the jurisdiction of England, and not to have been committed by the defendant personally, but by a third person, who was master of the French vessel, the defendant being a French subject. So far the plea is free from obscurity; if the defendant was not liable for the act of that other by that law which is to govern this case he has a good defence to the action, and for the defendants it is contended that the plea means to aver that by the law of France he was not liable for those acts, but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant, and not the servant of the individual composing that body, and if such be the true construction of this plea, we all are strongly inclined to think that there is a good defence to this action."

I am of opinion that that rule applies to this case, and that if the defendant is not liable for the act of the master by the law which is to govern the case, he has a good defence to the action, and if, therefore, according to the true rule, the law which is to govern the case be Spanish law, the defendant is not liable by that law, and has a good defence to the action.

Baggallay, J.A.—I am of the same opinion. The learned judge of the court below seems to have relied very much in his judgment upon the decision in the case of *Reg.* v. *Anderson* (*ubi sup.*), but that case, it appears to me, was a very distinguishable one from the case with which we have to do now. In that case the argument proceeded much more upon the question whether Anderson was liable, inasmuch as he was a foreigner, upon a French ship, in French waters, than if he had been an Englishman, but their Lordships thought that having entered into articles to serve on board an

English ship, so long as he remained on board that ship he was in the same position as an English subject would have been. Then the great difference is this, that in that case the offence was fully and entirely committed on the vessel upon which Anderson and the murdered man were. I am unable to see any analogy between that case and the present.

Then, the learned judge of the court below referred to several other cases, and amongst them to *The Halley*, which he said appeared to his view to follow the same course as *Reg.* v. *Anderson* (*ubi sup.*). There, again, I am unable to agree with the learned judge. Where a suit is instituted in an English court in respect of a tort committed in a foreign country, it is not sufficient for the plaintiff to show that there is a liability on the part of the defendant in respect of foreign law, but he must also show a liability in respect of the English law, and therefore in that case of *The Halley* (*ubi sup.*), inasmuch as by English law there is no liability on the owners by reason of their having engaged a pilot by compulsion, it was not open to the plaintiff to claim or receive damages, because, by the law of Belgium the owners were not relieved from responsibility because they did employ a pilot by compulsion.

The principles seem to be laid down much more clearly and distinctly, I think, in the case of *Phillips* v. *Eyre*—I am reading from the judgment of Willes, J.—they are laid down in these terms: "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fufilled, first, the wrong must be of such a character that it would have been actionable if committed in England. Therefore, in *The Halley*, the Judicial Committee pronounced against a suit in the Admiralty, founded upon a liability by the law of Belgium, for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, for whom, therefore, as not being his agent, he was not responsible by English law; secondly, the act must not have been justifiable by the law of the place where it was done."

If English law alone is applicable to this case, there would have been an actionable wrong just as if the wrong had been committed in England; then the question remains would it have been justifiable by the law of the place where it was done. For the purpose of the present proceedings we are bound to presume that according to the law of Spain, there is no liability or responsibility on the part of the owners of the ship for the acts of the master and crew. It appears to me, therefore, by applying the principles so enunciated in *Phillips* v. *Eyre* (*ubi sup.*), we are able to arrive at the conclusion in the present case that the law of Spain, and not the law of England, applies.

I am reminded by my learned brother that the words "for action justifiable," must mean with regard to the particular defendant against whom the action is brought; we, therefore, think it is clear from that that the proceedings against the defendant must fail by reason of there being no liability under the Spanish law.

Appeal allowed.

Solicitors for the appellants, *Parker* and *Clarke*.
Solicitors for the respondents, *Ellis* and *Co.*

Wednesday, March 1, 1876.

(Before James and Mellish, L.JJ., and Baggallay, J.A.).

The Peter der Grosse.

Damage to cargo—Bill of lading—Weight, contents and value unknown—Onus of proof.

A master signing a bill of lading in which it is stated that the goods were "shipped in good order and condition," but which contained a memorandum of "weight, contents, and value unknown," admits that, as far as could be seen externally, the goods were shipped in good condition, and if they arrive damaged the onus lies upon the shipowner to excuse him from the damage.

This was an appeal from a decree of the High Court of Admiralty of England in a cause of damage to cargo instituted on behalf of Schœtensack, Riecken, and Co., merchants of London, against the Russian steamship *Peter der Grosse*, and her owners intervening.

In June 1874, Scheumann and Spregel, of St. Petersburg, shipped on board the *Peter der Grosse*, then lying at St. Petersburg, seventeen bales of down and eight of feathers for delivery to the plaintiffs in London, and the master signed and gave to the shippers in respect of the said bales bills of lading, which were in the following words and figures:

Shipped in good order and well-conditioned, by Scheumann, Spregel, and Co., in and upon the good steamship, called the *Peter der Grosse*, whereof is master for the present voyage, H. Godtman, now lying at anchor in the harbour of St. Petersburgh, and bound for London:

W.D. 1180/1186,	7 bales,	down,	gross weight, 35p. 38lb.
G.D. 1336/1345,	10 bales,	,,	,, 51p. 15lb.
P. 1670/1674,	5 ,,	feathers	,, 25p. 27lb.
1104/1106,	3 ,,	,,	,, 15p. 16lb.

being marked and numbered as in the margin, which are to be delivered in the like good order, and well-conditioned at the aforesaid port of London (the act of God, the Queen's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the seas, rivers, and steam navigation of whatever nature and kind soever excepted), unto Messrs. Schœtensack, Riecken, and Co., or to their assigns, he or they paying freight for the said goods, at 70s. sterling per ton, gross weight, in full with prisage and average accustomed. In witness whereof the master and purser of the said ship hath signed five bills of lading all of this tenor and date, one of which bills being accomplished, the others to stand void.

Not accountable for accidents from fire at sea or on shore. Weights, contents, and value unknown. These goods, if not taken out within twenty-four hours after the ship's arrival, the master to be at liberty to enter and land the same at the consignee's risk and expense.

Dated in St. Petersburg, the 8th June 1874.

H. Godtman.

The ship had a very long passage from St. Petersburg to London. On her arrival at the latter port, the bales were discharged from the ship by means of lighters, and were at once examined, and were found to be stained and damaged by some offensively smelling liquid, the exact character of which was not ascertained, some persons supposing it to be oil of tar, others some sort of spirit; portions of the feathers and down in the bales were wetted with the liquid and completely spoiled. When the bales were landed, they were marked on the outside so that the lighterman in giving his receipt for them made an entry therein of "bales dirty." The bales were sold at a loss of 156*l.* on their proper value of 840*l.* 12*s.* 6*d.* Evidence was given on behalf of

the plaintiffs to show that the bales could not have been damaged by internal heating or other inherent vice, and that they sustained no injury in the lighters. From the defendant's evidence it appeared that the damaged feathers and down were stowed in the forehold on the top of some bales of wool, and were covered with sail cloth; also that although there was some strong spirit in the afterhold, there was no part of the cargo in the forehold of the ship that could have produced the damage complained of. The ship on her voyage was compelled to put into Revel, having broken her propeller. Between Cronstadt and Revel the ship carried passengers who lived down in the forehold on the top of the feathers. Evidence was also given for the defendants that no other goods in the ship were in any way damaged, and that the feathers were no worse damaged than feathers arriving by steamer from Russia usually are. The defendants alleged that the damage was not occasioned by any negligence, breach of duty, or contract on the part of themselves or their servants, but by reason of inherent vice in the feathers and down and by reason of improper curing; and that the goods were properly stowed and preserved on board ship.

The cause was heard before the learned judge of the Admiralty Court on the 22nd July 1875, and he then delivered the following judgment:—

Sir R. Phillimore.—This suit relates to seventeen bales of down and eight bales of feathers which were placed on board the Russian vessel *Peter der Grosse* in the month of June 1874. There is no question whatever as to the fact that these bales were taken out of the ship in a bad condition—in what one of the witnesses has called "a not merchantable condition." The question which the court has to determine, upon the evidence before it, is, whether the plaintiff has succeeded in maintaining the position that he put these bales on board in good order, and that therefore the damage must have occurred from some cause with which he may not be acquainted, but which could not arise from the state of the cargo itself when put on board the vessel. Now, the bill of lading says, "Shipped in good order and well-conditioned by Scheumann and Spregel, in and upon the good steamship called the *Peter der Grosse*, whereof is master for this present voyage H. Godtmann, now lying at anchor in the harbour of St. Petersburg, and bound for London;" and then there follows the numbers of the bales of down and of feathers, and then the bill of lading goes on, "which are to be delivered in the like good order and well-conditioned at the aforesaid port of London:" then the usual exceptions, "unto Messrs. Schœtensack, Riecken, and Co., or to their assigns," and there is the freight, and in the margin is written, "Not accountable for accidents from fire at sea or on shore; weight, contents, and value unknown." Now the vessel made a very long voyage; she was six weeks before she reached the port of her destination, and she was detained by the necessity of repairs at Revel for 17 days. The evidence as to the state of these bales when they were taken out is important, not only with respect to the latter part of the case, but in respect to the former part. Soon after their arrival early intelligence was given by the consignees of their objection to the state of the cargo. I need not enter into the details of the letters which passed as to the state of these goods when they arrived. One fact is very clearly established by all the witnesses, and is indisputed in this case—that the feathers were of the very best class, and the down also, that could be imported. They were surveyed by two gentlemen experienced in the business, one appointed by the consignees and one by the ship-owners. Mr. Brookes was the person appointed by the consignees, and he surveyed the feathers and down in company with another gentleman whose name was Blumenthal, and he gives evidence that a clerk was present from Messrs. Bailey and Leetham, who were the representatives of the owners of the ship during the time, and he put in a report. The essential part of this report was that the bales emitted a very bad smell, which smell was, to use the expression of the witness, "foreign to the natural smell of feathers," and, in his opinion, also the damage to them must have come from the outside. He said there was no appearance of heat; the outside of the canvas in which these feathers were placed was more or less dirty. I think it was stated that they were bags 5ft. high, or thereabouts, and 3ft. broad. He said they were stained with a black stain, and they also smelt more or less. That is the substance of the evidence given by Mr. Brookes. Mr. Blumenthal, who, as I have said, was appointed on behalf of the shipowners, says that he deals in down and feathers, and he surveyed these bales, and that the outside was as if some liquid had been poured over them, while the inside had an offensive smell more or less through it; certainly not a natural smell, something quite strange to the article. And then another witness was examined, also conversant with what is called the feather business, a gentleman of the name of Worrall, who said he imported a great deal, and that he bought a parcel of the feathers from the plaintiff in this case by sample. He afterwards refused to take the feathers on account of the condition in which they were. He said that he got a notice that the goods were damaged; that he went down to the quay the next morning, and found every bag stained more or less, some in the side, and some in the middle; he put his hand nearly through, and he says the damage was from the outside decidedly; it certainly was not damaged by the inherent heating. He proceeded to say that the smell was a very bad one, and certainly one not natural to the feathers, and I think he said from 8in. to 12in. in the interior was quite wet, he refused to accept the feathers; he said that the smell of heat in feathers would be quite different. He said, in cross-examination, that he put his hand in, and that they were of an oily or greasy appearance. The next witness of importance is, I think, the lighterman who fetched the bales from the *Peter der Grosse*, and he, when he received these goods, called attention to their condition, because he said they looked as if they had lain in mud, and when he gave his receipt for them, it was in these words: "Received the within, in good condition, into barge *Result*, Number 1765, to be landed at the Custom House, bales dirty;" then he delivered them to Mr Mackenzie, at the Custom House quay, who was manager to Mr. Dudley Smith at the quay. Mr. Mackenzie said the goods were landed about the 27th of July; that the outside of the bales was dirty and damp, they looked as if they had been drawn across the deck; the cause of this condition was recent, and they

were not externally in a merchantable condition. He did not examine the inside. It is clear, therefore, that these goods were taken out in an unmerchantable condition, and that they were damaged externally as well as internally, that the damage was recent, that the damage was not one which would be naturally inherent in any goods in the feathers themselves, and that the feathers and down themselves were of the very first quality. Now, these points being established, it becomes important to consider what evidence is furnished by the bill of lading, as to their condition when they are put on board, and I agree with the observation which has been made by Mr. Clarkson, that, 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 meet the eye, and externally, they were placed in good order on board this ship. Well, then, if that be so, if the plaintiff has shown by *primâ facie* evidence that, having put these bales and bags in good order on board the ship, and they were then taken out in bad order, both externally and internally, then I agree with the observation which was made that it is not incumbent on him to show either how or when the damage was done. It is for the defendant to displace the evidence, which certainly shows that it did not occur from any internal mischief inherent in the feathers or the down, and was not one which had any external appearance when they were put on board the ship. It has been asserted that the shipowner has proved the impossibility of the mischief having happened on board the ship; but it does not appear to me that the evidence goes to that length. There were spirits of strong smell on board this ship; there were passengers who, for a short time, were living in the vicinity of this cargo, in and amidst the cargo; the vessel was seventeen days at Revel, and the cargo was discharged, I think, according to the evidence, all about the same time, and there was a leaking cask, or casks, among the cargo. But whether these circumstances do or do not suggest any reason for the damage which unquestionably happened to these goods, I think that the plaintiffs have discharged the burthen of proof that lay upon them, and it was for the defendants, if they could, to displace that burthen of proof by showing that when the goods were put on board the vessel they were in a bad condition, internally, and that the bad condition showed itself at the time in the external state of the packages in which the goods were placed. I need not repeat what I have already said, that rebutting evidence has not been furnished, but that the evidence which has been given leads me to the conclusion, from the facts before me, that the plaintiffs have established their case, that these goods were put on board the vessel in good order and condition, and taken out of that vessel in bad order. I therefore pronounce for the prayer of the petition, and I must order the documents and vouchers to be left with the registrar and merchants to report the amount of damage done.

A decree was accordingly made in favour of the plaintiffs, and from this decree the defendants appealed.

A. L. Smith (*C. Hall* with him) for the appellants. — The master by inserting the words "weight, contents, and value unknown" in the bill of lading refuses to sign a clear bill, and asserts that he knows nothing of the condition of the goods. It is consistent with the evidence that the goods were damaged before shipment. When the consignee shows that the goods are delivered damaged he proves, no doubt, a *primâ facie* case, and the shipowner must show that nothing on board could have caused the injury which the consignee states the goods to have received; but on the shipowner giving such proof the onus goes back to the consignee, who must show that the shipowner did the damage. A shipowner is not estopped from showing that the goods carried by him are injured out of the ship, although his bill of lading states them to have been shipped in good condition, provided it contains the words "weight, contents, and value unknown."

Jessel v. *Bath*, L. Rep. 2 Ex. 267;
Lebeau v. *The General Steam Navigation Company*, *ante*, vol. 1, p. 435; L. Rep. 8 C. P. 89; 27 L. T. Rep. N. S. 447.

The consignee has no better right than the shipper, who alone, before the Bills of Lading Act could have sued, and the master signing such a bill of lading would have been at liberty to show as against the shipper, that although the goods were shipped apparently clean they came in contact with nothing on board the ship that could account for the damage. It has been shown here that the injury to the goods was not of a nature which could have been caused on board the ship, more especially as these were the only goods damaged out of the whole cargo.

E. C. Clarkson and *Lanyon* for the respondents were not called upon.

James, L.J.—The judgment of the court below must be confirmed.

The appellants have sought to contend that because the master signed a bill of lading containing the words "weight, contents, and value unknown," it must be taken that he repudiated anything like an admission as to their condition when shipped, but I do not think that these words have such a meaning; the bill of lading taken together must be considered to admit that the goods when shipped were, as far as they could be seen, in good order, and by adding the words above quoted, the master does no more than say that he does not admit anything as to the contents of the packages, which he cannot see. He does admit, however, that the goods appear to be in good condition outside, and this throws upon the appellants the onus of proving that the damage did not arise whilst the goods were on board the ship or in their custody, or that it comes within the exceptions of the bills of lading. For the purpose of doing this they have attempted to show that there was nothing on board the ship that could have occasioned damage of the nature sustained, but looking to the evidence as to the passengers, I do not think that this is made out. Again, they contended that the damage could not have been done on board ship because only this consignment was damaged, whereas, if material of the nature causing the damage had been in the ship, other goods must likewise have been damaged. But there is no force in this argument, because these bales were all together, and it was most probable that the cause of the damage might affect a particular lot of bales. Many causes of damage are

necessarily purely local, as in the case of ink spilt over books; it is true a whole cargo may be damaged by a leak, or by some portion rotting, and affecting the rest, but saturation by an oily substance may very well be local, and affect only a portion, especially if the amount of damaging matter has been small. I am of opinion that the appellants have failed to show that this damage was not done on board ship, and in fact the evidence satisfies me that it was done on board the ship and not outside of it. The appeal will be dismissed with costs.

Mellish, L.J., and Baggallay, J.A., concurred.

Appeal dismissed.

Solicitors for the appellant, *Plews, Irvine,* and *Hodges.*

Solicitors for the respondent, *Stibbard* and *Cronshey.*

APPEAL FROM THE COMMON PLEAS.

Reported by Gilbert G. Kennedy, Esq., Barrister-at-Law.

Jan. 24 *and May* 29, 1876.

(Before Cockburn, C.J., James and Mellish, L.JJ., Mellor, J., and Cleasby, B.)

Nugent *v.* Smith.

Act of God—Carrier by water—Damage to mare—Accident caused partly by storm, partly by terror of animal—Liability of owner of ship not a general ship.

A loss occasioned by the act of God is a loss arising from and occasioned by the agency of nature which cannot be guarded against by the ordinary exertions of human skill and prudence so as to prevent its effect.

The plaintiff delivered to the defendant in London a mare to be carried by the defendant by steamer from London to Aberdeen, between which places the defendant ran steamers as a common carrier. A storm arising during the voyage, the mare was so injured that she died. The jury found that the injury was caused partly by excessive bad weather and partly by the fright and struggling of the mare, and they negatived all negligence on the part of the defendant.

Held, reversing the decision of the Common Pleas, that upon these findings of the jury the defendant was not liable.

Per Cockburn, C.J.—There is no authority for the proposition, nor is there any trace of a special custom of the Realm, i.e., common law, that all carriers by sea are subject to the liability of a common carrier, whether by sea or land.

This was an action against the defendant as secretary of a steamboat company, who advertised and ran a line of steamers from London to Aberdeen. The plaintiff delivered to the company in London two horses to be carried to Aberdeen. The horses were shipped without any bill of lading. At a part of the voyage, during rough weather, one of the animals, a mare, was injured to such an extent that she died, and the plaintiff brought the action for damages occasioned by the loss.

The action was tried before Brett, J., at the sittings in London after Hilary Term 1874, when the following questions were left to the jury:

1. Was the injury to the mare caused by negligence of the defendant's servants, either in preparing for bad weather or in attempting to save the mare from the consequences of bad weather? Answer, No.

2. Or, was the injury caused solely by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants? Answer, No.

3. Or was the injury caused solely by the perils of the sea, *i.e.*, by more than ordinary rough weather, without any negligence of the defendant's servants, or any fright and consequent struggling of the mare?—Answer, No.

4. Or was it caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants?—Answer, Yes.

5. Were there any known means, though not ordinarily used in the carriage of horses by people of ordinary care and skill, by which the defendant could have prevented the injury to the mare? The jury were unable to agree upon this question.

Upon the answers to these questions the learned judge entered a verdict for the defendant, with leave to the plaintiff to move to enter the verdict for him. In Easter Term 1874, a rule *nisi* was granted, against which cause was shown in Easter Term 1875. The considered judgment of the court (Brett and Denman, JJ.) was, on 2nd Nov. 1875, delivered by Brett, J., in favour of the plaintiff (*ante*, p. 87; 33 L. T. Rep. N. S. 731; L. Rep. 1 C. P. D. 19).

Against this judgment the defendant now appealed.

Benjamin Q.C., *Holl,* and *Douglas Walker* for the defendant, the present appellant.—We do not appeal against that part of the judgment of the court below which decides that the defendant is liable as a common carrier, but we contend that by the act of God the defendant is excused from legal responsibility. In order to come within the legal definition of the act of God, the act must be one from which all human intervention is absent. The doctrine of the common law, that a common carrier by water is liable as an insurer, is founded on public policy, because if any human intervention, however irresistible, were allowed to be pleaded by him as an excuse for loss or injury, there would be no safety to the person entrusting him with goods; the doctrine does not extend to loss occasioned by the act of God or by the King's enemies, for the reason that such case would preclude the possibility of any collusion of the carrier's part. Such is the theory of the law. [Cockburn, C.J.—Only as confined to English law]. It is founded on the Roman law. [Cockburn, C.J.—The Roman law only contains *nautæ, caupones, et stabularii*; but must we not look at a cognate matter, and see how far a storm, however wild, is covered by the words "perils of the seas" in a policy of marine insurance?] There has been a distinction between perils of the sea and the act of God, in this way, that perils of the seas are what could be averted; for instance, if in ordinary bad weather a ship strains and water gets through her seams so that the goods get injured, the owner is liable; but if a wave, rushing on board, breaks into a hatchway, that is within the sense of the exception an act of God. The reason of the rule is that it does not apply where human collusion is possible, and if the carrier has not neglected every human precaution he is not liable. The leading

case is *Forward* v. *Pittard* (1 Term Rep. 27), where judgment was delivered by Lord Mansfield. That case is followed by the case of *The Trent and Mersey Navigation Company* v. *Wood* (3 Esp. 127; 4 Doug. 287), also before Lord Mansfield. The result of the authorities is summed up by Story on Carriers, ss. 510, 511. [James, L.J.—Supposing the horse had been put in a padded box?] The duty of the carrier is not so to pack the goods that no harm can come to them; as, for instance, in order to prevent wet reaching goods, is he bound to pack them in waterproof coverings? He is not bound to use extraordinary means. His liability is only to use reasonable care. Even in the case of fine weather, such circumstances might be found as would amount to the act of God, and which would therefore exonerate the carrier from liability; as, for instance, if calm weather delays a ship so that fresh meat carried by her becomes corrupt, the carrier is excused: (*Taylor* v. *Dunbar*, L. Rep. 4 C. P. 206.) [Mellish, L.J.—If injury resulting from the act of God is an excuse, as well as injury resulting from the inherent character of the thing, the combined action of the two is an excuse.] Such is our contention here. The guiding rule in determining what is the act of God is that no human agency has been concerned with the act. If the moving cause has been from natural causes, and there has been no contributory negligence on the part of man, the carrier is excused. The following authorities were also on this point referred to in the argument:

Angell on Carriers, sect. 156, note;
Amies v. *Stephens*, 1 Strange 128;
Colt v. *M'Mechen*, 6 Johnson's Reports of the Supreme Court of New York, 159;
Abbott on Shipping, 8th edit., 345, 382;
McArthur v. *Seers*, 21 Wendell's New York Reps. 190;
Williams v. *Grant*, 1 Day Conn. Rep. 487;
Nicholls v. *Marsland*, 33 L. T. Rep. N. S. 265; L. Rep. 10 Ex. 255; 44 L. J. 134, Ex.;
1 Parsons on Shipping, 253.

Secondly, the accident was owing to the inherent qualities of the animal. An insurer is not liable if injury is caused by the inherent quality of the thing:

Taylor v. *Dunbar*, (*ubi sup.*);
Kendall v. *South-Western Railway Company*, 26 L. T. Rep. N. S. 735; L. Rep. 7 Ex. 373; 41 L. J. 184 Ex.;
Blower v. *Great Western Railway Company*, L. Rep. 7 C. P. 655;
Jones on Bailments, App. 21;
Clark v. *Rochester and Syracuse Railway Company*, 4 Kernan's (American) Rep. 570;
Smith v. *Newhaven Railway Company*, 12 Allen 531.

Cohen Q.C. (*Lanyon* with him) for the plaintiff.—If the common law presses harshly on the carrier, he may protect himself by a bill of lading; he is not liable for injury occasioned by the act of God or the Queen's enemies, but the onus is on him to show that the loss was so occasioned, and unless he discharges himself from such onus, he is liable. The question is, what is the meaning of the phrase *actus Dei?* It is not sufficient to show that the intervention of man is absent. Here there was no more intervention than in a case where a bale of cotton catches fire by spontaneous combustion, and sets fire to adjoining bales; the carrier would be exonerated from liability for the original bale, but not for the others. Where damage was done to goods on board a ship by rats, the shipowner was held liable for such damage, although he had kept cats on board: (*Laveroni* v. *Drury*, 8 Ex. 166; 22 L. J. 2, Ex.) The tendency of rats to bite wood and the tendency of a bale on fire to set fire to other bales is not the intervention of the hand of man. The act must not only be the act of a higher power in order to exonerate the carrier, but it must be an act that is sudden, overwhelming, and extraordinary. The common law rule by which the carrier by sea is rendered an insurer was founded by the Roman law at a time when owners navigated their own ships, and therefore as the goods were entirely under the control of the shipowner and his servants, it was impossible for the owner of the goods to enter into any question of how injury was caused to the goods while under the care of the shipowner. Therefore it was in order to prevent litigation, not collusion, that the common law rule came to be what it is at the present day. That was before insurance. Now the shipowner can protect himself by exceptions in the bill of lading. He is not liable for perils of the sea: (*Lawrence* v. *Aberdein*, 5 B. & Ald. 107; *Gabay* v. *Lloyd*, 3 B. & C. 793.) All the American jurists and the greatest English judges have laid it down that it is not the act of God unless it is something unusual, sudden, and certain, and one that no care operating between the cause and the effect could provide against. [James, L. J.—If between the commencement of the storm and the happening of the injury, the placing of two men at the head of the horse could have prevented the accident, then you say that the act was not in a legal sense the act of God?] Quite so. Kent's Comm. 8th edit. pp. 784, 785. The evidence shows that there was plenty of human intervention—how difficult for the plaintiff to show whether such intervention was wise or not!

Benjamin, Q.C. in reply,—The act of God must first be established, then comes in the human intervention; the human intervention must not be practically impossible but physically impossible. The evidence shows that all care was taken.

Cur. adv. vult.

May 29.—The following judgments were delivered.

Cockburn, C.J.—This case involves a question of considerable importance as regards the law relating to carriers by sea, but the facts are few and simple.

The plaintiff being the owner of two horses, and having occasion to send them from London to Aberdeen, shipped them on board a steamship belonging to the company of which the defendant is the representative, plying regularly as a general ship between the two ports. The horses were shipped without any bill of lading. In the course of the voyage a storm of more than ordinary violence arose, and partly from the rolling of the vessel in the heavy sea, partly from struggling caused by excessive fright, one of the animals, a mare, received injuries from which she died. It is to recover damages in respect of her loss that this action is brought. The jury, in answer to a question specifically put to them have expressly negatived any want of due care on the part of the defendant either in taking proper measures beforehand to protect the horses from the effect of tempestuous weather, or in doing all that could be done to save them from the consequences of it after the storm had come on. A further question put to the jury was whether there were any known means, though

not ordinarily used in the carriage of horses by people of ordinary care and skill, by which the defendant could have prevented the injury to the mare, but to this question the jury returned no answer.

The question is whether, on this state of facts, the shipowners are liable. For the defendant it was insisted that the storm, which was the primary and in a partial degree the proximate cause of the loss, must be taken to have been an "act of God" within the legal meaning of that term, so as to afford immunity to the defendants as carriers (all due care having been taken to convey the mare safely) from liability in respect of the loss complained of, and the question to be determined is whether this contention is well founded.

The judgment of the Common Pleas Division in favour of the plaintiff, as delivered by Brett, J., involves, if I rightly understand it, the following propositions: First, that the Roman law relating to bailments has been adopted by our courts as part of the common law of England; secondly, that by the Roman law all ships, whether common carriers or not, are equally liable for loss by inevitable accident; thirdly, that such is the rule of English law as derived from the Roman law, and as evidenced by English authorities; fourthly, that to bring the cause of damage or loss within the meaning of the term "act of God," so as to give immunity to the carrier, the damage or loss in question must have been caused directly and exclusively by such a direct, and violent, and sudden, and irresistible act of nature as the defendant could not, by any amount of ability, foresee would happen; or if he could foresee that it would happen, he could not by any amount of care and skill resist so as to prevent its effect; fifthly, that notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, the defendant has in this case failed to satisfy the burden of proof cast upon him so as to bring himself clearly within the definition, as it is impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred. In no part of this reasoning am I able to concur.

In the first place, I think it right to observe, that as the vessel by which the mare was shipped was one of a line of steamers plying habitually between given ports, and carrying the goods of all comers as a general ship, and as from this it necessarily follows that the owners were common carriers, it was altogether unnecessary to the decision of the present case to determine the question so elaborately discussed in the judgment of Brett, J., as to the liability of the owner of a ship not being a general ship, but one hired to carry a specific cargo on a particular voyage, to make good loss or damage arising from inevitable accident.

The question being, however, one of considerable importance, though its importance is materially lessened by the general practice of ascertaining and limiting the liability of the ship owner by charter-party or bill of lading, and the question not having before presented itself for judicial decision, I think it right to express my dissent from the reasoning of the court below, the more so as for the opinion thus expressed I not only fail to discover any authority whatever, but find all jurists who treat of this form of bailment carefully distinguish between the common carrier and the private ship. Parsons, a writer of considerable authority on this subject, defines a common carrier to be "one who offers to carry goods for any person between certain termini, and on a certain route." He is bound to carry for all who tender to him goods and the price of carriage, and insures these goods against all loss, but that arising from the act of God, or the public enemy, and has a lien on the goods for the price of the carriage." "If either of these elements is wanting we say the carrier is not a common carrier, either by land or by water. If we are right in this," he adds, "no vessel will be a common carrier that does not ply regularly, alone or in connection with others, on some definite route, or between two certain termini" (1 Parsons' Shipping 245). Story seems to be of a like opinion, "When it is said," he observes, "that the owners and masters of ships are deemed common carriers it is to be understood of such ships as are employed as general ships, or for the transportation of merchandise for persons in general, such as vessels employed in the coasting trade, or foreign trade, or on general freighting business for all persons offering goods on freight for the port of destination. But if the owner of a ship employs it on his own account generally, or if he lets the tonnage, with a small exception, to a single person, and then for the accommodation of a particular individual, he takes goods on board for freight, not receiving them for persons in general, he will not be deemed a common carrier, but a mere private carrier" (Story on Bailments, sect. 501). So Angell, speaking of shipowners as common carriers, says, "When it is said that the owners and masters of ships are treated as common carriers, it is to be understood of such ships as are employed for the transportation of merchandise for all persons indifferently. Should the owner of a ship employ it on his own account, and for the special accommodation of a particular individual take goods on board for freight not receiving them for all persons indifferently, he does not come within the definition of a common carrier, he not holding himself out as engaged in a public employment." But the learned author does not say what would be the case where a shipowner holds himself out as ready to send his vessel with cargo to any place that may be agreed on, but on a private bargain and not as a general ship.

In the absence of all common law authority for the proposition that by the law of England every carrier by sea is subject to the same liability as the common carrier, the authority of the Roman law is invoked, but this law on which so much stress is laid in the judgment of the Court of Common Pleas affords no support to this doctrine. In the first place it is a misapprehension to suppose that the law of England relating to the liability of common carriers was derived from the Roman law, for the law relating to it was first established by our courts with reference to carriers by land on whom the Roman law, as is well known, imposed no liability in respect of loss beyond that of other bailees for reward. In the second place the Roman law made no distinction between inevitable accident arising from what in our law is termed the "act of God," and inevitable accident arising from other causes, but, on

the contrary, afforded immunity to the carrier without distinction whenever the loss resulted from *casus fortuitus*, or as it is also called *damnum fatale*, or *vis major*, unforeseen and unavoidable accident. The language of the Prætorian Edict as given in the digest, might, indeed, if it stood alone, lead to the supposition that the liability of the carrier by sea was unlimited. "Ait prætor, nautæ, caupones, stabularii quod cujusque salvum fore receperint, nisi restituant, in eos judicium dabo." (Dig. IV., Lib. 9, pro.) But, Ulpian, who gives the words quoted in his treatise on the edict, explains this meaning: "Hoc edicto omnimodo qui recepit tenetur, etiam si sine culpâ ejus res periit vel damnum datum est nisi si quid damno fatali contingit. Inde labeo scribit si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari. Idem erit dicendum si in stabulo aut in cauponâ vis major contigerit." In the one case the absence of *culpa* makes no difference. In the other it does. No difference of opinion exists among civilians as to the law on this subject. There is no doubt that inevitable accident, "damnum fatale," "casus fortuitus," "vis major," for these are synonomous terms, exempt the carrier from liability. "Casus fortuitus," says Averani, "appellatur vis major, vis divina, fatum, damnum fatale, fatalitas." Such is the Roman law, and such is the existing law of all the nations which have adopted the Roman law, France, Spain, Italy, Germany, Holland, and to come nearer home, Scotland. It is embodied in the Code Civile of France. Treating of carriers by land and by water, the Code says (art. 1754): "Ils sont responsable de la perte, et des avaries des choses qui leur sont confiées, à moins qu'ils ne prouvent qu'elles ont été perdues et avaries par cas fortuit ou force majeure." That such is the law of Scotland we learn from what is said in Erskine's Institutes (pp. 591, 592, *n*), from which it appears that not only storm and pirates, but also housebreaking and fire constitute *damnum fatale*, which will exonerate the innkeeper or carrier. See also the appendix to Stair's Institutes, by More (p. 57).

But not only does this essential difference between the Roman law and our own suffice to show that so far as the liability of carriers is concerned, our law has not been derived from the Roman; as matter of legal history we know that the more rigorous law of later times, first introduced during the reign of Elizabeth, was in the first instance established with reference to carriers by land, to whom by the Roman law no such liability attached. It was not till the ensuing reign, in the 11th of James I., that it was decided, in *Rich* v. *Kneeland* (3 Cro. Jac. 330, Hob. 17), that the common hoyman or carrier by water stood on the same footing as a common carrier by land, and rightly, for in principle there could be no difference between them. The next case in point of date (and it is the first case in the books) in which the liability of the owner of a seagoing ship comes in question, is the well-known case of *Morse* v. *Slue* (1 Ventris, 190, 238), in which it was held, after a trial at bar, that where a ship, lying in the Thames, was boarded by robbers, who took the plaintiff's goods, which had been loaded on board the vessel, out of her, in an action brought against the master, the plaintiff was entitled to recover. And it certainly surprises me that this case should be relied on as an authority for the position that the liabity of a common carrier attaches to the shipowner or master where the ship is not a general ship; for though it is not expressly said that the ship in question was a general ship, which has led to the somewhat hasty assumption that she was not, the internal evidence shows conclusively that she was so. In the first place the declaration is laid on the custom of the realm, and we know that the only custom to which effect had, up to that time, been given, and that quite in recent times, was in respect of common carriers by land, and still more recently in respect of common carriers by water. Secondly, Hale, C.J., in giving judgment, puts the case as on all fours with that of a common carrier or hoyman and nowhere says that it is to be treated as that of a private ship. "He who would take off the master from this action," says the Chief Justice, "must assign the difference between it and the case of a hoyman, common carrier, or inn holder." Doubtless the counsel for the defendant, if the case had been distinguishable on the ground that the vessel was not a common ship, would have pointed out the difference, and, at all events, taken the point; and in the corresponding report of the case in Levinz (2 Lev. 69), the case of *Rich* v. *Kneeland* having been referred to, the Chief Justice is reported to have said that the case "differed not from that of the hoyman." But in that case of *Rich* v. *Kneeland* we know that the barge or hoy was a common vessel, and it is obvious that if in *Morse* v. *Slue* the vessel had been a private one, instead of treating the case as identical with that of the common hoyman, the Chief Justice would have put it on the ground that all sea going vessels were subject to the larger liability. But, besides this, there is a circumstance which appears to have been overlooked, which is a decision to show that the ship must have been a general ship. It is mentioned in the report in Ventris that the ship was a vessel of 150 tons burden bound for Cadiz, while the goods shipped by the plaintiff consisted of three trunks, containing 400 pairs of silk stockings and 174lb. of silk. It seems idle to suppose that a ship of that size would have been hired on such a voyage for the purpose of carrying the plaintiff's three trunks as her entire cargo. There seems, therefore, no reasonable doubt that the ship was a general ship. In like manner in the case of *Dale* v. *Hall* (1 Wilson, 281), although the declaration was not upon the custom of the realm, but upon the implied obligation to carry safely, it appearing that the defendant was a shipmaster or keelman who carried goods from port to port, the court decided in favour of the plaintiff, expressly on the liability of the defendant as a common carrier (though the latter was prepared to show an absence of negligence on his part), on the ground that the allegation of the duty of a common carrier "to carry safely" was equivalent to a declaration on the custom of the realm. In the subsequent case of *Barclay* v. *Cuculla y Guna* (3 Doug. 389), which was a case where as in *Morse* v. *Slue* goods had been forcibly taken by thieves from a ship lying in the Thames on the objection being taken on behalf of the defendant that he was not charged in the declaration on the custom of the realm, while there was neither express undertaking or negligence to make him liable otherwise, the answer of the court is "that there was no question at the trial as to the

ship being a general ship," and Lord Mansfield adds that it was impossible to distinguish the case from that of a common carrier. Thus far the reported cases as to carriers by sea have been cases of general vessels. The next case in point of time, that of *Lyon* v. *Mells* (5 East. 428), was one in which the defendant kept sloops for carrying other persons' goods for hire, and also lighters for carrying such goods to and from his sloops, as well as to and from the sloops of other owners. One of these lighters, in which goods of the plaintiff were being conveyed on board a sloop, proved leaky, and took in a quantity of water, and the goods became seriously damaged, and it was also found as a fact that the goods had been negligently stowed. The defendant relied on a notice that he would not be answerable for any loss or damage unless occasioned by want of ordinary care of the master and crew, in which case he would pay 10 per cent. on the loss or damage, but that persons desirous of having their goods carried free from any risk in respect of loss or damage, whether arising from the act of God, or otherwise, might have them so carried on entering into an agreement to pay extra freight in proportion to the risk. The question was whether, no extra freight having been paid, the defendant was protected by this notice from liability for more than 10 per cent. of damages. Nothing in reality turned upon his being a common carrier, or subject to the liability of a common carrier. Some discussion, it is true, took place on the argument as to whether the defendant was a common carrier or not; but Lord Ellenborough, in giving judgment, put the matter on the right footing, namely, that a carrier by water impliedly engages that his vessel should be water tight, an obligation obviously applicable to all carriers, whether common carriers or otherwise, and that the defendant could not be taken to have intended by such a notice to claim immunity in respect of his own breach of contract, but only immunity above 10 per cent. for loss or damage arising from the negligence of the master and crew, and total immunity in respect of loss or damage from the act of God or other cause unless extra freight was paid. The owner, no doubt, thought his liability that of a common carrier, and, as Lord Ellenborough points out, sought to protect himself accordingly; but Lord Ellenborough nowhere treats him as such, but decides the case on a general ground applicable to all carriers, whether common or private. Yet this case is relied on as showing that a man who lets out a lighter or ship not to carry the goods of general comers, but to a particular individual on a specific job or contract, if his business be to let out lighters or ships, is a common carrier, or is at all events subject to an equal degree of liability. The last case is that of the *Liver Alkali Company* v. *Johnson* (*ante*, vol. 1, p. 380; vol. 2, p. 332; 31 L. T. Rep. N. S. 95; L. Rep. 9 Ex. 338; 43 L. J., 216, Ex.), in which the defendant was a barge owner and let out his vessels for conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply within any fixed termini, but the customer fixed in each particular case the points of arrival and departure. In an action against the defendant by the plaintiffs for not safely and securely carrying certain goods, the Court of Exchequer Chamber held, affirming the judgment of the Court of Exchequer, that the defendant was a common carrier, and liable as such. Mr. Justice Brett, differing from the majority, held that the defendant was not a common carrier, but asserting the same doctrine as in the judgment now appealed from, held him liable upon a special custom of the realm attaching to all carriers by sea—of which custom, however, as I have already intimated, I can find no trace whatever. We are, of course, bound by the decision of the Court of Exchequer Chamber, in the case referred to, as that of a court of appellate jurisdiction, and which therefore can only be reviewed by a court of ultimate appeal; but I cannot help seeing the difficulty which stands in the way of the ruling in that case, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such vessel or vehicle if required to furnish it. At all events, it is obvious that the decision of the Court of Exchequer Chamber having proceeded on the ground that the defendant in that case was a common carrier, the decision is no authority for the position taken in the court below that all shipowners are equally liable for loss by inevitable accident. It is plain that the majority of the court did not adopt the view of Brett, J.

While it does not lie within our province to criticise the law we have to administer, or to question its policy, I cannot but think that we are not called upon to extend a principle of extreme rigour peculiar to our own law, and the absence of which in the law of other nations has not been found by experience to lead to the evils for the prevention of which our law was supposed to be necessary, further than it has hitherto been applied. I cannot, therefore, concur in the opinion expressed in the judgment delivered by Brett, J., that by the law of England all carriers by sea are subject to the liability which by that law undoubtedly attaches to the common carrier whether by sea or by land.

But there being no doubt that in the case before us the shipowner was a common carrier, we have now to deal with the question on which the decision turns, namely, whether the loss was occasioned by what can be properly called the "act of God."

The definition which is given by Brett, J. of what is termed in our law the "act of God" is that "it must be such a direct, and violent, and sudden and irresistible act of nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted." The judgment then proceeds, "We cannot say, notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the burden of proof cast upon him so as to bring himself clearly within the definition. It seems to me impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it or that no human ability could prevent injury to a frightened horse in such weather as occurred." The exposition here given appears to me far too

wide as regards the decree of care required of the shipowner, and as exacting more that can properly be expected of him. It is somewhat remarkable that previously to the present case no judicial exposition has occurred of the meaning of the term "act of God," as regards the degree of care to be applied by the carrier in order to entitle himself to the benefit of its protection. We must endeavour to lay down an intelligble rule.

That a storm at sea is included in the term "act of God" can admit of no doubt whatever. Storm and tempest have always been mentioned in dealing with this subject as among the instances of *vis major* coming under the denomination of "act of God." But it is equally true that it is not under all circumstances that inevitable accident arising from the so-called "act of God," will, any more than inevitable accident in general by the Roman and continental law, afford immunity to the carrier. This must depend on his ability to avert the effects of the *vis major*, and the degree of diligence which he is bound to apply to that end. It is at once obvious, as was pointed out by Lord Mansfield in *Forward* v. *Pittard* (1 T. R. 27) that all causes of inevitable accident, "*casus fortuitus*," may be divided into two classes, those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term "act of God" to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term "act of God" is properly applicable. On the other hand, it must be admitted that it is not because an accident is occasioned by the agency of nature and therefore by what may be termed the "act of God" that it necessarily follows that the carrier is entitled to immunity. The rain which fertilises the earth, and the wind which enables the ship to navigate the ocean are as much within the term "act of God" as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier, who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in the former. For here another principle comes into play. The carrier is bound to do his utmost to protect the goods committed to his charge from loss or damage, and if he fails herein becomes liable from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so. If by his default in omitting to take the necessary care, loss or damage occurs, he remains responsible though the so-called "act of God" may have been the immediate cause of the mischief. If the ship is unseaworthy, and hence perishes from the storm which it otherwise would have weathered; if the carrier, by undue deviation or delay exposes himself to the danger which he would otherwise have avoided, or if, by his rashness, he unnecessarily encounters it by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of it. This being granted the question arises as to the degree of care which is to be required of him to protect him from liability in respect of loss arising from the act of God.

Not only, as has been observed, has there been no judicial exposition of the meaning of the term "act of God," as regards the degree of care to be applied by the carrier in order to entitle himself to its protection, but the text writers, both English and American, are for the most part silent on the subject, and afford little or no assistance. As we are here on common ground with the civilians, so far as one head of inevitable accident is concerned, it may be of use while endeavouring more clearly to fix the limits of that class of inevitable accidents which comes under the head of "act of God," to turn to their views on that subject with reference to inevitable accidents in general. As the result of the different instances of *casus fortuitus*, which occur in the Digest, Viminius gives the following definition: "Casum fortuitum definimus omne quod humano cæptu prævideri non potest, nec cui proviso potest resisti:" (Instit. Juris. lib. 2, c. 66.) He enumerates various instances: "Casus fortuiti varii sunt, veluti a vi ventorum, turbinum, pluviarum, grandinum, fulminum, æstus, frigoris, et similium calamitatum quæ cælitus immittuntur. Nostri vim divinam dixerunt. Græci Θεου βίαν. Item naufragiæ, aquarum inundationes, incendia, mortes animalium, ruinæ ædium, fundorum, chasmata, incursus hostium, prædonum impetus. His adde damna omnia a privatis illata quæ quominus inferrentur, nullâ curâ caveri potuit." Baldus (Quæst. 12 No. 4) gives the following definition: "Casus fortuitus est accidens quod per custodiam curam vel diligentiam mentis humanæ non potest evitari ab eo qui patitur." In our own law on this subject judicial authority, as has been stated, is wanting, and the text writers, English and American, with one exception, afford little or no assistance. Story, however, in speaking of the perils of the sea, in which storm and tempest are, of course, included, and, consequently, to a great extent the instances of inevitable accident at sea, which come under the term, "act of God," uses the following language: "The phrase, 'perils of the sea' whether understood in its most limited sense as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents occurring upon that element, must still in either case be understood to include such losses only to the goods on board as are of an extraordinary nature, or arise from some irresistible force, or from inevitable accident, or from some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. Hence it is that if the loss occurs by a peril of the sea, which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party." Story, it will be observed, here speaks only of "ordinary exertion of human skill and prudence and the exercise of reasonable skill and diligence." I am of opinion that this is the true view of the matter, and that what Story here says of perils of the sea applies equally to the perils of the sea coming within the designation of "acts of God." In other words,

that all that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse he does all that can be reasonably required of him, and if under such circumstances he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods which has not become generally known, or because it cannot be proved that if the skill and ingenuity of engineers or others were directed to the subject, something more efficient might not be produced, that the carrier can be made liable. I find no authority for saying that the *vis major* must be such as "no amount of human care or skill could have resisted," or the injury such as "no human ability could have prevented," and I think this construction of the rule erroneous.

That the defendants here took all the care that could reasonably be required of them to insure the safety of the mare, is, I think, involved in the finding of the jury directly negativing negligence, and I think it was not incumbent on the defendants to establish more than is implied by that finding. The matter becomes, however, somewhat complicated from the fact that the jury have found that the death of the mare is to be ascribed to injuries caused partly by the rolling of the vessel, partly by struggles of the animal occasioned by fright, leaving it doubtful whether the fright was the natural effect of the storm, or whether it arose from an unusual degree of timidity peculiar to the animal, and in excess of what would generally be displayed by horses. But the plaintiff is in this dilemma, if the fright which led to the struggling of the mare was in excess of what is usual in horses on ship board in a storm, then the rules applies that the carrier is not liable where the thing carried perishes or sustains damage by reason of some quality inherent in its nature, without any fault of his, and which it was not possible for him to guard against. If on the other hand the fright was the natural effect of the storm, and of the agitation of the ship, then it was the immediate consequence of the storm, and the injuries occasioned by the fright are sufficiently closely connected with the storm, in other words, with the act of God, to afford protection to the carrier.

For these reasons I am of opinion that the judgment of the court below must be reversed, and judgment entered for the defendant.

Mellish, L J.—I do not wish to give any opinion on the question whether the defendant if he had not been a common carrier would have been subject to the liability of common carriers. It is unnecessary to give any opinion on that question, because it was admitted in the argument before us that the defendant was a common carrier.

I agree with the Lord Chief Justice that the judgment of the Common Pleas Division ought to be reversed, and generally with the reasons he has given in his judgment. If the jury had found that the injury to the mare was caused solely by more than ordinary bad weather without any negligence of the defendant's servants, or any fright and consequent struggling of the mare, I am of opinion that a plea that the injury to the mare was caused by the act of God would have been proved. It is obvious that if a horse is properly secured on deck, and properly attended to by the carrier's servants, and is quiet, and nevertheless is so injured as to be killed by the pitching of the vessel, the violence of the storm must be very great indeed, and the whole accident would be of such an extraordinary character as plainly to amount to the act of God within the authorities. So, also, if the jury had found that the injury was caused solely by the conduct of the mare herself by reason of fright and consequent struggling without any negligence on the part of the defendant's servants, I am of opinion that a plea that the injury to the mare was caused by the vice of the mare herself would have been proved. The cases of *Kendal* v. *London and South-Western Railway Company* (26 L. T. Rep. N. S. 735; 41 L. J. Rep. 184, Ex.; L. Rep. 7 Ex. 373) and *Blower* v. *The Great Western Railway Company* (L. Rep. 7 C.P. 655) are direct authorities to this effect. Now, if these conclusions are correct, it seems to me it would be absurd to hold that, although the injury to the mare was occasioned by two causes combined, for neither of which the carrier was responsible, nevertheless he was liable. It may, no doubt, be true that as the injury of the mare was not solely occasioned by more than ordinary bad weather, the bad weather may not have been so bad as to deserve the description of a direct and violent and sudden and irresistible act of nature, which, in the court below, it was said it must amount to, in order to amount to an act of God. The bad weather may not have been irresistible, because, if it had not been for the conduct of the mare herself, it might have been resisted. So, also, the conduct of the mare herself may not have been the sole and irresistible cause of the injury, because, if it had not been for the bad weather any injurious effect from the fright and struggling of the mare might, by reasonable precautions, have been prevented. Still it may be perfectly true, and I think the jury must be taken to have found it was true, that the more than ordinary bad weather, and the fright and struggling of the mare herself, did together form a direct and violent and irresistible cause of the damage which the mare suffered:

In the court below the learned judges first consider the question whether the loss in this case can be considered to have occurred by the act of God; and because the bad weather did not, in their opinion, amount to a direct and violent and sudden and irresistible act of nature, they came to the conclusion that the loss was not occasioned by the act of God. They then consider whether the loss was occasioned by the vice of the mare herself, and because they think that the fright and struggling of the mare was occasioned principally by the bad weather they hold that the loss was not occasioned by the vice of the mare herself. The objection to this mode of considering the case seems to me to be that the two causes of loss are considered separately, and because neither, taken separately, affords an answer to the plaintiff's claim, it is assumed that both, taken together, cannot afford an answer.

Now, I am of opinion we ought to hold that notwithstanding neither the more than ordinary bad weather, nor the fright and strug-

gling of the mare herself, each taken separately were sufficient to account for the loss, yet if both taken together formed an irresistible cause of the loss in this sense, that by no reasonable precaution on the part of the carrier could the damage resulting from them have been prevented, the carrier is protected. It being a clear rule of law that if the loss of the goods carried is occasioned by an irresistible act of nature the carrier is protected, and another clear rule of law that if the loss of the goods is solely occasioned by a defect in the thing itself the carrier is also protected, it seems to me to follow that if a loss is occasioned partly by an act of nature, although one not by itself irresistible, and partly by a defect in the thing itself, although that defect is not the sole cause of the loss, and the carrier has no means of preventing the combined effect of the two causes, he ought to be held to be protected. The principle seems to me to be that a carrier does not insure against acts of nature, and does not insure against defects in the thing carried itself; but in order to make out a defence the carrier must be able to prove that either cause taken separately or both taken together formed the sole and direct and irresistible cause of the loss. I think, however, that in order to prove that the cause of the loss was irresistible it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented.

For these reasons I am of opinion that the judgment of the court below ought to be reversed, and the rule to enter a verdict for the plaintiff discharged.

Cleasby, B.—I should hesitate to decide this case upon the general ground much insisted on during the argument that where there is a loss or destruction of anything intrusted to a carrier from natural causes without the intervention of any human agency the carrier is discharged. In other words, that the exception of "the act of God" from the carrier's responsibility applied to every condition of things resulting from natural causes. The words "act of God" as applied to the carrier's exemption comprehend no doubt such events as earthquakes and all other convulsions of nature. Violent storms and tempests have always been considered as coming within the words, and men have thought they could avert them by prayers and offerings. Mr. Wallace, the American editor of Smith's Leading Cases, as cited in the note to Angell on Carriers, sect. 155, p. 153, attempts a definition, "Upon the whole it would seem that the act of God signifies the extraordinary violence of nature." This entirely disapproves of those American cases referred to in the argument, *Colt* v. *M'Meeher* and *Williams* v. *Grant* (*ubi sup.*), which appeared to go to the extent of showing that "act of God" and "act of nature" meant the same thing. I mean, of course, "act of God" as applied to the carrier's exception. I would not adopt this or any definition as exact and including all cases; but wherever there is that unusual violence of nature against which, in the opinion of the jury, precautions would be considered unavailing, and could not be expected to be taken, I should say the case would come within the exception.

Now how does the present case stand as regards this? I should have been better satisfied if the note of the case had shown more distinctly that there had been in this case the intervention of the act of God in the sense which I have mentioned. Still, looking at the language of the questions put to the jury, and the answers, it is a fair conclusion, I think, that the weather was of such a nature "more than ordinary bad weather," as to come within the meaning of "act of God." It seems to have been argued in that way, and if that be so, the judgment of the Court below is subject to this criticism, that though the carrier is excused by the "act of God," he is yet bound to use precautions against the "act of God." This seems an inconsistency, and I should feel fully justified in saying that if the "act of God" and the nature of the animal combined to produce the injury, the defendants would be discharged. The fifth question asks: "Were there known means not ordinarily used in the carriage of horses by sea by people of ordinary care and skill, by which the injury might be prevented?" It is not surprising that the jury could not agree upon an answer to this question. Some would say it must be possible to use means to attain this end, and of course they could not be unknown contrivances, but known to persons of skill, and this would lead to one answer; others would say, the only known means, in the proper sense of the words, were means in use, that is in ordinary use, and this would lead to an opposite answer. It does not appear to me that an answer to that question was essential to determine the case, because, whichever way it was answered, the answers to the other questions, particularly the fourth, determine the case in favour of the defendants. I consider it expressly found that there was no negligence on the part of the defendants in any way contributing to the injury. If the second question had been answered in the affirmative the case would have come within the authority of decided cases. Carriers of live animals are not, as such, without negligence responsible for injury to or death of the animals carried by themselves: (*Blower* v. *Great Western Railway Company*, *Kendall* v. *London and South-Western Railway Company*, *ubi sup.*) But in the present case it appears that the injuries were due to two causes together, the rough weather and the nature of the animal. If the extraordinary rough weather can be regarded as the act of God within the meaning of those words in the exception then, as I have before stated, the case appears clear; but if it be not, still as the jury have negatived negligence in their answer to the fourth question, it amounts to this—that the defendants took all reasonable and proper precautions against rough weather, but still the extraordinary bad weather and nature of the animal caused the injury. This, in my opinion, is sufficient to absolve the carriers, because, all negligence being negatived, they cannot be said in any way to have contributed to the injury, and so far as being carriers they are insurers, this liability does not extend to injuries caused by the animals themselves, and even though the extraordinary rough weather may have contributed directly, yet no direct conclusion could be founded upon the joint operation of the two causes, as no division could be made of the result caused by each. The third finding negatives the injury being caused by the rough weather alone, and as it follows that the character and conduct of the animal must have been an effective cause the sounder conclusion seems to be

that the plaintiff fails in making out a case to recover anything rather than that the defendants are to be made responsible for the whole consequences of both causes combined.

The effect of this opinion is that the judgment of the court below should be reversed.

Mellish, L.J. stated that James, L.J. concurred that the decision of the court below must be reversed, and desired to add the following observation:—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 have been prevented by any amount of foresight and pains and care reasonably to be expected from him. In this case the defendant has made this out.

Mellor, J. agreed that the judgment of the court below must be reversed.

Judgment reversed.

Solicitors for the plaintiff, *Lyne* and *Holman*.

Solicitors for the defendant, *Lawrance, Plews, Boyer*, and *Co.*

SITTINGS AT LINCOLN'S INN.

ON APPEAL FROM THE ADMIRALTY DIVISION.

Reported by James P. Aspinall, Esq., Barrister-at-Law.

Wednesday, May 3, 1876.

(Before James L.J., Baggallay, J.A., and Lush, J.)

The Limerick.

Master's wages and disbursements—Shipwright's claim—Collision—Bond given by master—Liability.

Where shipwrights execute repairs to a ship at the order of the master given under circumstances by which the shipwrights acquire a right to claim against either the owners or the master, and they elect to claim against the master, the latter may, in an action for wages and disbursements, proceed against the ship and recover for the amount of such shipwright's claim as a disbursement made on ship's account.

Where a ship through the default of her master has run into and damaged another ship, and the master of the former has in respect of such collision given a bond for the amount of the damage binding himself and his owners and the ship, he, being himself a wrongdoer, cannot, in an action for wages and disbursements, claim the amount of such bond or to be indemnified against any claim to be made against him thereunder in respect of the collision.

This was an appeal from a judgment of the Right Hon. Sir R. Phillimore in a cause of wages and disbursements instituted in the High Court of Admiralty of England on behalf of Sheriff Hopkins, master of the steamship *Limerick* against that vessel, and against James Jutson, mortgagee of the vessel, intervening.

The cause was instituted by the plaintiff—in consequence of the failure of the owner of the vessel, Mr. Ireland, and of the arrest and sale of the ship in other suits—to recover his own wages and disbursements made on account of crew's wages and provisioning, fitting, and repairing the ship. The defendant did not oppose the claim altogether, but claimed a reference, and in consequence the judge on the 14th July 1875 made a decree for the plaintiff's claim, and referred the same to the registrar and merchants to report the amount due. The claim was heard before the registrar (Mr. Rothery), assisted by merchants, on the 13th Dec. 1875, the 12th and 14th Feb. 1876. The plaintiff then claimed amongst other things 102*l.* 0*s.* 2*d.* the amount of an account due for repairs of the ship to Messrs. Dowson and Worth, shipwrights, but which had not been paid to them; and also 200*l.* in respect of a "bond given by the master in respect of a collision between the *Limerick* and the schooner *Skitty Belle*."

In reference to Dowson and Worth's claim it appeared that the *Limerick* was in need of some repairs in 1875, and the master was taken to Dowson and Worth by Messrs. Breslauer and Co., who were the managing agents of the ship, and he then engaged them to effect the repairs. Breslauer and Co. had many ships under their control, and were in the habit of employing Dowson and Worth. The master's evidence on this point was as follows:

Messrs. Dowson and Worth are known to Messrs. Breslauer, but they were not employed by him. Mr. Port (their clerk) took me and introduced me to Messrs. Dowson and Worth, telling them that the *Limerick* was not one of their ships, they only managed her. I cannot account for the bill being made out only to the owners. I, in the first place, sent to Messrs. Dowson and Worth for their account; I did not know whether I was liable or not, and wished to have all the accounts. I should say that this is the account they sent me (account produced). They did not at the time make any demand on me. I did not hear personally from them until two months ago. They have not sued me nor threatened me with a suit.

The account referred to in the evidence was headed "The owners of the steamship *Limerick*" and not "captain and owners," as is usual. On the 13th March 1876, Dowson and Worth wrote to the plaintiff saying:

We are sorry to have to trouble you again with regard to our account against the *Limerick*, but as Mr. Jutson denies his ownership, and Mr. Ireland has failed, we must apply to you for payment. Our contract was made with you, and you are equally liable as master of the vessel.

Yours faithfully (Signed) Dowson and Worth.

As to the claim on the bond given for the collision with the *Skitty Belle*, it appeared that the collision occurred on the last voyage of the *Limerick* whilst in charge of the plaintiff in the port of Huelva in Spain. The *Limerick* was leaving the port in charge of the plaintiff, and by his default ran into and damaged the *Skitty Belle*. The plaintiff admitted in cross-examination that if anybody on board his ship was wrong, he was wrong. The plaintiff did not communicate with his owners before giving the bond. The material parts of the bond were as follows:—

British Consulate, Huelva.

Agreement between Sheriff Hopkins, master of the S.S. Limerick on behalf of the owners, underwriters, and all others concerned in the said vessel, and Mr. William Rees, master of the brigantine *Skitty Belle*, of Swansea, for and on behalf of the owner and all others concerned in the said brigantine.

Mr. Sheriff Hopkins acknowledging, as he does by these presents, the liability of the said steamship *Limerick* to the payment of the damages, losses, detentions, costs, and expenses sustained by the brigantine *Skitty Belle*, in consequence of her being run into by the said steamship *Limerick* under his command, hereby binds himself, owners, underwriters, and all others concerned in his said vessel to the payment of the said damages, losses, costs, detentions, and expenses in the manner and with the conditions hereinafter stated, viz.:

1. Mr. William Rees, master of the *Skitty Belle*, will cause such temporary repairs to be done to this vessel

at this port as to put her, in the opinion of surveyors, in a seaworthy state to proceed on her intended voyage to the port of Liverpool. (Then followed various provisions as to the full repairs and payment therefor.) . . .

6. On signing these presents, Mr. Sheriff Hopkins will be at liberty to proceed with the said steamship *Limerick* on her intended voyage without any further hindrance or detention on the part of the owners, masters, or others, concerned in the *Skitty Belle*.

For the faithful performance of the foregoing agreement, Mr. Sheriff Hopkins binds himself, the owners of the steamship *Limerick*, and all others concerned, in the penal sum of 200*l.* to be paid unto the owner or owners of the said *Skitty Belle*, his or their executors, administrators, or assigns.

This done, sealed, and executed at Huelva, on this 6th day of April 1875. (Signed) S. Hopkins.
W. Rees.

Before me (Signed) Edward Diaz, British Vice-Consul.

The registrar made his report on the 16th Feb. 1876, and found that the said sum of 102*l.* 0*s.* 2*d.* was recoverable by the plaintiff, and allowed that amount in the schedule to the report, and as to the bond for 200*l.* and the right of the plaintiff to priority, he found as follows:

"I am also of opinion that the plaintiff is entitled to have the sum of 200*l.* retained in court to answer any claim that may be established against him under the bond given by him in respect of the collision between the *Limerick* and the *Skitty Belle*. I am further of opinion that the plaintiff in this cause is entitled to payment of the amount found due to him out of the proceeds of sale of the vessel *Limerick* that may be now remaining in court in priority to all other claims."

On the 23rd Feb. 1876, the defendant gave notice of objection to this report, and in due course filed his petition in objection to the report, and amongst other things alleged as follows:—

4. The defendant objects to the said report in so far as it finds that the plaintiff is entitled to have the sum of 200*l.* retained in court to answer any claim that may be established against the plaintiff under the bond given by him in respect of the collision between the *Limerick* and the *Skitty Belle*, upon the grounds that such bond was given by the plaintiff without authority from or due communication with the owner of the *Limerick*, that the plaintiff himself was at the time of the collision conducting the navigation of the *Limerick*, and that he was personally liable in respect of the damage done to the *Skitty Belle* by reason of the said collision at the time when he executed the said bond.

5. And the defendant also objects to the said report in so far as the same allows to the plaintiff by item fifty-four of the schedule thereto the sum of 102*l.* 0*s.* 2*d.*, in respect of a claim by Dowson and Worth, shipwrights, upon the ground that such sum never was claimed of the plaintiff by the said Dowson and Worth, and that the plaintiff never was liable to the said Dowson and Worth in respect of the said claim.

The plaintiff's solicitor, in the answer to this petition, alleged, among other things:—

2. The bond referred to in the fourth article of the petition was given on behalf of the owners of the *Limerick* by the plaintiff, acting under the advice of the British Consul at Huelva, in Spain, where the collision occurred, and for the best interests of the owner of the *Limerick*, in order to prevent her arrest and detention in the port of Huelva, and consequent losses and expenses, and loss of freight, and was, as they submit, within the scope of the plaintiff's authority. The act of the plaintiff in giving this bond was approved and ratified by Frederick Ireland, the then managing owner of the *Limerick*. Insurances had been effected by the said Frederick Ireland for and on behalf of the owners of the *Limerick* against loss by collision, and the amount of the said bond has been or might have been recovered from the underwriters of the said insurances for the benefit of those interested in the Limerick.

3. They deny the plaintiff was personally liable in respect of the damage done to the *Skitty Belle* by reason of the collision referred to in the fourth article of the petition.

4. They say that Dowson and Worth have claimed of the plaintiff the sum allowed in item fifty-four of the Registrar's report, and they submit to the court whether the plaintiff is liable or not in respect of the said claim.

The defendants denied the allegations of the answer, and the pleadings were concluded.

March 21, 1876.—*E. C. Clarkson* for the defendant, in objection.

W. G. F. Phillimore for the plaintiff.

Sir R. Phillimore.—I am asked to overrule the decision of the Registrar on two points in this case. One is as to a sum of money due to Messrs. Dowson and Worth of 102*l.* 0*s.* 2*d.*, which the registrar has allowed, I understand, on the ground that it is at least doubtful whether the master be not liable to those who furnished the articles for the benefit of the ship, and I think it doubtful in spite of the argument which has been addressed to me. I think it is very possible myself that the master may be found liable for the 102*l.* 0*s.* 2*d.*, to Dowson and Worth; at all events it is a question as to which I should be sorry to give an off-hand opinion upon. But I think the justice and equity of the case will be answered by allowing the mortgagee to have the 102*l.* 0*s.* 2*d.*, upon his giving security that if the master be found liable for this sum he will be repaid. That seems to me to be a fair proposition, and I think the same principle applies to the other item. The bond given by the master for 200*l.* in respect of the collision between the *Limerick* and the *Skitty Belle* falls under the category of those cases decided in this court, where a master, acting *bonâ fide* for the purpose of getting his ship out of arrest in a foreign country, has always been upheld. He may or may not be personally liable under this bond, but I think that what he did was for the benefit of the owners, and I think it would be a harsh thing to compel him to pay, although the bond was given in his name as well as in that of the owners; it would be a harsh thing to deprive him of a lien he would otherwise have on the ship. But I do not see what harm will happen if the 200*l.* is paid out of court upon security being given to cover it if he should be made liable.

The minute of the order made upon this judgment as entered in the registry was as follows:—

The judge, having heard counsel on both sides, adjourned for a fortnight for further consideration of the objection to the registrar's report in this cause, for the purpose of allowing the defendant to give within fourteen days if he shall think fit a valid guarantee to secure the plaintiff in respect of the sum of 102*l.* 0*s.* 2*d.*, claimed by Messrs. Dowson and Worth, being item No. 54 in the schedule annexed to the said report, and in respect of costs, if he shall be sued for the same, and also in respect of any claim that may be established against the plaintiff under or in consequence of the bond for 200*l.* given by him, and referred to in item No. 50 of the schedule to the said report.

The defendant, however, declined to give security, and was desirous of appealing, whereupon the judge, on the 4th April 1876, made an order confirming the registrar's report as to the two items above mentioned, as well as other matters not material, and pronounced the sum found by the report to be due to the plaintiff, and condemned the proceeds of the vessel *Limerick* therein.

May 3, 1876.—From this order the defendant now appealed.

E. C. Clarkson, for the appellant.—The master was himself a wrongdoer in respect of this collision, and cannot claim contribution from his owners in respect of his own wrongful act. Moreover, he was bound himself personally by the bond, and is in consequence a principal. As to Dowson and Worth's claim, credit was not given to the master, and he is not liable.

Watkin Williams, Q.C. and *W. G. F. Phillimore*, for the respondent.—The bond was given *bonâ fide* by the master to release the ship when there was urgent necessity to do so, therefore the master must be taken to have acted with authority and on behalf of his owners. If he did so act his owners cannot, we submit, set up that he was personally liable, and if they cannot, how can the mortgagee do it? The act of the master in giving the bond was the best thing he could do for his owners. As to the claim of Dowson and Worth, the master having given the order, was jointly liable with the owners, and the material men had an option as to whom they might sue, and they have elected to claim from the master. The master possibly had no implied authority to charge his owners for necessaries supplied in a home port, but here there was express authority, because he was taken to the shipwrights by the managing agent of the ship:

Mitcheson v. *Oliver*, 5 Ell. & Bl. 419.

James, L.J.—On the first point the objection must fail as to the allowance of 102*l.* 0*s.* 2*d.* in respect of the repairs. The Judge of the Admiralty Division came to a right conclusion with regard to that. The plaintiff is liable to Dowson and Worth if it was a debt contracted under such circumstances as to enable the shipwrights to elect whom they would sue, the owners or the master; and I am of opinion that it was such a debt.

With regard to the other point it stands upon the evidence and the statement of the captain and in the bond itself, that it was entirely due to his own negligence that the collision happened, and that he was the wrongdoer. It is impossible upon any principle to say that an agent can charge as a disbursement against his principal the money which he has made himself liable to pay by reason of his own wrong. It was his duty to remedy the mischief, and if he does pay the money under a bond it is impossible to allow him to recover the sum against his principal as a disbursement for the ship in order to cure a mischief which he himself has brought about.

Baggallay, J.A.—I am of the same opinion.

Lush, J.—I am of the same opinion. I agree with my lords on the first point. As to the second point contended for by the plaintiff, that the giving the bond was the best thing to do for the owners, as it extricated the ship from a difficulty, the master was bound to do the best for the owners, and he would have incurred greater liability the longer he kept the ship there; but although it was done for the benefit of his owners that does not give him a charge against them for money paid in respect of any liability he incurred in consequence of his own wrongful acts. The negligence is an admission by the master himself, and he might have been re-examined on the matter: but it is left nakedly as he gave it on his cross-examination. It is clear that the master cannot charge as a disbursement against his principal an expense which he incurred by his own wrongful act.

Appeal allowed as to the 200*l.*, *and disallowed as to the* 102*l.* 0*s.* 2*d.*, *and without costs.*

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

Solicitors for the defendant, *Linklater* and *Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKellar, J. M. Lely, and R. H. Amphlett, Esqrs., Barristers-at-Law.

April 25 *and* 26, 1876.

Shand and others v. Bowes and others.

Consignment to be shipped in one of two months—Material part shipped in neither of the two months—Refusing to accept—Whether refusal to accept justified—Time for delivery.

The plaintiff agreed to sell, and the defendant to buy, 600 *tons of rice, "to be shipped in the months of March* and/or *April." About* 8000 *bags were put on board in February, and about* 50 *bags in March, whereupon the defendant refused to accept:*

Held, that the shipment was not a March shipment, and that the defendant's refusal to accept was justified.

Alexander *v.* Vandersee (*L. Rep., C. P.*, 530.) *distinguished.*

This was an action for the non-acceptance of 600 tons of rice. The rice had been sold by the plaintiffs to the defendants by two contracts, dated March 17 and March 24 respectively. Both these contracts stipulated that the rice was to be "shipped at Madras or coast for this port during the months of March and/or April 1874, per *Rajah of Cochin*." The rice was shipped in 8200 bags, all of which, except about 50, were put on board before the 1st March. Bills of lading were given as follows:

February	23	1780 bags.
,,	24	1780 bags.
,,	28	3560 bags.
March	3	1080 bags.

The ship sailed on the 10th March, but the defendants having refused to accept the cargo, this action was brought.

The case was tried before Brett, J. and a special jury, at the Michaelmas Sittings 1875, when the jury found that the cargo was a shipment in March and/or April, in the ordinary business sense of the terms.

April 25.—*Benjamin*, Q.C. (with him *Gainsford Bruce*), moved to enter judgment for the defendants, pursuant to leave reserved. He cited

Alexander v. *Vandersee*, L. Rep. 7 C. P. 530.

Cohen, Q.C. and *J. C. Matthew*, argued for the plaintiffs. *Cur. adv. vult.*

April 26.—The court delivered oral judgment as follows:

Blackburn, J.—We have considered this case since the argument, and have come to the conclusion that judgment ought to be entered for the defendants. It appears that the defendants had entered into two contracts to take 600 tons of rice, to be shipped during march or April. The result of that contract is, that if the rice had been ship-

ped during either of the agreed months, the defendant would have been bound to accept it, otherwise not. The question therefore is, whether or not there was a shipment during those months. Now we are met at the outset by *Alexander* v. *Vandersee* (L. Rep. 7 C. P. 530), decided by the Exchequer Chamber. This case, of course, is binding on us here, but I take it to be distinguishable. The facts of it were these: The defendant contracted for the purchase of a large quantity of Danubian maize for shipment in June $\frac{\text{and}}{\text{or}}$ July 1869. In fulfilment of this contract, two cargoes of maize were tendered to the defendant, the bills of lading for which were dated the 4th and 6th June 1869. The loading of these two cargoes was commenced on the 12th and 16th May, and completed on the 4th and 6th June. More than half of each cargo was put on board in May. It was left to the jury to say whether the cargoes were "June shipments" in the ordinary sense of the term, and they found that they were. The majority of the court held, affirming the decision below, that the verdict was rightly entered for the plaintiff, and also that the question was one for the jury. Now what are the undisputed facts here? Three parcels, amounting in the whole to nine-tenths of the cargo, were shipped in February, and the bill of lading in respect of those parcels was signed in February. So far as these parcels are concerned, there was in every sense a complete shipment. With respect to the remaining parcel, the shipment of that was not completed till the 3rd March. If all the parcels had been dealt with in a manner similar to this last a question might have arisen how far *Vandersee* v. *Alexander* (*ubi sup.*), would apply. But it does not become necessary to consider this question. The defendant agreed to take 600 tons in March or April; such a contract is not answered by the delivery of 15 tons in March and 185 in February.

Mellor and Lush, JJ. concurred.

Judgment for defendants.

Solicitors: *Stevens, Wilkinson,* and *Harries*; *Dattly* and *Hart.*

Tuesday, June 20, 1876.

Lutscher *v.* Comptoir D'Escompte de Paris.

Advances upon cargoes to be shipped—Bills drawn and documents hypothecated—Equitable title of agent of sale.

Plaintiff had arranged with a merchant in Africa that the latter should purchase articles of produce and ship them for sale in this country by the plaintiff upon commission, plaintiff allowing the African merchant to draw upon him in order to purchase the articles, and the documents of title of the shipments being hypothecated to the plaintiff so as to enable him to provide funds to meet the bills drawn upon him. The day after the shipment of a cargo under this arrangement, the African merchant stopped payment, and his liquidator gave the bill of lading to the defendants with instructions not to part with it unless paid the value of the cargo. On action brought to recover back the value paid by the plaintiff under protest, and damages for the detention of the bill of lading:

Held, upon demurrer that the plaintiff had an equitable title to the bill of lading under the arrangement, and that the action was maintainable.

This was a demurrer to the following statement of claim:

1. The plaintiff is a merchant and carries on business at 8, Austin Friars, London.

2. The defendants are bankers carrying on business at 144, Leadenhall-street, London.

3. During and since the month of April 1875, the plaintiff has had consigned to him by Mr. Louis Levy, a merchant, carrying on business at Oran, in Africa, cargoes of palm leaves and other produce, upon the terms mentioned in the next paragraph.

4. In order to place the said Mr. Levy in funds for the purchase of the said produce, the plaintiff agreed to allow him to draw upon the plaintiff's said firm. The said Mr. Levy was to make purchases in Africa of the said produce and ship the same to the plaintiff. The plaintiff agreed to effect sales in this country of such shipments, charging a commission thereupon. The documents of title of such shipments were hypothecated to the plaintiff so as to enable him to provide funds to meet the bills drawn by the said Mr. Levy.

5. On the 27th May 1875, the plaintiff, at the request of the said Mr. Levy, and in pursuance of the said agreement set out in the 4th paragraph, contracted with the Tovil Paper Company (Limited) carrying on business at Maidstone, in Kent, to sell to them 250 tons of palm leaves at 3*l.* per ton free on board in Oran, payment to be by acceptance of the buyers at three months on delivery of the bill of lading. The cargo to be shipped by vessel chartered by the buyers to arrive at Oran aforesaid not latter than 31st Oct. 1875.

6. The said Mr. Levy having drawn upon the plaintiff in pursuance of the said agreement set out in the 4th paragraph was enabled to purchase, and did, in fact, purchase 250 tons of palm leaves, and the same were shipped on board the steamship *Sydenham*, chartered by the said Tovil Paper Company (Limited), the loading of the cargo being entirely completed on the 22nd Oct. 1875.

7. The bill of lading was, on the 22nd Oct. 1875, duly signed and handed by the captain of the steamship *Sydenham* to the said Mr. Levy, and the plaintiff alleges that the same should have been transmitted to the plaintiff by the said Mr. Levy in order to put the plaintiff in funds to meet drafts of the said Mr. Levy upon the plaintiff under the agreement aforesaid.

8. Upon the 23rd Oct. 1875, the said Mr. Levy stopped payment and his affairs were placed in liquidation. The liquidator having obtained possession of the said bill of lading instructed the Bank of Algiers to transmit it to their correspondents in London, who are the defendants, with directions not to part with the same until they were paid the sum of 538*l.* 4*s.* 2*d.*, the alleged value of the cargo of 250 tons of palm leaves.

9. Upon the 4th Nov. 1875, the plaintiff, having paid the drafts of the said Mr. Levy to a large amount, which amount is still due to the plaintiff, applied to the defendants for the bill of lading, but was informed of the instructions they had received. The plaintiff claimed the bill of lading under his said agreement with the said Mr. Levy, but the defendants refused to part with same unless they were paid the sum of 538*l.* 4*s.* 2*d.*

10. The plaintiff, on the 8th Nov. 1875 under protest paid to the defendants the sum of 538*l.* 4*s.* 2*d.*, and obtained the said bill of lading.

They then handed over the bill of lading to the said Tovil Paper Company (Limited) in performance of the contract aforesaid.

11. The plaintiff alleges that the defendants improperly withheld from the plaintiff the said bill of lading to which the plaintiff was entitled under the said agreement with the said Mr. Levy.

The plaintiff claims: First, the payment of 538*l.* 4*s.* 2*d.* and interest thereon at 5*l.* per cent. from the 8th Nov. 1875 until judgment; secondly, 250*l.* damages for the detention of the bill of lading; thirdly, such further or other relief as the nature of the case may require.

The following was the second paragraph of the statement of defence:

The defendants demur to the plaintiff's statement of claim and say that the same is bad in law on the ground that it shows no legal title in the plaintiff to the bill of lading in question, and that the mere breach of an agreement on the part of Mr. Levy (assuming that it applied to the cargo in question, which is not alleged) gave no legal title to the bill of lading as against the liquidator or the defendants under the circumstances mentioned in the plaintiff's statement of claim, so as to entitle the plaintiff to recover the money claimed; and on other grounds in law sufficient to sustain the demurrer.

The following were the plaintiff's points of argument: First, the statement of claim shows a legal title in the plaintiff to the bill of lading; secondly, the statement of claim shows an equitable title in the plaintiff to the bill of lading; thirdly, the statement of claim shows that the assignee of Mr. Levy took the bill of lading subject to its previous hypothecation to the plaintiff, and the defendants as agents of the assignee can have no better title; fourthly, the plaintiff has a legal title to the 538*l.* 4*s.* 2*d.*; fifthly, the plaintiff has an equitable title to the 538*l.* 4*s.* 2*d.*

The following were the defendants' points: The defendants contend that the statement of claim does not show such a title in the plaintiff to the bill of lading and such a wrongful detention thereof by the defendants from him as entitles him to recover back the money paid to obtain possession of the document. That there was no hypothecation of the document by Mr. Levy so as to pass the property in it to the plaintiff. That the mere breach of an agreement on the part of Mr. Levy, assuming that it applied to the cargo in question (which is not alleged), gave no title to the plaintiff, after Levy's affairs were placed in liquidation, to have the bill of lading delivered up to him without payment of the value of the cargo. That the mere fact of the plaintiff having paid the drafts of Mr. Levy, and Mr. Levy having become indebted to the plaintiff, gave him no legal right to the bill of lading so as to support this action.

Holl argued for the defendants.—The facts stated put the plaintiff's claim within the decision of *Chinnock* v. *Sainsbury* (6 Jur. N. S. 1318). That was a demurrer to a bill in equity which prayed substantially, as was held by the Master of the Rolls, for the specific performance of a contract of agency; in consideration of the plaintiffs (auctioneers) having advanced to the defendant a sum of money, the defendant agreed in writing to deposit with them for sale the whole of his collection of pictures, &c., upon the understanding that the amount of advances and the commission were to be deducted from the proceeds of the sale. The defendant deposited only a portion of the collection which, however, the plaintiffs proceeded to sell, but it realised a very much smaller sum than was anticipated; in fact not more than half the amount of the advances. The defendant refused to deposit for sale the remaining portion of the collection, and the plaintiffs filed their bill for specific performance of the agreement. The demurrer to this bill was allowed. The Master of the Rolls considered that "the object of the bill was to have it declared that the property not delivered to the plaintiffs is a security for the amount advanced upon the property which was handed over to them. On the facts of the case, I am of opinion that the 1500*l.* was not advanced on the security of the property not deposited with the plaintiffs; the property was handed over at different times, and there was no refusal on the part of the plaintiffs to advance the money until the whole collection was deposited. It must therefore be assumed that they were satisfied with the security offered by the amount deposited with them. I am of opinion, therefore, that no case has been made out for enforcing the contract in this court. The plaintiffs must proceed at law to ascertain what is due to them on account of the loan and commission, and for the damages which they have sustained." The plaintiff has the same remedy in this case, but he cannot be held to have met the bills drawn by Levy on the security of this cargo of which the bill of lading had not been deposited with him.

Benjamin, Q.C. (with him *Anderson*), for the plaintiff.—The plaintiff had a sufficient equitable title to this bill of lading, on the agreement alleged, to support his claim in this action. *Chinnock* v. *Sainsbury* is cited and discussed in Fisher on Mortgages. The effect of it is stated in these words (sect. 3): "A mere contract to deposit property for sale, and out of the proceeds to pay advances made by the intended depositee will not amount to a security, if it appear that the advances were not in fact made on the security of the property, but will be treated only as a contract to make a deposit." Here, however, it appears that plaintiff's advances were in fact made on the security of these hypothecations, and that the agreement was to give plaintiff a lien upon each cargo shipped. Mr. Fisher, in treating of Agency Liens, says in sect. 201: "An agent who has advanced money or incurred liability on account of his principal is protected by a lien on the property in respect of which the advances were made, or on the produce of the sale of it. An army agent, therefore, in respect of his advances to an officer for his outfit, has a lien on the purchase-money of his commission; and a person who has carried on trade for another, upon the stock and debts, of which he may restrain the assignees in bankruptcy of his principal from taking possession. An agreement that the lender of money shall be employed to sell, and shall be repaid out of the proceeds of goods expected to be purchased, there being no contract for the purchase of such goods, will not however give him a lien upon goods which are afterwards purchased and sent, but were not paid for with the money advanced." The authority for the last-mentioned instance, *Deane* v. *Byrnes* (13 W. R. 299), does not apply to this case, for here the purchase was completed with the money drawn by Levy upon the plaintiff. This is a case within

the application of *Bristow* v. *Whitmore* (9 H. of L. Cas. 391). [Cockburn, C.J.—How can the defendants contend that this is not an equitable lien which the plaintiff possesses over the bill of lading?]

Holl, in reply.—The statement of claim does not make it clear that the cargo was purchased by plaintiff's advances, nor that this bill of lading would have been hypothecated to the plaintiff if Levy had not stopped payment. [Cockburn, C.J.—The facts may be loosely stated, but the effect is to make the case in my opinion too clear for argument]. At all events *Chinnock* v. *Sainsbury* is an authority distinctly in the defendants' favour.

Cockburn, J,—I think upon the statement of claim there can be no question that this cargo of 250 tons of palm leaves was shipped under the agreement stated between Levy and the plaintiff, that Levy had drawn upon plaintiff for the funds to purchase the cargo, and that in pursuance of the agreement the bill of lading ought to have been hypothecated to plaintiff as the security upon which he allowed Levy to draw upon him. This being so, the plaintiff was entitled at least in equity to be paid his advances out of the value of the cargo shipped under his agreement with Levy.

Mellor and Field J.J. concurred.

Judgment for plaintiff.

Solicitor for the plaintiff, *A. G. Ditton.*

Solicitors for the defendants, *Lyne* and *Holman*

EXCHEQUER DIVISION.

Reported by H. Leigh and A. Pawson, Esqrs., Barristers-at-Law.

May 29 *and* 30, 1876.

(Before Kelly, C.B., and Cleasby, B.)

Fisher *v.* Smith.

Marine insurance — Shipowner and insurance broker—Broker employing a sub-agent—Lien of sub-agent for premiums paid by him—Principal and agent—Notice.

The plaintiff, a shipowner, who had, on several occasions during three years previously, employed S. and Co. as insurance brokers, to effect marine insurances for him, authorised them to effect an insurance for him on a cargo by a ship of his, which they accordingly did through the sub-agency of the defendant, also an insurance broker, who paid the premiums on the policies, and who had on previous occasions, by the instructions of S. and Co., effected policies for the plaintiff and other persons. The defendant had notice throughout that S. and Co. were acting as brokers, and that the plaintiff was their principal; but the plaintiff did not know, until after the policies had been effected, that they had been effected through the defendant, or by any other person than S. and Co. The plaintiff, who had monthly accounts with S. and Co. in such matters, paid them, in due and usual course of business between them, their monthly accounts, in which, in usual course, they debited him with the amount of the premiums on the policies in question, but he neither asked for nor received the policies at that time. The defendant, who was aware of the course of dealing between the plaintiff and Skinner and Co., paid the premiums in usual course to the underwriters on effecting the policies, and, in accordance with the usual course of business between him and S. and Co., sent a debit note of such premiums to S. and Co., with whom he had monthly accounts for insurances effected by him under their instructions for the plaintiff and other persons; but he kept the policies in his own hands, as was his usual practice, until the premiums should be repaid him by S. and Co. He subsequently delivered his monthly account to S. and Co., which included, among other items, the premiums on the policies in question, but S. and Co. never settled such account, or repaid him the premiums paid by him as above mentioned.

A loss having occurred, the plaintiff brought an action of detinue for the policies against the defendant, who, in answer thereto, set up a lien on the policies for the premiums paid by him upon them, and it was

Held by the Exchequer Division (Kelly, C.B., and Cleasby, B.), that the defendant had no such lien, the relation and course of dealing between the parties creating no liability as between the plaintiff and the defendant, and that the contract between S. and Co. and the defendant and the liability arising therefrom were confined to themselves alone, and its effect clearly was that the defendant should look to S. & Co. alone for repayment of the premiums advanced by him to the underwriters.

Westwood *v.* Bell and another (4 *Camp.* 349) *distinguished.*

This is an action of detinue to recover four policies of marine insurance effected upon a cargo of steel rails, per steamer *E. S. Milligan*, and money payable upon accounts, for money lent and money received for the use of the plaintiff, and for interest, and for moneys due on accounts stated, and the amount claimed as damages is 3200*l.*

The defendant pleaded a denial of the detinue of the said policies, or any of them; and, secondly, a denial of the plaintiff's property in the policies; and, thirdly, that he had a lien on them for premiums paid by him as an insurance broker upon and for the said policies respectively of the plaintiff, and at his request, which premiums remained due and payable by the plaintiff to the defendant during the said detention; and, fourthly, a general lien of the defendant for money due by the plaintiff to the defendant as insurance broker for effecting the said policies and other policies as such broker, and for money paid for premiums on the said policies, and other policies effected by the defendant as such insurance broker for the plaintiff; and fifthly, sixthly, and seventhly, to the remaining counts, never indebted, payment, and set-off.

The plaintiff replied by taking and joining issue on the above several pleas.

The cause came on to be tried before Archibald, J. and a common jury at the last spring assizes for Gloucestershire, held at Gloucester, when a verdict was taken by consent for the plaintiff for the damages in the declaration and 40*s.* costs of suit, subject to the opinion of the court upon the following

Case.

1. The plaintiff is a shipowner and merchant at Barrow-in-Furness, at Lancashire, and sole shipper at that place for the steel rails of the Barrow Hematite Steel Company, which company carries on its business also in Barrow-in-Furness, and are the only manufacturers of steel rails there.

The defendant is an insurance broker carrying on business at Liverpool in connection with W. H. Brand.

2. On or about the 19th July 1874, the plaintiff authorised Messrs. Skinner and Co., who are insurance brokers at Barrow-in-Furness, to effect marine insurances to the amount of 4000*l.* on part of a cargo of steel rails from Barrow to St. John's, New Brunswick, per ship *Eliza S. Milligan*, provided they could effect such insurances at 40*s.* per centum.

3. On the 1st Aug. 1874, the plaintiff received from Messrs. Skinner and Co. a covering note, of which the following is a copy:

58, Hindfoot-road, Barrow-in-Furness.
1st Aug. 1874.

Insured for account of Messrs. James Fisher and Sons 4000*l.*, per *Eliza S. Milligan*, Captain
From Barrow to St. John's.
On steel rails valued at 4000*l.*

"f. p. a." "f. g. a."	£.	s.	d.
4000*l.* at 40*s.* per cent.	80	0	0
Policy...	0	10	0
	80	10	0
10 per cent. of 76*l.*	7	12	0
	£72	18	0

W. J. SKINNER AND CO.
FREDERICK EVANS.

The letters "f. p. a.," "f. g. a.," and "f. c. and s.," meaning "from particular average," "foreign general average," and "free from capture and seizure," refer to known clauses or conditions which were to be among the terms of the policies. The deduction of 10 per cent. in the amount of the premium represents the annual underwriter's discount, and the signature "Frederick Evans" to the said note is the signature of the clerk in the employ of Skinner and Co., who made out the note.

4. The plaintiff had employed Skinner and Co., as insurance brokers, to effect policies of marine insurance on cargoes of steel rails for about three years. There are no underwriters in Barrow, and Skinner and Co. effected such insurances in Liverpool or London, either directly with the underwriters or through other insurance brokers in those towns.

5. The plaintiff generally knew the name of any insurance office with which Skinner and Co. effected policies without the intervention of any broker, and in the present case had been informed, before receiving the covering note, that the policies which Skinner and Co. were authorised to effect, as above stated, had been effected through Brand and the defendant.

6. The course of business between the plaintiff and Skinner and Co., which was the usual course of business in the trade, was for that firm to make out and deliver to the plaintiff, on the 8th day of each month, an account, debiting him with the sums of money due and payable by him to Skinner and Co. in respect of premiums, brokerage, and other charges in relation to policies of insurance effected by Skinner and Co. for the plaintiff in the course of the month then preceding, and for the plaintiff thereupon to pay the amount of such account by his bills of exchange for the amount at one month's date; and such course of business had been regularly followed, and all such monthly accounts had been duly paid and settled up to and including that for July 1874, which was delivered and paid early in August.

7. Of this account the first two items of the date of 4th Aug. were in respect of premiums for policies of insurance to the amount of 3750*l.*, in respect of the before-mentioned cargo per ship *Eliza S. Milligan*. On the 5th Sept. 1874, the plaintiff paid and settled such account with Skinner and Co., by his bill at one month, which said bill was duly honoured and paid. And the plaintiff is in no way indebted to Skinner and Co. on such or any other account, and all accounts between them have been long since settled.

8. The plaintiff did not demand of Skinner and Co. the policies of insurance until after the 13th Aug. 1874, when an average loss accrued in respect of the said cargo of the *Eliza S. Milligan*, and thereupon the plaintiff required possession of the said policies for the purpose of recovering the amount due in respect thereof. Three of these policies were at that time in the possession of the defendant, under the circumstances hereinafter mentioned. The fourth policy has never been in the defendant's hands, and as to that policy no question arises.

9. No communication had, up to that time, passed between the plaintiff and the defendant, or Brand, nor did the plaintiff know that Skinner and Co. had not paid the premium on the policies, but when the plaintiff required the policies he found that the three above mentioned were in the possession of the defendant. He thereupon demanded them from him, but the defendant refused to give them up, on the ground of a lien for unpaid premiums, he having effected the policies under the circumstances hereinafter mentioned.

10. Skinner and Co., immediately upon receiving instructions from the plaintiff to procure insurances upon the cargo of the *Eliza S. Milligan*, as before set forth, communicated by letter, addressed to W. H. Brand, at Liverpool, requesting him to procure the said insurances. The defendant answered the letter in his own name, and Skinner and Co. continued the correspondence, sometimes addressing Brand and sometimes addressing the defendant by name. Ultimately the insurances in question were effected by the defendant at the request of Skinner and Co.

11. The defendant sent debit notes of the premiums paid in respect of such policies to Skinner and Co., and also forwarded to Skinner and Co. copies of the said policies, and such copies were received from the defendant on the 5th Aug. 1874. A duplicate of one of such copies accompanies and forms part of this case. The 2½ per cent. mentioned in the note at the foot of the copies of the policies represents one moiety of the brokerage of 5*l.* per cent. allowed by the underwriters, and the 10 per cent. represents the usual discount allowed by all underwriters to brokers, and the brokers to merchants. (*a*)

12. Skinner and Co. have effected various policies of marine insurance through the said W. H. Brand and the defendant during the course of six months, or thereabouts, upon the terms of sharing equally the brokerage fee of 5*l.* per cent. in respect of the premiums payable on such policies; and the course of business was for the

(*a*) The usual brokerage of 5*l.* per cent. allowed to the underwriters was shared between Skinner and Co. and the defendant, the sub-agent, and the latter in his account with S. and Co. credited them with brokerage on the transaction at 2½ per cent., being the moiety of such usual allowance.

said W. H. Brand, or the defendant, to effect the policy with the underwriters, and procure and deliver to Skinner and Co. copies of the policies, and also to send to Skinner and Co. a debit note of the premiums paid, and at the commencement of each month to make out and deliver to Skinner and Co. an account debiting them with the money due in respect of the premiums paid on the several insurances effected for them during the month then preceding, and on the 10th of each month the account of premiums paid on the preceding month was paid.

13. It was not the usual practice for the defendant or Brand to part with the original stamped policies to Skinner and Co. until the premiums were received from Skinner and Co.

14. The defendant sent to Skinner and Co. during the first week in August the usual monthly account for such premiums due for the month of July 1874, and inserted in such account, as the two last items in point of date, 26*l.* 7*s.* and 26*l.* 11*s.* 9*d.*, premiums due and payable in respect of the policies effected upon the said cargo of the *Eliza S. Milligan*. Upon examination of such account Skinner and Co. objected to such account as incorrect, on the ground that such last items ought not to have been introduced until the account for the next month (August). The defendant admitted such objection to be valid; the account for the month of July was corrected accordingly, and paid.

15. Early in September, 1874, the defendant delivered the usual monthly account of the sums due and payable in respect of premiums paid during the month of August, including the two items mentioned in the last paragraph, and transferred from the prior account as before mentioned, but Skinner and Co. have not paid such account. The defendant detains the three policies in dispute; first, on the ground of a lien for the unpaid premiums on the policies; secondly, on the ground of a general lien for unpaid premiums on other policies effected under similar circumstances for the benefit of the plaintiff, upon instructions received from Skinner and Co.

16. The defendant had notice throughout the transaction that Skinner and Co. were acting as brokers, and that the plaintiff was their principal.

17. The premiums paid by the defendant on the three policies detained by him and still owing to him, amount to 52*l.* 18*s.* 9*d.* The premiums paid by the defendant on other policies effected by him for the benefit of the plaintiff on the instructions of Skinner and Co., under similar circumstances to those stated above, and still owing to him, amount to a much larger sum.

It is agreed between the parties that the pleadings in this action on both sides shall form part of the special case, also that the court be at liberty to draw any inferences or find any fact which in the opinion of the court a jury ought to have drawn or found.

The questions for the opinion of the court are, first, whether the defendant was entitled to retain the said policies of insurance as against the plaintiff in respect of a lien for the premiums on those policies; secondly, whether he was entitled to retain the said policies in respect of a general lien for the unpaid premiums upon the other policies mentioned in the 15th paragraph of this case.

If the court shall be of opinion in the affirmative on both questions, the verdict entered for the plaintiff is to be set aside, and a verdict entered for the defendant generally, with costs. If the court shall be of opinion in the affirmative on the first question only, a verdict is to be entered for the defendant with costs, except on the 1st, 2nd, and 10th pleas, on which a verdict is to be entered for the plaintiff. If the court shall be of opinion in the negative on both questions, the verdict entered for the plaintiff is to stand for 3000*l.* with costs, to be reduced to 40*s.* upon the three policies in the defendant's possession being given up to the plaintiff.

The plaintiff's points for argument:—First, that there was no privity of contract between the plaintiff and the defendant under the circumstances stated in the case out of which any lien, either general or specific, could arise in respect of the premiums on the policies effected through the defendant, by Skinner and Co. Secondly, that Skinner and Co. were the defendant's agents to receive the amount of the premiums, and the plaintiff has paid Skinner and Co. the whole of such amount. Thirdly, that the defendant, with a knowledge that Skinner and Co. were only brokers, and were acting for the plaintiff, allowed the plaintiff to pay the premiums to them, and settle his accounts with them on that footing. Fourthly, that the defendant has waved his lien as against the plaintiff. Fifthly, that the defendant elected to take the exclusive liability of Skinner and Co. for the premiums. Sixthly, that Skinner and Co. have paid the defendants the premiums in respect of the policies claimed.

The defendant's points for argument:—First, that the defendant, having effected the policies sued for in this action, and paid the premiums thereon in his business of an insurance broker, has a lien upon such policies for the premiums so paid, as against everybody otherwise having a right to the possession of such policies. Secondly, that the defendant has such a lien, notwithstanding that the policies were effected through the instructions of Messrs. Skinner and Co., also insurance brokers, particularly as they knew that the policies were effected by the defendant as an insurance broker. Thirdly, that the first and second questions for the opinion of the court, and each of them, ought to be answered and decided in the affirmative.

Powell, Q C. (with whom was *Pritchard*), for the plaintiff.—The question in substance is whether the plaintiff having employed Skinner and Co., as his brokers, and paid them every penny they were entitled to, and Skinner and Co. having employed the defendant as their agent in the matter, and not having paid him, the defendant as such sub-agent, and knowing all the facts at the time, can recover from the plaintiffs the moneys which Skinner and Co. ought to have paid, but failed to pay him. The principle with regard to the employment of a sub-agent is clearly laid down in Story on Agency, paragraphs 387 and 388 (8th edit., p. 474). The case is defective in not stating whether or not the plaintiff knew of the employment of the sub-agent, before or at the time the policies were effected. The case of *Power and another* v. *Butcher and another* (10 B. and C. 329), is an authority for the proposition that if a merchant directs a broker to insure and the broker does not pay the premium and the principal does, the broker can nevertheless recover it. This agrees with the rule

as laid down in Arnould on Insurance, pp. 194-5-6, 4th edit., by Machlachlan.

H. Matthews, Q.C. (with him was *J. O. Griffits*, Q.C.) for the defendant, *contra*.—The first point is that the defendant had a lien on the policies for the amount of premiums paid by him upon them. In the face of the authorities a general lien is not here claimed or contended for; but as against the plaintiff a lien for all premiums paid in respect of these particular policies. The defendant here is within the rule of law stated and assigned and laid down in *Maans* v. *Henderson and others* (1 East, 336), and having paid these premiums, he has a lien for them on the policies on which they were so paid. [KELLY, C.B.—Is there not a distinction that in that case the third person was not, as here, a broker?] It is contended that no such distinction is known to the law: (*Mann* v. *Forrester*, 4 Campb. 60; *Olive* v. *Smith* (per Gibbs, C.J.), 5 Taunt. 56; 2 Rose 122.) The point is, not whether or not the plaintiff knew that the defendant acted as the broker, but it is that the defendant expended money on the policy the benefit of which the plaintiff claims, and can only claim with the burden of the lien on it: (*Westwood* v. *Bell*, 4 Campb. 349.) Had the defendant done anything to induce the plaintiff to pay Skinner and Co. it might have been considered a payment to the defendant, whose lien can only be so discharged: (*Heald and others* v. *Kenworthy*, 10 Ex. 739; 24 L.J. 76 Ex.) A sub-agent effecting an insurance has a lien on the policy for the premiums paid by him, even although he has no authority from the principal:

Whitehead v. *Vaughan*, 6 East, 523, note *b*;
Westwood v. *Bell*, *ubi sup.*;
Lanyon v. *Blanchard*, 2 Camp. 597;
Story on Agency, s. 389;
1 Arnould Marine Insurance, p. 197.

The lien accrues for work done, whether he has the authority of the original principal or not. If he has none, the plaintiff is not entitled to the policy; if he takes up the policy, the principal ratifies his acts (per Gibbs, C.J. in *Westwood* v. *Bell*). The lien once attaching, attaches against all the world, and continues until it is discharged:

2 Duer's Law of Marine Insurance (American) p. 282, sed. 2, 3, *et seq.*;
Threlfall v. *Borwick*, in the Exchequer Chamber, on appeal from the Queen's Bench, 32 L. T. Rep. N. S. 95; 44 L. J. 87, Q. B.; s. c. nom. *Threlfall* v. *Borwick*, L. Rep. 10 Q. B. 210.

Powell Q.C., in reply, cited
Smyth and others v. *Anderson*, 7 C. B. 21; 18 L. J. 109, C.P.; 13 Jur. 211;
Pinnock and another v. *Harrison*, 3 M. & W. 532; 7 L. J., N. S., 137, Ex.

KELLY, C.B.—It is essentially necessary to look at the precise facts of the case when we are about to pronounce a decision upon it, because it will be found that they differ entirely from those in any of the cases which have been cited and so ably dealt with and relied on in the course of this argument by Mr. Matthews on behalf of the defendant.

Now, we find in the present case, as in every other case in which he had any dealings with Skinner and Co., with respect to their effecting policies of insurance for him, that the plaintiff contracted with them, and with them alone, and gave them no authority to employ a sub-agent or otherwise to act in the transactions which took place between them than on his behalf alone, and for themselves alone, to act, and alone to do the acts which they were employed by him to do in the matter. Moreover, it is perfectly clear that at the time of their employment, and at the time of the making of the policies, and indeed up to the time when the defendant actually effected them, and so, as between himself and the underwriters, entitled himself to the receipt and possession of the policies, the plaintiff had no knowledge that the defendant had been employed, and had given no authority, express or implied, to Skinner and Co., to employ him or any other person whatever, or, by delegating the authority conferred upon them by their contracts with the plaintiff, to compromise the latter's rights in any way, such, for instance, as his right to the possession of the policies.

And, in considering the employment of the defendant by Skinner and Co., it becomes a question, to which I will advert hereafter, what was the actual contract between them and the defendant?—whether, as between him and Skinner and Co., it conferred upon the defendant, either in its terms or its legal effect, any right whatever to claim a lien upon the policies which he should effect under that employment? And, as we are entitled to draw inferences from the facts stated in the case, I own the inference appears to me to be such as put an end to the lien which the defendant claims, and upon the grounds which I will afterwards state. To revert, however, at present to the facts.

It appears that the plaintiff, who was a shipowner, had on many occasions employed Skinner and Co. to effect policies of marine insurance on his behalf, and it likewise appears in paragraph 2 of the case that Skinner and Co., who were insurance brokers, were authorised by the plaintiff to effect insurances to the amount of 4000*l.* on the cargo in question; and it appears, moreover, that down to that time, although other transactions had taken place between them, the plaintiff had no knowledge that any of the many insurances effected for him by Skinner and Co. had been effected through the agency of any other persons or otherwise than by Skinner and Co. themselves. Then, it further appears by paragraph 3 that on the 1st Aug. 1874, Skinner and Co. having been authorised to effect these policies according to the usual course of business between them and the plaintiff, sent to the plaintiff the account of their claim in respect of the premiums thereon, amounting, less the usual discount of ten per cent., to 72*l.* 18*s.* (I need not go further into the account, which has been called the covering note); and this account was paid and settled by the plaintiff in the usual course by means of a bill payable at a month's date, which was duly met and paid at maturity. Now, thus far it appears that in this, as in numerous other transactions which had previously taken place, the plaintiff never directly or indirectly conferred any authority upon Skinner and Co. to employ any sub-agents, or to do otherwise than effect these insurances themselves. And, further, that until the insurances in question had been actually effected, the plaintiff did not even know that Skinner and Co. had employed the defendant or any other person in any one of these transactions.

Now, the contract between Skinner and Co. and the plaintiff, under which these insurances were effected by Skinner and Co. as insurance

brokers, must be regulated and interpreted according to the course of dealing between the parties, which, and also the usual course of business in the trade, appears from paragraph 6 of the case to have been for Skinner and Co. to make out and deliver to the plaintiff on the 8th of each month an account debiting the latter with the sum of money due and payable by him to them in respect of premium, brokerage, and other charges in relation to policies effected by or through them for the plaintiff in the course of the then preceding month, and for the plaintiff to pay the amount of such account by bills at one month's date. And it is here that, exercising our power to draw inferences, when we find that this course of dealing was not only the course of business between Skinner and Co. and the plaintiff, but was the usual course of business in the trade, I draw the inference, and I entertain no doubt that the defendant perfectly well knew that that was the course of business between the parties, and that he therefore not only knew that the plaintiff was the principal in all these transactions, but that he also knew from the course of business between him and Skinner and Co., who were to effect the policies, that, whether Skinner and Co. should obtain them or not, or whether they should have effected the policies themselves, or through any other person, the premiums would be paid to them by the plaintiff on the 8th of the month succeeding that in which the policies should be effected. Then what follows? Such being the contract between the plaintiff and Skinner and Co, there was nothing pointing to any sub-agency, or to Skinner and Co. taking upon themselves to delegate the power received by them under their contract to any other person. Under these circumstances, without any authority from the plaintiff, or any knowledge on his part, Skinner and Co. effect the insurances through the medium and agency of the defendant. Then comes the question, what was the relation and what the contract between the defendant and Skinner and Co? If we look at the case, and bear in mind that it was (as appears by paragraph 6) the same course of dealing which prevails in the trade, then on looking at paragraphs 9, 10, and 11, we find, not merely that the same course of dealing existed between them, but that the defendant actually sent in his monthly account under this course of dealing to Skinner and Co, including, among other claims, claims for the premiums in question. I do not advert to the circumstances which may or may not bear materially upon any question arising in this case, that the plaintiff did not demand the policies until he had learned that a loss had taken place. It appears, and we know independently of any finding in the case before us, that it is the practice in many cases for the merchant to leave the policies in the hands of the insurance broker until the event of the voyage is known. If the ship arrives in safety the policy becomes of no value; but if a loss takes place the merchant applies for and obtains the policy from the insurance broker

We now come to the course of dealing between Skinner and Co. and the defendant, and the question is, what was the contract which we are to infer to have been made between Skinner and Co. and the defendant, with respect to any claim by the defendant as against Skinner and Co., or any body else, with respect to the amount of the premiums paid on effecting these policies? I do not hesitate to say that I find, as a fact, that the contract between Skinner and Co. and the defendant was confined to transactions between themselves and themselves alone, and that the effect of it was that the defendant should look to Skinner and Co. and to them alone for the repayment of the premiums which he should advance to the underwriters. If that be so it would be the common course, as between principal and factor, and sometimes between principal and insurance brokers, and, when the latter employ sub-agents, between them and such sub-agents, that the broker employed by the principal, looks to the principal, and to the principal only, for the amount of the premiums which he would be entitled to, and which would be paid upon the effecting of the policies, and that the sub-agent in any transaction of this nature looks solely and exclusively to the insurance broker who has employed him. Consequently, therefore, applying that course of dealing, and drawing the inferences therefrom, and from the facts of the case which we are entitled and authorised to draw, I am of opinion that the contract between Skinner and Co. and the defendant was that the defendant should look to Skinner and Co. alone for the repayment of any premiums advanced by him on effecting the policies. If that be so, then it is the not unusual case of a merchant or shipowner employing an insurance broker, and a contract being made between them, the liability arising out of that contract is confined to themselves, the two parties to the contract, the employment on the one side and the definitive execution of the work to be done on the other, and no question arises or can arise between the merchant and the sub-agent.

We have been referred to many cases and various authorities, and there may be general propositions stated in several of them which may seem to apply to a case like the present; but I do not see one of them in which the facts are the same or analogous to those in the present case. The only case at all like it, and on which Mr. Matthews, in his able argument, placed his principal reliance, is that of *Westwood* v. *Bell and another* (4 Camp. 349). There undoubtedly a sub-agent was held to be entitled to a lien as against the principal in respect of certain premiums which he had paid. But a distinction, and a marked and obvious one, between that case and the case now before the court is that in *Westwood* v. *Bell and another* the party there, the sub-agent, in the situation of the present defendant, did not know that there was any principal at all behind the person who had actually employed him in the business. The marginal note in that case is as follows: "If A. employs B. to effect a policy of insurance for his benefit, and B. without A.'s knowledge employs C. to effect the policy, representing himself, to C. as the principal, C. has a lien on the policy as against A, for the general balance due to him from B." The marginal note does not notice that the defendant not only was unaware that there was any principal behind his immediate employer, but believed that his immediate employer was himself the principal. It thus became the common case of one employing another to do a certain act in respect of which a liability arises, and when it turns out that the person who acted as and was believed to be the principal was only acting as the agent of another, then, if that other, the real original principal, adopts the act

that has been done, he adopts the employment and takes the benefit of it, and must of course take it *cum onere*, and treat the sub-agent as an agent of his own. That rule was the ground of the decision, or rather it was that which pervaded the summing-up to the jury of the learned judge, Gibbs, C J.; in that case his Lordship (at p. 352 of 4 Campb.) said, "I am of opinion that the action cannot be maintained. I hold that if a policy of insurance is effected by a broker, in ignorance that it does not belong to the persons by whom he is employed, he has a lien upon it for the amount of the balance which they owe him." And so if the policies here had been effected by the defendant in ignorance that they were being effected for the plaintiff, and he had believed that his immediate employers, Skinner and Co., were themselves the principals in the transaction, no doubt *Westwood* v. *Bell* would then have applied. Gibbs, C.J., then proceeds: "In this case Clarkson" (now Clarkson in that case is the Skinner and Co. of the present one). "Clarkson misconducted himself, and is liable for not disclosing that he was a mere agent in the transaction; but the defendants, who had every reason to believe that he was the principal, are entitled to hold the policy, If goods are sold by a factor in his own name the purchaser has a right to set-off a debt due from him in an action by the principal, for the price of the goods. The factor may be liable to his employer for holding himself out as the principal; but that is not to prejudice the purchaser, who *bonâ fide* dealt with him as the owner of the goods, and gave him credit in that capacity." Now, is that so here? Did the defendant ever deal with the plaintiff as "the owner of the goods, and give him credit in that capacity?" The very reverse is the fact as it appears to me. The learned Chief Justice then goes on, "The lien of the policy broker rests on the same foundation. The only question is whether he knew, or had reason to believe that the person by whom he was employed was only an agent; and the party who seeks to deprive him of his lien must make out the affirmative. The employer is to be taken to be the principal until the contrary is proved. If the plaintiff's assent to the employment of Clarkson is denied, then he can have no right to the policy, and there is no privity between the parties. The argument about pledging the policy is fallacious. This never was a policy of the plaintiff's, which he held unencumbered and handed over to his agent. In its very origin and creation it was burthened with the lien." That would be so in the present case if the defendant had not known that the plaintiff was his principal, but had believed that Skinner and Co. were and had so dealt with them. "It never," Gibbs' C.J., goes on to say, "has been the plaintiff's for an instant, but subject to the lien which is now claimed. The rights of the parties do not stand on the same footing as if Clarkson had said he had authority to pledge the policy, but as if he had said; the goods to be insured are mine, the policy is for my benefit alone, and I agree that when it is effected it shall remain in your hands till the whole of the balance I owe you is satisfied; and on the strength of it you will continue to trust me.' If that had passed, can I say that the defendants are to be stripped of their right on account of a fact of which they had no knowledge, and that they are to deliver up to a stranger the policy which they have effected under a contract that they should hold it as a security for the balance due to them from their employer? Nor do the cases cited on the part of the plaintiff at all contradict the doctrine I am laying down. In *Snook* v. *Davidson* (2 Campb. 218), the person who employed the defendants to effect the policy, said that it was for a correspondent in the country. In *Lanyon* v. *Blanchard* (2 Camp. 519) likewise, the defendant must be taken to have had notice that the person who employed him was not the principal The representation made by Crowgy that he had authority to endorse the bill of lading was abundantly sufficient to show that he was only an agent, and I entirely subscribe to what Lord Ellenborough is there supposed to have laid down respecting the risk which the defendant ran in giving faith to that representation. The subsequent case of *Mann* v. *Forrester* (4 Campb. 60) is quite decisive. The doctrine stands upon authority as well as upon principle. I should have had no difficulty in determining the question were it entirely new; and I find myself strongly fortified by the opinions of other judges."

Now, in the case before us, this defendant had clear and express notice from beginning to end that Skinner and Co., who employed him, were not principals, but that, on the contrary, they were acting only for the plaintiff, and that the latter was the principal, with whom the defendant had no communication, and to whom he gave no notice of any claim, and with whom in fact he had no dealings at all until the present question arose upon, what we must assume to have taken place, the insolvency of Skinner and Co. Now the very foundation of the ruling of Gibbs, C.J., which I have quoted at length, and to which I entirely accede, was that the defendants there, the sub-agents, believed that they were dealing with the intermediate parties as principals, and had no knowledge that there was a real principal behind.

Under these circumstances, without adverting to the other cases which have been cited, on the one side or the other, no one of which is parallel in its circumstances with, or lays down any principle applicable to, this particular case, it appears to me that the present is not a case in which the sub-agent, the defendant, is entitled to the lien which he claims, and that the plaintiff is entitled to maintain an action for the policies, and that these policies were his, and that it makes no difference that they were procured, not by Skinner and Co. alone, but through the sub-agency of the defendant.

Upon these grounds, therefore, I am of opinion that our judgment ought to be in favour of the plaintiff.

CLEASBY, B.—I am of the same opinion.

I do not think that it is intended at all to question the lien in general of an insurance broker actually effecting a policy and paying the premiums, as against any person desiring to avail himself of that policy by obtaining possession of it. It is, no doubt, as has been stated, a common practice for the broker who has actually communicated with the underwriters to retain the policy, and simply to settle for the matter and deduct his premium in that particular case, and any other premiums that he may have paid. The authorities seem to show that that is so, and we have to consider how far in the present case that course is modified by the circumstances.

Now here we have one transaction as between Skinner and Co. and the plaintiff, the amount insured being 4000*l.*, but as between Skinner and Co. and the defendant there were three separate transactions. In this case, therefore, we are asked to make the plaintiff, who was a party to only one transaction with Skinner and Co., a party to three different transactions with the defendant, so as to establish an account with him. And we are also asked to go further, and, although there is this one transaction between Skinner and Co. and the plaintiff, and, although that one transaction was settled by him according to the usual course of business, we are asked to say that he was unable to close it by a settlement with Skinner and Co. on the 5th Sept., according to the usual course of trade, and that he must be a party to I know not what number of other transactions.

Now the facts may be stated very shortly as follows: The plaintiff, a merchant, had a cargo on his hands, and he instructed Skinner and Co., insurance brokers, in his own town, to effect an insurance for him on such cargo, and thereupon Skinner and Co., employed the defendant, who was an insurance broker to do it, and he did it accordingly. The defendant knew that the policies were effected through him for Skinner and Co. for the benefit of the plaintiff; and the plaintiff knew, soon after the policies of insurance were effected, that Skinner and Co. had employed the defendant to effect them. Now the usual course of the business, and the usual course between Skinner and Co. and the plaintiff, was for a monthly account of premiums to be sent in by them to be settled by the plaintiff. It appears that in all previous transactions of the same nature—and there seems to have been several—the plaintiff had always paid Skinner and Co., and Skinner and Co. had always paid the defendant. There never had been a transaction between the plaintiff and the defendant.

The real transaction then is that the defendant knew that the policies were the property of the plaintiff, and not of Skinner and Co., and he knew that the plaintiff settled for the premiums with Skinner and Co. That I take to be a fact, and a decisive fact in the case. In other words, he knew that the plaintiff settled with Skinner and Co. and not with him for these premiums, which he, the defendant, had advanced. I cannot see how to escape from that conclusion. If they were to be paid in that way, then whatever money the defendant advanced was to be paid to Skinner and Co., and not to the defendant, and it follows thence that the lien of the defendant is not in respect of the premiums unpaid to him, but of the premiums unpaid by the owner of the policies to Skinner and Co. It is in reality a sort of joint transaction between Skinner and Co. and the defendant, and they divide the brokerage. Of course it follows that the lien was one subject to be discharged and intended to be discharged in the usual way by payment to Skinner and Co. I do not consider it necessary to advert to the fact that the plaintiff paid on the 5th instead of the 8th of the month. There seems on both sides to have been some deviation, and for doubtless a sufficient reason, from the ordinary course, but it would be monstrous that the case should be decided upon the fact that the payment being made on the 5th instead of the 8th of the month. I take it to be a fact quite clear that when the plaintiff paid on the 5th Sept. no claim whatever had been made by the defendant, nor had the plaintiff any knowledge that the defendant had not been paid. That is not quite clearly or distinctly stated, but I think it is an inference which we may reasonably draw from the case, and particularly from paragraph 9.

I quite concur with my Lord, and for the reasons he has adduced, that our judgment should be for the plaintiff.

Judgment for the plaintiff with costs.

Solicitors for the plaintiff, *Chester, Urquhart, Mayhew*, and *Holden*, agents for *Bradshaw* and *Pearson*, Barrow-in-Furness.

Solicitors for the defendant, *Sharpe, Parkers, Pritchard*, and *Sharpe*, agents for *Gill* and *Archer*, Liverpool,

ADMIRALTY DIVISION.

Reported by James P. Aspinall,, and F. W. Raikes, Esqrs., Barristers-at-Law.

Thursday, Feb. 3, 1876.

(Before the Right Hon. Sir R. Phillimore.)

The Juno.

Collision —Compulsory pilotage— Falmouth Harbour—Costs.

Falmouth Harbour being within a Trinity outport district for which pilots were licensed by the Trinity House prior to 1854, *pilotage is, by the Merchant Shipping Act* 1854, *compulsory there for a vessel bound from a Mediterranean port to the port of Falmouth.*

Where defendants in an action of collision raise the defence of compulsory pilotage only and succeed therein they are entitled to their costs.

This was an action brought by the owners of the British barque *Indus* against the Swedish barque *Juno* to recover damages in respect of a collision between the two vessels.

The plaintiffs alleged that the *Indus* was lying at anchor in a proper berth off St. Mawe's Castle, in the harbour of Falmouth on the 13th Dec. 1875, at about 8 p.m. with her regulation anchor light duly exhibited and burning brightly; that the *Juno* entered the harbour under sail, and instead of keeping clear of the *Indus* improperly let go her anchor at a short distance from the *Indus*,, and come into collision with her and did her considerable damage.

The defendants admitted the plaintiffs' allegations, but alleged that the *Juno* was on a voyage from Alexandria to Falmouth with wheat, and whilst entering the harbour as alleged the *Juno* was in charge of a duly licensed Trinity House pilot named E. W. Chard, and that "before and at the time of the collision aforesaid the *Juno* was by compulsion of law in charge of the said Elias W. Chard, who was a pilot duly licensed for the district in which she was being navigated, and the said collision and the damage proceeded for in this action were caused by the negligence of the said Elias W. Chard and not by any fault of the *Juno*, her master and crew."

In support of this defence the master and crew of the *Juno* gave evidence to the effect that the pilot was in charge of the *Juno*, and that he gave the order to let go the anchor, and the order was obeyed. As to the pilotage being compulsory, James Henry Hart proved that he had been a clerk in the Trinity House for thirty-three years, that Chard was duly licensed at the time of the collision for the Falmouth district, including the

harbour of Falmouth (the license was produced and read); and that prior to the year 1854 the Trinity House had been in the habit of licensing pilots for the Falmouth district and the harbour of Falmouth. By the licence Chard appeared to have been duly examined and licensed by the sub-commissioners of pilotage for the Falmouth district.

The defendants called evidence to show that the order to let go the anchor was not given by the pilot of the *Juno*.

Butt, Q.C. (*W. G. F. Phillimore*, and *Stubbs*), for the defendants contended that the facts showed that the pilot alone was to blame for the collision. Assuming that to be the case the pilotage was compulsory. By the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104, s. 369), "The Trinity House shall continue to appoint sub-commissioners . . . . for the purpose of examining pilots in all districts in which they have been used to make such appointments," &c.; sect. 370, "The Trinity House shall continue, after due examination by themselves or their sub-commissioners, to appoint and licence under the common seal pilots for the purpose of conducting ships within the limits following, or any portion of such limits—that is to say . . . 'The Trinity House outport districts' comprising any pilotage district for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter;" sect. 376, "Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are the London district and the Trinity outport districts, as hereinbefore defined," &c. There is no exemption in the Act which would excuse a foreign vessel coming from Alexandria from taking a pilot. Hence pilotage is compulsory.

Milward, Q.C. and *E. C. Clarkson*, for the plaintiff, contended that the evidence showed the pilot did not give the orders which brought about the collision. The defendants have not shown that there is no particular provision made by Act of Parliament or charter; hence it cannot be held to be a Trinity outport district.

Sir R. PHILLIMORE.—The evidence satisfies me that the orders were given by the pilot, and that the collision was occasioned by his sole default. And I am also satisfied that the defendants have shown that the Falmouth district is a Trinity outport district, and that pilotage at Falmouth is compulsory for vessels of the class of the *Juno*. I must, therefore, give judgment for the defendants.

Butt, Q.C. applied for costs against the plaintiffs upon the ground that the only issue raised being compulsory pilotage, and the defendants having succeeded thereon, they were entitled to costs on the authority of *The Royal Charter* (L. Rep. 2 Adm. & Ecc. 362; 20 L. T. Rep. N. S. 109; 3 Mar. Law Cas. O. S. 262).

Clarkson contended that the allowing of costs in these cases were purely discretionary, and that as the plaintiff's case was brought forward *bonâ fide*, and there was a great conflict of evidence, the plaintiff ought not to be condemned in costs.

Sir R. PHILLIMORE.—I look upon it as an established rule that where compulsory pilotage is within the knowledge of the plaintiffs the only defence, and the defendants come into court and prove that the collision was occasioned by the pilot's sole default, the plaintiff disputing this fact and failing must pay the costs.

Solicitor for the plaintiff, *Thos. Cooper*.

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

Tuesday, March 7, 1876.

THE FYENOORD.

County Court Appeal—Salvage—Tender—Amount awarded under 50*l.—County Courts Admiralty Jurisdiction Act*, 1868, *sects.* 26, 31.

No appeal lies from the decision of a County Court in a salvage cause where there is a tender of less than 50*l. and that tender is upheld, the amount tendered being the amount "decreed or ordered" within the County Courts Admiralty Jurisdiction Act* 1868 (31 *&* 32 *Vict. c.* 71), *sect.* 31.

THIS was a motion for leave to appeal in a cause of salvage, which was instituted in the City of London Court (Admiralty jurisdiction) to recover reward for salvage services alleged to have been rendered by a pilot to the foreign ship *Fyenoord*. The defendants had tendered 5*l.* for the services, and the learned judge of the City of London Court upheld the tender.

Myburgh, for the plaintiff, now moved for leave to appeal against the award as insufficient.

E. C. Clarkson opposed the motion, contending that there was no jurisdiction because the amount decreed or ordered was under 50*l.*, and in such case there was no appeal by the provisions of the County Court Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71, sect. 31).

Myburgh, in reply, submitted that the section did not apply because the decree in effect was a decree for the defendant, and the section clearly did not apply to cases where the plaintiff recovered nothing. If the plaintiff could not appeal here a defendant could always stop appeals by tendering a small sum where he had any prospect of their being upheld.

Sir R. PHILLIMORE.—If there had been no tender, and the court had awarded 5*l.* or any other sum less than 50*l.* there would have been no appeal. In effect the court has said that 5*l.* is enough, and that that sum is the award it would have made if there had been no tender. How is the upholding of a tender different from the making of an award? 5*l.* is the amount decreed or ordered. The application must be dismissed with costs.

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

Solicitor for the defendant, *Thomas Cooper*.

Tuesday, April 4, 1876.

THE EMMA.

Discovery—Action in rem—Foreign ship—Practice.

In an action in rem against a foreign ship whose owners are resident abroad, the court will make an order for discovery of documents against such owners, but will always allow a reasonable time for making the affidavit of documents.

THIS was an action instituted *in rem* against the American ship *Emma*, and her freight, on behalf of Messrs. De Wolf, of Liverpool, the owners of the barque *City of Halifax*, to recover damages in respect of a collision between the two ships.

An appearance was entered on the 22nd March 1876, on behalf of the owners of the *Emma*, and

on the 31st March, the solicitors for the plaintiffs took out a summons calling upon the defendants to show cause why the defendants should not answer within three days stating what documents were in their, or either of their custody, possession, or power, relating to matters in question in the action, or what they or either of them knew as to the custody they or any of them were in, and whether he or they objected, and, if so, on what ground, to the production of such as were in his or their possession or power. This summons was taken out before the delivery of pleadings, and came on to be heard before the judge in court.

E. C. Clarkson, on behalf of the plaintiffs.—By the rules of the Supreme Court, Ord. XXXI. r. 12, plaintiffs are entitled to an order directing the defendants to make the discovery asked for by the summons on oath.

R. E. Webster for the defendants.—The defendants are resident abroad, and I submit that the court has no jurisdiction to make any order for the discovery of documents against them, having in effect no power to enforce such an order. The defendants are willing to produce the log book, protests, and other documents material to the case, which are in the control of their master. Even if the court makes the order, the defendants ought to have more than three days to file an affidavit of documents. Three days is insufficient.

Sir R. PHILLIMORE.—I shall make the order directing the defendants to make discovery on oath, but I wish it to be understood that in all cases where a similar order is made on the owners of foreign ships, I shall allow a reasonable time for them to obey the order.

Solicitors for the plaintiffs, *Gregory, Rowcliffe, and Co.*

Solicitor for the defendants, *Thomas Cooper.*

Monday, May 1, 1876.

THE MEDINA.

Salvage of life—Agreement—Exorbitancy—Setting aside.

Where the master of a vessel found passengers of another vessel (550 *pilgrims*) *wrecked on a rock on the Red Sea in fine weather, and refused to carry them to Jeddah for a less sum than* 4000*l.*. *and the master of the wrecked vessel was by such refusal compelled to sign an agreement for that amount, and the service was performed without difficulty or danger, the agreement was held inequitable and set aside.* 1800*l. awarded in the place thereof.*

THIS was an action brought by the owners of the *Timor* against the Singapore Steamship Company (Limited) to recover an amount alleged to be due to the plaintiffs under an agreement for services rendered to the passengers on board the defendants' ship *Medina*. The action was originally commenced in the Exchequer Division, but was by order transferred to the Admiralty Division. No statement of claim was delivered by the plaintiffs, but the endorsement on their writ was as follows :

The plaintiffs claim £4000 due from the defendants to the plaintiffs under an agreement dated 1st Oct. 1875, between Captain J. Brown, master of the plaintiffs' ship *Timor*, for and on behalf of the plaintiffs and Captain Charles Black, master of the defendants' ship *Medina*, for and on behalf of the defendants for the conveyance at defendants' request of passengers by the plaintiffs' ship *Timor* from Parkin Rock, Harnish Island, to Jeddah, with interest at £5 per cent. per annum from the date of the said agreement until payment, and £4 4*s.* for costs, and if the amount claimed be paid to the plaintiffs or their solicitors within fifty days from the service hereof further proceedings will be stayed.

The defendants' statement of defence was so far as material as follows :

1. On the 30th Sept. 1875 the *Medina* while on a voyage from Singapore to Jeddah with a general cargo and having on board 550 passengers (pilgrims) who had embarked at Penang for Jeddah was wrecked on the Parkin Rock in the Red Sea and the pilgrims were landed by the *Medina's* boats on the rock.

2. The Parkin Rock is a small sharp rock about thirty miles from the mainland and about 240 miles from Aden and from two or three days' voyages from Jeddah.

3. The *Medina's* boats were so knocked about in landing the pilgrims on the rock as to be useless and the lives of the pilgrims for whom there was scarcely standing room on the rock were exposed to danger.

4. About 10 a.m. of the 1st Oct. the master of the *Medina* observed a steamer which proved to be the *Timor* bound on a voyage from Kurrachee to Liverpool, and made signals of distress which were observed by the *Timor* and she altered her course and bore down to the rock.

5. When the *Timor* approached the rock the master of the *Medina* went on board of her and told the master of the *Timor* the position of the pilgrims and asked him to render assistance.

6. Thereupon negotiations took place between the master of the *Timor* and the master of the *Medina*. The master of the *Timor* refused to take the pilgrims from the rock to Jeddah for less than £4000 and the master of the *Medina* who offered £1500 and subsequently £2000 to the master of the *Timor* for his services and after these offers had been refused proposed to refer the amount to arbitration which proposal was rejected was ultimately forced to acquiesce in the demand of the master of the *Timor* and to sign the agreement sued on. The *Medina* was totally lost on the said rock.

7. The said sum of £4000 was not a reasonable amount for the services to be rendered by the *Timor*, but was an exorbitantly excessive amount for such services and the master of the *Timor* in procuring the master of the *Medina* to sign the said agreement took undue advantage of the position in which the master of the *Medina* and the pilgrims were placed and the defendants further say that the master of the *Medina* had not any authority to enter into the said agreement on behalf of the defendants, and that the said agreement was extorted and improperly obtained from the master of the *Medina* and is wholly unjust and inequitable and is not binding on the defendants.

8. The defendants are ready and willing to pay to the plaintiffs such reasonable amount for their services as the court may think just.

The plaintiffs replied as follows :

1. Paragraphs 1, 2, 3, 4, and 5 of the statement of defence are admitted.

2. The plaintiffs join issue upon paragraphs 6 and 7 of the statement of defence except the averments that negotiations took place between the master of the *Medina* and the master of the *Timor*, and the latter refused to take the pilgrims from the rock to Jeddah for less than £4000.

3. As to the 8th paragraph of the statement of defence the plaintiffs submit that the agreement of the 1st Oct. 1875 is a valid and subsisting agreement and binding upon the defendants, and that the defendants are liable to pay to the plaintiffs the said sum of £4000 and no less.

At the hearing it appeared that the *Medina* being on a voyage from Singapore to Jeddah with a general cargo took on board at Penang 550 pilgrims bound for Mecca. On the 1st Oct. 1875 in the morning she struck on the Parkin Rock in the Red Sea, nearly 200 miles from Aden and thirty miles from the mainland. The Parkin Rock is about 400ft. long the highest part of it being 6ft. out of the water, and some of it level with the water. All the passengers were landed on this island by means of the *Medina's* boats. At about

11.30 a.m. on the same day the *Timor* was passing the rock on a voyage from Singapore to Liverpool, when her assistance was requested by the master of the *Medina*, who came off in a boat. The master of the *Medina* boarded the *Timor* without difficulty and asked the master of the *Timor* to remove the pilgrims from the rock and take them to Jeddah. There was a considerable discussion between the masters as to the terms upon which the service should be rendered. The master of the *Medina* offered first 1500*l.* and then 2000*l.*, and finally offered to refer the amount to arbitration thereafter, but the master of the *Timor* refused to render the required service for any less sum than 4000*l.*, and ultimately the following agreement was made and signed by the master of the *Medina*.

Agreement made this 1st Oct. between Captain Brown of the *Timor*, of London, and Captain Black, of the steamer *Medina*, belonging to the Singapore Steamship Company (Limited), that the said Captain Brown agrees with Captain Black of the *Medina* to take the whole of his passengers (pilgrims) from off the Parkin Rock and take them to the port of Jeddah, and as near thereto as she can safely get, for the lump sum of £4000 sterling.

The master of the *Timor* duly performed this agreement. He also tried to get the *Medina* off the rock, but without success, and she became a total loss. The weather was and remained calm and fine during the whole service.

The *Admiralty Advocate* (Dr. *Deane*, Q.C.) and *Myburgh*, for the plaintiffs, contended that the service was not a mere life salvage, but was also a completion of the contract of the defendants to carry the pilgrims to Jeddah by which they were enabled to earn freight. There was risk on entering the port of Jeddah; and if any of the pilgrims had been ill, the *Timor* might have been put in quarantine, and have incurred great expense. The fact that no delay or danger did accrue is not a fact to be considered: (*The Enchantress*, Lush. 93.) This agreement was entered into between competent persons, and ought, therefore, to be upheld.

Wood Hill (*Cohen*, Q.C. with him), for the defendants.—Where a demand is exorbitant and a master improperly accedes to it, the court will not uphold an agreement made upon such a basis: (*The Theodore*, Swabey 351). Here the demand was outrageous, and forced upon the master of the *Medina*. The amount recoverable for life salvage is only a reasonable amount under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 458, and this amount is unreasonable, the services being unattended by either difficulty or danger.

Sir ROBERT PHILLIMORE.—The circumstances of this case are very singular, but it is one in which the court really feels no doubt at all as to the judgment which it ought to give. It is not necessary that I should go into an examination of the authorities which I recently referred to in the case of *Cargo ex Woosung* (3 Asp. Mar. Law Cases 50). And which I also referred to in the case of *The Waverley* (3 L. Rep. A. & E. 369), but I may state the result of them to be this: that it is the practice of the court, partly for the protection of absent owners, and partly on the grounds of general policy, to control agreements made by captains, when an examination of the agreements shows that they are clearly inequitable.

In the present case there were upwards of 500 pilgrims on a rock which is just six feet above water, their ship had gone to pieces, and the plaintiffs' vessel, the *Timor*, came up close without any difficulty or danger at all, because the evidence is that the water was quite deep up to the rock; she came up and her captain in effect says, "I will not relieve you from this situation, which four hours of bad weather might convert into a most imminent danger, indeed it may be said into your total destruction; I will not take you away unless you give me 4000*l.*" Now what is 4000*l.* with regard to the matter saved, which is human life? On the other hand, however, that sum is the whole sum that was to be paid for conveying pilgrims to Jeddah. And in my opinion if the *Timor* had not taken these pilgrims off the rock in the circumstances stated, and bad weather had come on, and they had lost their lives in consequence, he would hardly have been in a better condition than that of a pirate. Nevertheless, it was certainly a valuable salvage service according to the principles upon which such services have always been considered in this court, but I am of opinion that 4000*l.* is a great deal too much, and I shall reduce it to 1800*l.*

As to the costs, there has been no tender, and I shall, therefore, leave each party to pay their own costs. If there had been a sufficient tender I should have given the defendants the costs. I shall not give costs to either side.

Solicitors for the plaintiffs, *Brooks, Jenkins*, and *Co.*

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

Tuesday, May 23, 1876.

THE PARANA.

Objection to registrar's report—Damage to cargo—24 Vict. c. 10*—Measure of damages—Loss of market.*

Where, through the negligence of a carrier by sea, goods carried by him are not delivered in a reasonable time, the owner of the goods or assignee of the bill of lading for the goods is entitled to recover as damages from the shipowner the difference between the market value of the goods when they ought to have been delivered and the market value when they actually were delivered.

THIS was an objection to a report of the registrar (H. C. Rothery, Esq.) in a cause referred to him by the court.

The cause was instituted under the Admiralty Court Act 1861 (24 Vict. c. 10), s. 6, on the 4th Dec. 1873, in the High Court of Admiralty, on behalf of Joseph Samuel, of London, the assignee of certain bills of lading for goods (sugar and hemp) forming part of the cargo of the steamship *Parana*, against that vessel, her tackle, apparel, and furniture, and the freight due or payable for the transportation of the cargo, and against William Malcolmson, of Portland, in Ireland, her owner, intervening. After the pleadings in the cause had been concluded, and witnesses had been examined by commission at Manila and Hong Kong, the defendant, on the 14th April 1875, admitted his liability, and consented to a reference of the accounts to the registrar and merchants.

On the 14th Dec. 1875 the plaintiffs brought into the registry a claim containing three items: First, loss of market in respect of the hemp;

secondly, loss of interest; and thirdly, loss by drainage of sugar by reason of the unusual length of the voyage. The defendant, before the registrar, admitted that there was some unreasonable delay, and that he was ready to make good any damages necessarily resulting therefrom. The facts of the case, which were not disputed, are detailed by the registrar in his report as follows:

"The *Parana* was a trading steam vessel of 1372 tons gross and 1027 net register, and she was of 180 horse power nominal, which the master stated was a small power for a vessel of her size. When she left England she was, according to the master, 'frightfully deep,' having from 1000 to 1300 tons of iron as dead weight, and she was filled up with light goods.

"She took ninety days to get to Hong Kong, and having there discharged her cargo was docked, surveyed, and repaired. She thence proceeded in ballast to Manila, where the master entered into a charter-party with Messrs. Engster and Co. to load a cargo at Manila and Ilo-Ilo, and to proceed therewith to London, passing through the Suez Canal.

"In pursuance of the charter-party she took on board some parcels of hemp and sugar at Manila, and having sailed to Ilo-Ilo she then took in further parcels of sugar, but as the charterers were not able to supply her with a full cargo it was agreed that she should be at liberty on the homeward voyage to call in at Singapore to fill up. She left Ilo-Ilo on the 24th July 1873, but owing to the defective state of the boilers she was obliged on the 30th of the same month to put into Labuan for repairs. Thence she proceeded to Singapore, where she took in some cargo and a large quantity of coals, and having effected some further repairs to the boilers she again proceeded on her voyage. On the 18th Aug., owing to the state of the boilers, she was obliged to put into Acheen, and after effecting repairs she again proceeded. On the 1st Sept. she had to alter her course for Point de Galle, it being found that she could only carry 11lb. steam. She arrived in Point de Galle on the 4th Sept., and, having completed her repairs, she left again on the 9th. On the 1st Oct. she arrived at Acheen, where further repairs were done to her boilers, and again at Port Said, at Malta, and at Gibraltar, so that it was not until the 28th Nov. 1873, 127 days after leaving Ilo-Ilo, that she arrived in the Port of London.

"As to the lamentable state in which this vessel's boilers were there can be no two opinions. It seems that after the vessel had discharged her cargo she proceeded to Greenock, where her boilers were taken out. We have no information as to what may have been the condition of one of the boilers, as it was broken up before the surveyors saw it; but the other was examined by two practical engineers, who reported that of the eighty-three tubes of which the boiler originally consisted, one had never been used, twenty-one others had been plugged up with either iron covers or wooden plugs, so that only sixty-one tubes were at all effective. It was found also that the backs of both furnaces had been patched with large patches, and that there were traces of considerable leakage on the crowns of the furnaces. There were also numerous patches on the shell of the boiler varying from 4ft. by 2ft. 3in. wide to 12in. long by 8in. wide. The rivets also were worn away by long use, so that they had but little hold of the plates, and some of the plates were worn away by corrosion to half their original thickness. They further said that although this boiler, when new, was constructed to bear a pressure of from 30lb. to 35lb. of steam to the square inch, they thought in that condition in which they found it she could not with safety have borne a pressure of more than 10lb. or 12lb. There is no reason to suppose that the boiler which had been broken up was in any better condition. A more lamentable state of affairs can hardly be imagined to anyone at all acquainted with the construction of steam engines. It is apparent that with engines originally of small power, with a tabular boiler, of which twenty-two out of eighty-three of the tubes were perfectly useless, of which the plates were so much worn away that they would bear only 10lb. or 12lb. instead of 30lb. to 35lb. to the square inch, and with the crowns of the furnaces leaking badly, the available power to contend with the S. W. monsoon must have been very small, and it can therefore hardly be wondered at that the vessel made on an average but four knots an hour, and that she had frequently to put into port for repairs, and to replenish her stock of coals."

The reference was concluded on the 27th Jan., the 14th Feb., and 13th April 1876. Evidence was taken both by affidavit and by oral examination, and the registrar, after hearing counsel on both sides, made a report and gave his reasons, saying, *inter alia*, "that the plaintiff would have had no reasonable grounds of complaint, if the voyage from Ilo-Ilo to London had lasted ninety days. But it did, as a fact, take 127 days. We think, therefore, that the ship's owner is, by his admission, liable for the excess of thirty-seven days, during which the voyage lasted, beyond what may be called a not unreasonable time. Taking thirty-seven days then as the measure of the unreasonable delay in the voyage, let us consider what damages may be said to have resulted directly from this delay." He then proceeded to discuss the three different items of the claim, and allowed, first, for extra loss occasioned by drainage of the sugar during the thirty-seven days 1½ per cent. in the original shipment of 500 tons equal to 7½ tons at 12*l.* 10*s.* per ton or 93*l.* 15*s.*; secondly, for interest 5 per cent. for thirty-seven days on the invoice value of the cargoes, 19,959*l.* 9*s.* 11*d.* or 101*l.* 3*s.* 3*d.*

On the third point the registrar's report was as follows:

"There remains the last, and by far the most important question, namely, whether the plaintiff is entitled to any compensation for the alleged loss of market by reason of the non-delivery of the cargo within a 'reasonable' time. The question does not arise on the sugar, in regard to which no claim has been made for the loss of market, but on the hemp only."

It was said by the plaintiff that, had the vessel arrived by the middle of October, or even by the 22nd or 23rd Oct., which would be about ninety days after leaving Ilo-Ilo, the hemp could have been sold for about 41*l.* 10*s.* per ton, but that not having arrived until the 28th Nov., it was impossible to get the hemp landed and placed on the market before the middle of December, and that it was then impossible to get within 20*s.* a ton of

that price. It was said that the owner continued to hold the hemp in hopes that the market would rally, but that it never did, and that ultimately he had to sell it at a considerable loss. He claimed, not, indeed, the difference between the price at which he might have sold it, had it arrived in October, and the price at which he ultimately did sell it; but the difference between the former, and the price which he might have got for it, immediately after it had been delivered. It was shown that during November and in the first week of December there was a fair demand for hemp at 41*l.* 10*s.* per ton, and that price might have been obtained for it. It was also shown that it would have taken about three weeks after the vessel's arrival to have got the hemp sampled and put upon the market; that by that time there was no demand for it, and that, although the prices current had not altered much, a seller forcing any quantity upon the market would have had to submit to a reduction of at least 20*s.* in the ton. It was proved, also, that after Christmas the market continued to fall, owing to large shipments of hemp brought to Liverpool, so that, as one of the brokers observed, the market was knocked all to pieces.

"Assuming, then, that by the delay in the delivery there was a loss of market, the question arises whether this is an item which can be properly allowed in a claim of this description; whether, in fact, a claim for loss of market can be allowed on account of an unreasonable delay in the delivery of the goods. The case must have frequently arisen in this court, as, for instance, when a vessel has been run into by another, and the delivery of the cargo has been delayed by the vessel having to put into port for repairs; and yet I think that I may say with certainty that no such claim has ever yet been preferred in this court, certainly not during the time I have held this office, now nearly twenty-three years. It may be, however, that we have hitherto proceeded on a wrong principle, and as the point has been very strongly urged in this case by a counsel who is not wont to maintain an untenable position, I propose to examine carefully all the authorities which have been cited in support of that position, as well as the grounds upon which it has hitherto been thought that a claim for loss of market cannot properly be allowed."

The Registrar then referred to and discussed the following cases:

The St. Cloud, Br. & Lush. p. 4;
Josling v. *Irvine*, 6 Hurl. & Nor. 512;
Collard v. *South-Eastern Railway Company*, 7 Hurl. & Nor. 79;
Fraser and others v. *Telegraph Construction and Maintenance Company*, L. Rep. 7 Q.B. 566;
Hadley v. *Baxendale*, 9 Exch. 341;
Smeed v. *Foord*, 1 Ell. & Ell. 602;
Horne v. *Midland Railway Company*, L. Rep. 8, C.P. 131;

and concluded his report as follows:

"It seems to me that the cases of *Hadley* v. *Baxendale*, *Smeed* v. *Foord*, and *Irvine and another* v. *The Midland Railway Company* (*ubi sup.*), are conclusive on the point; and that the practice of the Court of Admiralty, in refusing to entertain any claim for loss of market in such cases, is in entire accordance with that of the courts of common law, and I shall refuse to alter that practice until I am corrected by superior authority. I may add that the merchants by whom I am assisted, entirely concur with me in the conclusions to which I have come."

As to the costs of the reference, the report was as follows:

"The general rule in collision cases is that where more than one-third is taken off, the claimant shall pay the costs of the reference. But this rule does not apply to cases of this description. The defendant in the first instance denied altogether his liability, and set up several pleas, which he afterwards withdrew; the condition of the boilers of his vessel was most discreditable, and he entailed heavy losses on the plaintiff; he has, moreover, made no tender on account of the sums which the latter was undoubtedly entitled to recover. On the other hand, the plaintiff has failed in the main issue, the question of loss of market. On the whole, we think that justice will be done by leaving each party to pay his own costs of the reference, but the reference fees will have to be paid by them in moieties."

A motion was heard in court in objection to the report of the Registrar, "to modify and alter the same so far as it disallows the sum of 289*l.* 5*s.* 9*d.*, claimed as damages for the defendant's breach of contract in respect of the depreciation in value by loss of market on 2403 bales of hemp, weighing 5785 cwt., forming part of the cargo of the above-named steamship, because the disallowance of such damages is based upon a misapprehension of law, and is erroneous, and the plaintiff is legally entitled upon the facts of the case appearing by the Registrar's report to recover such damages, and also to alter the said report so far as it orders the plaintiff to bear his own costs of the reference, and to make such order as shall be meet and right in and about the premises, and to condemn the defendant in the costs of this motion."

Clarkson, in support of motion.—It is admitted that the speed of the *Parana* was defective, and the plaintiff claims 285*l.* 5*s.* 9*d.* for the loss of market. The Registrar has allowed nothing in respect of this claim. The only cases in which loss of market has been disallowed as the measure of damages, are those in which it has been occasioned by a special sub-contract, unknown, and not in the consideration of both parties: In *Smeed* v. *Foord* (1 Ell. & Ell. 602) the wheat claimed for was not the subject matter of the contract, which was for the delivery of thrashing machines, not to deliver wheat; here the subject matter of the contract was the carriage and delivery of the hemp; the plaintiff could have recovered on the thrashing machines if he had procured others at a higher price. The Registrar relied also on *Hadley* v. *Baxendale* (9 Exch. 341), but that case is in my favour, for the fluctuation of the market is a matter in the knowledge of both parties. [Sir R. PHILLIMORE.—There are two criteria (1) Was it in contemplation of the parties? (2) Was it the natural result of the negligent delay of the defendant?] *Fraser* v. *Telegraph Construction and Maintenance Company* (L. Rep. 7 Q.B. 566) lays down the law under which damages of this description may be recovered. The breach of contract there was in not supplying a vessel whose principal moving power was steam; here it is for delay in delivery of goods occasioned by defective power of ship, and the loss occasioned thereby is the difference of price caused by the

delay. *Horne* v. *Midland Railway Company* (L. Rep. 8 C. P. 131) is really in favour of the plaintiff; the reason that the extra sum there claimed for loss upon the contract by delay could not be recovered was because the defendants had not notice of any special sub-contract which would increase the ordinary loss caused by non-delivery in time. In *Borries* v. *Hutchinson* (34 L. J. 169, C. P.) the question was what was the proper measure of damages where, from the delay of the carrier, the plaintiff lost his market altogether, and there, also Willes, J. says, "In ordinary cases, the measure of damages is the difference between the contract price, and the market price." In *O'Hanlan* v. *The Great-Western Railway Company* (34 L. J. 154, Q. B.) the general principle is the same, and in *The Great-Western Railway Company* v. *Redmayne* (L. Rep. 1 C. P. 329) the court held that the market value of the goods at the time was the true test of the measure of damages. In *Collard* v. *The South-Eastern Railway Company* (4 L. T. Rep. N. S. 410; 7 H. & N. 79) also, the plaintiff, a hopgrower, was held entitled to recover the difference between the market value and the contract price.

Watkin Williams, Q.C. and *G. Bruce*, in support of the report. — The principle adopted by the Registrar is the only correct one. The shipowner cannot be taken to know the purpose for which the cargo is intended, and ought not to be involved in questions concerning the rise and fall of the market. The only questions are, whether the fall of market occasioning the loss was in the contemplation of the parties when the contract was made, and whether the goods have depreciated intrinsically. *Hadley* v. *Baxendale* (9 Exch. 341) settled, at all events, that complete compensation for such a loss could not be claimed. There must also be some general principle applicable to all cases, and that the Registrar has correctly stated in his report. *Cory* v. *Thames Ironworks and Shipbuilding Company* (17 L. T. Rep. N. S. 495; L. Rep. 3 Q. B. 181), is not a question between carrier and sender, it is true, but I especially rely on the judgment delivered therein by the Lord Chief Justice. It is necessary to look at the nature of the contract and the circumstances under which it was made, to see if the damage resulting was such as was in contemplation of both parties. Here it was not in contemplation of shipowner that loss of market would ensue; some loss was contemplated, certainly, and that is fairly represented by the five per cent. on the value of the cargo allowed by Registrar. *The British Columbia, &c., Saw Mills Company (Limited)* v. *Nettleship* (L. Rep. 3 C. P. 499), is directly in point; there the non-delivery of a certain piece of machinery stopped the whole work, but the defendant was held not to be liable for the loss arising therefrom, but only of the price of replacing the goods which he had lost, and interest at the rate of five per cent. for the delay occasioned by his negligence, and this is the true principle to allow a rough mercantile profit. Any other rule would lead to complications practically insoluble by the court. The actual amount of damage cannot be looked to, as it is not and cannot be in the contemplation of the parties. The cases cited for the plaintiffs are all cases between vendor and purchaser, and therefore do not apply. The plaintiff's contention is opposed to the universal practice of this court and to the analogy of insurance law, by which underwriters in goods are never made responsible for loss of market. The plaintiff cannot recover such damages as these without notice to shipowner that he wanted the goods to be delivered for a particular market:

Horne v. *Midland Railway Company*, L. Rep. 8 C. P. 131;
Wilson v. *Lancashire and Yorkshire Railway Company*, 30 L. J. 232, C. P.; 9 C. B. N. S., 632;
O'Hanlan v. *Great Western Railway Company*, 34 L. J. 154, C. P.;
Borries v. *Hutchinson*, 34 L. J. 169, C. P.;
Great Western Railway Company v. *Redmayne*, L. Rep. 1 C. P. 329;
Collard v. *South-Eastern Railway Company*, 7 H. & N. 79; 4 L. T. Rep. N. S. 410.
Smeed v. *Foord*, 1 Ell. & Ell. 602;

Clarkson in reply.

In addition to the cases mentioned above, the following authorities were cited in the course of the argument.

Jackson v. *Union Marine Insurance Company*, *ante*, vol. 2, p. 435; L. Rep. 10 C. P. 125;
The Lucy, 3 C. Rob. 208;
Phillimore's International Law, vol. 3, p. 699, 2nd edit.;
Smith's Leading Cases, vol, 2, *Vicar* v. *Wilcox*, 6th edit., p, 503.

Cur. adv. vult.

June 13.—Sir R. PHILLIMORE.—I have taken time to consider my judgment in this case, partly on account of the great number of reported cases to which I was referred, but more especially because, unfortunately, I am unable to agree with the very elaborate and carefully reasoned opinion of the Registrar from whose ruling this appeal has been prosecuted.

It is admitted in this case that the carrier must make some compensation to the merchant for the loss sustained by him in consequence of the delay in the execution of the contract; the question is what are to be the items of that compensation. The registrar has found that these items are 93*l.* 15*s.* for deterioration in quality of a portion of the cargo and 101*l.* 3*s.* 3*d.* for loss of the interest, during the detention in consequence of the delay, at five per cent. on the value of the cargo. The merchant also claims, in addition to these items, the ascertained difference between the market value of the goods at the time when they might have been sold, if the carrier had not unreasonably delayed the fulfilment of his contract, and their value at the time when they did actually arrive, and the justice of this claim is the sole subject of this appeal.

The law applicable to this question has apparently been difficult to ascertain and the application of it when ascertained more difficult. The general rule of law is stated with his usual clearness by M. Massè in the last edition of his Droit Commercial, vol. 3, p. 239, edit. 2, Lib. 5, Tit. I. Ch. 3, sect. iv., § 1. The principle of this rule is in different words expressed in the English and American judgments. In accordance with this principle the carrier has been holden liable to pay damages on the hypothesis that he contemplated payment of a certain kind of compensation in the event of his not executing, or his unreasonably delaying to execute his part of the contract. Another form of stating that proposition is to be found in the judgment of the Lord Chief Baron in the Exchequer Chamber in *Horne*

v. *Midland Railway Company* (*Limited*) (L. Rep. 8 C. P. 135) decided in the year 1873. "The principle clearly to be declared for all the authorities is that the damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable results of the breach of it." The last English judgment which I have been able to find is one delivered by the Lord Chief Justice in 1876, in the case of *Sampson* v. *The London and North-Western Railway Company* (L. Rep. 1 Q. B. Div. 274). It is the only English case, I think, for the knowledge of which I am not indebted to the industry of counsel. "The law," the Lord Chief Justice says at p. 277, "as it is to be found in the reported cases, has fluctuated, but the principle is now settled, that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the future of that object. The latest American decision, I believe, is that of *Ward* v. *The New York Central Railroad Company* (48 N. Y. 29), it is thus stated in a note to the last edition of Sedgwick on damages (p. 430): "It is here held, that where a carrier from mere negligence, or plain violation of duty, omits to transport merchandise within a reasonable time, and its market value falls in the meantime, the true rule of damages is the difference in its value at the time and place it ought to have been delivered and the time of its actual delivery, the court observing that sagacious men rely upon their own ability to judge of the market in undertaking large commercial projects, and according to their views of the market send their merchandise by a quick or by a slow carrier, and make compensation accordingly. A contrary rule would deprive them of all benefit of a rapid transit. The court further remarked, had the goods been injured by reason of improper exposure by the carrier, and thus become depreciated in their market value, the carrier would be liable for the loss. Here his negligent delay caused the loss; the injury also is natural and direct; arriving later by the carrier's negligence, these goods, measured by the only standard that regulates value, were not worth as much as at the time when they should have arrived." I do not refer to other cases besides those two, but I have read them all with care; most of them will be found in the notes to Mr Sedgwick's valuable work on the Measure of Damages (6th edit., chap. 3, p. 81; chap. 13, p. 430), to which I have already referred.

The result of the reported decisions is, that this merchant may claim to be indemnified for the actual loss in the value of the goods shipped (*perte qu'il a fait*)—*damnum emergen*,—and from loss of profit, gain *dont il a été privé*)—*lucrum cessans*—when such loss is the direct consequence of the carrier's default. Why should not the ascertained difference between the market price, when the goods might have been sold had there been no delay, and the market price which they would fetch after the delay, be a reasonable measure of the loss of the merchant's profits; the depreciation is the direct consequence of the carrier's default; in other words, he must be taken to have known or contemplated that the merchant desired a safe and quick transport of marketable goods to their intended market. This is the ordinary knowledge with which a carrier receives goods, and it is on this principle, as it appears to me, that in *Horne* v. *The Midland Railway Company* (*Limited*) (L. Rep. 8 C. P. 135), already cited, the difference between two market prices was considered to be the proper measure of the damages.

The case before me is not one of a special private speculation or particular mercantile operation in which delay may inflict as much injury on the shipper with respect to the market value of the goods as their deterioration from want of requisite appliances or improper exposure during the passage. Upon the same principle the carrier is responsible for both injuries, the depreciation in the market value of these goods has been in my opinion the natural consequence of the carrier's unreasonable delay — *Propter rem ipsam non habitam*, as the civilians say—and for reasons already alleged, I think the shipper is entitled to have included in his damages the difference between the market price at the time when the goods did arrive and at the time when they ought to have arrived.

I must therefore direct that the registrar's report be varied by adding to the damages allowed the sum of 289*l.* 5*s.* 9*d.*, which represents the loss of market. I think that the justice of the case demands that the plaintiff's have their costs of appeal and of the reference.

Solicitors for plaintiff, *Hillyer, Fenwick,* and *Stibbard.*

Solicitors for defendants, *Parker, Watney,* and *Clarke.*

Tuesday May 30, 1876.

THE SISTERS.

Limitation of liability—Practice.

A vessel under arrest in a cause of damage was liberated on payment into court of the amount to which her liability was limited under 25 *&* 26 *Vict. c.* 63. *s.* 54, *together with a sum to cover costs and interest, and subsequently she was found solely to blame for the collision. The owners, who had instituted a suit for limitation of liability moved for a decree in that suit, and that the money in court should be transferred to the credit of that suit;*

The court granted the prayer of the first part of the motion but not of the latter, holding it to be not necessary.

ON the 15th Oct. 1874, the *Sisters*, a barge, in company with two other barges, the *Volunteer* and the *Alfreda*, were cruising up Halfway Reach in the river Thames. A steamer called the *Thames* was going down the river, and after just avoiding doing serious damage to the *Sisters*, ran into and sank the other two barges with their cargoes, and caused the death by drowning of two of the three persons on board the *Alfreda*. The *Volunteer* instituted an action against the *Thames*, which was dismissed on the ground that the *Thames* had been obliged to adopt the course she had done to avoid the imminent danger of collision with the *Sisters*, which was occasioned by the improper navigation of that vessel. The *Alfreda* then, on the 2nd Feb.

1875, instituted an action against the *Sisters* and arrested her; the *Volunteer* also instituted an action against the *Sisters*; the owners of the *Sisters* on the 22nd Feb. 1875 instituted a cause of limitation of liability, and on the 2nd March 1875 moved the court to release that vessel on payment into court of 960*l.* 7*s.*, that being the amount at 15*l.* per ton, for which the owners were liable under 25 & 26 Vict. c. 63, s. 54, and the court, after hearing counsel, permitted the release on that sum and a further sum of 329*l.* 8*s.* to cover interest and costs, being paid into court, and the *Sisters* was released accordingly. On the hearing of the cause of damage the *Sisters* was found alone to blame, and that decision was confirmed on appeal (*ante* p. 122; 34 L. T. Rep. N. S. 338).

F. W. Raikes. on behalf of the plaintiffs in the limitation of liability suit, the owners of the *Sisters*, now moved the court for a decree in that suit limiting the plaintiff's liability to 15*l.* per ton and the costs incurred in the causes of damage and limitation of liability, for a stay of proceedings in the cause of damage, and that the sums paid into court in that suit should be transferred to the credit of the suit for limitation of liability. He pointed out that as the jurisdiction in cases of limitation of liability was originally vested in the Court of Chancery, by the Merchant Shipping Act 1854, § 514, and was only transferred to the Court of Admiralty in certain cases, by the Admiralty Court Act 1861, § 13, the payments out of court must be in the limitation of liability suit and not in the cause of damage, and that for that purpose the money in court should be transferred to that suit.

E. C. Clarkson, for the defendants in the limitation of liability suit only required that whatever course the court pursued with reference to the money in court, that the defendants' costs in the limitation of liability suit which had not yet been taxed should be secured.

Sir R. PHILLIMORE, after consultation with the registrar as to the practice, made the decree prayed for in the limitation of liability suit, the plaintiffs' solicitors undertaking that the costs in that suit should be paid, and ordered a stay of all further proceedings in the damage suit, but as to latter part of the motion made no order, on the ground that whatever might have been requisite had the cause for limitation of liability been in another division of the high court, the money being in this division it was immaterial which suit it stood to the credit of.

Solicitors for the plaintiffs, *Deacon, Son*, and *Rogers*.

Solicitors for the defendants, *Ingledew, Ince*, and *Greening; Keene* and *Marsland*.

Tuesday, Aug. 1, 1876.

THE CLUTHA.

Pleadings—Limitation of liability—Counter claim.

Under the system of pleading established by the Judicature Act and rules, the defendant where he admits his liability for the damage done by a collision, but claims to have his liability limited to 8l. or 15l. per ton of his vessel under the Merchant Shipping Act 1862 (25 *&* 26 *Vict. c.* 63,) *s.* 54, *can so claim by counter claim instead of by instituting a separate suit for limitation of liability:*

Semble, when liability is not admitted a similar course may be adopted in the alternative.

IN this case actions were commenced against the *Clutha* and her owners by the owners of the Russian barque *Tovernus*, and of a portion of the cargo laden on board her, for damages sustained by a collision between the vessels whilst the *Tovernus* was at anchor in the river Clyde on the 23rd Dec. 1875. The *Tovernus* was sunk by the collision, and three of her crew drowned.

These actions were, by order of the court, consolidated and statement of claim in the consolidated action delivered on the 26th June 1876.

On the 14th July 1876, the defendants delivered a statement of defence and counter claim, which so far as material was as follows:

Between RICHARD JANSSEN, of Parga, and others, the owners of the Russian barque *Tovernus* (plaintiffs),

and

The owners of the steamship or vessel *Clutha* (defendants),

(by original action),

and

Between WILLIAM STOWELL AND OTHERS, the owners of the said steamship or vessel *Clutha* (plaintiffs),

and

RICHARD JANSSEN, of Parga, and others, the owners of the Russian barque *Tovernus* and the owners of the cargo lately laden on board the said barque, and the survivors of her crew, and the legal personal representatives of such of her crew as are deceased, and against all and every person or persons whomsoever claiming to be entitled to claim in respect of damage or loss to the said barque *Tovernus* or her boats, or to any goods, merchandise, or other things on board of her at the time of the collision, in the statement of claim mentioned, or in respect of any loss of life or personal injury occasioned by the said collision . . . (defendants)

(by counter claim).

Statement of defence and counter claim.

1. The defendants in the said original action admit the statements contained in the statement of claim, and that the said collision was occasioned by improper navigation of the said steamship or vessel *Clutha*, and by way of counter claim the said defendants say as follows:

2. The said defendants were before, and at the time of the said collision, the owners of the said steamship *Clutha* which is a duly registered British steamship.

3. On the 27th June 1876, another action, numbered 1876 O No. 330, was commenced against the said steamship *Clutha* by the said owners of cargo, laden on board the said barque and in the statement of claim mentioned, to recover damages for the loss of the said cargo in the said collision, and such action has by order of the court been consolidated herewith.

4. No other action or suit save as aforesaid has yet been brought against the said defendants or the said steamship *Clutha* or her freight in respect of the said collision, but the defendants apprehend other claims in respect of a damage to goods, merchandise, and other things on board the said barque *Tovernus*, and also in respect of loss of life and personal injury caused to persons on board of and carried in the said barque *Tovernus* at the time of the said collision.

5. The said collision took place without the actual fault or privity of the said defendants, or either or any of them, and the said defendants submit that they are entitled to the benefit of the provisions of the Merchant Shipping Act 1854 and the Merchant Shipping Acts Amendment Act 1862, for limiting their liability in respect of the said collision.

6. The gross tonnage of the said steamship *Clutha*,

without deduction on account of the engine room, is 514 $\frac{70}{100}$ tons.

7. The said defendants are willing, and they hereby offer to pay in such manner as the court shall direct, the amount to which they are liable in respect of the said collision, regard being had to the provisions of the Merchant Shipping Act 1854, and the Merchant Shipping Acts Amendment Acts 1862.

The said defendants claim

1. A declaration that the defendants are not answerable in respect of loss of life or personal injury caused by the said collision, together with loss or damage to ship's boats, goods, merchandise, or other things to an aggregate amount exceeding 15*l.* for each ton of the gross tonnage of the said steamship *Clutha*, without deduction on account of the engine room, nor in respect of loss or damage to ship's goods, merchandise, or other things on board the said barque *Tovernus*, caused by the said collision to an aggregate amount exceeding 8*l.* for each ton of the gross tonnage of the said steamship *Clutha* without deduction on account of the engine room.
2. That the said defendants may be at liberty to give bail for such an aggregate amount and for such interest as the court may think fit to award.
3. That upon the filing of the bail bond all further proceedings in the said actions, numbered 1875 J. No, 106, and 1876 O, No. 330 respectively, may be stayed, and the respective plaintiffs in the said actions, and all and every other person and persons claiming in respect of damage or loss to the said barque *Tovernus*, or to her boats, or to any goods, merchandise, or other things on board her, or in respect of loss of life or personal injury occasioned by the said collision, may be restrained from bringing any other action or actions in respect of these said losses or injuries.
4. That all proper directions may be given by the court for ascertaining the persons who have any just claim in respect of loss or damage to ships, goods, merchandise, and other things caused by the said collision, and in respect of loss of life and personal injury caused by the said collision, and for the exclusion of any claimants who shall not come in within a certain time to be fixed for that purpose.
5. That the amount of the said defendant's liability may be rateably distributed among the several persons who may establish a claim thereto.
6. Such further and other relief as the nature of the case may require.

On the 10th July the plaintiffs replied by not admitting the truth of the 5th and 6th paragraphs of the counter-claim, and on the 1st Aug. 1876 the case came on for hearing.

Clarkson, for owners of barque *Tovernus*.

Phillimore, for owners of part of cargo.

Aspinall for defendants, mentioned the matter to the court, as the pleadings were new to the practice of this division, but he submitted that under the Judicature Act and rules the defendant was entitled to raise the question of the limitation of his liability by counter claim to the original action, instead of instituting a special suit for the purpose, the affidavit and copy of register usual in such suits being filed in this. He referred to Order XIX., rule 9, Order XXII., rule 5, and Supreme Court of Judicature Act, 1873, sect. 24, sub-sects. 4, 6, 7; Merchant Shipping Act 1854, sect. 514; Common Law Procedure Act 1860 (23 & 24 Vict. ch. 126. sect. 35), and the Admiralty Court Act 1862 (24 Vict. c. 10, s. 13).

Clarkson and *Phillimore* agreed that it was now the proper course to pursue.

Sir R. PHILLIMORE said that there could be no doubt that course could now be pursued, and that under the circumstances it was the proper one to adopt, and ordered all proceedings in the actions to be stayed except for taxation and payment of costs, 8*l.* per ton, on the gross tonnage of the *Clutha*, to be paid into court, and bail to be given for the remainder up to 15*l.* per ton on the gross tonnage of the *Clutha*, with costs and interest.

Solicitor for the plaintiffs, *Thomas Cooper*.

Solicitors for the owner of the cargo, *Stokes, Saunders*, and *Stokes*.

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

March 13 *and* 15, 1876.

CARGO *ex* SCHILLER.

Life salvage—Cargo—Separately salved—Liability to pay life salvage—Merchant Shipping Act 1854, *sect.* 458.

Where life salvage is performed, cargo, subsequently salved from the same vessel as the lives, but by persons wholly distinct from the life salvors, is liable to contribute towards the payment of the reward due to the life salvors under the provisions of the Merchant Shipping Act 1854, *sect.* 458.

THIS was an action *in rem* instituted on behalf of the owners, masters, and crews of the pilot cutter *Rapid* and the boats *O. and M.*, *Guinevre*, and *Swift*, against the cargo of the late German steamship *Schiller*, to recover salvage reward for services rendered to the lives of the passengers of that vessel.

The *Rapid* was a pilot cutter belonging to the Island of Bryher, one of the Scilly Islands, was of the value of 500*l.*, and at the time of the services was manned by a crew of eight hands. The *O. and M.* was a six-oared gig belonging to the Island of St. Agnes, one of the Scilly Islands, and at the time of the services was manned by a crew of six hands, including a licensed Trinity pilot. The *Guinevre* was also a six-oared gig belonging to the Island of St. Agnes, and was manned by a crew of seven hands. The *Swift* was a boat also belonging to the Island of St. Agnes and was manned by a crew of four hands.

The *Schiller* went ashore on the Retarrier reef, which is about three miles and a quarter west of the Island of St. Agnes, and about two miles and three-quarters west and by south of the Island of Annett. The services were rendered during the morning of the 8th May, 1876, and during a dense fog. The *Swift* picked up one passenger from the *Schiller's* lifeboat which was discovered full of water in Smith's Sound; the *Rapid* picked up two men between the rocks of Minalto and Mincarlo; the *O. and M.* discovered the *Schiller* herself, and picked up from spars and wreckage five men; the *Guinevre* also got to the *Schiller* and picked up two men from among the wreckage; all these men were got ashore and saved. The *O. and M.*, after taking the men she picked up ashore, got a steamboat that was going to Penzance to go to the wreck. The steamboat took the lifeboat and the *O. and M.* in tow, and proceeded to the *Schiller*, the Trinity pilot from the *O. and M.* being on board the steamboat. The *O. and M.* was damaged before getting to the *Schiller* the second time, and had to put back, but the steamboat and lifeboat went on and saved more lives. The *Guinevre* also sent some fishing boats to the *Schiller*, and these saved more lives. All

the persons saved were taken ashore by the persons who picked them up, and were landed either in the Island of St. Agnes or St. Mary's. The plaintiffs alleged that during the services the weather was very bad, the sea running very high, and that the services were rendered at great risk to the plaintiffs. A small portion only of the stores and hull of the *Schiller* were saved, but large portions of her cargo, mainly specie, to the value of 40,000*l.*, were saved. The above facts and others appearing in the judgment were fully set out in the statement of claim in twenty-two paragraphs.

The cargo proceeded against was not nor was any part of it saved by the plaintiffs, nor was it saved for a considerable time after the services rendered by the plaintiffs. The defendants' (the owners of the specie saved) statement was as follows:

1. The defendants admit the statements of fact in Articles 1 to 22, inclusive of the statement of claim.

2. The services of the plaintiffs to the passengers of the *Schiller* were rendered at some risk to themselves, but not at great risk as alleged.

3. The said passengers were not the owners of the cargo proceeded against in this action, and the plaintiffs rendered no services to and did not attempt to save the said cargo or the owners thereof. Such cargo was saved under the circumstances in the next article mentioned.

4. Some time after the wreck of the *Schiller*, and after the vessel was partially broken up, and with her cargo had sunk in deep water, and had been abandoned by all concerned, the defendants determined to endeavour to raise six barrels of specie belonging to them, and which were known to be in the vessel's hold. The defendants thereupon engaged a staff of divers and workmen, and worked for many weeks at great expense, and with great uncertainty as to the success of their operations. During this time, and so long as it remained doubtful whether the operations would not be altogether unprofitable, the plaintiffs did not profess to be interested, or to have a claim against the cargo in respect of which the operations were proceeding.

5. After many weeks of unsuccessful and unremunerative operations, the defendants succeeded in raising four of the barrels of specie and a portion of the contents of another barrel, of the total value of 40,000*l.*, and the specie so saved was conveyed to Penzance. This specie is the cargo proceeded against in this action.

6. After the arrival of the specie at Penzance, the plaintiffs were induced by persons who had taken no part in the salvage services to put forward the claim made in this action, and they consented to do so upon being indemnified against liability for costs, and this action is being prosecuted in the plaintiffs' name under such indemnity.

7. Upon the arrival of the specie at Penzance, it was arrested in two distinct actions by or in the names of certain of the plaintiffs in the present consolidated actions, and a third action was afterwards instituted against it on behalf of the said plaintiffs. The said actions were all commenced by the instructions of the same person acting or professing to act as agent for the plaintiffs, and through the same solicitor, and the claim of the plaintiffs might or ought to have been put forward, if at all in one action.

8. Numerous portions of the *Schiller*, and of her tackle appparel, and furniture had been saved and recovered by persons other than the defendants prior to the commencement of these actions, but the plaintiffs made no attempt to enforce a claim against such property.

9. The plaintiffs respectively have received or are entitled to receive, and can upon application receive, from the passengers to whom they rendered the said services, and from the owners of the *Schiller*, and from the German Government, ample remuneration for their said services.

10. The *Schiller* at the time of her loss was a German ship, sailing under the German flag, and by the law of Germany the ship and the owners thereof, and the passengers themselves, are liable for the remuneration of the services in the statement of claim mentioned, and the defendants as owners of the cargo on board the ship are not in the circumstances aforesaid liable for such remuneration.

The plaintiff's reply was, so far as material, as follows:

1. It is not true, as stated in the fourth paragraph of the statement of defence, that during the time therein mentioned the plaintiffs did not profess to be interested in, or to have a claim against, the cargo therein mentioned.

2. The several allegations in the sixth paragraph are untrue. It is further untrue, as stated in the seventh paragraph, that the actions therein mentioned were all commenced by the instructions of the same person, or that the claim of the plaintiffs might or ought to have been put forward in one action. The costs of the separate institutions of the two suits and action are trifling, The several allegations in paragraphs 6 and 7 are immaterial.

3. It is not true that any portions of the *Schiller*, or of her tackle, apparel, or furniture, which were or are of any appreciable value, had or have been saved or recovered.

4. It is true, as stated in paragraph 10, that the *Schiller* was at the time of her loss a German ship, sailing under the German flag, but with this exception, the several allegations in paragraphs 9 and 10 are untrue.

5. At the time of the rendering of the services stated in the statement of claim, the *Schiller* was a ship stranded or in distress on the shore of a sea or tidal water situate within the limits of the United Kingdom, and the services so stated were rendered wholly or in part in British waters.

From an affidavit filed by the plaintiffs in answer to interrogatories administered to them on behalf of the defendants, it appeared that the crew of the *O. and M.* received 75*l.* from three out of the five persons saved by that boat; that none of the other persons saved paid the plaintiffs anything; no claim other than these actions had been made upon the persons saved or the owners of the *Schiller*; that the crews of *O. and M.* and *Guinevre* sent in a statement by way of petition to the German Government and also to the Board of Trade, but no reply thereto was received before the institution of these actions; that the crew of the *Swift* accepted as a present from the German Government the sum of 1*l.* per head without prejudice to their present claim; and that, save us aforesaid, no other sums had been received by the plaintiffs for the services proceeded for in these actions.

March 13, 1876.—The *Admiralty Advocate* (Dr. *Deane*, Q.C.) and *W. G. F. Phillimore*, for the plaintiff.—The facts are admitted, and the only question in the case is whether the plaintiffs can by law recover reward for salvage of life. The right arises under the Merchant Shipping Acts. Even if the *Schiller* can be said to have been wrecked outside of British waters, the plaintiffs performed part of their service within British waters by taking the persons rescued to and landing them on the island of St. Agnes and St. Mary. The first case on the point is *The Johannes* (Lush. 182; 3 L. T. Rep. N. S. 757; 1 Mar. Law Cas. O. S. 24), where it was held in 1860 that the Court of Admiralty had no original jurisdiction over life salvage, and that the Merchant Shipping Act 1854, s. 458 only gave jurisdiction over life salvage rendered within the limits of the United Kingdom. In the following year the Admiralty Court Act (24 Vict. c. 10) s. 9, extended the provisions of the Merchant Shipping Act "to the salvage of life from any British ship or boat, wheresoever the services may have been rendered, and from any foreign ship or boat, where the services have been rendered wholly or in part in British waters." Hence there is

clearly jurisdiction. In *The Fusilier* (Bro. & Lush. 341; 10 L. T. Rep. N. S. 699; 2 Mar. Law Cas. O. S. 39, 177) it was held that passengers must be taken as "belonging to such ship" within the 458th section of the Merchant Shipping Act 1854. In *The Willem III.* (*ante*, vol. 1, p. 129; L. Rep. 3 Adm. & Ecc. 487; 25 L.T. Rep. N. S. 386) the services were rendered wholly outside British waters, and it was held that the plaintiffs could not recover for life salvage against the ship and cargo.

Butt, Q.C. and *Lodge*, for the defendants.—It is an admitted fact that the plaintiffs made no attempt to save the vessel or cargo. In *The Fusilier* (*ubi sup.*) there was a joint salvage of ship, cargo, and lives of crew and passengers by the same salvors. Here the services rendered were wholly separate from those subsequently rendered to ship and cargo. The cargo now proceeded against was got up some time afterwards by a wholly distinct set of persons, [Sir R. PHILLIMORE.—By the Merchant Shipping Act 1854, s. 458, salvage is payable for "assisting such ship or boat;" for "saving the lives of the persons belonging to such ship or boat;" and for "saving the cargo or apparel of such ship or boat, or any portion thereof," and is made payable "by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services or any of them are rendered." Dr. Lushington, in *The Fusilier* (*ubi sup.*), says: "That section begins by defining what constitutes a salvage service; it states three special heads. . . . The section then goes on to declare, that payment shall be made by the owner of the ship or cargo of a reasonable amount of life salvage. If the statute ended there, I should say the effect of it was simply to constitute the saving of life to be *per se* a salvage service, and to leave the mode of payment to be according to former practice; for I cannot find any words in this section adequate to effect so serious a change in the law, as to introduce a new system of payment, in substitution of the ancient rule which, where life was saved together with ship and cargo by a single set of salvors, threw upon the cargo a part of the proportionate increase of the salvage reward. The existing grievance was not the mode of payment—charging the cargo in part—but the absence, in some cases, of all payment for life salvage." Does not that passage show that the Merchant Shipping Act makes life salvage chargeable upon the cargo, whether saved with the lives or not?] We submit that if such was the effect of the decision it must have been given without consideration of the 459th section which, provides that "salvage in respect of the preservation of life or lives of any person or persons belonging to any such ship or boat as aforesaid shall be payable by the owners of such ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may in its discretion, award to the salvors of such life or lives out of the Mercantile Marine Fund, such sum or sums as it deems fit." This clearly shows that the intention of the Act was that life salvage should only be payable where the persons saved are identified with the owners of the property saved. That is to say, that if the whole service to ship, cargo, and life is effected at once, the whole fund should contribute, but if only the lives are saved and no salvage to ship or cargo rendered until a later period, the ship only should be liable to pay the reward for the salvage of life. The cargo here was got up not by salvors, but by the owners of the cargo itself, and cannot be identified in any way with the salvage to life or the persons saved. If the ship was not sufficient, the plaintiffs should have obtained reward from the Board of Trade. The plaintiffs have accepted reward in respect of the services rendered.

The *Admiralty Advocate* in reply.—In *The Cairo* (*ante*, vol. 2, p. 252; L. Rep. 4 Adm. & Ecc. 58) reward for salvage to life was given, although no services were rendered to ship and cargo at the time of the life salvage.

Cur. adv. vult.

March 15, 1876. — Sir ROBERT PHILLIMORE.—It appears that on the 7th May last year, shortly before midnight, the plaintiffs heard the whistle of a steamer and the report of a gun, at the Island of St. Agnes. At that time there was a very dense fog over the whole of the Scilly Islands. It appears that, nevertheless, suspecting some vessel might be in danger, the crew of the *O. and M.* started from the Island of St. Agnes towards the Western Rocks. The weather continued densely thick with fog, the wind was from the S.W. and a heavy sea was running through the rocks and breaking over the sunken ledges between which the boats had to pass before they could get outside, to such an extent as to greatly imperil the lives of those on board them. The facts, I should have said, are all admitted, except that the great danger to the lives of the salvors is not admitted; as to this, the admission is qualified, for it is said that at this time there was not great danger. At the same time, it is a fact that the fog had shut out all landmarks, and, although some of the plaintiffs were Trinity pilots, they found great difficulty in making their way. One of the men on the Island of Bryher saw three spars wash on shore where he then was, and about six a.m. he saw some broken deck planks floating in the water. He immediately summoned the crew of the *Rapid*, who got her under weigh and passed down the channel between the islands of Sampson and Bryher. The statement of claim goes on to state that the coxswain of the *Swift*, being on the look out above Smith's Sound, on the Island of St. Agnes, saw a broken ship's lifeboat drifting to the southward, through the Sound, with something dark in it, which he could not distinguish for the fog. He immediately, with the crew of the *Swift* launched that boat, and proceeded as fast as possible in the direction where he had seen the lifeboat. They saw her close to Buccaba, and rowing up to her found she belonged to the *Schiller*, and that there was lying in her a passenger from the *Schiller*, groaning, benumbed with cold, and in a very weak state. The lifeboat was very much damaged, one half of her port side being clean gone. She was floating on a level with the water, and the passenger was immersed in water, except his head and shoulders, and he had lost all power of speech. Having got him on board the *Swift*, they took every measure to restore him to animation. In the meanwhile, the other boats, *Rapid*, *O. and M.* and *Guinevre*, were making the best of their way to the wreck of the *Schiller*. They first went to the Reef of Meledgen, thence to Gorregan, Rosevean, Rosevere, and Crebawithen,

at none of which reefs could they discover anything. Shortly before seven a.m. the crew of the *Rapid*, which was then reaching in towards Minalto, heard cries, but could see no one, owing to the fog. Their statement goes on to show that they went in the direction of the cries, between the rock of Mincarlo and Minalto, which is a dangerous channel, and there they saw a man floating in the water, whom they rescued, and, going on, they saw another man, whom they took on board. It appears that the *Rapid* made several tacks in order to see if there were more men in the water, and not seeing any, and finding the men they had got out required care, they rowed to St. Mary's for medical assistance, and whilst so proceeding, they passed quantities of boxes, clothes, and trunks, which they did not stop to pick up, being anxious to obtain assistance for the two men. I mention these facts because it is not disputed that the account of the men is accurate. On the whole, the plaintiffs saved ten lives, and must be considered as having indirectly saved more, because the *O. and M.* obtained a steamer which was going to Penzance, and the *Guinevre* sent word of the distress and danger that the *Schiller* was in, and some of the passengers were saved and got on board the steamer and some fishing smacks.

Now, a question of law has been raised with respect to these services; and it has been said, first of all, that the cargo is not liable to pay any salvage remuneration for saving the lives of these persons. It is admitted that no part of the cargo or ship was saved; but the claim was rested exclusively and entirely upon the preservation of human life. The question was, it was admitted, discussed in *The Fusilier* (*ubi sup.*), both in the High Court of Admiralty and in the Privy Council, and a conclusion favourable to the plaintiff was arrived at in both courts. The case is reported in 3 Moore's P. C. C., N. S. 55, where Dr. Lushington is reported to have said: "Several questions of law have arisen respecting what is called life salvage, and to these questions I will address my attention before considering the particular facts of the case. First, then, as to the old law respecting salvage of property—the law before any statute was passed on the subject. There is, I apprehend, no doubt that the law was, that where no ship or cargo had been salved, no property rescued from destruction, but life had been saved from the ship, no suit for salvage reward could be maintained. One reason for this state of the law was, that no property could be arrested applicable to the purpose. There could be no proceeding *in rem*, the ancient foundation of a salvage suit. It is true that sometimes an anomalous case did arise, where one set of salvors exclusively saved life, and another, wholly distinct, salved the ship and cargo; but, even in these circumstances, the salvors of life alone could not render the property amenable to their claim. Then, as to the case where life and property had both been salved by one set of salvors, it was the practice of the court to increase the amount of salvage which would have been given if property only had been saved, and such doctrine does, I think, rest on too high authority to be doubted. The practice, too, was that all the property salved should pay in such increased rate of salvage—the ship, the freight, and the cargo, each in proportion to its value. Such being the state of the law and the practice of the court, a question arises—what was the grievance which required the interposition of the Legislature? That grievance clearly was, that persons who had risked their own lives, perhaps, and salved life only, or with so little property as not to afford the payment of an adequate reward, could not be justly compensated. That was the grievance intended to be remedied. No doubt the leading motive for the legislative enactment to remedy this grievance was to encourage the saving of life; but there was a subsidiary ground—the encouragement of salvors generally, for the reward of life salvage operates as a further incentive to salvage exertions. This being so, it would be reasonable to suppose, *à priori*, that the remedy given by the Legislature would be commensurate to the evil, and effect no further change." Then the learned judge enters into a consideration of provisions in the Merchant Shipping Act (17 and 18 Vict. c. 104), ss. 458 and 459, and he comes to a conclusion that the cargo was clearly liable to pay the life salvage. The matter was argued on the pleadings before the Privy Council, and I had the honour to appear for the appellants, and Dr. Deane for the respondents. The question was very fully gone into and considered in the Privy Council, and Lord Chelmsford delivered the judgment and said: "The general rule as to the parties liable to pay salvage is, that the property actually benefited is alone chargeable with the salvage recovered. But this rule is inapplicable in the case of life salvage, because it is difficult to imagine a case where the saving of the lives either of the crew or of the passengers of a vessel in distress would be any benefit either to the vessel or to the cargo. The Legislature, therefore, could not have intended to enact that the benefit to property should be the criterion of the liability to the payment of life salvage. All that seems to have been contemplated is, that there should be included in the entire sum payable for the salvage of ship and cargo a distinct award for the preservation of human life." Then he goes into the question of the 458th section of the Merchant Shipping Act, much discussed before me, and then says: "The Legislature seems merely to have had in view the rewarding at a higher rate persons whose services were more meritorious from having rescued human life as well as property from peril, and almost to have assumed that the liability to the salvage would attach, without any distinction, upon all the owners of property exposed to the common danger." And then, entering into a consideration of the 468th and 469th sections of the statute, which removed any doubt which the previous sections created upon this point, his Lordship concluded the judgment by saying: "The object of the Legislature in the different sections referred to seems to have been to give a legislative sanction to the practice of the Court of Admiralty of indirectly rewarding salvors for the preservation of human life by allowing the value of their services to be made the subject of a distinct estimate, but without intending to fix the responsibility of payment upon one class of owners of property involved in the common peril more than on another."

Now, it has been contended, as I have already observed, that these judgments are erroneous, and should be reconsidered, and would, perhaps, be reversed before another tribunal. I am

not of that opinion myself, but I am clearly of the opinion that if I was, it would be improper in me to give a judgment in any way at variance with the decision of my predecessor and the Privy Council, and I decline to do so. It has been contended that there is a distinction between this case and *The Fusilier*—that in this case the cargo was saved afterwards by the owners, and no cargo at the time by the salvors, when the lives of these passengers were saved. I am unable to follow any distinction in principle between the two cases. *The Fusilier* I have before me, and the argument there, that it was not a salvage service, appears to me to be wholly untenable. The property here saved amounted to 40,000*l.* in specie. I think that the cargo so saved was liable under the statute to which I have referred, in accordance with the judgment to which I have adverted, and was liable to pay salvage remuneration to those who saved the lives, by whomsoever it was saved. I am of opinion, therefore, that the judgment in *The Fusilier* supports the present case.

It remains only to say what shall be the remuneration the court ought to award. The property is very large—40,000*l.*; and the services, though not very effective, were not long or attended with much danger to the parties concerned. They lasted between three and four hours, and there is no doubt whatever that the lives of these persons would have been irrecoverably lost but for the exertions of these men. I have already spoken of the praise which they deserve in their hastening to save human life, and, therefore, I need not refer to that again. It has been said that they have received 75*l.* But, on looking at the affidavit, it appears it must be really considered as not paid so as to cover the amount payable as its proportion by the cargo, but as paid by the passengers themselves, from their natural desire to give some reward out of their own pocket to those who saved their lives. There are four boats, and I think I shall make a fair award if I allow 500*l.* to all the boats, and that is the judgment which I deliver.

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

Solicitors for the defendants, *Waltons*, *Bubb*, and *Walton.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

ON APPEAL FROM THE ADMIRALTY DIVISION.

Reported by J. P. Aspinall, Esq., Barrister-at-Law.

Wednesday, April 12, 1876.

The Victoria.

Appeal—Security for costs—Arrest of ship—Bail bond—Supreme Court Rules, Order LVIII., rules 15, 16.

The Court of Appeal will not order security for costs of an appeal except under special circumstances. A plaintiff arresting a ship which is released on bail and against which he obtains a decree is not entitled to security for the costs of appeal, merely because the bail bond only covers the costs of the court below and not of the Court of Appeal.

This was a cause instituted on behalf of the master of the *Victoria* against that vessel to recover his wages and disbursements. The ship was arrested and was subsequently released on the ordinary bail bond being given by the defendants in the month of Sept. 1875. The cause was tried in Dec. 1875, and a decree was given in favour of the plaintiff and the question of amount was referred to the registrar and merchants. From this decree the defendants appealed and obtained an order from the judge of the Admiralty Division staying proceedings pending the appeal under the rules of the Supreme Court Order LVIII., rule 16.

The plaintiff now applied to the Court of Appeal that the defendant might be ordered under Order LVIII., rule 15, to make or give a deposit or security for costs.

Maclachlan, for the plaintiff.—The ship has been released and the bail bond does not cover the costs of the appeal. It is the ordinary form in use before the Admiralty Court Act 1861 (24 Vict. c. 10), and consequently does not cover the costs of appeal despite sect. 33 of that Act. (*The Helene*, B. & L. 425). The Privy Council has in certain cases enforced distinct security for costs of an appeal.

Macpherson, P.C. Practice, p. 156.

E. C. Clarkson, for the defendants.

James, L.J.—It must not be considered to be the general practice to require security for the costs of an appeal. It will be required only where there are special circumstances, and such do not exist here. No form of bond covering the costs of an appeal has been shown to us, and the practice of Privy Council seems clear that except under special circumstances security for costs is not required. The same practice will be followed here, and this application dismissed with costs.

Mellish, L.J. and Baggallay, J.A. concurred.

Solicitor for the plaintiff, *H. Aird.*

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

Tuesday, May 16, 1876.

The City of Brooklyn.

Collision—Speed—Steamship—Lights—Showing signal astern—Regulations.

When a night is so dark that a steamer cannot make out other vessels until within her own length of them, she is not justified in running at such a speed that she cannot then avoid coming into collision with them.

A vessel is not bound to show a light or signal astern to a following vessel, unless there is apparent danger from that vessel.

This was an appeal from a decree of the Admiralty division of the High Court of Justice in an action brought by the owners of the Italian barque, *I. Mille*, against the owners of the screw steamer, *City of Brooklyn*, to recover damages caused by a collision between the two vessels.

The statement of claim on behalf of the plaintiff was as follows:

1. Shortly before 4 a.m. of 7th Jan. 1876, the Italian barque, *I. Mille*, of 376 tons register or thereabouts, of which some of the plaintiffs were the owners, manned by Guiseppi Burlando, her master, and a crew of eleven hands, was about thirty-five miles distant from the Old Head of Kinsale, proceeding on a voyage from Maria-

nople to Queenstown for orders as to her port of discharge.

2. The wind at this time was about S.E. by E., the weather was cloudy but clear, and the *I. Mille* was under inner jib foretopmast staysail, foresail, lower foretopsail, main upper and lower topsails, and mizen stormsail close hauled on the starboard tack, heading N.E. by E., and making about three knots an hour, with a green light on the starboard side, and a red light on the port side, both duly exhibited and burning brightly, and a good look out was being kept from on board her.

3. At such time the bright white light of a vessel, which proved to be the steamship *City of Brooklyn*, was seen at the distance of about three or four miles, and on the port quarter of the *I. Mille*. Shortly afterwards the green light of the *City of Brooklyn* was also seen, and the *I. Mille* was kept on her course close hauled to the wind on the starboard tack, in the expectation that the *City of Brooklyn* would keep out of her way. The *City of Brooklyn*, however, notwithstanding that the bell of the *I. Mille* was rung, and those on board the *I. Mille* loudly hailed the *City of Brooklyn* to keep away, ran into and struck the *I. Mille* on the port side about the main hatch, and cut into her, and did her so much damage, that she sank shortly afterwards and three of her crew were drowned. The rest of the crew of the *I. Mille* succeeded in getting on board the *City of Brooklyn*, and were afterwards taken by her to Liverpool.

4. A good look-out was not kept on board the *City of Brooklyn*.

5. The *City of Brooklyn* improperly neglected to take in due time proper measures for keeping out of the way of the *I. Mille*, and improperly neglected to keep out of the way of the *I. Mille*.

6. The *City of Brooklyn* improperly neglected to comply with Article 16 of the Regulations for Preventing Collisions at Sea.

The defendants' statement of defence was so far as material as follows:—

1. About 4.15 a.m. on the 7th Jan. 1876, the steamship *City of Brooklyn*, of 1978 tons register, 2911 tons gross measurement, of which the defendants were and are owners, whilst on a voyage from New York to Liverpool *viâ* Queenstown with a general cargo and passengers was about 25 miles east of the Fastnet.

2. The wind at such time was about south-east, a moderate breeze, the tide was ebb and of little force, the weather was cloudy and very dark, and the *City of Brooklyn* was under steam alone, proceeding at the rate of about ten knots and a half per hour. She had her proper masthead and side lights duly exhibited and burning brightly, and a good look out was being kept on board her.

3. At such time the red light of the *I. Mille* was seen at the distance of about from one to two ship's lengths from the *City of Brooklyn*, and bearing about from half a point to a point on her starboard bow. The engines of the *City of Brooklyn* were immediately stopped and reversed, and an order was given to put the helm hard-a-port, but such order was immediately countermanded, and an order was given to hard-a-starboard, and the helm was starboarded, but the *City of Brooklyn*, with the starboard side of her stem came into collision with the port side of the *I. Mille*, about abreast of the forehatch, and the *I. Mille* shortly afterwards sank, and although every effort was made by the master and the crew of the *City of Brooklyn* to save the master and crew of the *I. Mille*, several of the crew were drowned.

4. Before the said red light of the *I. Mille* was seen, the relative positions of the two ships were such that the *City of Brooklyn* was coming without any light of the *I. Mille* visible to those on board the *City of Brooklyn*, and owing to the darkness those on board the *City of Brooklyn*, although they kept a good look out, were unable to discover the *I. Mille* until her said light was seen as aforesaid.

5. Those on board the *I. Mille* acted negligently and improperly by omitting to show a light or make a signal, or otherwise to take proper measures to warn those on board the *City of Brooklyn* of the presence and position of the *I. Mille*.

6. Those on board the *I. Mille* neglected to observe and comply with the provisions of Articles 19 and 20 of the Regulations for Preventing Collisions at Sea.

7. The collision was so far as regards the *City of Brooklyn* the result of inevitable accident.

The plaintiffs joined issue on this statement of defence, and also demurred to so much of the 5th paragraph thereof as alleged that the *I. Mille* acted negligently and improperly by omitting to show a light, and said that the said paragraph was bad in law, because it was not the duty of the *I. Mille* to show a light other than the regulation lights.

Feb. 15.—*Gainsford Bruce* in support of the demurrer contended that the duty as to exhibiting lights and signals was prescribed by the Regulations for Preventing Collisions at Sea, and that there are in such regulations no rule prescribing such a light or signal as that required by the defendants.

E. C. Clarkson contended that whether there was or was not such a duty depended upon the circumstances of each case. There might be circumstances where there was such a duty, and one of the questions of fact in the present was, whether such circumstances existed here. Hence the pleading was good.

The Earl Spencer, *ante*, p. 4; 33 L. T. Rep. N. S. 235; *The Anglo-Indian*, *ante*, p. 1; 33 L. T. Rep. N.S. 233.

Gainsford Bruce in reply.

Sir R. Phillimore.—As the circumstances may be such as to bring the case within the ruling of the Privy Council in the cases cited, and may show a duty to exhibit a light or signal as alleged, the defendant is entitled to judgment on the demurrer with costs. The question of law as to the duty will arise when the facts have been heard.

Feb. 19—The action came on for hearing.

Milward, Q.C. and *Gainsford Bruce* for the plaintiffs.

Butt, Q.C., *Clarkson*, and *Myburgh* for the defendants.

Sir R. Phillimore.—This is a case of collision which happened shortly after four o'clock in the morning on 7th Jan. 1876, and I may observe, in passing, that it is satisfactory that a case may be brought into this court in such a short time after the accident happened. The direction of the wind is variously stated as S.E. by E. and S.E., and the weather, which is an important element in the decision of this case, is admitted on all hands to have been as follows:—There was an extremely dark night, in which lights were visible at the proper distance, but objects were not visible until within a shorter distance. The speed of both vessels is not contested in this case. There is no dispute that the *City of Brooklyn* was an overtaking vessel, and that the Italian barque was the vessel ahead. In my judgment the rule of law which applies to this case is in the 17th Article of the Sailing Rules, which says, "Every vessel overtaking any other vessel, shall keep out of the way of the said last-mentioned vessel." Here it may be proper to observe that the evidence fully establishes that the sailing vessel kept her course, and, further, that at the time when the sailing vessel was discerned by the steamer, no manœuvre on the part of the steamer could have prevented the collision, either by porting or starboarding.

Now, the defence is this, that the collision so far as regards the *City of Brooklyn*, was

the result of inevitable accident. On that I have had a careful conference with the Elder Brethren of the Trinity House, who are satisfied that the accident cannot be properly described as inevitable. Disposing of that part of the defence, I come to another, in which the *I. Mille* is charged with acting negligently or improperly by not showing another light to warn those on board the *City of Brooklyn* of her presence. The first question which I have had to consider with the Elder Brethren of the Trinity House is this, whether the Italian barque carrying the canvas that is specified—inner jib, foretopmast staysail, foresail, lower foretopsail, main upper and lower topsails, and mizen stormsail—ought to have been visible at a sufficient distance, that is, between 300 and 400 yards, by a good look out on board the *City of Brooklyn*. The Elder Brethren have brought to the solution of this question their own personal knowledge and experience of the distance at which vessels are visible in such a state of the weather as is proved in this case, and they are of opinion that the *I. Mille* ought to have been seen at a distance which would have prevented the collision. Unfortunately the starboard look-out, who is an important person in this case, has not been produced. It is proved that search has been made for him, but that he cannot be found, and his absence is an important circumstance. The elder brethren are of opinion that the barque could be seen from the forecastle further off than from aft, and that she ought to have been visible in sufficient time to have enabled the steamer to have got out of her way. But I do not like to leave the case solely upon that issue.

The next question I have to put to them is whether the sailing vessel, seeing this green and white light—assuming it was her duty to exhibit some light or make some signal—was not justified in thinking that up to the last moment the steamer would pass clear of her to leeward. I think that she was so justified—that is, all along proceeding on the assumption that it was necessary for the sailing vessel to do some act by indicating her presence to the overtaking vessel.

The next question I have had to deal with is whether the speed of the steamer was or was not proper in the circumstances. Now she was going within four or five miles of the Irish coast, where the currents would be rapid, and she was going full speed, although it was so dark that she could not see another vessel ahead of her until she came absolutely alongside of her. Now in my opinion that speed, under the circumstances, was improper on the part of the *City of Brooklyn*, and that that has another bearing besides is proved in the result upon the facts of the case.

If it was the duty of the sailing vessel to give a signal to the vessel overtaking her at a time when she saw she could not pass her, she did make the attempt to do so, she caused the bell to be rung before the time of the collision, but this was for some reason or other never heard by any one on board the *City of Brooklyn*. The boatswain was also sent up to light the flare or flash light, but he was unable to do more than move about two or three lucifers, which did not take light, and he was then obliged to go away because the other vessel was advancing at a rate of about a quarter of a mile in a minute and a half, therefore the speed of the other vessel prevented the overtaken vessel from doing that which it is contended she ought to have done—*i.e.*, making a signal to the other vessel. I am bound to say, as to the duty of the vessel ahead, that has been discussed in the cases of *The Earl Spencer* and *The Anglo-Indian*, and there is a decision of the Privy Council upon the point (*ante*, pp. 1, 4). Now their Lordships there say they are very far from saying that it is never the duty of a vessel ahead to look behind. There may undoubtedly be circumstances of an exceptional character which may throw upon the vessel ahead the duty of looking behind further than giving some signal, by way of a light or otherwise, to the vessel behind, whilst there are circumstances under which there is reason to suppose that the after vessel does not see the vessel in front, and where there is danger of collision. So far as the statute regulations are concerned, I went into the matter at considerable length in the case of *The Earl Spencer* (*ubi sup.*), and as far as they are concerned there is certainly no law binding upon the vessel ahead to exhibit a light astern, and if it had been the intention of the Legislature that she should be under that obligation, there are several rules in which one would expect to find an expression of that intention. But I am of opinion and the elder brethren agree with me, that in this case there are no exceptional circumstances which compelled this vessel to exhibit a stern light, at least at the time when she attempted to do so, and when the speed of the other vessel prevented her succeeding in the attempt.

Looking to all the circumstances of this case, I am of opinion that the *City of Brooklyn* is alone to blame for this collision, and I decree accordingly, with costs upon the higher scale. Execution stayed for a fortnight.

From this judgment the defendants appealed.

May 16.—The appeal came on for hearing before James, L.J., Baggallay, J. A., and Lush, J., and two nautical assessors.

Butt, Q.C., *E. C. Clarkson*, and *Myburgh*, for the appellants.—The night being clear there was no reason why the steamer should not go at full speed. To condemn a vessel for going fast under ordinary circumstances is to interfere with the convenience of commerce and passengers, and unless there is apparent danger there ought to be no restriction. But even if the steamer was going at too high a speed the barque contributed to the accident by not showing a proper light in time to warn the steamer. She must have known the steamer could not see her, and that she must be overtaken. There is nothing in the regulations expressly compelling such a course, but it is an ordinary seamanlike precaution which ought to have been taken in this case:

The Earl Spencer, *ante*, p. 4; 33 L. T. Rep. N. S. 235;
The Anglo-Indian, *ante*, p. 1; 33 L. T. Rep. N. S. 233;
The Saxonia, Lush. 410;
The Olivia, Lush. 497;
The John Fenwick, *ante*, vol. 1, p. 249, L. Rep. 3 Adm. & Ecc. 500; 26 L. T. Rep. N. S. 322.

Milward, Q.C. and *Gainsford Bruce*, for the respondents, were not called upon.

James, L.J.—I am opinion that we cannot come to any conclusion different from that to which the learned judge below has come, that conclusion being in accordance with the opinion

of the nautical assessors upon this matter, which is to a great extent a matter of nautical skill and science.

The learned judge was of opinion that the ship complained of was going at a speed not to be justified, having regard to the state of the night, the position of the coast, and the probability of there being other vessels coming in the way; and I am bound to say that however convenient it may be for commerce and travellers—however convenient it may be to be able to go to America at eleven or twelve miles an hour—it is still a speed which it does not seem to us to be reasonable for a steamer like this to go at when not far from the coast, and on a night so dark, according to the evidence of their own witnesses, that they could not see another vessel more than the length of a ship away. It is said a look out on such a night could not, with the steamer going at such a pace, have seen a vessel ahead in time to avoid her, and that consequently the steamer ought not to have gone at such a pace.

It is said on the other hand, on behalf of the steamer, that if the other ship did see the steamer she ought to have shown a light. Of course we cannot suppose that any captain would wantonly neglect to take the necessary precautions to save his own life and the lives of his men, which would necessarily be at risk if such a steamer as this ran into their own vessel. Therefore we must suppose that he formed the best judgment he could, and did everything that would help to avoid a collision. When he saw the danger, he did, apparently, what he could; he ordered the bell to be rung and a line to be got, but it was too late.

I am of opinion, therefore, that whatever may have occurred in other cases, where it was held to be the duty of a ship to warn another of the risk she was running, there were in this case no such circumstances as to show any neglect of duty upon the part of the crew of the Italian ship, or that they did anything to justify our charging them with contributory negligence. I am, upon the whole, of the same opinion as the court below.

Baggallay, J. A.—I am of the same opinion.

Lush, J.—I am also of the same opinion.

I think the rule of law, with regard to travelling at sea, is identical with the law of travelling on the high road. No one on a dark night has a right to go at such a rate of speed as not to be able to escape an accident if he happens to follow immediately in the wake of another, whether it be by sea or land. I think that the rate of speed was an unjustifiable rate for that vessel to run on such a dark night when she could not discern another vessel until within her own length of that vessel.

As to contributory negligence, I do not think there is any necessity for a ship ahead to look out for ships that are behind her unless the danger is apparent. It is only when there is an apparent danger that the necessity arises to do the best they can for their own safety. Here the persons on board the first ship did so, but when it was too late.

Appeal dismissed with costs.

Solicitor for plaintiff, *T. Cooper.*

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

May 17, 18, *and* 29, 1876.

The Transit.

Collision—Appeal—Facts—Reversing dicision of court below—Lookout.

The Court of Appeal has great reluctance in reversing a decision of a judge of first instance where he has come to a conclusion of fact upon conflicting testimony and after hearing the witnesses, but where the court of first instance draws inferences from the facts proved before it, a decision founded upon such inferences will be reviewed, and if necessary reversed without great pressure by the Court of Appeal, if erroneous.

A steamship running through a roadstead should, in addition to her master on the bridge, carry a lookout man in the day time.

This was an appeal from a judgment of the Admiralty Division in an action instituted on behalf of the owners of the steamship *Glannibanta* against the steamship *Transit* and her freight to recover damages occasioned by a collision between the two ships.

The plaintiffs' statement of claim in court below was so far as material as follows:

1. Shortly before 1 p.m. on the 23rd Jan. 1876, the three-masted iron screw steamer *Glannibanta*, of 534 tons register, and ninety-nine-horse power, of which the plaintiffs were owners, whilst proceeding from London to the Tyne ballast, had passed St. Nicholas' light-vessel for the purpose of entering and proceeding through Yarmouth Roads.

2. The wind at this time was about south west, a light breeze, the weather was fine, and the tide was in the last quarter ebb and of the force of about half a knot per hour, and the *Glannibanta*, under steam and sail, was steering about north, and proceeding at the rate of about nine knots per hour.

3. At such time those on board the *Glannibanta* observed an approaching steamer under steam and sail (which proved to be the steamship *Transit* proceeded against in this action) bearing about two points on the port bow of the *Glannibanta*, and at the distance of about one half to three quarters of a mile.

4. The helm of the *Glannibanta* was slightly ported, and she was kept on with a view to passing the *Transit* port side to port side. The *Transit*, instead of passing the *Glannibanta* on her port side as she should have done, starboarded her helm and caused danger of collision, and although the engines of the *Glannibanta* were immediately stopped and reversed, and her helm was starboarded, the *Transit*, with her starboard side abreast of the foremast, came into contact with the stem of the *Glannibanta*, and a great deal of damage was thereby done to the *Glannibanta*.

5. The *Transit* improperly neglected to take proper measures for passing the *Glannibanta* on her port side.

6. Those on board the *Transit* improperly starboarded the helm of the *Transit*.

7. Those on board the *Transit* did not duly observe and comply with the provisions of article 16 of the regulations for preventing collisions at sea.

8. The said collision was occasioned by the negligent and improper navigation of the *Transit*.

9. The said collision was not occasioned by any negligence or default on the part of those on board the *Glannibanta*.

The defendants delivered a statement of defence and counter-clain which so far as material was as follows:

1. The *Transit* a screw steamship of 345 tons register and ninety-horse power with a crew of twenty-one hands left Grimsby about 2 a.m. of the 23rd Jan. 1876, with a general cargo bound for Dieppe.

2. Shortly before 1 a.m. of the same day the *Transit* in the course of her voyage was passing through Yarmouth-roads heading about S. by W. and keeping well over to the east side of the roads as is the practice with vessels southward bound. The wind was about S.W. The weather was fine. The tide was ebb about three knots an hour. The *Transit* under sail as well as steam

was making about eight knots an hour. A good look out was kept on board her.

3. In these circumstances those on board the *Transit* observed the steamship *Glannibanta* about a mile off right ahead and drawing on to their starboard bow under steam and sail, having signals flying and apparently heading towards the town of Great Yarmouth. The helm of the *Transit* was starboarded about two points and then steadied, and the *Transit* kept on, those on board her expecting the *Glannibanta*, to pass starboard side to starboard side. The *Glannibanta*, however, as she drew near ported her helm and caused danger of collision and notwithstanding that the engines of the *Transit* were stopped and reversed the *Glaanibanta* came into collision with her striking her with the stem very violently on her starboard bow in the fore-rigging.

4. Save as hereinbefore appears the several allegations contained in the statement of claim are untrue.

5. A good lookout was not kept on board the *Glannibanta*.

6. The helm of the *Glannibanta* was improperly ported.

7. Those on board the *Glannibanta* improperly neglected or omitted to keep on her course.

8. Those on board the *Glannibanta* improperly neglected or omitted to ease, stop, and reverse her engines.

9. The collision was occasioned by some or all of the matters and things alleged in the 5th, 6th, 7th, and 8th paragraphs hereof or otherwise by the default of the *Glannibanta* or those on board of her.

10. No blame in respect of the collision is attributable to the *Transit* or to any of those on board her.

The cause was heard in the court below on the 21st March 1876 before the judge (Sir R. Phillimore) and Trinity Masters; judgment was then given.

Milward, Q.C. and *Clarkson*, for the plaintiff.

Benjamin, Q.C., *Phillimore*, and *Stubbs*, for the defendants.

Sir R. Phillimore.—This is an important case of collision which happened about one o'clock in the middle of the day on the 23rd Jan. this year, in Yarmouth Roads somewhere about the South Elbow Buoy and the South-west Scroby Buoy off the Scroby Sands; the state of the weather was fine and clear and the tide was ebb. The vessels that came together in this collision were the three-masted iron screw steamship the *Glannibanta*, of 534 tons register, and ninety-nine horse power, the plaintiff in this suit, going from London to the Tyne in ballast, and the *Transit*, a screw steamer of 345 tons register, and ninety-horse power, with a crew of twenty-one hands, bound from Grimsby to Dieppe with a general cargo. The parts of the vessels which came into contact were the stem of the *Glannibanta* and the starboard side of the *Transit*, just abreast of the foremast.

The case has been very well argued on both sides, and the importance of it well deserved such an argument. I have carefully considered the arguments and the evidence with the Elder Brethren of the Trinity House, and it is with their entire concurrence that I pronounce the following judgment:

It appears that the *Glannibanta*, preceded (a very material fact in this case) by a steamer called the *Paradox*, came through Hewitt's Channel, and left the St. Nicholas light vessel on her port side and the Scroby S. Elbow Buoy on her starboard side. It is expedient in all these cases, if possible, to see what the natural and proper conduct of a vessel would be, before we consider the conduct she actually pursued. Now in this case the natural and proper conduct for the *Glannibanta* was to make a fair course under her starboard helm to the N.N.W., and to port when clear of the Scroby buoys, and alter her course as she passed the lightship to N. or N. half E., and having done that to straighten down the roads, keeping the buoys on her starboard hand. That is not denied to have been her natural course, but it has been contended, and with very great power, that her fault was this, that she went towards Yarmouth further than was necessary and proper and thereby brought her starboard side open to the *Transit*, which, on seeing her starboard side, was justified in starboarding, which it is admitted that she did. Amid a considerable conflict of evidence, we are opinion that we may safely rely upon the testimony given by those on board the *Paradox*—by the two witnesses produced from that steamer—and according to their evidence the *Transit* passed the *Paradox* port side to port side. At that time the *Glannibanta* was about a quarter of a mile astern, it might have been a little more or little less, and half a point on the port quarter of the *Paradox*, and as the witness described it "on the edge of her wake" on a north course. It is clear that the *Transit* did not alter her helm until she had passed the *Paradox*, and therefore, not until the *Glannibanta* had straightened down and consequently the *Glannibanta* must have been at that time on the *Transit's* port bow. It is admitted that the *Transit* starboarded about two points, and the great debate before me has been when she effected that manœuvre.

Now for the reasons alleged it appears to us that she must have done so when the *Glannibanta* was on her port side, and that therefore she is alone to blame.

From this judgment the owners of the *Transit* appealed, and the appeal came on for hearing before James, L.J., Baggallay, J.A, and Lush, J., assisted by nautical assessors.

The facts and arguments are fully stated in the judgment of the Court of Appeal.

May 17 and 18.—*Benjamin*, Q.C., *Phillimore*, and *Stubbs*, for the appellants.

Milward, Q.C., *Butt*, Q.C., and *Clarkson*, for the respondents. *Cur. adv. vult.*

May 29.—The judgment of the court (James, L.J., Baggallay, J.A. and Lush, J., assisted by two nautical assessors) was delivered by

Baggallay, J.A.—On the 23rd Jan. 1876, about one p.m., two iron screw steamships, the *Glannibanta* and the *Transit*, came into collision in Yarmouth Roads, and both vessels sustained considerable damage. The weather was fine and clear, the wind in the S.W., blowing a light breeze, with no sea, and the tide on the last quarter ebb, running to the northward. It does not appear that the roadstead was unusually crowded with vessels, and it is difficult to imagine a state of circumstances under which, with the use of reasonable precautions, a collision was less likely to occur.

On the 25th Jan. an action for damages in respect of this collision was commenced in the Admiralty Division of the High Court of Justice, by the owners of the *Glannibanta*, against the owners of the *Transit*, and was met by a counter claim for damages on the part of the latter.

The action came on for hearing before the judge of the Admiralty Division on the 20th and 21st March. On the latter day the learned Judge decided that the *Transit* was alone to blame, and made the usual order for assessing the damage

sustained by the *Glannibanta*, and from that decision the present appeal is brought.

The *Glannibanta* was a vessel of 534 tons register, and was proceeding from London to the Tyne in ballast; the *Transit* was of 345 tons register, and was on a voyage from Grimsby to Dieppe with a general cargo. Shortly before the collision, the *Glannibanta* had come through Hewitt's Channel, and had passed the St. Nicholas lightship on her course northwards, and the *Transit* had passed the Belle Buoy on her course southwards; the collision took place between the South Elbow and the south-west Scroby buoys, at a distance from the Scroby Sands of from a quarter to half a mile.

The plaintiffs allege that, immediately after passing the St. Nicholas lightship, the *Glannibanta*, which had previously been steering N. by W., ported her helm so as to change her course to N. half E., and proceeded down the roads at the rate of about nine knots an hour, but shortly before one p.m., those on board her saw the *Transit* approaching, bearing about two points on the port bow, and at the distance of from a half to three quarters of a mile, that the helm of the *Glannibanta* was again slightly ported, and she was kept on her course, with the intention of passing the *Transit*, port side to port side; but that the *Transit*, instead of passing the *Glannibanta* on her port side, suddenly, and with the apparent intention of crossing the bows of the *Glannibanta*, starboarded her helm, and although the engines of the *Glannibanta* were immediately stopped and reversed, and her helm was starboarded, the starboard side of the *Transit*, abreast of her foremast, came into contact with the stern of the *Glannibanta*.

The defendants, on the other hand, allege that when the *Transit* first observed the *Glannibanta*, the latter was about a mile ahead, that the *Transit* was then heading about S. by W., well over to the east side of the roads, and proceeding at the rate of about eight knots an hour; that the *Glannibanta* was not then approaching so as to pass port side to port side, but was continuing on her N. by W. course, by which she had passed the lightship, and was apparently heading to the town of Yarmouth, and communicating with the shore by signals; that the *Transit*, in this belief, and expecting the *Glannibanta* to pass starboard to starboard, starboarded about two points, but the *Glannibanta* suddenly ported, then, for the first time, straightening down the roads, and the vessels were almost immediately in collision, notwithstanding the stoppage and reversal of the engines of the *Transit*. The defendants further allege that there was no proper or sufficient look-out on board the *Glannibanta*; and then, when she so ported, those on board her were not aware that the *Transit* was so close to them, and only discovered the fact after they had ported, and when the collision was inevitable. It is not immaterial to note that, having regard to the speed at which the two vessels were proceeding, they were nearing each other at the rate of about a mile in three minutes to three minutes and a half. Now, the substantial question which had to be decided in the court of the Admiralty Division, and which has to be decided by us in the present appeal, is as to the time at which the *Glannibanta* straightened her course from N. by W. to N. half E., whether she did so at the time of, or immediately after, passing the St. Nicholas lightship, as alleged by the plaintiffs, or whether, as alleged by the defendants, she continued on her N. by W. course for some half a mile or three quarters of a mile after she had passed the lightship, and then and not till then, straightened her course. If the former be the correct view of the case, it is clear, upon the evidence, that the *Transit* was in error in starboarding when she did, and if the latter is the correct view, it is equally clear upon the evidence, that the *Glannibanta* ought not to have ported when in such close proximity to the *Transit*. This question was decided by the learned Judge of the Admiralty Division, in accordance with the plaintiff's contention, and he appears to have been much influenced in arriving at this conclusion by the course taken by another steamer, the *Paradox*, which was at the same time proceeding to the north, and by the evidence given by persons who were on board the *Paradox*, respecting the movements of the *Glannibanta* and the *Transit*. The *Paradox* had passed the St. Nicholas lightship somewhat in advance of the *Glannibanta*, and had changed her course on passing the lightship from N. by W. to N. half E., so as to straighten down the roads, and on meeting the *Transit* had passed her port side to port side. From this the learned Judge very justly inferred that the course so made by the *Paradox* was the natural and proper course for any other ship similarly circumstanced, and having stated that in his opinion the natural course for the *Glannibanta* was to have ported immediately on passing the lightship, he proceeded to refer to the argument which had been addressed to him on the part of the defendants, and which was the same in substance as has been addressed to us here, in the following terms: "The porting or passing the lightship is not denied to have been her natural course, but it has been contended, and with very great power, that her fault was this, that she went towards Yarmouth further than was necessary or proper, and thereby brought her starboard side open to the *Transit*, which, on seeing the starboard side, was justified in starboarding."

To this argument, and the evidence upon the subject of it, the learned Judge next addressed himself, and having stated that in the conflict of evidence he and the Elder Brethren of the Trinity House were of opinion that they might safely rely upon the testimony of those who had been on board the *Paradox*, he acted upon the evidence of those witnesses; and considering it to be thereby established that the *Glannibanta* had followed in the wake of the *Paradox*, he held that the *Transit* had starboarded when the *Glannibanta* was on her port bow, and had thus caused the collision, for which she was alone to blame.

If this view be correct, it of course negatives the contention of the defendants that the *Glannibanta* continued on her course of N. by W. for some distance after she had passed the lightship. In the course of the argument on behalf of the plaintiffs we were much pressed with the language from time to time made use of by the Judicial Committee of the Privy Council in Admiralty cases, and particularly in the cases of *The Julia* (Lush. 224; 14 Moore, P. C. C. 210), and *The Alice* (3 Mar. Law Cas. O.S. 103), to the effect that if in the court of Admiralty there was conflicting evidence, and the judge of that court, having had the oppor-

tunity of seeing the witnesses and observing their demeanour, had come, on the balance of testimony, to a clear and decisive conclusion, the Judicial Committee would not be disposed to reverse such decision, except in cases of extreme and overwhelming pressure, and it was urged upon us that in the present case there was no such extreme and overwhelming pressure as should induce us to reverse the decision of the Admiralty as to the question of fact upon which its decision was based. Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance, whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements.

But the parties to the cause are nevertheless entitled, as well on question of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence, and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.

In the present case, it does not appear from the judgment, nor is there any reason to suppose, that the learned judge at all proceeded upon the manner or demeanour of the witnesses; on the contrary, it would appear that his judgment in fact proceeded upon the inferences which he drew from the evidence before him, and which we have really the same means of considering that he had, and with this further advantage, that we have had his view of the inferences to be drawn from the evidence as well as the evidence itself made the subject of elaborate and able discussion on both sides.

Having given our best consideration to the evidence in this case, we are unable to arrive at the same conclusion as that arrived at by the learned judge of the Admiralty Division. It is quite true, as has been already stated that the evidence of the captain and helmsman of the *Paradox* is to the effect that in their opinion the *Glannibanta* ported her helm immediately after she had passed the lightship, and that such evidence is in accordance with the captain and helmsman of the *Glannibanta*, but it is in our opinion clear, from the circumstances to which we are about to advert, and to which the attention of the judge of the Admiralty Division does not appear to have been directed, that these witnesses must have been mistaken. The captain of the *Glannibanta* himself most distinctly states that he saw the *Transit* directly after he ported, and that she was then about half a mile or a little more from the *Glannibanta*; and this is supported by other persons who were on board the *Glannibanta*. Now, there is no dispute that the point at which the collision took place was upwards of a mile to the north of the lightship, though there is some slight difference of opinion as to the distance from Scroby Sands, and as the two vessels were approaching each other at about equal rates, the *Transit* must at the time when the *Glannibanta* passed the lightship have been at least a mile to the north of the point of collision, and at least two miles from the *Glannibanta*, and had the *Glannibanta* ported her helm immediately on passing the lightship, the *Transit*, when first seen from the *Glannibanta*, must have been at least two miles distant instead of half a mile or three-quarters of a mile, which most of the witnesses, except those who were on board the *Paradox*, agree in treating as about the distance between the two ships when the *Glannibanta* straightened her course. If, however, as is contended by the defendants, the *Glannibanta* did not port her helm until she had left the lightship more than half a mile behind her, she would have been when she ported about half a mile to three-quarters of a mile from the *Transit*, each being about a quarter of a mile from the eventual point of collision.

Under these circumstances, having given our best consideration to all the evidence in the case, and having had the benefit of the advice of the nautical assessors, by whom we have been assisted on the present occasion, we have arrived at the following conclusions, in which they entirely concur:

1. That the *Glannibanta* continued on her course for more than half a mile after she had passed the lightship, whether or not she did so for the purpose of interchanging signals with Yarmouth, as suggested by the defendants, it is immaterial for us to consider. The fact is proved to demonstration by the evidence of the captain of the *Glannibanta*, and it follows from this,

2. That by keeping on this course she led those on board the *Transit* to believe, and that they were justified in believing, that she was making for Yarmouth, and would pass them starboard to starboard.

3. That, having regard to these circumstances, the *Transit* was fully justified in starboarding when the *Glannibanta* was first seen from her deck, and that the *Glannibanta* was not justified in porting when in such close proximity to the *Transit*.

4. That the collision was occasioned by such improper porting of the *Glannibanta*, it being practically impossible to avoid a collision after the course of the *Glannibanta* had been changed.

In arriving at these conclusions, we are doubtless dissenting from the view expresssed by the captain and helmsman of the *Paradox*, upon which the Judge of the Admiralty Division relied, but we can well understand how in such a case persons desiring to speak with the most perfect honesty and accuracy, may have been mistaken. There was nothing in the surrounding circumstances prior to the collision to direct the attention of the people on board the *Paradox* to the movements of the *Transit* and the *Glannibanta*, so as to induce them to watch such movements with any particular nicety, and the want of accuracy in such casual notices as were taken is exemplified by the circumstance that the captain of the *Paradox* states that the *Glannibanta*, after she had straightened her course, was a quarter of a mile astern of him, whilst his helmsman makes the distance 200 yards only, and the captain of the *Glannibanta* says he was as much as half a mile, or nearly so, astern.

We cannot part with this case without expressing our surprise that there should have been no proper or sufficient look-out on board the *Glannibanta*, for had there been a proper look-out, and the *Transit* had been seen from the *Glannibanta*, as in such case she must have been before the latter

ported, we cannot for a moment suppose that that change of course would have been made. The captain of the *Glannibanta*, in his examination, stated that it was not a customary thing to keep a man on the look-out in the daytime on board ships belonging to his owners, and, on the occasion in question, until after she had ported, the captain was the only person on the look-out, and he was on the bridge, with his view forward limited by reason of the sails on his own ship to four points on the starboard bow. A very different course was pursued by the *Transit*, on board of which an efficient look-out was kept by her captain and mate on the bridge, and by a seaman well forward in the bows. We have only further to remark, that having regard to the fact that the *Transit* had a proper and efficient look-out in every direction, the course pursued by her of starboarding when she first saw the *Glannibanta* would be quite inexplicable if the vessels had been approaching each other port side to port side, as contended for by the plaintiffs. It appears to us impossible to adopt the suggested explanation of the plaintiffs, that by crossing the bows of the *Glannibanta* the *Transit* might save a little distance in her course to the south, and that that was her object in starboarding. On the other hand, we can well understand that the *Glannibanta*, having no sufficient look-out, ported her helm in ignorance of the position of the *Transit*, and simply with the view of straightening her course down the roads.

The *Transit* was, in our opinion, very carefully and cautiously handled. The *Glannibanta* was carelessly and recklessly managed in changing her course in ignorance of the position of another vessel which was only half a mile off. It is possible, no doubt, that the careful ship may have blunderingly gone wrong, and that the careless ship may by accident have gone right, but the burthen of proof on the latter is then very heavy, and the *Glannibanta* has certainly not discharged it in this case.

It may be well to add, that having regard to the position of the *Glannibanta* and *Paradox* in passing the lightship, and their position when the *Glannibanta* sighted the *Transit*, the *Glannibanta*, the faster ship, must have lost instead of gaining ground, which can only be accounted for by the one having taken a straight and the other a devious course. Upon the whole we are of opinion that the *Glannibanta* was alone to blame, and that, consequently, the appeal must be allowed, the order of the court below discharged, and the usual order of reference made for assessing the damage sustained by the *Transit*. The costs both of the court below and of the appeal must follow the result. *Judgment reversed.*

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

Solicitors for the *Glannibanta*, *Stokes*, *Saunders*, and *Co.*

ON APPEAL FROM THE ADMIRALTY DIVISION.

Thursday, May 18, 1876.

THE ANNA.

Necessaries—Jurisdiction—Foreign ship—Colonial port.

The Admiralty Division of the High Court of Justice has jurisdiction to entertain an action brought for necessaries supplied to a foreign ship in a British Colonial port. The Wataga (*Swab.* 165) *followed.*

Where a master in a colonial port unable to procure or pay for necessaries otherwise draws a bill of exchange upon a firm of shipbrokers in this country who accept and pay the bill, such shipbrokers can proceed against the ship as for necessaries supplied in default of payment of the amount due by the shipowners.

The Onni (*Lush.* 154) *followed.*

THIS was an action in *rem* brought by Lloyd, Lowe, and Co., shipbrokers, of London, against the Norwegian vessel *Anna*, her owners intervening, to recover an amount alleged to be due to the plaintiffs as appeared by the following:

STATEMENT OF CLAIM.

1. The said barque or vessel is a Norwegian vessel belonging to the defendants, and arrived in the port of Liverpool, in the month of Dec. A.D. 1875.

2. The plaintiffs are shipbrokers, carrying on business in co-partnership, in London.

3. About the end of Oct. or beginning of Nov. A.D. 1875, the said vessel was lying at the port of Quebec, bound for some safe port on the West Coast of Great Britain.

4. The master of the said vessel was at Quebec aforesaid, then and there obliged to make certain necessary disbursements to the extent of 293*l.* 8*s.* 2*d.* for and on account of and for the use of the said vessel, and for the supply of necessaries thereto; and being himself without funds and without credit, procured the said sum of 293*l.* 8*s.* 2*d.* for the said necessaries, by means of a bill of exchange for the said amount then and there drawn by him upon the plaintiffs; and the said master thereupon advised the plaintiffs of the same by a letter which was in the words and figures following:

"Quebec, 6th Nov. 1875.

Messrs. Lloyd, Lowe, and Co., London.

Dear Sirs,—I have this day taken the liberty to value on you at thirty days' sight for 293*l.* 8*s.* 2*d.* sterling—Two hundred and ninety-three pounds eight shillings and two-pence—in favour of Mr. Francis Gunn, of Quebec, being for the necessary disbursements of my vessel, the barque *Anna* of Christiana, which I hope you will duly honour on presentation, and please charge to account of said vessel and owners. P. Hernandsen, Esq., of Christiana. Your obedient servant, H. W. HANSEN,

Master of the barque *Anna*.

P.S. The above amount is duly insured from Quebec to Liverpool. Policy enclosed.

5. The plaintiffs duly accepted and paid the said bill of exchange at maturity.

6. The said bill of exchange was accepted and paid by the plaintiffs as aforesaid in the necessary service of the said vessel as aforesaid, and upon the credit of the said vessel, and not on the personal credit of the said master; and the said sum of 293*l.* 8*s.* 2*d.* still remains wholly due and owing to the plaintiffs.

The plaintiffs claim:

1. Judgment for the said sum of 293*l.* 8*s.* 2*d.*
2. The condemnation of the said vessel and the defendants and their bail therein, and in the costs of this suit.
3. A reference, if necessary, of the claim of the plaintiffs to the registrar, assisted by assessors, to report the amount thereof.
4. Such further or other relief as the nature of the case may require.

To this statement the defendants demurred upon the grounds that a foreign ship cannot be made answerable for a claim in respect of necessaries supplied in a foreign port, and that the plaintiffs were, under the circumstances stated in the statement of claim, in no better position than the persons who supplied or advanced the alleged necessaries at Quebec aforesaid.

March 7. — *Myburgh* for the defendants in support of the demurrer. — If *The Wataga* (Swab. 165) is still to be considered as of binding authority, where it decided that necessaries supplied in a colonial port are within the jurisdiction, this point must be taken against me. But that

decision can be supported upon the ground alone that the ship was upon the high seas at the time of the supply. Moreover, that decision is not consistent with Dr. Lushington's decisions in *The Ocean* (2 W. Rob. 368), and *The India* (12 L. T. Rep. N. S. 316; 1 Mar. Law Cas. O. S. 390), where it was held that the statute did not give jurisdiction over necessaries supplied to a foreign ship in a foreign port. There is nothing in the act to show any distinction between a colonial and a foreign port, and all the argument in the judgment of *The India* (*ubi sup.*) covers colonial as well as foreign ports. [Sir R. Phillimore.—No points for argument have been delivered. I consider that as this court now has demurrers before it, the practice prevailing in the Common Law Divisions should prevail here also, and that in all cases to be argued on demurrer, the points for argument should be delivered.] The second point is that there is no allegation in the statement of claim, that at the time the money advanced was expended for necessary supplies, the owners of the ship were without credit; thirdly, the plaintiffs accepted the bill of exchange on the personal credit of the owners of the ship, as appears by the master's letter set out. Hence there is no claim against the ship, the plaintiffs having elected to proceed against the owners.

E. C. Clarkson for the plaintiffs.—Since the decision in *The Wataga* (Swab. 165), acquiesced in since 1856, the Legislature has dealt with the whole question by the Admiralty Court Act 1861, (24 Vict. c. 10), and has not seen fit to enact anything with respect to necessaries supplied to foreign ships in colonial ports. Hence it must be taken that the Legislature left the law as defined by this court intentionally as it then stood; secondly, the plaintiffs are at liberty to show the circumstances under which the necessaries are supplied, and it is sufficient for them to allege in their statement of claim, that the supplies were necessary. The jurisdiction does not depend upon whether credit is given to the owner or to the ship. The 3 & 4 Vict. c. 65, s. 6, gives jurisdiction independently of the question of credit. It must be presumed that the ship is liable, inasmuch as the necessaries were for her use: (*The Perla*, Swab. 353.) He also referred to

The Ella A. Clark, B. & L., 32.
The Onni, L. Rep. 4 P. C. 161.

Myburgh in reply.

Sir R. Phillimore.—This is a discussion which relates to the admissiblity of a demurrer to a statement of claim.

The Norwegian vessel *Anna* arrived in the port of Liverpool in the month of December 1875, and the master, finding himself without funds, had carried on board goods to the amount of 293*l.* 8*s.* 2*d.* for the purpose of supplying necessaries to the vessel, and had borrowed the money by means of a bill of exchange, which is in these words:

Quebec, 6th Nov. 1875.

Messrs. Lloyd, Lowe and Co., London.

Dear Sirs,—I have this day taken the liberty to draw on you at thirty days' sight for 293*l.* 8*s.* 2*d.* sterling (two hundred and ninety-three pounds eight shillings and two pence), in favour of Mr. Francis Gunn, of Quebec, being for the necessary disbursements of my vessel, the barque *Anna*, of Christiana, which I hope you will duly honour on presentation, and please charge to account of said vessel and owner, P. Hernandsen, Esq., of Christiana.—Your obedient servant,

H. W. Hansen, Master of the barque *Anna*.

P.S.—The above amount is duly insured from Quebec to Liverpool. Policy enclosed.

Now these points have been made in support of this demurrer, and it will be convenient to take the first point last, because it is one of the greatest importance. The first of the two latter points is that it appears upon the statement of claim the money which had been paid by the bill of exchange had been expended in necessaries, and was obtained on the captain's personal credit, he being without funds ready. I am of opinion that that point is untenable. The third point is that the bill was accepted on the credit of the owners. That depends on the construction in some measure of the letter I have read. It is said that there is no claim upon the ship, and that the master of the vessel supplied the necessaries, and has to look only to the owners. Now in the first place it is distinctly pleaded in the sixth article that "the bill of exchange was accepted and paid by the plaintiffs for the necessary supplies of the vessel, and not on the personal credit of the master." It is contended that this written document cannot receive any construction from the statement contained in the 6th paragraph. I am by no means certain that it would not be proper in this case, in order to understand the letter to which I have referred, to take into consideration the surrounding circumstances. But I do not think it necessary to place the rejection of the demurrer upon that ground. I consider the question that was raised by my learned predecessor in the case of *The Onni* (Lush. 154) is substantially the same as the point raised here to-day. In that case he says: "I must now consider my jurisdiction entirely governed by the 3rd and 4th of Vict. c. 65, sect. 6. That section merely says that the court shall be authorised to decide all cases for necessaries supplied to any foreign ship or seagoing vessel, and to enforce payment thereof. It makes no distinction whether the necessaries were furnished on personal credit or not. I have held that the advance of money for the procuring of necessaries is within the equitable construction of the statute. Can the present case be considered as a case of that kind? I can only judge by the information afforded me, and according to that affidavit the master obtains the money to procure necessaries by means of this bill, and the money so procured was duly expended for the benefit of the ship. I think in these circumstances I am justified in allowing this claim."

In this case the money was obtained by means of a bill of exchange to provide necessaries for the benefit of the ship. I am unable to find any substantial distinction on the matter between the two cases. I consider that case, therefore, is a precedent for the court in the present case.

I have only to advert to the first point raised in the discussion to which I referred, namely, the question as to whether the court has any jurisdiction in the circumstances of this case, the circumstances of this case being briefly that a Norwegian vessel has obtained necessaries when lying in the port of Quebec, and the plaintiffs, the ship's brokers, bring this suit under the 6th sect. of 3 & 4 Vict. c. 65, which enacts that "the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatever in the nature

of salvage services rendered to a sea going vessel in the nature of tonnage, or for necessaries supplied to a foreign vessel, and to enforce the payment thereof, whether such ship or vessel may have been in the body of a county, or upon the high seas." It was very properly admitted by Mr. Myburgh in the course of the argument that this point as to the question of jurisdiction was in reality, so far as necessities are concerned, decided by Dr. Lushington in the case of *The Wataga* (Swa. 165). It is not necessary to read the whole of that case, but that learned judge considered fully the effect of the statute, and came to a distinct conclusion. There an American ship had been supplied with necessaries, and had been arrested. It was a question of jurisdiction when brought into this court. The judgment was given in 1856, and as far as I know the question was decided at that time. I think, also, that it has received confirmation from the subsequent statute, 24 Vict. c. 10, sect. 5. I think that the argument which has been addressed to me by Mr. Clarkson upon that point is a sound argument, but in any case I should not think it right if I entertained an opinion which I by no means express, that Dr. Lushington had erred in his judgment, and had not taken the right view, to take upon myself to reverse his judgment, which I understand he had long considered, and I should leave the parties to resort, if aggrieved by my adhering to his decision, to the Court of Appeal. I am therefore of opinion that I ought to overrule the demurrer, and I so do. I give leave to the defendants to appeal.

From this judgment the defendants appealed.

May 18.—*Myburgh* (*Milward*, Q.C. with him). —Has the court jurisdiction over claims for necessaries supplied to a foreign vessel in a colonial port? When the 3 & 4 Vict. c. 65 was passed the Admiralty Court had no jurisdiction over causes of necessaries supplied whether in an English or a foreign port, and the words of that Act by which jurisdiction is given, whether the supply was "within the body of a county or upon the high seas," can only give jurisdiction over claims where the necessaries are supplied either in this country or on the high seas. The Act does not cover supplies made in all parts of the world or in any port out of England. Dr. Lushington so decided in *The Ocean* (2 W. Rob. 368), and though *The Wataga* (Swab. 165) makes an exception from this ruling in favour of necessaries supplied in a colonial port that latter decision ought not to be followed by this court. There is no essential difference between a foreign and a colonial port, and neither are within the words of the statute:

The India 12 L. T. Rep. N. S. 316; 1 Mar. Law Cas. O. S. 390;
The Ella A Clark B. & L. 32.

[James, L.J.—Would not foreign owners suffer if the defendants were to succeed? Their masters could not obtain the necessary supplies. They would have no security to give the merchants]. Masters have without this power too much facility for spending money.

E. C. Clarkson, for the respondent, was not called upon.

James, L.J.—This case does not require a ormal judgment. Dr. Lushington, twenty years ago, in a very elaborate judgment, decided upon the construction of the statute, and that judgment has been acted upon ever since. The Legislature has since that time continually dealt with the matter, and if there had been any notion that the decision was wrong they would have made an alteration accordingly. We have no hesitation in coming to the same decision to which Dr. Lushington came twenty years ago. It is too late to raise questions of jurisdiction after that lapse of time.

Upon the other points it is perfectly clear what the decision should be.

Baggallay, J.A., and Lush, J., concurred.

Appeal dismissed with costs.

Solicitors for plaintiffs, *H. W. Collins*, and *Robinson*.

Solicitors for defendants, *Gregory, Rowcliffe*, and *Co.* for *Hull, Stone*, and *Fletcher*, Liverpool.

ON APPEAL FROM THE ADMIRALTY DIVISION.

Thursday, May 4, 1876.

Cargo *ex* Woosung.

Salvage—Government ship as salvor—Agreement—Validity of—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *sect.* 484.

Although the captains, officers, and crews, of Government ships are entitled to be remunerated for salvage services to the same extent as officers and crews of merchant vessels would be rewarded under similar circumstances, they are not entitled to impose terms upon the persons whose property they salve, and refuse to render assistance unless those terms are accepted.

An agreement so imposed by the captain of a Government ship upon the master of a ship in distress, by which the latter becomes bound to pay a fixed sum for services to be rendered, not merely by the officers and crew, but by the Government ship also, is invalid, as the services of the ship are not to be rewarded under the Merchant Shipping Act 1854, *sect.* 484.

Semble, that the officers and crew of a Government ship, ordered by Government to render salvage assistance, have no right to make any agreement with the master of the distressed vessel as to the amount of their reward.

A vessel owned by the Bombay Government, and manned by uncovenanted servants of that Government, whose officers carry no Queen's commission, is a "ship belonging to Her Majesty," within the meaning of the Merchant Shipping Act 1854, *and no salvage reward is recoverable in respect of services rendered by such a vessel.*

This was an appeal from a decree of the High Court of Admiralty of England, in a cause of salvage instituted on behalf of Capt. Elton and the officers and crew of the *Kwangtung*, of the Bombay Marine, against the cargo of the steamship *Woosung*.

Capt. Elton and the other plaintiffs were uncovenanted servants of the Bombay Government, the officers not holding a Queen's commission, but performing duties analogous to those of the officers and crews of despatch boats. The *Woosung* was wrecked in the Red Sea, and news of the wreck was sent to London, when application was

made for assistance to the Indian Government. The Secretary of State for India telegraphed to the Resident at Aden to send a gunboat to protect the property, if he thought it necessary. In accordance with these instructions, the Resident at Aden directed the *Kwangtung* to proceed to the assistance of the *Woosung*, giving Capt. Elton the instructions contained in the following letter—

Sir,—I have the honour to annex for your information a note respecting the steamship *Woosung*, on the island of Kotama, and to request that you will proceed to the spot at full speed, after landing the relief detachment to Perim. You will notice the *Woosung* is said to be holed in several places, and to be full of water. If practicable, your stay at Kotama for salvage services should not exceed forty-eight hours, as your early return to Perim is desirable, to convey to Aden the released detachment of the 2nd Grenadiers, and other details. The *Kwangtung* can return to Kotama, if it should be considered advisable on the receipt of your report, but from the condition of the ship it seems doubtful whether much cargo can be saved.

The *Kwangtung* did proceed to the wreck, and rescued much of the cargo. Capt. Elton, however, declined to undertake the service except under an agreement, which was, after much discussion, signed by the master of the *Woosung*, by which the plaintiffs were to have half the proceeds of the property salved. This agreement was upheld by the learned Judge of the High Court of Admiralty (Sir R. Phillimore) and from his decree the owners of the cargo appealed.

The facts and arguments are fully set out in the report of the case below: (*ante*, p. 50; 33 L. T. Rep. N. S. 394).

Sir *H. James*, Q.C., *Cohen*, Q.C., and *Phillimore* for the appellants.

Butt, Q.C., *Herschell*, Q.C., and *Edwyn Jones* for the respondents.

James, L.J.—I am of opinion that, having regard to the admitted circumstances of the case, this agreement cannot stand as a final measure of the amount to be paid as a remuneration to the captain, officers and crew of the ship *Kwangtung*.

The circumstances of the case seem very simple. The ship *Woosung* was wrecked on a reef in the Red Sea, and was in a position of imminent peril. The lives of the passengers and crew were saved, but as far as the ship itself is concerned, she was in such peril that she never was rescued, but went to pieces, and the cargo was got out of her when she was on the reef in this state of the most imminent peril. That being so, it so happened that in consequence of a passing ship coming up, a communication was made to London to certain persons interested in the ship and cargo, in the position in which she then was, and thereupon they wrote to the India Office, and the result of this communication was that the office gave directions to the proper authorities at Aden to send a ship to the rescue of the *Woosung*. A letter had been written by the agent of the Salvage Association, making offers to reimburse the expenditure for coal consumed on board the ship to be sent, and to make presents to her officers and crew.

It was contended by Sir Henry James that this amounted to an agreement which precluded any right to salvage afterwards. I do not think that it can be fairly said that it in any degree whatever interfered with what otherwise would be the right of the captain as to the salving of the ship. What was said was, "We will pay for coals, and make such present to the men as you may think fit." But it cannot be contended that by accepting that offer the men were not to have what they otherwise would be entitled to. They retain their rights as salvors notwithstanding.

It was settled in the case of *The Azalea* (*a*) that, having regard to the peculiar position of the captain and officers in the Bombay Marine, they are to receive such salvage as would be allotted to the officers and crew of a merchant vessel in similar circumstances. That must be considered as a rule to be applicable to all these vessels, and the men would be entitled to remuneration, like the officers and crew of a merchant vessel.

That being so, the Resident at Aden directs Captain Elton to go to the ship. He is to go, according to the letter, to the spot, to the reef, and he is told, "the *Woosung* is said to be holed in several places, and to be full of water. If practicable, your stay at Kotama for salvage services should not exceed forty-eight hours, as your early return to Perim is desirable, to convey to Aden the released detachment of the 2nd Grenadiers, and other details. The *Kwangtung* can return to Kotama, if it should be considered advisable, on receipt of your report, but from the condition of the ship, it seems doubtful whether much cargo can be saved."

Then the captain, under that direction, does proceed; and I think it was his duty to render his services—all reasonable services—upon the usual terms, that is to say, on receiving such a salvage reward as would be allotted to the officers and crew of a merchant vessel under similar circumstances. He was there to use his ship in a reasonable manner for the protection of the ship and cargo. When he states that he makes a bargain by which he is to give his services, and those of the officers and men of the ship, for the saving of the fittings of the disabled ship, and for the purpose of saving as much as possible of the cargo, in consideration for which salvage services one sum is to be given, and that is one-half of the salved property, that is an agreement which, upon the face of it, cannot stand. If it had been an agreement between the captains of ordinary merchant vessels, beyond all question it would have been for a salvage service to be performed by ship, captain, officers and crew—the price given being for the whole services to be performed. It appears that that alone would show that it would be entirely impossible that this can stand as the price to be paid for the services

(*a*) *June* 8, 1875.—*The Azalea*.—This was a cause of salvage instituted by the commanding officer, officers, and crew of the *Dalhousie*, another vessel belonging to the Bombay Marine, against the cargo of the steamship *Azalea*, which was also wrecked in the Red Sea on the 26th July 1873. The work was very great, owing to the decomposition of the cargo, which consisted of rice, seed, and hides.

The value of the cargo salved was 22,400*l*.

Milward, Q.C., E. C. *Clarkson*, and *Goldney* for the plaintiffs.

Brett, Q.C. and *Myburgh* for the owners of cargo.

Sir R. Phillimore said that although there was no danger from sea or weather, the service was of great merit, owing to the great heat and the state of the cargo, and the liability to sickness to which the salvors were exposed. It was, however, a circumstance that the court must bear in mind, that the *Dalhousie*, being a Government steamer, was not to be considered as a salvor, but, on the other hand, her officers and crew were entitled to salvage reward, and their services must be remunerated, excluding the ship, and that the captain and crew were entitled to 4500*l*.

of the officers and men alone. It is one entire consideration. We have no means of determining what proportion is to go to the ship, and what to the officers and crew. Therefore, we are driven to find some other mode of ascertaining how much the officers and crew are to receive.

Independently of that, I consider that it would be *pessimi exempli* if a person placed in the position in which Capt. Elton was, sent by the local Government to this ship to assist it, and not content to take the salvage upon the same footing as on merchant officers, could say to the master of the wrecked ship, "Well, if you do not agree to give me my terms, I will sail away, and leave you here to do whatever you can with such assistance as you can get, inadequate as it is; although I have been told to come here for the purpose of assisting you." It would be something odd if that could be said by any public servant who had a public duty to perform, and that he could say, "I will not render those services which I have been ordered to render with a public vessel, unless you come to my terms." Nobody, except under circumstances of enormous pressure, would think of agreeing to pay half the proceeds of the cargo.

For all these considerations, I think the agreement cannot stand, but that the captain and the crew are entitled to a full, adequate, and liberal remuneration, of which the amount will have to be considered.

Baggallay, J.A.—I am of the same opinion.

I concur with the Lord Justice in thinking Capt. Elton was in no way restricted as to what he might do under the circumstances in which he was placed, by what took place in London between the Salvage Association and the India Office.

But that brings me to the second question, which is the most important one in this case—namely, whether Capt. Elton was at liberty to enter into a salvage agreement such as that entered into by him on the 9th March. Now, he was at that time acting under the orders of the Bombay Government, commanding a ship belonging to her Majesty, and was sent to protect property which was on this reef in the Red Sea. Without actually deciding the question, I entertain a strong opinion that it was contrary to his duty as an officer in the service to enter into the agreement in question; and that is borne out by considering the 484th and 485th clauses of the Merchant Shipping Act of 1854. The 484th section provides:—"In cases where any salvage services are rendered by any ship belonging to her Majesty, or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk thereby caused to such ship, or to the stores, tackle, or furniture thereof, or for the use of any stores or any other articles belonging to her Majesty supplied in order to effect such services, or for any expense or loss sustained by her Majesty by reason of such services." But the 485th section goes on to provide for a claim for salvage services rendered by the officers and crew of one of her Majesty's ships, and no proceedings are to be taken, and "no claim whatever on account of any salvage services rendered to any ship or cargo, or to any appurtenances of any ship, by the commander or crew, or part of the crew, of any of her Majesty's ships, shall be finally adjudicated upon, unless the consent of the Admiralty has first been obtained." That authorises the officers and crew to commence proceedings in the Court of Admiralty. Then the 486th clause relates to the various steps to be taken when salvage services have been rendered by her Majesty's ships abroad; and it provides that any officer entering into any port with salved property, is to make a statement on oath, specifying so far as he can the particulars of the property, and the place, condition, and circumstances in which the ship, cargo, and property was at the time when the services were rendered for which salvage is claimed; and the nature and duration of the services rendered, also the value of the property salved, and then the consular officer or a judge to fix the amount of the bond to be given by the owner or master of the salved property. That appears to negative the power of an officer commanding a ship belonging to her Majesty to enter into such an agreement as in question here. But it is unnecessary to decide that question, because it appears that the agreement was not one which could be allowed to stand.

Two cases have been referred to in the course of the argument. One is the case of *The Helen and George* (Swab. 368), where it was held, "That salvage would be upheld unless proved to be very exorbitant, or to have been obtained by compulsion or fraud." Therefore, the ground of exorbitancy of the agreement would be sufficient to set it aside. The case of *The Inca* (Swab. 370) laid down this rule, that a moiety of the property salved, with costs, is the maximum remuneration that should be allowed to the salvors. Here is, then, a moiety of the property saved not in the hands of those in whom it ought to be, but claimed for the services of the officers and crew, entirely omitting from consideration any services of the ship employed. That alone would be sufficient to show that this agreement was inequitable. But beyond this we have this fact, that at the same time services are rendered by a Greek trader, who was to receive one-third of the proceeds, and on whom was cast the obligation of providing boats and necessary appliances, and he had to pay a heavy price to secure the service of an interpreter. Therefore the case falls within that of *The Helen and George*, and the agreement cannot stand.

Lush, J.—I am of the same opinion. Even if Capt. Elton could have entered into any agreement, the agreement before us is not one which could stand. As the learned judges have already delivered their judgments, it is not necessary for me to do more than say that I think that Capt. Elton was precluded from entering into any such agreement. He was an officer sent on that special service, and it was not competent for him to stipulate for payment. Although he was not an officer in the navy, he was not in the position of a merchant captain. The provisions on this subject contained in the Merchant Shipping Act are entirely consistent with public policy, and are such as the Court would act upon without express legislation upon the subject.

Appeal allowed.

Their Lordships having expressed their opinion that the compensation ought to be on a liberal scale, it was agreed between the counsel for the plaintiffs and defendants that the amount to be paid to the India Office for the master and crew of the *Kwantung* should be 6000*l.*; the respondents to have their costs in the court below, the appellants theirs in the Court of Appeal.

Solicitors for plaintiffs, *Kearsey, Son,* and *Hawes.*

Solicitors for defendants, *Waltons, Bubb,* and *Walton.*

SITTINGS AT WESTMINSTER.

Reported by R. H. Amphlett, and W. Appleton, Esqrs., Barristers-at-Law.

Tuesday, May 23, 1876.

River Wear Commissioners *v.* Adamson and others.

Harbours, &c., Clauses Act (10 & 11 *Vict. c.* 27), *s.* 74—*Damage to pier by abandoned vessel—Liability of owner—Act of God.*

Sect. 74 *of the Harbours, &c., Clauses Act of* 1847, *enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the buoys or works connected therewith," &c.*

Held, by the court (unanimously reversing the decision of the court below), that the damage contemplated by this section was damage such as human agency could avert, and not damage caused by the Act of God, or of the Queen's enemies.

Dennis *v.* Tovell (*ante,* Vol. 2, *p.* 402 *n.*; *L. Rep.* 8 *Q. B.* 10; 27 *L. T. Rep. N. S.* 482; 42 *L. J.* 40, *Q. B.*) *overruled.*

The defendants' ship, *The Natalian,* whilst endeavouring to make the port of Sunderland for shelter during a storm, was driven ashore by the violence of the gale. The crew were saved and the ship necessarily abandoned. While the storm continued the vessel was driven by the force of the winds and waves against the pier of the plaintiffs and did damage to it to the amount of 1500*l.* The weather was such that nothing could be done by the crew or other persons to prevent the ship damaging the pier—in other words, the accident was inevitable.

The plaintiffs sought to make the defendants, the owners of the vessel, liable under sect. 74 of 10 & 11 Vict. c. 27 (The Harbours, Docks, and Piers Act 1847).

The cause was originally tried at the Durham Summer Assizes 1873, before Quain, J. and a special jury, when a verdict was entered for the plaintiffs, and leave reserved for the defendants to move to have the verdict entered for them on the ground that the damage was solely the result of the storm.

The Queen's Bench Division, on the authority of *Dennis* v. *Tovell* (*ubi sup.*) discharged the rule.

Against this decision the defendants appealed.

Gorst, Q.C. and *Greenhow* (with them the *Attorney-General,* Sir J. Holker, Q.C.), argued for the appellants.—This case is distinguishable from *Dennis* v. *Tovell* (*ubi sup.*). In that case there were still some of the crew on board. Here the ship was abandoned. If we make no exception the defendants might be liable for acts arising from the clear negligence of the plaintiff, or, again, in the case of salvors bringing in the ship, must the owner still be held liable for their negligence? The latter part of the section shows that some exception was contemplated. The law compels the employment of a pilot—here the owner is compelled by the act of God. This court is not bound by the decision in *Dennis* v. *Tovell* (*ubi sup.*).

Herschell, Q.C. and *H. Shield* (with them *C. Russell,* Q.C.), *contra.*—The first part of the section is general, and limited in no way—it starts with an absolute rule. The damage must fall somewhere; it should rather fall on the person whose property has done the damage, than on a person whose property has suffered the injury. It is somewhat dangerous to insert words into an Act of Parliament. Probably, by excluding the owner's liability when there was a plot on board, the Legislature showed they intended to include all other cases. [Mellish, L.J.—When the law imposes a duty does it not always except what happens by the act of God or the Queen's enemies?] The terms of the law are precise and plain. In either case an innocent party must suffer.

Jessel, M.R.—No doubt there are difficulties attending any proper construction of the section the meaning of which we are called upon to decide. It is equally indubitable that a mere literal construction would, on a consideration of the nature and objects of the statute, lead one to the conclusion that in every case the owner of the vessel was liable for any damage done by the vessel to the harbour, dock, or pier. But the conclusions to which such a construction would lead are so startling that I think we must consider that they could not have been in the contemplation of the Legislature.

The first proposition is this: that if a vessel is driven by stress of weather without the fault of anyone, and is shipwrecked against the pier, the unfortunate owner of the vessel must not only lose his vessel by shipwreck, but must also pay the damage done to the pier. It is something like the hospitality which in the long past was shown to vessels when they had the misfortune to be wrecked on the coast. That would be a very startling conclusion to arrive at; but the matter does not stop there, because, if the vessel were driven against the pier by the undertakers themselves, so that it was their wrongful act which caused the vessel to be driven against the pier, the damage would still be done by such vessel. Again, a literal construction would lead to this result—that the person who did the act might make the person who was wholly innocent pay for the damage done by such wrongful act. There are many other cases which might be put. One was put in argument perhaps not so probable as the first I have suggested, but perhaps not more improbable than the second, the vessel might be taken by the Queen's enemies, and before condemnation be used either as a battering ram or otherwise against the pier, and then, being recaptured, the unfortunate owner in whom the title would revest would be liable for damage done to the pier by the Queen's enemies. A great number of other cases equally startling might be put as the result of construing the section literally. If that leads to so absurd and revolting a conclusion, then I think it is the duty of a court when construing the section to give it what they may consider a fair interpretation. In the first place on reading the section we find that it contains a limitation—there is a proviso at the end of the section—"provided always that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel which shall at the time when such

damage is caused be in charge of a duly licensed pilot whom such owner or master is bound by law to employ and put his vessel in charge of." The reason, which appears tolerably obvious to my mind, for that proviso is this—the owner is compelled by law to put the vessel in charge of the pilot, and he ought not to be liable for the acts of the pilot when the State takes the charge of the vessel from him and puts it into the hands of somebody else. The pilot may be liable, but the pilot is only liable for negligence, so that if in the case I put of storm or tempest—or as we lawyers call it, by the act of God—the vessel is driven against the pier, the loss in that case would fall upon the pier owners. Therefore there is one case in which, at any rate, the pier owners are to take the chance, which every owner of a pier must know must result from the action of the weather, of damage in the same way as it might be damaged by a thunderstorm, or by any other accident, independently of any vessel being concerned in doing the damage. It appears to me, therefore, judging from that proviso, the Legislature did not intend to make the owner always liable where the matter happened from causes entirely beyond his control.

Therefore we are driven back on the familiar maxim of law—"That where there is a duty imposed or a liability incurred, as a general rule, there is no such duty required to be performed, and no such liability required to be made good where the event happens through the act of God or the Queen's enemies." Considering that that is the general rule of law, and looking at the general object and purview of this Act of Parliament, and considering the exceptions I have mentioned, I think we may well come to the conclusion that the act of God and the Queen's enemies were not intended to be comprised within the first words of the section, and consequently, in this case, the defendants ought not to be liable.

Therefore, I think the decision of the court below must be reversed.

Kelly, C.B.—I entirely agree with Mr. Herschell in the argument he has urged that we are not to disregard the express terms of an Act of Parliament because their literal construction does not provide against a possible case of inconvenience or even of injustice. But there are certain principles of law which, though not expressed either in the common law or in the judgments of judges, or in the language of Acts of Parliament, nevertheless must be held to qualify all that may fall from judges in expounding the common law and all that is to be found throughout the statutes in the various Acts of Parliament. Among those principles and maxims is this—that no man can be answerable, unless by express contract, for any mischief or injury occasioned to another by the act of God, and the justice of that maxim, and that it does apply to all cases, except where by express contract it is otherwise provided, is so clear that I think we ought to apply it to the present case, and though at first sight the Act seems to provide that the owner of the vessel shall be liable when it comes in contact with the pier, we must qualify that provision by introducing into it the maxim of the law that no man is to be answerable for the act of God. I think that is implied in the Act of Parliament, and we cannot hold the defendant liable here.

But I must say upon a technical consideration of the language of the Act, I go further, and think that reading the whole of it together, it contemplated the case of a vessel or float of timber which was in charge of some person or persons. The words are: "The owner of any vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same to any harbour, dock, or pier, or the quays or wharves connected therewith"—if it had stopped there, no doubt the provision would have been general, absolute, and imperative; but it does not, there is a comma in the Act of Parliament after the word "therewith," and the section proceeds—"the master or person having the charge of such vessel or float," that is, continuing the same sentence, and, therefore, seems to imply that the sentence refers to a vessel of which some master or person has the charge; and then it goes on to say: "The master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same and the undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same." Then what is the meaning of the word "also?" It is to superadd to the liability of the master or person by whose wilful act or negligence the mischief is occasioned—the liability there enacted by the statute. It appears to me that it is a reasonable construction of the statute, even apart from the implication to which the Master of the Rolls has alluded (and in whose observations I entirely concur), as to anything arising from the act of God. In addition to that, I think upon the reasonable construction of the statute itself the defendants cannot be held liable.

I would only observe in regard to what has fallen from the Master of the Rolls, that it is clear it never was the intention of the Legislature to make the owner liable, except in the character of owner, for anything for which another is made expressly responsible, and which takes the power out of the owner's hands to prevent the act, whatever it may be, which may occasion the mischief. If it had been intended by the Legislature that from whatever cause, whether through the wilful act or negligence of the master or other persons, the pier had been injured, yet nevertheless the owner should be liable, they would never have introduced into the same section the provison that where there is a pilot whom the owner is bound to employ who takes the management of the vessel out of his hands, then he shall be no longer liable. It is to be observed upon this question, and that fortifies the construction which I must say, speaking for myself, I put upon the section taking it altogether, though this section exonerates the owner, it does not exonerate the master or any other person through whose wilful act or negligence the mischief is occasioned. It says the owner shall be liable where either the master or person in charge of the vessel, by wilful act or negligence occasions the mischief to the pier, or runs the vessel against the pier, save only in the case of the pilot; and it also goes on to provide, and that is the principal object of that part of the section, that in addition to the liability of the owner, which no doubt is specially enacte the individual who is the wrongdoer and who occasions the mischief in question, whether the mas-

ter or the person in charge, who is the real origin of the mischief, shall be likewise liable as well as the owner.

I think, therefore, on all these grounds, the defendants are not liable, and consequently the judgment of the court below ought to be reversed.

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

I think, taking the language of the section, it clearly was the intention of the Legislature to extend the liability of the owners of vessels in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law; because if that is not the intention it is not easy to see the objects of the section at all. Looking at the pointed language in which negligence is brought in, or "wilful act," and looking to the fact that the section goes on to speak of the master or the person having the charge of the vessel, it seems to show clearly that the owner is intended to be liable even in the case where neither the owner nor the crew had anything to do with it. But the question arises, because we may decide that the owner may be made liable where it is not proved that he or the master was guilty of negligence, are we bound to hold that in every case whatever where the vessel physically damages the wall, the owner is to be liable? I am of opinion the statute only contemplates the case where either directly or indirectly, through the act of man, the vessel is caused in some way or other to run against the pier. It is quite consistent with our law, that in certain cases a person may be made liable as insurer against the acts of all the men whom he may have under his control. And many examples of that may be put; but although that is the case with regard to the act of man, the act of God is in point of law opposed to that which may be said to be the act of man, and the act of God does not impose any liability upon anybody. Although, of course, the Legislature are not bound by any such rule, and may make a person liable for what is the consequence of the act of God if the Legislature so pleased, yet, in construing the words of the Act of Parliament, we are justified in assuming that the Legislature did not intend going against the ordinary rules of law, unless the language they have used obliges the court to come to the conclusion that they did so intend.

Then the question is, looking at the whole of the section, did the Legislature intend to make the owner of the ship liable only for the act of man, or did they intend to make him liable for the act of God, or where without his own fault, or the fault of anybody whatever, but through the violence of nature the vessel has been taken against the pier? Looking at it so, without going through the words of the section again, it appears to me that I am bound to agree with the remarks which have been made by the Master of the Rolls and by the Lord Chief Baron, and that the section points to something that is done by the act of man, or to the act of the person in charge; it looks as though the Legislature considered somehow or other through the act of man damage might be done to the pier, and then they say, to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say he shall be liable; but if it was the consequence of the negligence of somebody else, that person is not discharged, but you have your remedy over. Then they make one exception to that rule in the case of the pilot. They say, if a pilot is in charge of the vessel, even although it may be by his act, the owner will not be liable. I do not think it was intended by the Legislature to put upon the shipowner the absolute liability for damages occasioned by the ship being driven against the pier when she is really upon the high seas, and thence being driven from outside the harbour by the violence of the winds and waves against the pier; therefore I agree that the judgment should be reversed.

Denman, J.—I am of the same opinion.

No doubt, taking the words of sect. 74, it is possible to hold that they include an absolute liability on the part of the owner of the vessel to the dock-owner. The words are strong, intelligible, and grammatical; but I am of opinion that, taking the final words of the section, some qualification must be put on those words, not by introducing fresh words into the Act of Parliament, or supposing a clause to exist in it which does not exist, but by qualifying those words by well known principles of law which must be taken to override an Act of Parliament. I apprehend that there is no principle of law better established than this, that in every Act of Parliament words are not to be construed to impose a liability for an act or acts done, upon individuals, if those acts are not done by individuals, or not caused by their property or servants, but are acts which are substantially caused by a superior power, such as the law calls the act of God. In this case there can be no doubt, from the evidence, that the injury occasioned by the vessel was not the result of any neglect on the part of the owner, or on the part of any person having charge of the vessel, or indeed of any human being, but was really the effect of the violence of the winds and waves overcoming all control on the part of the master or owner of the vessel, and forcing the vessel against the pier. Under these circumstances I apprehend, upon the general principle, that every statute is to be so construed as to leave untouched a principle of common law which applies to all similar cases, we are not bound to hold, and ought not to hold in this case, that damage was done by the vessel within the meaning of the Act of Parliament, but that, on the contrary, it was damage that was occasioned by the act of God, and, therefore, no action lies.

With regard to the other words of the section, I think a strong argument arises from the words which contemplate the punishment of a person who had charge of the vessel. I do not myself, however, go so far as to think that there might not be a case where the owner of the vessel would be liable where no person was in charge. If there was a person appointed, although not on board, but who ought to have been controlling the vessel, and through his negligence the accident is occasioned, I think the section would apply. Therefore, I should put that qualification on the proposition that it must be the act of man. I think this section does not exclude the exception of the act of God, which, in my opinion, was the sole cause of the accident here; and, so thinking, I am of opinion the defendants are not responsible.

Pollock, B.—I am of the same opinion, although the process of reasoning by which I have arrived at that conclusion is not the one which has been adopted by the other members of the court. We

are bound to put a reasonable construction upon the section. To put a reasonable construction is not to put a construction which might produce the result that may appear to the court reasonable, but it is to apply to the section that meaning which would seem to carry out the intention of the Legislature as applied to the subject matter with which they were dealing. I find the ordinary Dock Act Clause providing for the cleaning of the dock, the protection of things in the dock, and all the necessary provisions with regard to vessels and timber floats which may be placed in the dock, or which are going into the docks or going out of the docks. Looking at it in this aspect, one of the things the section intends to provide is that in the event of the structure of the dock being injured by vessels or floats of timber, the owners of the dock are not to be put to the proof of negligence or to the proof of showing how the injury was occasioned.

I am not prepared to say that if it was the case of damage done during the night to one of the dock gates by a float of timber that it would be any answer to say it arose from some unforeseen cause or accident against which human providence could not protect it. I do not know what would be meant in that case by the act of God. We know what is meant by the act of God in the case of lightning, &c. I do not know how it may be as to matters as to which the providence of mankind may or may not prevent a particular result. Therefore, if that were the case here, I should pause before I came to the conclusion at which my brothers have arrived; but this is a case in which the vessel was extraneous to the dock, entirely out on the high seas, she met with certain risks and injuries which compelled her crew to leave her, and she became derelict, and in that condition, being wholly extraneous of the dock, she is, by force of the elements, driven against it. That seems to me to be an event which the section did not intend to provide against, and there is nothing, looking to the subject matter, and the difficulty of providing against it, unjust or unreasonable in it. In all other respects I agree with all that has been said, and I think the judgment ought to be reversed.

Judgment reversed.

Solicitors for plaintiffs, *J. W. Hickin*, for *Ralph Simey*, Sunderland.

Solicitors for defendants, *Johnson* and *Weatherall* for *E. H. Haswell*, Sunderland.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Reported by G. WELBY KING, and JOHN E. THOMPSON, Esqrs., Barristers-at-Law.

Saturday, July 1, 1876.

Re ARTHUR AVERAGE ASSOCIATION (DE WINTON AND CO.'S CASE).

Marine insurance — Illegal company — Invalid policy—Consideration—Return of premium.

The association was not registered under the Companies Acts. Persons became members by effecting mutual policies, members were empowered also to effect "special rate policies." The applicants were not members, but had taken out a "special rate policy," signed per procuration by J. and S., the managers, who gave and accepted on their personal liability, a bill of exchange for the amount assured. In a similar case, the amount assured had been disallowed by the Appeal Court as a claim made on the association. J. and S. became insolvent, and their acceptance was dishonoured. De W. and Co. claimed that the amount of the premiums should be repaid them by the members of the association.

Held, that they were not entitled to have the premiums repaid, because, first, as they well knew, J. and S. had no power, as agents, to grant such a policy to non-members; and, secondly, there was no failure of consideration, as J. and S. had made themselves personally liable.

FURTHER consideration.

The constitution and history of this association are fully reported, *ante*, Vol. 2, pp. 530, 570.

This was a claim by Messrs. De Winton and Co., who were not members of the association, for a return of the premiums which they had paid in respect of a policy of insurance on one of their vessels which had been insured by the association. The policy of the applicants was a special rate policy, and had been signed by the managers, Messrs. Jackson and Sheppard, "per procuration of the several members of the Arthur Average Association." Jackson and Sheppard gave a bill of exchange, accepted by themselves personally for the amount of the claim; but the bill was dishonoured at maturity, and the managers had become insolvent.

The position of Messrs. De Winton and Co. was similar to that of Messrs. Hargrove and Co, who after the winding-up of the company, were found to be creditors to a large amount on special rate policies, but whose claim was disallowed by the Master of the Rolls, and subsequently by the Court of Appeal, on the ground that the association ought to have been registered, and not being so, was an illegal company, which ought never to have been wound-up; that the policies were void under 30 Vict. c. 23, s. 7, because they did not specify the names of subscribers or underwriters, and that the policies were *ultra vires* as, under the rules of the association, special rate policies could only be issued to those who were already members of the association by having taken mutual policies: (*ante*, Vol. 2, pp. 530, 570; L. Rep. 10 Ch. 542.)

In these circumstances Messrs. De Winton and Co. applied for a return of the premiums.

North and *Hilbery*, for shareholders, who opposed the claim.

Waller Q.C. and *E. C. Willis*, for the official liquidator.

Fischer, Q.C. and *J. C. Wood*, for the applicants, cited

British and American Telegraph Company v. *The Albion Bank*, L. Rep. 7 Ex. 119;

Tyrie v. *Fletcher*, 2 Cowper, 668.

JESSEL, M.R.—The first point, as to the claim of these gentlemen to be creditors of the association for the amount insured, has been already decided. They are not creditors for that amount.

This is a hard case, but if you consider all the circumstances, it is quite as hard upon the alleged members of this association as upon the present applicants. The only persons who are members are those who have taken out mutual policies. These gentlemen are not members. There is not a suggestion that they were not aware of the

constitution of the association. So I must take it that they effected their insurance with a full knowledge of the rules: they must have had notice. That being so, if they had such notice, they must have had notice of the limited powers of the agents to enter into a contract which was beyond the scope of their authority. The policy was void on that ground alone wholly independently of the objections founded on the statute. The result, therefore, is that there is nothing binding on the association. Therefore the premium was paid for nothing. That is so far clear, and nothing more was done.

Then it is said that the premiums were paid to Jackson and Sheppard as managers, who were not entitled to receive the premiums, and consequently that there is an individual liability on the members. But this cannot be shown. The association was a shifting number of persons; nobody knew of whom it consisted. It varied as to its members every year in form, every day in fact. I do not know whether there was even a common council. The premiums were received by Jackson and Sheppard. There was no evidence in the winding-up that there ever was a common authority granted to Jackson and Sheppard.

Besides all this there is another difficulty. It is not quite true that there is a total failure of consideration. They had the personal security of the managers. If the policies had been valid, and the managers had themselves failed, the arrangement made was this—the managers were empowered to draw on each of the other members for contribution. The premiums were a personal debt to the managers. There is here the machinery of a *quasi* partnership. The present applicants were as much responsible for an insolvent manager as those who were members of the association. It is quite possible that if the policy had been a legal one, and the managers had ceased to pay, and the members were able to pay, that I could have made the members pay—that is, if the association had been legal and the members were liable to pay the manager. In that case the applicants might, through a court of equity, have obtained payment. There is no doubt that Jackson and Sheppard were liable to pay, and there is equally no doubt that if they had been partially insolvent, the present applicants would have been entitled to be paid the full amount of the dividend declared on their estate. De Winton and Co. got a security, which was valuable in this sense, and in that sense there is no total failure of consideration.

The present application must be refused, but as this is a representative case, the costs will be allowed.

Solicitors: *Hilbery; W. W. Wynne; Roberts* and *Barlow; Webb, Stock*, and *Burt*.

(Before Vice-Chancellor BACON).

Reported by H. L. FRASER, F. GOULD, and W. COWELL DAVIES, Esqrs., Barristers-at-Law.

March 6 *and* 11, *and April* 6, 1876.

BARING *v.* STANTON.

Principal and agent—General agent for remuneration—Discount on insurances—Agent's right to retain as against principal—Custom of London merchants—Agency revoked on one insurance—Effect of on agent's right to charge commission for collecting policy moneys.

S., a shipowner, employed B. and Co., merchants, as his general agents at a remuneration, and transacted all his business through them. Part of the business was the insurance of S.'s ships, which was effected by B. and Co., who received a commission of 2½ per cent. for collecting the insurance moneys on lost ships.

In 1872 *a ship was lost. and S. demanded of B. and Co. the policies in order that he might collect the insurance moneys himself. B. and Co., although they had no lien or claim on the ship, refused to give up the policies, and collected the policy moneys themselves, charging S. with the* 2½ *per cent. commission for so doing.*

On a bill by B. and Co. against S., to assert a lien on certain ships, and for an account:

Held, that in taking the accounts, B. and Co. were entitled to retain for themselves the 10 *per cent. discount allowed them by underwriters in respect of insurances effected by them for S.*

Held, also, that as the agency of B. and Co. in respect of the lost ship had been revoked they had no right to withhold the policies, and were not entitled to charge S. with the usual commission for collecting the policy moneys.

THE defendant, George Stanton, was a shipowner, and from the year 1861 to the year 1872 kept a current account with the plaintiffs, Baring Brothers and Company, a firm of bankers and merchants, through whom he transacted all his business.

The course of business between the defendant and the plaintiffs in respect of the current account was, that they charged interest on all debit transactions at the rate of 5*l.* per cent. per annum, and allowed interest at the rate of 4*l.* per cent, per annum on all credit transactions, and charged also a commission of 1*l.* per cent. on the amount of what was called the "long leg of the account".—that is to say, that side of the account which showed the largest amount of transactions. They also obtained an advantage of 15*l.* per cent. on all premiums for insurances, and charged a separate commission of 2½*l.* per cent. for collecting moneys payable for losses under policies.

In May 1872, the plaintiffs filed their bill against the defendant, seeking to assert a lien on certain ships of the defendant for the balance due to them from him on his account current, and for consequential relief.

On the 24th Feb. 1875, a decree was made in the plaintiffs' favour, which directed an account to be taken of what was due to them for principal and interest. Under this order the plaintiffs carried in two accounts, one showing the current accounts from the year 1861 to the year 1871, the other showing the balance due from the defendant. Upon proceeding to take these accounts, two questions arose, first, whether the plaintiffs were entitled to retain the discount of 10*l.* per cent. allowed to them by the companies with whom insurances were effected; secondly, whether they were entitled to charge the defendant with a sum of 525*l.* for commission on receiving the policy moneys of the *Knightsbridge*, a ship which was never mortgaged to the plaintiffs.

As to the first point, the plaintiffs asserted that they were entitled to retain the discount in accordance with the well settled custom of London

merchants. The defendant, however, denied that there was any such custom.

As to the second point, the facts were as follows: On the 24th Jan. 1870, the defendant received a telegram informing him of the destruction by fire of the *Knightsbridge*, which was insured with her freight for 21,000*l*. The policies on this ship were in the hands of the plaintiffs on the defendant's account. The same day the defendant wrote to the plaintiffs the following letter:

Gentlemen,—The policies on the ship *Knightsbridge* having been refused to be handed over to me this morning by your Mr. Theobald, with a reply that what I might require I had better inform you by letter, therefore beg to say that the ship *Knightsbridge* having been destroyed by fire at sea it is necessary for me to give notice of abandonment to the respective underwriters and for this purpose may I ask you to be good enough to cause them to be handed over to the bearer, as no time should be lost.—Your obedient servant,

GEO. STANTON.

The same day the plaintiffs wrote to the defendant the following reply:

Sir,—In reply to your letter of this date we beg to say that as the insurance on the *Knightsbridge* was effected by us and in our name, we will give the requisite notice of abandonment to the respective underwriters.—Your obedient servants, BARING BROTHERS & Co.

In answer to the last-mentioned letter the plaintiff, on the 25th Jan. 1870, wrote as follows:

Gentlemen,—I am this morning in receipt of your letter of yesterday's date as to the insurance on the *Knightsbridge*. In reply, I beg to repeat my request for the policies, and offer to pay you the premiums in respect of them. . . .

The plaintiffs did not give up the policies, but themselves collected the insurance moneys and charged their usual commission for so doing.

On the 10th Feb. 1876, the plaintiffs took out a summons, now adjourned into court, to the effect (1) that in taking the accounts directed by the decree the plaintiffs might be allowed the full amounts debited to the defendant in the accounts they had brought in for insurances on the defendants' ships, or their freights, or ship's stores, or disbursements, without giving credit to the defendant for the discount received by or allowed to them by underwriters in respect of such insurances as claimed by the defendant.

(2.) That the plaintiffs might be allowed to retain as their own moneys the sum of 525*l*., being the difference between the sum of 21,000*l*. (the sum for which the ship, the *Knightsbridge*, was insured by the plaintiffs), and the sum of 20,475*l*. (the sum for which credit was given by the plaintiffs, as mentioned in their claim for the total loss of the same ship), which sum of 525*l*. was claimed and retained by them as their commission (at the rate of 2*l*. 10*s*. per 100*l*.) for collecting the moneys payable for such loss, and that the defendant might be ordered to pay the costs of the summons.

Cotton, Q.C. and *J. Kaye*, in support of the summons.—On the first point they relied on *Great Western Insurance Company* v. *Cunliffe* (*ante*, Vol. 2, p. 298; 30 L. T. Rep. N. S. 661; L. Rep. 9 Ch. App. 525). They also cited

Xenos v. *Wickham*, 14 C.B., N.S., 435, 460;
Power v. *Butcher*, 10 B. & C. 329.

On the second point, they contended that as the insurance had been effected by the plaintiffs, not at the request of the defendant, but on their own interests, they were entitled to collect the insurance money and charge their commission.

Kay, Q.C. and *Caldecott*, for the defendant.—*Great Western Insurance Company* v. *Cunliffe* (*sup.*) does not apply to this case at all. The distinction is, that the defendant in that case was employed as an insurance broker and nothing else; here the plaintiffs are general agents as merchants and not simply insurance brokers. They are general agents on terms of special remuneration, which does not include the right to charge specially as insurance brokers. Any profit, therefore, which they made over and above their commission as agents they must account for to their principal:

Turnbull v. *Garden*, 20 L. T. Rep. N. S. 218; 38 L. J. 331, Ch.;
Queen of Spain v. *Parr*, 21 L. T. Rep. N. S. 555; 39 L. J. 73, Ch.;
Williams v. *Stevens*, L. Rep. 1 P.C. 352.

As to the second point. The plaintiffs had no interest in the ship and no claim whatever on the policies except for the premiums they had paid, and these the defendant offered to repay them. Neither was the defendant bound to the plaintiffs to employ them as his agents in any special manner. When, therefore, he demanded the policies on the *Knightsbridge*, there was a revocation of their authority as agents in their particular transaction, which in point of law they could not resist. Therefore, as they refused to comply with his demand, and insisted on collecting the policy moneys themselves, they are not entitled to charge him with the usual commission.

Cotton, Q.C., in reply.

The VICE-CHANCELLOR.—Upon the first point the case is conclusively covered by the decision in *Great Western Insurance Company* v. *Cunliffe* (*sup.*), which makes it impossible for me to adhere to any opinion adverse to that decision. Lord Justice James there says (p. 300): "Whether you call him a broker or not, the person who is the agent for the merchant or anybody else, by a well established practice obtains the insurances, and receives a discount of 5 per cent., which he puts into his own pocket. He is paid by the underwriter instead of by his principal. And then, by a practice quite as well known, recognised by everybody connected with the business, recognised by the courts of law of this country, referred to over and over again, there is another thing—there is a gratuity which the broker receives upon the settlement of the accounts, being 12 per cent. upon the balance, if the balance should happen to be a favourable one, that is, if the underwriter finds it to be a profitable account he gives 12 per cent. upon it to the broker who brought the business to him. It is not, as I gather, upon the particular transaction, but it is upon the whole result of transactions which the broker has introduced to the particular underwriter, and is calculated upon all the business during the whole year. That is the established remuneration which a broker receives for effecting that business, and in my opinion that is as right a thing as the 5 per cent." Then the evidence of the plaintiffs, although it does not conclusively establish the custom for which they contend, yet it proves the system on which they carried on their business. I cannot, therefore, in the face of that evidence and of the decision in *Great Western Insurance Company* v. *Cunliffe*, come to any other conclusion than that the plaintiffs are entitled to the discount which they claim.

As to the second point, that also, in my opinion, is abundantly clear. I quite agree that the

plaintiffs were general agents of the defendant, and that unless their authority was revoked they were entitled to carry on the transaction to a conclusion. The defendant, however, was not bound to them by any special agreement, and he was therefore entitled to revoke their authority in whole or in part. True, they might have refused to continue to act as his agents altogether when he demanded back the policies, unless he permitted them to collect the insurance money. They did not do this, however, but insisted in collecting the money, and paid themselves a commission. In my opinion that was an unreasonable and unlawful claim on their part. In my opinion, the defendant had a right to say, "don't you receive that insurance money; I am ready to receive it myself." They choose, however, to go on and collect it perforce, but that did not give them the right to receive that which the defendant would have received himself.

The defendant, therefore, is right on the second point and wrong on the first. I make no order as to costs.

Solicitors for plaintiffs, *Markby, Tarry,* and *Stewart.*

Solicitors for defendants, *Shum, Crossman,* and *Crossman.*

EXCHEQUER DIVISION.

Reported by H. Leigh and H. F. Dickens, Esqrs., Barristers-at-Law.

Jan. 20 *and* 21, 1876.

(Before Bramwell, Amphlett, and Huddleston, BB.)

Cohen *v.* The South Eastern Railway Company.

Carrier—Railway company—Carriers by rail and steam vessel—Passengers' luggage—Liability for loss of—Special contract—Signature of by passengers—Conditions limiting liability.

The luggage of a passenger by railway comes within sect. 7 *of the Railway and Canal Traffic Act* 1854 (17 *&* 18 *Vict. c.* 31), *fixing the liability of railway companies for the loss of or injury to "any articles, goods, or things in the receiving, forwarding, or delivering thereof," and no condition therefore limiting the company's liability in respect of such luggage is binding, unless it be a "just and reasonable one," and be embodied in a special contract, signed by the passengers or the person delivering such luggage to the company for carriage.*

By sect. 16 *of the Regulation of Railways Act* 1868 (31 *&* 32 *Vict. c.* 119), *sect.* 7 *of the Railway and Canal Traffic Act is incorporated, and its provisions extended and made applicable to luggage conveyed by railway companies on board steam vessels used by them for the purpose of carrying on a communication between any towns or ports.*

Stewart *v.* The London and North-Western Railway Company (19 *L. T. Rep, N.S.* 302) *discussed and distinguished.*

By the first count of his declaration the plaintiff charged that the defendants were carriers of passengers and their luggage by sea from Boulogne, in the Republic of France, to Folkestone, and thence by land from Folkestone to London; and in consideration that the plaintiff caused his wife to become and be a passenger, to be carried, with her luggage, by sea from Boulogne to Folkestone, and thence by land from Folkestone to London aforesaid, for reward then paid by the plaintiff to the defendants in that behalf, the defendants promised the plaintiff to use all due and reasonable care in so carrying the plaintiff's wife and her said luggage; and all conditions were fulfilled, and all times elapsed necessary to entitle the plaintiff to have the defendants perform their said promise; yet the defendants did not use due and reasonable care in carrying the said luggage, but by the negligence of the defendants, while the said luggage was being carried by them by sea from Boulogne to Folkestone, a certain trunk, containing wearing apparel of the plaintiff's wife, and other things belonging to the plaintiff, being a part of the said luggage, fell into the sea, whereby the said trunk, and the contents thereof, were greatly injured, &c., and allegations of damage to the plaintiff.

By the second count the declaration charged that the defendants were carriers of passengers and their luggage, as in the first count mentioned for reward to the defendants, and the defendants, at the request of the plaintiff, received the plaintiff's wife as a passenger, with her luggage, including the trunk in the first count mentioned, to be by them, as such carriers, safely and securely carried by sea from Boulogne to Folkestone, and thence by land from Folkestone to London, for reward then paid by the plaintiff to the defendants; yet the defendants did not safely and securely carry the said trunk by sea from Boulogne to Folkestone aforesaid, but while the said trunk was being so carried by them as aforesaid, it fell into the sea and was injured, and the plaintiff suffered the damage in the first count mentioned, and the plaintiff claims 100*l.*

For a fifth plea (amongst others), to the whole of the declaration the defendants say, that they are a railway company incorporated for the conveyance of passengers with their luggage within the United Kingdom, and upon lines of railway situated therein, and that Boulogne in the declaration mentioned is a place or town in the Republic of France, and beyond the extent of the defendants' lines of railway; and that the said damage to the said luggage in the declaration mentioned, did not happen or occur whilst the said luggage was being carried or conveyed on the defendants' line or lines of railway; and that the plaintiff caused his said wife and her luggage to be received by the defendants, as the same were received by the defendants, to be carried as in the declaration mentioned; and under a special contract between the plaintiff's said wife, as agent for the plaintiff and the defendants, and subject to certain conditions contained in the said contract, and set out in a certain through ticket taken by the plaintiff's said wife, as agent for the plaintiff, from the defendants, one of which conditions was that the defendants would not be responsible for luggage if the value thereof exceeded 6*l.* And the defendants say that the said luggage of the plaintiff's wife, delivered to the defendants to be carried by them as in the declaration mentioned, exceeded the value of 6*l.*

Replication to the said fifth plea, that the defendants are a railway company authorised to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, and working steam vessels, for the purpose of carrying on a communication between the towns or ports, amongst others, of Folkestone and Boulogne aforesaid, and to take tolls in respect

of such steam vessels, within the meaning of the 11th section of the Railways Regulation Act 1863; and that in carrying the plaintiff's wife and her luggage from Boulogne to Folkestone aforesaid the defendants were acting in pursuance of such authority, and the vessel on board of which the plaintiff's wife and her luggage was carried was a steam vessel, and the carrying of the plaintiff's wife and her luggage was a carrying of traffic within the meaning of the said section; and the matters and things in the declaration mentioned happened after the passing of the said Act, and all things were done and happened, and all times elapsed, so as to make the provisions of the Railway and Canal Traffic Act applicable to the matters and things in the declaration mentioned, and binding in all respects on the defendants. And that the alleged special contract in the said plea mentioned related to the receiving, forwarding, or delivering of articles, goods or things within the meaning of the 7th section of the said last-mentioned Act, and that such special contract was not signed by the plaintiff.

The third replication repeated the allegations in the last replication contained, except the allegation that the contract was not signed by the plaintiff; and further alleged that the condition in the plea mentioned was not just or reasonable.

Demurrer and joinder in demurrer to the fifth plea, on the ground that the special contract was within sect. 7 of the Railway and Canal Traffic Act, and was not alleged to have been signed by the plaintiff, and that the condition was not just and reasonable.

Demurrer and joinder in demurrer to the second and third replications, on the ground that they did not show that the contract alleged in the fifth plea was within the provisions of the Railway and Canal Traffic Act.

The plaintiff's points.—First by virtue of the Railways Regulations Acts of 1868 and 1871, the provisions of the Railway and Canal Traffic Act are extended to goods and traffic carried by Railway companies by sea, whether by their own vessels or otherwise; secondly, the luggage, the loss of which is complained of, is within the provisions of the 7th section of the Railway and Canal Traffic Act as so extended; thirdly, the special contract alleged in the fifth plea is a special contract within the meaning of the said section, and was not signed by the plaintiff or anyone on his behalf, and the condition is therefore void; fourthly, the condition that the company will not be liable in any case if the value of the luggage exceeds 6*l.* is an unreasonable condition, and therefore void.

Points for the defendants.—First, the luggage, the loss of which is complained of, is not within the provisions of sect. 7 of the Railway and Canal Traffic Act; secondly, the provisions of the said section do not extend to the contract or duty declared upon; thirdly, that the special contract alleged in the fifth plea is not a special contract within the meaning of the said section; fourthly, the conditions of the said contract are reasonable.

The following sections of the several Acts of Parliament bearing on the question are material.

The Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) enacts:

Sect. 7.—Every such company as aforesaid shall be liable for the loss of or for any injury done to any horse, 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, 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 company 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 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, &c.

The Regulation of Railways Act 1868 (31 & 32 Vict. c. 119)

By sect. 16 provides for the securing equality of treatment in respect of tolls in cases "where the company is authorised to build, or buy, or hire, and to use maintain, and work, or to enter into any arrangements for using, maintaining or working steam vessels for the purpose of carrying on a communication between any towns or ports and to take tolls in respect of such steam vessels," &c., and 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."

The Railway Regulation Amendment Act 1871 (34 & 35 Vict. c. 78) enacts:

Sect. 12.—Where a railway company under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages in respect of . . . loss of or damage to "goods" in like manner and to the same extent as the railway company would be answerable if the vessel had belonged to the railway company, provided that such . . . . loss or damage to such . . . . goods happens to the . . . , goods during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company.

Bray, for the plaintiff.—The question is whether passengers' luggage, when being conveyed by rail under the usual circumstances, does or not come within sect. 7 of the Railway and Canal Traffic Act of 1854; and it is contended on the part of the plaintiff, that it does. In the case of *Zunz* v. *The South-Eastern Railway Company* (20 L. T. Rep. N. S. 873; 38 L. J. 209. Q. B.; L. Rep. 4 Q. B. 539), the Court of Queen's Bench indirectly, as it were, so decided. No doubt in the case of *Stewart* v. *The London and North-Western Railway Company* (10 L. T. Rep. N. S. 302; 3 H. & C. 135; 23 L. J. 109, Ex.; 10 Jur. N. S. 805), the Court of Exchequer held that the luggage of a passenger of an excursion train was not within the Act; but there a printed condition on the ticket stated that the luggage was "at passenger's own risk;" and it would appear from the judgments in the case that the decision would have been different in the case of passengers' luggage by an ordinary train. There can be no real difference in the company's liability with respect to the amount of luggage which they are bound and that which they agree to carry: (*Macrow* v. *The Great Western Railway Company*, 24 L. T. Rep. N. S. 618; L. Rep. 6, Q. B. 612; 40 L. J. 300, Q. B.) Sect. 7 is wide enough to comprise passengers' luggage under the words "articles, goods,

or things," and such luggage is like other "goods" carried by the company of which they are common carriers. The case of *Richards* v. *The London, Brighton, and South Coast Railway Company* (7 C. B. 839; 18 L. J. 251), is conclusive for the plaintiff on that point. The proposition contended for is clearly put in Hodges' Law of Railways (5th edit., by Manley Smith), at p. 570; and *Richards* v. *The London, Brighton, and South Coast Railway* is cited, with other cases, in support of the propositions there stated. [BRAMWELL, B.—It must be assumed, I think, that a passenger's luggage is in a position similar to goods sent for carriage alone.] Again, secondly, the provisions of sect. 7, and the liabilities of railway companies, have been extended by the 31 & 32 Vict. c. 119, s. 16, and 34 and 35 Vict. c, 78, s. 12, to traffic by steamboats, and, therefore, if luggage is included in the term "goods," it comes within sect. 7 of the Railway and Canal Traffic Act 1854, even when carried on board a steamboat: (*Moore* v. *The Midland Railway Company*, Ir. Rep. 8 C. L. 232.) Again, the condition limiting the liability to the value of 6*l.* is unreasonable. He cited also

Aldridge v. *The Great Western Railway Company*, 15 C. B., N. S., 582; 33 L. J. 161, C. P.;

Willis, for the defendants, *contra*.—The common law liability of the company as common carriers of the luggage is not disputed, but sect. 7 of the Railway and Canals Traffic Act is restricted in its application to ordinary merchandise conveyed as "goods" apart from passengers. If that is not so, the liability of a railway company can only be limited by obtaining the signature of every individual passenger to a special contract with regard to his luggage, which would be practically impossible. [BRAMWELL, B.—I think this Act has been misconstrued occasionally; the intention of its framers was, I believe, that the company under the first proviso might give a general notice limiting their liability, if only such limitation were just and reasonable, independently of any contract being signed. I think it a mistake to hold (although it has been so held) that such a condition would be void if it were not signed. The Act plainly means that notice should not limit the company's liability unless the conditions were reasonable; but the framers of it should have added a clause that the companies might make any condition they pleased, reasonable or otherwise, so long as it was signed by the other party. That is my construction of the Act, and it is, I know, that which was intended.] The 7th section, and the words therein, "receiving, forwarding, and delivering," are inapplicable to a passenger's luggage, but strictly applicable, and intended to be so, to "articles, goods, and things" sent as ordinary merchandise. *Stewart* v. *The London and North-Western Railway Company* (*ubi sup.*), cited *contra*, is a decision directly in favour of the defendants, for there is no distinction, as regards liability for luggage, between an excursion train and an ordinary train Pollock, C.B., in his judgment there, said the court were all of opinion that the case was not within the Act; but it cannot be said that the luggage there was not quite as much "received, forwarded, and delivered," as it was here. [BRAMWELL, B.—I am not over well satisfied with my judgment in that case. Not one of the judges there says directly that passengers' luggage is not within the Act.] In *The Great Western Railway Company* v. *Tally* (23 L. T. Rep. N. S. 413; L. Rep. 6 C. P. 44; 40 L. J. 9, C. P.) the passenger took charge of his luggage in the carriage with himself, and the court held that the company were not liable. Further, the 31 & 32 Vict. c. 119, and 34 & 35 Vict. 78, do not incorporate sect. 7, but only the first six sections of the Railway and Canal Traffic Act; and the word "traffic" does not occur in sect. 7. It was not intended that railway companies carrying by sea should be put on a different footing from other steamboat companies. Lastly, the contract was made in France, as stated in the declaration. [BRAMWELL, B.—The point does not arise, and it must be assumed, there being no allegation to the contrary, that the contract was made in England.]

Bray, in reply.—In *Stewart* v. *The London and North-Western Railway Company* (*ubi sup.*) nothing is said as to passengers' luggage not being within sect. 7. The ground of the decision there was that it was not an ordinary journey at ordinary fares, and that there was a special contract between the company and the travellers.

BRAMWELL, B.—The second question raised by Mr. Willis in his argument on behalf of the defendants is whether the Regulation of Railways Act 1868 (31 & 32 Vict. c. 119) does or does not extend to and include the 7th section of the Railway and Canal Traffic Act of 1854 (17 & 18 Vict. c. 31). Mr. Willis contended that the first-mentioned Act of 1868 includes the first six sections, but does not include the 7th section of the last-mentioned Act of 1854. I think, however, that the best and short answer to that is that the 31 & 32 Vict. c. 119, by sect. 16 expressly says that "the provisions of the Railway and Canal Traffic Act 1854, so far as the same are applicable, shall extend to steam vessels and to the traffic carried on thereby." Mr. Willis wants us to read that section as if it had said "some of the provisions" of that Act "minus sect. 7 shall extend, &c.," but that we cannot do. Indeed, it is very obvious that if the Legislature had intended what Mr. Willis suggests, they would have said so; and therefore, unless by necessity, arising from some absurdity and incongruity on the face of it, we are obliged to say otherwise, we must read the section as it stands, as extending to the railway company's steam vessels, and the traffic carried on thereby; and I can see no incongruity or absurdity in the matter at all, nor any reason why sect. 7 should not so extend. There is too, I think, good reason for saying that that view of the case is corroborated by sect. 14 of the Act of 1868 referred to; and therefore, on the short ground that, in the absence of any absolute necessity for so doing, we ought not to limit the operation of the express language of sect. 16, which incorporates sect. 7, we are bound to hold that that section is included in the provisions of the Regulation of Railways Act 1868, and so therefore extends to the present case.

That being so, the next question is, whether sect. 7 of this Act of 1854 applies to passengers' luggage. Now the words of it are, "Every such company, as aforesaid, shall be liable for the loss of, or for any injury 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," and so forth. These things are goods—passengers' goods, or luggage; they are received by the company, forwarded by the company, and delivered by the company to the pas-

senger at the termination of his journey. Again Mr. Willis wants us to put in certain words of exception, that is to say, "excepting passengers' luggage." The same reasoning, however, applies to this as to the former case. We ought not to put in an exception unless there would be an impossibility or some absurdity or incongruity in construing the section without it, or some inconvenience so great that we might be driven to suppose that the exception was intended by the Legislature. I do not, I confess, see that there is anything of the sort here. Mr. Willis says that it would be a very extraordinary thing if passengers were to be stopped and told by the company that their luggage could not be carried unless they signed a special contract. I do not myself see any insuperable difficulty in that—inasmuch as the result would probably be that if it were found to be inconvenient to the travelling public the matter would be very soon looked into and an Act of Parliament probably be passed for the purpose of relieving them from the inconvenience. But if the Act were construed as I think it ought to have been no difficulty at all would arise. I am of opinion, therefore, that we ought not to insert the proposed exception in sect. 7 excluding therefrom passengers' luggage.

I think it is very important that we have ascertained from the arguments and admissions of the learned counsel in this case that the railway company are insurers of the luggage of their passengers. That being so, there is only one matter which I need notice, and that is how to deal with the case of *Stewart* v. *The London and North Western Railway Company* (*ubi sup.*); and here let me observe that in the present case we have to deal with a plea setting up a special contract as to the carriage of these goods, to which there is a replication that such contract was not signed; and therefore that it is not a sufficiently signed contract under sect. 7. The question in *Stewart* v. *The London and North-Western Railway Company* did not arise in that way. It arose upon a plea that the defendants did not contract with the plaintiff as alleged; and it appeared, upon going into the facts, that it was not the ordinary case of a person paying the ordinary fare charged to a passenger for carrying him, which, as it has been properly said, comprehends a remuneration for carrying his luggage as a common carrier; but it was a case of a special excursion train, where the parties made a bargain, of the terms of which the plaintiff might have informed himself if he had thought fit to do so, but which he did not do. That bargain was, that the passenger should be taken upon special terms, one of which was that the company would not be liable for his luggage. I see that it was there said by Pollock, C.B. "We are all of opinion that this case is not within the Railway and Canal Traffic Act." And, if I may cite my own judgment, I said: "the Railway and Canal Traffic Act does not apply, and no question arises as to the reasonableness of the condition." And further on I said: "There was thus a plain bargain entered into by virtue of which the plaintiff obtained his ticket at about one-fourth of the ordinary fare, and for this accommodation he was content to take the risk of his luggage on himself." And Pigott, B., also said: "This was a special contract, and it was competent for the parties to make it." I have no wish to cast any doubt upon that case, but there are, it may be, some questionable expressions in it; for if it was a special contract, it was not a sufficient special contract under the Act because it was not signed. But I find that Mr. (now Mr. Justice) Brett, who argued that case for the plaintiff, never put it upon that ground at all; neither do I see in either of the judgments that any allusion or observation was made with respect to the contract not being within the meaning of the statute by reason of its not being signed. The only way in which, as it seems to me, the judgment in that case can be supported (and, as I said before, I have no wish to cast a doubt upon it) is by saying that the Railway and Canal Traffic Act applies to the ordinary taking of a passenger and his luggage for the ordinary remuneration, and does not apply to the case of a special bargain as to the carriage of the passenger of a different character from that which he would have a right to make by going to the company and tendering his fare and saying, "I require you to take me upon such and such terms," in which case if they refused to take him, I rather think that he would have an action against them for such refusal. I think, therefore, that *Stewart* v. *The London and North-Western Railway Company* was not within the Railway and Canal Traffic Act; not because it was the case of a passenger and his luggage, but because it was the case of a special bargain between the passenger and the company for a particular journey to and fro in a certain time, and not the ordinary case of a passenger going into a carriage and being conveyed from one station to another as a matter of right.

I think the present case is clear. *Stewart's* case, for the reasons I have mentioned, does not apply. I do not think, moreover, that any great injustice will be done to railway companies by our present decision. The companies, I have no doubt, will always guard themselves by making a condition that they will not be liable for passengers' luggage beyond the statutory weight unless it is weighed and paid for accordingly. But, as we all know, many people carry with them an amount of luggage in excess of the prescribed weight, and few people will ever weigh and pay for it. That would be a reasonable condition, and the consequence of it would be that the companies would be protected. However, be that so or not, I think the present case is clearly within the words of the Act, and that our judgment must be for the plaintiff.

AMPHLETT, B.—I am of the same opinion, and I shall not add anything to what my learned brother Bramwell has said with regard to these statutes of the 31 & 32 Vict. c. 119, or the 34 & 35 Vict. c. 78. I also agree, whatever be the construction of the 7th section of the Railway and Canal Traffic Act, that that section is made applicable by these later Acts to the case of steam packets and their traffic in the same way as to the company's ordinary trains running on their lines.

Then the question comes—and it is a very important one, and I am only surprised that up to this present time there has been no authoritative decision upon it—the question, I say, comes, whether ordinary passengers' luggage is included in the terms "articles, goods, or things," which are mentioned in the 7th section of the Act of 1854. It would be very important, of course, to have the question decided whether or not railway companies are common carriers, and subject to the liabilities of

common carriers with respect to passengers' luggage. That has been, for the purposes of the argument, very properly admitted by Mr. Willis to be so, and it really would be almost impossible to contest it at this time of day; because there are two positive decisions on the point—namely, *Richards* v. *The London, Brighton, and South Coast Railway Company* (7 C. B. 829; 18 L. J. 251), and *Le Conteur* v. *The London and South-Western Railway Company* (13 L. T. Rep. N. S. 325; L. Rep. 1 Q. B. 54; 35 L. J. 40, Q.B.; 12 Jur. N. S. 266.) In both of these cases it was decided that with regard to passengers' luggage railway companies are common carriers. There were some very weighty observations made against that view of the case in *Tally's case* (L. Rep. 6 C. P. 44), by Mr. Justice Willes; but those observations were not really necessary for the decision of that case. The matter was again brought before the Court of Queen's Bench in *Macrow* v. *The Great Western Railway Company* (*ubi sup*), where *Tally's* case was cited and fully discussed; and *Macrow's* case is also another clear decision on the point in question. The railway company, therefore, being clearly common carriers, any subject to liability as such, the question is whether upon any fair construction of the 7th section, and distinction can be drawn between "goods" carried by the company as luggage and "goods" carried by them in the ordinary way as merchandise. I confess that I can see none.

Then Mr. Willis argued that the last proviso, which was that no special contract between the company and any other parties, as to the receiving, forwarding and delivering of any articles, &c, shall be binding upon or affect any such party, except the same be signed by him, or by the person delivering such articles, &c., meant and was only applicable to ordinary merchandise, or goods sent by commercial people in the ordinary way by goods trains; but, in my opinion, the words of this section apply equally to the case of luggage which we are now considering. Then we were pressed with the argument *ab inconvenienti*, that it would be excessively inconvenient and practically impossible for a passenger, at the moment of starting, to have to sign a special contract. I quite agree that it would be practically impossible; and that any company who insisted upon it would doubtless lose a vast deal of traffic, and would probably not long continue to insist on it. But is that really so? Parliament would say, "You, the railway company, practically have a monopoly in the carrying of passengers, and you must not be allowed to tell a passenger that you will not carry him unless he signs a special contract." Now, the Legislature has already said that if railway companies do not have a special contract with their passengers they shall be liable as common carriers; and although it may be as my learned brother has observed, that it is a slip in the Act of Parliament, and that it was never intended, I confess I cannot see that there is any very great hardship in a railway company being obliged to take a passenger's luggage as common carriers, or at all events that they should not be able to free themselves of a common carrier's liability unless they elect to do injury to their traffic by insisting upon their passengers signing a contract. I do not think, therefore, that the argument *ab inconvenienti* ought to prevail against the clear and distinct words of the statute; and we should be wrong to raise exceptions which really do not and never were intended to, exist upon such grounds.

Therefore our judgment must be for the plaintiff.

HUDDLESTON, B.—For the reasons stated by my learned brothers I hold the same opinion as they have expressed on the matter, and I think it obvious that the provision at the end of sect. 16 of the Act of 1868 refers to three sects. 14, 15, and 16.

If, then, that be so, what is the meaning of the 7th section of the Act of 1854? Now I find that that section has undergone a judicial decision in the house of Lords. In the case of *Peek* v. *North Staffordshire Railway Company* in the House of Lords (8 L. T. Rep. N. S. 768; 10 H. of L. Cas. 473; 32 L. J. 241, Q. B.; 9 Jur. N. S. 914), Lords Westbury and Wensleydale adopted the decision of Jervis, C.J. in the case of *Simons* v. *The Great Western Railway Company* 18 C. B. 805; 26 L. J. 55, C.P.) and of Williams, J., delivering the judgment of the Court of Exchequer Chamber in the case of *McManus* v. *The Lancashire and Yorkshire, Railway Company* (4 H. & N. 327; 28 L. J. 353, Ex.), and held that in fact "special contract" and "condition" in the statute were synonymous; whilst Lords Cranworth and Chelmsford, in the same case, held that they were two different things, and that a condition being a reasonable one need not be signed. Lord Westbury, L. C. there explained what he understood to be the meaning of the 7th section, and said (8 L. T. Rep. N. S. 770): "I think that the true construction of that section may be expressed in a few words. I take it to be equivalent to a simple enactment that no general notice given by a railway company shall be valid in law for the purpose of limiting the common law liability of the company as carriers. Such common law liability may be limited to such conditions as the court or judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person." (See 1 Smith's L. C. 7th edit., p. 236.) The words of the Act expressly state that any condition having for its object the relief of a railway company from liability for neglect or default of such company shall be null and void.

If that be so, the question arises whether passengers' luggage is "goods" within the meaning of the 7th section? Mr. Willis tried to draw some distinction, and said, that that Act merely applied to "goods" which were sent, and not to luggage which was carried by the passengers; and he urged that that was so not only upon the words of the section themselves but also from their collocation. Now the words themselves seem to me to be very general, and quite to include passengers' luggage; and, with reference to the collocation, it seems to me that the section deals with two classes of matters, namely, first, "horses, cattle, or other animals," and then takes another class, namely, "articles, goods, or things," and it speaks of "the receiving, forwarding, or delivering thereof." Now is not passengers' luggage

"goods" which are "received" at the company's station, and in the ordinary course of events "forwarded" thence by the company and "delivered" by them at the station of its destination? I apprehend that it clearly comes within the meaning of those words in the section in question. I find that in *Macrow* v. *The Great Western Railway Company* (*ubi sup.*), Cockburn, C.J., delivering the judgment of the Court of Queen's Bench in that case, deals with this question in the spirit in which my brother Amphlett has treated it on the present occasion. The learned Lord Chief Justice (at p. 619 of 24 L. T. Rep. N.S.) said, "The impossibility of travelling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveller has led, from the earliest times, to the practice on the part of carriers of passengers for hire, of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passengers. Under the older system of travelling by stage coaches, canal boats, or vessels, &c., the amount of luggage to be thus carried free of charge was commonly made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various Acts of Parliament under which railways have been established. The provision fixing the amount of luggage which the traveller shall be entitled to take with him free of charge, has a twofold object; first, that of securing to the traveller the conveyance of a reasonable amount of luggage; and, secondly, that of protecting the carrier from all dispute as to the amount of luggage which the passenger may claim to have carried, as well as of entitling the former to a proper remuneration for the carriage of luggage in excess of the quantity thus fixed by statute. Besides thus fixing the quantum of luggage which the passenger shall be entitled to have carried free of charge, the railway Acts have, in conformity with the practice of carriers under the old system, taken care expressly to limit the right of the passenger so carrying luggage, which must be taken to mean the personal luggage of the traveller. The conveyance of the personal luggage of the passenger being obviously for his convenience, and therefore a necessary, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of passengers' luggage should have been co-extensive only with the liability in respect of the safety of the passenger. The law, however, is—now too firmly settled to admit of being shaken—that the liability of common carriers in respect of articles carried as passengers' luggage is that of carrying "goods," as distinguished from that of carrying of passengers; unless, indeed, where the passenger himself takes the personal charge of them, as in *Tally* v. *The Great Western Railway Company* (*ubi sup.*), in which case other considerations arise." I think that that is conclusive. As to *Stewart* v. *The London and North-Western Railway Company*, on which the defendants here rely, I think that my brother Bramwell has very clearly distinguished that case from the present one.

For these reasons I think that the replications are good, and that there must be judgment for the plaintiff.

Willis, for the defendants, applied for leave to add a plea to the effect that the contract was not made in England but in France, and was therefore not governed by English, but by French law.

BRAMWELL, B.—This is rather late, but it strikes me that the defendants ought to have the opportunity of doing it at their own cost, because, had they pleaded it before, it would have been argued now and at no greater expense. On payment, therefore, by the defendants, of all costs occasioned to the plaintiff by the plea not having been pleaded before, the defendants may add the desired plea, the plaintiff being at liberty to reply, take issue, and demur. The costs of the present demurrer to follow the event.

Judgment for the plaintiff accordingly.

Solicitor for the plaintiff, *H. J. Coborn.*
Solicitor for the defendants, *W. R. Stevens.*

Friday, Nov. 5, 1875.

(Before CLEASBY and AMPHLETT, BB.)

JONES *v.* ADAMSON AND ANOTHER.

Ship and shipping—Charter-party—Breach of contract to load—Detention of ship—Demurrage—Damages—Proximate cause—Remoteness.

The plaintiff's ship was chartered by the defendants under a charter-party, whereby it was agreed that the ship should go to a foreign port for a cargo, "and there in the usual and customary manner load in her regular turn," a cargo, &c. The ship went to the port but was not, owing to the defendants' default, ready to load when her turn came, and consequently had to wait for eleven days before her turn came again. When it did come round again the ship was ready, but the wind having meantime come on to blow hard, and the harbour being crowded with shipping, the harbour master would not allow the ship to move up to the loading berth, whereby she was detained for a period of three days further.

In an action on the charter-party for damages as demurrage for detention of the ship, it was

Held by the Court (Cleasby and Amphlett, BB.), that, inasmuch as the default of the defendants in not being ready for the "first turn" was the proximate cause of the further detention of the ship during the three days, the plaintiff was entitled to recover damages as demurrage for the detention of his ship during the three days as well as during the eleven days.

THIS was an action by the plaintiff upon a charter-party to recover damages from the defendants as demurrage for the detention of the plaintiff's vessel at the port of loading.

The action came on for trial before Huddleston, B. at the summer assizes 1875, at Liverpool, upon which occasion it appeared that by a clause in the charter-party in question it was provided that the ship should go to a foreign port for a cargo of coals, and there "in the usual and customary manner load in her regular turn a cargo," &c. The ship went to the port named, but when her "turn" came she was not, through the default of the defendants, ready to load, and, consequently, she lost one turn, and had to wait eleven days

before her "turn" came again. When that came round again she was ready. The wind, however, had in the meantime come on to blow hard, and the harbour being crowded with shipping, the harbour master would not permit the plaintiff's ship to be taken alongside the loading place in the harbour, for fear of an accident from collision, &c., and in consequence she was detained for a further period of three days. The plaintiff then claimed damages, as demurrage, in the present action for the detention of the ship and loss of time for the whole period of fourteen days. The jury found that the loss of the "first turn" to load was occasioned by the default of the defendants, and gave a verdict for the plaintiff, with damages for the detention of his vessel, such damages including the sum of 93*l.* 15*s.* as demurrage for the three days during which the vessel was prevented by the harbour master from moving up to the loading berth as before mentioned, and leave was reserved to the defendants, by the learned judge, to move to reduce the damages by such last-mentioned sum.

Benjamin, Q.C. (with whom was *Foard*), on the part of the defendants, now moved for a rule to that effect accordingly, and argued that the defendants were in no manner responsible for the delay and detention during the three days, such detention being the result entirely of "perils of the sea." It is not contended for a moment that the defendants are not liable for the delay in not being ready to load when the vessel's first turn came, whereby she had to wait till her regular turn came again; but when that second turn came she was ready, and it was by no act or omission of the defendants that she did not then proceed to load; but it was the act of the port authority, over which the defendants had no control, and they are not liable or responsible for the consequences resulting from it. The damages claimed for these three days are too remote, and arise from a cause and a state of things which the parties never contemplated. They are not the natural result of the first default of the defendants, and the damages, therefore, ought to be reduced by the amount mentioned, namely, 93*l.* 15*s.*

Cleasby, B.(*a*)—I am of opinion that in this case we ought not to grant a rule for the reduction of the damages on the ground on which it has been asked for by the learned counsel for the defendants. The detention of the plaintiff's vessel for the three days must properly be taken into consideration as part of the damages sustained by him. There were not two separate detentions, but only one. The defendants' contract was to "load in regular turn," and it was not a question of the first turn or the second turn. The defendants did not load the ship "in regular turn," and it was the breach of their contract in that respect that caused the delay and detention of the ship for fourteen days altogether. Mr. Benjamin has argued that the defendants are not to be held responsible for the three last days of the fourteen, because the detention of the vessel during that latter period was caused, not by any default on the part of the defendants, but by events and circumstances over which they had no control. I cannot agree with that argument. It seems to me that the proximate cause of the detention of the vessel during those three days was the default of the defendants in not being ready to load when the vessel's first or "regular" turn arrived, and so not performing their contract, and that it was not the result of any *vis major*, or any accident over which the defendants can be said to have had no control.

Amphlett, B.—I am entirely of the same opinion.

Rule refused.

Solicitors for the plaintiff, *Chester, Urquhart, and Co.*, for *Gill* and *Archer*, Liverpool.

Solicitors for the defendants, *R. Miller* and *Wiggins.*

(*a*) Kelly, C.B., had left the court.

COMMON PLEAS DIVISION.

Reported by P. B. Hutchins and Cyril Dodd, Esqs., Barristers-at-Law.

May 3 *and* 10, 1876.

Creen *v.* Wright.

Shipowner and master—Reasonable notice of dismissal.

The master of a ship in the absence of express stipulation in the contract of hiring, is entitled to reasonable notice of dismissal from the shipowner.

This was an action for wrongful dismissal, brought by the plaintiff, who had been in the defendant's employment as captain of a ship, against the defendant, who was a shipowner. The plaintiff had entered into an agreement with the defendant to act in his service as captain of the ship *City Camp*, at a salary after the rate of 180*l.* a year; the wages were to begin when the plaintiff joined the ship. The question on which the decision turned was whether either party could determine the agreement without notice, and the clause in the agreement relating to this question was as follows: "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners to have the option of paying or not paying his expenses travelling home." The defendant dismissed the plaintiff in Liverpool without notice, and without any reasonable cause, after the ship was partly loaded for an outward voyage, and it was for this dismissal that the present action was brought. The case was tried before Lush, J., at the Liverpool Winter Assizes 1875, and the verdict was directed to be entered for the defendant. A rule *nisi* was afterwards obtained for a new trial on the ground of misdirection by the learned judge, in ruling that the plaintiff, having agreed to the terms of the engagement, could be dismissed without notice.

T. H. James showed cause.—The agreement does not entitle the plaintiff to notice if he is discharged abroad, for if he is entitled to notice under such circumstances the provision that wages are to cease from the day when the captain is required to give up the command would have no meaning, and there is nothing in the agreement to show that he is entitled to notice if discharged in this country. Where there is no specific agreement as to notice, the question must be determined by custom: Manley Smith on Master and Servant, page 77, 3rd edition; but where there is no stipulation and no custom there is no right to notice. In the cases where it has been held that notice was necessary, there has always been evidence of custom, as in *Hiscox* v. *Batchellor* (15 L. T. Rep.

N. S. 543). In *Foxall* v. *The International Land Credit Company* (16 L. T. Rep. N. S. 637), the jury found that the custom was proved. Here notice is excluded by the contract.

Herschell, Q.C. (*M'Connell* with him) in support of the rule. The ruling of the learned judge at the trial cannot be supported. It must be admitted that there is no inflexible rule, but an indefinite hiring is *primâ facie* a yearly hiring: (*It.* v. *The Inhabitants of Hampreston*, 5 T. R. 205.) If the plaintiff can be dismissed at any time without notice, he can leave the service at any time without notice, and this cannot have been the intention of the parties. The plaintiff was at least entitled to such notice as was reasonable under the circumstances. This view is consistent with the law as laid down by Pollock, C.B., in *Fairman* v. *Oakford* (5 H. & N. 635; 29 L.J. 459, Ex.), where he says, "there is no inflexible rule that a general hiring is a hiring for a year; each particular case must depend on its own circumstances. From much experience of juries I have come to the conclusion that usually the indefinite hiring of a clerk is not a hiring for a year absolutely, but rather one determinable by three months' notice."

Cur. adv. vult.

May 10.—The judgment of the court (Lord Coleridge C.J., and Archibald and Lindley JJ.), was delivered by

Lord Coleridge C.J.—This was an action tried before my brother Lush, at Liverpool, in Dec. 1875, in which he directed a verdict to be entered for the defendant, and we have to determine whether that direction was correct.

The plaintiff had been the master of the ship *City Camp*, under a written contract dated the 28th March 1875, from that day until the 10th Aug. 1875, when he was dismissed, not for misconduct, but without notice, the defendant contending that by the terms of the contract between the plaintiff and himself, the plaintiff was not entitled to any notice before dismissal. Other points arose in the case, but were not discussed before us.

The action was brought for a dismissal, wrongful in being without notice, and the sole question argued was whether, under the contract, the plaintiff was entitled to notice before dismissal, and on this single point my brother Lush directed the verdict for the defendant.

The contract, so far as it is material to set it out, was as follows: "I hereby accept the command of the ship *City Camp* on the following terms: Salary to be at and after the rate of 180*l.* sterling per annum." Then followed certain other terms not material, and then—"Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home. Wages to begin when captain joins the ship. Francis Green, master *City Camp*."

It was contended for the plaintiff that under this contract he was entitled to a reasonable notice before dismissal, at any rate if dismissed in this country; but my brother Lush held that he was not; but upon consideration we are of opinion that he was.

The relation of the master of a ship to his employer, the shipowner, is not one in which, in the case of an indefinite hiring, the law has made, and there was no evidence of any custom making, the hiring a hiring for a year, or for any other definite time, nor the notice by which the service is to be determined certain. As to the hiring we adopt the language of Pollock, C.B. in delivering the judgment of the court in *Fairman* v. *Oakford* (5 H. & N. 635; 29 L. J. 450, Ex,): "There is no inflexible rule that an indefinite hiring is a hiring for a year. Each particular case must depend upon its own circumstances." As to the notice we think the sound construction of the contract before us is that, except in the single case provided for by its terms, there must be a reasonable notice before it can be put an end to by either party. The rule of construction must be the same for both parties to the contract. If the shipowner may dismiss the master without notice on the very eve of a voyage, the master may leave the ship without notice at the same point of time. But the great inconvenience and heavy loss which might be, and indeed in most cases would be, inflicted on the shipowner, without any remedy by such a construction of the contract, if acted on by the master, lead us to believe that such is not and could not be the meaning of the contract, nor the intention of the parties to it. The loss and inconvenience to the master following upon the construction contended for, though not positively so great, may be relatively very great indeed; and this consideration points to the same conclusion. The provision that the master's wages shall cease instantly upon dismissal abroad may well have been intended to prevent any question as to the shipowner being liable to the whole expense of bringing the master back to the United Kingdom; and does not appear to us to permit an argument for construing the contract so as to enable either party to put an end to it at any time without notice of any kind. Indeed, upon the construction of the contract contended for by the plaintiff, and if no notice before putting an end to it was required at any time on the part of either master or shipowner, it is not easy to assign a reason for the insertion of this particular provision into the contract. Nor was any satisfactory reason offered to us why the rule, *Expressio unius est exclusio alterius*, should not apply to it.

We think, therefore, that under his contract, as the master could not, except under very unusual circumstances, be dismissed during the continuance of a voyage, and while the vessel was at sea, so he was entitled to some notice, and that is to reasonable notice, before dismissal in this country.

There is some authority for saying that as a proposition of general law reasonable notice is to be implied as a term of such a contract of hiring as this. Sir John Byles so laid down the law at Nisi Prius, in the case of *Hiscox* v. *Batchellor* (15 L. T. Rep. N. S. 543), and the case of *Fairman* v. *Oakford* (5 H. & N. 635; 29 L. J. 459, Ex.), already referred to, seems, if the facts of it be carefully considered, to be an authority to the same effect. For in the absence of stipulation for any notice, a month's notice was held reasonable to determine an indefinite hiring of a clerk, on the ground that the same clerk had accepted such a notice as sufficient to determine a former indefinite hiring, also without stipulation for notice of any kind. It is nowhere suggested that the absence of stipulation made no notice necessary in either of the hirings, which would have

been a short and simple ground, if a sound one, for upholding the verdict in that case.

But without intending to throw any doubt whatever upon these cases, we decide the one before us upon its own circumstances, and upon considerations especially applicable to the contract on which the dispute arose. And we think that the order must be absolute for a new trial.

Order absolute.

Solicitors for plaintiff, *Evans* and *Lockett*, Liverpool.

Solicitors for the defendant, *Gregory, Rowcliffes*, and *Co.*, for *Hull, Stone*, and *Fletcher*, Liverpool.

ADMIRALTY DIVISION.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

July 10, 11, *and* 25, 1876.

THE DELTA.

Collision—Foreign judgment—Estoppel—Res judicata—Lis alibi pendens.

In an action of collision a judgment of a foreign court given in a cause between the same parties cannot be pleaded as an estoppel unless such judgment was obtained prior to the institution of the action in this country; there being no res judicata, but only lis alibi pendens, when the plaintiff instituted his action here, he can claim to proceed to judgment in this country if he chooses.

Semble a judgment in a foreign court against a person not subject to the jurisdiction of that court to be an estoppel, must be a judgment on the merits, and not merely by default.

THESE were cross causes of collision instituted respectively by the owners of the Italian barque *Erminia Foscolo*, and of her cargo against the French steamship *Delta*, and the French company of the Messageries Maritimes, her owners intervening, and by the owners of the *Delta* against the owners of the *Erminia Foscolo*.

The collision occurred in the Straits of Gibraltar on 11th Aug. 1871, and resulted in considerable damage being done to both vessels.

The petition (in the principal cause against the *Delta*) was in the ordinary form, alleging the facts charging negligence against the *Delta*.

The answer, after dealing with the facts, and charging negligence against the *Erminia Foscolo*, continued as follows:

7. The *Erminia Foscolo*, at the time of the collision, was an Italian ship, and her owner was then, and always since has been, and now is, resident in Italy, and an Italian subject.

8. In or about the month of Sept. 1871, the owner and master of the *Erminia Foscolo* commenced a suit against the said company, the owners of the said steamship *Delta*, and against the said steamship in the court of the Tribunal of Commerce at Marseilles, in the republic of France, and prayed the said tribunal to declare the said owners of the *Delta* responsible for the consequences of the collision between the *Erminia Foscolo* and the *Delta*, on the night of the 11th Aug., as hereinbefore mentioned, and to condemn the said defendants, the owners of the *Delta*, to pay to the said plaintiffs in the said suit the amount of their damages and costs.

9. In or about the said month of September 1871, the master of the *Delta* and the company of the Messageries Maritimes, the owners of the said steamship, instituted proceedings against the master and owner of the *Erminia Foscolo*, and the said barque in the said Tribunal of Commerce at Marseilles, and prayed the said tribunal to condemn the defendants in the said suit jointly and severally, the one as master and the other as owner of the *Erminia Foscolo*, to be civilly liable to pay to the said company the amount of the damage and losses occasioned to the *Delta* in the said collision between the *Delta* and the *Erminia Foscolo*, which had taken place in the Strait of Gibraltar, as hereinbefore mentioned, by the improper navigation of the captain of the *Erminia Foscolo*, together with costs.

10. At the time of the institution of the said respective suits and proceedings, and until and at the time of the judgments given in the same as hereinafter mentioned, the said Tribunal of Commerce was a court of competent jurisdiction to entertain the said suits and proceedings, and to adjudicate thereupon, and had jurisdiction over the said parties to the said suits and proceedings in and about the premises.

11. The master and owners of the *Delta* duly appeared as defendants in the suit brought against them by the said master and owner of the *Erminia Foscolo*, in the said Tribunal of Commerce as aforesaid, and the said master and owner of the *Erminia Foscolo* appeared and defended the suit brought by the said master and owners of the *Delta*. Subsequently to such appearances proceedings were duly had and taken in the said suits before the said tribunal in accordance with the laws of France.

12. After several adjournments, granted at the request of the master and owner of the *Erminia Foscolo*, the cause which they had brought against the said company of the Messageries Maritimes, the owners of the *Delta*, was definitely fixed for hearing by the said tribunal upon the 22nd Dec. 1871. Upon the said 22nd Dec., the said Tribunal of Commerce delivered judgment by default against the plaintiffs in the said suit, and rejected their claim against the said company, and dismissed the said company from the suit brought against them as aforesaid.

13. The cause brought by the owners of the *Delta* against the master and owner of the *Erminia Foscolo* was also appointed by the said Tribunal of Commerce to be heard upon the said 22nd Dec.; and upon the said day the plaintiffs in the said cause having proved their case to the satisfaction of the court, and the defendants in the said cause not appearing to contradict their evidence, the said Tribunal of Commerce delivered its judgment in the said cause, and condemned the master and owner of the *Erminia Foscolo* to pay to the said company the amount of the loss and damage sustained by the *Delta* by reason of the said collision, which was, by the said judgment, determined to have been occasioned by the improper navigation of the *Erminia Foscolo*.

14. Notice of the said decrees was duly given to the said owner and master of the *Erminia Foscolo* in accordance with the requirements of the law of France, and all things on the plaintiffs' part have been done to make, and the said judgments have now by the law of France become, and are valid and conclusive, and final judgments, and binding upon the plaintiffs, and are still in full force and effect.

15. The defendant's submit to this honourable court that by reason of the aforesaid judgments, the plaintiffs ought not to be allowed to further prosecute the suit against the *Delta*.

To this answer the plaintiffs' solicitor replied and, after dealing with the facts, averred as follows:

3. He denies the truth of the several allegations contained in the 8th, 9th, 10th, 11th, 12th, 13th, and 14th articles of the said answer.

3*a*. He says that if any such suit as stated in the 8th article of the said answer was brought in the names of the master and owner of the *Erminia Foscolo*, the bringing of such suit was never authorised or ratified by the plaintiff, the owner of the cargo of the *Erminia Foscolo*.

4. He says that if any suit was commenced by the owner and master of the *Erminia Foscolo*, as in the said 8th article alleged, it was commenced against the owners of the *Delta* only and not against the *Delta*, and that it was subsequently, and before the 22nd Dec. 1871, and before the 18th Nov. 1871, the day of the institution of this suit, and before the 20th day of the same month, the day of the appearance of the defendants herein, abandoned by the master and owner of the *Erminia Foscolo*, and that the judgment in the 12th article of the said

answer stated was and is a judgment of nonsuit only, and not a judgment on the merits.

5. If any such judgment, as in the said 13th article alleged, was delivered by the said Tribunal of Commerce, it was delivered in default of appearance of the said master and owner of the *Erminia Foscolo*, and without any evidence being previously given before the said tribunal, and was not and is not a judgment on the merits.

6. The said owner and master of the *Erminia Foscolo*, and the said owners of cargo respectively, were not, nor was or were any or either of them at the time of the happening of the said collision, or at any time afterwards, subjects or a subject of France, or resident or present therein.

7. The said owner and master of the *Erminia Foscolo*, and the said owners of cargo respectively, had not any notice of the said alleged decrees within the time allowed by the law of France for an appeal therefrom respectively.

To this reply the defendants' solicitors rejoined as follows:—

1. As to article 3*a* of the amended reply of the plaintiffs, the owners of the cargo of the *Erminia Foscolo* authorised and ratified the said suit.

1*a*. By the law of France, apart from any express authority or ratification, the plaintiffs, the owners of the cargo of the *Erminia Foscolo*, are under the circumstances bound and estopped by the said judgment, and the said defendants submit that the law of France is the law applicable to this case.

1*b*. As to the 4th article of the reply, they deny that at any time before the said 22nd Dec. 1871, the said owner and master of the *Erminia Foscolo* abandoned the said proceedings and suit instituted by them in the said Tribunal of Commerce at Marseilles.

2. They deny the allegations contained in the 5th and 7th articles of the said reply.

3. They submit that the allegations contained in the 6th article of the reply are immaterial under the circumstances set forth in the 8th article of the answer.

4. By the law of the kingdom of Italy, and by treaties between France and Italy heretofore and now existing and in force, and particularly by the treaty between the said countries of the 24th March 1760, it is provided that the Supreme Courts of Italy should be guided by letters of request of the Supreme Courts of France in giving executory effect and force within the said kingdom of Italy to the sentences and judgments of the courts of France according to law.

5. On the 12th Feb. 1882, the defendants in this suit duly obtained from the Court of Appeal of Aix in the Republic of France, being a Supreme Court of France within the meaning of the said laws and treaties, a letter of request addressed to the Court of Appeal of Genoa in the said kingdom of Italy requiring executory force and execution within the said kingdom to be given to the sentences and judgments of the said Tribunal of Commerce of Marseilles alleged in the 12th and 13th articles of the answer, and the said owner and master of the *Erminia Foscolo* were duly cited to appear before the said Court of Appeal of Genoa to answer to the prayer and request that executory force should be given to the said judgments as aforesaid; the said owner of the *Erminia Foscolo* appeared, and opposed the said prayer and request.

6. On the 4th day of June, 1872, the said Court of Appeal of Genoa, being a Supreme Court of Italy within the meaning of the said laws and treaties, after hearing the pleadings and exceptions of the said owner of the *Erminia Foscolo* in opposition and contrary thereto, rejected every petition and exception of the said owner of the *Erminia Foscolo*, and decreed and declared that executory force must be and thereby was given to the said sentences and judgments delivered by the said Tribunal of Commerce of Marseilles in the suits respectively brought by the defendants and the said owner and master of the *Erminia Foscolo* as set forth in the answer filed herein, and declared the said judgments to be executory within the said kingdom of Italy.

7. The said judgments of the said Tribunal of Commerce of Marseilles set forth in the 12th and 13th articles of the answer, and the said judgment of Court of Appeal of Genoa are, by reason of the premises valid and binding, and conclusive upon the said owner of the *Erminia Foscolo* in Italy as well as in France, and by the law of Italy as well as by the law of France, the said owner of the *Erminia Foscolo*, one of the plaintiffs in this suit, is barred and precluded from recovering any damages from the defendants in respect of the collision between the *Delta* and the *Erminia Foscolo*, alleged in the petition.

8. The defendants repeat the submission contained in the 15th article of the answer.

The plaintiffs' solicitor concluded the pleadings by denying the allegations of the rejoinder, and alleging that the rejoinder was bad in substance.

The pleadings in the cross cause merely raised the question of the negligence of the two vessels, and made no mention of the point of law raised in the principal cause.

The causes were first called on for hearing in July 1874, before the judge (Sir R. Phillimore), assisted by Trinity Masters, but at that time the parties were not prepared to go into the defence raised upon the pleadings under the judgment of the French tribunal, and on that point the case was adjourned; but on the merits the judge determined to hear the cause *de bene esse*, and the cause was accordingly heard on the merits, and the *Delta* was found alone to blame for the collision, and the further hearing on the points of law was adjourned.

July 10 *and* 11.—The cause again came on for hearing before Sir R. Phillimore, in the Admiralty Division. It was then proved that the judgments stated in the pleadings had been given by the French tribunal at Marseilles, and that under the treaties mentioned in the fourth article of the rejoinder the Court of Appeal at Aix, the proper tribunal, addressed *lettres rogatoires* to the Court of Appeal at Genca, and that in consequence of such letters the Court of Appeal at Genoa declared the said judgments to be executory within the kingdom of Italy; and it was also proved that the plaintiff appeared and opposed such declaration by the Italian tribunal. The judgments mentioned were respectively, in the case against the owners of the *Delta*, a judgment for the owners of the *Delta* by reason of want of prosecution by the owners of the *Erminia Foscolo*; and in the case against the owners of the *Erminia Foscolo*, a judgment for the owners of the *Delta* by default of appearance by the owners of the *Erminia Foscolo;* and there was no decision on the merits of the case either in the French or Italian tribunal. Several French and Italian advocates were called to give evidence as to the foreign law. They stated that in a case of collision a judgment given against a ship and its owners was, by French and Italian law, also binding upon the owners of the cargo laden on board that ship, as the ship and its owners represented all the interests embarked in the ship at the same time. The owners of the cargo of the *Erminia Foscolo* had no notice of, and had never been summoned in the proceedings in the French and Italian tribunals, although they had a house at Marseilles. There was a difference of opinion between the French advocates as to the binding effect of a judgment by default, some asserting that a judgment by default not appealed from was as binding as a judgment on the merits, and prevented any further proceedings between the same parties; and others being of opinion that a party condemned by default might under certain circumstances renew proceedings against the same parties, as, for instance, where a judgment by

default has not been executed within six months from its being pronounced, and it consequently becomes lapsed (*non avenu*: See Code de Procedure, sect. 156). Neither of the judgments before-mentioned has been executed either by the French or Italian tribunals. French and Italian law are the same upon these matters.

The remaining facts and dates are fully stated in the judgment.

Milward, Q.C. and *E. C. Clarkson*, for the *Erminia Foscolo*.—We ask for judgment notwithstanding the defence made by the owners of the *Delta*. As far as relates to the owners of the cargo of the *Erminia Foscolo*, they never were summoned, and had no notice of the foreign proceedings, and hence cannot be bound by them. The present action was commenced (18th Nov. 1871) before they obtained judgment in the French actions (22nd Dec. 1871), and they appeared in this action without protest (20th Nov. 1871) and gave bail and then they subsequently (15th Jan. 1872) commence a cross action in this court against the *Erminia Foscolo*. In none of their proceedings do they mention the French judgments until the answer in the action against the *Delta*. In the petition against the *Erminia Foscolo* there is no mention of those proceedings. These judgments are a good answer to the action if they amount to an estoppel, and a judgment, to be an estoppel, must be a judgment on the merits of the case. There is no case which establishes that a judgment other than a judgment on the merits is an estoppel. Again, before a judgment can be pleaded by way of estoppel, such estoppel must have been operative at the time of the institution of the cause in which it is pleaded; it cannot become an estoppel during the process of the cause. There was no judgment in the French tribunals until after this cause was instituted in this court, and consequently there can be no estoppel. The owners of the *Delta* should have followed the course indicated in *The Mali Ivo* (L. Rep. 2 Adm. & Ecc. 356), and have put the owners to their election as to which action they would continue, and should have pleaded *lis alibi pendens*, not *res judicata*. There was no judgment in Italy until 4th June 1872, that is, after the defendants' answer was filed (22nd March 1872), and consequently at that time there was no judgment in Italy. An English court will examine into a foreign judgment before giving it effect: (*Don* v. *Lippman*, 5 C. & F. 1.)

The *Admiralty Advocate* (Dr. Deane, Q.C.) and *R. E. Webster*, for the *Delta*.—This is *res judicata*. There have been judgments by default against plaintiffs, and these are binding against them, and must be acted upon by English courts so long as they are in accordance with French law, and there is a duty upon the plaintiffs to obey those judgments: (*Schibsby* v. *Westenholz*, L. Rep. 6 Q. B. 155.) That they are binding upon the plaintiffs in accordance with French law is clear from the evidence laid before the court. There was a duty upon the plaintiffs to obey the judgments, because they themselves were suing the defendants in respect of this same collision, and were constructively present in Marseilles by their agent or advocate when the actions in the Tribunal of Commerce were commenced and judgment was given. Moreover, in consequence of the treaties existing between France and Italy, the judgments became Italian judgments, and the plaintiffs were Italian subjects and resident in Italy, and hence there was a duty to obey those judgments. A judgment not appealed from, whether by default or not, passes into *res judicata*, and when once it is *res judicata* it bars further proceedings between the same parties, and is a good plea to an action brought by the party who has been condemned.

Marten's Droit des Gens, vol. 1, s. 94;
Westlake's International Law, p. 376;
Story's Conflict of Laws, ss. 598, *et seq.*;
General Steam Navigation Company v. *Guillou*, 11 M. & W. 877;
Dig. c. 44, tit. I. II., De exceptionibus, De exceptione rei judicatæ.

A judgment by default in a foreign court cannot be questioned by the party against whom it has passed, where he has subjected himself to the jurisdiction and has had notice of the proceedings, and even in some cases where he has had no notice:

Tarleton v. *Tarleton*, 4 M. & S. 20.
Copin v. *Adamson*, L. Rep. 9 Ex. 345; L. Rep. 1 Ex. Div. 17; 31 L. T. Rep. N.S. 242; 33 L. T. Rep. N.S. 860;
Vallee v. *Dumergue*, 4 Exch. 290.

[Sir R. PHILLIMORE.—It seems clear that a foreign judgment on the merits of a case may be an estoppel, but how can that be the case where there has been no decision on the merits?] Where there has been notice to the party in default he must answer for his own default.

Milward, Q.C., in reply.—No judgment can be an estoppel unless the case has been contested on the merits: (*Langmead* v. *Maple*, 17 C. B., N.S., 255.)

Cur. adv. vult.

July 25, 1876.—Sir R. PHILLIMORE.—These are cross causes of collision, brought originally in the High Court of Admiralty; the first by the owners of the barque *Erminia Foscolo*, and the owners of the cargo, against the steamship *Delta*; the second by the owners of the *Delta* against the *Erminia Foscolo*.

In the suit against the *Delta* the proceedings, besides narrating in the ordinary form the incidents of the collision, raise a further issue, or further issues, in the following manner. Articles 7 to 15, inclusive, of the answer as amended, are as follows: (The learned judge then read those articles of the answer as given above.) Articles 3 to 7, inclusive, of the reply, as also amended, are as follows: The truth of the allegations of the answer is denied, and it is further stated: (the learned judge then read the reply as given above.) A rejoinder was put in, which was as follows: (as given in the rejoinder set out above.) The pleadings in the *Erminia Foscolo* merely raise the issue as to the blameworthiness of the two vessels.

When the causes came on for hearing, by arrangement, the last question was determined first, and in the result I then found the *Delta* alone to blame for the collision. The point, however, remains—on which opinions of foreign jurists and others have been since taken, and which was finally argued on the 10th of this month—whether the question in dispute between the parties had not previously been determined by another competent court, so that the matter was in the category of *res judicata*.

The collision occurred on 11th Aug. 1870, off Gibraltar. On 9th Sept. 1871 the captain and

owners of the *Delta* instituted a suit in the Court of Commerce at Marseilles against the captain and owners of the *Erminia Foscolo*. On 12th Sept. a suit was instituted in the same court by the owner of the *Erminia Foscolo* against the owners of the *Delta*. Some adjournments of the two suits were had, and on the 22nd Dec. the tribunal, in the suit brought against the captain and owners of the *Erminia Foscolo*, pronounced judgment against the defendants, for default of appearance, condemning them in the plaintiffs' damages and costs. On the same day the tribunal, in the suit brought against the owners of the *Delta*, pronounced judgment against the plaintiff for default of prosecution, condemning him in costs. By a treaty of 1760, between France and the kingdom of Sardinia, the Supreme Commercial Courts of either country were to execute the decrees of each other. A petition was presented by the owners of the *Delta* to the Court of Appeal at Aix, praying that court to put in force the provisions of this treaty by sending letters of request (*requisitiones—lettres rogatoires*) to the Court of Appeal at Genoa. Such letters were accordingly decreed by the court at Aix on 12th Feb. 1872. On 24th Feb. a citation out of the Court at Genoa was served on the owners of the *Erminia Foscolo*; a further citation seems to have been served on the 12th of the month, and on the 4th June the Court at Genoa, having heard arguments on both sides, decreed that executive justice must be given to the judgment of the Court of Commerce, and condemned the owners of the *Erminia Foscolo* in costs. Some attempt seems to have been made to execute this judgment, but ultimately it remained unexecuted. In the meantime the suits in the High Court of Admiralty had already been instituted. That against the *Delta* was instituted on the 18th Nov. 1871, and an appearance was entered by the owners of the *Delta* on the 20th, that appearance not being under protest, but absolute. The suit against the *Erminia Foscolo* was instituted on the 13th Jan. 1872, and an appearance was entered on the same day. The judgments in the Court of Commerce were not rendered till the 22nd Dec. 1871, so that at the time of the institution of the suit against the *Delta* and of the appearance of the owners of the *Delta* the suit in the Court of Commerce had not passed into *res judicata*, but was only a *lis alibi pendens*. After the judgment in the Court of Commerce the owners of the *Delta* instituted this suit here against the *Erminia Foscolo*, and filed pleadings in their suit, in which no mention is made of the judgment of the Court of Commerce.

On the question of foreign law, both French and Italian advocates were examined. Their evidence left it at last doubtful whether the judgment of the Court of Commerce, rendered as it was in default of appearance, never having been executed, would now have in France or Italy the force of a *res judicata*. But I think it unnecessary to go into their evidence in detail, as I am of opinion that this defence must fail for two reasons. The first is, that at the time when the suit against the *Delta* was begun here there was confessedly no *res judicata*, there was only a *lis alibi pendens*. If the owners of the *Delta* had wished to escape from having two suits against them for the same matter brought to a hearing, they should have put the owners of the *Erminia Foscolo* to their election, compelling them to abandon one or either of the suits, according to the rule laid down by me in *The Mali Ivo* (L. Rep. 2 Adm. & Ecc. 356), and quite recently applied in *The Cattarina Chiazzaro*: (L. Rep. 1 P. D. & A. 368; 34 L. T. Rep. N. S. 312; *ante* p. 170.) As regards the suit against the *Erminia Foscolo*, it was brought by the owner of the *Delta* while a foreign *lis* was pending. They cannot be heard, therefore, to object that that *lis* is a bar to the decision on the merits of the suit. The second reason is, that the foreign judgment not having been rendered on the merits of the case, but on matter of form only, cannot be set up as a bar to a decision on the merits. It is, however, upon the former ground that this judgment is principally founded.

I have already pronounced the *Delta* to be alone to blame for the collision. I must now pronounce that the further defence raised on behalf of the owners of the *Delta* is not sustained, and that they must be condemned in the damages occasioned by the collision, and in the costs of the suit, and I must dismiss the suit against the *Erminia Foscolo* with costs.

Solicitor for the owners of the *Erminia Foscolo*, *Thomas Cooper*.

Solicitors for the owners of the *Delta*, *Gellatly, Son*, and *Warton*.

Tuesday, May. 16, 1876.

Re SMITH AND OTHERS.

Practice—Collision upon high seas—British and foreign ship—Jurisdiction—Service out of the jurisdiction—Rules of the Supreme Court, Order II. r. 4; *Order XI. r.* 1.

Where an English ship is damaged in collision upon the high seas, outside any territorial jurisdiction, by a ship owned by a foreign company established abroad, there is no power to issue a writ for service out of the jurisdiction upon, or of which notice is to be given out of the jurisdiction to, the foreign company, and claiming damage in respect of the collision.

Semble, that "within the jurisdiction" in Orders II. and XI. of the Supreme Court Rules, means within the territorial jurisdiction.

IN Jan. 1876 the British steamship *City of Mecca*, being about nine miles from the mouth of the river Tagus, and upon the high seas, came into collision with the steamship *Insulana*, belonging to the Empreza Insulana Company—a company owning steamships and carrying on their business at Lisbon. Considerable damage was done to the *City of Mecca*.

An application was made by summons in chambers, on behalf of the owners of the *City of Mecca* (Smith and others), under the Rules of the Supreme Court, Order II., rule 4, and Order XI., rule 1, that a writ endorsed with a claim for compensation for the damage so done might be issued for service out of the jurisdiction upon, or of which notice might be given out of the jurisdiction to, the Empreza Insulana Company.

In an affidavit used in support of the summons, it was stated that the Empreza Insulana Company carried on business at Lisbon, that the members of the company were not British subjects, and that the *Insulana* was registered at Lisbon as belonging to the directors of the company.

The judge having adjourned the summons into court.

E. C. Clarkson, on behalf of the owners of the *City of Mecca*, contended that the collision having occurred on the high seas, which is within the jurisdiction of the Admiralty, the act done was done within the jurisdiction. Hence, under Order XI., rule 1, and Order II., rule 4, of the rules of the Supreme Court, the court has power to order the writ to issue, and can direct service of notice of the writ out of the jurisdiction.

Sir R. PHILLIMORE.—In this case the court would, if the *Insulana* could have been arrested within the territorial jurisdiction, have exercised jurisdiction so far as the *res* was concerned, but it would under the old law, have possessed no jurisdiction *in personam* over the owners of the vessel, unless they could have been served with a citation within the territorial jurisdiction, I do not think that the Legislature, in enacting the 1st rule of the 11th order in the schedule to the Judicature Act, contemplated any alteration of the law in cases similar to the present, and, in the circumstances, I am not satisfied that I can grant the leave asked for. If I acceded to the application I should be exercising a jurisdiction *in personam* over persons for doing an act at a time when they were without the territorial jurisdiction of this country.

Motion refused.

Solicitors for the owners of the *City of Mecca*, *Gellately, Sons*, and *Wharton*.

Thursday, Aug. 3, 1876.

THE THOMAS LEA.

Sailing rules — Regulations for preventing collisions at sea—Rule 20.

When a vessel is aground in a place where her ordinary riding light cannot be distinguished by approaching vessels, and where vessels are not expected to lie, it is her duty to exhibit a light on a mast or some elevated position, and to have a lookout to give warning to approaching vessels of her position by the best means in her power.

THIS was a cause of damage instituted by the owners of the screw steamer *Belmont* against the screw steamer *Thomas Lea*.

There was no cross cause.

The *Belmont* was a vessel of 576 tons register, belonging to the port of Sunderland, and the *Thomas Lea* was a vessel of 486 tons register, belonging to the port of London.

The collision occurred on the 19th Jan. 1876, about 8.15 p.m. The *Belmont* was then lying on the ground at the entrance of the tidal basin of the Sunderland Docks, and the *Thomas Lea* was about to enter the basin, inward bound from London.

It was alleged by the plaintiffs that those on board the *Thomas Lea* did not keep a proper lookout, and by the *Thomas Lea* that the *Belmont* neglected to give proper warning of her peculiar position, and that a light alleged to have been shown over her stern was either not exhibited at all or of insufficient power, and obscured and reddened by smoke on the glass of it.

Webster and *Phillimore*, for the plaintiffs.

Butt, Q.C. and *Myburgh*, for the defendants.

Sir R. PHILLIMORE.—This is a case of collision between two steamships near the tidal basin in the river Wear, at the entrance of the Sunderland South Dock. The plaintiffs in this case, the owners of the *Belmont*, had finished loading her cargo, on the morning of the 19th Jan., and she drew 16ft. and 3 or 4 inches of water. She seems to have had two courses before her — either to have gone through the South Dock, or to have at once straightened down the river over the bar—she elected the former. It was a neap tide, and as the vessel was entering the basin she took the ground upon the eastern side of it; she remained fast, lying a little on her side, her head towards the dock gates, and her stern projecting into the river. She took the ground at 10 a.m., and remained fast till 10 p.m. The collision took place at 8.15 p.m. At this time a steamship, the *Thomas Lea*, was entering the river and going into the South Dock. The wind was blowing very hard from the S.W., and the night was dark and cloudy, though lights could be seen at some distance. The *Thomas Lea* had her proper lights up and burning, but there is a dispute as to whether she had a good lookout. Her own account is, that "whilst rounding to out of the river into the harbour, her engines were going easy astern, and they had but little headway on her," about half a knot, and she ran into the *Belmont*, striking her about 20ft. from the stern upon the port side.

Now, on the one hand, it is urged by the *Belmont* that the collision was in consequence of the want of a proper lookout on board the *Thomas Lea*; and, on the other, it is contended by the *Thomas Lea* that it was caused by the want of due notice being given, by proper signals, to vessels entering the harbour, of the position of the *Belmont*.

There can be no doubt that it was the duty of the *Belmont*, whilst she remained in this position at the entrance of the dock, to take every precaution in her power to warn other vessels entering of that position. She says she satisfied that requirement in the following way: she put up two lights, one in her starboard fore rigging, and the other 3ft. above the wheel at the stern, the wheel itself standing 2½ft. from the deck. It is admitted that the light in the fore rigging could have no effect in apprising vessels entering of the position of the *Belmont*; as it could not be seen by them in consequence of intervening objects on shore; it may, therefore, be left out of consideration. The only question then is, whether, if she had a light over the wheel or the stern, and if that light was of sufficient power in itself, and at the time in a proper condition, and if so, whether that was a sufficient precaution. Now the first duty of the *Belmont*, in the circumstances, was to have a good lookout. The mind of the court, assisted by the attention of the Elder Brethren, has been anxiously directed to an examination of that point. The mate was on shore, and his orders were to put up two lights, one aft and one in the starboard fore rigging; the anchor watch was kept by a sailor who has not been examined, and who is said to be on a foreign voyage. Where was the second mate? It seems that common prudence would have suggested that he should be at the stern looking out. He was not there. He was walking up and down the deck, forward and aft, and he gives this extraordinary evidence, that before he had taken a walk forward he saw the masthead light of a steamer coming up the river, five or six

miles off; and when he returned from his walk he found the masthead light of a vessel pretty close, coming right into his port quarter. What did he do? Did he take any steps when he first saw the vessel coming up, and knew he was in an anomalous position where no one could expect a vessel to be? He did nothing whatever. In my judgment —and the Elder Brethren are of the same opinion —he ought to have blown the whistle, and taken every precaution to announce his position, instead of which, the converse is the case, and hence the result. What measures were taken to avoid the collision? None whatever; the only precaution alleged was the placing of the light aft, and it becomes important to consider the evidence with regard to that light. Assuming, in favour of the *Belmont*, that the light was there, it is extremely doubtful to me whether it was of sufficient quality and proper colour for the purposes for which it was intended. We are, moreover, of opinion that it was not placed in a proper position, as it ought to have been on a mast, or in some way elevated much higher above the deck than it was; and I have already said that even if the light were properly placed, there ought to have been a better lookout, and other modes adopted of warning an approaching vessel of the position in which the *Belmont* was lying.

The result at which I have arrived, with the advice and assistance of the Elder Brethren, is, that the *Belmont* has not shown that she used the precautions it was incumbent on her to adopt in her peculiar position, and that unquestionably she had a bad lookout, and, therefore, she cannot recover in this suit. I dismiss her petition with costs.

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

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

June 13, *July* 20, *and Aug.* 1, 1876.

THE STAR OF INDIA.

Damage by collision—Measure of—Damages—Loss of charter-party.

In estimating the loss sustained by a ship in a collision, a charter-party previously entered into contingent on the arrival of the ship at a fixed date at another place and cancelled by the charterers by reason of the delay occasioned by the collision should be taken into consideration, the amount recoverable being the freight that would have been earned under the charter-party, less deductions for freight actually earned after repairs and for expenses and saving of wear and tear, &c., which would have been incurred in the performance of the charter-party.

In addition to such damages the shipowner is entitled to demurrage during the time he is detained for repairs at the usual rate allowed to ships.

A CAUSE of damage was instituted by the owners of the *Cheviot* against the *Star of India*, for damages sustained by the former vessel in a collision which took place in Madras Roads on the 1st May 1875, between the two vessels whilst the *Cheviot* was shortening in her cable to proceed to ports on the Coromandel Coast, from which she was chartered to London.

The defendants, the Merchant Shipping Company (Limited), the owners of the *Star of India*, admitted their liability for the damage sustained by the *Cheviot*, and on the 31st Dec. 1875, the amount thereof was referred to the registrar and merchants.

The registrar, after examination of witnesses on both sides, and hearing counsel, reported on the 27th March 1876, as follows:

I find there is due to the plaintiffs in respect of their said claim the sum of 577*l.* 19*s.* 10*d.*, together with interest thereon, as stated in the schedule hereto annexed. And I am also of opinion that each party ought to be left to pay his own costs of the reference, the reference fees to be paid by the plaintiffs.

The following schedule is that referred to:

	Claimed. £ s. d.	Allowed. £ s. d.
1. Demurrage of the barque *Cheviot*, of 494 tons, at 4*d.* per day from 1st May to 4th July 1875, viz., 65 days	535 3 4	535 3 4
2. Loss of charter-party	583 18 9	0 0 0
3. Surveyor's fees at Madras	15 16 3	15 16 3
4. Telegrams from Madras	16 15 3	16 15 3
5. Telegrams from Glasgow to Madras	6 10 0	6 10 0
6. Repairs to figure head	3 15 0	3 15 0
	£1161 18 7	577 19 10

With interest at 4 per cent. per annum from the 4th July 1875, until paid.

The plaintiffs, on the 12th April 1876, filed a petition in objection to this report, in so far as it disallowed the second item in the schedule and made the above order as to costs, for these reasons (among others):

(A.) At the time of collision the *Cheviot*, which was in Madras Roads, was under charter to take a cargo from the Coromandel Coasts to London, at the rate of 55*s.* per ton nett weight, delivered, and was heaving short in order to proceed to Gopalpore, the first or only port under the charter. The cargo which she would have carried would have been a dead weight cargo.

(B.) The collision occurred on the 1st May 1875, and as the *Cheviot* was so damaged that she could not possibly reach Gopalpore by the 10th May, the charterers, in accordance with a power given to them to that effect, cancelled the charter.

(C.) By the time the *Cheviot* was repaired, the season had nearly closed and freights had fallen.

(D.) The *Cheviot* was not sufficiently repaired to take in cargo till the 4th July, nor sufficiently repaired to proceed to sea till the 13th July.

(E.) On the 4th July, the *Cheviot* could have been chartered for a similar voyage to that which she had been chartered at the rate of 45*s.* per ton, but she could not have sailed for the ports of loading till on or after the 13th; instead thereof she was loaded at Madras on and after the 4th July, at the rate of 45*s.* per ton of measurement goods.

(F.) The plaintiffs' claim is for the difference between the freight of which the *Cheviot* would have earned under the cancelled charter-party and that which she earned under the loading at Madras.

The plaintiffs have not claimed or received demurrage for the detention of the *Cheviot* after the 4th July.

(G.) If the plaintiffs succeed wholly or partially in their claim, the cost of the reference ought to be awarded to them.

and prayed the court to order the report to be reformed by allowing to the plaintiffs the said sum of 583*l.* 18*s.* 9d., or such part thereof as to the court may seem just, and by condemning the defendants in the costs of the reference, and that the defendants might be condemned in the costs of the appeal.

On the 2nd May 1876, the defendants answered as follows:

1. They say that the respective reasons alleged in the said petition were not borne out by the charter-party and evidence produced before the registrar and merchants, and they crave leave to refer to such charter-party and evidence.

2. They say that the alleged damage claimed by the plaintiffs in respect of the loss of the said charter party was too uncertain and too remote, and that it was therefore properly disallowed by the registrar.

3 They say that, regard being had to the demurrage allowed to the plaintiffs and to the other facts and circumstances of the case, the plaintiffs failed to prove that they had in fact incurred any loss by reason of their not having fulfilled the said charter-party, and that on the contrary the profits actually earned by the plaintiffs were fully equal to the profits which they would have earned had the *Cheviot* performed the said voyage to Gopalpore and received her intended cargo and proceeded to London therewith and delivered the same there.

4. The defendants have always been ready and willing to settle the claims of the plaintiffs other than the said claim for loss of charter-party, from which latter claim alone the necessity for the reference arose.

and prayed the court to confirm the report of the registrar, and to condemn the plaintiff in costs.

June 13 and *July* 20.—The petition came on for hearing before the judge, when the facts stated in the petition were proved or admitted.

Watkin Williams, Q.C. and *Phillimore*, for the plaintiffs.—The owners are entitled to recover the loss they have sustained by the tort of the defendants, and to be put in the same position exactly as that they would have occupied but for his misconduct. The question of remoteness does not arise here, as the charter-party was entered into and the plaintiffs were actually taking the first step to earn the money under the charter-party when they were prevented from doing so by the act of the defendants: (*Hadley* v. *Baxendale*, 9 Exch. 341; *Jebsen* v. *East and West India Dock Company*, L. Rep. 10 C.P. 300, 32 L. T. Rep. N. S. 321; and the notes to *Vicars* v. *Wilcocks*, in Smith's Lead. Cas. 7th edit. vol. 2, p. 551, *et seq.*) The case is different from those in which damages are claimed for a breach of contract, where that only can be recovered the loss of which was in contemplation of both parties or which was the natural result of the breach of contract: (*France* v. *Gaudet*, L. Rep. 6 Q. B. 199.) In *Davis* v. *Garrett* (6 Bing. 716) the owner of a barge was bound to make a restitution *in integrum* for damage done to a cargo through his wrongful deviation, and that is the proposed measure here; we should have earned all we asked for, and are entitled to recover it. Had the cargo been on board, and the delay occasioned a loss of market, that loss would have been recoverable, and this is really the same case. He also referred to *The Frederick Warren* (Pritchard's Ad. Digest, p. 708 n. 153), and *The Gladiator* (Pritchard's Ad. Digest, p. 707, n, 143).

E. C. Clarkson, for the defendants.—The damage claimed is too remote. Had the ship been at her loading port ready to load under a charter-party the amount might perhaps have been allowed, but here there is the chance, first, of the non-arrival at her loading port at all, and, second, of her non-arrival in time to prevent the charterers taking advantage of their option to cancel the charter party; she had only eight or ten days to reach Gopalpore in, and the ordinary chances of a sea voyage might well prevent her getting there in that time. The case is the same in principle as *Portman* v. *Middleton* (4 C. B., N.S., 322), and the notes to *Vicars* v. *Wilcocks*. [Sir ROBERT PHILLIMORE referred to *The Parana* since reported, *ante*, p. 220.] This principle is further illustrated by *Walker* v. *Goe and others* (3 H. & N. 395; 4 H. & N. 350). The loss of the charter-party was not the necessary result of the damage, but of a clause in the charter-party itself, requiring the ship to be at Gopalpore by a certain date, and that is a matter which the defendants cannot be supposed to have had in contemplation. *Hadley* v. *Baxendale* (9 Exch. 341), so far as it is in point at all, favours my contention for the court says: "We think the proper rule is this—the damages should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things . . . or such as may reasonably be supposed to have been in the contemplation of both parties." But that case is one of the measure of damages for breach of contract, not for a tort; in the latter class of cases only that damage which is the natural and obvious result of the tort can be recovered, for nothing more can be considered to be in the contemplation of the parties at the time. At all events, they can only recover for the loss of the chance of being able to fulfil the charter-party, not for the loss of the charter-party. The vessel might have had another charter-party to come into operation on her arrival in England from Gopalpore; if so, could the plaintiffs recover for the loss of that? The claim is remote and hypothetical. Had the damage not been sustained at all she would have occupied much time and sustained loss by wear and tear in beating back again from Gopalpore, and the insurance for the voyage would have been higher, and all these things were in contemplation of the parties to the charter, and, therefore, the amount of freight was higher; besides, they have got demurrage at 4d. per ton per day, and this is equal to a profitable employment of the ship for the sixty-five days. [The Registrar, in reply to Sir ROBERT PHILLIMORE, explained that the practice was to allow demurrage at the rate of 2*d.* per ton per day for the actual costs of the employment of the ship, and another 2*d.* as representing a reasonable profit on her employment.] The plaintiff has not shown that he has suffered any real loss; he has lost 10*s.* per ton of freight, but he has saved a month's time on the voyage, and all the wear and tear entailed thereby, the extra premium on insurances, and has been paid demurrage representing the profitable employment of his ship for sixty-five days. *Davis* v. *Garrett* is different from this case. It was there said truly that a wrong-doer could not qualify his wrong, but the wrong was the direct cause of the damage; in fact, the Registrar, in allowing the demurrage, has gone further than any case at common law.

Phillimore, in reply, referred to *France* v. *Gaudet* (L. Rep. 6 Q. B. 199), and admitted that some deduction must be allowed for the shortening of the voyage, and saving of wear and tear, but claimed to be entitled to the amount of chartered freight less such deductions, and less the freight actually earned on the voyage from Madras. There was an inception of the proceedings to earn freight, and the chance of not earning it was no greater than that of a person for whose death a claim is made under Lord Campbell's Act, not earning wages or making profits: (*Rowley* v. *London and North-Western Railway Company*, L. Rep. 8 Ex. 221; 29 L. T. Rep. N. S. 180.) Fourpence per ton does not represent a profitable employment of the ship; that is stated in the charter-party to be 120 rupees per diem, and would in sixty-five days make a difference over and above what is allowed of 208*l.* 15*s.* We had an insurable interest

in the freight, and had we insured it, could have recovered on the policy (Maude and Pollock on Merchant Shipping, 2nd edit. p. 305), and the defendants must indemnify us to the same extent.

Cur. adv. vult.

Aug. 1.—Sir ROBERT PHILLIMORE.—The *Cheviot*, a vessel of 494 tons, was run into on the 1st May 1875, while at anchor in Madras Roads, by the *Star of India*. This vessel admitted her liability, and the usual reference was ordered to the registrar, assisted by merchants, to ascertain the amount of damages. On the 27th March 1876, the registrar made his report, in which all the items of the plaintiffs' claim were allowed except one; each party to pay his own costs. The item not allowed was for the loss of a beneficial charter-party, estimated at 583*l.* 18*s.* 9*d.*; the whole of this sum was disallowed. Against this ruling, and against that which left each party to pay his own costs, the owners of the *Cheviot* have appealed.

The case has been ably and carefully argued before me. The following averments in the petition are proved or admitted. [His Lordship then read the paragraphs (A to E) of the petition set out above.]—The clauses of the charter-party to which it is necessary to refer are the following: "Twenty-five working days are to be allowed the charterers or their agents, if the ship be not sooner despatched, for loading the said ship on the Coromandel Coast, to commence twenty-four hours after the captain has given notice in writing to the charterers' agent that he is ready to receive cargo, and ten days' demurrage over and above the said laying days at 120 rupees per day to be paid to the master day by day as due at his option. Time occupied in changing ports not to count as lay days. Lay days not to commence before 10th April 1875. Charterers to have the option of cancelling this charter-party if the vessel do not arrive at her first loading port, and be ready to take in cargo by 10th May."

The main ground upon which the registrar founded his rejection of the loss of the beneficial charter-party, and which has been insisted upon in the argument before me, was that the claim for damages on this account was too remote. This was the main ground, but the registrar appears also to have held that the proximate cause of the loss was the option given by the charter-party to the charterer, and which he exercised, of cancelling the agreement because the ship did not arrive so as to be ready to take in cargo by the 10th May. I may dispose of this latter question first. I am unable to see how the granting of this option which it was perfectly competent for the owners of the *Cheviot* to do, can be in any legal sense considered the real or proximate cause of the loss. But for the damage, there is every presumption that the *Cheviot* would have arrived in proper time, and that there would have been no opportunity given for the exercise of the option. With regard to the main objection of remoteness, it has been contended that the ordinary length of the voyage was six months and six days; it is admitted that the ship had eight days over the time necessary to enable her to get to her loading port in time to fulfil it, and that at the time the collision occurred, according to the evidence of the captain the *Cheviot* was ready to proceed to Gopalpore, which was the first port she had to proceed to on the Coromandel Coast to load, and indeed the crew were actually heaving short on board the *Cheviot* for the purpose of getting under weigh to proceed to the said port of Gopalpore. The voyage may therefore, be said to have begun, but it is contended that nevertheless the ship might have met with some perils before she arrived at her loading port, might have been lost, or at least delayed by bad weather, and that all the plaintiffs can be said to have lost was the chance of performing the charter-party, which is too remote an item to be taken into account in the consideration of compensation. The answer to these objections appears to me to be that though they may avail to show that the whole sum which represents the loss of the beneficial charter-party cannot be claimed, but that a certain deduction should be made from it, they do not avail to show that the item should be entirely struck out.

With respect to various decisions which were cited relating to cases of insurance contracts and the like, I must observe that this is the case of compensation demanded from a wrongdoer and governed by different principles of law. In the case of *The Halley* (L. Rep. 2 A. & E. 3; 17 L. T. Rep. N. S. 329; 2 Mar. Law Cas. O. S. 556), I said what I must again repeat: "I gladly avail myself of Dr. Lushington's language in this matter in a case in which he distinguishes—speaking of the duty of the registrar and merchants as referees of the High Court of Admiralty—between cases of collision and cases of insurances. 'One,' he says (*The Gazelle*, 2 W. Rob. p. 280), 'of the principal and more important objections to the report under consideration is this: that the registrar and merchants in fixing the amount to be paid for repairs and the supply of new articles in lieu of those which have been damaged or destroyed, have deducted one-third from the full amount which such repairs and new articles would cost. This reduction, it is said, has been made in consideration of new materials being substituted for old, and is justified upon the principle of a rule which is alleged to be invariably involved in cases of insurance. The first question then which I have to consider is the applicability of the rule in question to a case of the present description, and this question, it is obvious, involves principles of considerable importance, not only as regards the decision in this particular case, but as establishing a rule for assessing the damage in all other similar cases. Now in my apprehension a material distinction exists between cases of insurance leases of damages by collision and for the following reasons.' And then the learned judge explains the nature of an insurance contract, and he continues: 'With regard to cases of collision it is to be observed that they stand upon a totally different footing. The claim of the suffering party who has sustained the loss arises not *ex contractu* but *ex delicto* of the party by whom the damage has been done, and the measure of the indemnification is not limited by the terms of any contract, but is co-extensive with the amount of the damage. The right against the wrongdoer is for a *restitutio in integrum*, and this *restitutio* he is bound to make without calling upon the party injured to assist him in any way whatever. If the settlement of the indemnification be attended with any difficulty, and in these cases

difficulties must and will frequently occur, the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party, and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise affecting such indemnification without exposing him to some loss or burthen which the law will not place upon him.'" In the more recent case of *France* v. *Gaudet* (L, Rep. 6 Q. B. 190), the distinction between an action of contract for the recovery of damages, and an action against a wrongdoer, appears to have been very clearly taken.

Lastly, it has been contended that the grant of demurrage in this case of 4*d.* per ton per day from the 1st May to the 4th July (sixty-five days) puts an end to any claim founded on difference of freight, and includes the profitable employment of the ship during that time: that 2*d.* per ton covers the expenses, and the other 2*d.* per ton compensates the owner for the use of the capital. I am not of opinion that on those accounts the claim founded on the difference of freight is extinguished. It is not merely the beneficial charter-party which is lost, but also the sixty-five days during which the vessel has not been beneficially employed, and upon the whole I am of opinion that I must refer this matter again to the registrar, with the assistance of merchants, to report upon what may be in the circumstances, according to their opinion, a compensation for the loss of the beneficial charter-party.

The whole sum, viz., 583*l.* 18*s.* 9*d.*, ought not to be granted, and indeed is not claimed. Among the deductions from this sum will have to be considered the difference between a voyage from Madras to London and from the Coromandel Coast to London; the saving of what is called wear and tear to the vessel, and the uncertainties and perils incident to all sea voyages. Other circumstances justifying deductions will perhaps suggest themselves to the great experience of the registrar and merchants, as to which I have no desire to fetter their discretion. The judgment which I now deliver is that the items for the loss of the beneficial charter-party, which, as being too remote and uncertain has been disallowed, ought to be considered and allowed, subject to all just and reasonable deduction. The question of costs must stand over till the amended report is made.

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

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

Tuesday, July 18, 1876.

THE JULIANA.

Wages—Cause by default—Waiver of proceedings—Intervention of foreign consul—Solicitor—Officer of court.

Where a ship has been sold in a cause in which no appearance has been entered, and the proceeds remain in the registry, all preliminary proceedings in a cause of wages may be waived, and the money due paid out of court.

The court will not pay the money to a foreign consul at his request, but will require the solicitor of the parties to satisfy any claims the consul may have before receiving the money.

IN this case the *Juliana*, which was a Russian vessel, had been sold by order of the court in another suit in which the proceedings had been in default of appearance, and the proceeds of the sale remained in the registry.

W. G. F. Phillimore replied on behalf of the master and a portion of the crew, that the wages due to them, and a sum of money by way of viaticum, as well as in respect of certain necessary expenses incurred by them, should be paid out of court at once without requiring them to file pleadings or take the other steps customary in a case of default of appearance.

The *Registrar* read a letter from the Russian consular officer stating that he had made advances of money to the crew for their expenses, and that by the law of Russia the money payable to the crew ought to be paid to him on their behalf.

Sir R. PHILLIMORE made an order waiving under the circumstances all the preliminary steps in a cause of default, and ordering the money to be paid out of court, on the solicitor of the parties before the court undertaking to pay the Russian consular officer the sums he had advanced for necessaries or producing his receipt.

June 27 *and Aug.* 8, 1876.

THE EVANGELISTRIA.

Jurisdiction—Foreign vessel—Possession—Foreign mortgage—Decree of foreign court—Intervention of foreign consul—Practice.

The arrest necessary to found the jurisdiction of the High Court of Justice (Admiralty Division) over claims by mortgagees of foreign ships under 3 *&* 4 *Vict. c.* 65, *must be in a cause over which the court has jurisdiction; a mere de facto arrest is not sufficient.*

The High Court of Justice (Admiralty Division) has jurisdiction, independent of the Judicature Acts, to and will entertain, on the intervention of the representative of a foreign state, or by the consent of parties, a cause of possession or mortgage of a foreign ship belonging to such state, so far as to ascertain the true position of the claimants and the nature of their title, and will, where it is for the advantage of all parties, order a sale of the ship.

The See Reuter (1 *Dods.* 22) *followed.*

Where a defendant objects to the jurisdiction in a cause in rem, *and appears under protest, the former practice of the High Court of Admiralty, as to proceedings under protest, must be observed throughout.*

THIS was a cause of possession.

The *Evangelistria*, a Greek vessel, arrived at Falmouth in April, 1875, and whilst there the defendants, two brothers of the name of Piangos, who at that time had the control of the vessel, were by the authority of the Greek consul dismissed, and the plaintiff Empirikos substituted for them, on the ground that by the judgment of a Greek court at Syra the plaintiff was entitled to the possession of the vessel. The vessel sailed under the control of the plaintiff to Swansea, and whilst there the plaintiff was forcibly dispossessed, and the master appointed by him expelled from her by the defendants. Whilst at Swansea the vessel was arrested in a cause of necessaries, in which cause the present plaintiff appeared under protest on the ground that the alleged necessaries had been supplied in a foreign port, and that the court had no jurisdiction. Whilst the vessel was still under arrest in that suit the plaintiff com-

menced a cause of possession by issuing the writ with the indorsement on it set out in the 8th paragraph of the petition on protest given below. The plaintiffs in the necessaries suit subsequently abandoned their suit, leaving the mortgage suit the only one existing against the ship.

The defendants appeared under protest, and on the 16th June 1876 delivered the following petition on protest to the jurisdiction of the court:

1. The plaintiffs and defendants are subjects of his Majesty the King of Greece, and are resident within the Kingdom of Greece.

2. The defendants are the owners of the ship or vessel *Evangelistria* which is a Greek vessel belonging to the Port of Syra, in Greece.

3. On or about the 4th Oct. 1874, at Syra aforesaid, by a certain agreement or instrument of mortgage, which was made at Syra aforesaid, the said vessel was mortgaged by the defendants to the plaintiffs to secure repayment to the plaintiffs of the sum of 54,450 drachmas, together with interest at the rate specified in the said agreement.

4. The said sum, as will appear on reference to the said agreement, was advanced as to one-third thereof, for a period of two years from the date of the said agreement, and it was a further condition of the said agreement that in case of default of payment of either interest or principal, the said ship should be brought by the plaintiffs to Syra to be there sold or otherwise dealt with. No default has been made in payment of interest pursuant to the said agreement, and no part of the said principal sum is due and payable.

5. The *Evangelistria* lately arrived at the Port of Swansea, laden with a cargo of grain from Lagos, and is now lying at the said Port of Swansea.

6. On or about the 10th May 1876, the *Evangelistria* was arrested in a suit for necessaries instituted in this honourable court by one John Petters.

7. The said necessaries in respect of which the said suit was instituted were supplied to the *Evangelistria* at Syra aforesaid whilst the said ship was building there. On her completion she was registered as a Greek ship, and has since continued so registered. The present plaintiff appeared under protest, and has since filed a petition on protest praying the court to pronounce against its jurisdiction on the ground that the claim of the plaintiff in that suit is not a claim for necessaries within the meaning of 3 & 4 Vict. c. 65, s. 6, or 24 Vict. c. 10, s. 5.

8. The present suit was commenced by writ dated the 17th May 1876, after the said ship had been arrested in the said suit for necessaries. The endorsement on the said writ is in the words and figures following: "The plaintiff claims to be the sole owner or mortgagee of the ship *Evangelistria*, of the Port of Syra in Greece, and to be entitled to have possession of the said ship decreed to him or to have the said ship sold for the repayment of various sums of money now due and owing to the plaintiffs, and the plaintiffs claim 3500*l*.

9. This honourable court has no jurisdiction to entertain the said cause of necessaries, and by reason thereof the said arrest of the *Evangelistria* is, under the circumstances stated in this petition, irregular and void, and the defendants submit that the said proceedings in the said cause of necessaries being null and void, and by reason of the circumstances aforesaid, this honourable court has no jurisdiction to entertain this suit.

The petition then prayed the court to pronounce against its jurisdiction, and dismiss the suit with costs.

June 27.—*E. C. Clarkson*, on behalf of the plaintiffs, moved the court to reject the defendants' petition on protest.—The first question is, whether the arrest in the necessaries suit was such an arrest as will enable the court to entertain the present suit of the mortgagee? The court has jurisdiction in a cause of mortgage in the case of a foreign ship only where the ship is under the arrest of the court or the proceeds of the sale of the ship are in the registry: (3 & 4 Vict. c. 65 sect. 3.) Now this vessel was at the time of the institution of this suit *bonâ fide* under the arrest of the court, within the words of that section, and such an arrest is, I submit, sufficient to sustain the jurisdiction; it is only where an arrest is collusive or fraudulent that it can be of no avail to found further jurisdiction. If the court once gets hold of the corpus of the ship, it cannot be ousted of its jurisdiction because some party before it has made a mistake as to his rights. Secondly, this is not a mere mortgage suit; it is a claim for possession by the plaintiff, who claims in the alternative as sole owner or mortgagee (see indorsement on writ set out in 8th paragraph of the petition above); and over causes of possession the English Court of Admiralty has always exercised jurisdiction independently of statute.

Myburgh, for the defendants, in support of the protest.—It is clear that there is no jurisdiction over a claim for necessaries supplied in a foreign port: (*The Anna* (*ante*, p. 237; L. Rep. 1 P. D. & Adm. 253; 34 L. T. Rep. N. S. 895.) Can it be that the plaintiff can object to the jurisdiction in the necessaries suit and take advantage of that very suit to create jurisdiction on his own behalf? If there was no jurisdiction in that suit there was no power to arrest, and, consequently, there was no arrest in law. The indorsement on the writ clearly shows that the suit arises under a claim by a mortgagee, and over such claim the court has only jurisdiction in the case of foreign ships where the ship is under legal arrest.

Clarkson, in reply.—The defendant asks the court to introduce into the 3rd section of 3 & 4 Vict. c. 65, words to the effect that before the court can have jurisdiction over a cause of mortgage the ship must be under arrest in a cause in which the court has jurisdiction. By the words of the section, a *de facto* arrest is sufficient.

Sir R. PHILLIMORE.—There can be no doubt that the "arrest" contemplated by the 3rd section of 3 & 4 Vict. c. 65, is an arrest *de jure*, not a mere arrest *de facto*. The plaintiff's claim, as it appears in the petition on protest, must, for the present purpose be treated as the claim of a mortgagee. I am of opinion, after hearing the arguments on both sides, and considering the statute, that the petition on protest is admissible; and I must refer the motion to reject it.

July 4.—*Myburgh*, for the defendants, moved to dismiss the action, on the ground that the court having held that the petition on protest ought to be admitted, the court had decided that it had no jurisdiction. The plaintiffs had not obtained any leave to plead further, and the statements in the petitions must be taken as true, and by those statements it appeared that the jurisdiction was sought to be maintained by reason of the ship being under arrest in an action in which the court had no jurisdiction. Hence the action ought to be dismissed. A petition on protest is a demurrer to the jurisdiction, and there being no leave to plead further, the action is gone:

Rules of the Supreme Court, Order XXVIII., rules 5, 12.

E. C. Clarkson for the plaintiff.—The court has only admitted the petition on protest, and it is now the duty of the plaintiff to file his answer on protest. The court has held that in questions of jurisdiction the old practice still remains. [Sir R.

PHILLIMORE.—The old practice must be carried out entirely, and not merely partially.] I have to ask for time to file the answer on protest.

Sir R. PHILLIMORE dismissed the defendants' motion with costs, and gave the plaintiff a fortnight's time to file his answer on protest.

The petition on protest being admitted, on the 17th July 1876, the plaintiffs delivered their answer, which, after admitting the truth of the 1st, and denying the truth of the 2nd paragraphs of the petition on protest, proceeded as follows:

3. By an agreement or deed of sale, dated the 21st Sept. 1874, and duly made at Syra, in the Kingdom of Greece, before a notary public, with all the formalities required by the law of Greece, and numbered 15,742, the defendants being owners of the *Evangelistria*, sold to the plaintiff the *Evangelistria*, and delivered to him the possession thereof for the price of 54,450 drachmas of government tariff (Greek), paid to them by the plaintiff.

4. The said agreement was valid and effectual according to the law of Greece to pass the property, ownership, and right of possession of the said ship to the plaintiff in whom such property and ownership and right of possession have been ever since and are now vested.

5. Such sale to the plaintiff was duly registered on the 23rd Sept. 1874, at the Port of Syra aforesaid, by the proper authorities, and the plaintiff thereupon became and has ever since been, and still is the sole registered owner of the said ship.

6. On the 4th Oct. 1874, an agreement, being the agreement mentioned in the 4th paragraph of the said petition, was entered into between the plaintiff and the defendants. Such an agreement was and is in the Greek language, and the following is a correct translation thereof:

It is this day agreed between the undersigned Constantine Empirikos of the one part, Gianuli N. Piangos and George N. Piangos of the other part, the following:

I. By an agreement made before the notary public, S. Bisti, dated the 22nd Sept. A.D. 1874, No. 15,742, Messrs. Gianuli N. Piangos and George N. Piangos, sold to Constantine Empirikos their ship called *Evangelistria* at the price of 54,450 drachmas of government tariff.

II. Right of repurchase of ship is conferred on the brothers Piangos, such right to be exercised within a period of three years commencing from the date of the sale document No. 15,742, within which time they have the right to pay to Mr. C. Empirikos in full or by any instalments, the above amount, with interest at the rate of 20 per cent. per annum; they will also pay the sum of 5381 drachmas government tariff, with interest thereon, which according to the particulars given below in Clause III., Mr Empirikos paid up to this day; and also any sum or sums which Mr. Empirikos may in future pay for accounts of Messrs. Piangos. After payment of all the above sums Messrs. Piangos will become the rightful owners of the ship.

III. M. Empirikos has this day paid to the brothers Gianuli N. Piangos and George N. Piangos 5381 10 per cent. drachmas government tariff, and is a loan for the settlement of the accounts for the purchase of ship, building material, and for the necessary expenses for dispatching the ship. On the above sum interest at the rate of 20 per cent. per annum will be charged from this date.

IV. The interest on the 54,450 drachmas, and 5381 10 per cent. drachmas must be paid down regularly every voyage, and at the port of discharge of the ship. At the end of the second year one-third of the whole sum at least must be repaid to Mr. Empirikos, and there must not be any default in the payment of interest, otherwise in case of the non regular payment of the interest, or in default of payment of one-third of the original sum at the end of two years, Mr. Empirikos has the right to sell the ship at public auction, hereafter giving notice to the Piangos brothers to be present at such auction. In such case Mr. Empirikos has the right of bidding for the ship at the auction.

V. After the ship is sold, according to the above clause, out of the price fetched M. Empirikos will be repaid the sum of 59,831 drachmas 10 per cent. government tariff, and interest thereon, and expenses incurred, and whatever other sums he may have paid for account of Messrs. Piangos, and if after deducting the above there is any balance left, such balance remains for the benefit of the brothers Piangos.

VI. The profits as well as the losses of the ship, for the period of three years, as well as all expenses, are for account of the brothers Piangos, whom they entirely concern, and who have a right to insure in their own name the sum of 15,000 drachmas on the value of the ship, but without any responsibility on the part of M. Empirikos for the payment of the insurance premiums thereon.

VII. After the expiration of the last day of the three years the right of re-purchase on the part of the brothers Piangos ceases, and the ship remains the indisputable property of M. Empirikos, fixing the value equal to the sums mentioned in the sale document No. 15,742. In addition to this all sums belonging to M. Empirikos that the Piangos' have in their hands at the time will be added to the value of the ship.

VIII. Captain of the ship for the period of three years will be one of the brothers Piangos, but M. Empirikos has the right to appoint a nautical superintendent on the ship, taking his meals with the captain. In case the captain is dismissed the brothers Piangos have the right of selling the ship through a court of law, and if the superintendent is dismissed M. Empirikos has the right of the sale of the ship. The expenses of the keeping of the superintendent are borne by the Piangos brothers.

Two similar documents were made and signed by the contracting parties.

Syra, 4th Oct. 1874.

Signed { CONSTANTINE EMPIRIKOS. GIANULI N. PIANGOS. GEORGE N. PIANGOS.

Copied by Constantine Empirikos.

7. In pursuance of the said agreement the *Evangelistria* proceeded upon several voyages in charge of and under the command of the defendants, or of one or other of them.

8. Before the *Evangelistria* could leave the Kingdom of Greece to proceed on such voyages the plaintiff was compelled by the law of Greece to give, and he did before she left the Kingdom of Greece give, with the knowledge of the defendants, a bond to the proper authorities in two-thirds of the value of the *Evangelistria* conditional for the return of the *Evangelistria* to the Kingdom of Greece within the period of two years from the date of her so leaving Greece. The said period of two years will expire in the month of September now next ensuing.

9. The plaintiff denies the allegations contained in the 4th paragraph of the said petition, and says that the sum of 54,450 drachmas and 5381, 10 per cent. drachmas are still owing to the plaintiffs, and the defendants have made default in the payments of interest due under the terms of the said agreement of the 4th Oct. 1874, and that large sums of money are now due and owing to the plaintiff from the defendants in respect of such interest.

10. On or about the 15th Oct. 1875 the plaintiff instituted a suit in the Commercial Division of the Court of First Instance at Syra aforesaid, being a court of competent jurisdiction in that behalf, against the defendants, and prayed the said court by reason of such default as aforesaid, and upon other grounds, to order that the defendants or such one of them as was acting as master of the *Evangelistria* should be substituted by a man of his (the plaintiff's) confidence, and that the said ship should be brought to Syra, and that a provisory execution of the decision should be ordered as well as the personal arrest of the defendants, and that the defendants should pay the costs.

11. The defendants were duly summoned to appear in the said suit in accordance with the law of Greece, but failed to appear therein.

12. On the 22nd April 1876, the said suit was heard before the said court, and the said court delivered judgment therein, and ordered expulsion of the defendants from the said ship, and that they should be sub-

stituted by a captain enjoying the plaintiff's confidence, and ordered the personal arrest of the defendants, and condemned them in costs, and requested the proper officers to execute or assist in executing the said judgment.

13. By order of such judgment the Greek consular authorities in this country, being the proper authorities in that behalf, dismissed the defendants from the said ship on her arrival at Falmouth on or about the 28th April 1876, and put on board her a person appointed by the plaintiff and enjoying his confidence, and put her into the possession of such person on behalf of the plaintiff, and such person took the said ship from Falmouth to Swansea to discharge her cargo.

14. On arrival of the said ship at Swansea, the defendants, against the will of the plaintiff and of the said consulate authorities, forcibly ejected the said master so appointed by the plaintiff from the said ship, and forcibly took possession of her, and they remained in possession of her against the will of the plaintiff and of the said consulate authorities.

15. By the law of Greece all persons in charge of any Greek vessel entering a foreign port are required to deposit all the ship's papers with the Greek consular officer at such port. On the arrival of the said ship at Swansea, the Vice-Consul of Greece at that port, being such consular officer as aforesaid, applied to the defendants, and required them to deposit such papers with him. Such papers include the libretto or certificate of registry showing the ownership of the said ship. The defendants have refused and still refuse so to deposit such papers, and the plaintiff is unable to obtain possession of the said papers, including the said libretto, although such libretto shows the plaintiff to be sole owner of the said ship.

16. The plaintiff admits the truth of the allegations contained in the 6th and 7th paragraphs of the said petition.

17. The defendants have threatened and intend, unless prevented by the court, to take the *Evangelistria* to South Africa, or to some other foreign port or place not being a Greek port or place, and to deprive the plaintiff of the power of taking the *Evangelistria* to Greece within the time allowed by the said bond, and of the power of selling the *Evangelistria* at Syra, under the said agreement of the 4th of Oct. 1874, and they refuse to give up possession of the said ship to the plaintiff, and the plaintiff cannot obtain possession of the said ship or of the papers, without the assistance of this honourable court.

The answer then prayed the court to pronounce for its jurisdiction, and to overrule the petition on protest, and to condemn the defendants in costs. On the 2nd Aug. the defendants replied by a simple denial of the answer and joinder of issue, and on 8th Aug. the question of jurisdiction came on for argument.

A discussion arose as to the mode in which the case was to be brought before the court for decision, the defendants contending that the court ought, as in the case of a demurrer, to decide on the pleadings as they stood, the plaintiffs maintaining that the defendants must prove by evidence the facts averred in the petition on protest. The court ruled that although on motion to reject a petition on protest the facts therein stated must be taken as true, yet at the hearing on protest it was different, and that the defendants must now produce evidence in support of their petition, and that the plaintiffs would then be at liberty to prove their answer, and that the former practice as to petitions on protest must prevail. The defendants were then called in support of their petition, and in their evidence claimed to be the owners of the ship, the plaintiffs by their cross-examination and the subsequent evidence setting up the same claim. The defendants stated that the plaintiffs were only mortgagees.

The judgment of the Greek Court, with the document (an ordinary bill of sale) referred to in the 3rd paragraph of the answer, attached to it, and also the document set out in the 4th paragraph of the answer, were put in in evidence, and the Greek Consul-General deposed that on the instructions of his government he was desirous that the court should if possible exercise jurisdiction.

Aug. 8.—*Benjamin*, Q. C. and *W. G. Phillimore*, for the defendants, in support of the petition.—The question is not one of ownership or possession, but of mortgage; the payment of interest is inconsistent with ownership. The court has no jurisdiction to entertain a question of mortgage except by statute. 3 & 4 Vict. c. 65, ss. 3, 4, applies only to British ships, and to them only when under arrest; even if it could apply to a foreign vessel at all, it can plainly only do so when the vessel is under arrest, and this vessel cannot be considered to have been under arrest, as the arrest was not a lawful one, and consequently a mere nullity. 24 Vict. c. 10, ss. 8, 11, applies expressly only to British registered ships, and mortgages registered under the Merchant Shipping Acts, and therefore cannot include the case of a foreign ship and foreign mortgage: (*The Innisfallen*, L. Rep. 1 Ad. 72; 16 L. T. Rep. N. S. 71; 2 Mar. Law Cas. O. S. 470) The judgment of the Greek court at Syra was given on an obviously defective knowledge of the facts. Only one document is annexed to it, and referred to in it, and that is a document apparently of sale, but the subsequent document which plainly shows the nature of the transaction to be a mortgage, was not shown to the court and is not referred to in the judgment. Besides, the judgment was obtained without any notice being given to the present defendant on protest, and in his absence: *The Highlander*, 2 W. Rob. 109.) In a matter of co-ownership the court might in virtue of its original jurisdiction entertain a cause by request of the parties or of their government (*The See Reuter*, 1 Dods. 22), but not in a case of mortgage where the authority given by the statute is limited by the statute to British vessels and mortgages under the Merchant Shipping Act. Even if the court could obtain jurisdiction the question must be decided by English law, as it is here a question of procedure and is governed by the *lex fori*. The court must dismiss the suit and allow us to take the ship and pay the mortgagees their interest. A mortgage is unknown to the law maritime, and if the Court of Admiralty had no jurisdiction in this cause, the Judicature Acts have made no difference, for the High Court of Justice has only acquired the same jurisdiction *in rem* as the court of Admiralty had, and this is a suit *in rem*. They also referred to

The Cathcart, L. Rep. 1 Ad. & Ecc. 314; 16 L. T. Rep. N. S. 211;
The Neptune, 3 Hagg. 132;
Simpson v. *Fogo*, 8 L. T. Rep. N. S. 61; 1 Mar. Law Cas. O. S. 312.

Clarkson, for plaintiffs.—Relief *in rem* may be obtained now in any division of the High Court (Supreme Court of Judicature Act 1873, sect. 4, sub-sects. 6, 7), it is only a question of procedure, and each division and every judge has all the powers of any court (Supreme Court of Judicature Act 1873, sect 39), and, therefore, the court has jurisdiction to entertain the suit, whether *in rem* or *in personam*. Here the writ was *in personam*, but the warrant *in rem* was only a

subsequent matter of procedure in the cause. The Greek judgment must be taken to be a good judgment. The absence of the defendant may be immaterial, as it frequently is in the practice of this and the divorce divisions of the High Court, and even supposing this to be a mortgage, the plaintiffs were mortgagees in possession both *de facto* and *de jure* until they were unlawfully ousted by the defendants, and, therefore, this is a suit of possession, and exactly similar to *The See Reuter* (1 Dods. 22).

Phillimore, in reply.

Sir R. PHILLIMORE.—This case has been very carefully and elaborately argued, and it raises a question by no means free from difficulty; but at the same time a careful examination of the matter results in this, that the only question is, whether the court has jurisdiction to examine into the claims of the respective parties or not. It is not a question whether the law of Greece is in favour of one party or the other, but whether, under the circumstances—and they are very peculiar—the court ought to decline jurisdiction to inquire into the matter at all. The contest is between two foreigners, each claiming possession of the vessel, one contending that he was the original possessor and that he has never parted with the property in the ship by sale or otherwise; the other, that the former had parted with the property in the ship, and that the right of possession had passed to him. One of the pieces of evidence which has been submitted to the court, and which has been gravely discussed, is the judgment of the Greek Court of First Instance at Syra, where the court pronounced in favour of the ownership of one of the defendants upon the question of the expulsion of one captain and the substitution of another. Against the judgment many objections have been taken, but it has been enforced by the Consul-General of Greece in this country so far as, in his opinion it was competent for him to do so, and he has expressed his desire that the court should, if possible, exercise jurisdiction in the matter.

It has been contended that this court had no original jurisdiction in questions of mortgage, and many authorities have been cited to establish that proposition, and to show that previously to the statute giving a limited authority over mortgages, the Court of Admiralty had no jurisdiction over mortgages even of British vessels, and that if they had none by English law, still less had they any in a case of foreign law. The question, upon the authorities cited, appears to be still an undecided one. But here the question is whether the plaintiff is not to all intents and purposes the owner of the vessel. The defendants have assumed by their protest, to maintain the position that the court is not competent to entertain a suit of this description.

Now this court has always been in the habit of entertaining suits between foreigners in matters of Admiralty law and jurisprudence. In *The See Reuter* (1 Dods. 22), Lord Stowell said: "The court has never entertained suits of this kind"—*i.e*, causes of possession between foreigners—"unless the cases had been referred to its decision by the consent of parties, or by the intervention of the representative of the foreign state devolving the jurisdiction of his own country on the court." He then proceeds to consider whether the authority in the case before him could be considered equivalent to the consent of an accredited agent of the state, and he said: "Here is a judicial order or decree by the burgomasters and councillors of the city of Rostock in senate assembled, and in whom the admiralty jurisdiction of that city is said to be vested, directing the master to deliver up possession of the ship to Mr. Martens. This document, officially subscribed by the prothonotary of Rostock, is given under the seal of that city, and its authenticity is not denied on the part of the master. I am of opinion that this instrument arms the court with sufficient authority."

What are the facts here? That there is *primâ facie* a judgment of a competent Greek court in a matter where two Greeks are concerned, pronouncing in favour of the plaintiff's right to this vessel, that that judgment, whatever its faults may be, has been acted upon by the Consul-General in this country, and that he has expressly said that he wishes this court to exercise jurisdiction.

Now, without entering into the argument based on sect. 38 of the Supreme Court of Judicature Act 1873, and on the intention of the Legislature that every court should exercise the jurisdiction of any court in matters that come properly before it, which appears to deserve considerable attention whenever it becomes necessary to decide the point, I think, for the reasons I have stated, that I ought not to decline to exercise jurisdiction in this case so far as I am asked to do—that is, to inquire into the question between these two parties. The real owner is entitled to possession of the ship, and it may turn out that the parties in this case are neither of them mortgagees, or that the plaintiff in this case is not the owner. All that I am about to pronounce is that I will exercise jurisdiction so far as to inquire into the position of the respective parties, and no further.

I pronounce for my jurisdiction, and order ship to be sold, the money to be brought into court, and put out at the usual interest, both parties are entitled to bid at the sale, and all questions of costs to be reserved.

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

Solicitor for the defendants, *Toller*.

Friday, May 12, 1876.

THE ST. OLAF.

Master—Dismissal—Ship's certificate of registry and papers—Refusal to deliver up—Lien—Merchant Shipping Act, 1854, *sect.* 50—*Jurisdiction. The High Court of Justice* (*Admiralty Division*) *has power, upon the application of the owners of a ship, to order a master who has been dismissed from their employment to deliver up the certificate of registry and other papers and property belonging to the ship where he refuses to surrender them. Semble a master, whether co-owner or not, can have no lien upon a certificate of registry or ship's papers in case of wrongful dismissal by the managing owners.*

THIS was a motion made in an action of co-ownership instituted on behalf of James Bremner, John Bruce, John Cormack, and William Harper, part owners of the schooner *St. Olaf*, against James Cormack, part owner and also late master of the schooner, in order to procure a settlement of accounts of the earnings of the said vessel. The schooner had been purchased by the plaintiffs and

defendant, and was worked by them under a written agreement, signed by all the part owners, by which James Bremner was managing owner, with power to appoint and dismiss the master. The defendant had been appointed master, and had sailed the schooner in several voyages. On the return of the schooner in April 1876, from a voyage from Tercera Bremner discharged defendant from his employment as master without notice, and took possession of the schooner. The alleged ground for such discharge was that the master had improperly given some of the cargo as food for the crew, the master stating that conduct was made necessary by the condition of the cargo and the delay of the voyage. The defendant left the schooner, but retained possession of her certificate and register and of the keys and papers belonging to her, alleging that he was wrongfully dismissed and that he was entitled to retain possession of these things.

The cause was commenced on or about May 10th 1876, and after the defendant had been served with the writ, and before any further proceedings were taken in the cause, the plaintiff moved the court for an order that the defendant might be ordered forthwith to deliver possession of the certificate and register of the schooner *St. Olaf*, of Wick, and the keys and all papers belonging to the said vessel to Mr. William Marshall, the plaintiffs' agent, and that he may be restrained from doing or suffering any matter or thing whereby the above named James Bremner may be prevented or hindered from performing or exercising his rights and duties as managing owner and ship's husband of the said vessel.

W. G. F. Phillimore, for the plaintiffs, in support of the motion.—This court has power to and will interfere to give possession of the certificate of registry. In *The Frances* (2 Dods. 420) Lord Stowell, after saying that justices have power by statute in certain cases to order the delivery of certificates, says: "But these statutes have nothing to do with the Admiralty jurisdiction upon such matters. If the Admiralty had no jurisdiction but what it derives from these statutes, it has no jurisdiction at all upon such subjects, for they do not refer to the jurisdiction of that court—they merely give new powers in certain cases to justices of peace. The jurisdiction of the Admiralty (if it exists) is of older date and of larger extent. We know that it is not uncommon for parties, after applications to justices, without effect, to resort to this court for its monition. This court would certainly not have hesitated to go the length of granting its monition, to show cause why the register should not be restored." By the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 50, it is expressly enacted that "the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatsoever" by any person, and that justices or "any court capable of taking cognisance of such matter" may summon the person detaining the certificate before it and examine him in relation to the detention, and if there was no reasonable cause may inflict a penalty. This is a court capable of taking cognisance of such matter, and the master having no lien upon the certificate (*Gibson* v. *Ingo*, 6 Hare, 112) has no reasonable cause for detaining it.

E. C. Clarkson, for the defendant. — The managing owner had no power to dismiss under the circumstances of the case. [Sir R. PHILLIMORE.—The agreement between the owners expressly says he shall have power.] But it must be implied that such power can only be exercised upon due notice (*Green* v. *Wright*, p. 254; L. Rep. 1 C. P. Div. 591). [Sir R. PHILLIMORE.—If the master has been wrongfully dismissed his remedy is to bring an action against the managing owner for damages. The power to dismiss has been exercised, and the remedy is not to detain the ship's papers.] Then, as we have a counterclaim for wages and damages, we ought to have security for the amount of our claims in this action to save the expense of arresting the ship.

W. G. F. Phillimore, in reply, undertook to give security for any damages which might accrue from the making of the order prayed.

Sir R. PHILLIMORE.—I am of opinion that I have authority to make the order asked for, and I shall do so. I direct the defendant forthwith to deliver to William Marshall the certificate and register, and all keys belonging to the *St. Olaf*, upon the plaintiffs undertaking to be answerable for any damage occasioned by such delivery. Costs of the motion to be costs in the cause.

Solicitors for the plaintiffs, *Harper, Broad,* and *Battcock.*

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

Tuesday, July 25, 1876.

THE SCEPTRE.

Forfeiture—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 103—*Concealing British character —Assuming foreign character.*

Where a British subject, the owner of a British ship, by a representation to the collector of customs at the port of registry that his ship has been sold to foreigners procures the closing of the registry, and sails her under a foreign certificate of registry and under a foreign flag, whilst he continues to own her and to receive the profits of working her, doing such acts with the intent to conceal her British character from the officers of customs, and prevent her seizure as unseaworthy, he commits an offence against the provisions of the Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 103 *by reason of which his ship is liable to, and will be condemned to forfeiture to Her Majesty.*

THIS was an action instituted by Her Majesty's Procurator General on behalf of Henry Hallett, collector of customs, at Hartlepool, against the *Sceptre*, and her owner intervening, to obtain the forfeiture of the *Sceptre* to Her Majesty, for the commission of offences by her owner against the provisions of the 103rd section of the Merchant Shipping Act 1854, which, so far as material, is as follows:

Sect. 103. The offences hereinafter mentioned shall be punishable as follows (that is to say): . . . .

(2) If the master or owner of any British ship does or permits to be done, any matter or thing, or carries or permits to be carried any papers or documents, with intent to conceal the British character of such ship from any person entitled by British law to inquire into the same, or to assume a foreign character, or with intent to deceive any such person as lastly hereinbefore mentioned, such ship shall be forfeited to her Majesty, and the master, if he commits or is privy to the commission of the offence, shall be guilty of a misdemeanor. . . . .

And in order that the above provisions as to forfeiture may be carried into effect, it shall be lawful for any commissioned officer on full pay in the military or naval service of her Majesty, or any British officer of customs, or any British consular officer, to seize and detain any ship which has, either wholly or as to any share therein, become subject to forfeiture as aforesaid, and to bring her for adjudication before the High Court of Admiralty in England or Ireland, or any court having Admiralty jurisdiction in her Majesty's dominions, and such court may thereupon make such order in the case as it may think fit, and may award to the officer bringing in the same for adjudication such portion of the proceeds of the, if any, forfeited ship or share as it may think right.

The plaintiffs' statement of claim setting out the offences charged was as follows:

1. The plaintiff was on and before the 10th Nov. 1874, and has ever since been and still is a British Officer of Customs, within the intent and meaning of the 103rd sect. of "The Merchant Shipping Act 1854."

2. Before and on the said 10th Nov., the ship or vessel *Sceptre*, proceeded against in this action was a British ship, registered at the Custom House of Sunderland, as a British ship, in the name of the defendant, James Saunders, as sole owner, and she then belonged to the defendant as sole owner. The said defendant is a natural born British subject.

3. On or about the 9th Nov., the defendant as such owner wrote and sent to the collector of customs, at the port of Sunderland, being the registrar of British ships at that port, and a person entitled by British law to inquire into the character of the said vessel, a letter informing the said collector that the said vessel was sold to foreigners, and inclosed and sent in the said letter to the said collector the certificate of registry of the said ship, for the purpose of the register of the said ship being cancelled by the said collector, and requested the said collector to forward to him, the defendant, a certified copy of the register of the said ship.

4. The said collector received the said letter on the 10th Nov., and acting upon the statements and representations contained therein, made an indorsement upon the register of the said vessel as follows, namely: "Certificate cancelled, register closed 10th Nov. 1874. Vessel sold to foreigners," and drew a line across the said register.

5. The said vessel was not on or before the 10th Nov. 1874, sold to any foreigner or foreigners, but she was on that day and she afterwards continued to be owned by the defendant as sole owner, and she then was and she subsequently continued to be a British ship within the true intent and meaning of the 103rd section of "The Merchant Shipping Act 1854."

6. On or about the 12th Jan. 1875, the defendant being still the sole owner of the said ship, produced and exhibited to one William Robert Arkless, the Superintendent of Customs and Mercantile Marine, at Seaham, a person entitled by British law to inquire into the character of the said ship, a document purporting to be a certificate of ownership of the said ship, and dated on or about the 28th Nov. 1874, by which document it was stated and represented that one Henry Thomas Watson, of Antwerp, Belgian citizen, having purchased the said ship, had by bill of sale become the owner of the said ship, and that the said ship was then Belgian property.

7. The said statements and representations in the said document lastly mentioned were respectively wholly untrue. The said ship, on the said 28th Nov. 1874, continued to be and was the property of the said James Saunders as sole owner thereof, and a British ship within the true intent and meaning of the said 103rd section.

8. On the 5th Feb. 1875, one James Farguson, the then master of the said ship, by and with permission of the defendant as sole owner of the said ship, applied at the Custom House, at Seaham, in the port of Sunderland, to one William Farrow, the officer of customs then on duty in that behalf, for a transire or clearance coastwise for the said ship, and the said master then and thereby, and with the permission of the defendant, declared to the said William Farrow the name of the nation to which the said master claimed that the said ship belonged as being the Belgian nation, and that her port of registry was the port of Antwerp, in the Kingdom of Belgium, and the said William Farrow then inscribed such port as the port of registry of the said ship on a clearance or transire, which he then granted, and the said master, by and with the permission of the defendant, then and there signed upon the said clearance or transire a declaration whereby he the said master certified that all the requirements of the said Act had been fully complied with.

9. The nationality of the said ship was not upon the said 5th Feb. 1875 Belgian, but the said ship then was and continued to be the sole property of the defendant as sole owner thereof, and a British ship within the true intent and meaning of the said 103rd section, and the said declarations respectively made and signed by the said master as in the last paragraph stated were wholly false.

10. On or about the 21st Aug. 1875, the defendant being then the sole owner of the said ship, applied as master thereof to the said William Robert Arkless, still being such superintendent of customs and mercantile marine as aforesaid, at the Custom House, at Seaham, aforesaid, for a clearance or transire of the said ship, and stated the name of the said ship to be the *Cotopaxi*, of Arca, and declared to the said William Robert Arkless the name of the nation to which he, the defendant, claimed that the ship belonged to be Uruguay, and the said William Robert Arkless thereupon inscribed the name of such nation upon a coasting clearance or transire which he then granted, and the defendant then and there signed a declaration upon the said clearance or transire whereby he certified that all the requirements of the said Act had been fully complied with.

11. The name of the said ship was not on the said 21st Aug. 1875, the *Cotopaxi*, of Arca, and the nationality of the said ship was not upon that day Uruguayan, but the said ship then was, and continued to be, the property of the defendant as sole owner thereof, and a British ship within the true intent and meaning of the said section, and the said declarations so made and signed respectively by the defendant were wholly false.

12. The said ship subsequently to the 10th Nov. 1874, and whilst she still continued to be the property of the defendant and a British ship within the true intent and meaning of the said 103rd section, was sailed by the defendant or by and with his permission under a foreign flag, to wit under the Belgian flag.

13. The several matters and things hereinbefore alleged to have been done or permitted to be done by the defendant, or some or one of such matters and things, were or was matters or things, or a matter or thing done by the defendant as owner of the said British ship *Sceptre*, with intent to conceal the British character of such ship from the said collector of customs at Sunderland, and from the said William Robert Arkless, and from the said William Farrow, and from others the collectors and officers of customs at divers British ports and from the officials of the Board of trade defined by the said Act, or from some or one of such persons all such persons being persons entitled by British law to inquire into such character, or with intent to assume a foreign character, or with intent to deceive such persons as aforesaid, or some or one of them, and thereby the said ship became and is forfeited to Her Majesty.

14. The said document or certificate in the 6th paragraph of this statement of claim, mentioned further, stated, and represented that the said document or certificate would remain in force for not exceeding one year from the date thereof, to wit, from the 28th Nov. 1874, and was issued for the purpose of proving the nationality of the said ship until her arrival in Belgium, and such document was carried by the defendant or by the master of the said ship, by and with the permission of the defendant as owner of the said ship, as a certificate of the nationality of the said ship. Such document or certificate was not according to the law of Belgium, a good or valid certificate of the nationality of the said ship, and the said ship was not on the 12th Jan. 1875 a Belgian ship or entitled to a certificate of nationality as a Belgian ship, but she then continued to be and was the property of the defendant as sole owner thereof, and a British ship within the true intent and meaning of the said section. Such document was carried by the defendant as sole owner of the said ship or by the master of the said ship by and with the permission of the defendant as sole owner of the said ship, with intent to conceal the British character of such from the said William Robert Arkless, and others, the collectors and officers of customs at divers British ports, and the officials of the Board of Trade defined as aforesaid, or from some or one of such

persons, all such persons being persons entitled by British law to enquire into the same, or with intent to assume a foreign character, or with intent to deceive such persons or some or one of them, and thereby the said ship became as is forfeited to Her Majesty.

15 The plaintiff as a British officer of customs has seized and detained the said ship as having become subject to forfeiture to Her Majesty as aforesaid, and has brought her for adjudication before this court pursuant to the said section.

The plaintiff claims—

1. A declaration and judgment that the said ship or vessel *Sceptre* has become and is forfeited to Her Majesty.

2. A sale of the said ship *Sceptre* by the marshal of this court.

3. An award to the plaintiff of such portion of the proceeds of the sale of the said ship as the court may think right.

4. The condemnation of the defendant in the costs of this action.

5. Such further and other relief as the nature of the case may require.

The defendant, James Saunders, delivered an answer denying the statement of claim; but at the hearing the defendant himself was called as a witness for the plaintiff, and admitted that the allegations of the statement of claim were substantially accurate. He stated that he was, prior to 10th Nov. 1874, the sole owner of the *Sceptre*, which was then registered as a British ship; that on or about that date he was informed by some shipbrokers that they could procure the registration of his ship in Belgium on the payment of certain fees, and that by this means he would be enabled to avoid the then recent legislation relating to unseaworthy ships. He accordingly represented to the collector of customs at Sunderland, where the ship had been registered, that the ship was sold to foreigners, and requested the collector to send him a copy of the register of the ship. The shipbrokers before-mentioned procured for him the provisional certificate mentioned in the statement of claim, paragraphs 6 and 14, which represented the ship as being a Belgian ship, and she was sailed under the Belgian flag, but she never ceased to be the sole property of the defendant, and he had, after the closing of her British registry, worked her himself, and had received the freights and profits. The action was undefended at the hearing.

The *Admiralty Advocate* (Dr. Deane, Q.C.) and *E. C. Clarkson*, for the plaintiff.

Sir R. PHILLIMORE.—The facts stated in the statement of claim being admitted by the defendant, I must pronounce in this case that the owner of the ship was intending to conceal the British character of the ship from the person entitled to inquire into it, and that the vessel assumed a foreign character with intent to deceive the officer or customs, and is therefore liable to forfeiture under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104, s. 103), and therefore pronounce for the forfeiture of the vessel.

Proctor for the plaintiff, the *Queen's Proctor*.

Solicitors for the defendant, *Oliver* and *Botterill*.

Tuesday, Nov. 7, 1876.

THE SFACTORIA.

Practice—Default in pleading—Signing judgment—Proceeding in rem — Supreme Court Rules: Order XXIX., rule 2.

Order XXIX., rule 2, *of the Supreme Court Rules, as to signing judgment in default of pleading, does not apply to proceedings in rem.*

Where in an action in rem for a liquidated sum for necessaries supplied, the defendant makes default in delivering his statement of defence, the plaintiff cannot at once sign final judgment, but must bring the case on for hearing before the judge upon affidavit.

THIS was an action of necessaries instituted on behalf of John Abbott and Francis Parny Adey, ship chandlers at Cardiff, *in rem*, against the Greek ship *Sfactoria*. The necessaries supplied were ship's stores, and were supplied by the order of the master of the ship.

The plaintiff, in the statement of claim, alleged that the goods were supplied on three several occasions, and that the amounts due for such supplies were 412*l.* 16*s.* 9*d.*, 61*l.*, and 84*l.* 17*s.*, making together 551*l.* 13*s.* 9*d.*, and that the goods were supplied upon the credit of the ship and not of the master.

The owners of the ship duly appeared in the action, and the statement of claim was served upon them by special leave during the vacation.

The defendants, after obtaining several extensions of time for the purpose, made default in delivering their defence. The plaintiffs now brought the matter before the court on motion "for an order that, the defendants having failed to deliver their statement of defence within the time limited, the plaintiff be at liberty to sign final judgment for 551*l.* 13*s.* 9*d.*, together with interest, as claimed in the statement of claim, and costs of suit, and for an order that a commission do issue for the sale and appraisement of the *Sfactoria*, and that the proceeds thereof be brought into the registry of the court."

E. C. Clarkson, for the plaintiff, in support of the motion.—Here the plaintiff's claim is for a liquidated demand, and consequently, under Order XXIX., rule 2, of the Supreme Court Rules, the defendant having made default in pleading the plaintiff becomes entitled to sign final judgment; that is to say, if the rule applies to proceedings *in rem*. It is true there may be grave objections to judgment being signed in such a manner in these cases; as, for instance, a friend of the plaintiff might collusively appear in the action and make default in pleading, and judgment go against a ship which had never been liable. As the decree would go against all the world, it is perhaps desirable that some proof of the validity of the claim should be given. This might be done either by giving final judgment subject to a reference, or by ordering the action to be set down for hearing on proof by affidavit, which the court would have power to do under Order XXXVII., rule 1, of the Supreme Court Rules. At the same time we are within the words of the rule before quoted.

Sir R. PHILLIMORE.—I do not think that Order XXIX., rule 2, was ever intended to apply to proceedings *in rem*. To so apply it would be dangerous, as the court might condemn and sell the wrong ship. There ought to be some inquiry in such cases. I shall order the case to stand over for hearing on the next motion day, when proof of the plaintiff's claim can be given on affidavit. The court, according to the old practice of the Court of Admiralty, has power to order evidence to be taken on affidavit, independently of Order XXXVII., rule 1.

Solicitors for the plaintiffs, *Ingledew*, *Ince* and *Greening*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Thursday, March 30, 1876.

(Present: The Rt. Hons. Sir J. W. COLVILE, Sir R. J. PHILLIMORE, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

THE NORMA.

Collision—Practice—Vice-Admiralty Courts—Preliminary Acts—Examination of witnesses—Rule of the road—Regulations for preventing collisions at Sea, Arts. 15, 16, 18.

The form of preliminary Acts now in use in the High Court of Justice in collision cases should be used in similar cases in the Vice-Admiralty Courts.

In collision causes in the Vice-Admiralty Courts witnesses should, as far as possible, be examined viva voce *before the court, not upon written interrogatories before an officer of the court prior to the hearing.*

A sailing vessel, meeting a steamer, is bound to keep her course, and it is not the rule of the road that she should port her helm on nearing the steamer, such a deviation from the rules being allowed only under circumstances of immediate danger.

THIS was an appeal from the decision of the Judge of the Vice-Admiralty Court of Canada, in a suit brought by the respondents against the appellant for damages sustained by them by reason of a collision between the *James Seed*, carrying a cargo of copper, of which the respondents were owners, and the *Norma*, of which the appellant is owner.

The collision in question occurred in the river St. Lawrence, between Bic and Quebec, and between 10 and 11 p.m. of the 11th Aug. 1874. The wind was S.W. or S.W. by W., a moderate breeze; the night was clear, and the tide was ebb. The *James Seed*, a three masted Schooner, of 156 tons, with a crew of eight hands and a pilot, was going down, and the *Norma*, a steamship, of 653 tons, with a crew of twenty hands and a pilot, was going up the river. Both vessels had their proper regulation lights. The parts of the two vessels which first came in collision were the port-bow of the *James Seed* and some part of the starboard-bow of the *Norma*. The *James Seed* sunk almost immediately, with the loss of five lives.

On these points both parties were agreed.

The remaining facts of the case as stated in the preliminary Act and libel filed on behalf of the respondents, were substantially as follows:

The *James Seed*, making about four knots an hour, was heading N.E. by E., when the bright and red lights of the *Norma* were observed from two or three miles off, about a point on the starboard-bow. The helm of the *James Seed* was put to port, and the lights were brought on the port-bow. The *James Seed* then steadied her helm and kept her course. After some time, the green light of the *Norma* came in sight. Those on board the *James Seed* then hailed the *Norma* (which was then coming directly upon them), to port her helm, and put their own helm hard-a-port. The *Norma*, however, starboarded her helm, and without stopping or reversing her engines, came into collision with the *James Seed*, with such violence, as to do the damage already mentioned.

The case of the *Norma*, as stated in the responsive allegation, filed on behalf of the appellants, was as follows:

5. That at about half-past 10 o'clock at night, of the said 11th Aug., the *Norma*, then going at the rate of about seven knots per hour, and being a few miles from Bic, the look-out man reported a light about two miles off, a little on the port bow, which was first supposed to be a white light, but which subsequently proved to be a green light of a vessel coming down the river, which said vessel was subsequently ascertained to be the *James Seed*.

7. That, immediately upon the said light being reported, the said pilot, Joseph Lavoie, perceiving the vessel coming down the river to be a sailing vessel, gave the order to put the helm hard-a-starboard, which order was obeyed, and the green light of the *James Seed*, was thereby brought about a point on the starboard-bow of the *Norma*, the *Norma*, as a steam vessel, giving way to the *James Seed*.

8. That the green light of the *James Seed* remained visible to the people of the *Norma* until a few minutes before the collision, when suddenly the *James Seed* put her helm hard aport, bringing herself right across the bows of the *Norma*, and disclosing her red light.

9. That the people on board the *Norma* shouted to those on board the *James Seed* to put her helm a-starboard, but the *James Seed* continued to pay off to starboard, keeping her helm hard-a-port.

10. That thereby a collision was rendered inevitable, the *Norma* striking the *James Seed* in her fore-rigging, the *James Seed* sinking immediately, and carrying with her the starboard anchor and sixty fathoms of chain of the *Norma*, and making an immense hole in the forward compartment of the *Norma*, which for some time threatened the safety of the ship.

11. That immediately that there appeared any danger of collision the engines of the *Norma* were stopped, and then reversed.

The cause came on for hearing before the judge of the Vice-Admiralty Court, assisted by nautical assessors, the evidence of several witnesses, taken before the registrar of the court previously, was read, and the preliminary Acts were opened. The preliminary Acts were those ordinarily in use in the Vice-Admiralty Courts, and did not contain all the questions and answers contained in the preliminary Acts in use in the High Court of Justice of England. The following are wanting "VI. State and force of the tide;" "VIII. The lights, if any carried by her;" "X. The lights, if any, of the other vessel which were first seen;" "XI. Whether any lights of the other vessel other than those first seen came into view before the collision." The learned judge submitted certain questions to the nautical assessors, which, with the answers thereto, were as follows:

1st. Whether after the vessels sighted each other they had time to take the necessary precautions to prevent the collision which followed? Answer. Yes.

2nd. Whether the steamer at any time after seeing the schooner's light should have ported her helm and whether she pursued a proper course in putting it to starboard when she did? Answer. The steamer on seeing the schooner's green light a little on her port bow should have stopped her engines to ascertain the exact position of the schooner and then acted accordingly.

3rd. Whether the schooner was to blame in porting her helm instead of keeping her course? Answer. The schooner in porting her helm followed the rule of the road and was not to blame.

4th. Whether the schooner by porting foiled the manœuvre of the starboard helm of the steamer or the steamer by starboarding defeated

that of the schooner's port helm? Answer. The steamer seeing that she was nearing the schooner so rapidly should have stopped and reversed full speed instead of starboarding her helm, which had the effect of showing her side lights to the schooner, and justified the latter in porting her helm.

5th. Whether the steamer was to blame for not having stopped her engines earlier than she did? Answer. Yes.

6th. Whether the collision was inevitable or was occasioned by the carelessness, mismanagement, or want of proper skill on the part of both vessels, or of either and which of them? Answer. The collision was occasioned by want of caution and experience on the part of the steamer, which could have avoided a collision by keeping to the northward or by stopping her engines in time, whereas the schooner in porting her helm, to shew her red light, was following the rule of the road, therefore we consider the *Norma* is alone to blame.

The learned judge then delivered judgment, which, after setting out the facts and the above questions and answers, was as follows:—

STUART, J.—It is beyond doubt that after sighting each other both vessels continued their course until within about half a mile of each other, and I may add that it appears to me that if neither had deviated from her course then they would have gone clear, though they might have passed nearer than it was prudent to do, the responsibility of the collision must therefore rest on the vessel which altered her course at the eleventh hour. The pilot and man at the helm of the *Norma* establish that they both saw the *James Seed's* green light two miles off, and the mate deposes that when the schooner's green light was seen on the *Norma* the people of the schooner must have seen the masthead and red lights of the steamer. This is proved to have been so by the pilot of the *James Seed*. The chief officer of the *Norma* says, "she (the schooner) would continue to see those lights until we starboarded and brought her on our starboard bow when she would lose our red and see our green light, and our green light must have remained visible from that time till the collision." Charles Dale, the man on the look-out on the *Norma* says, "Directly after the *Norma* began to answer her starboard helm the *James Seed*, which up to that time had shown her green light, then showed her red light." Thus the change in the lights which establishes the alteration of the course of these two vessels relatively to each other is attributed by the witnesses who were themselves executing the change in the course and observing its effect to the action of the *Norma's* starboard helm, and serves to relieve the persons in charge of the said *James Seed* of any imputation of having contributed to this altered and very dangerous condition of things. It is made certain by the evidence that the schooner, upon seeing the lights of the *Norma*, took her course and pursued it without deviation until the steamer, then a short distance off, opened up her coloured lights, and was seen coming end on the schooner, when, in pursuance of the rule, she ported her helm. It is equally certain from the evidence of the crew of the *Norma* that the steamer saw the schooner's green light at a distance of about two miles, and that she continued her course for a full half hour—so says the pilot—when she starboarded her helm and exhibited her coloured lights to the schooner. It does not appear to have been taken into calculation by the persons directing the course of the *Norma* that before the red light of the steamer was shut out and the green light substituted instead there would be an interval of time when both her coloured lights would appear to the persons on the schooner and show a condition involving the greatest danger of collision end on and making it a duty on the schooner to port her helm in compliance with the rule of the road. These, then, are all the circumstances influencing the relative positions of these two vessels immediately before the collision, which caused the schooner to sink on the spot, and the largest part of her crew to be drowned, to which the law is to be applied. The relative duties towards each other of these two vessels under the circumstances are to be found in the Regulations for Preventing Collisions at Sea.

Art. 15.—"If two ships, one of which is a sailing ship and the other a steamship are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing-ship."

Art. 16.—"Every steamship when approaching another ship so as to involve risk of collision and shall slacken her speed, or, if necessary, stop reverse."

It was held in the case of *The Rose* (2 Wm. Rob. 1) that the expression "giving way" in the Trinity House Regulations means not crossing a vessel's bows, but going under her stern. The term used in the 15th article, "Shall keep out of the way," appears to me to correspond in meaning with "giving way." In that case a steam vessel having three lights and proceeding at the rate of ten knots an hour came into a collision with a sailing vessel having no light, and proceeding at the rate of four knots an hour. On discovering each other the sailing vessel ported her helm, and the steamship starboarded. The steamer was condemned in damages and costs. In the case of *The James Watt* (2 Wm. Rob. 270) a steam vessel discovered a sailing vessel approaching her, which from the direction and state of the wind she was aware must be sailing closehauled, but from the darkness of the night was unable to make out upon what tack. It was held she should (in order to comply with the general rule which obliges a steamer to give way to a sailing vessel) have at once stopped her engines until she had ascertained the exact course of the other vessel, and should not by mere surmise put her helm one way or the other. The defence set up on behalf of the steamer that she had ported her helm was not deemed sufficient. The first of these decisions held the steamer answerable for the collision for putting her helm astarboard instead of aport. The second held the steamer answerable though she had ported her helm, because she had not stopped her engines. Both of these decisions militate against the *Norma*. With these decisions, and the opinion of the Assessors, in which I concur to the full, I should have no hesitation in coming to a conclusion, but I am confirmed in my views by a decision in the Privy Council in the case of *The Velasquez* (L. Rep. 1 P. C. Rep. 494). This last case in its important features is identical with the present one. The steamer *Velasquez* was sighted by the *Star of Ceylon* at a sufficient distance to

have avoided a collision, the steamer took no steps until the vessels were very near each other, when she starboarded her helm, and the sailing vessel ported her helm to avoid the collision, which, notwithstanding, took place. It was held that the steamer was alone to blame, as it was the duty of the steamer to keep out of the way of the sailing vessel provided she could do it either by starboarding or porting her helm, and that on the other hand it was the duty of the sailing vessel to keep her course, and that she could only be excused from deviating from it by showing that it was necessary to do so to avoid immediate danger. The *Norma* kept her course though the danger of this proceeding was apparent to the apprentice pilot whose suggestions as to the propriety of porting her helm before she had got so near was disregarded by the pilot. The *Norma* then, as the *Velasquez*, is chargeable with approaching too close, and is answerable for a manœuvre which threatening a collision end on imposed it as a duty on the schooner to port her helm, and leaves the steamer with the whole burden of the occurrence. I cannot do better than reproduce the words of Lord Westbury in the case of *The City of Antwerp* (L. Rep. 2 P. C. 25), "It is undoubtedly true in cases of collision between a sailing ship and a steamer that although the sailing ship may be found to have been guilty of misconduct, or not to have observed the sailing regulations, yet the steamer will be held culpable if it appears that it was in her power to have avoided the collision. It cannot be too much insisted on that it is the duty of the steamer where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done consistently with her own safety to avoid the collision." To this extent does the law make responsibility weigh upon steamers, and as they are independent of the wind and always under command, it seems humane and just it should be so. Applying these principles of law to the facts proved in these cases as the *Norma* saw the green light of the *James Seed* two miles off, when the combined speed at which they were approaching was twelve miles an hour, and a period of time of ten minutes only was afforded to take the precautions necessary to avoid collision, I am of opinion the *Norma* should then have slackened speed so as to be in a condition to stop or reverse her engines if upon the nearer approach of the vessels the safety of the sailing vessel required a resort to that expedient (*The James Watt, ubi sup.*). Instead of this the *Norma* proceeded at full speed down to the moment of collision. I am further of opinion that the attempt to cross the bows of the schooner at the last moment was unseamanlike and culpably hazardous, as the event has demonstrated, and lastly the *Norma* is answerable when so near the schooner as to involve risk of collision for having starboarded her helm when the rule required her to port. (*The Rose, The Velasquez*) (*ubi sup.*) For these acts of omission and commission the owner of the *Norma* is answerable to the promoters for the catastrophe. I decree against the owner of the *Norma*, and order the usual reference in both cases to the registrar and merchants to report on the damage.

From this judgment the owners of the Norma appealed, for the following, amongst other reasons:

1. Because the learned judge of the court below erroneously held that the steamer was bound to get out of the way of the *James Seed* by porting her helm, whereas she was entitled to do so either by porting, or starboarding, or keeping on as those on board her thought fit.

2. Because the steamer, by starboarding her helm, performed the duty imposed on her of keeping out of the way of the *James Seed*, and the evidence proved that there would not have been a collision if the *James Seed* had performed her duty by keeping her course.

3. Because the learned judge of the court below erroneously held that the *James Seed* was justified, according to a rule of the road, in porting and hard porting her helm, whereas there is not and was not any such rule.

4. Because the learned judge was wrong in holding that the steamer should have stopped or slackened speed at the time he holds in that behalf.

5. Because the evidence proved that the collision was not occasioned by any negligent or improper navigation on the part of the *Norma*.

Milward, Q.C. and *E. C. Clarkson*, for the appellants.

Brett, Q.C. and *W. G. F. Phillimore*, for the respondents.

The judgment of the court was delivered by

Sir R. J. PHILLIMORE.—This is an appeal from a decree of the judge of the Vice-Admiralty Court of Quebec, in a suit for damages, the consequence of a collision between two vessels, the *James Seed*, a sailing vessel, and the *Norma*, steamship.

Before their Lordships approach the consideration of the merits of this case they desire to say a few words with respect to the pleadings and the mode of taking evidence in the court below. The "Preliminary Acts," the operation of which has been eminently conducive to the ascertainment of the truth in these cases, are in the same form as when first tried in the High Court of Admiralty. Since that time, sections 6, 8, 10, 11, which form a very important part of the present Preliminary Acts in the English Court of Admiralty, have been introduced, and their Lordships think that it would be expedient to introduce similar regulations into the practice of the Vice-Admiralty Courts; their Lordships must express a hope that in subsequent suits this defect will be remedied. The mode of taking the evidence before the Registrar alone, and the use of written interrogatories, would, in their Lordships' opinion, be advantageously exchanged for the practice of the *viva voce* examination of witnesses at the hearing before the judge who is to decide the case, in causes where it would be possible to obtain their attendance for that purpose without inconvenience or additional expense, a practice which has been for a long time prevalent in the English Court of Admiralty, and attended with very beneficial results.

The judge of the court below pronounced the *Norma*—the steamship—to be alone to blame for the collision. From this judgment the owners of the *Norma* have appealed to this court. The collision occurred in the river St. Lawrence, between ten and eleven o'clock of the night of the 11th August 1874, five or six miles from a place called Bic. The *James Seed*, a three-masted schooner of 156 tons, with a crew of eight hands, and a pilot, was going down, and the *Norma*, a steamship of 653 tons, with a crew of twenty hands and a pilot, was coming up the river; the two vessels were approaching each other, not exactly, but within about a point, on opposite courses. Both vessels had their proper regulation lights. The weather was fine and clear; it was a starlight night, and there was a moderate breeze

from the south-west under the influence of which the schooner was approaching Bic—having previously taken in her foresail—at the rate of about four knots through the water. At a distance of about five miles from the Bicquette light, the pilot on board the schooner saw through his glass the masthead light, and the red light of the steamer about two miles off and about a point on his starboard bow. At the same distance the "look-out" on board the steamer reported a bright light ahead on her port bow. The schooner, under the pilot's orders, ported enough to bring the steamer's bright and red lights a little on her port bow; her helm was then steadied, and she kept her course until within half a mile of the steamer, when the three lights of that vessel came in sight; the schooner's helm was then ported and hard-aported, and the steamer was hailed to port; she did not do so, and struck with her stem and starboard bow the schooner's port bow so severe a blow that she sank directly, and five of her crew were unhappily drowned. To return to the steamer, the bright light which had been reported a little on her port bow proved, as the vessels approached each other, to be a green light; the steamer continued her course at a speed of seven knots an hour for some minutes, when, at a distance of about half a mile, her pilot gave the order to starboard and the collision took place in the way described.

The contention of the respondents (the plaintiffs in the court below) was that the collision was caused by the starboarding and the continuance of the speed of the steamer. The contention on the part of the appellants (the defendants in the court below) was that the collision was caused by the porting of the schooner.

The learned judge was assisted by nautical assessors, to whom he submitted various questions; their answer to which was, in substance, that the steamer should have stopped and reversed full speed instead of starboarding, and that the schooner followed what they called the rule of the road in porting her helm, and therefore was not to blame. The learned judge unfortunately adopted this latter premiss, and, as he supposed, supported it by reference to certain articles of the Regulations for preventing Collisions at Sea. He cited Article 15, which is: "If two ships, one of which is a sailing ship and the other a steam ship, are proceeding in such directions as to invoke risk of collision, the steam ship shall keep out of the way of the sailing ship;" and Article 16, which says that, "every steam ship, when approaching another ship so as to involve risk of collision shall slacken her speed, or, if necessary, stop and reverse." The learned judge omitted to notice the 18th Article, which, so far as it concerns the present case, is, "where by the above rules one of two ships is to keep out of the way, the other shall keep her course." It is an entire mistake as to the existing law to suppose that it is the duty of a sailing vessel when meeting a steamer to port her helm; it is her duty to keep her course. And if the conclusion at which the learned judge arrived could only be supported by adopting the grounds upon which he appears mainly to have founded it, it would be the duty of their Lordships to recommend Her Majesty to reverse the sentence; but their Lordships are of opinion in this case that though the reasoning is partially incorrect, the conclusion is, on the whole, right. Their Lordships, after conference with their nautical assessors, are of opinion, on the one hand, that the first porting of her helm by the schooner was, at the least, having regard to the distance and the degree, an innocent manœuvre; and, on the other hand, that it is not proved that the schooner's red light was seen on board the steamer. But their Lordships are clearly of opinion that the steamer is to blame for having approached too close to the schooner before she altered her helm; that she did wrong in continuing up to so late a period the position of danger and embarrassment which exists when the green light on one vessel is opposed to the red light on another. The steamer came so close that she had not time to go off more than a point and a half under her starboard helm. The nautical assessors think that if she had starboarded a quarter of a mile off she would have cleared the schooner; and with regard to the second porting of the schooner almost in the moment of collision, they think that in the circumstances it was the best manœuvre she could have adopted.

Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the court below, and to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the appellant, *Thos. Cooper.*

Solicitors for the respondent, *Waltons, Bubb,* and *Walton.*

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

June 15 *and* 20, 1876.

(Before the LORD CHANCELLOR (Cairns), Lords CHELMSFORD, PENZANCE, and O'HAGAN.)

PEARSON *v.* THE COMMERCIAL ASSURANCE COMPANY.

ERROR FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Ship—Fire policy—Construction—Localization of policy.

A ship belonging to the appellant was insured against fire with the respondents by a time policy. In the policy the ship was described as "lying in the Victoria Docks, London, with liberty to go into dry dock." The ship went into dry dock, and after leaving the dry dock was moored for some time in the river in order that certain repairs might be done which were usually done in the river, but might have been done, though at a greater cost, in the Victoria Docks. While so moored the ship was completely destroyed by fire. Held (affirming the judgment of the court below), that the loss was not covered by the policy.

THE plaintiff had effected a policy of insurance against fire with the defendants on the steamship *Indian Empire* for three months from May 14th, 1862. The ship was described in the policy as "lying in the Victoria Docks, London, with liberty to go into dry dock, and light the boiler fires once or twice during the currency of the policy." The *Indian Empire* was a paddle steamer of very large size, of 2000 tons, 249ft. long, and 60ft. beam, and it was found that the only dry dock in the Thames capable of receiving a ship of that size was Lungley's dry dock at Deptford, two miles higher up the river than the Victoria Docks, and to enter this dock it was necessary to

remove the lower part of the paddle wheels. This was done in the Victoria Docks, and the ship was towed up to Lungley's Dock, and after the repairs there were finished, she was towed down the river again to a point 600yds. or 700yds. from the entrance to the Victoria Docks, and moored there, in order that the halves of the paddle wheels might be replaced. While so moored she was burnt. The present action was brought on the policy. It was proved that it was usual to replace the paddles in such cases outside the docks, but that it might have been done inside at a much greater expense. The utmost despatch was used in replacing the paddles and the work was not quite finished when the fire happened. Evidence was given at the trial that great precautions were in force within the Victoria Docks to prevent accidents by fire.

The cause was tried before Erle, C.J., at the sittings in London after Trinity Term 1863, when the jury found a verdict for the plaintiff for the full amount claimed, 10,000*l*.

This verdict was set aside by the Court of Common Pleas (Erle, C.J., Williams, and Keating, JJ.) as reported in 33 L. J. 85, C. P.; 9 L. T. Rep. N.S. 442; 1 Mar. Law Cas. O. S. 401, on the ground that on the true construction of the policy the ship was not covered at the time of the loss; and in June 1873 this decision was affirmed by the Court of Exchequer Chamber (Kelly, C.B., Martin and Cleasby, BB., Blackburn, Quain, and Archibald, JJ.) as reported in *ante*, vol. 2, p. 100; L. Rep. 8 C. P. 548, and 29 L. T. Rep. N.S. 279.

From this judgment error was brought to the House of Lords.

Watkin Williams, Q.C. and *Lanyon*, for the plaintiff in error, argued that the ship was covered by the policy up to the 14th Aug., and that the "liberty" given by the policy must be taken to mean liberty to do what was usual under the circumstances, not only what was strictly necessary, and that underwriters are bound to know the circumstances of the trade to which their policy relates. They cited

Noble v. *Kennoway*, Doug. 492;
Bouillon v. *Lupton*, 15 C. B., N. S., 113; 33 L. J. 37, C. P.;
Pelly v. *Royal Exchange Association Company*, 1 Burr. 341;
Bond v. *Gonsales*, 2 Salk. 445;
Vallance v. *Dewar*. 1 Camp. 503;
Moxon v. *Atkins*, 3 Camp. 200;
Lindsay v. *Janson*, 4 H. & N. 699;
Newman v. *Cazalet*, Park on Ins. 900;
Long v. *Allen*, Ibid. 797;
Salvador v. *Hopkins*, 3 Burr. 1707;

And the following American authorities:

Webb v. *National Fire Insurance Company*, 2 Sand. N. Y. 497;
Fitchburg Railway Company, v. *Charlestown Insurance Company*, 7 Gray, Mass. 64;

and also Phillips on Insurance, vol. 1, p. 489.

Cohen, Q.C., *J. C. Mathew* (*Benjamin*, Q.C., with them), for the defendants in error, maintained that this was a localised fire policy, and that the analogy of voyage policies was false. The risk must be clearly present to the minds of both parties: (See *Rodocanachi* v. *Elliott*, 2 Asp. Mar. Law Cas. 21, p. 399; 28 L. T. Rep. N. S. 840; 31 *ib.*, 239.) The policy only covered what was necessary for the transit to and from the dry dock. Usage may be resorted to for the purpose of explaining the terms of a policy, but not in express disregard of them; the risk must not be altered.

Watkin Williams, Q.C., in reply.

June 20.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—My Lords, the insurance in this case was an insurance against fire, effected by the appellants with the respondents on a large paddle-steamer called the *Indian Empire*, which so long ago as the year 1862 the appellant was proceeding to have repaired in the port of London.

The policy is a time policy for three months, from 14th May 1862 till 14th Aug. 1862. The insurance, however, does not protect the ship wherever it might be, or wherever it might be in the port of London. The ship is confined and localised for the purpose of the risk by these words, "lying in the Victoria Docks, London, with liberty to go into dry dock, and light the boiler fires once or twice during the currency of this policy."

The ship is, therefore, covered by the policy during the three months so long as it is lying in the Victoria docks, and so long as it is in a dry dock, or at all events in a dry dock in the port of London. Nothing is expressly said as to the insurance attaching while the ship goes from the Victoria Dock into dry dock, but the court below have held, and as it appears to me rightly held, that the liberty to go into dry dock necessarily carries with it the protection of the insurance while the ship should be in transit from the Victoria Docks to the dry dock and back again.

I think, further, there can be no doubt that in the transit to and from the dry dock the ship would be at liberty to do anything and everything usual under the circumstances for the accomplishment of the end in view, namely, the transit to and from the dry dock. Any delay usual under the circumstances, any deviation usually or conveniently made from the straight line, provided the delay and deviation are connected with, and tend to the attainment of the end in view, would in my opinion be justifiable under the words of the policy which I have read. A delay or deviation of this kind would fairly come within the words of Lord Mansfield in the case of *Pelly* v. *The Royal Exchange Assurance (ubi sup.)* "It is absurd to suppose that when the end is assured the usual means of attaining it are meant to be excluded." If on the other hand a delay in the transit to or from the dry docks were to occur, not as part of the usual and ordinary means or mode of effecting the transit, but for some collateral object or purpose, then, in my opinion, however usual and convenient a delay for the purpose of attaining that collateral object might be, the ship would not, during the delay, be covered by the policy.

It is unnecessary to speculate whether the risk would or would not be greater when the ship was in the river than when it was in the dock. There is, as it seems to me, evidence that the risk would be greater in the former case than in the latter, but it is sufficient to say that the respondents have defined the risk which they were willing to undertake, and that risk cannot be enlarged beyond the ordinary meaning of the words upon any theory that the difference of risk is immaterial.

Applying these observations to the facts of the

present case, your lordships find that the dock called "Lungley's Dry Dock" was the only dry dock in the Thames which could take in the *Indian Empire*, and that even into this dock the ship could not be received without taking off the lower half of the paddle-wheels. Accordingly the lower halves of the paddle-wheels were taken off in the Victoria Docks, and having thus been made ready for the dry dock, it was towed two miles up the Thames from the Victoria Docks to Lungley's Dry Dock, and the repairs were proceeded with, and, so far as they were to be done in the dry dock, were completed there.

The ship was then taken out of the dry dock, and it being intended to take her back to the Victoria Docks, there was nothing to prevent her being taken back there at once, and the halves of the paddle-wheels might have been replaced, just as they had been removed, in that dock. In place, however, of being towed back to the Victoria Docks, it was towed still further up the river, and moored there; the paddle-wheels were brought from the Victoria Docks in a barge, and the work of replacing them was proceeded with in the river. While this was being done the repairs to the masts, riggings, and capstans of the ship, and other carpenters and joiners' work, were continued at the same time, and at the end of ten days, before the paddles were completely replaced, the ship was burnt.

It is found by the case that it is usual after a ship whose paddles have been removed is taken out of dry dock to moor it in the river, for the purpose of replacing the paddles. And it is also found that though the paddles could have been replaced equally well in the Victoria Docks, it would have cost four times as much as if done in the river. My Lords, I am clearly of opinion that the delay which was thus occasioned was a delay for a purpose altogether collateral. When the ship left the dry dock the course, if it was wished to maintain the insurance, was to bring her back to the Victoria Docks; and I assume that anything done in the usual course towards the attainment of this end would be within the insurance. But that which was done did not in any way contribute to that end. It may have been usual, and because it was economical it may have been convenient, but it did not in any way facilitate or conduce to the transit of the ship to the docks from which it had come.

My Lords, it was the unanimous opinion of the Courts of Common Pleas and Exchequer Chamber that the respondents, in the events which have happened, were not liable under this policy for the loss which occurred. I think there is no ground whatever for differing from their judgment, and I propose to your lordships that this appeal should be dismissed with costs.

Lord CHELMSFORD.—My Lords, from the moment this case was fully opened it seemed to me impossible to doubt the propriety of the judgment in which no fewer than ten judges agreed. I can see no ground for the statement which was made to us on the part of the appellant, that the true point of the case was never submitted to the court. Everything which was urged in argument before us appears to me to have been brought under the consideration both of the Court of Common Pleas and of the Exchequer Chamber.

The question turns entirely on the construction of the policy, which is a localised time policy against fire upon the steamship *Indian Empire*, lying in the Victoria Docks, London, with "liberty to go into any dry dock." The place to which the insurance principally applies is the Victoria Docks. This place the vessel is to be at liberty to leave only for the purpose of going into a dry dock for repairs. That object being satisfied, the policy seems to require that it should return without delay to its original situation, and be again "lying in the Victoria Docks." Of course the policy impliedly covers the permitted transit to and from one dock to the other. But if the parties contemplated, as it is clear they did, that during the currency of the policy the vessel would be usually lying in the Victoria Docks, when the intended repairs in the dry dock were completed it was the duty of the assured to return without delay to the Victoria Docks. Instead of doing so the ship was towed to a part of the river about 600yds. or 700yds. from the Victoria Docks, and there moored for ten days, during which time it was while so moored totally destroyed by fire. The loss, therefore, did not occur in the actual passing from the dry dock to the Victoria Docks.

But it is said for the appellant that according to the usual course of proceeding in the repair of steam vessels of the size of the one in question, the mooring in the Thames for the purpose of replacing the half of her paddle-wheels must be regarded either as a necessary incident to the transit from the dry dock, or must be taken to have been intended to be included in the policy.

But it seems to me that the precise terms of the policy afford no ground for such an argument. An insurance against fire necessarily has regard to the locality of the subject-matter of the policy, the risk being probably different according to the place where the subject of the insurance happens to be. In the present case it appears that there was greater risk where the loss happened than there would have been in the Victoria Docks, to which place the policy principally applied.

The parties cannot be said to have contracted with reference to the usual practice of large paddle steamers going into dry dock to remove a portion of their paddle-wheels, because it is stated in the special case that neither party knew that the vessel was of a width too great to admit of its entering the dock adjoining the Victoria Docks, where it would be expected it would go under the liberty to go into dry dock. And therefore the argument of the appellant must go the length of asserting that as it was an implied term of the policy that if it should be necessary to remove a portion of the paddle-wheels for the purpose of enabling the vessel to enter the dry dock, its return to the Victoria Docks might be delayed during the mooring in the Thames for any time that was required to complete the work of replacing the wheels.

But I agree with what was said by Blackburn, J., in the Exchequer Chamber, that if the parties wished to cover the risk of the ship while so moored, they should have provided for it by appropriate words in the policy. Whether the underwriters would have undertaken this risk it is impossible to say; as they were not aware that it would arise, there was of course no provision applicable to it.

It would be a strong implication to raise against the underwriters, that they necessarily contracted by the policy to extend the locality to which the insurance against fire was expressly confined, upon the ground of a usual practice of dealing with large steam vessels under repair, which they did not know would have to be resorted to on the part of the assured. More especially is this the case when it appears that the whole work upon the paddle wheels might have been done in the Victoria Docks. In fact the halves of the wheels were taken off in the Victoria Docks, and it is stated in the special case that the work of replacing them might have been equally well done in those docks, but that it would have cost four times as much as if done in the river; a very good reason for the assured running the risk of performing the work beyond the limits of the policy, but no reason at all for imposing upon the underwriters, by implication, an undertaking to accept a risk different and more extensive than that to which they expressly agreed to be liable. The policy only attached while the vessel was in the Victoria Docks or the dry dock, or was passing directly to and from one dock to the other. It therefore did not extend to the time the ship was moored in the Thames, and the underwriters are not liable for the loss which then occurred.

I am therefore of opinion that the judgment appealed from is right, and must be affirmed.

Lord PENZANCE.—My Lords, the protection intended to be given by this policy was limited expressly not only to a period of three months, but to a particular place, the Victoria Docks, in which the vessel was to lie. When lost it was not lying in that place, but was moored in the river, and the only question is whether, at the time of the loss, being moored in the river was a circumstance within the special liberty which had been reserved to the owner in the policy under the words "with liberty to go into dry dock."

The Court of Common Pleas held, as it seems to me very properly, that this liberty was not confined to any particular dry dock, and that the plaintiff might take the vessel to any convenient dry dock without losing the protection of the policy. The vessel therefore was justified within the limits of the liberty in proceeding to Lungley's Dry Dock, two miles away from the Victoria Docks, in which it was to lie, but it is contended that these limits were exceeded in the course taken with the vessel on its returning from the dry dock.

In construing the meaning and extent of this liberty, I think great latitude should be allowed. To state at length in writing all that the vessel might be intended to be allowed to do in going to the dry dock, in lying there while being repaired, and then returning, the length of time to be occupied, and all that was to be done in various alternative events, would be the work of a lawyer, and a work that could not be comprised in any but a very lengthy document. The convenience of mercantile transactions makes this impossible in many cases, and in this mercantile contract of insurance especially, it is always the custom to express the mutual bargain in short and convenient terms.

In construing such terms it is always to be borne in mind that the object of insurance is indemnity from the risks attending some commercial adventure or operation which the owner of the subject of insurance is engaged upon; and it is well understood by both parties that the desire and object of the assured is that the policy should extend to all such risks of the character insured against, as may arise by the adventure or operation being carried out in the usual and ordinary manner. The assured therefore is not intended to be bound to make his mode of carrying out the adventure conform to the words of the policy rigidly construed and confined to what is absolutely necessary, but the general words of the policy are intended to be construed so as to conform to the usual and ordinary method of pursuing his adventure.

This, as I understand it, is the principal pervading the cases on voyage policies which have been cited; they are all instances of a policy being extended to cover proceedings which were usual and ordinary in the course of performing the voyage assured, though the exact words of the policy did not extend to them, or were even adverse to them. To the extent, therefore, of the principle involved in these cases, I think they are applicable to the present case, although I do not think that this "liberty to go into dry dock" can be said to have all the incidents of a voyage policy.

It follows from this that the vessel in proceeding to Lungley's Dry Dock, in being repaired there, and in returning to the Victoria Docks, would be protected so long as it was engaged in doing not merely what was necessary, but what was ordinary and usual for these purposes. If, for instance, it was usual, though not necessary, to take off part of the paddle wheels, as is admitted to have been the case here before entering the dry dock; and further, if, in order to do that, it had been usual for the vessel to lie a certain time in the river outside the dock while it was being done, I should have thought that the vessel would have been protected in doing so, because it was taking the usual course for the purpose of going into dock and being repaired. But when the repairs were completed, or so far completed as they were intended to be in the dry dock, and the vessel was brought out of that dock again, all that remained to be done within the liberty contained in the policy was to return to the Victoria Docks. And here, again, if it had been usual to wait a tide in the river, or perform the passage in any particular way, thereby encountering a delay which was usual but not necessary, and the vessel had done so, I should still have thought that it would have been protected.

But what the vessel really did was to abandon for the time, returning to the Victoria Docks, and remaining for some days in the river for the purpose of a certain repair, namely, the putting on of the half paddle wheels which had been taken off, a purpose which had no connection with returning to the Victoria Docks, and was in no way even ancillary to getting there. It is admitted that it is usual for shipowners to have this species of work done in the river instead of in a dock, because it is cheaper; but it cannot be said that a delay for that purpose was within the usual course of vessels moving from one dock to the other.

It appears to me, therefore, that the delay in the river, during which the vessel was burnt, was created for a purpose apart from, and independent of, the liberty to go into dry dock, to be repaired there, and then to return, which had been conceded to the assured in the

policy, and that the protection of the policy was consequently lost.

Lord O'HAGAN.—My Lords, I am of the same opinion.

The question is one of construction, and we must endeavour to ascertain from its terms the intentions of the parties to the policy of insurance upon this steamship, the *Indian Empire*. The facts are undisputed, and the words of the policy, if they are literally taken, import merely a contract to insure the ship for a period of three months against loss by fire whilst lying in the Victoria Docks, and whilst going into dry dock, according to the liberty specifically granted for that purpose. This is all that the words expressly convey, but I quite concur with the counsel for the appellant that they imply a liberty to return from the dry dock, and are an undertaking to insure during the transit back again. The real matter for decision is whether the ship when burnt was returning to the Victoria Docks, within the implied meaning of the policy, and according to the true contract of the parties.

Now it is found in the case that the vessel, having been taken out of the dry dock, was "towed up the river to the Government buoy off Deptford, about six or seven hundred yards off the Victoria Docks, and altogether out of the course from Lungley's Dock to the Victoria Docks, and there moored, for the purpose of having the lower parts of the paddle wheels replaced." So that we find the vessel removed to the place at which it was destroyed by a course altogether different from that to the Victoria Docks, and for a purpose wholly alien from that of returning thither. I feel it impossible to hold that in such circumstances it was covered by a policy which, even assuming that the doubt of one of the ablest judges of England (Blackburn, J.), whether the vessel was insured while passing from the dry dock to the Victoria Docks, should be, as I think it should be, disregarded, only assured the vessel during that passage. It had made, as I have said, a totally different passage, with a totally different object. I do not think the policy was ever designed to insure the ship in a condition of facts which it does not profess to contemplate, and which the parties to it could not have foreseen.

It is said that such contracts should be construed liberally, and for the interests of commerce; this view has not improperly been entertained in certain cases. But it can never justify indifference to the real purpose of a policy, or warrant the recognition of an obligation which was not directly, or by reasonable implication, imposed by its terms, when those terms are fairly interpreted according to their natural and ordinary meaning. Here the parties were vigilant to specify the risks they undertook, by providing for "liberty to go into dry dock, and light the boiler fires once or twice during the currency of the policy;" and we, in my opinion, are not free to add another material condition to their contract, and say that this carefully limited liberty could authorise the taking of the vessel wholly out of the course of passage to the dry dock and back again, with the manifest increase of danger of her destruction. The case, by setting forth the precautions taken in the Victoria docks to prevent or extinguish fires, shows the nature of this increase very clearly. Watchmen at all hours, policemen and other persons trained to the use of fire engines, and carpenters ready to scuttle ships on fire, with an ample supply of water, diminished the risks of fire in the Victoria Docks; while in the river those appliances were wanting, and in the particular case of the *Indian Empire* nearly an hour elapsed between the breaking out of the fire and the arrival of one of the three floating engines placed at considerable distances from each other, and alone available to control the conflagration, which probably from that delay resulted in the loss of the ship. Without discussing the question of the admissibility of evidence on the one side or the other, these facts are persuasive to show that the effect of the policy, according to the view of the appellant, must have been to burden the respondents with a liability for risks far more serious than those for which they would have had to answer on their own construction of it; and it is to my mind quite plain that when it was framed such larger risks were not in contemplation of either insurer or insured. Neither of them knew that the width of the *Indian Empire* was too great to allow it to go into the graving dock, which was close to the Victoria Docks, and both of them had in view the prompt passage to the "Thames Graving Dock," by pontoons and hydraulic pressure, which, if they could have been applied, would have obviated the necessity of taking off the lower half of the paddle wheels, and removing the ship to "Lungley's Dry Dock," and would have prevented the unfortunate transfer up the river to the place at which it was burned. They expected a prompt, quick, and safe exercise of the privilege of going into dry dock, and we may assume that the premium was arranged accordingly.

Can we say that if the size of the vessel, and the effect of that in inducing removal first to a distant dry dock, and then to an unguarded portion of the river, far from the Victoria Docks had been known, a heavier rate would not more properly have protected the insurer? He might not have accepted the risk at all, or he might have accepted it on terms more favourable to himself, and more onerous to the assured.

And on this point we should remember that the vessel might have been brought back immediately and directly to the Victoria Docks, and refitted there with an avoidance of the greater perils to which I have adverted; but that the appellant deviated from this proper course, took the ship to a place of danger, and delayed it long upon the river, not from any necessity or difficulty in doing otherwise, but simply to save himself the fourfold expense which would have been incurred by an immediate return to the safer Victoria Docks. If he chose to act in this way, and solely for his own apparent advantage, it does not seem unreasonable that the resulting loss should fall on him, rather than on the insurers, who never contracted to sustain it under such circumstances.

The authorities on the subject of usage have been already sufficiently discussed. They do not appear to me to apply to the circumstances before us. The analogy of voyage policies is not a true one, and we must deal with this case according to the contract of the parties. It may be right and reasonable that a usage known to exist, which affects directly the progress of a voyage, or the dealing with a mercantile venture, should be held to be contemplated by insurers, and to regulate more or less their liabilities; but

it must be a usage not collateral to, and unconnected with the voyage which is the subject of insurance. Here the custom of merchants to save money by refitting a ship in the river rather than in the docks had nothing to do with the specific contract of the insurer to cover a vessel in the Victoria Docks, in the dry dock, and in the passage from one to the other; he did not cover it in a place different from any of these, to which it had been taken by the insured's own option, and for his own interest. I think, therefore, that the appeal should be dismissed.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Tatham, Oblein,* and *Nash.*

Solicitors for the respondents, *Hollams, Son,* and *Coward.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS and CYRIL DODD, Esqs., Barristers-at-Law.

Feb. 10 *and* 21, *and June* 14, 1876.

KEITH AND ANOTHER *v.* BURROWS AND ANOTHER.

Mortgage of ship—Omission to register—Rights of mortgagee as against assignee of freight.

A mortgage of a ship transfers the ownership, so far as to entitle the mortgagee to the whole of the mortgagor's interest as security for his money.

The only effect of the omission to register a mortgage of a ship is to postpone it to a subsequently registered mortgage.

A mortgagee of the ship is entitled to freight as against an assignee of freight by an assignment made after the mortgage, but before its registration.

A ship was mortgaged to plaintiffs. Afterwards defendants advanced money on the security of the cargo without notice of plaintiffs' mortgage. Defendants and the mortgagor then sold the cargo to J., on the terms that 55*s. a ton freight should be paid. An assignment of freight was made to defendants as security for their advances. The ship was then mortgaged to H., who registered his mortgage. Afterwards plaintiffs registered their mortgage. Defendants, by arrangement, acquired J.'s rights. H. and plaintiffs took possession; H., being satisfied with the ship as security, made no claim to freight.*

Held, that plaintiffs were entitled to the freight of 55*s. a ton as against defendants, notwithstanding their omission to register their mortgage.*

THIS was a special case stated for the opinion of the court in an action brought by the plaintiffs as mortgagees of the ship *Stonehouse,* to recover money alleged to be due to them from the defendants in respect of freight.

1. The plaintiffs are merchants, carrying on business under the style or firm of James Wyllie and Co., in London. The defendants are corn-factors and brokers, carrying on business under the style or firm of Burrows and Perks, in London. The action is brought by the plaintiffs, who claim as mortgagees in possession of the ship *Stonehouse,* to recover moneys alleged to have become due and payable in respect of freight from the defendants under the circumstances hereinafter appearing.

2. Mr. John Morison, of Billiter-street, trading under the style or firm of John Morison and Co., was, during the period covered by this case, the registered owner of 60-64ths of the *Stonehouse,* Mr. Bley, the captain, being the registered owner of the remaining 4-64ths.

3. On the 1st Dec. 1874, Morison executed a mortgage of his 60-64ths of the ship in favour of the plaintiffs to secure 7500*l.* and interest in account current, and any further sum which might become due.

4. The *Stonehouse* was at this time at San Francisco seeking employment, and the freight market being disorganised owing to a recent commercial failure, her captain, Bley, determined, rather than accept the low offers of freight which were being made in the thick of the crisis, to load a cargo of wheat "on account of the ship," hoping by its sale in England to realise a better margin than what was available as freight at the port of loading.

5. Accordingly, a cargo of 23,644 sacks of wheat (being the cargo in respect of which the present claim arises), was obtained through Messrs. Parrott and Co., merchants at San Franscisco, and shipped on board the *Stonehouse.* The invoice, dated the 2nd Dec. 1874, stated that the wheat was shipped by Parrott and Co. on board the *Stonehouse,* bound to Falmouth or Downs for orders, consigned to order, that is, to the order of Parrott and Co. (they thus keeping control over the cargo until the money found by them for the purchase thereof should be paid), by order of John Morison and Co. for account and risk of whom it may concern.

6. Bills of lading were made out for the wheat, deliverable to the order of, and were handed to Parrott and Co., stating the freight payable on delivery to be 1*s.* per ton. Parrott and Co. simultaneously drew bills of exchange on Morison at sixty days' sight against the wheat, to recoup themselves for the price of the wheat, and their commission, and sold the bills of exchange with three bills of lading, indorsed by Parrott and Co., attached thereto, to the Bank of British North America.

7. It is a common practice in many places for foreign shippers, when a cargo is to be shipped "for the account of the ship," to draw bills of lading for a nominal instead of a blank freight, there being an opinion among merchants that a blank freight is not a desirable thing.

8. On or about the 3rd Dec. 1874, the *Stonehouse* sailed from San Francisco. The rate of freight general at this date at San Francisco was only 55*s.* per ton; but the plaintiffs were informed by Morison that they would receive 5000*l.* to 6000*l.* for the freight of the *Stonehouse.* The defendants, however, did not know that Morison had given the plaintiffs any information on the subject, or that they had any interest in the ship.

9. On the 21st Dec. 1874, Morison accepted the bills of exchange payable at the London and County Bank on the 22nd Feb. 1875.

10. On the 1st Jan. 1875, Morison effected two policies of insurance in respect of the *Stonehouse*, or freight valued at 4000*l.* and 1000*l.* respectively.

11. The sum necessary to meet the bills of exchange at maturity was 10,364*l.* 19*s.* 4*d.*; and at some time in Dec. or the beginning of Jan., it had been arranged between Morison and the defendants that the defendants should advance to Morison the moneys necessary for the purpose, that the defendants in return should be at liberty to sell the cargo and receive the proceeds of sale on Morison's account, and that the bills of lading and policies of insurance should be deposited with the defendants as security for their advances.

12. Before making and carrying out this arrangement with Morison, the defendants searched the ship's register at the Custom House, and found that 60-64ths were registered in Morison's name, and that there was no encumbrance whatever on the register. The defendants had no notice in any way that Morison had mortgaged his shares in the *Stonehouse*.

13. On the 4th Jan. 1875 the defendants advanced to Morison 3000*l.*, and shortly afterwards, in pursuance of the arrangements then made, received from him the former of the two policies, being the policy on freight valued at 4000*l.*

14. On the 2nd Feb. 1875 Morison executed another mortgage in similar terms of his interest in the ship to the plaintiffs, to secure 4000*l.* and further advances Morison subsequently, on the 2nd March 1875, further mortgaged his interest in the *Stonehouse* to Joseph Harrold, who registered his mortgage on the 3rd March 1875, and thus became the first mortgagee, the plaintiffs not having registered their mortgages until the 6th March 1875, as hereinafter mentioned.

15. On or about the 16th Feb. 1875 the defendants offered the cargo of wheat for sale to divers persons on cost freight and insurance terms, but did not succeed in obtaining a purchaser until on the 19th Feb. they effected a sale of the cargo on the terms hereinafter appearing.

16. On the 19th Feb. 1875 the defendants, on behalf of Morison, and on their own account to the extent of their advances, sold the cargo to Henry Jump and Sons, of Liverpool. The following is a copy of the contract signed by Harris Brothers and Co., brokers, on behalf of the buyers:

London, 19th Feb. 1875.

Bought of Messrs. John Morison and Co., through Messrs. Burrows and Perks, for Messrs. Henry Jump and Sons, Liverpool, a cargo of Californian wheat of fair average quality of the season's shipments when shipped.

Shipped per *Stonehouse*, first class, from San Francisco, bill of lading dated about 2nd Dec. 1874, say 23,644 bags, containing 3,089,775lb., at the price of 43s. 6d. per quarter of 500lb., shipped, bags weighed and paid for as wheat, including freight and insurance to any safe port of the United Kingdom of Great Britain and Ireland, calling at Falmouth or the Downs for orders. Vessel to discharge afloat. No charge for damage or bags. Payment, cash in London within seven days, less discount for unexpired portion of two months from this date at 5 per cent. per annum in exchange for bill of lading and policies of insurance (free of war risk) effected with approved underwriters, but for whose solvency sellers are not responsible. Damage by sea, water, or otherwise (if any) to be taken as sound. Invoice quantity is to be final. Sellers to have our brokerage of half per cent. contract cancelled or not cancelled. Any average incurred before this date to be for account of and settled by sellers. Sellers to give policies of insurance for 2 per cent. over the invoice amount, including the half per cent., and any amount over this to be for seller's account; three days for awaiting orders at port of call. To discharge according to the custom of the port. Should any dispute arise, it is agreed by buyer and seller to leave the same to be settled by two London cornfactors respectively chosen, with power to call in an umpire, whose decision is to be final. As cargo is coming on ship's account, freight is to be computed at 55s. per ton of 2240lb., and invoice to be rendered accordingly.

HARRIS BROTHERS AND CO. Brokers.

17. The defendants would have had a difficulty in disposing of the cargo without allowing an amount equivalent to freight to remain unpaid until the vessel's arrival, and would not have obtained so large a price for it.

18. In accordance with the above contract an invoice was subsequently made out by Morison, of which the following is a copy:

Invoice of cargo of wheat, per *Stonehouse*, of San Francisco, sold to Messrs. Henry Jump and Sons, of Liverpool, as per contract of 19th Feb. 1875.

23,644 sacks of wheat, weighing 3,089,775lb.

	£	s.	d.
6179$\frac{275}{500}$qrs., at 43s. 6d. per 500lb.	13,440	10	5
Freight on tons, 1379 7 1, 55s. per 2240lb.	3,792	5	0
	£9,647	5	5
Brokerage, ½ per cent.	67	4	0
	£9,580	1	5
Interest from 26th Feb. to 19th April, 52 days, at 5*s.*	68	4	10
	£9,511	16	7

BURROWS AND PERKS.

London, 22nd Feb. 1875.

19. On the 22nd Feb. 1875, Morison obtained a further advance from the defendants of 9000*l.*, making with the sum of 3000*l.* previously advanced, the sum of 12,000*l.* With such advance he paid the said bills of exchange at maturity, and received the bills of exchange and the bills of lading thereto attached from the London and County Bank, as arranged with the defendants.

20. On the 23rd Feb. 1875, in pursuance of such last-mentioned arrangement. Morison handed the bills of exchange, with the three bills of lading attached, to the defendants, and the following memorandum was endorsed on the bills of lading, and signed by Morison:—

We assign our interest in the within freight to Messrs. Burrows and Perks, London, whose receipt or that of their appointed agents, will be sufficient discharge.

The freight assigned is at the rate of 55*s.* per ton, and not the nominal amount of 1*s.* per ton.

J. MORISON AND CO.
24/2 75.

Such indorsement, although dated the 24th Feb. 1875, was not really made and signed until about the 26th Feb.

21. At the same time Morison handed to the defendants the aforesaid invoice, made out in pursuance of the contract with Messrs. H. Jump and Sons for transmission to the buyers, together with a letter to the defendants themselves, dated the 25th Feb. 1875, and enclosing the policies therein referred to, which was as follows:—

21, Billiter street, 25th Feb. 1875.

Messrs. Burrows and Perks—

Dear Sirs,—We further give you, in security, policy of insurance on wheat 1500*l.*, and on freight 1000*l.*, both in the *Stonehouse*. Should this vessel be lost we trust you will give us the collection on them, as well as on the former policies. J. MORISON AND CO.

Both of the above policies are in the Marine Insurance Company.

22. The invoice was duly forwarded by the de-

fendants to H. Jump and Sons, who thereupon paid the balance thereon appearing of 9511*l.* 16*s.* 7*d.*, in pursuance of their contract. The cargo was subsequently resold by Jump and Sons to Ross F. Smyth and Co., of Liverpool.

23. On the 6th March 1875, the plaintiffs duly registered their mortgages.

24. On the 13th April 1875, the *Stonehouse* arrived at Falmouth for orders. She was then taken possession of by Mr. Harrold and the plaintiffs, as first and second mortgagees respectively. Mr. Harrold's debt being more than secured by the ship he had no claim to the freight. The *Stonehouse* proceeded in the possession of Harrold and the plaintiffs to Liverpool, where she arrived on the 19th April 1875, on which day Messrs. Lowless and Co, on behalf of the defendants, wrote a letter to the plaintiff's attorney, Messrs. Freshfields and Williams, as follows:—

Dear Sirs,—We have a telegram that this vessel (*Stonehouse*) is now off the port, and that the market is a falling one. Should there, therefore, be any difficulty in obtaining delivery, the purchasers may repudiate their bargain, and a loss of 1000*l.* might easily be sustained, in addition to the charges for landing and warehousing. Will you, therefore, please let us have your determination instantly. We are obliged to give you notice that our clients will seek to recover all damages sustained from Messrs. Wyllie and Co., and we have given you special notice of the circumstances, in order that our clients may be entitled to recover. We hope, however, that there will be no necessity for this.—LOWLESS & Co.

25. The plaintiffs refused to allow Messrs. Ross F. Smythe and Co. to take delivery of the cargo, except on payment of freight at 55*s.* per ton, and were prepared to protect themselves in the manner in the Merchant Shipping Amendment Act 1862; but to avoid such detention of the cargo, and the deterioration and expenses which would have been the result of it, the following agreement was made between the plaintiff and the defendants through their respective attorneys.

It is hereby agreed between Messrs. Freshfields and Williams, as representing Messrs. James Wyllie and Co., and Messrs. Lowless and Co., as representing Messrs. Burrows and Perks, that 3500*l.*, being the amount of freight on the cargo of the ship *Stonehouse*, claimed by Messrs. James Wyllie and Co, as second mortgagees in possession of the *Stonehouse*, shall be paid into the London and Westminster Bank in the joint names of Messrs. Freshfields and Williams and Messrs. Lowless and Co. to abide the result of an action to be brought by Messrs. James Wyllie and Co. against Messrs. Burrows and Perks, who hereby admit, for the purposes of the action, that they are the owners of the cargo under the bill of lading thereof, and liable to pay whatever freight may be due thereon. The action to be commenced within thirty days from this date, and duly prosecuted. In the event of no action being brought within the time aforesaid, or of Messrs. James Wyllie and Co. not obtaining a verdict in the said action, the amount so deposited, with any interest thereon, is to be paid to Messrs. Burrows and Perks or order; and, in the event of Messrs. James Wyllie and Co. recovering a verdict for the said sum of 3500*l.*, or any part thereof, the amount of such verdict is to be paid to them or order out of the sum deposited, and the balance (if any) to Messrs. Burrows and Perks or order.

It is admitted, for the purposes of the said action, that the amount of freight specified in the bill or bills of lading has been tendered, Messrs. James Wyllie and Co. to withdraw any stop which they may have put upon the goods on the money being deposited, Messrs. Burrows and Perks to have the same right of recovering interest on the sum to be deposited as if the money had been paid at the proper time into a wharfinger's hands under the provisions of the Merchant Shipping Amendment Act. Dated 19th April 1875.

FRESHFIELDS AND WILLIAMS.
LOWLESS AND CO.

26. It was subsequently found that freight at 55*s.* per ton amounted to 3577*l.* 5*s.* 7*d.*, and upon the execution of the agreement and the payment of the 3577*l.* 5*s.* 7*d.* as subsequently agreed, instead of 3500*l.*, into the London and Westminster Bank, the plaintiffs gave delivery of the cargo.

The question for the opinion of the court (who were to have liberty to draw all inferences of fact, was, whether the plaintiffs were entitled to refuse delivery except on payment of freight at the rate of 55*s.* per ton, or whether any freight was due on the said cargo beyond freight at the rate of 1*s.* per ton. If the opinion of the court on either point should be in the affirmative, judgment was to be entered for the plaintiffs for 3577*l.* 5*s.* 7*d.* with costs; if in the negative, for the defendants.

Feb. 10.—The case was argued by *Herschell*, Q.C. (*C. Bowen* with him, for the plaintiffs, and by *Webster* (*Thesiger*, Q.C. with him), for the defendants.

The court took time to consider, but afterwards desired that the case should be reargued on the point whether any equity was created as between the plaintiffs and the defendants by the fact that the defendants had searched the register, and had found no incumbrance.

Feb. 21.—The case was accordingly reargued.

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

Mercantile and Exchange Bank v. *Gladstone*, 18 L. T. Rep. N. S. 641; L. Rep. 3 Ex. 233; 3 Mar. Law Cas. O. S. 89;
Liverpool Marine Credit Company v. *Wilson*, *ante*, vol. 1. p. 323; 26 L. T. Rep. N. S. 717; L. Rep. 7 Ch. 507; 41 L. J. 798. Ch.;
Brown v. *North*, 8 Ex. 1; 22 L. J. 49, Ex.;
Lindsay v. *Gibbs*, 22 Beav. 552;
Brown v. *Tanner*, 18 L. T. Rep. N. S. 621; L. Rep. 3 Ch. 597; 3 Mar. Law Cas. O. S. 94;
Gardener v. *Cazenove*, 1 H. & N. 423;
Dickenson v. *Kitchen*, 8 E. & B. 789;
Liverpool Borough Bank v. *Turner*, 1 J. & H. 159;
Wilson v. *Wilson*, *ante*, vol. 1, p. 265; 26 L. T. Rep. N. S. 346; L. Rep. 14 Eq. 32; 41 L. J. 423, Ch.
8 & 9 Vict. c. 89, s. 37 (the former Merchant Shipping Act);
Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), ss. 57, 66, 69, 70, 71.

Cur. adv. vult.

June 14.—The judgment of the court (Brett, Archibald, and Lindley, JJ.) was delivered by

LINDLEY, J.—The material facts are these:—1st Dec. 1874, mortgage by Morison to the plaintiffs of a ship for 7500*l.* and further advances. 4th Jan. 1875, defendants advanced Morison 3000*l.* on security of cargo, without notice of the plaintiffs' mortgage. 2nd Feb. 1875, Morison again mortgaged the ship to the plaintiffs for 4000*l.* and further advances. 19th Feb. 1875, sale of cargo by defendants and Morison to Jump and Co. on terms of freight, being paid at 55*s.* per ton. 22nd Feb. 1875, further advance by the defendants of 9000*l.* 26th Feb. 1875, assignment to them of the freight at 55*s.* per ton, as security for their advances. 2nd March 1875, Morison mortgages the ship to Harrold. 3rd March 1875, Harrold's mortgage was registered. 6th March 1875, the plaintiffs registered their mortgage. 13th April 1875, the ship arrived, and Harrold and the plaintiffs took possession; Harrold being satisfied with his security on the ship did not claim the freight; an arrangement was come to by which the defendants acquired Jump and Co.'s rights.

Consider, first, how the case would have stood

if there had been no mortgage to Harrold. Two questions would then have arisen, viz., (1), would the freight payable to the plaintiffs as first mortgagees in possession have been 55*s.* per ton or only 1*s.*? (2), would the plaintiffs have been entitled to this freight as against the defendants.

(1.) With respect to the first of these questions, it is to be observed that although a nominal freight of 1*s.* was made payable by the bills of lading, the cargo being bought for the owner of the ship, in the contract with Jump and Co., the freight payable is agreed to be 55*s.* per ton, and the freight assigned to the defendants is likewise freight at 55*s.* per ton. The defendants, therefore, whether they claim through Jump and Co. or under the assignment to themselves are not in a position to deny that the sum payable as and for freight was to be 55*s.* per ton. It is true that this sum was not made payable when the cargo was put on board, nor when the defendants made their first advances on the cargo, and that it was made payable by an agreement entered into by the shipowner and the defendants and the purchasers of the cargo, after the date of the plaintiffs' mortgage. But there is no reason why the benefit of this agreement should not accrue to the mortgagee of the ship on his taking possession of her, on taking such possession he is entitled to all freight payable under charter-parties or bills of lading; and there is no difference material to the present case between freight payable under such documents and money payable as and for freight under such an agreement as that which is here to be considered. No authority on this point was referred to on either side, and, on principle, 55*s.* having been fixed by all parties interested in the cargo to be the freight, must be so treated for the purposes of the case.

(2.) The question whether the plaintiffs as mortgagees of the ship, or the defendants as assignees of the freight, would have had the better title to it but for the mortgage to Harrold turns on the true nature of a mortgage of a ship and on the effect of the omission of the plaintiffs to register their mortgage before the freight was assigned to the defendants.

The mortgage to the plaintiffs was in the statutory form, and by it the ship was mortgaged to them. The word mortgage is a well known word and signifies a transfer of property by way of security: See 2 Black. Com. 158; Termes de la Ley Mortgage.) A mortgage is a transfer of all the mortgagor's interest in the thing mortgaged, but such a transfer is not absolute; it is made only by way of security, or in other words it is subject to redemption. Unless, therefore, there is any statutory enactment to the contrary, the plaintiffs in this case acquired by their mortgage the whole of the mortgagor's interest in the ship, or in other words the legal title to the ship as security.

Such is *primâ facie* the effect of the instrument of mortgage. But the statutes relating to ships must be examined with a view to determine what the consequences of registration or non-registration may be.

Under the older statutes relating to merchant shipping all transfers and mortgages were made by a bill of sale, and such bill of sale had no effect whatever either at law or in equity until registration: (See the cases collected in *The Liverpool Borough Bank* v. *Turner*, 1 J. & H. 159; 2 De G. J. & J. 592; Maclachlan, on Shipping, p. 39, 2nd edit.) (*a*)

The Merchant Shipping Acts now in force, however, make a marked distinction between transfers of ships otherwise than by way of security and mortgages, and there are different groups of sections with distinct headings applicable to these two different subjects: (See 17 & 18 Vict. c. 104, ss. 55-65, which relate to transfers and transmissions, and ss. 66-75, which relate to mortgages.) Amongst other distinctions between these two modes of dealing with ships the following are the most noteworthy: A transfer (otherwise than by way of mortgage) must be by a bill of sale (sect. 55), and must be produced to the registrar for registration (sect. 57), and the transferee, if not a corporation, must make a declaration that he is a natural born British subject: (sect. 56, and schedule Form F.)

On the other hand a mortgage must be by a different kind of instrument (sect. 66), and there is no enactment requiring such instrument to be produced to the registrar (compare sect. 66 with sect. 57), and the mortgagee is not required to make any declaration as to his nationality.

It is true that in *The Liverpool Borough Bank* v. *Turner* (*ubi sup.*), Wood, V.C., and Lord Campbell, held that an unregistered equitable mortgage of a ship could not be enforced. But in consequence of this decision, 25 & 26 Vict. c. 63, s. 3, was passed, and the validity of an unregistered mortgage as against all persons except registered transferees or mortgagees (see sects. 43 and 69 of the Merchant Shipping Act 1854.) can hardly now be disputed: (See *Stapleton* v. *Haymen*, 2 H. & C. 918.)

It appears from the Merchant Shipping Act 1854 itself, that a mortgagee has an interest in the ship capable of transmission by bankruptcy, death, or marriage (sect. 74); and on payment off of the debt secured by a registered mortgage and entry of the payment in the registry, the estate, if any, which passed to the mortgagee vests in the person in whom the same would have vested if the mortgage had not been made (sect. 68).

The mortgagee, however, is not to be deemed the owner of the ship, except so far as may be necessary for making her a security for the mortgage debt (sect. 70). This section was inserted for his protection against liability which might have attached to him by reason of his interest in the ship (see *Dickinson* v. *Kitchen*, 8 E. & B. 789); and would have been quite unnecessary if the mortgage transferred no interest in the sense of ownership in her to him; or in other words if it created a mere charge on her in his favour,

Sect. 72, which protects registered mortgagees of ships from the operation of the reputed ownership clauses of the Bankruptcy Acts would also be unnecessary if a mortgagee had not such an interest in the ship as might render him her true owner within the meaning of those clauses.

Again, the right of a first registered mortgagee to take possession of the ship is too well settled

(*a*) Mortgages are still effected in the United States by bill of sale, and by the U. S. Statute of 1850, sect. 1; "No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bills of sale, mortgage, hypothecation, or conveyance be recorded in the office of the Controlier of Customs where such vessel is registered or enrolled."—ED.

to be capable of dispute; but the statute confers no such right in express terms, and it only exists by reason of the ownership transferred to the mortgagee by the mortgage itself; a mere charge would confer no such right. (See Fisher on Mortgages, p. 197) But as a mortgagee, unless in possession, would have no power of sale if it were not expressly conferred upon him; and as the mortgage contains no such power, the statute itself expressly confers it on registered mortgagees (s. 71). But this affords no argument against the view that the mortgage itself confers on the mortgagee an interest in the sense of ownership in the ship herself.

The conclusion, then, to be drawn from the mortgage and the statute is that the mortgagee of a ship, like the mortgagee of any other property, acquires an ownership in the ship, viz., such ownership as the mortgagor has to give. A first mortgagee will thus acquire the whole ownership in the ship, but only of course as a security for his money. Second and other mortgagees will only acquire the interest left in the mortgagor, or in other words, his right to redeem. That right will be legal or equitable, according as the time for paying off the first mortgage has not yet arrived or has passed.

That this is the true nature of a mortgage of a ship appears not only from the above observations, but also from the following decisions: *Dickenson* v. *Kitchen* (8 E. & B 789); and *Liverpool Marine Credit Co.* v. *Wilson* (*ante* vol. 1, p. 323; L. Rep. 7 Ch. 507).

The plaintiffs in this case having acquired by their mortgage the ownership of the ship, and that title being prior in point of date to the equitable assignment of the freight to the defendants, such title must prevail against them unless there be some sufficient reason to the contrary (see *Rice* v. *Rice*; 23 L. J. 289, Ch.). The only reason alleged is the non-registration of the plaintiffs' mortgage before the date of the assignment to defendants. If an unregistered mortgage of a ship were null and void, or if it had no legal effect before the time of registration, then the title of the plaintiffs would have accrued after that of the defendants, and would have to be postponed to theirs (see *Lindsay* v. *Gibbs*, 22 Beav. 522). But the present Merchant Shipping Acts contain no enactment to this effect, and, as already observed, an unregistered mortgage is not now void; moreover sect. 69 of the Act of 1854 enacts in effect that if there is more than one registered mortgage the mortgagees shall be entitled in priority one over the other according to the dates of registration. So far, therefore, as the Act itself is concerned, the only consequence of not registering a mortgage is to postpone it to a subsequent mortgage or a transfer, (see sect. 43), which is registered before it.

But it was contended that upon general principles of equity, and apart from any statutory enactment, the plaintiffs had lost their priority by reason of their own negligence in omitting to register the mortgage. The case states that the defendants searched the register before they advanced their money on the freight, and they were therefore really misled by the non-registration of the plaintiffs' security, and it is contended that this is one of those cases which ought to be decided according to the rule that whenever one of two innocent parties must suffer by the acts of a third, the one who has enabled such third person to occasion the loss must sustain it. This rule is a well known rule both at law and in equity; but it is by no means easy of application, owing to the ambiguity of the word enabled. The plaintiffs did not register their mortgage, but they were not themselves party or privy to any fraud on the defendants. The plaintiffs did not know that money was being obtained on the security of the freight, and in truth there is nothing save the mere omission to register which can be urged against them. But the mere omission by a person to do something, which it is not his duty to do, but which if done would have prevented loss to another, is not sufficient to render such person liable for such loss nor to deprive him of any rights which he would otherwise have had against that other. There are decisions to this effect both at law and in equity; one at law, *Arnold* v. *The Cheque Bank* (L. Rep. 1 C. P. Div. 578; 45 L. J. 562, C. P.; 34 L. T. Rep. N. S. 729), decided by this court during last sittings, where the cases at law are fully considered. In equity it is settled now that the mere omission by a first mortgagee to obtain the title deeds from the mortgagor is not sufficient to postpone the first mortgage in favour of a subsequent mortgagee who *bonâ fide* advances his money in the belief that the property is unencumbered, and who obtains the deeds, see *Evans* v. *Bicknell* (6 Ves. 173, 183); *Hewitt* v. *Loosemore* 9 Hare, 449). To postpone the first mortgage in such cases there must be either fraud or such gross and wilful negligence as is equivalent to it.

In the present case but for Harrold's mortgage the plaintiffs would have had a clear prior legal title to the freight as against the defendants; and although if the plaintiffs had registered their mortgage when it was made the defendants would not have been misled, there was neither fraud nor such gross and wilful negligence imputable to the plaintiffs as is sufficient to deprive them of their prior legal rights.

It remains to consider the effect of Harrold's mortgage. This although subsequent in point of date to the plaintiffs' mortgage was registered before it, and by sect. 69 of 17 and 18 Vict. c. 104, became entitled to priority over it. By reason of this statutory priority Harrold became first mortgagee of the ship and became entitled to take possession of her and to receive her freight. Having paid himself he would hold any surplus for the benefit of the subsequent incumbrancers according to their priorities, In point of fact Harrold was content to look to the ship only, and he laid no claim to the freight. But the plaintiffs had also taken possession of the ship, and they claim freight as second mortgagees. The priority gained by Harrold cannot affect the rights of the plaintiffs as against the defendants, and Harrold's claim being satisfied, his mortgage may, for all present purposes, be disregarded. The mortgage of the plaintiffs became as between them and Harrold a second mortgage instead of a first mortgage, but the plaintiffs' mortgage continued to be, as it always was, prior in point of date to the assignment of the defendants. Even therefore if the plaintiffs' mortgage became for all purposes and as against all persons an equitable as distinguished from a legal mortgage, its priority in point of date remained unaffected. It was, indeed, contended that by reason of Harrold's mortgage and its priority over

the plaintiff's mortgage, this last could only be regarded as an equitable mortgage, dating from the time of registration. But this contention is based upon the erroneous supposition that an unregistered mortgage has no validity until it is registered.

It was further contended that the plaintiffs having became second mortgagees had no right to take possession of the ship, and that their right to freight was, therefore, never perfected. But although a second mortgagee has no legal as distinguished from equitable right to possession, and although he cannot take possession as against a first mortgagee, yet as against all other persons he has a right to take possession, and can enforce such right if necessary by obtaining the appointment of a receiver, see *Liverpool Marine Credit Company* v. *Wilson*, *ante* vol. 1, p. 323; L. Rep. 7 Ch. 507; 26 L. T. Rep. N. S. 717, where the rights of a second mortgagee of a ship are pointed out. In this particular case the plaintiffs took possession, and it was, therefore, unnecessary to apply for a receiver; if they had neither taken possession nor applied for a receiver, still as the first mortgagee did take possession, it was probably unnecessary for the plaintiffs to do more than give him notice of their claim, for he would, after paying himself, hold all surplus monies received by him in trust for the persons beneficially interested in them according to their priorities.

For these reasons our judgment is for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs, *Freshfield* and *Williams*.
Solicitors for the defendants, *Lowless* and *Co.*

ADMIRALTY DIVISION.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Nov. 6, 11, *and* 17, 1876.

THE VIRGO.

Damage—Inevitable accident—Inherent defect in machine—Costs.

The owners of a vessel are not liable for damage caused to another vessel in a collision occasioned by the sudden breaking down of an apparatus in which there was an inherent latent defect, in the absence of any negligence in the user of the apparatus.

The William Lindsay (*ante*, *vol.* 2, *p.* 118; *L. Rep.* 5 *P. C.* 338; 29 *L. T. Rep. N. S.* 355) *followed.*

Where the defence of inevitable accident is sustained, the plaintiff will not be ordered to pay the costs, unless he might have known that there was, apart from the merits, a good legal defence.

THIS was a cause arising out of a collision which took place in the River Thames at 10 a.m. on 17th June 1876, between the schooner *Gem*, which was lying at anchor, and the screw steamship *Virgo*, which was steaming down the river. There was no material difference between the parties as to the weather, which was described as fine and clear. The *Virgo* struck the *Gem*, which was lying across the river, and head to wind, nearly amidships, with such violence that she sank, and her cargo of ice floated out. It was alleged in the statement of claim, on behalf of the *Gem*, that the collision and damage were caused by, and were wholly attributable to, the neglect, default, or mismanagement of the *Virgo*, or of those on board her, and that no blame in respect of the said collision or damage was attributable to the *Gem*, or to any of those on board her.

The General Steam Navigation Company, owners of the *Virgo*, in their statement of defence, alleged that the *Virgo* was proceeding about six knots an hour, and that the *Gem* was seen at a distance of half a mile, and continued:

4. As the *Virgo* approached the *Gem*, proper measures were taken in due time by starboarding the helm of the *Virgo*, to steer the *Virgo* clear of the *Gem* without danger of collision; but as the helm of the *Virgo* was being starboarded, her steering gear broke, and she could not be made to answer a starboard helm, and although her engines were promptly stopped and reversed full speed, she with her stem came into contact with the starboard side of the *Gem*.

5. The said breaking of the steering gear of the *Virgo* happened without any neglect or breach of duty on the part of the defendants, or of those on board the *Virgo*, and the said collision was not occasioned by any neglect, default, or mismanagement on the part of those on board the *Virgo*, and the said collision was the result of inevitable accident.

On the defence issue was joined, and the case came on before the Judge and Trinity Masters, on the 6th Nov. 1876.

It was proved that the *Virgo* had some short time previously to the accident ported to go ahead of a ketch which was working up the river, and had steaded again after doing so, and that the order was just given to "starboard" to clear the *Gem*, when it was reported to the master that something was wrong with the steering apparatus (a patent one), which would not move; the engines were at once stopped, and the master went aft, before he got aft it was reported to him that the wheel was all right, and thereupon the pilot started the engines on again as before. Almost immediately, when the engines had only made three revolutions, the master observed that the movement of the wheel produced no corresponding movement of the tiller and rudder, and he at once ordered the engines to be stopped, and reversed full speed, but before the way of the ship was stopped, the collision had happened.

After hearing the evidence and argument on the facts the Judge retired with the Trinity Masters and put the four following questions to them, which he afterwards stated in the course of his judgment:

(1) Was the *Virgo* under the circumstances bound to keep her engines stopped?

(2) Was she bound to anchor?

(3) Was she wrong in crossing the bows of the ketch?

(4) Was she going too fast?

All of which they answered in the negative. The argument of the point of law whether under these circumstances the *Virgo* was liable for the damage was postponed till

Nov., 13, 1876.—*Milward*, Q.C. and *Edward Pollock*, for plaintiffs.—It is for the defendants to prove inevitable accident, and they have not done so. The screw of the steering apparatus was not sufficient for its purpose, or it would not have broken with an ordinary strain. If the strain was extraordinary there was negligence on board the *Virgo* in putting her in a position when it became necessary to put on such a strain. There is no evidence to show how it was broken, and therefore negl

gence of some sort must be presumed to have broken it. After it was broken the accident might have been avoided if the *Virgo* had reversed her engines at once, or anchored, or even continued stopped, but notwithstanding distinct notice that something was wrong with the steering apparatus, the ship was allowed to proceed on a mere suggestion that it was all right again without any steps being taken to ascertain what had been wrong, and this in itself is negligence causing the collision. The cases where an inherent defect in a machine undiscoverable by ordinary means has been held to relieve the party using it from liability for damage done by it are cases of contract: *Redhead* v. *Midland Railway Company* (L. Rep. 4 Q. B. 379: 20 L. T. Rep. N. S. 628). There the passenger carried could not make the carrier of passengers liable for anything outside of the contract, which was to use reasonable care; here there is no contract, it is a tort or trespass, and the defendant is liable for any damage he does. There is no reason why the plaintiff should suffer loss because the defendant uses a machine insufficient for its purpose. It has been laid down by the Privy Council that a plaintiff to avail himself of the defence of inevitable accident, "must take all such precautions as a man of ordinary prudence, and skill, exercising reasonable foresight, would use to avert danger:" (*The William Lindsay*, *ante*, vol. 2. p. 118; L. Rep. 5 P. C. 338; 29 L. T. Rep. N. S. 355.) And in that case it was held that those conditions were satisfied; here it has not been shown that they were. Where a machine is under the management of a person, and an accident happens out of the ordinary course by means of the machine, it affords reasonable evidence of negligence in the person using it (*Scott* v. *London and St. Katharine Docks Company*, 3 H. & C. 596; 13 L. T. Rep. N. S. 148), and that is the present case.

Butt, Q.C., *Aston*, Q.C., and *E. C. Clarkson*, for the defendants.—This case cannot be distinguished from *The William Lindsay* (*ante*, vol. 2, p. 118; L. Rep. 5 C. P. 338; 29 L. T. Rep. N. S. 355). That it was done by a jerk or undue strain is a new case entirely and cannot be raised now, it was a question for Trinity Masters: (*The Marpesia*, *ante*, vol. 1, p. 263.) We have satisfied the onus of proof by showing that we took reasonable care. To anchor would have been certainly dangerous and probably useless: (*The C. M. Palmer*, *ante*, vol. 2, p. 94; 29 L. T. Rep. N. S. 120.) The case is stronger than that of *Readhead* v. *Midland Railway Company* (L. Rep. 4 Q. B. 379; 20 L. T. Rep. N. S. 628). If a carrier of passengers has no liability in such a case to a person whom he has contracted to carry safely, *à fortiori* he has none to a third party. If we get judgment we are entitled to our costs; the plaintiffs knew our defence, and had every opportunity of ascertaining by inspection and otherwise its validity.

The London, B. & L. 82; 9 L. T. Rep. N. S. 348;
The England, 5 Notes of Cases 176;
The Royal Charter, L. Rep. 2 Adm. 362; 20 L. T. Rep. N. S. 1019; 3 Mar. Law Cas. O. S. 262.

Edward Pollock, in reply, and on subject of costs.—Should judgment be against us it will be without costs.

The Marpesia, *ante*, vol. 1, p. 263; L. Rep. 4 P. C. 212.

Nov. 17.—Sir ROBERT PHILLIMORE.—In this case of collision, in which the plaintiffs are the owners of the vessel *Gem*, and the defendants the owners of the vessel *Virgo*, the case for the plaintiffs is that on the morning of the 17th June 1876, the *Gem*, a small schooner, was riding at anchor in a proper place near the Deptford buoys in the Thames, that the *Virgo*, a large screw ship, ran into her and sunk her.

The defence of the *Virgo* is that she was going up the river with a good look out, at the rate of six knots, that she saw the *Gem* about half a mile off, that having ported for a few barges, which she cleared, she then steadied and afterwards starboarded, which was the proper manœuvre to clear the *Gem*; that at this time there was no danger of collision, if she had answered her starboard helm, but the second mate came to the captain and told him there was something amiss with the wheel, and at the same time the man came from the wheel and reported to the captain that there was something wrong with the helm, the captain ascertained that the rudder and wheel were not acting together and gave, through the pilot, the order to stop and reverse It appears that very shortly before this time, something wrong had been discovered, but the mate having reported "all right," an unsuccessful attempt had been made to go on. That in consequence of this breaking of the steering gear the *Virgo* did not answer her starboard helm, and ran with her stem into the starboard side of the *Gem*. In these circumstances the contention is that the collision was the result of inevitable accident.

It was argued on the part of the *Gem*, first that the accident was not inevitable, and secondly that if inevitable the *Virgo* was still liable for the damages which she had inflicted on the *Gem*.

On the part of the *Virgo* evidence of the most conclusive character was produced to show that the steering gear was thoroughly good in every respect when it was put up in the vessel in the proper manner; and that it had been surveyed from time to time, and reported to be in perfect condition; that the accident had happened in consequence of the piston breaking off under the nut; that on examination of the piece of iron, which was produced in court, two small flaws were discovered in the centre of it which had caused the iron to break, that these flaws were latent, not to be detected by any means, probably formed in the course of use by some severe straining of the helm.

The grounds upon which the *Gem* contended that the accident was not inevitable were that it might have been avoided; first, by her stopping dead in the first instance, before the man came from the helm; secondly, by anchoring; thirdly, by having proceeded at a slower rate fourthly, by having gone astern of the barges, instead of crossing their bows. All these points I submitted to the Trinity Masters, and they advised me, upon a consideration of all the circumstances, that with respect to none of them was the *Virgo* to blame. The advice appeared to me to be sound, and I followed it.

There then remained these questions of law: First, Whether the *Virgo* had discharged the burden of proof which lay upon her of showing that the accident was inevitable? I was of opinion that she had. Second, though the *Virgo* was guilty of no negligence, and the accident was inevitable, whether she was not still liable for the damage to the *Gem*? I am of opinion that on this point the case falls within the principle of law laid down by

this court, and by the Privy Council in the case of *The William Lindsay* (*ante*, vol. 2, p. 118; 29 L. T. Rep. N. S. 355; L. Rep. 5 C. P. 338), in aid of the authority of which might perhaps be cited the decision in the case of *Readhead* v. *Midland Railway* (L. Rep. 2 Q.B. 412), affirmed on appeal to the Exchequer Chamber (L. Rep. 4 Q.B. 379; 20 L. T. Rep. N. S. 628), and that the defence of inevitable accident must prevail.

With respect to costs I shall make no order. The cases referred to by the defendants' counsel were those in which the plaintiffs must or might certainly have known that the defendants had, apart from the merits, a good legal defence. I am of opinion that in this case the plaintiffs had a right to compel the defendants to prove the facts upon which they relied. The *Virgo* is dismissed from the suit, and no costs on either side.

Solicitors for the plaintiffs, *Harper, Broad,* and *Battcock.*

Solicitor for the defendants, *W. Batham.*

AMERICAN REPORTS.

Collated by JAMES P. ASPINALL and F. W. RAIKES, Esqs., Barristers-at-Law.

UNITED STATES DISTRICT COURT,—EASTERN DISTRICT, MICHIGAN.

IN ADMIRALTY.

Saturday, Aug. 12, 1876.

THE DOLPHIN.

Marine insurance—Lien for premiums—United States law.

By United States law an underwriter upon ship has a maritime lien for the premiums due to him upon marine policies upon the ship underwritten by him, and can enforce payment by proceeding in rem in Admiralty against the ship insured.

A libel claiming payment of premiums against ship should set out the dates and amounts of the policies, and also the name of the parties insured, and the character and extent of their interest.

THIS was an exception to a libel of the Oriental Mutual Insurance Company. The libellants, in their libel, stated that they were a New York Corporation, that the *Dolphin* was a vessel of more than twenty tons burden, and was used in navigating the great lakes and waters connecting the same, and the waters of the State of Michigan; that on the 6th March, 1875, the master and owners of the *Dolphin* represented to the libellants that the vessel stood in need of insurance, and that, in pursuance of their representations and request, it furnished insurance in the amount of 4000 dols.; and that there was due to libellant for premiums the sum of 277 38 dols., for which libellant claimed a lien upon the vessel.

To this libel, Stephen B. Grummond, who also filed a libel against the schooner for salvage, excepted; for the reason that the matters set up therein were not within the Admiralty jurisdiction of this court; that a claim for premiums was not a lien upon the schooner, such as this court ought to enforce by proceedings *in rem.*

The *Dolphin* had been sold upon other claims, and the proceeds were in court awaiting distribution.

J. J. Atkinson for libellant.

F. H. Canfield for claimant.

BROWN, J.—The question presented by the exceptions to the libel is one of great novelty and importance; and it is believed that no direct adjudication upon the point can be found either in this country or in England. After years of doubt in the minds of the profession, and some conflict of opinion in the courts, it was finally settled by the Supreme Court in the case of *The Insurance Company* v. *Dunham* (21 Wall., 1) that the contract of marine insurance is maritime in its character, and that in case of loss a libel may be sustained by the insured against the underwriter. It seems to me to follow as a necessary corollary that the underwriter may maintain a suit in admiralty for the premium, as it would be at war with established principles to say that the maritime character of a contract could be invoked by one party and not by the other.

The more serious question, however, remains to be decided, namely, whether the underwriter has a lien upon the vessel for the payment of his premium. The question is not discussed in this case nor in any other where actions have been sustained in the Admiralty, upon contracts of insurance. If the analogies of the contract of affreightment are to govern, as indicated by the Supreme Court in the opinion above cited (11 Wall. 30), the lien would follow as a necessary consequence. It is described in the opinion as "a contract or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties to the port of its destination, and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So, in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the sea excepted), from the port of shipment to the port of delivery and there delivered. The contract of the one guarantees against loss from the dangers of the sea, the contract of the other against loss from all other dangers. . . . The object of the two contracts is in the one case maritime service and in the other maritime casualties." If in the one case the skipper has a lien upon the vessel for a breach of the contract of affreightment, and the ship has a lien upon the cargo for the payment of the freight (though for reasons applicable to the character of this property this lien is dependent upon possession), it is difficult to see why upon principle the underwriter should not have a lien upon the ship for the payment of his premium.

It is true the general sentiment of the profession is adverse to the existence of such a lien, but no more so, perhaps, than it was to the jurisdiction of the admiralty in actions upon policies of insurance.

In the case of *The Williams* (Brown's Admiralty Reports, 208), perhaps the most exhaustive disquisition upon maritime liens to be found in the books, the judge remarked, page 215: "Without any very thorough examination at the time, but drawing mainly upon what we had ever assumed to be the law, we ruled that all maritime contracts, made within the scope of the master's usual authority, did *per se*, hypothecate the ship; and that those of affreightment, *insurance*, towage, the fitting out and discharge of

vessels, and for aiding them in distress, were instances only of the application of the rule." I should have no hesitation in adopting the general principle there announced, that all contracts within the scope of the master's authority are binding upon the vessel, but in its application to the contract of insurance, I think the learned judge overlooked the fact that such contracts are not within the scope of the master's authority: *General Interest Insurance Company* v. *Ruggles* (12 Wheat., 408), *Foster* v. *United States Insurance Company* (11 Pick., 85).

Even a ship's husband, whose powers with regard to the fitting and equipment of a vessel are much more extensive than the master's, has no authority to bind the other part owners by a contract of insurance: *Bell* v. *Humphries* (2 Starkie, 345), *Finney* v. *The Warren Insurance Company* (1 Metcalf. 16).

The case of *The Williams* (*ubi sup.*) was that of a contract for services in the nature of salvage, made by a master whose power was unquestioned, and is a direct authority only for the proposition that all contracts, whether executed or executory, which he makes within the scope of his authority are binding upon the vessel. Obviously, however, the learned judge based his opinion upon a much broader principle. On page 217, referring to the case of *The Pigs of Copper* (1 Story, 314), he observes, "This judgment is referred to in this connection more particularly to illustrate the position that a denial of salvage is not a rejection of a proceeding *in rem;* but it quite as fully sustains the broader proposition, soon to be considered, that all authorised maritime contracts pledge the vessel for their performance." Again, on page 222, he says: "The wider principle, that every maritime agreement binds the ship as well as the owner, is that upon which we rest our decision. Although the authorities cited in support of this proposition refer to cases of salvage, or of contracts within the scope of the master's authority, and therefore do not sustain it to its fullest extent, yet I apprehend the principle is a safe one, and subject to two or three exceptions, which at an early day were imported into the maritime law of this country by the Supreme Court, following too closely the English authorities, one which may be acted upon without trenching upon the proper domain of the common law. So far as a dictum can be an authority it is certainly an authority for the lien of the underwriters.

The doctrine that the admiralty courts of this country are restricted to the jurisdiction exercised by the High Court of Admiralty in England at the time of the adoption of our constitution is now so completely overthrown that no argument can be properly deduced from it. The only exceptions believed to exist to the jurisdiction *in rem* of the admiralty over maritime contracts is that of supplies furnished to domestic vessels, established in the case of *The Gen. Smith* (4 Wheat. 434), and recently recognised in the case of *The Lottawanna* (21 Wall.), and that of masters' wages, held not to be the subject of a lien in the case of *The Steamboat New Orleans* v. *Phœbus* (11 Peters, 175). Contracts for the construction of vessels which are recognised as maritime by the continental codes and a lien given thereby, were also held by the Supreme Court in the case of *Roach* v. *Chapman* (22 How. 129) not to be subject to the admiralty jurisdiction in any form.

In determining whether a maritime lien exists in favour of the underwriter, it is well to consider the source of the doctrine that courts of admiralty have jurisdiction over policies of insurance. The subject is fully discussed in the case of *The Insurance Company* v. *Dunham* (pages 31-38), and the court remarks: "Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises, and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material, rules, and incidents therefrom. . . . These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact historically that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe." Mention is here made of the maritime laws of the ancient Rhodians, of the ordinances of Barcelona, Venice, Florence, and of Antwerp, and the court further observes: "But an additional argument is founded on the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of maritime insurance are within the jurisdiction of the admiralty or other marine courts. . . . It is also clear that, originally, the English Admiralty had jurisdiction of these as well as of other maritime contracts." This last remark is corroborated not so much by positive adjudications to that effect as from the language of the commissions issued to the early Vice-Acmiralty courts which authorise them to take cognisance of marine policies. This would hardly have been done had such jurisdiction never been exercised by the High Court of Admiralty in England.

Tracing, then, the jurisdiction of the Admiralty over contracts of insurance to the continental law, it is pertinent in this connection to inquire whether that law gives to the underwriter a lien upon the vessel for the payment of his premiums.

Art. 16 of the marine ordinance of Louis XIV., title "Of Seizure of Vessels," in enumerating the persons entitled to liens upon ships, makes no mention of underwriters, but Valin, in commenting upon this ordinance, book 1, lib. 14, sect. 16, says: "If this article has not mentioned them (the underwriters), it is probably because the ordinance takes it for granted in many articles under the title of 'insurance,' that the premium is paid in cash at the time the policy is signed, while, by the custom of this place and of many others, it is paid after the arrival of the ship at a port of safety. However this may be, the insurer of a vessel has doubtless a lien (privilege) upon her for the payment of his premium as the insurer of a cargo has a lien upon it. This lien ranks with that of the lender upon bottomry and with material men."

A privilege is defined by Art. 2095 of the Civil Code as "a right which the character of the credit gives to a creditor to be preferred to other creditors even mortgagees (*hypothécaires*)." If not analagous in all respect to our "lien," it authorises the like preference in payment to claims within its scope from the proceeds in court.

Emerigon treats the contract of insurance as analogous to that of Maritime Loan or bottomry, and observes (Emer. on Maritime Loans, chap. 1,

sect. 4): "In the one contract the lender bears the sea risks; in the other, the underwriter. In the one, the maritime interest is the price of the peril, and this term corresponds with the premium which is paid in the other. In either case it is incumbent upon the plaintiff to prove that the condition has been fulfilled. In case of a suit it lies upon the lender, in order to render the contract of maritime loan *executory*, to show that the ship has arrived at her port of destination in safety; and in an action on a policy of insurance it lies upon the assured to prove the loss, capture, or shipwreck of the vessel. The policies of insurance made on loose sheets of paper create a lien on the property of the parties, provided they are executed before sworn brokers or notaries; but the other contracts do not create such a lien unless they are recorded by a notary in his public register, in the sworn form as ordinary contracts."

Again, in his work upon the contract of Insurance, ch. 3, sect. 9, Emergion says: "The ordinance having regarded the premium as paid in cash upon signing the policy, the insurer, who had not been paid, was not placed among creditors whose ranks and preferences are determined by articles 16 and 17. Title "Seizure of Vessels." From this silence it has been often concluded that the insurer had no privilege, because it is said the matter of privilege is *stricti juris* (droit étroit) it is necessary they be expressly bestowed (deferés) by law, and it is never permitted to extend them from one case to another, because of equal or superior equities. But it should be considered that the premium of insurance is comprised in the expense of the equipment or building; it becomes, then, in some measure, part of the thing insured, which by this means is presumed to have an increased value (valoir davantage). Consequently, the privilege which the ordinance accords to the seller or material man ought to be common to the insurer, a creditor to the amount of his premium."

In support of this doctrine the learned author cites several decrees of the tribunals of commerce.

So, also, Alauzet des Assurances, Pt. 2, Sect. 2, Ch. 15: "It is rare that maritime premiums are paid in cash; they are settled generally in notes called premium notes (*billets de prime*) the maturity of which varies with the length of the voyage and the usage of the place; the lien of the insurer is preserved for the payment of the notes; they are not considered as working a novation, provided always the discharge (*quittance*) be not absolute, and the origin of the notes not doubtful."

See also Cleisac, P. 237, 318, 323, and 363. Pothier des Assurances, Ch. 3, Art. 3, sect. 2. Boulay Paty, vol. 1, tit. 1, sect. 2.

If any doubts, however, ever existed in the law of France, with regard to this lien, they are put to rest by Article 191 of the commercial code, which reads as follows: "Privileged debts are the following, and in the order in which they are classed:

1. Judicial costs and other charges incurred in obtaining a sale of the vessel and a distribution of the price.

2. The charge for pilotage, tonnage, hold fees, mooring, and dockage.

3. The wages of the keeper, and the expenses of guarding the vessel from the time of her entrance to port to the sale.

4. The storage of her rigging, tackle, and apparel.

5. The expenses of repairing the vessel, rigging, and apparel since her entrance into port from her last voyage.

6. Wages and pay of the captain and crew employed in the last voyage.

7. The sums loaned to the captain for the necessary expenses of the vessel during the last voyage, and the reimbursements of the price of goods sold by him for the same purpose.

8. The sums due to the vendor, material men, and workmen employed in her construction, if she has not yet made a voyage, and those due to creditors for furnishing work, labour, and for refitting, victualling, outfits, and equipments before the departure of the vessel, if she has already made a voyage.

9. The sums loaned on bottomry, on the rigging, and apparel for repairs, victualling, outfit, equipment before the departure of the vessel.

10. The amounts of the premiums of insurance effected on the hull, rigging apparel, outfit and equipment of the vessel for her last voyage.

11. The indemnity due to the freighters for not delivering goods laden on board or for the losses which the goods may have sustained from the default of the captain or crew.

The creditors comprised in each of the numbers of the present article shall have a concurrent lien on the vessel for the amount of their demand, and in case of insufficiency, the price of the vessel shall be divided equally among them (*i.e.*, those of the same class) in proportion to the amount due to each."

In a recent work upon the commercial code of France, by Edmond Dufour, (Paris, 1859,) in speaking of this article, sect. 215, the author observes, "We see that if the code has admitted this opinion (of Valin) as to the principle of the lien, it has largely modified the combinations. The underwriters are still paid before the shippers, but that is all. They are ranked after the material men, who are placed two degrees above them in the scale of liens. They are also distanced by tenders upon bottomry, who immediately precede them. This classification appears to me more rational than that of Valin. For, the truth is, insurance is only a private affair of the insured, it is a very proper act of prudence, it certainly merits, and it possesses, all the sympathies of the law, but it is, after all, only a passive element of navigation. It rather repairs disasters than comes directly in aid of them and its efforts. It is otherwise with the material men, as well as with tenders upon bottomry. It is the labour of the one, and the goods or the money of the other, which permit the vessel to undertake its voyage. There is then in their favour a reason for preference, which is not wholly arbitrary, and the code has done well in recognising it." The nature of this lien is discussed at length, and is applied as well to time policies, as well as to policies, or for a single voyage.

In a recent admirable dictionary of the maritime law of France, by Aldrick Caumont, Paris, 1867, under the head of marine insurance, sect. 141, the author observes: "A lien is attached to the premium for the last voyage, if it be that made during the life of the policy upon the hull. This lien for the last voyage, resulting from Articles 191 and 192 exists wherever there is a policy executed. The insured who, asserting his right to suit, has attached the proceeds of the ship for the amount of his premium, is not permitted to

claim a lien for the increase of premium for the time during which navigation is closed. Any number of voyages made during the time fixed for the duration of the insurance are considered as one and the same voyage. The broker has a lien upon the sum assured for the premium which he has paid. The liens for premiums of insurance upon property rank only after that accorded to contracts of bottomry. They constitute an expense made for the preservation of the *res*. In case where an insurance upon the hull has been made for a limited time, the underwriters have a lien upon the ship, not only for the premiums of the last voyage, but also for the entire premium due under the policy." In support of these various constructions of Article 191, the author cites opinions of the Court of Cassation of the Imperial Court of Bordeaux, and Rouen, and Aix, and of the Tribunal of Commerce of Marseilles.

From these authorities I gather the following summary of French law upon this subject:

1. That the Marine Ordinance of Louis XIV. did not expressly recognise the lien of the underwriter, but in this regard it was held not to be exclusive, and the premium was generally (perhaps not universally) held by the courts as a privileged debt.

2. That the privilege of the underwriter for payment of the premium due upon the policy for the last voyage is expressly recognised by Art. 191 of the Code of Commerce, and that such privilege is also extended to time policies.

3. That this privilege is not waived by taking premium notes, unless it is thereby intended to be discharged. Now, if the Supreme Court adopted the Continental law in respect of jurisdiction over contracts of insurance, must it not be presumed logically to have adopted it as an entirety, and not by piecemeal. It certainly seems so to me, and it goes very far to justify the language used by the circuit judge in the case of *The Williams* (Brown's Adm. Rep. 208). It is claimed, however, that these contracts are made exclusively upon the credit of the owner. If this were so, it might be presumed in a particular case that the lien was thereby waived, but with the exception of supplies, repairs, and materials furnished in the home port, the mere fact that the contract is made by the owner does not import a waver of lien. There is no doubt of the existence of such lien in favour of seamen, although hired by the owner in person; nor in favour of shippers, where the contract of affreightment is made with the owner. Nor is it, I believe, any objection to the lien of a lender upon bottomry, that the bond was made by the owner.

In the nature of the contract itself I see no reason forbidding such lien to the underwriter which does not apply with equal force to the salvor or material man. Their contracts differ mainly in the fact that the services of the underwriter are rendered only upon a contingency which may never happen. That the question has never before arisen is due, as before observed, solely to the fact that the contract of marine insurance was not generally recognised as maritime until the opinion was pronounced in *The Insurance Company* v. *Durham* (11 Wallace, 1). Under the ruling in this case, I feel constrained to hold that the contract of insurance being maritime in its character, the underwriter is entitled to a lien upon the ship for the payment of his premium, although, for the reason given by Dufour, I think it should rank in the lowest class of strictly maritime liens. I think, however, the libel is defective in this case, in failing to aver the names of the parties insured, and the character and extent of their interests in the vessel. I think it should also appear that the policy was a marine policy, or at least that it covered the vessel during the season of navigation. I regard it as very doubtful whether an ordinary fire policy covering a vessel while lying at the wharf during the winter, would be the subject of Admiralty jurisdiction. The above quotation, from Caumont, citing a judgment of the Tribunal of Commerce at Marseilles, apparently supports this opinion. The schedule annexed to the libel seems to indicate that the policies were issued covering separate moieties of the vessel. This, however, should be made distinctly to appear.

I think I see considerable difficulty in enforcing the lien of an underwriter upon an undivided interest of a part owner, especially if the proceeding were an original one, against the vessel itself, and not against its proceeds of sale. The same difficulty, however, frequently occurs in connection with the mortgages upon undivided interests, and I should not regard it as insuperable; and if it should appear that each moiety of his vessel was covered by a lien of the same amount, the question could be easily solved, as the effect would be practically the same as if the entire vessel was covered by a single policy. The difficulty with the libel in this case is, that it has been attempted to employ the ordinary blank libels for supplies in actions for premiums, for which they are badly adapted.

Upon this latter ground, the exceptions to the libels must be sustained, with leave to amend.

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

June 27 *and* 29, *July* 3 *and* 27, 1876.

(Before Lords CHELMSFORD, HATHERLEY, O'HAGAN, and SELBORNE).

ANDERSON AND OTHERS *v.* MORICE; MORICE *v.* ANDERSON AND OTHERS.

ON APPEAL FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Marine insurance—Insurable interest—Commencement of risk—Perils of the seas—Evidence.

The appellant contracted for the purchase of rice in the following terms: "Bought for account of A., of B. and Co., the cargo of new crop Rangoon rice per Sunbeam." The day after making this contract the appellant insured the rice at and from Rangoon to the United Kingdom, "as interest may appear." The ship proceeded to Rangoon, and after the greater part of the cargo had been shipped, she suddenly sank at her anchors, in fine weather, and the rice already shipped was wholly lost. In an action on the policy,

Held, by Lords Chelmsford and Hatherley (affirming the judgment of the court below), that the appellant had no insurable interest in the rice, it not being at his risk till the cargo was completed. By Lords O'Hagan and Selborne contra.

The evidence tended to show that the ship was seaworthy and in good repair on the voyage to the port where she was lost, and no direct evidence was, or could be given, why she sank.

Held (affirming the judgment of the court below), that there was evidence of a loss by the perils insured against.

THIS was an action on a policy of insurance on a cargo of goods and merchandise, at and from Rangoon to the United Kingdom.

The plaintiffs, Anderson and Co., were merchants in London, and on 2nd Feb. 1871, they entered into a contract for the purchase of a cargo of Rangoon rice in these terms:

"Bought for account of Anderson and Co. of Borradaile and Co., the cargo of new crop Rangoon rice *per Sunbeam*, 707 tons register, No. 1254, in *Veritas*, at 9*s.* 1½*d.* per cwt. cost and freight, expected to be March shipment, but contract to be void should vessel not arrive at Rangoon before April 1871. Payment by seller's draft on purchaser at six months' sight, with documents attached."

The following day they effected an insurance with the defendant Morice in these words: "At and from Rangoon to any port or place of discharge in the United Kingdom or Continent, by the *Sunbeam*, warranted to sail from Rangoon on or before the first of April, on rice, as interest may appear. Amount of invoice to be deemed the value; average payable on every 500 bags. The said merchandises are and shall be valued at 5500*l.*, part of 6000*l.*"

The *Sunbeam* arrived at Rangoon in ballast on 2nd March 1871, and anchored at the usual place by two anchors. She began to load the rice on 9th March, and continued loading till the 30th, on which day about five-sixths of the cargo was on board, and the remainder was in lighters alongside, she then suddenly began to leak very fast, and sunk at her moorings on the following day.

Evidence was given that she had been thoroughly overhauled and reclassed in 1869, and had been quite seaworthy in several long voyages, including the voyage to Rangoon, and had been examined by the captain while lying there.

After the loss the captain signed bills of lading for the cargo actually shipped, which were indorsed to the plaintiffs. The sellers drew bills of exchange for the price which the plaintiffs duly accepted and met.

The action was tried before Brett, J., at the sittings in London after Hilary Term 1873, when the jury found a verdict for the plaintiffs, leave being reserved to the defendant to move to enter a verdict on the ground that there was no evidence of a loss by the perils insured against, and that there was no insurable interest in the plaintiffs.

A rule was accordingly obtained, but it was discharged by the Court of Common Pleas (Lord Coleridge, C.J., Brett, and Denman, JJ.) as reported, *ante*, vol. 2, p. 424.

On appeal to the Exchequer Chamber (Bramwell, Pollock, and Amphlett, BB., Blackburn, Lush, and Quain, JJ.) the decision of the Court of Common Pleas was affirmed on the question of a loss by the perils insured against, but reversed on the question of the plaintiffs having an insurable interest in the rice before the loading was completed, Quain, J., dissenting from the majority of the court on this point (*ante*, vol. 3, p. 31).

Cross appeals were then brought to the House of Lords.

Sir *H. James*, Q.C. *Watkin Williams*, Q.C., and *J. C. Mathew*, appeared for Anderson and Co., the plaintiffs, below.

Butt, Q.C. and *Cohen*, Q.C., for Mr. Morice, the defendant below.

The same arguments were urged, and the same authorities relied on, as in the courts below.

July 27.—Their Lordships gave judgment as follows:

Lord CHELMSFORD.—My Lords,—The question to be determined upon this appeal is one of some difficulty, and it has given rise to a great diversity of judicial opinion. It may be thus shortly stated: Whether the appellant, under a contract for the purchase of a cargo of rice to be shipped on board a vessel called the *Sunbeam*, had any property in the rice, or had incurred any risk in respect of it so as to give him an insurable interest at the time of the total loss of the vessel and cargo.

Having regard to the terms of the contract for the purchase of the rice, it is clear to my mind that if the intention of the parties is to be collected from that document alone, no interest in the rice passed to the buyers till the cargo was completed, for payment was to be made only when the loading was finished: (*Appleby* v. *Myers*, L. Rep. 2 C. P. 651; 14 L. T. Rep. N. S. 669.) But although the purchaser of a cargo may have no interest in it until the happening of a certain event, as, for instance, until the delivery, he may, if he please, expressly take upon himself all the risks and dangers of the voyage, as in *Castle* v. *Playford* (*ante*, vol. 1, p. 255; L. Rep. 7 Ex. 98; 26 L. T. Rep. N. S. 315), although, without a stipulation to that effect, he would not be affected by anything which might happen to the cargo in its transit to him.

In the present case it is contended that either under the contract itself the buyers' risk began as soon as any rice was shipped on board the *Sunbeam*, or that the act of effecting an insurance on the rice by the plaintiffs was an agreement on their part to undertake the risk. Assuming that the intention of the parties can be implied from their acts, and so become a term in the contract, the acts ought to be such as to manifest that intention without any ambiguity. The acts relied upon in this case are a notice from the vendors to the purchasers to effect an insurance on the rice in the *Sunbeam*, and a policy of insurance effected by the purchasers accordingly, describing the adventure as "beginning upon the goods and merchandises from the loading thereof aboard the ship, and to continue and endure during her abode at Rangoon," &c. But it seems to me clear that, unless a change was produced in the rights and liabilities of the plaintiffs under the contract by their undertaking the insurance, they could have had no interest in the rice until a complete cargo had been shipped. But, although this was their position in relation to the contract itself, they had a contingent benefit which might accrue to them from the completion of the cargo on board the *Sunbeam*, and its safe delivery. This contingent benefit was one on expected profits, and, although it would not be protected by an insurance on the rice (*Lucena* v. *Crawford*, 2 B. & P., N. R., 269), yet the plaintiffs having that contingent interest in the safety of the cargo, might not be indisposed to take upon themselves an insurance against its loss, more especially as they would have an interest in the rice itself at Rangoon as soon as the cargo should be completed. The question is, did this insurance throw the risk of the loss of the rice upon them?

Did they, by undertaking it, impliedly agree with the vendors that, if the rice was destroyed after any part had been shipped on board the *Sunbeam*, the loss should be theirs? Did this act change the nature of the contract, the stipulations of which, enabling the vendors to take the bill of lading in their own name and to send it forward with the draught, were *primâ facie*, though not conclusive, evidence of the interest and property remaining in them? What was the nature of the risk which the plaintiffs were supposed to have undertaken? In the words of Blackburn, J., in *Castle* v. *Playford*, it was, "If the property perishes by danger of the seas, I shall take the risk of having lost the property, whether it be mine or not." If this was really their undertaking, every bag of rice shipped on board the *Sunbeam* was at their risk, and the loss of it must have fallen upon them. But the Court of Common Pleas held that, as the plaintiffs would not, if the ship had sailed and arrived with what was on board of her when she sank, have been obliged to accept what was on board, they were not bound to pay for the rice which was on board and lost when the ship sank; from which it would seem to follow that the plaintiffs were not exposed to any risk of loss before a complete cargo had been shipped on board the *Sunbeam*.

There being, therefore, conflicting evidence of intention as to the interest in the rice passing to the purchasers or remaining in the vendors, the effect of the written contract being that the interest was to continue in the vendors until the completion of the cargo, and the consent of the purchasers to insure not shifting the property during the loading and before the cargo was complete, and it being at the utmost an indication of intention to assume the risk, I think your Lordships should not look out of the contract, but determine the rights and the liabilities of the parties by it alone. It was not disputed that by the terms of the contract the plaintiffs were not bound to take less than a complete cargo of rice, and that they had an option either to accept or reject a part cargo. If they had exercised this option by accepting what was on board before the *Sunbeam* sank as a fulfilment of the contract on the part of the vendors, they would have had an insurable interest in the rice at the time of the loss.

The Court of Common Pleas thought the property had not passed out of the vendors at this time, but they were of opinion "that there was such an appropriation of the rice on board to the contract as to prevent the sellers from withdrawing that rice without the consent of the buyer;" thus apparently fixing the buyer with the risk of the rice, from time to time, as it was put on board. Upon this, Blackburn, J., in his judgment in the Exchequer Chamber, observed, "If we could see anything to indicate an intention that as each bag was shipped it should be at the buyers' risk, we should think it indicated an intention that it should not be taken out without his consent; but we cannot find anything to this effect."

Now, an intention that each bag of rice shipped should be at the risk of the purchasers was necessary to be established as a foundation for the argument maintained by the learned counsel for the appellants, that, if part of the rice had been shipped and had been damaged while on board, the vendors might, without removing it, have gone on loading the rice until a full cargo had been put on board, and have delivered it to the purchasers, who would have had no option, but must have accepted it as a faithful performance of the contract. Sir H. James went further than that, and argued that, even if part of the cargo shipped had been totally destroyed by fire, and the vendors had come with a further quantity of rice to be shipped, the master must have taken it in, and if the *Sunbeam* had afterwards arrived with a quantity of rice which, together with that destroyed, would have amounted to a full cargo, the purchasers could not have refused to accept it. This rather bold proposition requires for its support that it should first be established that each bag of rice as it was shipped on board was appropriated to the purchasers and was at their risk. Assuming that the rice was not the purchasers' property, nor at their risk, as Bramwell, B. thought, I cannot agree that in the circumstances supposed there could be a performance of the contract. The purchasers were entitled to a full cargo of merchantable rice, and were not bound to accept less than a full cargo. The learned counsel for the appellants argued that after the *Sunbeam* sank with a deficient cargo the purchasers had a right to exercise their option, and to accept the rice at the bottom of the river in fulfilment of the contract. As between the purchasers and the vendors there was nothing to prevent the purchasers, if they chose to do so extraordinary a thing, from taking the perished rice and paying the invoiced price for it. But the case was between the purchasers and the underwriters. The purchasers were entitled to a cargo of rice shipped on board the *Sunbeam*; the option which they were entitled to exercise related to a cargo of rice on board that ship, and no other. Both vessel and cargo were utterly lost, and therefore what subject was in existence upon which an option could be exercised? After the loss, the purchasers were not bound to pay for the rice, and the vendors could not insist upon payment. If there had been no insurance it could not be supposed that the purchasers would have taken to and paid for the rice at the bottom of the river. The payment was entirely voluntary, and, instead of being the exercise of a *bonâ fide* option by the purchasers, was only made by them and accepted by the vendors with the view of relieving themselves and throwing the loss upon the underwriters.

In these circumstances I think that the judgment of the Exchequer Chamber was right and ought to be affirmed.

Lord HATHERLEY.—Although the question in this case is one of considerable difficulty, the contract itself is easy to construe. It clearly appears to have been within the contemplation of the parties that the property in the rice should not pass to the buyers, at least until the vendors could attach the drafts; but I do not think the question of risk depends entirely upon the question of the passing of the property. The proper test appears to me to be this—what was at the plaintiffs' risk at the time when they effected the policy of insurance? Now it is clear that nothing could be at their risk, except what they had purchased, namely, the cargo of the *Sunbeam*, and no property could pass until such cargo was actually in existence. They were under no obligation to accept a half cargo, or any smaller portion, and as

there was never a cargo of merchantable rice in existence it is difficult to understand how there could be any cargo at the buyer's risk. Then it is said that they were entitled to exercise an option as to the acceptance of the rice which had been actually shipped; but I know of no authority which would warrant us in holding that such an option may be exercised as against the insurer after the actual loss of the partial cargo. I feel an equal difficulty in holding that there could have been two separate risks, one of the vendors and the other for the vendees, in operation at the same moment. I therefore concur with my noble and learned friend who has already addressed your Lordships, in thinking that the judgment appealed against ought to be affirmed.

Lord O'HAGAN.—I deliver my opinion upon this case with considerable diffidence, because it is opposed to the views of the two noble and learned Lords who have already addressed this house; but I cannot arrive at any other conclusion than that the property in the rice actually shipped had passed to the plaintiffs before the loss of the vessel. The case of *Appleby* v. *Myers* (L. Rep. 7 C. P. 651) does not appear to me to be in point, for the decision then turned almost entirely upon the terms of the contract. I rather prefer to base my decision upon *Aldridge* v. *Johnson* (7 E. & B. 855) and *Langton* v. *Higgins* (4 H. & N. 402). which seem to establish that each bag of rice, as soon as it was shipped, was so far appropriated to the plaintiffs that the contents became their property. Under these circumstances I adopt the view of the Court of Common Pleas, that the purchasers had an insurable interest in the rice which was lost, and I further think that the whole conduct of the parties leads to the inference that each part of the cargo when shipped, was intended to be at the plaintiffs' risk. The law on this subject was well stated by Willes, J., in *Joyce* v. *Swann* (17 C.B., N.S.,84), and liability to insure goods must always be strong evidence of a liability to the risk of their loss. I think the judgment appealed against ought to be reversed.

Lord SELBORNE.—My Lords, it is my misfortune to differ from two of your Lordships, as well as from the majority of the court below, my opinion being that the case was placed upon its proper ground by the dissentient judgment of Quain, J., in the Exchequer Chamber.

It is on all hands admitted that, if by the contract between the parties the rice was to be at the risk of the buyer while in course of shipment at Rangoon, the plaintiffs (the appellants here) are entitled to recover. I do not consider it necessary that the intention should have been expressed in the bought note. It was sufficient if it appeared by evidence proper to be considered by a jury that the parties did in fact so agree. But I cannot read the terms of the bought note without drawing from them the inference, which there was certainly nothing in the rest of the evidence to repel, that the intention of the parties was that the goods should be insured by the buyer. The majority of the judges of the Exchequer Chamber were of opinion that, as the time when the sellers under the terms of the contract would be entitled to draw upon the buyers for the price of the goods, and when the buyers would be bound to accept the goods in fulfilment of their contract, would not arrive until a full cargo had been put on board, the risk, against which the buyer was intended to insure, would commence at the same time and not earlier. I am unable to agree in that opinion because the evidence satisfies me that this was not the actual understanding or intention of the parties.

On the day after the contract, when there could be no object in shifting any burden from the right to the wrong party, the buyers did actually insure in terms which covered every bag of rice put on board from the first commencement of the loading of the vessel. The fact that such an insurance had been made seemed not to have then been communicated to the sellers. But they made no insurance, and on the 6th March 1872, when the vessel was in the Rangoon river, exactly three days before she began to take in her cargo, they advised the buyers by telegram that she was there, and called their attention to "insurance." I can only understand that as meaning that the time was then close at hand at which, by the commencement of the loading of the cargo, the risk intended to be insured against by the buyer would begin. Nor does it appear to me to be reasonable, or according to the probable and ordinary course of mercantile usage, that when a cargo was to be loaded at a given place on board a particular ship for a particular adventure, and when the duty of insurance was undertaken by the buyer, the parties should be supposed to mean to divide the risk, so that the buyer should insure after the cargo was complete, and the seller (though nothing was said about it) until that time. When we have once got so far as the direct evidence leads us in this case, the presumption appears to me to be against such a distinction, and the burden of proof to lie upon those who affirmed it. Mr. Baron Bramwell, whose opinion I always hold in the highest respect, considered it a sufficient answer that there might be a risk while the goods were on their way to and not yet on board the ship, against which it would certainly not be for the buyers to insure, and that the line must always be drawn somewhere. I am not satisfied with that argument. The line in this case appears to be clearly drawn by the contract. Whatever was within the scope of the contract is on one side of that line, and whatever was not is on the other. The parties, had, of course, in their contemplation the cargo of the ship, and that only, and goods neither placed on board the ship as part of that cargo nor subject to any maritime risks of that particular ship as hired for that particular adventure would be altogether outside of this contract, and entirely unaffected by its provisions. But surely it is otherwise with regard to goods put on board as part of the cargo and subject to the maritime risks of the ship as hired for the particular adventure. The subject of the contract was "the cargo," not specific goods nor a defined quantity of goods. Nothing can be less likely than that when the buyers undertook to insure, an insurance was meant which would not cover the whole risk of the adventure from its commencement as to every part of the cargo; or that they should have thought of such a refinement as that goods put on board for the purpose of the adventure were not to be regarded as "cargo" for the purpose of insurance, until the whole lading was completed.

As I understand that the purchasers were to insure, I hold that fact is sufficient for the decision of the case. Mr. Justice Blackburn, in the case of *Allison* v. *The Bristol Insurance Company* (*ante*

p. 178; L. Rep. 1 App. Cas. 209; 34 L. T. Rep. N. S. 809), said, "According to my experience merchants attach very great weight to a stipulation as to who is to insure as showing who is to bear the risk of loss." I agree entirely in that remark, which is supported by several authorities. It appears to me that the case resembles *Castle* v. *Playford* (3 Mar. Law Cas. O. S. 407; *ante*, vol. 1, p. 255), in that it was contemplated that the buyer should bear the risk, and that the case of *Gilmour* v. *Supple* (11 Moore, P. C. C. 557) is also an authority in point. On the other hand, the cases cited on behalf of the defendants do not appear to throw any light on the question. It appears to me that enough rice had been shipped on board at the time of the loss for the cargo to be at the purchaser's risk. I think, therefore, that it was intended that the buyer was to bear the risk of loss in this case.

In my opinion the judgment of the Court of Exchequer Chamber ought to be reversed, and I confess I very much regret the decision which will pass in the name of your Lordships' house as being a failure of what seems to me to be substantial justice.

Lord Chelmsford.—There is a cross appeal by the defendant, and the sole question is, whether there was evidence for the jury of a loss by the perils insured against. It is needless for me to go through the facts set out in the case. I will only say that since there was evidence of seaworthiness there was evidence which justified the jury in finding that there was a loss by the perils insured against. I therefore move your Lordships that the judgment of the Court of Exchequer Chamber upon this point be affirmed with costs.

Lords Hatherley, O'Hagan, and Selborne concurred. *Judgment affirmed with costs.*

Solicitors. *Parker* and *Clarke; Holtams, Son,* and *Coward.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by H. Peat, James P. Aspinall, and F. W. Raikes, Esqs., Barristers-at-Law.

Tuesday, July 18, 1876.

(Before James and Mellish, L.J.J., and Baggallay, J.A.)

Baring *v.* Stanton.

Principal and agent—General agent—Discount on insurances—Commission.

A shipowner had for several years employed merchants as his general agents at a remuneration, and they had effected insurances on his ships. In their accounts they charged him with the full insurance premiums, although they were allowed by the underwriters to retain out of the premiums 5 per cent. brokerage, and 10 per cent. discount for ready money, in accordance with the custom of the trade.

Held, that as these allowances were usually made and as the shipowner had for years assented to them, he could not now object to allow them to retain these allowances on taking the accounts in a suit with regard to a mortgage on certain ships of his.

Decision of Bacon, V.C., affirmed.

Turnbull *v.* Garden (20 *L. T. Rep. N. S.* 218), *distinguished.*

This was an appeal from a decision of Bacon, V.C.

The hearing in the court below is reported *ante*, p. 246, where the facts of the case are fully stated.

The shipowner appealed.

Kay, Q.C. and *Caldecott*, for the appellant.—*The Great Western Insurance Company* v. *Cunliffe* (*ante* vol. 2, pp. 219, 298; 30 L. T. Rep. N. S. 661; L. Rep. 9 Ch. 525), on which the Vice-Chancellor based his judgment, does not apply to this case at all. The distinction is that the defendant in that case was employed as an insurance broker and nothing else, while here the plaintiffs are general agents as merchants and not simply insurance brokers. They are general agents on terms of special remuneration, which does not include the right to charge specially as insurance brokers. The five per cent. brokerage is sufficient remuneration, and they have no right to retain the ten per cent. discount. As agents, they should, in their accounts, have disclosed all the allowances made to them, and the defendant was not bound to make any inquiry. They must pay over the discount to their principal:

Turnbull v. *Garden*, 20 L. T. Rep. N. S. 218; 38 L. J. 331, Ch.;
Queen of Spain v. *Parr*, 21 L. T. Rep. N. S. 555; 39 L. J. 73, Ch.;
Palmer v. *Butcher*, 10 B. & C. 329.

Cotton, Q.C. and *J. Kaye*, for the respondents, were not called upon.

James, L.J.—I am of opinion that the order of the Vice-Chancellor in this case ought to be affirmed.

The question is, whether this case is governed by the decisions pronounced by me as Vice-Chancellor in the *Queen of Spain* v. *Parr*, and in *Turnbull* v. *Garden*, or by the case of *The Great Western Insurance Company* v. *Cunliffe*. It appears to me that that last case really governs the present case. In that case Mellish, L.J., observed (*ante*, vol. 2, p. 290; 30 L. T. Rep. N. S. 664-5; L. Rep. 9 Ch. 539): "Then it is quite obvious that they must have known, and they do not deny that they did know, that Messrs. Pickersgill were to be remunerated by receiving a certain allowance on discount from the underwriters with whom they made the bargains. It was easy to ascertain by inquiry what was the usual and ordinary charge which agents who effect reinsurances are entitled to make. If a person employs another, whom he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him but by the other persons, which is very common in mercantile business, and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging." That really seems to me to govern this case.

It is quite clear that it was known to everybody connected with insurances that the insurance offices were in the habit of making allowances, by way of brokerage and otherwise, of 12 per cent. of the profits, or 10 per cent. discount, and also 5 per cent. brokerage, so much so, that some of the documents produced actually contain those terms printed as a common form. It is quite obvious

that this is a recognised practice of the insurance offices. That being so, it is very difficult to believe that Mr. Stanton did not know that Messrs. Baring were receiving from the insurance offices such allowances as the offices were in the habit of making. Their dealings go on for years. Mr. Stanton never takes the trouble to make inquiries, but settles all the accounts, and deals with Messrs. Baring on that footing; and it is not unimportant in this case to observe that when he filed a bill—it is true, for another object, namely, to have a declaration that the conveyance of the ships was by way of mortgage only—and asked that, upon the footing of that mortgage, the accounts might be taken, he actually accepted the course of business between the two firms including the very thing which is now the subject of this discussion. After that, as between himself and Messrs. Baring, it seems to me impossible to allow him to re-open an acconnt which has gone on from the year 1861 to the year 1872.

I am, therefore, of opinion that the order of the Vice-Chancellor ought to be affirmed, and the appeal dismissed with costs.

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

I think that this case cannot in principle be distinguished from the case of *The Great Western Insurance Company* v. *Cunliffe*. It appears that there are two ordinary modes in which agents employ underwriters—the cash system and the credit system. According to the credit system the accounts are made out at the end of the year; all the premiums which the particular merchant or agent has brought to the underwriter are put on one side, and all the losses are put on the other side, and then, if there is a profit, the underwriter allows the merchant 12 per cent. on that profit. We held that the merchant or agent who brought the business was entitled to keep that profit. The cash system, which was adopted in the present case, is this: Some underwriters, particularly new insurance companies, object to a long credit system, and prefer a system by which they get their premiums paid at once. They are willing to make a sacrifice for the purpose of obtaining prompt payment, and on payment, instead of the 12 per cent. on the net profits, if the premium is paid within a fixed number of days after the insurance is effected, they make an allowance of 10 per cent., the customers being charged with the premiums just as before. If that is generally known and acquiesced in, I cannot conceive that it is a fraud upon anybody.

It may be a misfortune to Mr. Stanton that, being an American, he really did not know the usage in London. But if a person comes and trades in London, he must make himself acquainted with the usages in London, and when he employs the Messrs. Baring he must expect the Messrs. Baring to treat him in the same way as they treat all their other customers; and he cannot be entitled, because, after ten years' business transactions with them, he quarrels with them, to say that they should treat him in a different way from that in which they treat anyone else. According to the evidence of Messrs. Baring's clerk, this is the way in which they invariably charge their customers, and if Mr. Stanton had inquired before he employed Messrs. Baring what their charges were, they would have told him that these were their charges. But he had confidence in them, and he thought they would charge what was right whether he asked them or not, and he cannot now be allowed to open the accounts. I think we do not at all overrule the case of *Turnbull* v. *Garden*, because, as I understand it, in that case the party from whom the discount was taken was not in the position of Messrs. Baring, but was an agent for somebody else. The real brokers were willing to allow a discount, and then the question was whether the next agent, could keep it in his own pocket, or was bound to give it to the principal, which was an entirely different question.

I am of opinion, therefore, that the judgment of the Vice-Chancellor in this case ought to be affirmed.

Baggallay, J.A.—I am of opinion that this case is entirely governed by the decision in *The Great Western Insurance Company* v. *Cunliffe*, and that there is nothing whatever in that case which was antagonistic to the principle established in the cases of *Turnbull* v. *Garden* and *Queen of Spain* v. *Parr*. It appears to me that exactly as in *The Great Western Insurance Company* v. *Cunliffe* Messrs. Pickersgill were employed, in this case Messrs. Baring were employed to do a particular business, namely, that of insuring, and they were making certain profits incidental to the carrying on of that business. That certainly appears to have been the view of the case which was taken by Mr Stanton when he filed his bill against Messrs. Baring, the statements in which bill he verifies by affidavit in a form which implies that that was the ordinary and usual course of business, and that he had been aware of it throughout.

Appeal dismissed with costs.

Solicitors for the appellant, *Shum, Crossman, and Crossman.*

Solicitors for the respondents, *Markby, Tarry and Stewart.*

Dec. 6 *and* 7, 1876.

(Before James L.J., Baggallay and Brett, JJ.A.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

The Franconia.

Collision—Steamships—Overtaking — Crossing — Slackening speed—Regulations for preventing collisions at sea, Articles 14, 16, 17.

As a general rule wherever two steamships are on converging courses, the one aboft the beam of the other in such a position that the hinder ship cannot see the side lights of the leading ship, the former, if going at a greater speed than the latter, is to be considered as a vessel overtaking another vessel, within the meaning of Article 17 *of the regulations for Preventing Collisions at Sea, and bound to keep out of the way; and they are not to be treated as crossing vessels under Article* 14.

Where one steamship is overtaking another within the meaning of Article 17 *of the Regulations, and there is risk of collision, the leading ship is not to be considered as approaching another ship so as to involve risk of collision within the meaning of Article* 16, *and is not bound to slacken speed, or stop and reverse.*

Where two steamships are navigating open waters, such as the English Channel, some miles from land, one has no right to assume that the other will at a given time or place alter her course and take another course up or down channel, but

the former must, as the other ship approaches, take such measures as are required by the regulations in reference to the course upon which such other ship actually is.

This was an appeal from a judgment of the High Court of Justice (Admiralty Division), in cross actions of collision respectively brought by the owners of the British steamship *Strathclyde* against the German steamship *Franconia*, and by the owners of the *Franconia* against the owners of the *Strathclyde*, to recover damages in respect of a collision between the two steamships which occurred off Dover, at about 4 p.m. on the 17th Feb. 1876.

The *Strathclyde* was a screw steamship of 1254 tons register, and 180 horse power nominal, was manned by a crew of forty-seven hands, had a number of passengers on board, and was bound upon a voyage from London to Bombay.

The *Franconia* was a screw steamship of 2111 tons register, and 360 nominal horse power, had a crew of seventy-three hands, and was bound upon a voyage from Hamburg to Havre, and thence to the West Indies. The *Franconia* had in the course of her voyage called at Grimsby, and was proceeding from that port to Havre.

The *Strathclyde* having a Thames pilot on board, stopped about half a mile east south east of Dover Pier, and landed the pilot.

After some little delay she went ahead full speed, steering a S.W. true course (S.W. by S. by the ship's compass) to get a good offing before straightening down on to the usual channel course, which is W.S.W. At this time the master of the *Strathclyde* sighted the *Franconia*, which was steering a W.S.W. course (W.S.W. $\frac{1}{4}$ S. by ship's compass) down channel, going full speed, and then bore about two points on the port quarter of the *Strathclyde*, and distant from two to three miles. The two vessels continued on their respective courses until within a quarter of a mile of one another, when the *Franconia* was overlapping the quarter of the *Strathclyde* by about one-third of her own length. At this time the *Strathclyde* ported half a point, and the two vessels continued their course until the two vessels were from two to three ships' length from one another, when the *Franconia* stopped and reversed her engines and ported her helm, and her master hailed the *Strathclyde* to port. The helm of the *Strathclyde* was accordingly ported, and her engines were kept going full speed ahead, but the *Franconia* with her stern struck the *Strathclyde* about sixty feet from the stern, and damaged her so seriously that she shortly afterwards sank. The relative positions and speed of the two ships were in dispute between the parties; the *Franconia's* crew had sighted the *Strathclyde* before she went into Dover Bay to land her pilot, and had watched her coming out again, and they alleged that when she began to come out again she bore about six points on the starboard bow of the *Franconia*, and that the *Strathclyde* must have been going much faster than the *Franconia* to have brought about the collision. The alleged speed of the two vessels was about the same, viz., about $8\frac{3}{4}$ knots an hour; but while that was the full speed of the *Strathclyde* the full speed of the *Franconia* was from $10\frac{1}{2}$ to 12 knots an hour, and she had been actually running her full speed up to noon on the day of the collision; it was alleged that the reduction in speed was owing to bad coals; the same had been burnt on board the *Franconia* during the whole time since she left Hamburgh. On the other hand, it was alleged by the *Strathclyde* that the positions of the two vessels as she left Dover Bay were as given above in the account of the collision, and that the speed of the *Franconia* was greater than that of the *Strathclyde* (these were found to be the facts by the judgment). There was no dispute however as to the courses of the two vessels, and their positions at the time of the final porting before the collision.

After the collision the *Franconia* rendered no assistance to the passengers and crew of the *Strathclyde*, and a great many were drowned in consequence, and the neglect to do so was made a substantive charge against the *Franconia* under the provisions of the Merchant Shipping Act, 1873, sect. 17; the defence, however, was that the *Franconia* was so damaged that her master believed her to be in a sinking condition, and made for the shore to beach her.

The *Franconia* was further charged by the owner of the *Strathclyde* with omitting to keep out of the way of the latter vessel, as it was her duty to do, either under Art. 14 of the Regulations for Preventing Collisions at Sea, which provides that "if two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard hand shall keep out of the way of the other;" or under Art. 17, which provides "that every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel."

The owners of the *Franconia* alleged that the *Strathclyde* by her conduct had deceived the officers of the *Franconia*, who had reason to expect that the *Strathclyde*, before approaching so near to the *Franconia* would have got on to her proper channel course, viz.: W.S.W., and have then been parallel to the *Franconia*, and that it was the persistent holding on of the *Strathclyde* upon her S.W. course, which she ought to have changed sooner under the circumstances, that brought about the collision; and they charged the *Strathclyde* with improperly neglecting or omitting to take in due time and keep her proper course down Channel, and with steering her across the hawse of the *Franconia*, and also with neglecting to comply with the provisions of art. 16 of the regulations, which provides that "every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

On April 27, 28, 29, and 30, and May 2 and 3, 1876, the case was heard before Sir R. Phillimore and Trinity Masters.

Butt Q.C. (*Clarkson* and *Webster* with him), for the *Strathclyde*, contended that under the Merchant Shipping Act 1873, s. 16, the master of the *Franconia* was bound to render assistance to the *Strathclyde*, and having neglected to do so the *Franconia* must be held to blame. Moreover whether the vessels were crossing or the *Franconia* were an overtaking ship it was equally her duty to keep out of the way of the *Strathclyde*. The *Strathclyde* had kept her course as she was bound to do, and the *Franconia* was alone to blame.

Benjamin, Q.C. (*Cohen*, Q.C. and *W. G. F. Phillimore* with him), for the *Franconia*, admitted that the *Franconia* was to blame, but contended that the vessels must be treated as crossing vessels under art. 14, and that they were, therefore, approaching so as to involve risk of collision, and

that it was, therefore, the duty of the *Strathclyde* to stop and reverse, which she did not do, and that she must, therefore, be held also to blame. Again, there being a well known channel course, a vessel has a right to expect that such course will be taken in due time by another vessel going down channel, and the former is justified in holding on in the expectation of such course being taken, she being on that course herself, and if the other vessel holds on beyond the place where she ought to take her down channel course, without given any warning of her intention, she must be responsible for the consequences. The merchant Shipping Act 1873, s. 16, cannot apply to a foreign ship on the high seas.

Butt, Q.C. in reply.

Sir R. Phillimore.—Since the admission made by the counsel for the *Franconia* that it could not be maintained that that vessel was not to blame, either for not porting at an earlier period or for not starboarding just before the collision, the inquiry has been narrowed to the consideration as to whether the *Strathclyde* be not also to blame. I will presently express my opinion on this point, but I think that, in the painful circumstances of this most unhappy case, I ought not to pass by wholly unnoticed the charge alleged in the pleadings against the master of the *Franconia* of steaming away directly after the collision without rendering assistance to the perishing crew and passengers of the *Strathclyde*.

It has been contended the statute 36 & 37 Vict. c. 85, s. 16, under which this charge was brought, does not apply to the case of a foreign ship. It has been answered that, so far as the question of collision is concerned, the statute applies to all vessels, while the punishment for a misdemeanour is confined to officers of British vessels. It really matters very little as to the issue now before me, and after the admission which has been made, whether the statute be applicable or not. I do not think it necessary to pronounce an opinion on this point at the present time.

The court, however, before the passing of any statute on the subject, would have deemed it right to comment on the conduct of a captain against whom so serious a charge had been brought. It is, I think, due to the captain of the *Franconia* to observe that it was under the pressing advice of an English pilot on board his vessel—not indeed, actually in command at the period, because the ship was just out of his pilotage waters, but who had been in command a very short time before—it was at his urgent exhortation that the captain took this most unfortunate and reprehensible step.

It appears that this pilot, after having been sent by the captain to ascertain the nature of the damage done to the ship, returned and cried out, "For God's sake put the helm a port and run to the shore; I think our ship is going to sink too." This certainly was the consequence of a disgraceful panic on the part of the pilot. The boats, which were put over the side within a few feet of the water, were never lowered into it. The *Franconia* steamed away, and many lives which might have been saved without any danger at all to her were, it is most horrible to state, unnecessarily lost. It is just to state that the English pilot gave this base advice, which was followed; nevertheless, it must be said that a captain of greater nerve, firmer presence of mind, and, I must add of more sensitive humanity, would not have heeded this counsel of panic, but would have lowered his boats and helped to save his fellow creatures. I have thought it my duty to make these remarks, and I have now to consider whether, as the *Franconia* contends, the *Strathclyde* was also to blame for this collision.

The question as to whether the *Strathclyde* was an approaching vessel, in the sense of the 16th article of the rules of navigation, is one of considerable importance, and it is expedient to carefully consider the proved or admitted facts as regards the navigation of both vessels.

The *Franconia* and *Strathclyde* were relatively two or three miles distant when the master of each admits having seen and noticed the other, and the direction in which she was steering. It being daylight, and clear in the channel, there was no uncertainty on the part of the masters as to the movements of either vessel. The *Franconia* was steering a direct course S.W. by S. $\frac{3}{4}$ W. to pass from two to three miles off Dungeness Point. The *Franconia* saw the *Strathclyde* standing out from Dover roads on her starboard bow, and steering so as to cross the *Franconia's* course. The master of the *Franconia* stated that he believed the *Strathclyde* to be bound down channel, and that before she approached too close to the *Franconia* she would haul to the westward. The *Franconia* was kept steady at S.W. by W. $\frac{3}{4}$ W., having the *Strathclyde* on her starboard bow, and approaching her at an angle of three points, steering S.W. by S. The relative courses were steered by the two vessels going at full speed until they came within about three ships' lengths of each other. The *Franconia* had drawn up with the *Strathclyde* until her bow was abreast of the *Strathclyde's* mainmast, the same angle of position being preserved.

The master of the *Franconia* ordered her engines to be stopped and reversed full speed. At the same time, though the *Franconia* had still way upon her, stated variously at from two to five or six knots, the master ordered her helm hard a port, and as a natural consequence (looking to the relative positions of the two vessels) ran stem on into the port side of the *Strathclyde* at nearly right angles, and sunk her. The *Strathclyde*, after landing her pilot at Dover, saw the *Franconia* about two miles off her port quarter steering a course down channel. The *Strathclyde* was bound down channel, but her master was desirous of getting to the southward of the track of inward-bound ships during the coming night, he, therefore, steered out S.W. by S. for that purpose.

The *Strathclyde* continued to steer S.W. by S. until she approached the *Franconia* within three ship's lengths, and going at full speed. The *Strathclyde* then pointed half a point, and her helm was steadied with her head at S.W. $\frac{1}{2}$ S. A few seconds after, observing that the *Franconia's* helm was hard a port, the master of the *Strathclyde* ordered her helm hard a port, also, and kept on full speed, as her only chance of escape; nevertheless, the *Franconia* came stem on into the port quarter of the *Strathclyde*.

I may observe here that I am advised that it was a prudent course in the circumstances, as stated on the part of the captain of the *Strathclyde*, to get a good offing. We do not think that, having regard to this statement of facts, the *Strathclyde* was a vessel approaching the other so as to involve a risk of collision in the sense of the 16th article,

and, therefore, bound to slacken her speed, because before the *Franconia* ported there was no reasonable ground of apprehension of collision, or, in other words, the two vessels were not so approaching as to involve the risk of collision in the ordinary meaning of the words. It was only the sudden and wrong manœuvre of the *Franconia* in porting that involved the risk of collision not previously existing; and after the *Franconia* had ported, the only chance of escaping collision, I am advised, was the execution of the manœuvre adopted by the *Strathclyde*, namely, going full speed putting her helm hard a port. The vessels were, in our judgment, crossing vessels in the sense of the 14th and not approaching vessels in the sense of the 16th article.

Therefore, upon the whole, I have arrived at the conclusion that the *Strathclyde* cannot be said to have contributed to this collision by transgressing the provisions of the 16th article, and I must pronounce the *Franconia* solely to blame.

From this judgment the owners of the *Franconia* appealed.

Dec. 6 and 7.—Benjamin, Q. C. and *Phillimore* (*Cohen*, Q.C., with them) contended the *Strathclyde* was bound to take the usual channel course, and to keep it, and that she ought not to deceive other vessels as to her intentions without due warning. There being a proper course, a deviation from it was a default for which she ought to be held to blame.

The Velocity, L. Rep. 3 P. C. 45; 21 L. T. Rep. N.S. 686; 3 Mar. Law Cas. O. S. 308;
The Esk and the Niord, *ante*, vol. 1. p. 1; L. Rep. 3 P. C. 436; 24 L. T. Rep. N. S. 667.

At least, if the intention of the master of the *Strathclyde* was to do something unusual he should have given due warning,

The *Bellerophon*, *ante*, p. 58; 33 L. T. Rep. N. S. 412.

As the two vessels were on courses not parallel, they must be considered as approaching ships, and hence it was the duty of the *Strathclyde* to slacken speed as soon as there was risk of collision. This she neglected to do, and she was, therefore, guilty of a breach of the regulations which, under the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 17, renders her liable to be deemed in fault, as there were no circumstances rendering a departure from the rule necessary.

Butt, Q.C., *Clarkson*, and *Webster*, for the respondents, were not called upon.

The judgment of the court was delivered by

Brett, J.A.—In this case the judgment of the Admiralty Court found that the *Franconia* was solely to blame upon these grounds. The judge and the Elder Brethren found that the vessels were crossing vessels; but, although it was said that they were crossing vessels, yet that the *Strathclyde* was not at all to blame for not slackening her speed as the vessels were coming together.

Now, I believe we are all of opinion that the judgment of the court below is correct, and that the *Franconia* was solely to blame. But we do not, I think, agree with the reasons which were given by the court below for arriving at that result. We take it, upon the evidence as a whole, to be proved that when the two ships laid their course, the position of the ships was very much what the captain of the *Strathclyde* stated it to be, viz., that when the ships had taken the two courses which they resolved to hold for some time, the *Franconia* was about two points on the port quarter of the *Strathclyde*. It is true that the vessels were then laying two courses, which mathematically would at one time or other bring those two courses to cross; but the question is, whether under those circumstances, the ships are crossing ships, or whether one is a ship overtaking another.

Now, if the two ships were in that position, and upon those two courses, it seems to me impossible that the *Franconia* could ever reach the *Strathclyde*, unless she was going faster than the *Strathclyde*; and we all think that the evidence is conclusive to show that the *Franconia* was going faster than the *Strathclyde*, and the gentlemen who advise us are, I believe, of the same opinion. It is true that there is evidence as to the pace or the speed of each vessel, and the evidence may look as if the two vessels were going the same, or as nearly as possible the same, speed. But if you once put the two vessels into the position which I have stated, and take the courses which it is admitted on both sides were the courses, it is impossible that the *Franconia* could have touched the *Strathclyde* unless she was going faster than the *Strathclyde*. Therefore I take it that the two ships were in the position as nearly as possible described by the Captain of the *Strathclyde*, and that the *Franconia* was going faster than the *Strathclyde*.

But the two ships were going upon courses which, mathematically, would eventually, at some point, cross each other.

Now, under those circumstances, the question seems to me to be whether two vessels in those positions can be said, within the meaning of the regulations for preventing collisions at sea, to be crossing ships.

This case has been argued as if ships cross, and must be crossing, unless they are going in exactly parallel lines, or as nearly as possible parallel lines. I cannot think that in the meaning of these rules. The 13th rule speaks of two ships under steam meeting end on or nearly end on. The 14th rule speaks of two ships under steam crossing; but the 17th rule is, "every vessel overtaking any other vessel." Now, Mr. Benjamin argues that, although ships were crossing they might also be overtaking. I cannot think that that is the true interpretation of these rules. The rule which applies to crossing ships, in using the word "crossing" is, using a sea term, a term of navigation; it is not using a mathematical term, and so in speaking of one vessel overtaking another, the 17th rule uses a sea and not a mathematical term at all. Now the 17th rule of course implies that one ship is going faster than another, for unless one ship is going faster than another it is difficult to say it is overtaking another.

Then we come to this, whether we can form a definition of the difference between crossing ships and overtaking ships. Now it would seem to me that this may be a very good definition—I will not say that it is exhaustive, or that it may not on some occasion be found to be short of comprising every case, but I think it is a very good rule—that if the ships are in such positions, and are on such courses and at such distances that if it were night the hinder ship

could not see any part of the side lights of the more forward ship, then they cannot be said to be crossing ships, although their courses may not be exactly parallel to one another; if one ship is so much behind the other, and their courses are such that if it were night the one ship could not see, by reason of the screens, any part of the side lights of the other ship, she must be so far behind her that she could not possibly reach her unless she was going very much faster than that other ship. It would not do, I think, to limit the angle of the crossing too much, but if it is limited to that extent it seems to me that that is a very useful and practical rule.

Well, if that is so, these ships were in the position which I have described. If the *Strathclyde* was a mile or even a quarter of a mile distant from—I do not say sideways, but distant from—the *Franconia*, and had the *Franconia* two points on her quarter, the *Strathclyde* being ahead, it is impossible the *Franconia* could have seen any part of the side lights of the *Strathclyde*, and that, I think, is the opinion of the gentlemen who advise us. That being so, the *Strathclyde* and the *Franconia* were not crossing vessels, and as a collision did take place, the *Franconia* must have been going faster than the *Strathclyde*. She was, therefore, an overtaking vessel, and came within the 17th rule.

Now it has been argued by Mr. Benjamin that if the vessels were crossing at all, they must have been approaching. I do not think it is absolutely necessary to determine that point, but I confess that my mind goes with him, and the inclination of my opinion certainly is that if two vessels can properly be said, within the meaning of the 14th article or rule, to be crossing vessels, that then, they must be approaching vessels; and if both of them are steamers the 16th rule would apply, and both of them ought to slacken. It seems to me clear that where the position of vessels brings them within the 17th rule, in which the one is overtaking the other, although they are both steamers, you cannot apply the 16th rule at all to the leading vessel. It is impossible by any fair construction of language that the one that is a leading vessel, although a steamship, is approaching the other; she is going away from the other, and it is an abuse of language to say that that vessel is an approaching vessel at all; when one steamship is overtaking another within the meaning of these rules, the first one cannot be said to be approaching the hinder vessel at all, and, therefore, the leading vessel is not within the 16th rule.

Now, that being so, the *Franconia* broke almost every rule. She was the vessel overtaking another. Under these circumstances she ought to have kept out of the way. She was a steamship approaching another. She ought to have slackened her speed. She did nothing until the last moment either to get out of the way or to slacken her speed. If what I say is correct, the *Strathclyde* broke no rule, unless it can be said that she broke eventually the 20th rule. Now, when the vessels had come close to each other, it seems to me impossible to suppose that they were, as has been stated, a quarter of a mile apart at the last moment when the *Franconia* ported. There is some evidence that she was only three ship's lengths distance from the *Strathclyde* at that time. If you tie down the evidence to this that she was a quarter of a mile off and overlapping the other vessel, in my opinion, and according to the opinion of the gentlemen who advise us, the collision could not have taken place as it did. What is the conclusion, then (the collision did take place), but that they were not a quarter of a mile off, but three lengths of a vessel apart at the time the *Franconia* ported? Now, if this be true, the *Strathclyde* up to that time, having broken no rule, can it be suggested that she broke a rule then? On the contrary, it was found in the court below, and it is the opinion of those who advise us here, and it is our opinion that so far from breaking any rule of navigation at the time, the *Strathclyde* did the very best thing she could do, she did yield half a point to the *Franconia*, and afterwards yielded more by putting her helm hard a-port, and it is our opinion and those who advise us, that it is the best thing she could do to avoid the wrong conduct of the *Franconia*. Therefore the *Franconia* broke the rules; the *Strathclyde* broke no written rule.

But, then, it has been suggested that the *Strathclyde* misled the *Franconia*. Now, I confess that that seems to me to be an untenable argument. First of all it rests upon an assumption that the *Franconia* had a right to keep on her course, not only as to direction but as to the place in which she was, and that because the *Strathclyde* was coming out of Dover Bay she ought either to have yielded to the *Franconia*, or that she ought to have ported her helm so as to go a course down channel which would keep her on the starboard side of the *Franconia*. That is so, it is said, because the *Franconia* was going down on her usual course; and the case was likened to *The Velocity* (*ubi sup.*), and *The Esk* (*ubi sup*)., and Mr. Phillimore invited us to say that the same rules were applicable to the usual course of the English Channel which are applicable to a river with a winding course. It is the first time such a proposition was put forth. The rules are made for the sea. The reason why, in the cases of *The Velocity* and *The Esk*, it was held that the rules did not apply was, because, as a matter of fact, the rules are held to be inapplicable to vessels meeting each other and sighting lights in a winding river. Their lights are seen overland, and it is impossible that the rules can be made applicable to these circumstances. If that is so, no regulations were ever intended to apply to circumstances where in truth and fact they cannot apply; and therefore in *The Velocity* (*ubi sup.*), and *The Esk* (*ubi sup.*), it was held that these written rules did not apply, but that some other rule did, and that other rules is the customary course of navigation in different rivers, and everyone who has known the Thames has known what the usual course of navigation in that river has been for many years. That does not apply at all to the Channel, and there is no usual course in the Channel in the sense in which it was argued. The ships are in the English Channel as if they were on the sea, and the only sailing rules which are applicable to them under those circumstances are those which have been enacted and are contained in those rules. The case of *The Velocity* therefore, is not applicable.

Therefore, on the whole, taking the position of these ships to have been what we find them to be, and taking their courses to have been what is admitted, we are of opinion that the *Franconia* was a

vessel overtaking the *Strathclyde*; that the vessels were not crossing vessels; that the *Strathclyde* was not a vessel which can be said to have been approaching the *Franconia*; that the *Franconia* was an overtaking and approaching ship, that she broke the rules, that she broke them up to the end; that the *Strathclyde* broke no rule either before the collision was imminent or at the moment before the collision was inevitable; she broke no rule from beginning to end. We are of opinion, therefore, that the *Franconia* was an overtaking ship, and that the *Strathclyde* was not a crossing ship. We agree with the Admiralty Court that the *Franconia* was to blame. We cannot, however, agree with the decision of the Admiralty Court that the two ships were crossing ships; and we hold that the *Strathclyde* was not bound to diminish her speed.

James, L.J.—The appeal will be dismissed with costs.

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

Solicitors for the respondents, *Gellatly, Son,* and *Warton.*

SITTINGS AT WESTMINSTER.

Reported by W. Appleton and P. B. Hutchins, Esqs., Barristers-at-Law.

Friday, Dec. 1, 1876.

(Before Mellish, L.J., Brett and Amphlett, JJ.A.)

Sanguinetti *v.* The Pacific Steam Navigation Company.

Charter-party—Days allowed for loading—Stiffening coal—Demurrage—Master's lien—Ceasing of charterer's liability.

Defendants chartered plaintiff's ship to carry a cargo to Callao. By the charter-party the ship was "to be loaded at the average rate of 75 tons per clear working day . . . Stiffening coal, if required, to be supplied at ship's expense at the rate of 40 tons per clear working day after written notice is given to the charterers' agent of its being required, but all days on which stiffening coal is taken on board, or the ship is detained for the same, to be excluded in the computation of the said working days allowed for loading . . . Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively at the rate of 3d. per registered ton per day. The master to have a lien on the cargo for all freight and demurrage due under this agreement . . . All liability of the charterers under this agreement shall cease as soon as the cargo is on board . . . All questions, whether of short delivery, demurrage, or otherwise, are to be settled with the manager or agents of the charterers at the port of destination, which settlement is to be binding on the owner. The owner and master to have a lien on the cargo for all freight, dead freight, and demurrage"

Defendants failed to supply stiffening coal, whereby the ship was detained forty-eight days at the port of loading. Plaintiff sued for demurrage.

Held (affirming the judgment of the Queen's Bench Division on demurrer to statement of claim), that putting stiffening coal on board was "loading" within the demurrage clause, and therefore demurrage was payable, but that this was a liability under the charter-party, which ceased when the cargo was on board, and the only remedy was by the master's lien, and therefore plaintiff could not recover on the charter-party.

Action by the plaintiff, owner of the ship *Guiseppe*, against the defendants, charterers. The statement of claim set out the charter-party, the material parts of which are as follows:

"The said ship, now at Genoa, being tight, staunch, and strong, and in every way fitted for the voyage, shall proceed to Cardiff, with option to take a cargo in Mediterranean for Cardiff for owner's benefit, and there load in any dock ordered by shippers a full and complete cargo of steam coal from the colliery named by the charterers' agent on the vessel's arrival at Cardiff, and being so loaded shall therewith proceed to Callao, or so near thereto as she may safely get, and there deliver the same (all on board to be delivered) into lighters, steamers, depot ships, or at any wharf as ordered by the charterer's agent . . . The ship to be loaded at the average rate of 75 tons per clear working day (as tendered during night or day), commencing when the vessel is in berth (under the tip where tips are used), wholly unballasted and ready to receive cargo, notice of which is to be given in writing by the master to charterers' agent. Any time lost by reason of riots, partial or general lock outs, strikes, or cessation from work on the part of the pitmen or other hands engaged in the getting, carriage, or loading of the said coals from whatever cause, or by reason of accidents in mines or to machinery, obstruction on or in any railway, river, canal, or dock used for the carriage of the coal, or in the loading of the ship, or by reason of floods, frosts, storms or any cause beyond the control of the charterers to be excluded in the computation of the said working days. Stiffening coal if required to be supplied at ship's expense at the rate of 40 tons per clear working day after written notice is given to the charterers' agents of its being required, but all days on which stiffening coal is taken on board or the ship is detained for the same to be excluded in the computation of the said working days allowed for loading. The vessel to be discharged at the average rate of 40 tons per clear working day, commencing from the day after written notice is given to the charterers' agents of readiness to deliver the cargo. Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively at the rate of 3*d.* per registered ton per day. The master to have a lien on the cargo for all freight and demurrage due under this agreement. . . . All liability of the charterers under this agreement shall cease as soon as the cargo is on board, except as to the aforesaid payment to be made on sailing, and all questions, whether of short delivery, demurrage, or otherwise, are to be settled with the manager or agents of the charterers at the port of destination, which settlement is to be binding on the owners, the owners and master to have a lien on the cargo for all freight, dead freight and demurrage."

The statement of claim went on to allege that the ship proceeded to Cardiff, and on 24th Feb. 1875, notice was given that stiffening coal was required.

Clause 5 was as follows: "The whole of the ballast from the vessel could not be taken out of the vessel until the necessary stiffening coal could have been provided, and the use was and is to discharge the greater portion of the ballast and to retain a small quantity of ballast which is kept in

the vessel for the purpose of keeping her upright, and this latter small quantity of ballast is discharged simultaneously with the receipt of the stiffening coal, whereof the defendants had notice."

Allegation that the defendants failed to supply any stiffening coal until the 15th April 1875, and that "the defendants detained the ship forty-eight days over and above the period so agreed upon for loading, and thereby became liable to pay to the plaintiff 350*l.* 13*s.* for demurrage of the vessel or for damages for the detention of the vessel, yet the defendants have not paid the same, and the same is still wholly due and unpaid."

There were also allegations that the defendants' agent at Callao requested the plaintiff to deliver the cargo without enforcing his lien, and the plaintiff did so; and that the defendants' agent did not settle the questions which arose.

Demurrer "to so much of the plaintiff's statement of claim as alleges liability in respect of what took place in England . . . on the ground that it appears that the cargo was on board, and that all liability of the defendants was by the charter-party to cease thereupon . . . and also on the ground that it does not appear that the said questions had been settled with the said manager or agent of the defendants."

The Queen's Bench Division (Mellor and Quain, JJ.) gave judgment for the defendants, and the plaintiff appealed.

Benjamin, Q.C. (*L. P. Russell* with him) for the plaintiff.—The clause in the charter-party by which all liability of the charterers is to cease as soon as the cargo is on board, does not apply to the claim for detention at the port of loading. It only exempts the charterers from liability for breaches of the charter-party in respect of which a lien is given to the owner:

Kish v. *Cory*, *ante*, vol. 2, p. 593; 32 L. T. Rep. N. S. 670; L. Rep. 10 Q. B. 553;
Francesco v. *Massey*, *ante*, vol. 2, p. 594n.; L. Rep. 8 Ex. 101; 42 L. J. 75, Ex.;
Lockhart v. *Falk*, *ante*, vol. 2, p. 8; 35 L. T. Rep. N. S. 96; L. Rep. 10 Ex. 132.

[BRETT, J.A. referred to *French* v. *Gerber* (L. Rep. 1 C. P. D. 737, now pending in the Court of Appeal).] In the present case the parties had two things in contemplation when the charter-party was drawn up—demurrage, and detention as distinguished from demurrage. The lien is only given for "freight, dead freight, and demurrage," and does not extend to the present claim. Therefore the claim is not within the clause exempting the charterers from liability, and the plaintiff is entitled to recover. The exemption is conditional on the defendants' agent settling according to the charter-party.

Cohen, Q.C. (*Arthur Williams* with him) for the defendants.—The point intended to be raised by the demurrer is that the defendants are subject to no liability, independently of what happened at Callao. This is a claim for demurrage, and as such is within the express words of the clause giving a lien. It follows that it comes within the clause exempting the defendants from liability under the charter party. The contention on the part of the plaintiff is that by making the charter-party, the defendants contracted an obligation that their agent should settle; if so, that is a liability under the charter-party, and the exemption applies. The court will not vary the meaning of the clause because the plaintiff finds his lien an insufficient security. He also referred to *Bannister* v. *Breslauer* (16 L. T. Rep. N. S. 418; L. Rep. 2 C. P. 497; 36 L. J. 195, C. P). [BRETT, J.A.—That case has been doubted; see *French* v. *Gerber* (*ubi sup.*)]

L. P. Russell, in reply, referred to

Gray v. *Carr*, *ante*, vol. 1, p. 115; L. Rep. 6, Q.B. 522; 40 L. J. 257, Q B.; 25 L. T. Rep. N. S. 215.

MELLISH, L.J.—The question in this case is whether, according to the true construction of the charter-party, the defendants are liable to pay demurrage or damages for detention of the plaintiff's ship, which was detained for forty-eight days at the port of loading, Cardiff. The demurrer only raises the question whether the defendants are liable to a claim for demurrage or detention in England. We thought that in order to settle the matter fully, it was desirable to consider the question whether the shipowner can maintain an action on the charter-party if the charterer's agent does not settle the claim at the port of destination.

The clause as to demurrage is this: "Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively at the rate of 3*d.* per registered ton per day." The first question which we have to consider is whether "loading" in this clause is confined to loading the ship at the rate of 75 tons per day after she is wholly unballasted and the stiffening coal has been put in, or whether it includes putting the stiffening coal on board, for which certain days are allowed, and so whether there is an agreement to pay demurrage in respect of that time.

The charter-party says: "The ship to be loaded at the average rate of 75 tons per clear working day as tendered during night or day commencing when the vessel is in berth (under the tip where tips are used) wholly unballasted and ready to receive cargo, notice of which is to be given in writing by the master to the charterers' agent." I agree that the working days mentioned in this clause do not begin until after the stiffening coal is put on board, because until then the ballast would not be entirely out. Then there is the clause: "Any time lost by reason of riots, &c., . . . to be excluded in the computation of the said working days." Then comes the following clause: "Stiffening coal if required to be supplied at ship's expense, and at the rate of 40 tons per clear working day after written notice is given to the charterers' agents of its being required, but all days on which stiffening coal is taken on board, or the ship is detained for the same, to be excluded in the computation of the said working days allowed for loading." If we look at the substance of these clauses it is plain that the parties meant that if stiffening coal were required it should be loaded at the rate of 40 tons per working day, and when the ballast was out, and the stiffening coal loaded, the cargo should be put on board at the rate of 75 tons per working day. These stipulations are only separated in the charter-party, because in the one case the rate of loading is to be 40 tons a day and in the other 75. If putting the stiffening coal on board is part of the loading within the meaning of the demurrage clause, demurrage is clearly payable in respect of delay in putting stiffening coal on board, and it is not easy to see why the owner should not be entitled to his 3*d.* per ton per day if there is delay beyond the days allowed for loading stiffening coal, just as much as if there is delay beyond the days allowed for

loading cargo at the rate of 75 tons a day. No number of days is named in the charter-party, but whatever time is occupied beyond the time which it would take to load the stiffening coal at the rate of 40 tons per working day and to load the cargo at the rate of 75 tons per working day, is to be paid for, whether longer or shorter, and I cannot see why this provision should not apply to the time for loading stiffening coal as much as to the time for loading cargo.

Then the next clause is: "The master to have a lien on the cargo for all freight and demurrage due under this agreement." We have to decide what the meaning of the word demurrage in that clause is, and I think it applies to demurrage for delay in loading stiffening coal as much as to demurrage for delay in loading cargo. I think this is the true construction, for the two clauses come immediately after each other, and to give any other meaning to demurrage in the latter clause would make them inconsistent with each other. In both I think it extends to detention in loading stiffening coal as well as in loading cargo.

Then there is the clause discharging the charterers. "All liability of the charterers under this agreement shall cease as soon as the cargo is on board." It is clear, according to the authorities, that the words in this clause cannot be confined to liability arising from breaches subsequent to the loading, but must extend to all liability under the charter-party of every description. The clause goes on: "And all questions, whether of short delivery, demurrage, or otherwise, are to be settled with the manager or agents of the charterers at the port of destination." Now, what is the meaning of the word "settle" in that clause? Is it meant to revive a liability under the charter-party which would have ceased under the previous part of the clause? If it does the charter-party is contradictory. It is shown that the master is to have a lien, and although the consignee and consignor are the same, I think there is no right of action, but the remedy is by lien on the cargo. I do not think the words "short delivery" make any difference; a claim for short delivery would be a claim by the charterers against the owners, and the charter-party means that such a claim is to be settled by the agent and the amount deducted from the freight; there is to be one settlement before the cargo is delivered. I do not think that the use of these words, or the fact that the consignee was the agent of the charterers, can afford any reason for construing the charter-party in a manner contrary to the decided cases. There may have been reasons why the charterers wanted to make a settlement with their agent at Callao compulsory; the agent might be in the habit of receiving large sums of money for them, and they might wish to compel him to settle claims against them out of the money which he so received. I think the true meaning of the clause is that in a case like the present the charterers are to be subject to no liability.

It is true that in the statement of claim it is alleged that the defendants' agent requested that the cargo might be delivered without the plaintiff's lien being enforced. If this be true, it might possibly give rise to some right of action, but it would be *dehors* the charter-party. Mr. Benjamin did not wish for a decision on this, so I offer no opinion as to whether there may be any right of action independently of the charter-party.

In my opinion, according to the charter-party, the defendants were freed from liability on the ship's sailing, and their liability did not afterwards revive. I think, therefore, that the judgment ought to be affirmed.

Brett, J.A.—I am of opinion that on this demurrer we are confined to the charter-party. If the statement of claim on proof being given of something outside the charter-party would give a cause of action, the demurrer is not pointed to that, and the question will still be open. The only question which we have to decide, and which the Queen's Bench Division had to decide, is whether there is a right of action on the charter-party. I have come to the conclusion that there is no such cause of action.

In the first place, I agree that the plaintiff's claim comes within the demurrage clause, and I think this is equally so whether stiffening coal is part of the cargo or not. When I asked Mr. Benjamin he admitted at the moment that it was part of the cargo, but I cannot say I am sure it is so, for it is to be supplied at the ship's expense. When a ship is chartered to carry goods on a voyage the time of the occupation of that ship depends partly on accident, such as wind and weather, partly on the conduct of the owner, and partly on the conduct of the charterer. It depends to a certain extent on the conduct of the charterer in supplying cargo, and in the same way at the end of the voyage, or whether the consignee is ready to receive the cargo. It is the time at the beginning and end of the voyage which depends on the charterer, and consequently there are provided lay days, during which the shipowner is not allowed to claim anything beyond the freight made payable by the charter-party. These days are fixed at the beginning and end of the voyage in one of two ways. The number of lay days may be stated, or, as was done in this case, the other mode may be adopted, which is by the use of certain phraseology to arrive at the number of lay days. Here the lay days at the commencement of the voyage are fixed by the quantity of stiffening coal and cargo to be put on board day by day. Instead of naming the lay days in the charter-party this method has been adopted. The capacity of the ship and the quantity of stiffening coal required not being known a fixed time cannot be named in the charter-party; but this is found out when the ship arrives, and if the ship can take a certain number of tons of cargo that number divided by 75 will give the number of lay days to be allowed in respect of the cargo, and the number of tons of stiffening coal divided by 40 will give the number of lay days in respect of the stiffening coal; the two added together will give the total number of lay days, and the result will be the same as if that number had been written in the charter-party. Then the charter-party goes on to provide that if the ship is detained, which must be understood to mean by the fault of the charterer, demurrage is to be paid; all days beyond the days allowed for loading and discharging are to be paid for, and the effect is to bring the whole case within the demurrage clause.

As to the question whether this is demurrage or detention, generally if there is a fixed number of

demurrage days named in the charter-party beyond the lay days, and the ship is delayed by the fault of the charterer beyond the demurrage days, this is detention, for which the owner is entitled to compensation in damages; but here the number of demurrage days is not mentioned at all, and therefore all the detention beyond the lay days seems to me to be demurrage. Therefore, whether the stiffening coal is part of the cargo or not all the days beyond the combined number of days to be allowed for loading the ship and for supplying stiffening coal are demurrage days, and are within the demurrage clause. But if they were not strictly demurrage days I should still agree that they would come within the clause which gives a lien, for that clause ought to be enlarged so as to include detention in the nature of demurrage. Therefore the captain could have exercised his right of lien in respect of detention at the port of loading, and there was a lien in respect of the plaintiffs claim. Therefore, whether the decision in *French* v. *Gerber* (*ubi sup.*) is adopted or not, this is an absolving clause, and, unless this is distinguishable from the other cases, will absolve the defendants from liability.

That reduces the judgment to the question whether the latter part of the clause modifies it or not. I think it does not. At the moment I was struck with the suggestion made as to the use of the words "short delivery," because for "short delivery" there would be no lien, but it seems that it would be a claim by the charterer against the owner, which would have to be settled. It seems to me that the question of short delivery would be determined by the agent at Callao. There is another question which the charterers' agent there may be the person most fit to settle, and that is the question of demurrage at the port of discharge. The agent is given power to settle both against the owner and in his favour, and the settlement is binding on the owner. If there was a dispute as to whether fifteen or ten days' demurrage were payable, and the agent said it was ten days, the captain might possibly refuse to deliver the cargo unless he were paid for fifteen; if he did so the owner would be liable, and if the charterer paid for fifteen days he could get back what he had paid for five of them, because the decision of the agent would be binding on the owner. Having regard to the nature of the clause, it seems to have been primarily meant to apply to cases of delay at the port of discharge, but the words are applicable to demurrage for delay at the port of loading. The effect of all the parts of the clause taken together is that the defendants' liability ceases on the charter-party as soon as the cargo is on board, and the only remedy left is the lien.

I am, therefore, of opinion that the judgment is right and ought to be affirmed, expressly stating that we do not determine whether, under the circumstances which took place at Callao, the plaintiff would have any right of action against the defendants or their agents.

Amphlett, J.A.—I am of the same opinion.

I regret that so much time has been taken up in discussing the pleadings, which are very unsatisfactory. It is admitted that there are two causes of action in the statement of claim, and to one there is a demurrer, that is to as much of the statement of claim as alleges liability in respect of all that took place in England, and if there is any cause of action in consequence of the conduct of the defendants' agent abroad this is inconsistent with an action on the charter-party. If the defendants' agent requested the cargo to be delivered without settling the plaintiff's claim, the question whether there is any right of action is left open.

I do not propose to go through the reasons for our decision so clearly given by Mellish, L.J., and Brett, J.A. I quite agree with the reasons given, and I think the judgment ought to be affirmed.

Judgment affirmed.

Solicitors for plaintiff, *Ingledew, Ince*, and *Greening*, for *Ingledew, Ince* and *Vachell*, Cardiff.

Solictors for defendants, *Field, Roscoe* and *Co.*, for *Bateson* and *Co.*, Liverpool.

June 13 *and Dec.* 1, 1876.

(Before Cockburn, C.J., Mellish and James, L.JJ., Baggallay, J.A. and Archibald, J.)

Borrowman and others *v.* Drayton.

"Cargo" of goods—Contract for sale of—Construction—Additional goods placed on board by sellers—Buyer's right to annul contract.

The plaintiffs, acting for principals at New York, contracted to supply the defendant with a cargo of from 2500 *to* 3000 *barrels (seller's option) of petroleum, at* 1*s.* 0¾*d. per gallon, the shipment to be made at New York, and the vessel to proceed to a port of discharge to be determined (within certain limits) by the defendants.*

The plaintiff's principals in New York accordingly chartered a vessel, and agreed to provide her with a full and complete cargo of petroleum. 3000 *barrels of petroleum were placed on board the vessel at New York, and a bill of lading signed making them deliverable to the order of the plaintiff's principals; but, as the ship would carry a further quantity,* 300 *additional barrels of petroleum were placed on board, which were marked with a different mark, and a separate bill of lading was signed for them.*

The plaintiffs gave notice to the defendant of the shipment of the 3000 *barrels, and were ready to order the ship from its port of call to any port of delivery within the contract, and there to deliver to the defendant the* 3000 *barrels, and to take the* 300 *additional barrels themselves, but the defendant refused to receive the* 3000 *barrels or any other quantity. The plaintiff sued the defendant to recover damages for such refusal.*

Held (affirming the decision of the Exchequer Division), that the plaintiffs were not, at the time of the defendant's so refusing, ready and willing to deliver to him a "cargo" of from 2500 *to* 3000 *barrels, within the terms of their contract, as they were not entitled, without the defendant's consent, to place any additional cargo on board the chartered vessel.*

This was an appeal from a judgment of the Exchequer Division, discharging a rule to enter the verdict for the plaintiffs.

The facts are fully set out in the judgment of the Court of Appeal (*post*).

Morgan Howard, Q.C. and *Tindal Atkinson*, for the plaintiffs.—The defendant cannot reject the contract because the 300 additional barrels were placed on board. If he could show that he has suffered damage thereby, it is possible he might recover it. He should have protected himself by

his contract. Supposing the plaintiffs had placed twenty barrels of sugar on board besides the 3000 barrels of petroleum, can it be supposed that the defendant could reject the whole of the petroleum? The consignees have the entire disposal of the ship, and the vendors here, under the contract, were the consignees, so that there was no question of any lien for freight as against the defendant. The cargo contracted to be sold was kept quite separated from what was put in in addition, and the defendant had entire control over the vessel when she arrived at the port of call; he cannot now reject the contract. In *Kreuger* v. *Blanck* (23 L. T. Rep. N. S. 128; 3 Mar. Law Cas. O. S. 470; L. Rep. 5 Ex. 179, which will be relied on for the other side, and upon which the judgment of the court below is founded), the judgment went upon the performance of the contract being essentially different to that which the defendant contracted for. That case, therefore, is distinguishable from this, and the authority of it has been doubted in *Ireland* v. *Livingstone* (*ante*, vol. 2, p. 389; 27 L. T. Rep. N. S. 79; L. Rep. 5 H. of L. Cas. Eng. & Ir. App. 395; 41 L. J. 201, Q B.). You cannot give an absolute and technical meaning to the word "cargo." By the contract the time for shipment was limited; the parties, therefore, in view of the difficulty attending it, could not have intended that a ship of exactly the proper size to carry 3000 barrels should be obtained. They also referred to

Sargent v. *Reed*, 2 Str. 1228.

Benjamin, Q.C. and *English Harrison*, for the defendant.—The contract expressly provides for payment of freight by the defendant. The shipowner has a lien on all freight. Therefore, on the ship's arrival at the port of call, the defendant's 3000 barrels would be liable for the freight on the extra 300 barrels. Two things are stipulated for by the contract. First, that the vendors should send a "cargo;" secondly, that that cargo should consist of from 2500 to 3000 barrels. They have done neither. If the plaintiffs' view is correct, the contract would have been for a "shipment" not a "cargo" of from 2500 to 3000 barrels. It is a part of a cargo, not a cargo, which has been tendered to us. No equivalent performance of the contract will do. The shipper, by placing on board an extra quantity of goods, can bring them into competition with the defendant's goods, and so reduce the price in the market. The quantity of goods which the defendant agreed to buy was between the limits of 2500 and 3000 barrels, "at the seller's option." Can it be contended that the plaintiffs could have delivered 1500 barrels to the defendant, and reserved 800 barrels for themselves? Many questions might arise in relation to the rights of the different owners of the goods on board, which the defendant could not have intended should be raised.

Tindal Atkinson replied.

Cur. adv. vult.

Dec. 1.—The judgment of the court was delivered as follows by

Mellish, L.J.—This was an appeal from a judgment of the Exchequer Division discharging a rule to enter a verdict for the plaintiffs.

This action was brought by the plaintiffs against the defendant on account of the defendant having refused to accept 3000 barrels of petroleum, which he had agreed to purchase from the plaintiffs, and the question to be determined is, whether according to the true construction of the contract between the parties, the defendant was entitled to refuse to buy those 3000 barrels on the ground that 300 other barrels of petroleum formed part of the cargo of the *Lindesneas* so that the 3000 barrels did not constitute the entire cargo. The contract between the plaintiffs and defendant was made on the 13th Dec. 1873, and was as follows: "Sold this day for Borrowman, Phillips, and Co., to John B. Drayton and Co. a cargo of from 2500 to 3000 barrels (sellers' option) United States American refined petroleum, crown, diamond, and brand of good merchantable quality without any guarantee as to test, but having American certificate Standard white burning test, not under 120° Fahr.: at shilling and three farthings per gallon, weighed 8lb. delivered; to be shipped from New York during the last half of February next, and vessel to call for orders off coast for any safe floating port in the United Kingdom, or on the continent between Havre and Hamburg, both inclusive (buyer's option). In case of vessel being ordered to the continent buyers are to pay the extra freight including insurance. On arrival of vessel at port of discharge the oil is to be landed at a public wharf and weighed on landing and tared for average, real average tare to be arrived at by taring one in every twenty barrels as they come from the ship. Buyers agree to pay landing and all other charges, including fire insurance, for which they are to be allowed five shillings per ton on the gross weight. In event of vessel coming to United Kingdom payment to be made at landing weights in fourteen days from last day of landing by cash, less 2½ per cent. discount, or cash against delivery order if required, allowing interest at five per cent. per annum, or bank rate if over, for unexpired portion of prompt, if to the continent three fourths of gross amount of invoice to be paid in exchange for shipping documents on arrival of vessel at port of call less interest at five per cent. per annum or bank rate, if over, for unexpired portion of prompt, and remaining fourth to be paid on the prompt, say fourteen days from last day of landing, by cash less 2½ per cent. discount. Should any dispute arise out of this contract the same to be settled by arbitration in London in the usual way. Particulars of shipment to be declared as soon as ascertained. Should vessel be lost contract to be void, as also for any portion that may not arrive. Destination to be given within forty-eight hours after ship's arrival at port of call.—Rose and Wilson, brokers." On the 11th Feb. 1874, the plaintiff's principals, Sawyer, Wallace, and Co., of New York, chartered the *Lindesneas* to convey the petroleum to the port of call, and agreed to provide the said vessel a full and complete cargo of refined petroleum in customary sized barrels. 3000 barrels of petroleum were placed on board the *Lindesneas* at New York, and a bill of lading signed making them deliverable to the order of Sawyer, Wallace, and Co., but, as this generally did not constitute a full cargo, 300 additional barrels of petroleum were placed on board, they were marked with a different mark and a separate bill of lading was signed for them. The plaintiffs gave notice to the defendant of the shipment of the 3000 barrels, and were ready to order the ship from its port of call to any port of delivery within the contract, and there to deliver to the defendant the 3000 barrels, and to take the

300 additional barrels themselves, or to deliver to the defendant at any such port a quantity of 2700 barrels. But the defendant refused to receive either the 3000 barrels, or any other quantity.

The question is, were the plaintiffs, under those circumstances, ready and willing to deliver to the defendant a cargo of from 2500 to 3000 barrels of petroleum within the contract, and we are of opinion that they were not.

The whole cargo of the *Lindesneas* consisted of 3300 barrels, and therefore was in excess of the quantity ordered, and the plaintiffs cannot succeed unless the defendant was bound to accept a part of a cargo. We, however, are of opinion that an agreement to sell a cargo is, according to the plain and natural meaning of the words, an agreement to sell the entire quantity of goods loaded on board a vessel, or freight, for a particular voyage. By the terms of the contract the seller engages to deliver to the buyer a cargo of petroleum of from 2500 to 3000 barrels at sellers' option. We think that effect must be given to the term "cargo," as distinguished from the specified quantity; as, if the parties had intended otherwise it would have been enough to specify the quantity without introducing the term "cargo" at all.

Now, generally speaking the term "cargo," unless there is something in the context to give it a different signification, means the entire load of the ship which carried it, and it may fairly be assumed that when one man undertakes to sell, and another to buy, a cargo, the subject matter of the contract is to be the entire load of the ship. And that such must have been the sense in which the term cargo is used in this contract is materially strengthened by the agreement that the vessel shall proceed to a port of discharge to be determined within certain limits by the buyer, showing plainly that what was contemplated was that the vessel and its entire cargo were to be at his disposal. There are various reasons why a purchaser may wish to buy the whole quantity of goods loaded on board a particular vessel. Such a contract gives him the complete control of the vessel. It enables him to select the port of discharge, to appoint the place in the port at which the discharge is to take place, to be free from the inconvenience of other persons' goods being unloaded at the same time with his own, and from the competition arising from other persons' goods being ready for sale at the same place, and at the same time with his. It may be said that in this particular case the plaintiffs were ready to give the defendant the same advantages, or nearly the same advantages, as if the 3000 barrels had formed the entire cargo. We think, however, that though the refusal to accept the petroleum, looking to the offers made by the plaintiffs, may, under these circumstances, have been an unhandsome proceeding on the part of the defendant, the latter in point of law, was not bound to accept it, nor can we enter into whether what the plaintiffs offered was or was not a fair equivalent for what they contracted to do, or whether the defendant would or would not have suffered any substantial damage from not getting the entire cargo. It may be that the real reason why the defendant refused to receive the 3000 barrels was that the price of petroleum had fallen. Still we think he was entitled in point of law to say, "The thing which you offered me was not the thing I agreed to buy, and therefore I will not take it."

It was argued that even though an agreement to buy the cargo of a particular named ship should amount to an agreement to buy the whole cargo, yet that an agreement to buy a cargo of from 2500 to 3000 barrels of petroleum, no particular ship being named, would be satisfied by sending a quantity of from 2500 to 3000 barrels in any one ship, although the ship might be filled up with other goods. We do not agree with this. We think that the reason why the precise quantity of petroleum to be sent is not fixed, and the seller has a margin of 500 barrels is, that he may have no difficulty in chartering a ship of the requisite size, and that he was not entitled without the defendant's consent to place any additional cargo on board the ship.

Judgment for defendant. Judgment below affirmed.

Solicitors for the plaintiffs, *Mercer* and *Mercer*.

Solicitors for the defendant, *Johnson, Upton*, and *Budd*.

SITTINGS AT LINCOLN'S INN.

Reported by James P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Tuesday, Dec. 7, 1876.

(Before James, L.J., Baggallay and Brett, JJ.A.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

The Medina

Salvage of life—Agreement—Exorbitancy—Setting aside.

Where the master of a vessel found passengers of another vessel (550 pilgrims) wrecked on a rock in the Red Sea in fine weather, and refused to carry them to Jeddah for a less sum than 4000l., and the master of the wrecked vessel was by such refusal compelled to sign an agreement for that amount, and the service was performed without difficulty or danger, the agreement was held inequitable and set aside; 1800l. awarded in the place thereof.

This was an appeal from a judgment of the Admiralty Division of the High Court of Justice.

The action was originally brought in the Exchequer Division, and was transferred to the Admiralty Division.

The claim, as it appeared on the indorsement of the writ, was for "4000*l.* due from the defendants to the plaintiffs under an agreement dated the 1st Oct. 1875, between Capt. J. Brown, master of the plaintiffs' ship *Timor*, for and on behalf of the plaintiffs and Capt. Charles Black, master of the defendants' ship *Medina*, for and on behalf of the defendants, for the conveyance at the defendants' request of passengers by the plaintiffs' ship *Timor*, from Parkin Rock, Harnish Island, to Jeddah."

The *Medina* was a steamship engaged in trading between Singapore and the Red Sea, and her owners, by means of that and other ships, conveyed pilgrims from various ports in the East to Jeddah, on their way to Mecca.

The *Medina*, in the course of a voyage to Jeddah with 550 pilgrims on board, was wrecked on Parkin Rock, in the Red Sea, and her pilgrims were landed on the rock, which is only just above the level of the sea.

The *Timor*, passing on her way from Singapore to Liverpool, *via* the Suez Canal, was asked for

assistance, and after considerable bargaining her master agreed to take the pilgrims to Jeddah for 4000*l.*, and an agreement to that effect was signed by the masters of the two vessels.

There was a considerable conflict of evidence as to what passed between the masters, especially as to who offered and who refused to refer the matter to arbitration, but in the result the master of the *Timor* refused to carry the pilgrims for any less sum than 4000*l.*, alleging that the risks of going to Jeddah, of being detained in quarantine, &c., were such as to justify his demand.

The master of the *Medina* alleged that he was compelled to agree to pay this sum by the perilous position of the pilgrims, and that he did his best to induce the master of the *Timor* to take a less sum, but was unable to do so. There were other steamers in the neighbourhood, and one came up before the *Timor* left.

The judge of the court below, assisted by nautical assessors, held that the sum demanded was excessive and exorbitant, and awarded 1800*l.* without costs.

The pleadings, facts, and judgment will be found set out in the report of the case in the court below: (34 L. T. Rep. N. S. 918; 3 Asp. Mar. Law Cas. 220.)

Myburgh (*The Admiralty Advocate*, Dr. Deane, Q.C. with him), for the appellants.—Besides the risk run by the *Timor*, the master of the *Medina* knew that his owners were in the habit of taking pilgrims to Jeddah, and that it would be injurious to their trade if they failed to carry out their contracts, and he considered this in agreeing to this sum, which was not unreasonable. Unless exorbitant or obtained by compulsion or fraud, the court ought not to upset the agreement:

The Helen and George, Swab. 368;
Cargo ex Woosung, *ante*, p, 230; L. Rep. 1 P. Div. 260; 35 L. T. Rep. N.S.S.

Cohen Q.C. and *Wood Hill*, for the respondent, were not called upon.

James, L.J.—I am of opinion that the decision of the court below was a right decision upon the balance of evidence. If the story of the defendant is the right one, the story of the plaintiff is wrong, that it was agreed to refer the case to arbitration before the agreement was made. We see no reason for coming to a different conclusion to that at which the court below arrived. Therefore we start from this, that there was no such preliminary. Then we come to whether this was an exorbitant sum which was got by compulsion, making it impracticable that the agreement could be enforced. It was stated in the court below that there were 500 pilgrims on a rock, whose lives might have been endangered at any moment. There was one ship, and one ship only, near them, and a man on that ship says, "I will take you to Suez for 3000*l.*; I will not take you for a farthing less." It involved nothing whatever but the mere taking the men on board and carrying them on to Suez. Afterwards he says, I will take them to Jeddah for 4000*l.* The defendant denies the 3000*l.*, but gives his own account as to what was asked, a sum of 4000*l.*, and says that this was a very exorbitant sum for a ship for only a few days' coming up to the rock and merely taking the pilgrims on board and carrying them on to the point defined. I agree that the conclusion of the Judge of the Admiralty Court was right, that it was exorbitant; and, having regard to the peculiar circumstances under which pressure was exercised, that it ought not to stand. Therefore, the court was right in giving a reasonable amount. That reasonable amount the court below, with the assistance of the two assessors, fix at 1800*l.* On one hand there was salvage to be paid, and there was no tender on the other hand. There was an attempt to set up an agreement. On the whole, we think that there should be no costs on either side.

Baggallay, J.A.—I am of opinion that the principle of these cases was expressed correctly by Dr. Lushington, that the agreement for salvage should be upheld unless obtained by compulsion or fraud. Now, by the very fact that you find a very large amount agreed to be paid in comparison with the services rendered, you are led to the conclusion that there may have been some unfair dealing in the transaction. But that applies with particular force where persons, who are in an extremity, in order to obtain assistance in their extremity, have been required to pay a large price for the assistance. That appears to have been the case here. There were 550 pilgrims on a barren rock in the Red Sea. Bad weather might have come on, or they might have been attacked by the natives, of whom there are plenty about there. In either case the pilgrims were in great peril, and from the fact that the rock was some distance from the course of vessels passing down the Red Sea, the captain of the *Medina* was bound to accept any terms which were pressed upon him by the *Timor*.

Brett, J.A.—I think the old rule of the Admiralty Court ought not to be encroached upon lightly, viz., that where there is an agreement made by competent persons, and there is no misrepresentation of facts, the agreement ought to be upheld, unless there is something very strong to show that it is inequitable, but I think that this agreement cannot be upheld, upon the ground that the amount claimed by the *Timor* was an exorbitant sum—not merely too large a sum, but, for the services to be rendered, a grossly exorbitant sum, and that it was forced upon the captain of the *Medina* by practical compulsion. Now, that the sum was grossly exorbitant, I think, follows, from this consideration—that the service was one of no difficulty at all, and under the circumstances, there was no danger to the salving ship whatever. She could take these people off with perfect facility; the service was not an onerous service; the pretence of a difficulty in going into a known port like Jeddah is fallacious, there was no difficulty or danger from the beginning to the end to the salving ship; and at the time the agreement was made there was no probability of any danger to her. Therefore, for performing so easy a service the sum of 4000*l.* was not only exorbitant but grossly exorbitant. But there is more in this case. It was forced upon the captain of the *Medina* by practical compulsion, because his position was this — and that it is to be considered—he was the captain of the *Medina*, the *Medina* was rendered helpless; it is true she was not at the bottom of the sea, but, so far as her being a useful ship for the pilgrims, she was useless, and could not be practically brought into use. You have these 500 human beings on a rock, twelve miles out of the course of ships, on a rock which was awash slightly over the ordinary level of the sea, so that

if a sea rose the people on the rock would be drowned. Therefore the captain of the vessel was responsible for them in case of weather coming on wherein their lives might be lost. Under those circumstances, it seems unfair to him to say, I will not take these people off for whom you are responsible unless you pay me a sum, which upon the assumption of the finding of the court below being correct, is a grossly exorbitant sum. If the captain had refused, he took upon himself the responsibility of allowing 500 human beings under his care to be left to the danger of being drowned. That is compulsion to the mind of any honest man. Therefore, I think there was a grossly exorbitant sum obtained on practical compulsion. Under all these circumstances, I think by the Admiralty rules of law it cannot stand.

Appeal dismissed with costs.

Solicitors for the plaintiffs, *Brocks, Jenkins* and *Co.*

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

Nov. 27, 28, *and Dec.* 1, 1876.

(Before Cockburn, C.J., James, L.J., Baggallay and Bramwell, JJ.A.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

THE CORINNA.

Damage by collision—Both vessels to blame—Costs. Where the Court of Appeal varies a decision of the Judge of the Admiralty Division, by which he has found one vessel wholly to blame for a collision, by finding that both vessels are to blame, each party will pay its own costs, both in the Court below and in the Court of Appeal.

The Agra *and* The Elizabeth Jenkins (2 *Mar. Law Cas. O. S.* 532; *L. Rep.* 1 *P. C.* 501; 16 *L. T. Rep. N. S.* 755) *followed.*

This was a cause arising out of a collision in the river Thames, between the steamship *Corinna* and the barque *Mary Anne.* The Judge of the Admiralty Division found the *Corinna* alone to blame for the collision; and from that decision the owners of that vessel appealed. The appeal was heard on the 27th and 28th Nov., and 1st Dec., 1876, and on the latter day the judgment of the Court was delivered by Cockburn, C.J., reversing the decision of the court below so far as concerned the *Mary Anne,* and finding both vessels to blame for the collision, and ordering the damages to be divided.

Raikes (with him Dr. *Deane,* Q.C. and *Clarkson*), applied for costs, admitting that the practice in the Privy Council (See *The Agra* and *The Elizabeth Jenkins*) was that each party should pay their own costs; the case is different now; a successful appellant always gets his costs: (Practice of the Court, W.N., 1875, pp. 185, 186.)

Milward, Q.C. (with him *W. Phillimore*), *contra.*

Cockburn, C.J.—In these cases the rule of the Privy Council will be retained; though the plaintiff has partially succeeded in his appeal, he is not found to be free from blame for the collision, each party will bear his own costs both here and in the court below.

Solicitors for appellants, *Gellatly, Son,* and *Warton.*

Solicitors for respondents, *Clarkson, Son,* and *Greenwell.*

Nov. 28 *and Dec.* 1 *and* 5, 1876.

(Before Cockburn, C.J., James, L.J., Baggallay and Bramwell, JJ.A.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

THE CITY OF CAMBRIDGE.

Damage by collision—Inevitable accident—Costs. Where the Court of Appeal varies the decision of the Judge of the Admiralty Division, by which he found one vessel wholly to blame for a collision, by finding that the collision was an inevitable accident, the practice of the Privy Council that each party should, except under very exceptional circumstances, pay their own costs, will be followed.

The Marpesia (*ante, vol.* 1, *p.* 261; *L. Rep.* 4 *P. C.* 212; 26 *L. T. Rep. N. S.* 333) *followed.*

This was a cause arising out of a collision in the river Thames, between the steamship *City of Cambridge* and the steamship *Brenda.* The Judge of the Admiralty Division on the 25th March 1876 found the *City of Cambridge* alone to blame for the collision, and from that decision the owners of the *City of Cambridge* appealed. The appeal was heard on 28th Nov. and 1st and 5th Dec.; and on the latter day the judgment of the court was delivered by Cockburn, C.J. reversing the decision of the court below, so far as concerned the *City of Cambridge,* and finding the collision to be the result of inevitable accident.

E. C. Clarkson (with him *Benjamin,* Q.C.) applied for costs.—It has been the uniform practice of the Court of Appeal since the coming into operation of the Judicature Acts to give a successful appellant his costs: (Practice of the Court, W. N. 1875, pp. 185, 186.) There is no reason why the rule as to costs in appeals from the Admiralty Division should be different from that in appeals from the other divisions. The rule as to costs in such a case in the Privy Council was not invariable, it was the same as that of the High Court of Admiralty. Dr. Lushington says, "On principle costs ought to follow the event," and in that case condemned the plaintiff in costs: (*The London,* 1 Mar. Law Cas. O. S. 398; Br. & L. 82; 9 L. T. Rep. N. S. 348, and *The Thornby,* 7 Jur. 659.)

Milward, Q.C. and *Bruce, contra.*—The practice of the Privy Council and High Court of Admiralty was that no order should be made as to costs in case of inevitable accident: (*The Marpesia, ante,* vol. 1, p. 261; L. Rep. 4 P. C. 212; 26 L. T. Rep. N. S. 833.) In the cases where a plaintiff has been condemned in costs, it has been because the court considered that he ought not to have brought the action, and that reason can hardly apply to a case in which he has obtained a decision of the court below in his favour. And this court will follow the practice of the Privy Council in appeals from the Admiralty Division: (*The Corinna, ante* p. 307.)

Clarkson in reply.

Cockburn, C.J.—In cases of inevitable accident this court will follow the practice of the Privy Council, and, as a rule, make no order as to costs.

The suit against the *City of Cambridge* was therefore dismissed, and no order made as to costs either in the court below or Court of Appeal.

Solicitors for appellants, *Gellatly, Son,* and *Warton*

Solicitor for respondents, *Thomas Cooper.*

December 7 and 20, 1876.

(Before James, L.J., and Baggallay and Bramwell, JJ.A.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

The Vivar.

Proceedings on protest—Service of writ out of jurisdiction—Cause of action arising on the high seas—Foreign ships.

The practice of the High Court of Admiralty previous to the passing of the Judicature Acts in proceedings on protest (R. G. Admiralty 1859, *r.* 37) *is preserved by sect.* 18 *of Supreme Court of Judicature Act* 1875.

This was an application to dismiss an action *in personam* against John McAndrew, instituted under the following circumstances.

On the 3rd Sept. 1876, the American ship *Sonora* of Boston was proceeding to Liverpool in tow of a steam tug, and when the South Stack Light, Holyhead, bore about N.E. by E. ½ E. and was about ten miles distant, she and the *Vivar*, a registered Spanish steamer, came into collision and both sank.

Under these circumstances, on the 23rd Oct. 1876, leave was given by the assistant registrar to serve a writ of summons on John McAndrew out of the jurisdiction, requiring him to enter an appearance within fourteen days after service. John McAndrew, who was alleged to be owner of the *Vivar*, was accordingly served with the writ in Spain, where at the time he actually was. He handed it to his solicitors in London, who wrote to the plaintiffs' solicitors the following letter:

24, Carter-lane, Doctors' Commons,
14th Nov. 1876.

Owners of Sonora and others v. *McAndrew; The Vivar.*

Dear Sirs,—The notice, dated the 23rd Oct., last which you have caused to be served on Mr. John McAndrew, has been handed to us with instructions to act on his behalf. The *Vivar* was a Spanish vessel Spanish owned. Mr. John McAndrew is a British subject, and resides in England. By the law of Spain a foreigner cannot own a Spanish vessel or shares in a Spanish vessel. Mr. McAndrew was not owner and could not be owner of the *Vivar*, or of any share in her. Under these circumstances we presume you will withdraw the notice you have given, otherwise we are quite prepared to appear to the action, and in that case shall, of course, ask for costs. You may consider this as an undertaking on our part on behalf of Mr. McAndrew. Be good enough to let us hear from you at once.—We are, dear Sirs, yours truly,

Clarkson, Son, and Greenwell.

Messrs. Stokes, Saunders, and Stokes.

Subsequently the defendant by his solicitor entered an appearance under protest, but took no further steps and before filing a preliminary act,

On the 6th Dec. 1876, the Judge of the Admiralty Division was moved to dismiss the suit.

R. E. Webster, for the defendant.

W. G. F. Phillimore, for the plaintiff.

The arguments of counsel are reported below, being the same as those used in the Court of Appeal.

Sir R. Phillimore.—I am asked in this case to dismiss the writ as having been improperly issued. It is admitted that if the protest can be looked at the court has no jurisdiction. Unless the decisions of the court in *Re Smith* (*ante*, p. 259; L. Rep. 1 P. D. 300; 35 L. T. Rep. N. S. 380), and *The Evangelistria* (*ante*, p. 264; 35 L. T. Rep. N. S. 410), are wrong, I must abide by them till they are set aside elsewhere.

The following order was made:

On the 6th Dec. 1876, the Judge, having heard counsel on both sides, dismissed the defendant John McAndrew from this action and all further observance of justice therein.

From this order the plaintiffs appealed, and on the 20th Dec. the appeal was argued, after a preliminary objection on the part of the defendants, that, under sect. 50 of The Supreme Court of Judicature Act 1873, there was no appeal except by special leave which had not been obtained in this case, had been overruled.

W. G. F. Phillimore (with him *Stubbs*), for the appellants, admitting that the registrar had no power to order service in such a case out of the jurisdiction, the defect has been waived by the appearance. The appearance spoken of in the letter from the defendant's solicitors is an absolute appearance; it says nothing of appearing under protest to raise the question of jurisdiction; the ground of defence alleged is that the defendant was not the owner of the ship. [James, L.J. referred to the conditional appearance in the Court of Chancery where a person desired to object to the jurisdiction. Bramwell, J.A.—Supposing the defendant to have been within the jurisdiction, could you have served him?] Yes, we could; and though this writ was one for service out of the jurisdiction, there is no difference in the form of the writ except as to the time for appearance to it: (*Westmans* v. *Aktiebolaget Ekmans Mekaniska Snickerfabric*, L. Rep. 1 Ex. D. 237.) The order of the registrar would have been perfectly valid so far as the mere issue of a writ was concerned; it only went too far in allowing service abroad. The rule as to appearance under the Judicature Acts (Order IX., r. 1) is the same for all courts, and is borrowed from the practice of the Common Law Courts before those Acts. What that practice was is clearly shown by *Staniforth* v. *Richmond* (13 W. R. 374); *Oulton* v. *Radcliffe* (L. Rep. 9 C. P. 189; 30 L. T. Rep. N. S. 22); *Diamond* v. *Sutton* (L. Rep. 1 Ex. 130; 13 L. T. Rep. N. S. 800), and they decide that when a person has attorned to the jurisdiction it is too late to protest against it. The only difference made by the Judicature Acts and Rules is that under them leave has to be obtained before service: (*Scott* v. *Royal Wax Candle Company*, 34 L. T. Rep. N. S. 683; L. Rep. 1 Q. B. Div. 404.) The proceedings on appearance under protest were peculiar to the High Court of Admiralty, and rendered necessary by its limited jurisdiction, and have been abolished, if not expressly, by necessary inference, by the fusion of the High Court of Admiralty with the other Superior Courts. If it still exists in the Admiralty Division, then it must also exist in all the other Divisions of the High Court of Justice.

Webster.—The letter of defendant's solicitors was not an unconditional appearance, if it was an unconditional undertaking to appear on behalf of the defendant by his solicitor the proper course for the plaintiffs to pursue is to attach the solicitor for contempt. The practice of the High Court of Admiralty in regard to proceedings on appearance under protest are preserved by sect. 18 of the Supreme Court of Judicature Act 1875. The Admiralty Rules 1859, r. 37 says, "If the proctor intends to object to the jurisdiction of the court, the appearance must be under

protest." The letter of defendant's solicitor was only an undertaking to appear under protest; after appearance it was the practice for the defendant to move the court: (Williams & Bruce Adm. Pr. 203). That we have done. The court then, according to the circumstances of the case, either directed a plea to the jurisdiction or petition on protest, as it is called, to be filed (*The Lyee Moon*, not reported), or dismissed the defendant from the suit, as in this case, or overruled the objection to the jurisdiction: (*The Catterina Chiazzaro*, *ante*, p. 170; L. Rep. 1 P. D. 365; 34 L. T. Rep. N. S. 588; *The Charkieh*, *ante*, Vol. I., p. 581; L. Rep. 4 Ad. 59; 28 L. T. Rep. N. S. 513). Sect. 18 of the Supreme Court of Judicature Act 1875, preserves all the existing rules of practice of the Admiralty Court, unless expressly varied by the rules under the Judicature Acts, and the rule as to appearance under protest has not been repealed or varied even by implication, still less expressly, and has been acted on: (*Re Smith*, *ante*, p. 259; L. Rep. 1 P. D. 300; 35 L. T. Rep. N. S. 380; *The Evangelistria*, *ante*, p. 264; 35 L. T. Rep. N. S. 410.) It was the duty of the defendant when served with a writ to appear, but under protest, in the Admiralty Division. The order of the court, dismissing the defendant, will not relieve him from the necessity of appearing to a writ served on him properly should he return to England.

W. Phillimore, in reply.—The Rules of the Supreme Court, Order XII., rr. 6, 15, by ordering one general method of appearance in the High Court of Justice, satisfies the requirements of sect. 18 of the Act of 1875, and expressly abolishes appearance under protest.

James, L.J.—The real point which was raised in the court below, and the real point laid before us, is, whether the defendant was estopped by what had taken place from objecting to the validity of the order for service abroad. I am of opinion that he is not estopped. The solicitor, writing the letter undertaking to appear, in ignorance of the fact that there might be disclosed a perfectly good objection on the ground of the cause of action having taken place out of the jurisdiction, did not bind the defendant. I am also of opinion that appearance under protest is not an idle form, but that it is the old form known to the Court of Admiralty, and is not expressly taken away by the new rules under the Judicature Act. The solicitor appeared under protest for the real purpose of raising the question whether he was properly cited, and was subject to the jurisdiction of the court by the procedure which had taken place—whether he was properly compellable to appear, and the learned judge dismissed the defendant from the action. I am of opinion that the learned judge was right.

Baggallay and Bramwell, JJ.A. concurred.

Appeal dismissed with costs.

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

Solicitors for the respondents, *Clarkson, Son, and Greenwell.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Reported by J. E. Thompson, Esq., Barrister-at-Law.

(Before Vice-Chancellor Hall.)

Monday, Nov. 20, 1876.

Ranken *v.* Alfaro.

Bill—Cargo—Specific appropriation—Lien—Equitable assignment.

Y., a merchant, in Costa Rica, shipped coffee to M. and Co., London, "on the strength of" which he drew bills on M. and Co., requesting them to have the coffee sold for his account, and the proceeds passed to his credit. There was no agreement between Y. and E. and Co., of Panama, to share profits and losses on this transaction. The bills came into possession of the plaintiffs, who presented them for acceptance to M. and Co., but the latter refused to accept them. Y. wrote to S., asking him to honour the drafts and obtain the bills of lading of the coffee from M. and Co., by whom they were accordingly handed over to S.

S. wrote to the plaintiffs, saying that he expected soon to get the delivery warrants of the coffee, and that he could dispose of the coffee as instructed by the sender.

M. and Co. were creditors to a large extent of E. and Co., whose agent they affirmed Y. to be, and they caused an attachment to issue out of the Lord Mayor's Court against the coffee.

S. then paid the proceeds of sale into court, and the plaintiffs applied to have their bills paid thereout on the ground that the coffee had been specifically appropriated to the bills, and that S. had made an equitable assignment of a part of the coffee equal in amount to the bills.

Held, following Robey and Co.'s Perseverance Iron Works *v.* Ollier (*ante, vol.* 1, *p.* 413; 27 *L. T. Rep. N. S.* 362; *L. Rep.* 7 *Ch. App.* 695) *that there was no such appropriation, and that S. had no authority to make such equitable assignment.*

Frith *v.* Forbes (1 *Mar. Law Cas. O. S.* 251; 6 *L. T. Rep. N. S.* 847; 4 *De G. F. & J.* 409) *distinguished on the ground that in that case the bills showed on the face of them that they were appropriated to the cargo.*

The plaintiffs, Peter Ranken, Clement John Andrew Ulloq, and John Francis Chalmers, are merchants, carrying on business under the firm of Chalmers, Guthrie, and Co., and now suing on behalf of themselves and other holders of the bills of exchange hereafter mentioned.

Between the 1st and 17th April 1874, the defendant Yldefonso Alfaro, who is a merchant carrying on business at St. José, in the Republic of Costa Rica, shipped and consigned three several parcels amounting in the whole to 808 sacks of coffee, belonging to him, to the defendants, Assur Henry Moses, Moses Henry Moses, Alfred Merton, Arthur Abraham Levy, and Edward Levy, merchants, carrying on business in co-partnership, in Fenchurch-street, in the city of London, under the firm of Moses, Levy, and Co., and drew various bills of exchange thereon.

On or about the 5th April, the said Yldefonso Alfaro wrote to Moses, Levy, and Co., a letter in Spanish, of which the following is a translation:

San José, 5th April 1874.

Messrs. Moses, Levy, and Co., London.

Gentlemen,—I inclose to you a letter of recommendation of Messrs. Eloy, Alfaro, and Co., of Panama, authorising me to draw on you at the rate of 4*l.* per quintal of coffee, which I may ship for my account to your consignment.

On the strength of this I have drawn on you the following drafts:

£	
200	No. 112, to the order of Mr. Miguel Cyelos, at 90 days.
600	No. 113, to the order of Mr. Adolfo Bonilla, at 90 days.
500	No. 114, to the same.
£1300	

Thirteen hundred pounds sterling, which I hope you will please accept and pay at maturity, to the debit of my account.

My agent, Mr. Nicolas Peña, of Puntarenas, will remit to you a bill of lading of said coffee. Up to to-day I have advice that they have remitted you already 220 sacks coffee with 130lb. each, and by the present another parcel will go forward, of which I cannot know to-day the number of sacks that can be shipped. Said coffee I request you to have sold for my account, and its proceeds passed to my credit.

In this transaction Messrs. Eloy, Alfaro, and Co., of Panama, have a share, being interested for a half of the profit or loss. On the strength of this, I hope you will please follow the instructions which said gentlemen may give you. By the succeeding steamers I shall continue remitting you greater quantities of sacks.

I avail myself of this opportunity to offer you my services in this place, and remain, yours truly,

(Signed) YLDEFONSO ALFARO.

The bills for 600*l.* and 500*l.* respectively mentioned in the said letter were two bills of exchange both dated the 31st March 1874, and drawn by the said Yldefonso Alfaro upon Moses, Levy, and Co., in favour of a Signor Adolfo Bonilla, who on the same day sold and indorsed the same to Messrs. Blanco of Triqueros, of San Salvador, in America, who in turn indorsed and forwarded them to the plaintiffs, their correspondents in England. The plaintiffs paid full value for the bills, and now hold them.

On or about the 15th April 1874, the said Yldefonso Alfaro wrote to the said Messrs. Moses, Levy, and Co., a letter in Spanish, of which the following is a translation:

San José, 15th April 1874.

Messrs. Moses, Levy, and Co., London.

Dear Sirs,—Without any of yours, I address the present lines to you, to advise you of the drafts I have drawn on you, on the same terms as heretofore:

£	s.		
500	0	No. 125, of Mr. E. Huard, at 90 days, dated	10th inst.
100	0	No. 126, do. do.	do.
125	0	No. 127, of Mr. Pedro Garcia	do.
291	14	No. 133, of Mr. Gasto Gomez	do.
200	0	No. 134, of Messrs. Juan Fernandez & Sons	do.
700	0	No. 135, of Messrs. B. Fernandez and Co.	do.
600	0	No. 137, of Mr. Joaquim Cantaglio	do.
£2216	14		

Two thousand two hundred and sixteen pounds, fourteen shillings, which I trust you will accept and pay at maturity, debiting me for their respective amounts, upon the same terms as before.

Coffee.—With a fall of the price there, the quintal has gone down §2 upon its price. My agent in Puntarenas remits you, by each steamer, bill of lading of shipment of above articles consigned to you, all of which please have sold according to my previous instructions. My opinion is that, given a fall of price there, it will be better to keep it three months longer, after which time I believe it would fetch a better price.—Yours, &c.,

(Signed) YLDEFONSO ALFARO.

The said Yldefonso Alfaro drew several other bills in like manner, on Moses, Levy, and Co. The total amount of the bills was 4256*l.* 14*s.* Yldefonso Alfaro also through his agent, the said Nicolas Pena, forwarded to Moses, Levy, and Co., and they on the 13th and 16th May 1874, received all the bills of lading, shipping documents, and warrants, relating to the said shipments.

On the 14th May, the plaintiffs presented the said bills of 600*l.* and 500*l.* respectively, to Messrs. Moses, Levy, and Co. for acceptance. They were, however, refused without cause assigned, and on the same day accordingly, the plaintiffs caused them to be protested for non-acceptance, and then held them to await maturity—they being bills at ninety days' sight.

In consequence of this the defendant Yldefonso Alfaro addressed the following letter to the defendant Schwarz:

Costa Rica, San José, 17th June 1874.

Mr F. M. Schwarz, London.

Dear Sir,—At the suggestion of Messrs. J. Ruatas and Co., of Panama, I take the opportunity of informing you, that having made various consignments of coffee for my risk and account to Messrs. Moses, Levy, and Co., of your city, amounting to 808 sacks (105,030lb.), and drawn upon them for 4256*l.* 14*s.* sterling, as per details at foot, said bills have not been accepted; they maintaining that my former letter, in which I gave them instructions, was never received by them.

I therefore beg of you to take charge of this consignment and to realise it, honouring all my drafts, which on account of it I drew upon Messrs. Moses, Levy, and Co., and for which you will kindly ask them for a list of the holders of the said drafts. If the proceeds of the coffee should not be sufficient to cover the drafts, telegraph to Messrs. Eloy, Alfaro, and Co., of Panama, so that they may inform me of the sum wanting, which I will immediately remit.

I will now explain to you how I came to enter into the transactions with these gentlemen.

At the beginning of this year I wrote to Messrs. Eloy, Alfaro, and Co., of Panama, requesting them to send me some letters of recommendation to Europe, and at the same time authorise me to draw upon the house in the which I should commence business at the rate of 4*l.* per quintal, for coffee sent to it in consignment, for my risk and account. In reply to this, the said Messrs. Eloy, Alfaro, and Co., sent me several letters such as I desired, and further proposed that we should do the business jointly, sharing losses and gains, which proposal I accepted, as the manager of the said house, Messrs. Eloy, Alfaro, and Co., is my brother.

I inclose you copies of my letters to Messrs. Moses, Levy, and Co. for your guidance. I also send you a power of attorney, for you to claim the consignment of those gentlemen, or else its proceeds in case it be sold.

I do not for a moment doubt but that you will attend to this affair as if it were your own, and that you will take all means in your power to prevent my reputation suffering commercially or morally.

I take this opportunity of subscribing myself—Your most obedient servant, YLDEFONSO ALFARO.

The "former letter" referred to in the first paragraph of this letter was the one dated 5th April 1874, above set out. The "details at foot" above referred to consisted of a list of drafts on Moses, Levy, and Co., among which were the drafts numbered 113 and 114 for 600*l.* and 500*l.* respectively.

In the said letter of the 17th June 1874, copies were inclosed of Yldefonso Alfaro's letters of the 5th and 15th April above set out. The plaintiffs contended that the said F. M. Schwarz was thereby constituted special agent of Yldefonso Alfaro with respect to the property and matters which were the subject of the suit.

Accordingly the defendant, F. M. Schwarz, by his clerk communicated to Moses, Levy, and Co., the contents of the letter of the 17th June, and applied to them for a list of the holders of the bills, and also for the bills of lading, shipping documents, and warrants relating to the said coffee.

On or about 14th Aug. 1874, the said F. M. Schwarz received from Moses, Levy, and Co. the following letter:

London, 14th Aug. 1874.

Mr. F. M. Schwarz.

Dear Sir—At your request we hand you list of bills drawn on us by Señor Don Yldefonso Alfaro, and also in whose hands they are. We shall take care to refer the holders of such bills, when they become due, to yourself for payment.—We are, dear Sir, yours truly,

(Signed) MOSES, LEVY, AND CO.

(A list of the bills, &c., was appended.)

On the 15th Aug. 1874, the said bills for 600*l.* and 500*l.* became due, and were presented for payment to Moses, Levy, and Co., who refused to pay either of them, and the plaintiffs had them accordingly protested for nonpayment. On the same day the plaintiffs received from the defendant, F. M. Schwarz, the following memorandum:

(Memorandum.)

14th Aug. 1874.

From F. M. Schwarz, 10, Basinghall-street, London, E.C.,

To Messrs. Chalmers, Guthrie, and Co., 9, Idol-lane, Tower-street.

£600 } Drawn by Yldefonso Alfaro, of San José
£500 } de Costa Rica, on Moses, Levy, and Co.

Please take note that I expect to receive from Messrs. Moses, Levy, and Co., early next week, delivery of the coffee sent by drawee [a clerical error for "drawer"] against the above, and that I will then again write to you on this subject.

Paragraph 13.—Shortly afterwards—namely, on the 17th Aug. 1874—the said F. M. Schwarz received from Moses, Levy, and Co., the delivery warrants relating to the said 808 sacks of coffee, and on the 17th Aug. wrote and sent to the plaintiffs the following memorandum:

(Memorandum.)

17th Aug. 1874.

From F. M. Schwarz, 10, Basinghall-street, London, E.C.,

To Messrs. Chalmers, Guthrie, and Co., 9, Idol-lane, Tower-street.

Referring to my memorandum of the 14th inst., I beg to inform you that Messrs. Moses, Levy have now handed me over the warrants for the coffee sent by Mr Yldefonso Alfaro, and that I shall dispose of same as instructed by sender, and will let you have further particulars in due time.

The said F. M. Schwarz paid in exchange for the said delivery warrants the charges for freight for the said coffee and other expenses, amounting to 464*l.* 11*s.*

On the 20th Aug. 1874, the plaintiffs received from the said F. M. Schwarz another memorandum, to the effect that an attachment had been served upon him in reference to the coffee, and that he requested to be informed if they (the plaintiffs) wished to take any steps to protect their interests in this matter.

The attachment had issued on the 17th Aug. 1874 out of the Lord Mayor's Court on behalf of Moses, Levy, and Co. in an action which they had commenced against Eloy, Alfaro, and Co.

On the 20th Aug. 1874 the plaintiffs entered an action against the said Yldefonso Alfaro as holders of the said bills for 600*l.* and 500*l.* respectively.

On Aug. 21st F. M. Schwarz sold a portion of the coffee, and the plaintiffs applied to him to pay the said bills out of the proceeds of sale. But Schwarz refused to do so, on the ground of the attachment. The original bill was filed 24th Aug. 1874, and shortly afterwards the defendant, F. M. Schwarz, sold the rest of the coffee, and under an order of the court paid the proceeds of the sale into court, amounting to 3692*l.* 12*s.*

The plaintiffs claimed that the coffee was specifically appropriated to meet the said bills of exchange, and that the proceeds of the sale might be paid to them and to the other holders of the bills proportionally, and that the defendants, Moses, Levy, and Co., might be restrained from prosecuting their action in the Lord Mayor's Court.

By the answer of Moses, Levy, and Co., it appeared that they had had large dealings with Eloy, Alfaro, and Co., and that the latter firm were very heavily in their debt. A long correspondence between the two firms was set out. It appeared that Eloy, Alfaro, and Co. had promised to send 2000 bags of coffee to Moses, Levy, and Co., in part payment of the balance owing.

In a letter from Eloy, Alfaro, and Co. to Moses, Levy, and Co, dated 4th April 1874, the following passage occurs: "We confirm your last of the 20th March. Mr Ydlefonso Alfaro writes advising us that he has already commenced his shipments of coffee of which we have spoken to you, and that in all the present month he will have sent you the whole of the 2000 bags promised by us . . . With the drafts which Mr Yldefonso Alfaro may draw on you against B/L coffee, we expect that the credit with you will be arranged (or settled) in taking care to make our remittances also in bills, so that they may arrive in time for the due dates by which our banking account with you will be terminated." And on the 15th May 1874, Moses, Levy, and Co. wrote to Yldefonso Alfaro in answer to his letter of the 15th April above set out a letter, in which they said: "We have received some B/L of small lots of coffee per the steamer just arrived, which, as per advice from the friends Eloy, Alfaro, and Co., of Panama, are part of 2000 bags which they promised you would send us for the account of themselves." Their case, therefore, was that the 808 bags of coffee were part of the 2000 bags promised by Eloy, Alfaro, and Co., and that Yldefonso Alfaro was the agent of Eloy, Alfaro, and Co. They denied that the bill holders had any lien on the proceeds of the coffee, and that even if the coffee belonged in part to Yldefonso Alfaro, it belonged in part also to Eloy, Alfaro, and Co., who were admitted to be entitled to a share in its proceeds, and they claimed to be entitled to at least an equivalent share in the proceeds of the sale thereof.

Dickinson, Q.C. and *Rawlins* for the plaintiffs.—The real question is this. A fund has been brought into court which the plaintiffs cla m as the holders of the bills, to which the goods of which the fund in court is the proceeds was appropriated. Now the coffee was Yldefonso's coffee. He consigned it to Moses, Levy, and Co., for them to take it for him. They were to credit him with the proceeds of the coffee, and they were to debit him with the bills. There was no other transaction between them. Eloy, Alfaro, and Co. had no interest in the cargo. Yldefonso Alfaro cannot be affected by the representations of Eloy, Alfaro, and Co. This was simply a debtor and creditor account between Yldefonso Alfaro and Moses, Levy, and Co. created for the first and only time. The coffee was to cover the bills, and was specifically appropriated to the bills, a balance to be struck. It makes no difference that Eloy, Alfaro, and Co. were to share in that balance. The coffee was the sole property

of Yldefonso Alfaro, and Eloy, Alfaro, and Co. had no share in it though they had in the proceeds. But they claim the actual coffee itself. Now, two facts are clear, and the deduction of law from those facts is equally clear. First, the fact, established by undisputed evidence, that the coffee never was the property of Eloy, Alfaro, and Co.; secondly, that Yldefonso Alfaro was not the agent of Eloy, Alfaro, and Co, and, thirdly, that by law an interest in the profits arising from the sale of goods is not an interest in the goods themselves. This is fully established. The most recent case is *Alfaro* v. *De la Torre* (34 L. T. Rep. N.S. 122) where it is laid down that where a person ships goods on the "half joint" account as it is called, that is, that another person is to share in half the profits, that interest in the profits gives that other person no property in the goods. We should have been paid in due course, but for the proceedings in the Lord Mayor's Court, but we could only interfere with the proceeds by coming here. Besides, Schwarz had authority to appropriate the goods or to make an equitable assignment of them.

Hastings, Q.C. and *Romer*, for the defendants Yldefonso Alfaro, and Schwarz.

Robinson, Q.C. and *A. Young* for the defendants Moses, Levy, and Co.

The case is completely covered by *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (L. Rep. 6 H. L. 353). To establish the plaintiff's bill there must be a clear case of appropriation of the goods to meet the bills. If there was such appropriation, it was made by Schwarz, and is stated in the 12th, 13th, and 14th paragraphs of the bill. It cannot be contended that Schwarz's memorandum amounted to a specific appropriation. There is a statement that the coffee was sent against the bills drawn, but that does not constitute specific appropriation. The latest case on this subject is *Robey and Co.'s Perseverance Iron Works* v. *Ollier* (*ante*, vol. 1, p. 413; L. Rep. 7 Ch. Ap. 695; 27 L. T. Rep. N.S. 362) which was a case of actual bills of lading sent against bills of exchange, and it was held that there was no specific appropriation. The bill in that case was founded upon *Frith* v. *Forbes* (1 Mar. Law Cas. O. S. 253; 4 De G. F. & J. 409; 6 L. T. Rep. N. S. 847). Now, there was no authority given to Schwarz to make such an appropriation or an equitable assignment; Yldefonso's letter to Schwarz certainly gives no such authority. See also *Thompson* v. *Simpson* (L. Rep. 5 Ch. 659); *Everett* v. *Williams* (13 East, 582). On both grounds the plaintiffs' bill is misconceived. The plaintiffs had no claim either on the ground of specific appropriation or on this afterthought of Schwarz's authority which is not suggested in the bill.

Dickinson in reply.—In *Thomson* v. *Simpson* the question simply was, did the conversation between the two bank managers amount to an appropriation? In that case there was a mere representation, a truthful statement of what was in fact the ordinary course of business between the Liverpool and the New Orleans Bank. The element was wanting which is present in this case of a direction to apply the money to the particular bill. There was no direction to the person in whose hands the funds were to apply them to meet the particular bills. It was not the case of a direction, with the number, date, and amount of the bills given, to appropriate them to goods equally well ascertained. In *Robey and Co.'s Perseverance Iron Works* v. *Ollier* it was held that there was no specific appropriation, because it simply amounted to this, "Out of my moneys pay my drafts:" There were two circumstances which Lord Justice James said distinguished *Robey* v. *Ollier* from *Frith* v. *Forbes*. In *Frith* v. *Forbes* the person who gave the directions was sole owner of the goods; so he was here. In *Robey* v. *Ollier* he was not. Secondly, in *Frith* v. *Forbes*, as here, the proceeds were to be applied to specified bills. *Frith* v. *Forbes* is still good law and completely covers this case.

HALL, V.C.—The argument of Mr. Robinson supplemented by what Mr. Dickinson has said, and the references which have been made to the authorities lead me to the conclusion that the plaintiffs' bill cannot be maintained. This case not being altogether identical with *Frith* v. *Forbes* must be taken to fall within the principle of *Robey and Co.'s Perseverance Iron Works* v. *Ollier*. In *Frith* v. *Forbes* there was one feature to which both the Lord Justices adverted, and on which Lord Justice Turner relied, viz., that on the face of the bills (or at least of two of them) it was shown that they were expressly drawn against the proceeds of the cargo. That circumstance does not exist in the present case. In *Robey and Co.'s Perseverance Iron Works* v. *Ollier* the Lord Justice James was not prepared to hold that the mere circumstance of a bill of exchange purporting to be drawn against a particular cargo, makes it carry a lien on that cargo into the hands of every holder of the bill. "In *Frith* v. *Forbes*" the Lord Justice said, "there were grounds for saying that the intention was to give Frith, Sands and Co. an equitable interest in the cargo, for the letters of the consignor to the consignees referred to bills of exchange which the consignor had drawn in favour of Frith, Sands, and Co. Here the reference is only to bills, which the consignor had drawn to his own order, not mentioning any third parties." Lord Justice Mellish does not even advert to this last circumstance. It seems that in the first letter dated the 15th April 1874, which was a letter of advice to Moses, Levy, and Co., there is mention made of bills drawn on them on the same terms as heretofore, mentioning the names of the bills as in *Frith* v. *Forbes*, but not mentioning the additional ingredient which was found in that case. Here we have not got the two ingredients which existed in *Frith* v. *Forbes*. We have not the additional ingredient of a bill on the face of it showing that it is drawn on account of a particular cargo.

It seems to me, therefore, having regard to the absence of this feature in this case, that I cannot hold that there was an appropriation of the proceeds of the cargoes in favour of the persons in whose favour the bills were drawn, either in virtue of the bills being drawn in their favour or by the instructions given to the original consignees or by these two circumstances taken together. The case, therefore, as regards appropriation as originally constituted seems to me not to be established.

But the case does not remain here. This took place: Moses, Levy, and Co. refused to have anything to do with the transaction. The bills were covered, and Moses, Levy, and Co. did not accept. It was their business, therefore, to

give up the cargoes. The consignor instructs fresh parties to act as he had instructed Moses, Levy, and Co. to act, viz., Schwarz, who undertook the same duties as Moses, Levy and Co. had undertaken. They were in the same position, and there was no appropriation of the proceeds any more than there had been in the former case. The bills having been presented, were dishonoured and protested. They were then held by the plaintiffs until they became due, *i.e.*, on the 15th Aug. 1874. Moses, Levy, and Co. furnished Schwarz with a list of the persons in whose favour the bills were drawn, and the holders of the bills. Schwarz writes, on the 14th Aug. 1874, to the plaintiffs, and gives them particulars of the two bills which the plaintiffs now hold and which are set out in the 12th paragraph of the bill. The memorandum is as follows: [His Lordship read the memorandum set out above.] There is no engagement in this to do anything with the proceeds of the cargo. He says he has not got the warrants from Moses, Levy, and Co., but that he expects to get them in the following week. Then he promises to write again on the subject. He writes again on the 17th Aug., having received the delivery warrants, and the memorandum which he sends is this. [His Lordship read it as above.] The plaintiffs, as holders of the two bills, had no conversation with the defendants as to what the instructions of the consignors were with reference to the proceeds. All that Schwarz says is, that he shall get certain warrants early in the next week, and will then write again; then when the warrants have come he says he shall dispose of the same as instructed by the sender. There is no representation that those proceeds were to be applied to one bill rather than to another, or as to any particular order in favour of one person rather than of another. It seems to me that there is no representation at all; at all events, the proceeds would be applied wholly or partially to taking up the bills. If it has any other meaning it amounts to this. "I am the person representing the owner of the goods, the drawer of the bills. I hand the bills to you. There are certain warrants which I shall receive, and I shall then be in funds." It appears to me to be simply the representation or contract of a man saying: "There are certain bills of mine becoming due. I am going to realise certain things, and then I shall be in funds to meet them." But there is nothing in the nature of an assignment or charge on the bills. It amounts to this: "It is only by realising this property that I shall be in a position to make arrangements. At all events, I shall wait for instructions." Those instructions amount to this—that he is to take up the bills out of the proceeds of the cargo. There is no representation that such original instructions were ever given to Moses and Co. or in like manner to their substitute Schwarz; there is not enough to amount in the original or in the second instructions to an assignment of a rateable share of the proceeds of the coffee to take up the bills.

The plaintiffs' case, therefore, fails on these grounds, independently of what was argued by Mr. Robinson, viz, that it does not appear on the plaintiffs' case that the principal debtor, the consignor, gave to Schwarz authority to make an equitable assignment to any particular creditor or bondholder. There is that additional difficulty in the plaintiffs' way. The plaintiffs' bill, therefore, is not sustainable; and as it has been proposed to sustain it by Yldefonso Alfaro, the consignor and owner of the goods, appearing and saying that he does not dispute the plaintiffs' claims, but that there is another question with reference to Moses, Levy, and Co., and that they ought to pay the costs—in these circumstances I say that the plaintiffs, not having made out their case, their bill must be dismissed with costs, with the exception of the costs of Yldefonso Alfaro who has supported the plaintiffs' case.

Solicitors: *Kynaston* and *Gasquet*; *Murray*, *Hutchins*, and *Co.*; *Hollams*, *Son*, and *Coward*.

QUEEN'S BENCH DIVISION.

Reported by J. M. LELY, Esq., and M. W. MCKELLAR, Esq., Barristers-at-Law.

Nov. 9 *and* 12, 1875, *and July* 11, 1876.

METCALFE *v.* BRITANNIA IRONWORKS COMPANY.

Delivery under charter-party—Liability for freight—Pro ratâ itineris.

By charter-party between plaintiff (the shipowner) and defendants (the charterers), the plaintiff agreed that his steamship should load a cargo of iron rails at an English port, and should therewith proceed to Taganrog, in the Sea of Azov, or so near thereto as she might safely get, and deliver the same afloat on being paid freight at a certain rate per ton delivered. The ship, laden accordingly, found on her arrival in December the Sea of Azov frozen over and at Kertch, thirty miles off, the nearest place to Taganrog which she could reach before the following April, she unloaded, notwithstanding the protest of the consignees, and left the cargo at the Custom House, from which it was subsequently removed to its destination by railway at the consignees' expense.

In an action for freight,

Held, that this was not a delivery under the charter-party, and that (per Mellor and Quain, JJ.) the plaintiff under the circumstances, could recover no freight at all.

But (per Cockburn, C.J.) that the plaintiff could recover freight pro ratâ itineris.

THIS was a case stated without pleadings.

The action was brought to recover 1491*l.* 16*s.* 3*d.*, being 1080*l.* for freight on 900 tons of iron per steamship *Meredith*, at 24*s.* per ton, as per charter-party of the 7th Oct. 1873, and 441*l.* 16*s.* 3*d.* for freight on 299½ tons of iron, at 27*s* 6*d.* per ton, as per charter-party of the 3rd Nov. 1873, and interest thereon.

1. By a charter-party, dated the 7th Oct. 1873, and made between the plaintiff (therein described as the chartered owner of the steamship *Meredith*, of the burthen of $\frac{900}{753}$ tons, register measurement, or thereabouts, then bound to London or Dunkirk from the Black Sea) and the defendants, it was agreed that the ship should with all convenient speed proceed to Middlesborough-on-Tees, and there load from the agents of the defendants a part of a cargo (say 900 or 1000 tons) of railway iron, and being so loaded should therewith proceed to Taganrog, or so near thereunto as she might safely get, and deliver the same afloat on being paid freight at the rate of 24*s.* per ton of 20 cwt. delivered in full of all port charges, pilotages, &c. (the act

of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, river, and steam navigation of whatever nature and kind soever during the said voyage always excepted). The freight to be paid as follows: one-third to be advanced on signing bills of lading if required, less 3 per cent to cover all charges, and the balance in cash in London against certificate of right delivery of the cargo.

2. By the charter-party it was, amongst other things, agreed that the ship should have liberty to call at Havre to complete cargo for ports on the way, it being understood that she should not remain in Havre more than 72 hours.

3. The ship, after the date of the charter-party, arrived at Dunkirk, and there met with an accident which necessitated her being repaired, for which purpose she went to Sunderland, and this delayed her arrival at Middlesborough for some time.

4. By a second charter-party, dated the 3rd Nov. 1873, and made between the same parties, it was agreed that the *Meredith* should, with all convenient speed, proceed to Middlesborough-on-Tees after repairs, and there load from the agents of the defendants about 800 tons of railway iron, in addition to 900 tons as per charter-party of the 7th Oct.; and being so loaded should therewith proceed to Taganrog, or near thereto as she might safely get, and deliver the same afloat, on being paid freight at the rate of 27*s.* 6*d.* per ton of 20 cwt., in the same manner as by the first charter.

5 and 6. Both charter-parties contained the following provisions:

Ship to have an absolute lien for all freight, dead freight, and demurrage.

To address to charterer's agents, Messrs. Berthold, Smith, and Co., Taganrog, paying 2 per cent. commission.

Captain to telegraph from Constantinople and Kertch his departure and weight of cargo to the agent of the Rostoff and Wladikowkese Railway Company, Taganrog, or in default he will have no claim for demurrage.

7. The *Meredith*, so soon as she was repaired, proceeded to Middlesborough-on-Tees and there loaded from the agents of the defendants 900 tons of railway iron under the first charter-party, and 299½ tons of railway iron under the second charter-party.

8. The freights payable under the two charter-parties respectively are the sums sought to be recovered, as above stated.

9. The *Meredith*, so soon as she was so loaded, proceeded on her voyage to Taganrog, and arrived at Kertch on the 17th Dec. 1873.

10. Upon arriving at Kertch the captain of the *Meredith* found—and it was the fact—that the Sea of Azov was then closed by ice, that the navigation of the port of Taganrog was effectually closed, and all the buoys, lightship, and other marks for navigation had been removed for the winter.

11. The captain thereupon proposed to discharge his cargo at Kertch, and made a protest at that place, of which the following are the material parts:

Protest. Steamer *Meredith*.

Arrived in Kertch on the 17th Dec. 1873, with a cargo of railway iron (bars), consigned to the Rostoff and Wladikowkese Railway Company, I found that the Sea of Azov was closed by ice, and that the navigation of the port of Taganrog, where the ship had to deliver the cargo, was officially and to all purposes closed, and all the buoys, lightships, and other marks for the navigation of its intricate gulf were removed for the winter. Basing myself upon the charter-party, and pointedly to that part of it beginning with "Taganrog, or so near thereunto as she may safely get," and next to the part of it beginning with "the act of God," and ending with "all and every other accident, dangers of the sea, rivers, and steam navigation of whatever nature and kind soever during the said voyage always excepted," I determined to discharge the cargo at Kertch, as the nearest port to Taganrog to which the steamer could safely approach, all others being closed by ice, having given proper notice of such determination to the consignees of the steamer at Taganrog, Messrs. Berthold, Smith, and Co., by telegram, dated from Kertch the 18th Dec.

Acting on the aforesaid, I am discharging my cargo at this port of Kertch under protest, and at the expense and risk of the consignees or whom it may concern; as no documents for the reception of the same have been presented, consequently I hereby solemnly protest against such receivers of said cargo, holding them responsible for all detention, loss of time, extra expenses, fines of Custom House for late presentation of documents, and whatsoever other charges to which I may be exposed.

20th Dec. 1873.

12. On the 19th Dec. 1873, Messrs. Berthold, Smith, and Co., on behalf of the defendants, sent the following telegram, which was received by the captain before he had commenced the discharge of the cargo: "If you discharge your steamer will be held responsible all consequences infraction charter-party."

13. Kertch was, under the circumstances, as near to Taganrog as the *Meredith* could get (about thirty miles) so long as the Sea of Azov was closed by ice, which, according to the ordinary course of weather, would have been until the latter end of the month of April 1874.

14. As no bill of lading for the cargo was produced to the captain of the *Meredith* at Kertch, he, in order to protect the ship, landed the cargo at Kertch, and gave it into the custody of the Custom House authorities there.

15. By the bills of lading, signed by the captain, the cargo was made deliverable at the port of Taganrog, "all and every the dangers and accidents of the seas and of navigation of what nature or kind soever excepted, unto the Rostoff and Wladikowkese Railway Company, freight and other conditions as per charter-party. Captain to apply to Messrs. Berthold, Smith, and Co., Taganrog."

16. After a part of the cargo had been landed one Jean Deopik, a merchant at Kertch, claimed the cargo under a power of attorney from the Rostoff and Wladikowkese Railway Company.

17. When the whole cargo had been delivered to the Custom authorities at Kertch, Jean Deopik produced to them copies of the charter-parties and bill of lading for the cargo and his power of attorney; and thereupon the cargo was delivered to him by the Custom House authorities without payment of any freight, and notwithstanding the captain's claim to retain the cargo on behalf of the owner of the *Meredith* until the freight was paid, and Jean Deopik thereupon gave to the captain the following receipt for the cargo:

On the power of the charter-party and the bill of lading passed to me by the agents of the Rostoff and Wladikowkese Railway Company, I hereby declare that I have received the cargo of the steamship *Meredith*, composed of 6578 bars of railway iron. This receipt to be the only one given, and all others to have no value.

Kertch, 15th, 27th Dec. 1873. JEAN DEOPIK.

The *Meredith* sailed from Kertch on the 29th Dec. 1873.

The cargo was in due course received by the said company, but the freight for the same has not been paid, pursuant to the said charter-parties or either of them.

The court is to have power to draw inferences of fact.

The question for the opinion of the court is, whether, under the above circumstances, the plaintiff is to be entitled to be paid the chartered freight, or any and what amount for the carriage of the railway iron by the *Meredith* to Kertch.

Cohen, Q.C. and *Beresford*, argued for the plaintiff.

Watkin Williams Q.C. and *Hollams*, for the defendants.

The arguments sufficiently appear from the written judgments of the court.

Cur. adv. vult.

July 11.—COCKBURN, C.J.—This is an action brought to recover a sum due for freight for the conveyance of a cargo of iron bars shipped under two charter-parties on board the plaintiff's vessel the *Meredith*, to be carried from Middlesborough-on-Tees to Taganrog on the Sea of Azov, "or so near thereto as the ship could safely get." The defendants were the charterers of the vessel. By the bills of lading, signed by the master as well as by the charterers, the iron was to be delivered at the port of Taganrog. It was consigned to the Rostoff and Wladikowkese Railway Company at the latter place. The cargo having been taken on board the ship started without delay on the voyage as agreed on and arrived on the 17th Dec. at Kertch, a port distant from Taganrog about thirty miles. On arriving at Kertch the master learned that the Sea of Azov was blocked up with ice, and the navigation suspended, the effect of which was that the further conveyance of the cargo to its destination was rendered impracticable till the ensuing spring the navigation being usually closed till the end of April.

Relying on the terms of the charter-party which, as has been stated, provided that the ship should proceed to Taganrog, "or so near thereto as she should safely get," the master, finding that he could get no nearer to Taganrog than Kertch, conceived that he was entitled to land the cargo at the latter place, and proceeded accordingly to discharge and land it. In so doing he acted in direct defiance of the opposition of the agents of the charterers at Taganrog to whom he had notified what he was about to do; and who, having thus become aware of it, gave him express notice not to land the cargo at Kertch, and that if he did so he would be held liable under the charter-party. There being no one to receive the cargo the master placed it under the charge of the Custom House authorities. From the latter it was claimed by an agent of the Rostoff and Wladikowkese Railway Company, the consignees; and on the production of the charter-parties and bills of lading possession was delivered to their agent by the authorities, notwithstanding a claim by the master that it should be retained till his freight was paid. Upon taking possession the agent of the consignees who must be presumed to have had full authority for the purpose, delivered to the master, no doubt, by the direction of the authorities, a receipt in these terms:

"On the power of the charter-party and the bill of lading passed to me by the agents of the Rostoff and Wladikowkese Railway Company, I hereby declare that I have received the cargo of the s.s. *Meredith* composed of 6578 bars of railway iron. This receipt to be the only one given and all others to have no value. Kertch, 15th—27th Dec. 1873."

Upon these facts I entirely concur in thinking that the plaintiff is not entitled to recover the full freight. The case of *Schilizzi* v. *Derry* (4 E. & B. 873) established that when a charter-party speaks of a vessel bound to a particular port discharging "as near as she can get" to such port this must be taken to mean some place "within the ambit" of the port, and Kertch certainly cannot be said to be within the ambit of the port of Taganrog.

I also concur in thinking that the receipt given by the agent of the consignees does not amount to an admission of the "right delivery" of the cargo. It amounts to no more than an admission of the delivery of the cargo at Kertch which is not a "right delivery" of it so as to entitle the owner to the full freight.

But it appears to me that the acceptance of the cargo by the consignees and the receipt thus given by their authorised agent are very material facts in determining the further question with which we have to deal, viz., whether the plaintiff, the shipowner, is here entitled to freight *pro ratâ itineris*.

I agree that according to the terms of an ordinary charter-party or bill of lading the whole voyage for which the freight is agreed to be paid must be accomplished before any freight becomes payable, and I agree that the master cannot, by wrongfully stopping short of the place of destination, compel the owner of the goods to take them, and pay the freight even for the part of the voyage performed any more than the charterer on the other hand can insist on having the cargo delivered at an intermediate place so as to deprive the shipowner of the opportunity of earning his full freight. If he desires to have his goods short of their original destination, unless some arrangement is come to between them he must satisfy the shipowner for the entire freight as fixed by the charter-party.

But it is obvious that while such is the absolute right of each of the parties to the charter, this right may be varied or waived; and that while the shipowner may be willing to forego his right to earn the entire freight on being paid a rateable part for so much of the voyage as has been performed, the goods owner, on the other hand, may be willing to take the goods at an intermediate place and to waive the conveyance of the goods to their original destination, paying a proportionate part only of the freight, all claim to the residue being abandoned; and such an arrangement in substitution of the original contract may not only be expressed but may also be implied from the circumstances and the conduct of the parties as was done in the case of *The Soblomsten* (L. Rep. 1 A. & E. 203; 2 Mar. Law Cas. O. S. 436), and ought to be so implied where justice and equity require it. Where such an expressed arrangement has been come to, of course, no difficulty exists. The case in which the question whether such an arrangement is to be implied usually arises is where the ship becomes disabled by some *vis major*, and it becomes necessary to land the cargo at an intermediate port where there are no means of sending it on, and it is there taken possession of by the owner or sold by the master for the benefit of those concerned. Nothing could apparently be more unjust than that having had the benefit of the conveyance of the cargo so far on its way the owner if he has derived benefit so far should be released from the obligation of

paying a proportionate part of the freight. No doubt under such circumstances it becomes necessary for the master if he desires to earn the freight either to repair his ship or to procure another in which to send on the cargo. But it may be that the ship cannot be repaired, and that no other ship can be procured or not without such a delay as would be fatal to the goods or to the adventure. Under these circumstances the owner of the goods is not bound to take to them if unwilling to do so. If they are not worth paying the freight upon he may refuse to accept them, but if he accept and dispose of them ought not we to imply an undertaking on his part to pay for the conveyance of them so far as it has gone?

Such was the view taken by Lord Mansfield and the Court of King's Bench in conformity with the rule laid down by the old authorities on maritime commercial law in the well-known case of *Luke* v. *Lyde* (2 Burr. 882; 1 W. Bl. 190). There a cargo of salt fish having been shipped on account of the defendant, a merchant in England, on board the plaintiff's ship to be conveyed from Newfoundland to Lisbon, the ship when within a few days' sail of Lisbon had been taken by a French privateer, but had afterwards been recaptured and brought to England, whereupon the defendant claimed and obtained possession of the cargo. An action of assumpsit having been brought by the owners of the ship to recover freight *pro ratâ*, Lord Mansfield in an elaborate judgment after referring to the old authorities on maritime law decided in favour of the plaintiffs; not upon any fiction of a substituted contract or of a dispensation of part of the voyage originally agreed on, but on the broad principle of maritime law, that the voyage having been interrupted without any fault of the shipowner, the merchant who has had the benefit of partial conveyance if he takes the goods must pay freight *pro ratâ*.

In so holding the Court of King's Bench appears to me I must say to have decided according to justice and good sense.

In the subsequent case of *Baillie* v. *Mogdigliani* Park on Ins. c. II., 8th ed. p. 116), a ship bound from Nevis to Bristol had been taken by a French ship, and condemned in a French prize court, but the sentence of condemnation was afterwards reversed and restitution ordered. In the meantime, however, the ship and cargo had been sold. The merchants received the proceeds and paid freight to the master *pro ratâ itineris*; and the goods having been insured they brought an action against the insurers to recover the amount of freight so paid. It was held that they could not recover, but Lord Mansfield said: "As between the owners of the ship and cargo in case of a total loss no freight is due, but as between them no loss is total where part of the property is saved, and the owner takes it to his own use. In this case the value of the goods was restored in money, which is the same as the goods, and therefore freight was certainly due *pro ratâ itineris*."

The subsequent case of *Cook* v. *Jennings* (7 T. Rep. 381) might at first sight appear to conflict with the foregoing authorities inasmuch as the ship having been wrecked on the voyage, but the goods having been saved, the merchant who had taken possession of them refused to pay freight, and the action having been brought to recover it *pro ratâ* it was held that the action would not lie. But the decision turned on the form of the action. The plaintiff having sued on the charter-party which was under seal had declared in covenant, and as on reference to the charter-party it appeared that the freight was payable on the right delivery of the cargo at the port of destination, it was held that until this condition had been complied with no freight became payable under the charter, and that the contract being under seal no implied assumpsit could be raised. Lawrence, J. puts the case on the right ground: "I agree," he says, "with the plaintiffs' counsel that whether the contract be by parol or under seal the operation of the law on it is equally the same. When a ship is driven on shore it is the duty of the master either to repair his ship or to procure another; and having performed the voyage he is then entitled to his freight, but he is not entitled to the whole freight unless he performs the whole voyage, except in cases where the owners of the goods prevent him, nor is he entitled *pro ratâ* unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties, but here the plaintiff has resorted to the original agreement under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action."

The case of *Hunter* v. *Prinsep* (10 East, 378) is also an authority which at first sight may appear to conflict with that of *Luke* v. *Lyde* (2 Burr. 882). A vessel bound from Honduras to London having been captured and recaptured and taken by the recaptors into St. Kitts was there wrecked, but the cargo was saved. The master, acting *bonâ fide* for the advantage of all concerned, but without orders or authority from the owner of the cargo and apparently without any necessity arising from inability to forward the goods, having obtained an order from the Vice-Admiralty Court of the island which order that court had no power to make, sold the cargo. The plaintiff, the owner of the cargo, having brought an action for money had and received against the shipowner to recover the amount of the proceeds, the defendants sought to set off the amount of freight *pro ratâ*. But Lord Ellenborough, delivering the judgment of the Court of King's Bench, held that inasmuch as by the terms of the charter-party which was under seal, the freight was to be paid in particular modes and proportions "on a right and true delivery of the cargo," no freight had become payable under the charter-party; and that as the sale of the goods by the master, which had been made without the assent of the plaintiff and without necessity, was unlawful, and the conveyance of the goods to their destination had thus been rendered impossible by the tortious act of the master, the plaintiff, the freighter, could not be taken to have dispensed with the further conveyance of the goods according to the terms of the original contract.

It was more difficult to deal with the argument urged on behalf of the defendants that by bringing an action to recover the proceeds of the sale the plaintiff would receive the equivalent of the goods, and therefore virtually the goods themselves and consequently became liable for the *pro ratâ* freight as much as if he had received possession of the goods themselves on the spot. Nor in my

opinion was any satisfactory answer given. It was not enough, as it seems to me, to say that the sale was tortious on the part of the master. By waiving the tort and suing in assumpsit for the proceeds of the sale the plaintiff became liable—certainly in point of justice, and as it seems to me in law—to the claim of the defendants for partial freight by way of set off, just as much as if he had taken to the goods themselves and sold them where they were.

Lord Ellenborough, it is true, puts the matter on such a footing as would render it impossible ever to imply a dispensation by a freighter of performance of part of a voyage. "The general property in the goods," he says, "is in the freighter; the shipowner has no right to withhold possession from him unless he has either earned his freight"—by which the Chief Justice evidently means the entire 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:" (10 East, p. 394). It is to be observed, however, that Lord Ellenborough does not seem to have had present to his mind the possibility of a case in which partial freight could be earned. In the case before him the ship had been taken out of her course as the result of her capture, and had been taken into St. Kitts by the recaptors. It is difficult to see how any freight could have been earned. The case of *Luke* v. *Lyde* (2 Burr. 882) does not seem to have been dealt with by the court.

In the later case of *Vlierbloom* v. *Chapman* (11 M. & W. 230), however, the question of *pro ratâ* freight presented itself as the point for decision, and a similar judgment was given under still more striking circumstances. A cargo of rice having been shipped at Batavia to be delivered at Rotterdam, and the ship having been compelled by a hurricane to put into the Mauritius, the rice was found to have been damaged, and to be in a state of rapid putrefaction, and it was therefore, as a matter of necessity, sold by the master; of course without the knowledge of the owner, whom at that distance it was, under the circumstances, impossible to consult. An action having been brought against the shipowner by the freighters to recover the proceeds of the sale, the defendant, though the action was in assumpsit, was held not to be entitled to set off the freight *pro rata*. I confess myself wholly unable to follow the reasoning of the court. It seems to have been admitted that as the goods must otherwise have perished the master had authority, as agent of the shippers, to sell. Nevertheless it was held that his thus dealing with the goods as agent for the freighters, although it might amount to an acceptance of the cargo by the latter, did not operate on their part as a dispensation of the conveyance of the goods to their destination; because, as the shipowner was not in a condition to carry it, it could not be supposed that the freighters would dispense with the performance.

Here, again, no notice is taken of the case of *Luke* v. *Lyde* (2 Burr. 882), in which, as I have before said, Lord Mansfield and the Court of King's Bench put the right to recover freight *pro ratâ* not on any dispensation by the freighters or new contract in substitution for the charter-party or bill of lading, but on the principle of maritime commercial law that the merchant, if he takes the goods short of their destination, when the shipowner, without any default on his part, but through the operation of a *vis major* is prevented from carrying them on is bound, having had the benefit of their carriage so far, to pay freight *pro ratâ*.

The argument of Lord Ellenborough, that where the shipowner is unable to forward the cargo, and so to earn the freight, the right of the shipper to the possession of it at once arises without any corresponding right in the shipowner to freight *pro ratâ* may hold where the circumstances give the master no authority to dispose of the goods. But it obviously becomes a very different thing where the ship having become disabled and the goods damaged, the duty is cast upon the master to dispose of the cargo in the interest of the owner of it.

The legal position of the master of a vessel disabled from carrying on the cargo at an intermediate port may be stated thus: If he desires to earn the entire freight he must cause the ship to be repaired or send on the cargo in another vessel. But if he chooses to forego the freight he is not bound to do either. The ship may not be worth repairing, the expense of hiring another ship may be greater than the freight to be earned. Having done his best to protect his goods he may leave them to be dealt with by the owners, the only consequence being that he forfeits the freight. But it may be that the master has no option, that the ship is incapable of being repaired, and that no other can be procured, while the circumstances are such as to render it certain that it will not be worth the while of the owner of the goods either owing to the locality or the distance at which they are found or owing to their damaged condition to send out a ship to bring them on, or it may be that the goods are perishable, and would become worthless by any delay. Under such circumstances, if the goods-owner cannot be communicated with, and his instructions taken within such time as the master can reasonably be expected to wait, the latter, as the servant and representative of the shipowner, has cast upon him the duty of acting for the goods-owner and disposing of the cargo to the best advantage. This obligation is tacitly implied in the charter-party or bill of lading, and, like every obligation to do a thing, involves an authority from the party to whose benefit the obligation enures to do the thing which is the subject-matter of the obligation. Where, therefore, the master, in disposing of the cargo acts *bonâ fide* and with reasonable judgment and discretion the goods-owner will be bound.

The law, as thus laid down by Lord Stowell in the case of *The Gratitudine* (3 Rob. Adm. 240) has since been universally acquiesced in. This being so, the position of Lord Ellenborough, that where the goods are not about to be carried on, possession may be demanded by the freighter, and if the demand be not yielded to will be wrongfully withheld appears inapplicable to the case of a master so circumstanced; and that of Parke, B., that the shipowner, not being able to carry or send on the goods, it cannot be supposed that the shipper would waive the further conveyance of them seems equally so where the master is acting as the agent of both parties, and doing that which is most conducive to their common advantage. If the master under these circumstances becomes to use the words of Willes, J., in *Notara* v. *Henderson* (*ante*

vol. 1, p. 278; L. Rep. 7 Q. B. 230), the "agent of necessity" of the shipper he becomes so as the servant of the shipowner, and by virtue of the original contract, which therefore must be taken to be still subsisting, though the goods cannot be carried on. If the law thus casts on him the duty of acting as agent for the shipper, it does not take from him the character of agent for the shipowner, or the duty of looking to the interest of the latter as well as to that of the former. If he becomes clothed with the character of agent for the goods owner, he acquires authority to do what the latter if on the spot might do, viz., dispense with the further transport of the goods.

It is, moreover, clear that cases may occur in which it would be for the manifest advantage of the freighter that the goods should be sold and the freight deducted; as for instance, where the goods being at an intermediate port, are found to have become so damaged that if carried on to their destination they will be worthless when they reach it, as was the case in *Notara* v. *Henderson* (*ante*, vol. 1, p. 278; L. Rep. 5 Q. B. 346; 7 Q. B. 225). That case is an express authority for saying that the master may not carry on a damaged cargo for the purpose of earning the freight where the necessary effect will be the destruction or deterioration of the goods. In such case, at all events, where the damage cannot be arrested at a reasonable expense of time or money, it becomes the duty of the master to sell; but it is obviously only equitable that if the master as the agent of the shipowner is prevented in the interest of the shipper from earning the entire freight at the expense of the cargo, the shipper in consideration of the benefit he thus secures, shall at least pay the freight for so much of the voyage as shall have been performed.

The cases on which I have been commenting, if in point, are of course binding on us, and can only be reviewed, as I hope they will be if the occasion should arise, in a Court of Appeal. But they do not go the length of overruling *Luke* v. *Lyde* (2 Burr. 882), all they do is to establish that where the master takes upon himself to sell the cargo without express authority from the shipper, though he may be perfectly justified in so doing as the agent of the latter by the circumstances in which he is placed, the shipowner cannot recover the *pro rata* freight. They do not touch the case in which the goods come to the hands of the owner short of their destination, and the owner has derived benefit from their conveyance so far, which is what has occurred in the case before us.

In deciding a question of English law, foreign law is, of course, of no authority. Nevertheless, as in a matter of commercial law, it is of importance that the rules of commercial nations shall as far as possible be the same, it may not be unimportant to see what is the state of the Continental law on this subject. The law will be found in the French Code de Commerce, Article 296; in the Italian Codice di Commercio, Article 403; in the Spanish Code, Articles 777 and 778; in the Code of the Netherlands, Article 478; in the Prussian Code, Articles 1701-6; in the Russian Code, Article 747; in the German Code, Articles 632-3. The rule in all these is the same, namely, that the master of a disabled ship is bound, if his ship cannot be repaired, to procure if possible another to carry on the goods. If both are impossible, he may then abandon the goods to the owners, and will be entitled to his freight *pro rata*, or as it is termed in the German law, the distance freight. The German law has, however, this qualification, that the freight payable shall not exceed the value of the goods.

In the present instance, the charterers having had the cargo brought from the Tees to within thirty miles of Taganrog, nothing could be more unjust than that the shipowner should receive nothing for the conveyance of it so far. And the principle of the decisions in *Luke* v. *Lyde* (2 Burr. 882) appear to me to be distinctly applicable.

But, besides this, when the facts are closely looked at, an acceptance of the cargo at Kertch by the consignees, and a dispensation of the further conveyance of it may properly be inferred.

Being prevented by the state of the navigation from taking the cargo on to its destination, the master was justified in landing and warehousing it at Kertch, provided he thereby put the charterers to no extra expense. He was not bound to wait with his ship with the iron on board till the navigation should be open, a period of four months. All that could be required of him would be that he should bring on or forward the cargo as soon as the navigation should be again open. In the meantime he was at liberty to seek other new employment for his ship in the interest of his owner. The charterers could have no right to exact from him a useless inactivity of several months; nor. if this be so, can it make any difference that the charterers in fact objected to the landing of the cargo. Their objection might have made all the difference if the cargo could have been brought on, but as that was impossible, no prejudice could result to them if not called upon to defray the extra expense. And even if put to such expense, they would always have had their cross claim against the shipowner on the freight.

The next important fact which occurs is that the cargo having been landed the consignees come forward and claim it. But they were not entitled to have it delivered to them till it had been brought to Taganrog, unless it was abandoned by the master or on the navigation being again opened he refused to bring it on or to forward it, they could not insist upon delivery short of the port of destination without paying the entire freight except by arrangement of the shipowner or the master as his agent. Without paying the entire freight or coming to such an arrangement, the consignees must have waited four months for the iron rails, which, being wanted for the construction of a railway, it was important to them to obtain without any delay.

When, under these circumstances, I find the consignees asking for the cargo, and the master compelled to give them possession of it, I cannot suppose that the master intended to forego, on the part of his owner, his claim to freight, or that the consignees, in accepting the iron at Kertch, were receiving it free from all claim of freight. The master might be glad to be relieved from all further difficulty as to forwarding the iron, the consignees would be glad to have present possession, so that they might send it by land carriage to Taganrog, instead of waiting four months to receive it by sea. The question of amount of freight payable, whether the whole or

part, they left to be settled between shipowners and charterers in England. The master evidently thought he had earned the entire freight, for he believed that, having brought the cargo "as near as the ship could get" to the port of destination, he had done all he was bound by the charter-party to do. It is true that in landing the cargo under the mistaken impression the master had no intention of taking it on to Taganrog; but it appears that while he was in the course of landing the iron at Kertch the consignees applied for it, and it was delivered up to them, they giving a receipt for it, the master on the other hand insisting on payment of his freight. It seems to me that under these circumstances the consignees, who had no right to have the iron carried on to Taganrog till the navigation was again open, must be taken to have accepted it subject to the claim for freight *pro ratâ*. It is clear that the master had no intention of giving up the cargo without receiving his freight, for he protested against its being given up to the consignees by the authorities without the freight being paid. And inasmuch as the consignees could not claim to have the cargo brought on to Taganrog till the navigation should be open, it is by no means certain that if the cargo had not been delivered over to the consignees, the shipowner on learning what had occurred, would not in order strictly to fulfil the terms of the charter and prevent all questions as to the payment of the entire freight, have provided a vessel to take the iron on when the navigation was re-opened. And this would have been the more likely to happen if the consignees instead of demanding present delivery of the iron, had protested against its being left at Kertch, and had insisted on its being brought on to Taganrog when the navigation should admit of it. It is highly probable that the plaintiff would then have availed himself of the intervening period, and would have made his arrangements for bringing on the cargo. Of this *tempus pœnitentiæ* he was, as it seems to me, prematurely and unduly deprived by the act of the consignees, in obtaining the possession of the iron from the custom house authorities.

It must be borne in mind, as a material fact in this case, and one which distinguishes it from the cases of *Hunter* v. *Prinsep* (10 East, 378), and *Vlierboom* v. *Chapman* (13 M. & W. 230), that the master did nothing in the way of disposing of the cargo, or of abandoning it so as to give up his lien on it for the freight. The cargo was given up to the consignees by the custom house authorities, against the will of the master, and notwithstanding his protest. The consignees could, therefore, as it seems to me, only take possession subject to the rights of the captain and his owner, one of these rights being, unless clearly abandoned, that of forwarding the cargo when the time came, and so earning the entire freight. Here again, it is by no means certain that if the lien for freight claimed by the master had not been disregarded, and the cargo handed over to the consignees, the owner would not in due time have sent it on to its destination.

Under these circumstances, the case of *Luke* v. *Lyde* (2 Burr. 882), which as far as I am aware has never been overruled, and which is binding upon us, appears to me to apply. In my opinion, though the charterers' agents protested against the landing of the cargo, yet the consignees, who as to the receipt of the cargo must be treated as the agents of the charterers, must be taken to have dispensed with the conveyance of the iron between Kertch and Taganrog, and to have accepted it, subject to the right of the shipowner to freight for so much of the voyage as had been performed. I think, therefore, that to that extent our judgment should be for the plaintiff. But my learned brothers think otherwise, and judgment must therefore be entered for the defendants.

QUAIN, J. (delivering the judgment of Mellor, J. and himself.)—It is unnecessary to recapitulate the facts of the special case which has been fully stated by the Lord Chief Justice.

Under the circumstances the plaintiff contends first that he is entitled to be paid full freight as on a performance of the whole voyage, or if not full freight, that he is entitled to be paid *pro ratâ itineris* up to Kertch.

In the first place we think that the master was quite mistaken in supposing that a delivery at Kertch was a delivery so near to Taganrog as he could safely get. According to the judgment of this court in *Schilizzi* v. *Derry* (4 E. & B. 873), the meaning of those words is that the ship must get within the ambit of the port, although she may not be able to enter it. There is no pretence for saying that Kertch is within the ambit of the port of Taganrog.

It was next contended that the condition of the charter-party, on the performance of which the full freight was made payable, had been complied with. By the terms of the charter party the freight was to be paid one-third on signing the bills of lading, and the balance in cash in London against certificate of right delivery of the cargo.

It was argued that the receipt given by the consignees' agents, and set out in paragraph 17 of the case, was such a certificate. But we are of opinion, assuming that the consignees or their agents were the proper persons to give the certificate required by the charter-party, that the receipt is not a certificate of right delivery of the cargo within the terms of the charter-party, especially as against the present defendants, the charterers, who expressly protested against the discharge of the cargo at Kertch. It is merely an acknowledgment of having received the cargo, and it is not the certificate of right delivery required by the charter-party.

It was further contended for the plaintiff, that as the consignees had taken possession of the cargo at Kertch as described in paragraph 17, the whole freight was payable.

The case of *London and North-Western Railway Company* v. *Bartlett*, (7 H. & N. 400) was cited in support of this proposition. In that case it was held that the carrier of goods consigned to a particular place, may deliver them at any other place that the consignee and the carrier may agree upon, and that in such case the carrier would be entitled to his full freight. So also in the case of *Cork Distilleries Company* v. *Great Southern and Western Railway Company* L. Rep. 7 H. L. 269), it was held by the House of Lords that where goods are delivered to a carrier to be carried to a certain person, at a certain place, the consignees may demand the goods of the carrier at another place, and the carrier will be justified in delivering the goods on payment of the full freight.

But in these cases the carrier was ready and willing to carry the goods to their destination

and earn his full freight, and refrained from doing so at the express request of the consignees. In the present case, on the contrary, the master discharged the cargo at Kertch without any request from the consignees, and against the express protest of the charterers, and refused to carry it further to its port of destination; and it was not till after this refusal and when the goods may be said to have been abandoned by the master, that the consignees took possession of them as holders of the bills of lading.

We think, therefore, that the cases cited have no application to the present case. It is said in paragraph 19 of the case that the cargo was "in due course" received by the railway company. But we cannot construe the language as intended to contradict or qualify the express statement in paragraph 17 describing the manner in which the cargo was received by the company.

It remains to consider the question whether the plaintiff is entitled to freight *pro ratâ itineris* having carried the goods to Kertch. Claims of this kind usually arise in cases of disabled ships unable by the accidents of the seas to complete their voyage; and we are not aware of any case like the present where the claim has arisen from the default of the master in refusing to proceed to his port of destination.

The rule on the subject was laid down by Dr. Lushington in the case of the *The Soblomsten* (L. Rep. 1 A. and E. 297), as follows:—"To justify a claim for *pro ratâ* freight there must be a voluntary acceptance of the goods by their owner at an immediate port in such a mode as to raise a fair inference that the further carriage was intentionally dispensed with." And the learned judge cites the case of *Vlierboom* v. *Chapman*, from the judgment in which case the rule is extracted in the words above quoted. This case is founded on the earlier case of *Hunter* v. *Prinsep* (10 East. 378).

In that case Lord Ellenborough says that the shipowner has no right to any freight unless the goods are forwarded to their destination, "unless the forwarding them be dispensed with, or unless there be some new bargain upon the subject. If the shipowner will not forward them the freighter is entitled to them without paying anything. . . . . ." He continues, "The general property in the goods is in the freighter; the shipowner has no right to withhold possession from him unless he has either earned his freight, or is going on to earn it." Applying these principles to the facts of the case before us, we feel bound to decide that in this case the claim for freight *pro ratâ* cannot be supported. This action is against the charterers on the charter-party; and so far from their having voluntarily accepted the goods at Kertch, and dispensed with the further carriage of the goods to their port of destination, they gave the master express notice on the 19th Dec., and before he had commenced to discharge the cargo (paragraph 12) that if he discharged the cargo at Kertch, that is to say left it at Kertch without any intention of carrying it further, he would be held responsible for an infraction of the charter-party. It is impossible, therefore, as against the present defendants, to infer that they dispensed with the further carriage of the goods to Taganrog. The case, as far as the present defendants are concerned is like *Liddard* v. *Lopes* (10 East. 526), where a similar notice was given by the owners of the cargo, and it was held that no new contract to pay freight *pro ratâ* could be presumed against the merchant.

But assuming that defendants would be bound in this action by a voluntary acceptance of the goods by the consignees at an intermediate port, and a dispensation by them of the further carriage (a point about which we entertain considerable doubt, especially after the protest of the defendants, agents), we are of opinion that there has been no such acceptance in this case. In fact the present case is one in which the master by an unfortunate mistake has left the goods at an intermediate port and refused to carry them on to their proper destination, and it was not till after such refusal that the agent of the consignees took possession of them as holders of the bills of lading. They had no other course to pursue if they wished to preserve their own property. It is said, however, that the master claimed a lien on the cargo for freight, and protested against the agent of the consignees taking possession; and that by reason of the consignees so taking possession he and his owners were prevented from sending a ship and carrying on the cargo at the opening of the navigation. But the master had no lien for freight, for he had neither earned any freight nor was he going to earn it; and he having declared that he discharged the cargo at Kertch, and did not intend to carry it further, the parties had a right to take him at his word, and act on that declaration, and treat it as a breach of the charter-party, and to take possession of the cargo which the master so abandoned; (See on this last point the *Danube Railway Company* v. *Xenos*, 11 C. B. N. S. 152; 13 C. B. N. S. 825; *Frost* v. *Knight*, L. Rep. 7 Ex. 111, and the cases there cited.)

The case, therefore, seems to come within the third rule laid down by Dr. Lushington in the case of *The Soblomsten* (L. Rep. 1 A. and E. 297)—viz., that no freight is payable if the owner of cargo against his will is compelled to take the cargo at an intermediate port.

It seems to us that the duty of the master was plain in the absence of any fresh arrangement between the parties, either to wait at Kertch till the navigation was open and then proceed on his voyage, or to land and warehouse the goods at Kertch, and return and take them on by his own or another ship when the navigation was open.

For these reasons we are of opinion that the plaintiff is not entitled to recover any freight in this case, and that our judgment must be for the defendants.

We may observe in conclusion that the special case before us gives no information as to what ultimately became of the cargo of the *Meredith*. We are not told if it was ever forwarded to Taganrog either by the charterers or the consignees, nor how the transaction has been arranged, if it ever has been arranged, between the parties. We are, therefore, entirely ignorant whether in the result the present defendants, the freighters, ever derived any benefit or advantage whatever from the carriage of the cargo to Kertch. We cannot infer necessarily that they must have done so, for many cases are conceivable in which the leaving the cargo at an intermediate port

might be of no benefit, but on the contrary cause a serious loss to the freighters.

In the jurisprudence of France and Germany the claim for freight *pro ratâ itineris* is not based on any such technical ground as a new contract to be inferred from a voluntary acceptance of the goods in such a way as to amount to a dispensation of their further carriage, but seems to be founded merely on the equity and reasonableness of the thing that the shipowner who has carried the goods a part of the way of which the freighter has had the benefit should be proportionately indemnified: (See Code de Commerce, Art. 294-206, and Valin's Commentary on the Ordonnance de la Marine, Liv. III. Lit. III., Art. 9) The German Code, Art. 633, expresssly provides that in calculating the amount of that indemnity the question is not one of distance merely, but that the circumstances of the case on both sides in relation to the performed and unperformed part of the journey, including the value of the goods at the intermediate port must be taken into consideration: (German Commercial Code, Arts, 632, 633, and Mackower's Commentary on the German Code, Note 123).

Had it appeared from the case before us that the defendants in the present case, notwithstanding the master's failure to complete his contract, had in the result derived benefit and advantage from the carriage of the cargo to Kertch, either in the price received for the goods or otherwise, a question might have arisen whether we might not now be called upon to administer in favour of a shipowner who had carried the cargo to within thirty miles of its destination, and of which part performance the defendants had the benefit, some of that "larger equity" alluded to by Lord Tenterden as exercised by Courts of Admiralty in similar cases: (Abbott on Shipping, 11th edit. 1867, pp. 402-3) Lord Tenterden cites with approbation the judgment of Sir Wm. Scott in the case of *The Friends* (Edw. Ad. Rep. 247-8), in which that learned judge says: "This court sits no more than courts of common law do to make contracts between parties, but as a court exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction." Sir R. Phillimore in the case of *The Teutonia* (*ante* vol. 1, p. 32; L. Rep. A. & E. p. 421), after citing this judgment, adds that this jurisdiction is not confined to prize cases, but that it is a part of the general power which the court always possessed. However, as the point to which we have last adverted is not expressly raised by the case, we give no opinion on the subject.

Judgment for the defendants.

Solicitors for the plaintiff, *C. C. Ellis* and *Company.*

Solicitors for the defendants, *Hollams, Son,* and *Company.*

Nov. 7 *and* 21, 1876.

ROBINSON *v.* PRICE.

General average—Donkey engine—Spars and cargo.

The plaintiff's ship sailed from Quebec to London with a cargo of timber, of which the defendants owned part. There was on board, although it was not the common practice to have such a thing with such a cargo, a donkey engine for loading and discharging, which might be used for pumping the ship; and there was sufficient coals on board, not only for the ordinary purposes of the ship, but also for pumping under ordinary circumstances.

The ship sprang a leak, and the crew having become worn out by pumping, the master was obliged to use the engine for that purpose in order to preserve the ship and cargo. The coals were insufficient to continue the working of the engine, and the master used for fuel some of the spars of the ship, and part of the cargo, until he procured a supply of coal from a passing steamship. The master did what was proper and necessary for the preservation of ship and cargo, and if he had not burnt the spars and cargo, the ship would probably have been lost.

Held that these circumstances constituted a general average loss, and that the plaintiff was entitled to contribution from the defendants in respect thereof.

THIS was an action brought to recover money alleged to be payable by the defendants to the plaintiff for general average. It has been agreed by the parties that the action should depend upon the opinion of the court upon the following special case:

1. The plaintiff is the owner of the ship *John Baring.*

2. The defendants are merchants, and were the owners and consignees of a portion of the cargo hereinafter mentioned.

3. The *John Baring* is a ship of 547 tons registered tonnage. Her ordinary crew is twelve hands all told. On the 19th August 1873, she sailed from Quebec for London with a cargo of timber and a crew of thirteen hands all told.

4. The *John Baring* then was and for two and a half years previously had been furnished with a donkey-engine adapted for the loading and discharge of cargo and ballast, and also for pumping the vessel as hereinafter mentioned. She had ordinary ship's pumps fitted with a fly wheel, to be worked by hand in the ordinary way, or, if necessary, they could be connected with the donkey-engine by means of the wheel and of a chain messenger which was provided on board for that purpose, and so could be worked by the donkey-engine.

5. It is now (1876) a common practice for vessels in the timber trade to carry donkey-engines. In August 1873, it was not the common practice to fit such vessels with donkey-engines, though it was not infrequently done.

6. At the time of sailing, the ship had five tons of coal on board, which was a sufficient supply of fuel for all purposes of the ship while at sea (other than pumping), for a much longer voyage than that from Quebec to London.

7. From the 1st to the 11th Sept. the ship encountered very heavy weather, and strained a good deal, and was pumped frequently. On the

morning of the 11th the ship, making a very heavy plunge, sprang a leak, and, although the pumps were diligently attended to, the water, on the morning of the 12th was found to be gaining. During the night of the 12th the watch was kept constantly at the pumps, and at 7 a.m. on the 13th, the weather still being very bad, the crew being worn out with pumping, and the water still gaining, the master connected the donkey-engine with the pumps, and so worked the pumps by means of the donkey-engine. The pumps were kept constantly going by steam during the 13th and 14th, the weather all the time being bad, and all efforts being scarcely sufficient to keep the ship free.

8. On the 14th, there being no prospect of stopping the leak, or of getting the ship into a place of safety for some time, and it being impossible to keep her afloat without having the pumps worked by the donkey-engine, the master, seeing that the supply of coals on board would, under the circumstances, be insufficient, used some of the ship's spare spars and a portion of the cargo, together with coal, to keep up the fire of the donkey-engine in order to keep the pumps going. On the 15th, 16th, and 17th Sept. the ship encountered very severe weather, and laboured heavily all the time. and it was only by keeping the pumps going constantly by steam that the leak could be kept under, and for this purpose all the spare spars having been used up, further portions of the cargo were necessarily used for fuel. On the 18th Sept, the leak seemed to be gaining on the pumps, but by means of great efforts on the part of the master and crew of the ship she was kept afloat until the 20th Sept., when she fell in with a steamship, and procured from her a supply of coals sufficient to keep the donkey-engine working, until, on the following day, the 21st, the ship was safely docked in the Thames.

9. The course and measures adopted by the master under the above circumstances, were proper and necessary for the preservation of the ship and cargo. If he had not burned the said spars and cargo the vessel and cargo would, in all probability, have been lost.

10. The said ship was sufficiently equipped and manned for the said voyage according to the ordinary practice in equipping and manning such vessels for such a voyage, and but for the leak she would have had sufficient pumping power on board without using the donkey-engine. As it was, she had not (without using the donkey-engine) sufficient pumping power to deal with the water which she actually made, and she had not on board enough coal, or enough fuel, or other materials belonging to the ship to enable her to use the donkey-engine to the extent to which it became in fact necessary to use it.

The questions for the opinion of the court were: First, Whether the loss incurred by the burning of the ship's spare spars is a general average loss; and secondly, Whether the loss incurred by the burning of portions of the cargo under the circumstances stated is a general average loss.

Should the court answer both these questions in the affirmative, then it was agreed the judgment was to be entered for the plaintiff for the sum of 25*l.* 14*s.* 7*d.*, together with costs of suit. Should the court answer the first question in the affirmative and the other in the negative, judgment was to be entered for the plaintiff for 6*l.* 11*s.* 10*d.* Should the court answer the second question in the affirmative and the other in the negative, judgment was to be entered for the plaintiff for 19*l.* 2*s.* 9d. Should the court answer both the questions in the negative, then judgment was to be entered for the defendants, with costs of suit.

Cohen, Q.C. (with him *Gainsford Bruce*) argued for the plaintiff.—The facts stated are sufficient to make this a general average loss, and this case is concluded by the authority of *Harrison* v. *The Bank of Australasia* (*ante*, vol. 1, p. 198; L. Rep. 7 Ex. 39); the facts of that case are exactly the same as in this, except that here it was not as there the common practice to fit such vessels with donkey-engines. Baron Cleasby, at p. 51, dissented from the judgment of the court, mainly on the ground that the loss incurred was, what it cannot be here, the necessary expenses of navigating the ship. In *Wilson* v. *The Bank of Victoria* (2 Mar. Law Cas. O. S. 449; L. Rep. 2 Q. B. 203) fuel for the working of an auxiliary screw was not considered to be within the rule as to general average; but it was so put on the ground that it was not an extraordinary disbursement, and it was expressly distinguished from a case like the present. Blackburn, J., said at the conclusion of his written judgment (p. 313): "It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature." The cases go to show that there is no necessity for the danger to be sudden to constitute general average; the facts here satisfy all the conditions required:

Birkley v. *Presgrave*, 1 East. 220;
Arnould on Marine Insurance (1st edit.) p. 895;
2 Phillips on Insurance, 1299;
Plummer v. *Wildman*, 3 M. & S. 482;
Johnson v. *Chapman*, 19 C. B., N. S., 563;
Stewart v. *West India and Pacific Steamship Company*, *ante*. vol. 1, p. 528; L. Rep. 8 Q. B. 362;
Brencke's Principles of Indemnity, p. 171.

French (with him *Benjamin*, Q.C.), argued for the defendant.—Although it is found here that it was unusual at the time to carry a donkey engine in a ship under these circumstances, yet the cases show that a master, if he has an exceptional equipment, must supply the necessary material for it. Part of the implied contract between the shipper and the shipowner is that the owner is to supply everything which may be required to work the ship, and a donkey engine without fuel is not an assistance to the equipment but the contrary, and the master would certainly have supplied himself with coals in this case and before starting on his voyage if his cargo had not been timber. Even if a sacrifice be proper, we must look back to see if it might not have been prevented; here it was the fault of the owner in not having supplied sufficient coal.

Parsons on Shipping, p. 411;
Daniels v. *Harris*, *ante*, vol. 2, p. 413; L. Rep. 10, C. P. 1.

Here there was no emergency, and the coal was not finished when the spars and cargo were used for fuel. The master might have put into some port for coal, and he burnt these articles merely to preserve his coals in case of emergency. According to Phillips' Law of Insurance, sect. 1270, "In order to constitute a basis for a contribution for an expense or sacrifice, it must be occasioned by an apparently imminent peril."

Cohen, Q.C., in reply.—The following paragraph (sect. 1271) of Phillips qualifies that which has just been quoted, "in this respect it is usually considered sufficient if it appeared to the master or other party having charge of the subject matter, to require the sacrifice, and the same is made in good faith." It does not appear that mention was made in the bill of lading of the donkey engine, and the result might be different if the owner had held out to the skipper the fact of such an engine being on board as an inducement to the contract. [Lush, J.—There is no finding as to the sufficiency of fuel on board for ordinary pumping purposes.] That fact can be ascertained.

Cur. adv. vult.

Nov. 21.—Lush, J. delivered the judgment of the court (Mellor and Lush, JJ.).—The circumstances under which the ship's spars and the cargo were used as fuel for the donkey engine satisfy all the conditions of a general average claim. The peril was imminent, the sacrifice was voluntary, in the sense of being an act of will on the part of the master, it was in the emergency necessary in order to save the ship from sinking, and was, of course, made with a view to the safety of the whole adventure, ship, freight, and cargo; *primâ facie*, therefore, the case of the plaintiff is made out.

But it was objected that as the ship was furnished with a donkey engine adapted and intended in case of need for pumping as well as for loading and discharging the cargo, the owner was bound to provide sufficient fuel for its use; that if this had been done the resort to the spars and cargo would not have been required, that it was not done, and therefore the use of the spars and cargo was not a necessity brought about by the perils of the sea, but a necessity occasioned by his own default. Although we cannot accede to the proposition in its terms, we entirely accede to the principle which underlies it. We think that a shipper of cargo is entitled in time of peril to the benefit not only of the best services of the crew in order to save his goods, but of the use of all the appliances for that purpose, with which the ship is provided. It follows that where a ship is fitted up with auxiliary steam pumping power, it is the duty of the owner to make some provision for supplying the engine with fuel. Not that he is bound to have on board enough for every possible emergency, but he is bound to have a reasonable supply, having regard to the nature of the voyage, the season of the year, the quality of the cargo, the condition of the ship, and what experience has shown to be prudent to provide against, under these conditions. If he fails to do so, he cannot call upon the owners to contribute towards that reasonable supply. That would be to make them pay for that which he ought to have provided at his expense. If under such circumstances the opportunity occurs during a time of peril of buying coals from passing steamer, we think it clear that he would not charge their cost as an extraordinary expenditure entitling him to general average.

The statement of the case not being as explicit as it might have been upon this point, we thought it right to send it back to the learned counsel who settled it between the parties to find from the evidence, he had taken one way or the other upon this question. He has returned it to us with a statement as follows, "I find that the *John Baring* when she left Quebec had on board a reasonable supply of coal for the donkey engine for pumping purposes."

This finding is conclusive against the defendants. The *primâ facie* claim to general average contribution is not displaced by any default on the part of the owner, and our judgment must be for the plaintiff.

Judgment for plaintiff.

Solicitor for the plaintiff, *H. C. Coote*, for *Tinley-Adamson*, and *Adamson*, North Shields.

Solicitors for the defendants, *Argles* and *Rawlins*.

Friday, Jan. 12, 1877.

Ex parte Minto.

Inquiry under Merchant Shipping Acts—Prohibition.

When an inquiry is instituted under the Merchant Shipping Acts into the conduct of a captain, the court may proceed with the inquiry, although the Board of Trade have no charge to make against the captain.

This was an application for a writ of prohibition to Joseph York, Esq., stipendiary magistrate of South Shields, to prohibit him from proceeding further in an inquiry regarding the stranding of the ship *Brazilian* on the Goodwin Sands, in the month of Dec. 1876, and the conduct of Mr. Minto, the captain of the ship.

The inquiry was held under the Merchant Shipping Acts 1854 and 1876, and the rules made by the Lord Chancellor under the authority of the latter Act.

By the Merchant Shipping Act 1854, s. 33, it is enacted as follows:

> If it appear to such officer or person as aforesaid [appointed by the Board of Trade] that a formal investigation is requisite or expedient, or if the Board of Trade so directs, he shall apply to any two justices, or to a stipendiary magistrate, to hear the case, and such justices or magistrate shall thereupon proceed to hear and try the same, and shall for that purpose, so far as relates to the summoning of parties, compelling the attendance of witnesses, and the regulation of the proceedings have the same powers as if the same were a proceeding relating to an offence or cause of complaint upon which they or he have power to make a summary conviction, or order, or as near thereto as circumstances permit; and it shall be the duty of such officer or person as aforesaid to superintend the management of the case, and to render such assistance to the said justices or magistrate as is in his power; and, upon the conclusion of the case, the said justices or magistrate shall send a report to the Board of Trade, containing a full statement of the case, and of their or his opinion thereon, accompanied by such report or extracts from the evidence, and such observations (if any) as they or he may think fit.

By sect. 32 of the Merchant Shipping Act of 1876 it is enacted as follows:

> In the following cases:
>
> (1) Whenever any ship on or near the coasts of the United Kingdom, or any British ship elsewhere, has been stranded or damaged, and any witness, if found at any place in the United Kingdom; or
>
> (2) Whenever a British ship has been lost, or is supposed to have been lost, and any evidence can be obtained in the United Kingdom as to the circumstances under which she proceeded to sea, or was last heard of.
>
> The Board of Trade (without prejudice to any other powers) may, if they think fit, cause an enquiry to be made, or formal investigation to be held, and all the provisions of the Merchant Shipping Acts 1854 to 1876

shall apply to any such inquiry or investigation as if it had been made or held under the eighth part of the Merchant Shipping Act 1854.

By sect. 9 of the Act of 1876 the Lord Chancellor has authority to make rules to carry into effect the provisions of the Act with respect to a court of survey, and the following rules made under that section are material.

Proceedings in court.

14. The proceedings shall commence with the examination of the master, officers, and any other person who was on board at the happening of the casualty, and who can give material evidence in regard thereto.

15. On the completion of their examination the Board of Trade shall state in writing whether they have any, and if so what, charge to make against any person, and against whom.

16. Where the person against whom a charge is made in these rules called the defendant is in court, or before the court, the Board of Trade may make him a party to the proceedings by handing to him a copy of the charge.

17. Where the defendant is not in court, or before the court, the judge may, on the application of the Board of Trade, cause a summons to be served upon him in the form No. 2 in the appendix.

18. When the defendant has become a party to the proceedings, or when the time allowed for his appearance has expired, and he has not appeared, the Board of Trade shall produce any further witnesses whom they may wish to examine.

19. The defendant shall then produce any witnesses whom he may wish to examine.

20. The judge may then allow any further witnesses to be examined before him.

21. When the evidence is concluded, the defendant and any parties who may have appeared shall first be heard, and afterwards the Board of Trade.

22. The judge may adjourn the court from time to time, and from place to place, as may be most convenient.

23. The judge may deliver the decision of the court either *viva voce*, or in writing; and, if in writing, it may be sent or delivered to the respective parties, and it shall not be necessary to hold a court merely for the purpose of giving the decision.

The examination of the captain on behalf of the Board of Trade having been completed, the solicitor of the Board handed to the captain a written "discharge" as follows:

The Brazilian.

After a careful consideration of the evidence taken in this inquiry into the stranding of the above named vessel, I have decided not to formulate any charge against you in connection therewith. H. HAMILL.

The captain not putting in any further appearance was recalled by the stipendiary magistrate.

Milwain for the captain applied for a prohibition to restrain the stipendiary from proceeding further, and argued that, as the official representative of the Board of Trade had formally declined to proceed, the stipendiary magistrate was *functus officio*.

The COURT (Mellor and Lush, J.J.) refused the application pointing ont that, upon the construction of the statute and rules suggested on behalf of the applicant, the stipendiary magistrate would be completely subordinate to the Board of Trade.

Solicitors for the applicant, *Oliver* and *Botterell*.

Application refused.

COMMON PLEAS DIVISION.

Reported by CYRIL DODD, Esq., Barrister-at-Law.

Tuesday, May 9, 1876.

MEYER AND OTHERS *v.* RALLI AND OTHERS.

Judgment of foreign court—Sale of cargo ordered by foreign court—Constructive total loss—Suing and labouring clause—Marine insurance.

A cargo of rye shipped on an Austrian ship for carriage from Enos to Schiedam was insured by a policy warranted free from particular average. The ship was compelled by stress of weather to put into a French port on the 14th Jan. 1876. Part of the cargo suffered sea damage, and had to be in consequence sold at once. The remainder was warehoused. Afterwards, on the 21st Feb., the court, on the petition of the captain, ordered the sale of the remainder. Notice of abandonment was given to the insurers, the defendants, that in the opinion of experts the cargo could not be carried to Schiedam. The defendants refused to accept this notice, and on the 5th March the defendants, as insurers, summoned the captain before the court to have it decreed that there was no need to sell the said remainder. The court, after a further survey, reversed its former decision, and decided that the remainder was capable of being conveyed to Schiedam. Notice of this decision was given to the insured, together with notice that any course pursued with the cargo would be for their benefit, and on their responsibility. The remainder was not forwarded, but was warehoused until December, although it would have been possible to have forwarded it. The captain having procured considerable sums to meet the expenses caused directly and indirectly by the forced interruption of the voyage, was summoned before the French court, and on the 14th Sept. an order was made that the ship should be sold, and a statement of general and particular average of the ship and cargo drawn up, which was accordingly done. On the 21st Dec. the court ordered the sale of the remainder of the cargo, on the ground that the weather was against its further preservation. On the 25th Jan. the court ordered the full amount of freight due upon the whole voyage from Enos to Schiedam to be charged on the proceeds of the cargo, and a statement of average was made out on this footing, and adopted by the court.

The said remainder of the cargo was sold on the 10th Jan. It was up to that date merchantable rye, and if carried to Schiedam at any time prior to its sale, would have fetched a price considerably more than the extra expenses properly incurred in respect of it and consequent upon the interruption of the voyage, including the cost of shipment to Schiedam. If the proportion of freight payable upon the said remainder under the above average statement was added to the aforesaid extra expenses, the amount would be more than what the remainder would have fetched at Schiedam.

Held, there was no constructive total loss of the cargo, the sale of the said remainder being rendered necessary by the delay and default of the captain, and not by the perils insured against.

Held, also, that it being found upon the special case that the judgment of the French court was clearly

wrong in law, this court was not bound to treat it as correct, or give effect to it.

Castrique *v.* Imrie (23 *L. T. Rep. N. S.* 48; *L. Rep.* 4 *H. of L.* 414), *considered.*

Held, also, that the expenses which could be recovered under the "suing and labouring" clause were the expenses necessary to avert a total loss, and that they would be the expenses of unshipping the whole cargo and conveying it to the warehouse, separating that which could be carried on from the rest, and conditioning that which could then have been carried on.

THIS was a special case.

The facts and arguments are fully stated in the head-note and the judgments.

Cohen, Q.C. (*M'Leod* with him), appeared for the plaintiffs.

Benjamin, Q.C. (*Norman* with him), appeared for the defendants.

The following authorities were cited or referred to during the argument:

Stringer v. *English, &c., Marine Insurance Company*, 22 L. T. Rep. N. S. 802; L. Rep. 4 Q. B. 676; L. Rep. 5 Q. B. 599;
Cammell v. *Sewell*, 3 H. & N. 617; 5 H. & N. 728; 27 L. J. 447, Ex. 29 L. J. 350, Ex.;
Castrique v. *Imrie*, 23 L. T. Rep. N. S. 48; L. Rep. 4 H. L. 414; 39 L. J. 350, C. P.;
Farnworth v. *Hyde*, 12 L. T. Rep. N.S. 231; 18 C.B., N. S., 835; L. Rep. 2 C. P. 204; 34 L. J. 207, C. P.; 11 Jur. N. S. 349;
Rosetto v. *Gurney*, 11 C. B. 176; 20 L. J. 257, C. P.;
Messina v. *Petrococchino*, 26 L. T. Rep. N. S. 561; L. Rep. 4 P. C. 144; 41 L. J. 27, Priv. Co.;
Kidston v. *The Empire Marine Insurance Company*, 15 L. T. Rep. N. S. 12; L. Rep. C. P. 535;
Dent v. *Smith*, 20 L. T. Rep. N. S. 868; L. Rep. 4 Q. B. 414.

May 9, 1876.—The judgment of the court (Lord Coleridge, C.J., Grove and Archibald, JJ.), was delivered by

ARCHIBALD, J.—This is a special case, with power to draw inferences of fact. The action is on a valued policy of insurance on 18,750 kilogrammes of rye, valued at 2731*l.*, including 150*l.* advance, on a voyage from Enos to Schiedam, in the Austrian ship *Unico*, warranted free of particular average unless the ship be stranded, sunk, or burnt, which was underwritten by the defendant in the sum of 2731*l.* The policy also contains the usual clause, that in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about the defence and safeguard and recovery of the said goods, merchandise, ship, &c., or any part thereof, without prejudice to the insurance, to the charges whereof the assurers will contribute.

On the 21st July 1865, the defendants had entered into a charter-party with one Faltata, of Venice, for the charter of the *Unico*, then lying at Smyrna, to proceed to Enos, a Turkish port, and there load a cargo of grain or corn and carry it to Amsterdam or Schiedam direct, and had on the 2nd Nov. 1865, shipped at Enos on board the vessel, of which Antonio Lucovich was the master, a cargo equal to 2343 English quarters, or 6800 hectolitres of rye, sound and in good order and well conditioned. The captain received at Enos 150*l.*, pursuant to the terms of the charter-party. He also signed a bill of lading.

On the 8th Nov. the *Unico*, then laden with the said cargo in bulk, left Enos on the voyage. On the 14th Nov. the plaintiffs, through their agents, Messrs. Schroder and Bonniger in London, purchased from the defendants for 2735*l.* 8*s.* 6*d.*, the cargo in question, including freight and insurance to Schiedam, as per charter-party; and on the 21st Nov. the defendants handed to them the policy in question.

During the months of November and December 1865, the *Unico* on her voyage met with very tempestuous weather, in consequence of which she was obliged to jettison a portion equal to 300 hectolitres of the insured cargo: and on the 14th Jan., after hoisting signals of distress, she was taken by a French fishing smack into the port of La Rochelle, in France. On her arrival there, the captain placed himself in the hands of Messrs. Admyrault and Seignette. Mons. Admyrault was the Austrian Consul, and his firm made all necessary advances of cash to the captain.

Certain proceedings were, as stated in the special case, taken at the instance of the captain in the Tribunal of Commerce at La Rochelle, in consequence of which, first a portion, and eventually the whole of the cargo was landed and warehoused by order of the court. On the 10th Feb. 1866, a portion of the cargo, amounting to 5552 kilogrammes, was, by order of the Tribunal of Commerce, sold, and realised 8537*fr.* 65*c.* On the 21st Feb. 1866, on the petition of the captain, the court ordered the sale of the residue of the cargo by public auction.

Immediately on receiving information of this order, on the 21st and 22nd Feb. 1866, Messrs. Schroder and Bonniger, on behalf of the plaintiffs, gave notice of abandonment to the defendants, on the ground that in the opinion of experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants declined to accept.

On the 5th March 1866, the defendants in their capacity of shippers, vendors, and insurers of the cargo, summoned Captain Lucovich before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye, and for a new survey to be ordered. The Tribunal of Commerce thereupon ordered that the sale of the rye should be provisionally suspended, and that a new inspection should be proceeded with by three surveyors, whose instructions were to say if it were possible by continuing the expedients of manipulation and ventilation to preserve it in its good condition, so as to enable it to be re-shipped without risk, and to be conveyed to Schiedam, its destination.

On the 14th March, the surveyors having examined the rye, then in certain warehouses, were unanimously of opinion that the grain might be perfectly well re-shipped and conveyed without any danger to Schiedam, recommending that, if not re-shipped very speedily, it should be subject to ventilation once a month until the moment of its being put on board for conveyance to its destination. This report was confirmed, and ordered to be executed by the said court, and notice of it was given to the plaintiffs on the 17th March, 1866, together with notice that any course pursued with the cargo or any portion of it was for their account, and on their responsibility.

On the 11th May, 1866, the Captain of the *Unico* applied to the Tribunal of Commerce for and obtained authority to raise a loan on the bottomry of the ship, freight, and cargo. On the 6th June

the Captain filed a petition in the Tribunal of Commerce, stating that he had been unable to effect a loan on bottomry, and asking the Tribunal to declare the ship unnavigable under Articles 369 and 389 of the French Code de Commerce, and a decree was made in conformity with the petition.

On the 21st June, 1866, Messrs. Admyrault and Seignette, who had made considerable advances to meet the several expenses caused directly and indirectly by the forced interruption of the voyage summoned the captain before the Tribunal of Commerce, to show cause why in default of payment to them of 20,000 francs within a fortnight from that date, they should not be authorised to sell for account of whom it might concern the said ship and the remainder of the cargo, the price to be paid over to them and used for the purpose of covering the advances made or to be made, and the surplus paid over to whom it might by justice be commanded; and upon the 11th July, 1866, after service of the last mentioned summons, Captain Lucovich issued a summons to the underwriters, and the then unknown holder of the bill of lading of the cargo, in order to their becoming parties to the suit commenced by the summons of the 21st of June, and submitting such conclusions and arguments as they might think proper, and to hear it declared that the judgment to be pronounced was to be common to and binding upon all the parties.

The summons of the 21st of June came on for hearing on the 14th of Sept. 1866, in the absence of the defendants or any person appearing on their behalf, when the Tribunal ordered the sale of the ship *Unico*, and a statement of general and particular average of the ship and her cargo to be drawn up, which was accordingly done.

On the 22nd Oct. Messrs. Michel et fils, having on behalf of the plaintiffs, made a claim for payment of 3780 francs for the advance freight paid to Captain Lucovich, and the captain inferring from this that the plaintiffs were the holders of the bill of lading for the cargo, then served upon them a notice of the judgment of the 14th Sept. 1866, and a summons to attend on all subsequent proceedings.

The plaintiffs had not, prior to the 23rd Oct., informed the master of the *Unico* that they were the holders of the bill of lading, and had not been summoned to attend any of the proceedings before the Tribunal of Commerce, and had not made themselves parties to any of the proceedings.

On the 21st Dec. 1866, the Tribunal of Commerce remanded to the 25th Jan. then next the decreeing respecting the statement of average; but nevertheless, on several grounds, among others that the state of the weather was unfavourable to its preservation, ordered the sale of the remainder of the cargo of the *Unico*, and the purchase-money was ordered to be paid over to Messrs. Admyrault and Seignette, to cover the advances made by them, which included expenses incurred in and about the unsold portion of the rye down to the date of the decree, together with the charges required by the law—the costs to be costs of average. This last mentioned judgment was given in the absence of any person representing the defendants. On the 10th Jan., under the said order, the remainder of the cargo was sold by public sale at La Rochelle, and realised a net sum of 27,830*fr.* 30*c.*

The total agreed freight of the cargo from Enos to Schiedam was 16,695*fr.* 95*c.* Of this 3780*fr.* (150*l.* sterling) was, as already stated, advanced at Enos, leaving 12,915*fr.* 95*c.* unpaid.

On the 25th Jan. the Tribunal of Commerce, by its judgment, declared that the freight for conveyance of the cargo from Enos to Schiedam was due in its entirety (including freight on the 300 hectolitres jettisoned), and that the advance to the captain on account of freight at Enos must contribute to general average, and referred back the statement to the average stater for the purpose of modifying the calculations therein; keeping in view, first the said judgment, secondly the sum realised by the sale of the rye, thirdly the various costs in the suit. The Tribunal also said that the average staters were at the same time to establish the net amount of the freight to be received by the captain out of the sum realised by the sale of the cargo.

The plaintiffs in this action were summoned through their agents, Messrs. P. Michel et fils, to appear in these proceedings, but they made default, and the judgment of the 25th Jan. was rendered without any opposition. The defendants in this action were not summoned to appear or defend the proceedings of the Tribunal of Commerce otherwise than by a summons left at the bar of the Procureur Impérial, according to French procedure, but not received by the defendants.

On the 24th May 1867, the Tribunal of Commerce confirmed an amended statement of general and particular average which had meanwhile been made, and condemned the plaintiffs to pay the sum of 12,915*fr.* 95*c.* remaining due on account of freight, with interest from the 11th July 1866, to the time of payment, and ordered that sum, being, as stated in the judgment, secured on the cargo, should be paid to Captain Lucovich by Messrs. Admyrault and Seignette as consignees. The said sum, together with 1000 francs damages and interest thereon from the 28th June 1867, together with an additional sum for costs subsequent to that date, was paid ultimately at La Rochelle to Captain Lucovich, after divers proceedings taken by him against the plaintiffs, out of the proceeds of the cargo. Such payment was made under and in pursuance of a judgment of the Civil Tribunal of La Rochelle of the first instance, dated the 7th Aug. 1867.

It is stated in paragraph 52 of the special case that, by the Law of France, the Tribunal of Commerce had jurisdiction to order the said various surveys of the ship and cargo and statements of average, and to make the said various orders, judgments, and decrees, but that it is a court of first instance of inferior jurisdiction, and its judgments, orders, and decrees are subject to appeal to the Imperial Court at Poitiers, which, if made, is usually decided in four or five weeks, and that no appeal was taken on the part of the plaintiffs.

It was admitted also in the case that the damages referred to in paragraphs 8, 11, and 13 were caused by the perils insured against. It is also found that the rye which was sold on the 10th Jan. 1867, was in March 1866 and in Jan. 1867, merchantable rye, and such as, if it had been carried on to Schiedam at any time between the time of its landing at La Rochelle and the time of its sale, would have fetched at Schiedam, a price considerably more than the total of all the extra expenses properly incurred in respect of it, and consequent upon the

interruption of the voyage under the circumstances, including the extra freight of forwarding it to its destination. It is also admitted by the defendants that, if the proportion of freight payable upon the rye sold on the 10th Jan., under the said average statement is to be taken into account, and added to the extra expenses aforesaid, the amount would be more than the rye would have fetched at Schiedam, if forwarded to its destination either in March 1866 or Jan, 1867.

The questions which arise in the case are: First, whether there was a constructive total loss of the cargo: Secondly, if not, whether the plaintiff is entitled to recover any and what portion of the expenses under the sue and labour clause.

For the purpose of deciding these questions, it is necessary to consider the effect of the proceedings and orders of the Tribunal of Commerce of La Rochelle. But, before doing so, it may be worth while to inquire what, under the circumstances, was the duty of the captain. It is found in the case (paragraph 51) that, by the law of France, the master under the circumstances was not entitled to full freight upon the cargo landed there; but that by Article 296 of the Code de Commerce, he was bound to hire another vessel to carry on the cargo to its destination, and if unable to hire a vessel, was entitled to *pro ratâ* freight only; and that the law of Austria on this subject is the same as that of France. It is further found that it would have been practicable to hire another vessel to carry on the cargo to its destination. The case also states that the portion of the cargo that was sold by order of the Tribunal of Commerce on the 10th Jan. was merchantable, and would have fetched at Schiedam a price considerably more than the total of all the extra expenses properly incurred and consequent upon the interruption of the voyage, including the extra freight of forwarding to its destination.

It is quite clear, therefore, that if the captain had done his duty the portion of the cargo sold on the 10th Jan. 1867, would have been forwarded to Schiedam, and that there would in the event have only been a partial loss, the portion of the cargo forwarded being only liable to pay so much of the freight of forwarding from La Rochell (*Rosseto* v. *Gurney*, 11 C. B. 176; 20 L. J. 257, C. P.), as exceeded the original rate of freight. The question is, what is the effect of the proceedings in the French courts on this simple state of the case?

In the view which we take, we do not consider it material, for the purpose of dealing with the question, whether or not there was a constructive total loss, to discuss the effect of the various surveys and orders of the Tribunal of Commerce of La Rochelle, prior to the order of the 21st Dec. 1866, by which the residue of the cargo was ordered to be sold, except in so far as the great lapse of time without any effort on the part of the captain to perform his duty bears on the case. There are portions of those orders and judgments, no doubt, which are properly judgments *in rem*, or in the nature of judgments *in rem*, and binding as against all the world, and, amongst others, as against both the plaintiffs and defendants. But, when we come to the order of the 25th Jan. 1867, whereby it was declared that the freight for conveyance of the cargo to Schiedam was due from the plaintiffs to the shipowner (or the captain as his agent) in its entirety, it cannot be regarded as in the nature of a judgment *in rem*, and apart from the fact that the defendants were no parties to that judgment, though we draw the inference of fact that the plaintiffs had such notice of it (*Reynolds* v. *Fenton*, 3 C. B. 187), that they might have appeared and defended, there is this peculiarity in the case, which does not, so far as we are aware, seem to have occurred before, that upon the express findings in the special case, by which both parties are bound, this part of the judgment seems to be manifestly erroneous in regard to the law of France, on which it professes to proceed.

The remark that the defendants were no parties to the judgment equally applies to the judgment of the 7th Aug. 1867, of the Civil Tribunal of La Rochelle, by which the proceeds of the residue of the cargo attached in the hands of Messrs. Admyrault and Seignette was confirmed, and the entire amount of freight ordered to be paid out of it. The defendants, therefore, can hardly be bound by the declaration that the residue of the cargo which was sold on the 10th Jan. 1867 should bear its entire proportion to La Rochelle, in addition to the extra freight of conveying it to Schiedam, or by the order to pay it out of the proceeds of the goods. Moreover, even if the defendants could be considered as at all indirectly affected by such a judgment as binding the plaintiffs, the question is how far, considering the findings in the case, we should be bound to give effect to it as against the plaintiffs.

It is a matter of nicety how far a judgment of a competent foreign court *in rem*, or between the same parties, is examinable here. The authorities on the subjects are all collected in Story's Conflict of Laws, §§ 547 *et seq.*, and in the notes to *Doe* v. *Oliver* (2 Sm. L. C. 751 7th edit.), and need not be referred to in detail.

In the late case of *Schibsby* v. *Westenholz* (L. Rep. 6 Q. B. 155; 24 L. T. Rep. 93), the principle on which effect is given to the judgments of foreign tribunals is stated to be, not on the ground merely of international comity, but on the ground that the judgment of a "court of competent jurisdiction over the defendant imposes a duty or obligation to pay the sum for which judgment is given, which the courts of this country are bound to enforce; and consequently anything which negatives that duty, or forms a legal excuse for not performing it is a defence to the action:" (See *Schibsby* v. *Westenholz*.) This principle is also assumed and acted on in *Goddard* v. *Gray* (24 L. T. Rep. N. S. 89; L. Rep. 6 Q. B. 139), where the majority of the court held that the judgment was binding, notwithstanding that it proceeded on a mistake as to English law, which did not appear to have been knowingly or perversely acted on.

In Story's Conflict of Laws, the extent to which and the grounds on which a foreign judgment is said to be examinable or open to be impeached are thus summed up (Article 607): "It is easy to understand that the defendant may be able to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or that it is irregular and bad by the law *fori rei judicatæ*. To such an extent the doctrine is intelligible and practicable." In *Castrique* v. *Imrie* (23 L. T. Rep. 348; L. Rep. 4 H. of L. 414), the House of Lords upheld a decree *in rem* of the Tribunal of Commerce of Havre, in which a decree was made in clear violation of

English law, on the ground that the foreign law being ascertained as a matter of fact in the case, the French court, with every honest endeavour to be right, was liable without any fault to go wrong either from imperfect evidence produced before it, or misapprehension of its effect. But in that case in delivering the opinion of the majority of the judges, Blackburn, J., speaking of the judgment on matters of French law, says (23 L. T. Rep. N. S. 348; L. Rep. 4 H. of L. 414), "we must (at least till the contrary is clearly proved) give credit to a foreign tribunal for knowing its own law and acting within the jurisdiction conferred on it by that law." And in the case *Becquet* v. *M'Carthy* (2 B. & Ad., at p. 957), Lord Tenterden had said before, "we ought to see very plainly that the court has decided against the French law, before we say that their judgment is erroneous on that ground," implying that if it clearly appeared to be wrong the court would not give effect to the judgment. Here the court expressly professes to proceed on the ground of French law; and, although the presumption would be that the court in delivering judgment would be taken to know its own law, still it clearly appears that that law was not followed, and we are precluded by the findings in the case from holding that the court has rightly declared it. The contrary—to use the words of Blackburn, J.—clearly appears, and, either from inadvertence or some other reason, the foreign tribunal has gone manifestly wrong. It does not profess to declare what is the law of Austria. If it had, though equally wrong, we might have been bound by *Castrique* v. *Imrie (sup.)* to have given effect to it; but it is a declaration of French law which is wrong.

Under these circumstances we are of opinion that there is no rule of comity, and no principle on which we are called upon to give effect to such a judgment, and that *pro ratâ* freight only was payable on the cargo at La Rochelle. If then freed from the burden of the entire freight at La Rochelle, the case finds that the portion of the rye sold on the 10th Jan. 1867, would have realised at Schiedam more than enough to have covered the extra freight from La Rochelle, and in that event, had it been forwarded, there would only have been a partial and no constructive total loss: (see *Rosetto* v. *Gurney* 11 C. B. 176.)

We must, however, consider the effect of the order of the 21st Dec. 1866, for the sale of the residue of the goods, and whether it could under the circumstances appearing in the case, constitute a total loss.

Now, although the sale may have been valid and binding, and the plaintiff may thereby have been deprived of the goods: (see *Cammell* v. *Sewell* 2 L. T. Rep. N. S. 799: 3 H. & N. 617; 5 H. & N. 728), still, upon the facts as found, it was a sale of a portion of goods which it was the duty of the captain to have transhipped and forwarded, for which a ship might have been hired at La Rochelle, and which if forwarded at any time between the time of its landing at La Rochelle, and the time of its sale some twelve months after would have realised at Schiedam considerably more than the total of all the extra expenses properly incurred in respect of it, and consequent on the interruption of the voyage.

Under these circumstances, it is impossible not to see that, although the ship and cargo were originally brought within the jurisdiction of the Tribunal of Commerce of La Rochelle by perils of the seas, the sale of this portion of the cargo was not really due to any of the perils insured against, which had long ceased to operate in regard to this portion of the goods, but was in fact made for the purpose of paying advances incurred through the captain's breach of duty. But it was strenuously argued on behalf of the plaintiffs, that the first order for sale of the entire cargo conferred on them the right to give notice of abandonment, and that nothing that occurred afterwards had varied the right. We think, however, that the proceedings in the case with respect to the last portion of the rye sold (the insurance being free of average), when taken together with the opinion we have expressed against the obligation to pay the entire freight at La Rochelle, are clearly in contradiction of that supposed right; and it becomes, therefore, unnecessary to consider a further contention of the plaintiffs, viz., that though acceptance of the notice has been declined, still the conduct of the underwriter in intervening in the Tribunal of Commerce was evidence of such acceptance, and irrevocable.

Being then of opinion that there was no constructive total loss within the meaning of the policy, it remains to consider the next question—whether the plaintiffs are entitled to recover anything, and how much, under the sue and labour clause?

It was argued on behalf of the defendants, that at the time the rye was unshipped it was in no danger of total loss, and that it was unshipped solely for the purposes and benefit of the plaintiffs. But it is only necessary to look at the reports which are referred to in the special case, and which are to be taken as correctly setting forth the state of the cargo at the time, to see that it was in a state of heat and partial fermentation from sea water, which if it had been allowed to go on would (and we feel constrained to draw this inference), in all probability have resulted in such damage as to be an actual total loss. It was necessary, then, for the preservation of some substantial part of the cargo, and in order to avert a total loss, to remove or unship the whole cargo.

It cannot be contended, since the case of *Kidson* v. *Empire Marine Assurance Company* (L. Rep. 1 C. P. 535; 2 Mar. Law Cas. O. S. 400, 468), that the warranty "free from particular average" excludes the operation of the suing and labouring clause; and that case is also an authority that the occasion upon which the expenses in this case were incurred, was such as to be within it. As to the cases of *Great Indian Peninsular Company* v. *Saunders* (1 B. & S. 41; 2 B. & S. 266; 6 L. T. Rep. 297; 31 L. J. 206, Q. B.), and *Booth* v. *Gair* (9 L. T. Rep. 386; 33 L. J. 99; 15 C. B., N. S., 291), cited to us by the defendants, we need only refer to the way in which they are distinguished by Willes, J., in his learned judgment in *Kitson* v. *Empire Marine Assurance Company* (*sup.*).

A more difficult question is as to the amount of the expenses recoverable under this head. This depends, in our opinion, upon the amount of expenses necessary to avert a total loss, for which alone the defendants were liable. That is a matter which, we think, must be reasonably treated, and not judged too strictly. The unshipping of the whole cargo was necessary, in order to its preservation, and to the separation of the sound part from that which was irreparably damaged. But, once con-

veyed to the warehouse where the separation might take place, any subsequent care bestowed on that which could not be benefited by it sufficiently to enable it to be forwarded to its destination would have been of no use whatever to the residue, and would not in any way have contributed to its preservation, We are of opinion, therefore that the plaintiffs will only be entitled to recover under this head the expenses of unshipping the whole and conveying it to a warehouse where the separation took place, and of the separation, and the expense of conditioning that portion of it which was sold on the 10th Jan. 1867.

As the case does not afford us the means of stating the amount of the expenses thus incurred, we think it must be referred back to the arbitrator to ascertain the amount, applying the principle we have laid down, and that for the sum so found by the arbitrator the plaintiffs are entitled to our judgment.

Judgment for plaintiffs.

Solicitor for the plaintiffs, *Matthews.*

Solicitors for the defendants, *Markby, Tarry,* and *Stewart.*

EXCHEQUER DIVISION.

Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Tuesday June 27, 1876.

(Before KELLY, C.B. and POLLOCK, B.)

MOULD AND ANOTHER *v.* ANDREWS AND OTHERS.

Ship belonging to several co-owners—Repairs to by order of the ship's husband—Cost of repairs apportioned between owners in proportion to their shares in ship—Payment by some co-owners in cash, and by some by bill—Bill of one co-owner dishonoured—Liability of other co-owners for amount of—Principal and surety.

The four defendants and one B., were the owners, in certain shares between them, of a ship to which the plaintiffs by order of W., the ship's husband, and with the authority and consent of the defendants, did certain repairs, and upon the plaintiff's account for such repairs being sent in to the owners, it was arranged between W. and the plaintiffs, that it should be paid partly in cash (subject to discount) and partly in good bills, and that the total amount on the contract should be apportioned between the said several owners according and in proportion to their interest and the number of their respective shares in the said ship. The necessary calculation having been made by W., the account was then paid to the plaintiffs through W., partly by a cheque of the defendant, Andrews, payable to W.'s order and indorsed by him for the amount of Andrews' proportion, partly by cash payments from each of the other three defendants for the amount of their respective proportions, and partly by a bill at six months, drawn by W. on and accepted by B., for the amount of B.'s proportion of the said account. B.'s bill being dishonoured at maturity, the plaintiffs brought this action against the defendants to recover from them, as joint owners of the ship, the amount of such dishonoured bill, in answer to which the defendants contended that the plaintiffs, by taking B.'s bill, and giving him time, had placed his co-debtors, the defendants, in a worse position, and necessarily postponed their remedy against B., and had consequently discharged the defendants; but it was

Held by the Exchequer Division (Kelly, C.B. and Pollock, B.), giving judgment in favour of the plaintiffs, and dismissing the defendants' motion to enter a verdict or a nonsuit, that the defendant was bound by the mode of payment adopted, and that that circumstance distinguished the case from that of principal and surety.

THIS was an action brought by the plaintiffs as executors of one Richard Hopper, deceased, to recover from the defendants, as joint owners of a vessel called the *Kildare*, the sum of 646*l.* 7*s.* 7*d.*, the balance of account for work done by the deceased and by the plaintiffs, as a shipbuilder, in repairs to the said ship, under the circumstances as set forth in the statement of claim.

1 and 2. The plaintiffs are the executors of one Richard Hopper, deceased, and the defendants are joint owners of a vessel named the *Kildare.*

3. One Charles Weatherburn was, at the time when the repairs herein mentioned were ordered and executed, ship's husband of the said vessel *Kildare*, and on or about the 20th March 1875, as such ship's husband, and under the authority and with the knowledge and consent of the defendants, he instructed Richard Hopper, now deceased, to execute certain necessary repairs on the *Kildare.*

4. In pursuance of the instructions given as aforesaid the said Richard Hopper commenced to repair the *Kildare*, but died during the progress of the work, and the said repairs were completed by the plaintiff as executors aforesaid. These repairs were completed on or about the 5th May 1875.

5. The amount charged by the plaintiffs for the said repairs was 1181*l.* 19*s.* An account showing this charge was made out and presented in or about the month of May 1875, to the said Charles Weatherburn, as such ship's husband as aforesaid, and to the defendants, and no objection was then or has since been made by the defendants, or any of them, or by the said Charles Weatherburn, or by anyone on behalf of either of them, to the quality of the work or the fairness of the charge aforesaid.

6. After the account had been presented and approved as aforesaid, the said Charles Weatherburn, acting as ship's husband as aforesaid, proposed to the plaintiffs to pay the amount of charges aforesaid, partly in cash and partly by good bills, to which the plaintiffs assented. The plaintiffs thereafter received payment of the whole amount of their charges in cash and bills, allowing discount for the amount paid in cash.

7. One of the bills so received by the plaintiffs from the ship's husband as aforesaid was a bill of exchange for 646*l.* 7*s.* 7*d.*, drawn by the said Chas. Weatherburn, acting as aforesaid, upon John Henzell Bruce, one of the owners of the *Kildare*, payable six months after the 11th May 1875, and accepted by the said John Henzell Bruce. At maturity the said bill was duly presented, but was dishonoured, and though the said John Henzell Bruce and the defendants had due notice of such dishonour, they did not pay and have not paid the said bill. The said sum of 646*l.* 7*s.* 7*d.* remains due to the plaintiffs in respect of the repairs in paragraph 4 mentioned.

8. The defendants refuse to pay the said 646*l.* 7*s.* 7*d*, whereby this action has been rendered

necessary, and the plaintiffs as such executors claim the 646*l.* 7*s.* 7*d.* and interest thereon.

In his statement of defence the defendant Andrews alleged—First, that the defendants were not joint owners of the *Kildare*.

Secondly, he denied the several allegations in paragraph 6 of the statement of claim, except the last thereof, which the defendant says is true.

Thirdly, that the said bill of exchange for 646*l.* 7*s.* 7*d.*, in paragraph 7 of the clause mentioned, was received by the plaintiffs from the said Charles Weatherburn, and given by him to them in full satisfaction and discharge of the said 646*l.* 7*s.* 7*d.* therein mentioned, and not merely for and on account thereof.

Fourthly, that the credit of six months mentioned in the said bill was given by the plaintiffs to the said John Henzell Bruce, without the consent or authority of the defendant Andrews, and he submitted that, if even the said bill were given on account only and not in satisfaction, still that the said defendant was in the position of a surety only for the said John Henzell Bruce, and that he was discharged by such giving of time.

Fifthly, that the said Chas. Weatherburn did not instruct the said R. Hopper, deceased, to execute, nor did the said R. Hopper and the plaintiffs jointly execute the said repairs for the defendants jointly, or on their joint credit. The said repairs were executed on the terms that they should be paid for by the defendants and the said John Henzell Bruce and one Marian Sheriff severally and rateably, in proportion to the several interests in the said vessel, and that no one of them should be liable for the others or beyond the amount of such proportion as aforesaid.

Sixthly, that the defendants and the said John Henzell Bruce and Marian Sheriff paid their several proportions of the said account, or satisfied and discharged the same by giving bills in accord and satisfaction thereof respectively, and which the plaintiffs, as such executors aforesaid, received in such accord and satisfaction as aforesaid.

Seventhly, he denied that the sum of 646*l.* 7*s.* 7*d.* or any part thereof, remained or was due to the plantiffs as in the seventh paragraph of the claim mentioned.

In the event of the plaintiffs establishing an original joint liability of the defendants, which the defendant Andrews disputed, he in that event said as follows:

Eighthly, after the accruing of the plaintiff's claim and before action, and after the death of the said R. Hopper, it was agreed by and between the defendants and the said Bruce and Sheriff, and the plaintiffs as executors as aforesaid, that each of the defendants and the said Bruce and Sheriffs should pay in cash, subject to discount, or give bills in full for their several shares of the said account respectively rateably in proportion to their respective interests in the said vessel, and that in consideration thereof the plaintiffs, as executors as aforesaid, should receive such payment or bills respectively, in full satisfaction and discharge of their claim against the said defendants, and the said Bruce and Sheriff; and the defendants and the said Bruce and Sheriff accordingly then paid in cash, subject to discount, or gave bills for their said several shares as aforesaid, and the plaintiffs as such executors as aforesaid, then accepted and received the same in full satisfaction and discharge of their claim.

Ninthly, in the alternative the defendant Andrews said that, after the accruing of the plaintiffs' claim and before action, and after the death of the said R. Hopper, it was agreed by and between the plaintiffs, as executors as aforesaid, and the defendant Andrews, that in consideration that he would draw and deliver to the plaintiffs a negotiable instrument (that is to say), a cheque on certain bankers, payable to the order of the plaintiffs, for the sum of 140*l.* 7*s.*, the plaintiffs should accept and receive the said cheque in full satisfaction and discharge of their claim against him; and he accordingly drew and delivered to the plaintiffs such cheque as aforesaid, and then accepted and received the same in full satisfaction and discharge of their claim against him.

Tenthly he denied that the said C. Weatherburn and the defendants respectively had due notice of dishonour of the said bill, and that the same was duly presented for payment as alleged.

The defendant Armstrong in his statement of defence admitted the 1st, 3rd, 4th, and 5th, and denied the 6th and 7th paragraphs of the statment of claim, and alleged that each of the defendants was (as the plaintiffs well knew) an owner of certain shares in, and not one of several joint owners of, the *Kildare*, and that it was before action agreed between the plaintiffs and the said several owners of the said shares, that the plaintiff's account should be apportioned between the said owners in proportion to the number of their shares; and each owner accordingly (except the said J. H. Bruce) paid his proportion of the said account, and the said J. H. Bruce paid his proportion by the said bill of exchange, and the defendant Andrews paid his proportion by a cheque, and the defendant Armstrong and the other owners each paid his proportion in cash; that the said bill of exchange and cheque were respectively received by the plaintiffs in full discharge and satisfaction of all claims against the said Bruce and Andrews respectively; and that the original joint liability (if such ever existed) of the defendants,had been changed into a separate liability by reason of the matters hereinbefore alleged,and the separate liability of the defendant Armstrong had been discharged by the payment aforesaid, and that the defendant Armstrong was discharged from all liability by reason of the before mentioned discharge of the said Bruce and Andrews respectively; and that the plaintiff well knew of the relationship existing between the owners of the "Kildare," and that the defendant Armstrong (if liable at all beyond his said proportion) was liable as surety only, and the plaintiffs by taking the said bill and giving time to the said Bruce, without the knowledge and consent of the defendant Armstrong, thereby discharged the latter from all liability as surety.

The statements of defence of the other defendants, Blenkinsopp and Clarke, were substantially to the same effect as those of the defendants Andrews and Armstrong hereinbefore set forth.

The plaintiffs by their reply joined issue with the defendants upon their several defences.

At the trial before Mellor, J., at the Spring Assizes, 1875, for Northumberland, at Newcastle-upon-Tyne, the facts appeared to be substantially as stated in the plaintiffs' statement of claim. The

manager of the plaintiffs also stated that when he took the defendant Andrews' cheque, he was not aware, and indorsed it without noticing, that the latter had inserted in the body of it the words "in full of Hugh Andrews' proportion of repairs," and that he (the manager) had no intention of taking the cheque "in full" of such proportion, or of discharging Andrews from all further liability.

A verdict was found for the plaintiffs for 646*l.* 7*s.* 7*d.*, and the learned judge directed that judgment should be entered for the plaintiffs for that amount and their costs, with leave to the defendants' counsel to move to enter the verdict for the defendants, or a nonsuit.

Herschell, Q.C. and *J. Edge*, for the defendant Andrews, moved to enter judgment or a nonsuit accordingly.

Littler, Q.C. and *Hugh Shield*, appeared for the three other defendants.

M'Clymont, for the plaintiffs, appeared in opposition to the motion.

Herschell, Q.C., stated the facts of the case and the point relied on by the defendants at the trial. [KELLY, C.B.—Did it appear that the defendants knew of Bruce's bill being given and accepted by the plaintiffs?]

M'Clymont for the plaintiffs.—It was admitted that Weatherburn was their agent and ship's-husband, and that he had authority to arrange all matters relating to the payment of the repairs of the ship.

Herschell, Q.C.—It was admitted that the work was done on the employment of the defendants, and that the account was in the first case properly sent in to them. But the question is, assuming the original joint liability of the several defendants, whether or not the plaintiffs, by their conduct, have discharged them. The ship's-husband divided the total amount of the account into shares, proportioned to the interest of each part owner in the ship, and then handed to the plaintiffs bills and cheques for these separate amounts. The proportion of the defendant Andrews of the account so divided was 147*l.* 11*s.*, and for that amount he gave to the plaintiffs his cheque, payable to the order of the plaintiffs "in full of Hugh Andrews's proportion of the costs of repairs to *Kildare*." and Andrews believed, that the plaintiff by accepting such cheque, discharged him from all further liability. The plaintiffs, or their manager indorsed this cheque, and received the money, but they allege that they accepted it and paid it into their bank without noticing the peculiar form in which it was drawn, and that they never intended nor agreed to discharge the defendant Andrews from his joint liability. At the same time that Andrews gave his cheque, Bruce, another of the part owners, gave his bill at six months for his proportion of the repairs, amounting to 646*l.* 7*s.* 7*d.*, which was dishonoured at maturity, and the amount of that bill is now claimed from the other joint owners, the four defendants in this action. It is submitted that the plaintiffs, under the circumstances, have discharged the defendants, because by giving time to one joint debtor they have placed the other joint debtors in a worse position. Had they insisted on cash, and had Bruce been unable to pay it, the defendant Andrews and the owners might have paid Bruce's proportion, and at once have sued him; but by the act of the plaintiffs the defendant's remedy against Bruce has been necessarily postponed. The question then is, Is it competent to the plaintiffs to postpone all remedy against one part owner, and yet retain all their rights against the other? The present case may be put as one of principal and surety, where the surety is discharged by time being given to the principal debtor without the assent of the surety. There is, I am bound to say, a case of *Keay* v. *Fenwick*, decided this week in the Court of Appeal, confirming the decision of the Court of Common Pleas (not reported), which I ought to mention, though it is, I fear, very much against the contention now urged on behalf of the present defendants. [KELLY, C.B.—That is a new case. Are there any older cases in point?]

M'Clymont.—It is submitted on the part of the plaintiffs that the cases of *Robinson* v. *Read* (9 B. & C. 449; 7 L. J., O. S., 236, K. B.), *Whitwell* v. *Perrin* (4 C. B., N. S., 412), and *Mitcheson* v. *Oliver* (5 E. & B. 443; 25 L. J. 39, Q.B.) are especially in point.

Herschell, Q.C.—The cases cited can, I think, be distinguished from the present one. There is, however, more difficulty in distinguishing *Keay* v. *Fenwick*. In that case the three defendants were part owners of a ship which the managing owner had sold without the knowledge of his co-owners, who, however, subsequently ratified the sale. The managing owner thereafter without the knowledge of his co-owners, gave bills at three, six, and nine months to the plaintiffs for commission in connection with the sale, which bills were dishonoured at maturity; and the defendants being thereupon sued by the plaintiffs, urged that, by taking the bills from one co-owner without the knowledge of the others, the plaintiffs had discharged the others, to which the plaintiffs replied that it was not a case of voluntary credit for the reason that in taking these bills they had taken all they could get, and the court, both below in the Common Pleas and on appeal decided in their favour. The only substantial distinction which, as it appears to me, can be suggested is, that in the present case the plaintiffs might have had cash at first had they chosen to insist on it.

M'Clymont.—The plaintiffs were not only willing but anxious to take cash, and offered discount for it. The bills were given to the plaintiffs not by one part owner behind the back of the other, but by the ship's husband, acting as the common agent of all the owners, in the usual and ordinary course of his duty as such agent. If the present case differs at all from that of *Keay* v. *Fenwick* it is, I submit, in being a far stronger case in favour of the plaintiffs.

KELLY, C.B.—The defendants in the present case were I think clearly bound by the mode of payment adopted; and that, I think, distinguishes this case from that of principal and surety, and really takes the ground from under Mr. Herschell's feet. We are bound by the authority of the case in the Court of Appeal, which he has cited to us, and it is not necessary to go into the questions of detail. The defendants' motion to enter a verdict for them must therefore be dismissed, and the plaintiffs must have judgment with costs.

POLLOCK, B. concurred.

Judgment for the plaintiffs with costs.

Solicitor for the plaintiffs, *John Tucker*, agent for *T. W. Stewart*, Newcastle-upon-Tyne.

Solicitors for the defendant Andrews, *Williamson, Hill*, and *Co.*, agents for *Ingledew* and *Daggett*, Newcastle-upon-Tyne.

Solicitor for the defendant Armstrong, *John Scott*, agent for *J. A. Busk*, Newcastle-upon-Tyne,

Solicitors for the defendant Blenkinsop, *Pyke, Irving*, and *Pyke*, agents for *J. G.* and *J. E. Joel*, Newcastle-upon-Tyne.

Solicitors for the defendant Clarke, *Pattison, Wigg* and *Co.*

ADMIRALTY DIVISION.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Nov. 8 *and* 9, 1876.

THE CADIZ AND THE BOYNE.

Salvage, agreement for apportionment—Additional salvage outside agreement—Persons not actually engaged in—Costs.

When persons agree to render a salvage service and to apportion the salvage in a particular way, and further salvage services are rendered, not contemplated by the agreement, the whole body of salvors are entitled to share in the reward, and not only those actually engaged in the further salvage operations.

Costs of all parties were ordered to be paid out of fund in court, except a defendant's, in consequence of his misconduct to his co-salvors.

THIS was a cause for the distribution of salvage earned by the plaintiffs and defendants in diving operations carried on for the purpose of saving cargo, &c., from the wrecks of the S.S. *Cadiz* and *Boyne*, near Brest, in France.

The *Cadiz* had gone on shore and sunk in May 1875, and in the same month an "Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property," engaged with defendant Samuel Edwards, who signed all agreements as Edwards and Co., and who was a diver belonging to Whitstable, to salve the cargo in which they were interested, at the rate of 15 per cent. for quicksilver and lead, and 5 per cent. for specie, 5 per cent. on value of a hunting knife valued at 7000*l.*, and 30 per cent. on all other cargo, and the other parties interested in the cargo made similar agreements as to their portions.

Samuel Edwards communicated with people at Whitstable, who engaged at that place the persons requisite to enable him to carry out the service.

It appeared that there were three methods in which it was customary amongst Whitstable divers to apportion salvage earned by diving operations.

(1.) That allowing three shares for those who were actually diving, three shares to the owner of each smack employed, and two to the owner of each diving apparatus; the other men should each take single shares, and boys a half or three-quarter share, according to their ability.

(2.) That the shares being estimated in the same way as above, the men and boys engaged to assist should only take half of the shares, and receive from those who had engaged them 10*s.* a week and an allowance equal in amount to half their food in exchange for the other half.

(3.) That the shares being still estimated in the same way, the men engaged to assist should receive wages of 1*l.* per week and their food from the persons who had engaged them, who received the whole of the shares in exchange.

At first a smack called the *Romp*, with a crew of six hands, was engaged to come out to Brest to assist, and there was a dispute between the parties as to whether her crew had been engaged in the first or second of the above methods.

After they had worked some time, another smack, the *Ann Elizabeth*, was also engaged to assist; her crew being, it was admitted, engaged by her owner on the 3rd method; whilst the salvage operations were proceeding, on the night of the 13th Aug. 1875, a light was seen and cries heard from a vessel apparently in distress; some of the men went off in the boats belonging to the smacks, and on the way met a barque standing into danger, which, after receiving notice of her position, put out to sea in safety; the boats afterwards met several boats with some passengers on board them, from the Royal Mail Steamship *Boyne*, and learnt that the light they had seen and cries they had heard proceeded from that vessel, which had run on the rocks; the smack's boats then towed and piloted the *Boyne's* boats to the island of Malines, off which the smack lay, for which service 20*l.* was paid to and shared by all the persons engaged.

In the morning the defendant, Samuel Edwards, drew up a contract on board one of the smacks to salve specie and diamonds, of which there were a large amount on board the *Boyne*, at 10 per cent., and went on board that vessel and got the captain of her to accept the contract; he then, with the assistance of some of the crew of the *Ann Elizabeth*, and, as it was subsequently proved, two of the crew of the *Romp*, got one of the diving apparatus on board the *Boyne*, and began to dive, and in a very short space of time, about an hour, succeeded in recovering 24,700*l.* worth of specie and diamonds; during that day the rest of the crews of the two smacks were employed, some in getting their smacks in readiness to convey the passengers from Malines to La Conquête, the nearest town on the main land, and others in navigating the *Romp* to the *Boyne*, and keeping her in readiness to assist in any way that might be necessary. On the next day the crews saved the mails and a large portion of the passengers' baggage; subsequently the salvage operations on the *Cadiz* were resumed.

The plaintiffs, a portion of the crew of the *Romp*, not being satisfied with the accounts rendered to them, on the close of the operations for the year, commenced proceedings for an account in the High Court of Justice, and assigned the cause to the Chancery Division in the Rolls Court.

On the 13th Nov. 1876, the Master of the Rolls ordered the cause to be transferred to the Admiralty Division: (*Humphrey* v. *Edwards*, Weekly Notes, 1875, p. 208.)

On the 16th Dec. 1875, a statement of claim was delivered on behalf of William Humphrey and three others of the crew of the *Romp*, praying for an account on the basis of division (No. 1), and claiming to divide the total salvage into 16½ shares against Samuel Edwards, the Royal Mail Steam Packet Company, who were owners of the *Boyne*, and the Association for the Protection of Commercial Interests, as respects wrecked and damaged property.

The 16½ shares were made up as follows:

The owner of the smack *Romp*	3	shares
William Rigden (diver),	3	,,
Samuel Edwards (diver), defendant	3	,,
William Humfrey, plaintiff	1	,,
William Ashby, plaintiff	1	,,
George Humphrey	1	,,
John Humphrey, plaintiff	1	,,
Ethelbert Edenden, plaintiff	1	,,
Richard Edwards	1	,,
Joseph Day (boy)	½	,,
Frederick Pierce	1	,,
Total	16½	shares

It subsequently appeared that Joseph Day was not a boy, and, therefore, was entitled to a full share, and that the diving apparatus employed entitled its owner to 2 shares, so making up a total of 19 shares, and the statement of claim was amended accordingly. The plaintiff also allowed that such sums as had been paid or were due to the crew and owner of the *Ann Elizabeth* should be taken into account.

On the 21st Dec. 1875, the statement of claim was ordered to be amended by adding the five other persons above enumerated as defendants. Three of them had been co-adventurers with Samuel Edwards from the beginning, and the other two were persons belonging to the *Romp*, who raised no objection to the accounts rendered by Samuel Edwards.

On the 6th Jan. the defendant salvors delivered statement of defence, claiming to have the amount arising from the *Cadiz* divided into 31¾ shares, to be distributed, as to the *Romp's* crew on plan (No. 2), and as to the *Ann Elizabeth* on plan (No. 3), and that that from the *Boyne* should only be divided amongst those actually engaged in the operation. The 31¾ shares were made up as follows:

The owners of the smack *Romp*	3	shares
The owners of the *Ann Elizabeth*	3	,,
The owners of the two diving apparatus	4	,,
William Rigden (diver) defendant	3	,,
Samuel Edwards (diver), defendant	3	,,
Frederick Pearce, defendant	1	,,
Joseph Day, defendant	1	,,
Richard Edwards, defendant	1	,,
William Humphrey, plaintiff	1	,,
William Ashby, plaintiff	½	,,
John Humphrey, plaintiff	½	,,
Ethelbert Edenden, plaintiff	½	,,
George Humphrey, defendant	½	,,
The remaining ½ shares to the four last mentioned persons to be taken by the original adventurers	4	,,
Five persons crew of the *Ann Elizabeth*	5	,,
One boy ,, ,,	¾	,,
Two French pilots	2	,,
Total	31¾	shares

On the 9th March the plaintiffs replied, joining issue on the statement of defence, and denying the employment of the French pilots except on ordinary wages.

On the 5th May 1876 the pleadings were further amended by joining the owner, master, and crew of the *Ann Elizabeth* as plaintiffs, and adding two more shares in respect of a second diving apparatus. The sums of money due for salvage from the various parties interested in the *Cadiz*, and from the Royal Mail Steamship Co., the owners of the *Boyne*, under the agreements were paid into court, and on the 2nd and 5th May 1875 the case came on for hearing. After hearing the opening statement for the plaintiffs and the partial examination of one witness on each side, the case of the salvage of the *Cadiz* as distinguished from the *Boyne* was referred to the registrar to report "on the basis or modes of calculation adopted by the plaintiffs and by the defendants respectively, or any modification of the said respective bases or modes of calculation rendered necessary by the accounts and vouchers produced." The registrar sat on the 12th and 13th July, and on 25th July 1876, made his report disallowing 7 per cent. out of a claim of 10 per cent. on the whole salvage for commission (as it appeared that only 3 per cent. was actually paid to other parties, the defendant, Samuel Edwards, reserving 7 per cent. for himself and his original co-adventurers, but not giving the other salvors any notice of their intention, but charging the whole 10 per cent. as Kerros, the agent's, commission), making some other deductions, and finding that the number of shares into which the amount due for salvage before the arrival of the *Ann Elizabeth* should be divided was nineteen, made up as follows:

The owner of the smack *Romp*	3	shares
William Rigden (diver), defendant	3	,,
Samuel Edwards (diver), defendant	3	,,
William Humphrey, plaintiff	1	,,
William Ashby, plaintiff	1	,,
George Humphrey, defendant	1	,,
John Humphrey, plaintiff	1	,,
Ethelbert Edenden, plaintiff	1	,,
Richard Edwards, defendant	1	,,
Joseph Day, defendant	1	,,
Frederick Pearce, defendant	1	,,
Owner of diving apparatus	2	,,
A total of	19	shares
And after the arrival of the *Ann Elizabeth*, in addition to the above	19	shares
The owner of the *Ann Elizabeth*	3	,,
Master of ditto (added as plaintiffs)	1	,,
Four men crew of ditto (added as plaintiffs)	4	,,
One boy crew of ditto (added as plaintiffs)	¾	,,
Owner of second diving apparatus	2	,,
A total of	29¾	shares

Disallowing altogether the claim for two shares in respect of the French pilots, as it appeared they had been paid by the day. He further reported as follows:

"I do not mean to say that the several persons whose names are set forth are entitled to take in their own right the amount of the shares set opposite their respective name. If any of them has assigned one of his shares to some other person that is a matter between the parties themselves, and with which I have at present nothing to do. All that I need say here is that no such assignment appears to have been made of the shares due to the master and crew of the *Romp*, but that some arrangement was made by the owner of the *Ann Elizabeth* with the master and crew that he should receive their shares in lieu of certain payments to be made to them."(a)

The report then proceeded to show the value of a share in the salvage earned before and after the arrival of the *Ann Elizabeth*. On the 8th Nov. 1876, the case came before the court again.

After the examination of witnesses on both

(a) The question of the validity of the assignment of a share of salvage has recently been raised and decided in the *Rosario* (reported on the next following page), where it is held that an assignment of shares of salvage, even for valuable consideration, is wholly void under the 122nd section of the Merchant Shipping Act 1854, in the case of services rendered by an ordinary trading vessel. The present case, however, would probably differ from that, and would come under the Merchant Shipping Act Amendment Act, sect. 18, as dealing with seamen belonging to ships which, according to their agreements, were to be employed on salvage services.—ED.

sides, it appeared that both the diving apparatus had been in use from the first, and that the owners of each were entitled to two shares as well before as after the arrival of the *Ann Elizabeth*, and it was admitted that the value of the shares should be ascertained before making a deduction for provisions supplied to the men employed, which deduction could only be made from the shares of the men, and not from those of the smacks or apparatus, and it was agreed that whoever might be found to be the salvors of the *Boyne* should divide that salvage on the plan which the court should decide it had been the intention of the parties to adopt in the *Cadiz*, except that the owner of the *Ann Elizabeth* waived any claim he might have to any shares the crew of that smack might be found to have in the *Boyne*.

R. E. Webster and *F. W. Raikes*, for the plaintiffs, contended that they were entitled to a full share of the *Cadiz* salvage, and that being all engaged in a joint operation, whether of salvage or for any other purpose, they were all entitled to share in the *Boyne*, whether actually present or not. The fact of the diving apparatus and divers being engaged at the *Boyne*, delayed the work on the *Cadiz*, and so entitled all those engaged in that salvage operation to share. On grounds of public policy it was desirable that they should share, or else in a case where life was in danger, as well as property, there would be a strong temptation for all to try and save the latter even at the expense of the former. In this case all were really engaged, either directly or indirectly. It was the universal and recognised rule of the Admiralty Court that all should share even if not actually engaged.

Watkin Williams, Q.C. and *W. Phillimore*, for the defendants, contended that the crew of the *Romp* had been engaged on the second method, and were therefore only entitled to half shares in the *Cadiz* salvage, and that the salvage of the *Boyne*, was done under an engagement made by Edwards and on behalf of himself and his original co-adventurers, and that therefore it was quite independent of the agreement with the *Romp* and *Ann Elizabeth*, and that only those actually employed by him in the operations should share at all, and that those persons were a portion of the crew of the *Ann Elizabeth*, and only engaged at weekly wages to do anything they were ordered by the original co-adventurers, and therefore not entitled to a share of the salvage at all.

Biron for the crew of the *Ann Elizabeth* and owner of *Romp*.

E. C. Clarkson for the owner of the *Ann Elizabeth*, who was also owner of one diving apparatus.

Webster in reply.

Sir ROBERT PHILLIMORE.—This is a case which has been sent to this Division by the Master of the Rolls on the ground that it related to a salvage service, and that it must be decided here upon the usual principles of salvage law. The first question is one of fact, and partly also of law, namely, whether the plaintiffs were, as the registrar represents, engaged to perform the service on the principle of what must be called the share, or that in which the half share goes to the men and a certain fixed amount of money to their wives and families. Now this is a question of evidence, and I am of opinion that it is established by the evidence on both sides, and especially by the evidence relating to the case of Ashby and George Humphreys, that these plaintiffs were engaged to serve upon the whole principle, and they ought to receive remuneration accordingly. That is as to the *Cadiz*. With regard to the other point, whether in the matter of the *Boyne*, the plaintiffs were salvors; I have also arrived at the conclusion that they are. It is proved before me that nine or ten of the men who belonged to the *Romp* and the *Ann Elizabeth* were employed in various ways in assisting; and it is proved that without their assistance the work could not have been satisfactorily carried out; they assisted in bringing the machinery to the vessel, and it is not necessary to refer to the principles so well known in this court in respect of the rule regulating salvage service; but not only those who are actually employed, but also those who stay behind; are entitled to participate. Applying those principles and the principles of common law, I am of opinion that the plaintiffs are to be considered as salvors in the case of the *Boyne*; and that the contract for the salvage service rendered by them to the *Cadiz* has been made out. There then remains the question of costs, as to which I have entertained some doubt, but upon the whole, and especially taking into consideration the conduct of the defendant Edwards, the agent of all engaged in this matter, I shall not do justice, I think without giving the salvors their costs. They are to receive their costs out of the funds in court but the defendant Edwards is to pay his own costs.

Solicitor for the plaintiffs, *A. R. Steele*, agent for *J. Minter*, Folkestone.

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

Nov. 30 *and Dec.* 5, 1876.

THE ROSARIO.

Salvage—Distribution — Seaman — Assignment—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *sect.* 182—*Demurrer.*

An assignment of a seaman of his right to salvage reward already acquired, is wholly void and inoperative by the Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104) *sect.* 182 *although such assignment is for valuable consideration, and in an action for distribution of salvage a defence setting up such an assignment is bad on demurrer.*

DEMURRER.

This was an action for distribution of salvage brought by William Bennett and fifteen others, formerly part of the crew of the steamship *Navarino*, against Thomas Wilson, Sons, and Co., the owners of that vessel, in respect of services rendered to the steamship *Rosario*, of Glasgow.

The statement of claim set out the circumstances under which the services were rendered and the services of the plaintiffs, and alleged that the owners of the *Rosario* and of her cargo had paid to the defendants, and the defendants had accepted, the sum of 750*l.* for the services so rendered to the *Rosario*, but the defendants, though requested to do so, had refused to pay the plaintiffs their equitable portion of the said sum, and the plaintiffs claimed an equitable proportion of the said sum.

The statement of defence admitted the main facts of the statement of claim, but averred that the service was rendered without difficulty or danger to the plaintiffs, and was mainly performed

by the *Navarino* herself by means of her steam power, and then continued:

3. The *Rosario*, after the performance of the said service, went to Scotland, and did not come within the jurisdiction of this court, and the defendants, who reside at Hull, did not and were unable to enforce the claim of themselves and the master and crew of the *Navarino* to salvage in respect of the said service.

4. The crew of the *Navarino* having made frequent application to the defendants for the payment of their shares of the salvage in respect of the said services, and constantly importuning the defendants in respect thereof, although the defendants had not received any amount in respect of such salvage, and had not agreed with the owners of the *Rosario* as to the amount to be received, the defendants determined to purchase their respective shares of the salvage from such of the crew as wished for an immediate payment, and accordingly, by an indenture dated the 11th June 1875, between the several persons whose names are thereunto subscribed and seals are affixed of the one part, and the defendants of the other part, the said several persons parties thereto of the first part, including all the plaintiffs except George Short and Robert Burns, in consideration of the respective sums set opposite to their respective names in the fourth column of the said schedule, paid by the defendants to the said parties of the first part, each of the said parties of the first part assigned to the defendants all and every the share, right, title, and interest of the said parties of the first part in the salvage or salvage reward and remuneration then due, or thereafter to be due, or paid, or awarded in respect of the salvage services set forth in the statement of claim, with power for the defendants to sue for, receive, and give receipts for the salvage, and to use the names of the said parties of the first part. The defendants crave leave to refer to the said indenture.

5. The sums so paid to the said plaintiffs respectively, other than George Short and Robert Burns, were as follows:

	£	s.		£	s.
William Bennett	1	0	Henry Brewer	1	0
John William Johnson	1	0	Daniel Levenson	1	0
George Tong	1	0	Henry Weatherson	1	0
Arthur Brook	0	10	James Dews	1	0
Alfred Cook	1	0	Charles Hope	1	0
Joseph Allen	1	0	Francis Loosemore	1	0
William Freeman	1	0	John Evison	1	0

6. In the month of March 1876, the *Rosario* being about to come within the jurisdiction of this court, her owners agreed to settle with the defendants for the said salvage, and paid the defendants in settlement thereof the sum of 750*l.* by a bill at three months' date.

7. In rendering the said service the *Navarino* was delayed on her voyage, and consumed an extra quantity of coals, and her hawsers were injured, and a loss of about 100*l.* was thereby incurred by the defendants. The master of the *Navarino* having taken upon himself the responsibility of rendering the service, the defendants have paid him the sum of 125*l.* as his share of the salvage.

8. The defendants legally tendered to each of the plaintiffs, George Short and Robert Burns, the sum of 4*l.*, in respect of his share of the salvage, before this action was brought, but each of them respectively refused to accept such sums. The defendants have brought such sums into court ready to be paid to the said plaintiff.

9. The defendants submit that the sum of 4*l.* so tendered to each of the said lastly named plaintiffs was and is sufficient, and that the other plaintiffs are bound by the said indenture, and that the sums paid to them respectively thereunder were reasonable and fair.

The plaintiffs demurred to the fourth and fifth paragraphs of the statement of defence, on the ground that such an agreement as therein set out was wholly void and inoperative, under the provisions of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 182, which provides that "no seaman shall by any agreement forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this Act, and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have to obtain in the nature of salvage, shall be wholly inoperative."

Nov. 30, 1876.—*James P. Aspinall*, for the plaintiffs, in support of the demurrer.—The two paragraphs demurred to amount to a statement that the plaintiffs have assigned their right to the salvage reward recovered in consideration of a sum of money paid to them. Such an agreement is bad under the Merchant Shipping Act 1854, s. 182. That section makes void any agreement by which a seaman abandons any right "he may have or obtain" in the nature of salvage, that is to say, avoids such agreements whether they relate to salvage already earned or to be earned. That this is the true construction of the section is shown by the Merchant Shipping Act Amendment Act 1862, s. 18, which provides that "the 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship, which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships." That section applies to assignments or stipulations made prior to the rendering of the service and leaves untouched the provision of the 182nd section of the Merchant Shipping Act 1854, as to stipulations or assignments made after the rendering of the service. [Sir R. PHILLIMORE.—This question was considered to some extent in *The Pride of Canada*, which is best reported in the first volume of the Maritime Law Cases, p. 406 (see also 9 L. T. Rep. N. S. 546; B. & L. 208), and that case seems in favour of your contention.] If such an agreement is null and void, as there stated, it cannot be pleaded in bar to the plaintiffs' action, and the demurrer is good.

E. C. Clarkson, for the defendants, *contra*.—The statute provides only that an abandonment of salvage shall be inoperative. Here there is no abandonment, but only an assignment of a right for valuable consideration. This court has always had power to decide whether an agreement entered into under similar circumstances was equitable or not, and this is the real question in this case, and not whether the deed is wholly inoperative. The defendants were bound to plead the facts alleged in the 4th and 5th paragraphs, in order to show how they came to pay the money to the seamen, and these facts should remain on the record as showing those facts. Rejecting the demurrer will not preclude the court from going into the question of the propriety of the agreement hereafter. [Sir R. PHILLIMORE.—Is there not a similar provision in the Naval Agency and Prize Distribution Act 1864?] Yes, sect. 15, but that provision expressly mentions assignments.

Aspinall in reply.—The 4th and 5th paragraphs of the defence taken together must mean that the sums there mentioned were paid in satisfaction and discharge of the plaintiffs' claim. In answer to the defendant's contention that the section does not refer to assignments for valuable consideration, it is enough to say that the section covers all agreements and stipulations, and this would include an assignment; and it cannot be supposed that the Legislature would deal in a statute with agreements other than binding legal agreements, that is to say, agreements made for valuable con-

sideration. Legislation for any other class of agreements would be useless.

Cur. adv. vult.

Dec. 5.—Sir R. PHILLIMORE.—This was a case of distribution of salvage, on which a demurrer has been raised.

The plaintiffs are the crew, and the defendants are the owners of the salving vessel. In the fourth article of the defence it is stated as follows: "The crew of the *Navarino* having made frequent applications to the defendants for the payment of their share of the salvage in respect of the said services, and constantly importuning the defendants in respect thereof, although the defendants had not received any amount in respect of such salvage, and had not agreed with the owners of the *Rosario* as to the amount to be received, the defendants determined to purchase their respective shares of the salvage from such of the crew as wished for immediate payment; and accordingly, by an indenture dated the 11th June 1875, between the several persons whose names are hereunto subscribed, &c., of the one part, and the defendants of the other part, including all the plaintiffs, except George Short and Robert Burns, in consideration of the respective sums set opposite to their respective names, &c. Then follow these words: "Each of the said parties of the first part assigned to the defendants all and every the share, right, title, and interest of the said parties of the first part in the salvage or salvage reward and remuneration then due, or hereafter to be due or paid or awarded, in respect of the said salvage services set forth in the statement of claim." Then the next article sets out the names of the crew, and the sums opposite to their names, which they have received by way of purchase for the assignment of their right to salvage. These sums vary from 1*l.* to 10*s.*

Now, the fourth and fifth paragraphs of the defence were demurred to on the ground that the agreement mentioned in the fourth paragraph is wholly void and inoperative under the 182nd section of the Merchant Shipping Act, 1854; and that the plaintiffs have not abandoned any right to recover from the defendants their due, equitable, and reasonable proportion of salvage reward.

This demurrer has been argued before the court, and well argued on both sides.

The question for the court now to decide is whether, under the statute referred to, this ancient right to shares in salvage is or is not valid, despite any such agreement as above set out.

The words of the Merchant Shipping Act of 1854, sect. 182, are: "Every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have to obtain in the nature of salvage, shall be wholly inoperative."

It is contended by the defendants that this section is not applicable to the present case, or to this deed of assignment, because the agreement set out in the 4th paragraph of the statement of defence is not a stipulation by which the parties consented to abandon any rights they might have in the nature of salvage, but is merely an assignment for a valuable consideration. But in construing the Act, I must look not only to the words, but the general purpose of the Act, which is well stated in *The Pride of Canada*, by Dr. Lushington (1 Maritime Law Cases, O. S. 406), where he says: "The ancient law of the court in questions of this kind was undoubted, viz., that whenever any sum has been allotted by way of salvage, it was competent to any party dissatisfied with the distribution by owners or masters to apply to this court for an apportionment of that sum of money, and so jealous was the law that no man should be deprived of his fair share of this reward, that even before the passing of the Act of Parliament, to which I must presently advert (The Merchant Shipping Act 1854), it was a general doctrine in this court that no seaman should enter into a stipulation of an inequitable nature; and giving up his salvage would so have been deemed, according to all the authorities and principles laid down by Lord Stowell, and every other judge upon the subject, until recently the Legislature also entertained the same opinion, and considered it a matter of great importance, in a case of salvage to give a just reward for the services performed, and a reward for risk of life, provided there was competency for so doing. The 182nd section of the Merchant Shipping Act is as follows: [He then read the section.] Here is the principle recognised, that if any agreement be made, it shall be null and void, and, I apprehend, upon the principles to which I have adverted." He then proceeds to advert to the subsequent statute The Merchant Shipping Act Amendment Act 1862 sect. 18. It is not necessary that I should consider the force of that section, for it is clearly inapplicable to the present case, being applicable only to sailors employed on board ships which, according to the terms of the agreement, are to be employed for salvage service. It is not however altogether without bearing upon the case to refer to Prize Act to show how jealous the law is to preserve seaman's rights. I refer to the 27 & 28 Vict. c. 24, s. 15, by which it is enacted that "any assignment sale or contract of or relating to any such money as aforesaid (shares of prize money), payable in respect of the services of any petty officer or seaman, non-commissioned officer of Marines, or marine, other than such as may be made or entered into under the authority of and in conformity with any order in council, shall be void."

The Legislature in the section of the Merchant Shipping Act, which is applicable to the present case, sect. 182, to which I have already adverted, could not have intended to provide merely for the case of the abandonment of a right to salvage reward without any valuable consideration whatever; but it must have intended, looking to the general purpose of the Act, to protect seamen in the assignment of their rights, whether made before or after they acquire their right to reward. The section of the statute is in aid of the general law—in support of it, and not as a substitute for it.

I think the demurrer must be sustained. The plaintiffs are entitled to costs. I grant leave to the defendants to amend their defence.

Solicitors for the plaintiff, *H. C. Coote*, agent for *A. E. Cowl*, Great Yarmouth; solicitors for the defendants, *Pritchard* and *Sons*.

Monday, Dec. 18, 1876.

THE INNISFAIL; THE SECRET.

Damage by collision—Inevitable accident—Costs. It is the practice of the Admiralty Court in case of inevitable accidents that each party should pay its own costs. But if, from the circumstances of the collision, it must have been obvious that the collision was an inevitable accident, the court will use its discretion as to dismissing the suit with costs.

THESE were causes of damage arising from the brig *Innisfail* having, it was alleged, given the brig *Secret* a foul berth, whilst the latter vessel was lying at anchor in the Downs on the 12th March 1876. The *Innisfail* subsequently dragged her anchors, one of them fouling the *Secret's* cable, and causing the latter vessel also to drag her anchors, until she came into close proximity with the three-master schooner *Flirt*, with which vessel the *Secret* afterwards, and after the *Innisfail* had got clear of her, on a change taking place in the direction of the wind, which was described as a hurricane, came into collision, doing considerable damage. The *Innisfail* herself never touched the *Secret*.

A suit by the *Secret* against the *Innisfail* was instituted in the City of London Court, and was heard on the 27th April 1876, when the judge (Mr Commissioner Kerr) found that the fouling of the anchor of the *Innisfail* with the cable of the *Secret* was the result of inevitable accident, and dismissed the suit with costs. From this decision the *Secret* appealed, and the appeal was heard on the 18th Dec. 1876, There being no record of the judgment of the court below, nor copy of the judge's or shorthand writer's notes of the evidence, excepting that of two witnesses, who had been examined before the Registrar of the City of London Court previously to the trial, the witnesses were again examined orally on both sides.

Milward, Q.C. and *E. C. Clarkson* for the appellant, contended that the *Innisfail* anchored so as to give the *Secret* a foul berth, and that her anchor fouled the cable of the *Secret* almost immediately.

Charles Hall and W. *Phillimore*, for the respondents, contended that the *Innisfail* anchored in a perfectly clear and good berth in a proper and seamanlike way, and that she was driven down on the *Secret* by the violence of the gale, and that it was not in her power to avoid the fouling of the anchor.

Sir ROBERT PHILLIMORE.—This is a case of collision between two vessels at anchor, which comes by way of appeal from the City of London Court, where the matter was inquired into in the presence of two nautical assessors, and the court, with their advice, came to the conclusion that the accident was inevitable. Now, the case comes before this court certainly in a very imperfect state. It was, to a certain extent, bettered by the evidence given *viná voce* to-day. There is only one single question I have to decide, and that is whether the *Innisfail* did or did not give the *Secret* a foul berth when she first came to anchor. This depends to a certain extent upon the credibility of the evidence produced before us on her behalf. I have conferred with the Elder Brethren, and they see no reason to disbelieve the statement of the witness Moss, and if that be believed she did not give a foul berth. It can hardly be suggested that after she began to drive she could have done anything but what she did do with the violent gale blowing at the time. Under all the circumstances of the case, I hold that it was an inevitable accident, and I must dismiss the appeal. There remains in this case to say a few words with respect to the costs. There is no doubt at all that the costs of the appeal must be given to the respondent. The general rule in the Court of Admiralty has been where the decision is founded on the ground of inevitable accident, to leave both parties to pay their own costs. But unquestionably the court retains a discretionary power on the subject, and the principles which guides it is this——whether the inevitable accident was or was not of that character that it must be apparent, or ought to be apparent to those who brought the action against the defendant. Now in this case the charge against the respondent was the one originally taken up, and it failed. The court has no hesitation in coming to the conclusion that the charge could not be maintained upon the evidence, and that the contrary fact must have been apparent to those who brought the action. I think it falls under the principle to which I have adverted, that the parties must have known that they would have no chance of succeeding. I therefore shall not disturb the finding of the court below either upon the question of costs, or upon the principal question in the case. I wish it to be clearly understood that the usual rule in the Court of Admiralty is, when it comes to the conclusion that the accident is inevitable, to leave both parties to pay their own costs.

Solicitor for appellants, *Thomas Cooper*.

Solicitors for respondents, *Lowless* and *Co.*

THE suit, originally instituted in the Admiralty Division, by the *Flirt* against the *Secret*, was then heard.

W. Phillimore and *Raikes*, for plaintiffs, owners of the *Flirt*.

Milward, Q.C. and *E. C. Clarkson*, for defendants, owners of the *Secret*.

The evidence in the previous case was admitted as evidence in this one, and fresh witnesses were examined on behalf of the *Flirt*.

Sir R. PHILLIMORE.—The defence for the collision in this case is that it was inevitable, and that the master of the colliding vessel was guilty of no negligence in his navigation. It is quite true that the *Secret* had been giving a foul berth for two hours or more to the *Flirt*, but it must be remembered, and it has been admitted that she was driven into the *Flirt* by a cause which she could not resist. Some questions still remain. The first relates to the alleged duty of the *Secret* to take a tug, it appearing that there were tugs there. The question is, would it have been prudent for her to take a tug? This is one in answering which the court is mainly guided by the advice of the Trinity Masters. They think, and I see no reason to disagree with them, that the *Secret* having two anchors down, and being under the control and management of them, her master was justified in holding her with both anchors, and that he would have incurred considerable danger in slipping one and endeavouring to weigh the other. When the weather or tide altered he might have been able to shift his

berth further off. Had there been no change in the wind the Trinity Masters do not think that there would have been any collision. With respect to the point made as to the bracing of the yards, the Trinity Masters are of opinion that the master braced them in a proper manner, and with regard to the last point, namely, the alleged duty of the *Secret* to starboard her helm, the Trinity Masters are of opinion that, as there was at that time no tide, an alteration of the helm would have had no effect. I must, therefore, pronounce that the collision was the result of inevitable accident, and both parties must pay their own costs.

Solicitors for plaintiffs, *Clarkson, Son,* and *Greenwell.*

Solicitors for defendants, *Thomas Cooper.*

May 27, *and June* 29, 1876.

THE MAUDE.

Salvage—Uncompleted service—Another ship engaged—Right to reward.

Where a ship is engaged to render assistance to another ship in distress, without any fixed sum being agreed upon, and does remain by ready to give assistance, she cannot be deprived of her right to reward by reason of another vessel offering and being engaged to tow for a less sum than the former ship is willing to accept, but will be entitled to recover a fair sum which will remunerate her for the services rendered, and compensate her for the loss she has sustained.

THIS was a cause of salvage instituted on behalf of the owner of the *Walter Stanhope,* a steamship of 458 tons register, against the *Maude,* a screw steamship of 496 tons register, belonging to the port of Hull.

The *Maude* was on a voyage from Huelva, in Spain to Hull, laden with a cargo of iron ore. On the 16th March 1876, when about five miles south of the Dudgeon Light, she lost the blades of her propeller, and as the wind was then blowing hard from the N.W., she could not proceed to Hull under canvas. The master of the *Maude,* at about 5 p.m. on the same day, made a signal of assistance. Shortly afterwards the *Walter Stanhope* came up and offered to take the *Maude* in tow. According to the story told by the defendants, the master of the *Maude* asked the master of the *Walter Stanhope* to tow the *Maude* to Hull, and the master of the *Walter Stanhope,* after offering to tow to Yarmouth, ultimately agreed to tow the *Maude* to Hull. According to the story told by the plaintiffs, the master of the *Walter Stanhope* never was asked to tow the *Maude* to Hull, but only to a place of safety, and intended from the first to take the *Maude* to Yarmouth. The *Walter Stanhope* was made fast to the *Maude* by two ropes, but soon after she got fast the tow ropes parted; this happened according to the plaintiff's story, by reason of the heavy sea running; according to the defendant's story, by reason of the *Walter Stanhope,* after towing a short time towards Hull, suddenly turning round for the purpose of taking the *Maude* towards Yarmouth without the knowledge or consent of the master of the *Maude.* The *Walter Stanhope* then asked for the *Maude's* chain, but the master of the *Maude,* considering the weather too bad for towing, determined to come to an anchor, and did so. The plaintiff alleged that the *Walter Stanhope* was asked to stand by the *Maude* during the ensuing night, but this was denied by the defendants. The *Walter Stanhope* did however remain by the *Maude* until about 5 p.m. on the following day, offering several times to take the *Maude* in tow, but the offers were always declined by the *Maude.* On the morning of the 17th March, the *Lord Cardigan* and another steamship came up and offered to tow the *Maude* to Hull for 250*l.* The master of the *Maude* then hailed the *Walter Stanhope,* and mentioning the offer, asked her master if she would do the service for the same sum. The master of the *Walter Stanhope,* however, declined, as he considered himself engaged to tow the *Maude* to a place of safety without any specified sum. The master of the *Maude* then said he should take the *Lord Cardigan* when the weather moderated. The *Maude* remained at anchor, and at about 3 p.m. on that day the *Walter Stanhope* left the *Maude* and proceeded on her voyage. At about 4 p.m. on the same day, the *Lord Cardigan* took the *Maude* in tow and set off towards Hull, but after towing some hours the tow ropes parted, and the two vessels lost sight of each other, and the *Maude* was obliged to run for Yarmouth Roads, which she reached in safety under her own sail, in the early morning of the 18th March, and there anchored. She was afterwards taken to Hull by two steamers.

The value of the *Maude* her cargo, and freight, was about 10,500*l.*

Milward, Q.C. and *E. C. Clarkson,* for the plaintiffs contended that the *Walter Stanhope* had performed a valuable service, and was entitled to substantial reward.

Butt, Q.C. and *James P. Aspinall,* for the defendants contended that the services having been inoperative there could be no reward. The agreement was to tow the *Maude* to Hull, and this had not been performed. It was the fault of the *Walter Stanhope* in not performing her agreement which compelled the *Maude* to employ the *Lord Cardigan.* There can be no salvage reward without success.

Milward, Q.C., in reply.

Sir R. PHILLIMORE.—This is a case of salvage in which it is alleged on the part of the asserted salvors, that is, the owners of the *Walter Stanhope,* that their vessel would have completed her service if the vessel to whom she rendered it had kept faith with her. On the other side it is contended by the vessel which was salved, the *Maude,* that no salvage service was rendered, inasmuch as none was completed, because the alleged salvor would not perform the agreement which had been entered into.

There is a conflict of evidence as to what actually passed when the plaintiff's vessel came up. No doubt the weather was extremely bad on the 16th and 17th March of this year. The vessel salved, the *Maude,* had lost her propeller and two of her three boats, and one had been stove in, and she had a signal of distress flying. There is no question that she wanted the service of the salvors. The *Walter Stanhope* got up to her when in this condition, and there is a dispute as to what really was said by the captain of the *Walter Stanhope* to the captain of the *Maude.* On the whole, I am inclined to think that the truth is pretty much this: that the *Maude* requested to be towed to Hull, where she was bound, the

captain of the *Walter Stanhope* said it was impossible to go there on account of the state of the wind and the weather, and he would go to Yarmouth. In a further conversation he said he would try what he could do to go to Hull, and he undertook to try to take her to Hull. He made the attempt and failed; the rope broke and the consequence was that the vessel had to anchor, as the captain of the *Maude* thought it dangerous to proceed in the then state of the wind and weather, and he made up his mind to anchor for that night. I believe the evidence of the captain of the *Walter Stanhope*. He was asked to stay by her that night, which he did. I think it extremely probable in the state of the ship and the weather, that he should do so, and I believe the evidence he gave. Before the next morning, another steamer came up, which is called the *Lord Cardigan*. A negotiation takes place between the captains of the *Maude* and the *Lady Cardigan*, the result of which is that he undertakes to tow the *Maude* to Hull for 250*l*.

The result of all the evidence on this part of the case is this, that the captain of the *Maude* tells the captain of the *Walter Stanhope* that he has heard this offer made, and shall close with it, unless he is willing to do what he requires. The reply of the captain of the *Walter Stanhope* is, that it could not be done in that wind and weather, and also, as his services had been engaged without any stipulation, he was ready to perform his engagement. The captain of the *Maude* refuses the services of the *Walter Stanhope* and accepts the proffered services of the *Lord Cardigan*, and the result is such as, in my opinion, to justify the conduct and advice of the *Walter Stanhope*, because what happened then was that he took the vessel in tow and towed her for eight miles in nine hours. The rope broke, and the *Maude* found herself compelled to go to Yarmouth, which she did.

It is true that it has been held in this court as a general proposition that a service however well intended, but not rendered, should not be rewarded. But that is a proposition which, in the circumstances of the case, induces the court to consider the reason why the service is not rendered.

The fair result of the evidence is that the *Walter Stanhope* was ready to do her best to the vessel in distress, and would have done so if the other engagement had not been made. The *Walter Stanhope* is not entitled to be rewarded on the scale which would have been her due had she towed the *Maude* to Yarmouth or Hull. She was there the whole night, and she ought not to have been discarded, and is entitled to be rewarded for the services rendered and to some compensation for the loss she has sustained by not being able to complete the service agreed upon.

Looking to all the circumstances of the case, I shall give to the *Walter Stanhope* 100*l*. As there was a point of law involved in the case beyond the facts, I think it was a fit case to bring into this court.

Solicitor for the plaintiffs, *Thomas Cooper*.

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

Wednesday, Dec. 13, 1876.

THE GLANNIBANTA.

Salvage—Distribution—County Court jurisdiction—County Courts Admiralty Jurisdiction Act 1868—31 *&* 32 *Vict. c.* 71, *sect.* 3, *sub-s.* 1.

Where a sum of money under 300*l. has been paid for salvage services rendered, a County Court having Admiralty jurisdiction has jurisdiction is an action for distribution in case of dispute between the salvors, to apportion such sum among the salvors, although such sum has been recovered by agreement with the owners of the salved property, and without action brought in the County Court.*

A County Court having Admiralty jurisdiction under the County Courts Admiralty Jurisdiction Act 1868, *has jurisdiction under sect.* 3, *in claims for salvage wherein the property salved does not exceed* 1000*l*., *or in the alternative where the amount claimed does not exceed* 300*l*.

THIS was an appeal from the judgment of the County Court of Durham, holden at Sunderland, in an action brought in that court by William Elemore, of Sunderland pilot, and Thomas Donken, waterman, against Robert Trim and others, the owners of the steamtug *Scottish Maid*, for distribution of salvage earned by services rendered by the plaintiff as part of the crew of the *Scottish Maid* to the steamship *Glannibanta*. From a petition annexed to the summons it appeared that on the 19th Dec. 1875, the *Glannibanta*, a screw steamship of 534 tons register, struck the bar of Sunderland harbour, and went behind the north pier, and, owing to the bad weather then prevailing, got into great danger; that the plaintiffs went on board the *Scottish Maid* and offered their services to the defendants to go to the assistance of the *Glannibanta*, and that their services were accepted; that Donkin, at the request of the owner, or those acting for him, took command of the *Scottish Maid*, and, with four others, including Elemore, went to the assistance of the *Glannibanta*; that, after great exertions, the *Glannibanta* was rescued from her perilous position, and brought into safety; that the defendants, the owners of the *Scottish Maid*, had received 250*l*. from the *Glannibanta* for the said services and had paid the plaintiffs out of such sum the sum of 7*l*. 13*s*. 4*d*. each; that the plaintiffs, considering the latter sum wholly insufficient, had applied to the defendants for a more equitable division of the 250*l*., but the defendants had refused to pay any greater sum. The petition prayed the judge to order an equitable proportion of such sum of 250*l*. to be paid to the plaintiffs, and to condemn the defendants in costs.

When the case came on for hearing in the County Court, the defendants objected to the jurisdiction of the court on the ground that the County Courts Admiralty Jurisdiction Act 1868, in giving jurisdiction to the County Courts in certain matters, gave no jurisdiction over claims for distribution of salvage, and further objected that even if there was jurisdiction, the plaintiffs could not proceed until they had brought into court the money they had already received, and had compelled the defendants by monition to bring in the rest of the amount named, in accordance with the alleged former practice of the High Court of Admiralty. The County Court Judge dismissed

the action with costs, on the ground of want of jurisdiction.

July 5, 1876.—*W. G. F. Phillimore*, for the plaintiffs, obtained a rule in the Admiralty Division, under 38 & 39 Vict., c. 50, s. 6, calling upon the defendants to show cause before the proper court why the above ruling of the County Court judge should not be set aside, and the action proceeded with. This rule, by some accident, was entered in the Registry and served upon the defendant as an order that the plaintiffs should be at liberty to proceed with their appeal.

Dec. 13, 1876.—On this date the defendants appeared to show cause. They at first objected to the jurisdiction of the Admiralty Division to hear the appeal on various grounds, viz., that no copy of the County Court judge's notes had been obtained (there were none taken); that the rule had been obtained when a divisional court was sitting, and on other grounds. But the defendants, on the court pointing out that it could and would, if necessary, extend the plaintiffs' time for appealing, by way of special case, consented to show cause against the rule, as if it properly raised the question whether the County Court had jurisdiction over claims for distribution of salvage. It was then admitted by the plaintiffs and defendants that the value of the *Glannibanta* when salved exceeded 1000*l.*

Bruce for the defendants showed cause accordingly.—The words of the County Court Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) s. 3, governing the case are "Any County Court having Admiralty jurisdiction, &c., to try and determine . . the following causes . . . as to any claim for salvage—any cause in which the value of the property saved does not exceed 1000*l.*, or in which the amount claimed does not exceed 300*l.* . . ." Those words can relate only to actions to recover salvage from the owners of the property valued, and not to actions for distribution of salvage. The value of the property salved is over 1000*l.*, and in an original suit for salvage the County Court would have had no jurisdiction. [Sir R. PHILLIMORE.—Do you contend that the section quoted requires that the value shall be under 1000*l.*, as well as the claim being under 300*l.*, or has the County Court jurisdiction in either event? The section appears to me to give alternate jurisdiction.] There has been no decision on that point, but I submit that if the value exceeds 1000*l.*, or the amount claimed, 300*l.*, in neither case is there jurisdiction. But I say that, in any case, the property here being over 1000*l.*, it is only under the second part of the section that any jurisdiction could be established, and that it cannot be under that part, because the words "amount claimed" there used must refer to an amount claimed in a salvage cause proper, and do not refer to an action for distribution. By the Merchant Shipping Act 1854, sect. 460, jurisdiction is given to the justices over "disputes with respect to salvage," "if the sum claimed does not exceed 200*l.*," but these words, although wide enough to do so, do not give any jurisdiction as to apportionment of salvage, for, by sects. 466, 467, it is expressly provided that where the amount awarded by justices does not exceed 200*l.*, and any dispute arises as to its apportionment, the receiver of wreck shall have power to apportion such sum. This Act was in force when the County Court Admiralty Jurisdiction Act was passed, and clearly contemplates the awarding of salvage, and the apportionment thereof being wholly distinct. The Merchant Shipping Act Amendment Act 1862, sect. 49, extended the jurisdiction of justices to cases where the value did not exceed 1000*l.*, and again made no alteration as to apportionment. [Sir R. PHILLIMORE.—Have you looked at sect. 498 of the Merchant Shipping Act 1854?] That section gives no doubt power to "any court having Admiralty jurisdiction," to apportion salvage earned and exceeding 200*l.*; but I submit that section does not apply to courts which were non-existent when it was passed, and, which, by that section, would acquire unlimited jurisdiction in apportionment. There must be some express words to give the jurisdiction: (*The John Evans*, *ante*, vol. 2, p. 234; 30 L. T. Rep. N. S. 308.) If the County Court has such jurisdiction, each member of the crew might proceed for distribution, although the whole amount recovered far exceeded 300*l.*

W. G. F. Phillimore in support of the rule.—The 3rd section of the County Courts Admiralty Jurisdiction Act 1868 was clearly intended to give salvage jurisdiction to the County Courts in two distinct cases—first, where the value of the property salved did not exceed 1000*l.*; secondly, where the amount of the claim did exceed 300*l.* [Sir R. PHILLIMORE.—I am entirely with you on that point. so that you need not argue it further.] The 3rd section gives jurisdiction over salvage, damage by collision, damage to cargo, and other things under general words only, and these words include everything that is within the jurisdiction of the Admiralty Court up to certain limits of value. Moreover, The Merchant Shipping Act 1854, sect. 498 expressly provides that where the amount awarded exceeds 200*l.*, "Any court having Admiralty jurisdiction may cause the same to be apportioned," and by the County Courts Admiralty Jurisdiction Act 1868, sects. 2 and 3, the words used as to jurisdiction are, "Any County Court having Admiralty jurisdiction." These words clearly bring such County Courts within the Merchant Shipping Act 1854. [He was then stopped by the court.]

Sir R. PHILLIMORE.—The question before the court in this case is, by consent of counsel, this: Whether a County Court having Admiralty jurisdiction has that jurisdiction in the matter of distribution of salvage where there has been no original suit for salvage. I am of opinion that it has jurisdiction.

I am of opinion, first of all, on the plain meaning, as it appears to me, of the terms used in the 31 & 32 Vict. c. 71, s. 3, "Any County Court having Admiralty jurisdiction shall have jurisdiction, and all powers and authority relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes: As to any claim for salvage—Any cause in which the value of the property saved does not exceed 1000*l.* or in which the amount claimed does not exceed 300*l.*

Now, first of all, "as to any claim for salvage," —it is admitted that these words are extremely broad, and taken in their common signification would include suits for distribution, which is a kind of claim for salvage. It is admitted also, and could not indeed have been denied, that the County Court must have jurisdiction in a case of distribution of salvage where the original claim

has been for salvage reward, and the subsequent proceedings have introduced the question of distribution. It was not intended by the legislature to exclude suits for distribution in those instances, nor do I consider it was so where there had been no previous suit for salvage services. That appears to me to be the fair construction of the words "as to any claim for salvage."

And, without relying upon it as necessary for the support of my opinion, I also think 408th section of the 17 & 18 Vict. c. 104, confirms my judgment in this matter. That section is "whenever the aggregate amount of salvage payable in respect of salvage services rendered in the United Kingdom has been finally ascertained, and exceeds 200*l.*, and whenever the aggregate amount of salvage payable in respect of salvage services rendered elsewhere has been finally ascertained, whatever such amount may be, then if any delay or dispute arises as to the apportionment thereof, any court having admiralty jurisdiction may cause the same to be apportioned amongst the persons entitled thereto in such manner as it thinks just." These are exactly the words used by the Legislature in the subsequent statute, 31 & 32 Vict. c. 71. The words are, "Any court having admiralty jurisdiction."

I am, therefore, of opinion that the court has jurisdiction in an original suit for distribution of salvage.

Upon the second point, it being admitted that the value of the property exceeds 1000*l.*, but that the claim is one for 250*l.* or under 300*l.*, I am of opinion that it comes within the category mentioned in the first paragraph of the 3rd section. I read those in the alternative that either when the property saved does not exceed 1000*l.*, or when the amount claimed does not exceed 300*l.*, there is jurisdiction. It was fairly admitted that there was some corroboration of that opinion in the language of the subsequent Merchant Shipping Act (25 & 26 Vict c. 63, s. 49), which has these words. Such provision shall extend to all cases in which the value of the property saved does not exceed 1000*l.* as well as the case provided by the previous Act; but independently of any corroboration it may receive from the section of this Act just cited, I am of opinion that this must be read in the alternative; that the word "or" must be read as indicating the alternative, and it would not be a correct interpretation of the statute to substitute the word "and" for the word "or" in these cases.

Upon both grounds, therefore, I am of opinion that the County Court has jurisdiction in this suit for distribution of salvage, and I must pronounce accordingly. I reverse the sentence of the court below, and make no order as to costs.

Solicitor for the plaintiff, *Southgate.*

Solicitor for the defendant, *G. J. Brownlow.*

Tuesday, Jan. 17, 1877.

THE JOHN BOYNE.

Collision between vessels—Damage to cargo—Preliminary acts—Practice—Rule of Supreme Court. Order XIX., rule 30.

In an action for damage to cargo sustained in a collision between two ships where the action is brought against the ship carrying the cargo, the parties are not bound to file preliminary acts under the Rules of the Supreme Court, Order XIX., rule 30.

THIS was an action brought by the owners of cargo of a ship called the *John Boyne* against that vessel for the damage sustained through a collision between the *John Boyne* and another ship, alleged to have occurred through the negligence of the *John Boyne.*

The plaintiffs before delivering pleadings took out a summons calling upon the defendants to show cause why an order should not be made with reference to the filing of preliminary acts in the action.

E. C. Clarkson, for the plaintiff, citing the Rules of the Supreme Court, Order XIX. rule 30, contended that in all actions for damage by collisions between vessels preliminary acts must be filed. This was a case of collision.

W. G. F. Phillimore, for the defendants.—What preliminary acts are plaintiffs to file? Not one in relation to the defendants' ship. They cannot make statements as to the other ship, because they can have no knowledge of the circumstances; there is consequently no mutuality.

Bruce as *amicus curiæ*.—In a similar case in the Queen's Bench Division in an action against a pilot, a Master at Chambers ruled that Order XIX.. rule 30, did not apply.

Sir R. PHILLIMORE.—I think the objection taken by Mr. Phillimore—that even if the defendant did deliver a preliminary act, the plaintiff, from the nature of the action, could not do so, so that it being impossible to apply Order XIX., rule 30, to both parties in the same action, there could be no mutuality—is an objection which cannot be got over. I think there should be no preliminary acts delivered in this action.

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

Solicitor for the defendants, *Thomas Cooper.*

Tuesday, Jan. 16, 1877.

THE ST. OLAF.

Practice—Costs—Discontinuance—Rule of Supreme Court, Order XXIII.

Where a plaintiff in an action, after succeeding in an interlocutory application, the costs of which are made costs in the cause, gives notice of discontinuance of the action, under Order XXIII. of the Rules of the Supreme Court, the defendant is entitled to his costs, including the costs of such application.

THIS was an action of possession instituted on behalf of James Bremmer and others, part owners of the schooner *St. Olaf*, against James Cormach, part owner and late master. The writ claimed possession of the schooner and also possession of her certificate registry, as against the defendant. The defendant had been dismissed from the schooner, and left her, taking away the certificate, keys, and papers. The plaintiffs thereupon took possession of the schooner, and in May 12th 1876, after the commencement of this action, applied to the court by motion for the delivering up of the certificate, &c.; and the defendant was ordered to deliver them up, costs of the motion to be costs in the cause (see *ante*, p. 268). On the de-

fendant complying with the order thus made, the plaintiffs, on 9th June 1876, gave the defendant notice in writing that they discontinued the action. The defendant then proceeded to sign judgment for the costs of the action, under Order XXIII. of the Rules of the Supreme Court, but the registrar refused to allow him to do so without an order of the court, upon the ground that the plaintiffs had partly succeeded in their claim, as they had recovered the certificate.

E. C. Clarkson, on behalf of the defendants, now moved the court to condemn the plaintiffs in all costs of the action. By Order XXIII. rule 1, of the Rules of the Supreme Court, a defendant is absolutely entitled to his costs on a plaintiff discontinuing his action. [Sir R. PHILLIMORE.—But here the discontinuance took place after the plaintiffs had succeeded in part of their action.] The plaintiffs' notice is that they wholly discontinue; the course by which he obtained possession of the certificate of registry, was merely incidental, a motion made in the action under the Merchant Shipping Act. Besides, the plaintiffs have taken away any discretion the court have, by giving the notice to discontinue, and they have also by so doing prevented the defendant from setting up a counter-claim for damages for wrongful dismissal; if such counter-claim had been tried there would no doubt have been a discretion as to costs, but this is gone by the plaintiffs' own acts.

W. G. F. Phillimore for the plaintiffs.—By Order LV. of the Rules of the Supreme Court, the court has an absolute discretion over the costs; and by sect. 49 of the Supreme Court of Judicature Act 1873, there can be no appeal as to costs. At any rate, the defendants are not entitled to the costs of the motion in which we were successful.

E. C. Clarkson in reply.

Sir R. PHILLIMORE.—I think Mr. Clarkson is entitled to succeed. There is no doubt, that according to the practice prevailing in the registry of the High Court of Admiralty, before the Judicature Acts came into operation, the defendant would have been entitled to all the costs of the action, other than those relating to the motion to obtain possession of the certificate of registry of the vessel. The court, however, must now be guided in the first place by the provisions as to costs contained in the rules of the Supreme Court, so far as they are applicable to the case. The only two rules of court to which I have been referred, are Order XXIII. rule 1, and Order LV. rule 1, of these two rules the former, Order XXIII. rule 1, is a distinct order in a particular case, whilst the subsequent rule is a provision as to costs generally. I am therefore of opinion that Order XXIII. rule 1, is not over-ridden by the general provision as to costs contained in Order LV. rule 1. The defendant is under the rules entitled to all the costs of the action.

Solicitor for plaintiffs, *Harper*.

Solicitors for defendant, *Lowless* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by W. APPLETON, JAMES P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

May 30, 31, *and June* 1, 1876.

(Before COCKBURN, C.J., JESSEL, M.R., MELLISH, L.J., and POLLOCK, B.)

WILLIAMS AND OTHERS *v.* THE NORTH CHINA INSURANCE COMPANY.

Marine insurance—Insurance on freight—Freight advances—Construction of charter-party—Valued policy—What is valued—Opening to show want of interest in—Ratification after knowledge of loss—Double insurance,

A charter-party contained the following clause: "Sufficient cash, not exceeding 600l., to be advanced against freight, if required, at ports of loading, subject to insurance and 2½ per cent. commission." The charterers submitted to the captain, as agent for the owners, and he accepted a disbursement account made up of three items, (1) cash actually advanced; (2) commission due to the charterers under the charter-party; (3) premium on a policy of insurance on freight made on owner's behalf.

Held, that such sums, though not all representing actual advances, were nevertheless "freight advances" within the meaning of the charter-party, and were, therefore, rightly insured by the charterers on their own account.

A policy of insurance on freight, valued at a certain sum, was made by charterers on behalf of themselves and those interested, in the usual terms. It came to the knowledge of the shipowners, but not till after they had heard of the loss. They then claimed the benefit under it.

Held that, there being satisfactory evidence of the policy having been made on the owners' account, it was open to them to ratify it, even after they had knowledge of the loss.

Routh *v.* Thompson (13 *East.* 274) *and* Hagedorn *v.* Oliverson (2 *M. & S.* 485) *followed.*

Under a valued policy it may be shown what it was that was intended to be valued, with a view to disputing interest in the whole subject of valuation though the amount of the valuation can be disputed only on the ground of fraud.

THIS was an appeal from a decision of the Common Pleas Division.

The material facts of the case are as follows:

The plaintiffs were the owners of a ship called the *Queen of the Colonies*. They chartered her for a voyage from Batavia to the United Kingdom, to a firm who then assigned the charter-party to Lorrain and Co., of Batavia. The firm of Lorrain and Co. have a house at Glasgow, under the name of Lorraine and Gillespie, and another in London under the name of Gillespie.

The charter-party contained this clause amongst others: "Sufficient cash, not exceeding 600*l.*, to be advanced against freight if required at ports of loading, subject to insurance and 2½ per cent. commission." Plaintiffs effected an insurance on

freight, valued at 5500*l.*, in several London insurance houses.

The ship was loaded at Pasœrœan, in Batavia, by Abraas and Co., the agents there of Lorrain and Co.; and subsequently the following disbursement account was submitted by them to the captain of the *Queen of the Colonies*.

Note of disbursements of the British *Queen of the Colonies*. Captain R. Jones.

	£	s.	d.
To cash per Receipt	165	11	4
2½ per cent. commission on £5796 3s. 2d.	144	18	0
3 per cent. Insurance on £5941 1s. 2d.	178	4	7
Total	£488	13	11

which was signed as "correct" by the Captain.

Abraas and Co. notified what they had done, and enclosed the above accepted account to their principals Lorrain and Co., who then effected two policies of insurance (hereinafter called the China Policies) with the defendant company, (1) for 5941*l.* 1*s.* 2*d.* for themselves and all who might be interested (in the usual terms), "on estimated amount of freight valued at 5941*l.* 1*s.* 2*d.*" at a premium of 1¾ per cent.; and (2) (on the same day and in the same office), an "advance against freight valued at 512*l.* 13*s.* 5*d.*" This sum, it appeared, they arrived at by adding to the account of 488*l.* 13*s.* 11*d.* above mentioned a commission of 2½ per cent. on 343*l.* 15*s.* 11*d.* (being the sums of 165*l.* 11*s.* 4*d.* and 178*l.* 4*s.* 7*d.* in that account)—which they were entitled to do by the charter-party, but which Abraas and Co. had omitted to include in their account—and the premium on this policy to the whole sum so arrived at.

Both the China policies were then sent by post to their house of Lorrain and Gillespie at Glasgow, arriving about the 10th or 15th Dec. 1874.

The *Queen of the Colonies* was totally lost on the 25th Jan. 1875.

The plaintiffs having been apprised of the loss, obtained settlement, but not payment, of the English policies on the 4th Feb. 1875.

On the 5th Feb. the China policy on freight came to the knowledge of the English underwriters, who thereupon delayed payment on their own policies.

A little later it came to the knowledge of the plaintiffs, and was subsequently given up to them: and they, on receipt from the various English underwriters of the sums for which they were respectively liable, purported to assign to them their (the plaintiffs') own interest in the said China policy.

Lorrain and Co. were paid the full amount on the other China policy for 512*l.* 13*s.* 5*d.*, the valuation of their advances against freight.

Plaintiffs brought their action for 441*l.*, the excess of the China policy on freight over the English policies, admitting, and showing by the receipts, that they had been paid the full amount of 5500*l.* due on those policies. They were awarded such excess by the Court of Common Pleas below.

At the trial a nominal verdict was taken; and it was agreed that the judge (Denman, J.) should enter all the material facts on his notes, which should then be treated as a statement of a special case before the Court of Appeal.

The present appeal was made by the defendant against that decision.

The court to draw inferences of fact.

Benjamin, Q.C. (with him *Cohen*, Q.C., and *Lanyon*), for defendants (appellants.)—I have two points. (1) As to the excess of 441*l.* that this China policy was a policy on an interest which did not wholly belong to plaintiff, and the fact of its being a "valued" policy does not prevent that being shown. (2) As to the whole sum, that plaintiff could take no advantage under it, since it was made by a stranger (though for his benefit), and not ratified till after loss. A decision in my favour on the first point will make it unnecessary to argue the second. As to the first point: From the facts it is clear that this policy was made by Lorrain and Co. on the whole freight, and that the shipowners were not interested to that amount, and the fact of the policy being a valued one does not debar me from showing that. That is well established by authority (Duer, II. 79.) It is not opening a valued policy to show over-valuation. I simply ask what it is that was intended to be valued, and does it all belong to you? There is nothing to prevent me doing that. Now, here I say it is clear that what was intended by Lorrain and Co. to be valued was the whole freight. Plaintiffs were not interested in the whole freight; but in the whole freight less the sum advanced. That is fully covered by 5500*l.*, and that sum they have already recovered from the English underwriters. They are the only people who have any right to sue us. They can sue us for contributions, and they are about to do so. [The Court intimated that they would now hear the other side on this first point.]

Butt, Q.C. and *J. C. Matthew*, for plaintiffs (respondents.)—Freight does not necessarily mean all freight. Whatever be the actual interest in the freight it is actually insured simply as "freight." [Jessel, M.R.—*Primâ facie* "freight" means all freight. It must be shown that it means something less in the particular case.] It is clear how Lorrain and Co. came to effect a policy at all. They had charged the shipowners with premiums for insurance, and felt therefore that if they were not already insured, or if their underwriters should turn out to be insolvent, they would have a right to call on them (Lorrain and Co.), for the policy, the premium on which had been charged against the owners in the account given to and accepted by the captain. Lorrain and Co. therefore insured, and insured the shipowners' interest and nothing else. That is clear by his making another policy, on the very same day, on his own account, to cover his advances. It is all a question of intention.

Barker v. *Janson*, 17 L. T Rep. N.S. 473; L. Rep. 3 C. P. 303; 3 Mar. Law Cas. O. S. 28.
Lidgett v. *Secretan*, *ante*, vol. 1, p. 95; 24 L. T. Rep. N. S. 942; L. Rep. 6 C. P. 616.

The sum of 5941*l.* 1*s.* 2*d.*, it is true, is somewhere about the actual amount of gross freight; but I say that the intention was not to insure the gross freight, but only shipowners' interest. It may be that they thought his interest extended to the whole freight; but it does not matter by what calculation they arrive at the sum, so long as it is the shipowners' interest alone which they intend to insure. The shipowners' interest was the gross freight, plus the premiums less the advances. This sum of 5941*l.* 1*s.* 2*d.* was arrived at, we say, by a rough calculation on that basis. These calculations are never supposed to be strictly accurate. They are always made on a liberal scale,

In the case of valued policies insurance is no longer a contract of indemnity; it is a contract of indemnity subject to mercantile usage. In the smaller policy, made on his own account, Gillespie included items in which he had no interest. Underwriters like over-valuation. The English policy was not large enough to cover the premiums. Probably Gillespie added the address commissions as well, which were, as a fact, included in the freight; but he added everything in which the owners could, by any possibility, be interested, meaning to cover their interest, and that is done every day in a valued policy, and is no ground for impeaching it.

Benjamin, Q.C., in reply.—It must be observed that this policy was made after the accounts had been made up, and therefore with full and exact knowledge of all the facts. The sum was arrived at by adding the address commission to the gross freight. The whole of the 512*l.* 13*s.* 5*d.* was in the nature of an advance against freight under this charter-party. The wording of the advance clause is peculiar, and has that effect. Therefore the interest of the owners in this policy was 512*l.* short of the whole. Moreover, the owners have been paid 5500*l.*, and the charterers 512*l.* 13*s.* 5*d.* 6012*l.* odd in all has, therefore, been paid on freight, considerably beyond its value. [After some time the court intimated that they would like to hear Mr. Benjamin on the second point before coming to any decision.] The second point is whether an insurance made by strangers, and not known till after loss, can then be adopted by the person on whose behalf it was intended to be made. A man cannot ratify at a time when he could not make the contract he seeks to ratify. The question can scarcely, from its nature, arise in other but contracts of insurance. At the time of the loss, and for some time afterwards, there was no contract in existence at all. Gillespie did not contract for himself, and he had no sort of authority to contract for the owners. They first hear of it after loss; they could not then have made the contract, and how could they transform what was then but a piece of paper into a contract? [Jessel, M.R.—That is the rule in equity, and no doubt it is the true rule; but the contract of insurance differs somewhat from an ordinary contract—say of sale—for you may insure what was at that moment actually gone to the bottom, if no one is aware of the fact.] The contract is against risk; it cannot be made after risk has ceased to exist, either directly or retroactively. If it were a question of the amount of knowledge, here there was, one may say, absolute knowledge; for the captain had returned from the wreck. In France the law is as I say it should be in this country. It is a fair argument against me that the rule has been now a considerable time in existence, but such a case must always be very rare. The rule is based on the authority of only two cases, which are in some measure distinguishable from this case; and there are cases, on the other hand, in my favour. The first case against me is that of *Routh* v. *Thompson* (13 East. 274), decided in 1811. That was the case of ratification by the Crown, by an order in council, of the insurance of a prize effected by the captors, the vessel being lost at the time of the ratification. But the judgment proceeded on the ground that the Crown was in constructive possession of the prize at the time of insurance, since the captors were officers of the Crown on board a ship of war, and therefore its servants and agents. The captors, Lord Ellenborough said, "could not have insured for themselves." This case, then, does not support the proposition I am contending against. The case was not argued or decided as a question of adoption, though it is on that point that it is cited as an authority in the text books. There is nothing in the case to show it was not adopted before loss. The second case is *Hagedorn* v. *Oliverson* (2 M. & Sel. 485), in 1814. There is not a trace of such a doctrine in the books before *Routh* v. *Thompson*. As to the general question of ratification, *Jardine* v. *Leathley* (7 L. T. Rep. N. S. 783; 1 Mar. Law Cas. O. S. 128; 3 B. & S. 700), is an authority for the proposition that a man cannot ratify at a time when he cannot contract; so is *Bird* v. *Brown* (4 Exch. 796). [Mellish, L.J.—Both those cases were ratifications of acts and not of contracts.]

Butt, Q.C. was not called on to reply on this point.

Cockburn, C.J.—I am of opinion that the decision of the court below must be reversed.

The first question is, was this policy of insurance made by Lorrain and Co. on their own behalf or on that of the shipowners? I come to the conclusion, looking at all the circumstances, that it was on behalf of the shipowners. They had charged the shipowners with the premium and the advances, and the policy was intended to cover the whole of those items. Having charged the shipowners with the premiums, they deemed it advisable to insure on their account.

The efficiency of the insurance, therefore, depended on that of the ratification. That was not made till after the loss. The cases on the point lay down that such a ratification is good. Mr. Benjamin's contention may be good in itself, but the cases are of too great historical authority to be now overruled; they have been too long accepted and acted upon.

But, further, I think this exception is a good one on its own merits. The loss is very likely to happen before ratification, and that is a circumstance which is in the minds of the underwriters at the time they subscribe the policy.

Ratification, then, as a fact, having taken place, can the whole amount be recovered on the policy? Now you cannot open the policy to inquire into the question whether there has or has not been overvaluation, but you can do so to see if the claim of the assured is co-extensive with the subject matter of the insurance. Here it is clear that it is not, for, if it were, the assured would be paid twice over.

Jessel, M.R.—The first question is, was the insurance on behalf of the shipowners? I have no doubt at all that it was.

Then, what did they insure? In a valued policy you cannot open the policy; but that does not touch the question of what it was that was valued. Here the wording of the policy may cover either the whole or the residue only of the freight still remaining due to the owners. We must look at the evidence. Now, 5941*l.* 1*s.* 2*d.* is got by adding together the gross freight, the advances, the address commission, and the commission on the advances. Thus the address commission has in reality been twice included, but we cannot look to that. But as to the question of intention, the figures speak for themselves.

Then, has it been ratified? I agree with the Lord Chief Justice; the decisions on that point are now too old and have been too long acted upon to be now upset. They have also long been incorporated in the text books, which does not make them law it is true, but causes the merchants to act upon them. It is an exception to the general rule no doubt, but there are other exceptions, and this is a convenient one.

Then what has happened since? The shipowners have received 5500*l.* There is a question whether or not the 441*l.* has also been paid. Defendants say it has. It belonged to Lorrain and Co., they say, and not to you, and more, they have been paid it under their other policy. That policy was for 512*l.* 13*s.* 5*d.* in three items: (1) 23*l.* 19*s.* 6*d.*, commission and premium on advances; (2) 343*l.* 15*s.* 11*d.*, premium and advances; (3) 144*l.* 18*s.*, address commission. This address commission was also an advance under the charter-party, for Lorrain and Co. might have asked for it at once, or the captain might ask it to be lent him, which was actually done in this case, as it was included in the account accepted by him. Therefore the whole sum was advanced against freight. But it would have been so as to this address commission quite independently of the charter-party, for it is not set off but retained. Freight is to be paid less that which the charterer has a right to retain by mercantile usage. The sum, therefore, has been already paid, and it cannot be again recovered.

Mellish, L.J.—I am of the same opinion. I agree with the Common Pleas on all the points of which they took notice. Our decision turns on a point which they did not notice.

The question is, what was included in the 5941*l.* 1*s.* 2*d.*? Was it the whole freight, or the whole freight less the advances? Now the insurance was for the benefit and on account of the shipowners. They were interested in the freight less advances, not in the advances at all. The words may mean only freight less advances; and, therefore, I should have felt inclined to conclude that they did mean what they must be taken *primâ facie* to mean. But the sum exceeds not only the residue of the freight, but the whole freight including the advances. Therefore, the question comes, what did they estimate? From the facts I draw the inference that the whole freight was insured, and not only that but some other sums that were added to it. There is no rule of law preventing us, on those facts, from looking into the valued policy. The sum the shipowner is entitled to recover is that proportion of 5941*l.* 1*s.* 2*d.* which his interest in freight is of the whole freight. The amount of the advances, therefore, becomes important in this calculation. The premium they have a right to charge is not three per cent. but one and three-quarters per cent., but that leaves this decision the same.

Pollock, B.—I am of the same opinion. It is clear, in my opinion, that the policy was for the shipowner, and that the insurance was on the whole freight. We are not debarred from looking to see what was the subject-matter of the insurance. We therefore arrive at the same conclusion, whether we regard it as an insurance without interest, or as an insurance already paid. As to ratification, I think there is no strict analogy between an insurance contract and another; and I also am of opinion that the present rule should be upheld on grounds of policy.

Attorneys for appellants, *Hollams, Son,* and *Coward.*

Attorneys for respondents, *Waltons, Bubb,* and *Walton.*

Wednesday, May 24, 1876.

The Swansea Shipping Company (Limited) *v.* Duncan Fox and Company.

Practice—The Judicature Act 1875*—Order XVI., rr.* 17, 18, 19, 20, 21*—Order XVI., rr.* 1 *to* 4*—Defendants' power to cite third party—Service of notice out of the jurisdiction.*

The court, on the application of defendant in an action, will order service of a notice citing a third party to appear in the action under rr. 17 *and* 18 *of Order XVI., where it is satisfied that there is a material question to be tried in the action, common both to the plaintiff and the defendant, and the defendant and the third party, although the whole question to be tried is not precisely identical in both cases, and that the plaintiff will not be prejudiced by so calling in the third party.*

The plaintiffs sued the defendants for breach of a charter-party, and claimed a sum for demurrage at the rate of 12*l. a day by reason of the defendants, who were the charterers, having failed to discharge the cargo "as fast as the custom of the port of discharge would allow" according to their contract. Whilst the ship was on her voyage the defendants sold the cargo to arrive to third parties in Scotland, who, by the contract of sale, were to name the port of discharge and pay lighterage, if any. The third parties named Leith as the port of discharge, and by the usage of trade there purchasers of a cargo to arrive were bound to discharge according to the custom of the port of Leith.*

Held (reversing the decision of the Queen's Bench Division below), that the defendants might issue a notice under rr. 17 *and* 18 *of Order XVI., citing the third parties to appear in the action.*

Held also that such notice might properly be served on the third parties in Scotland, as rr. 1 *and* 4 *of Order XI. apply to service of notices under rr.* 17 *and* 18 *of Order XVI.*

This was an appeal from an order of the Queen's Bench Division discharging an order made by Master Unthank.

The plaintiffs, by their statement of claim, alleged that by a charter-party of the 18th Feb. 1875, the plaintiff's ship *Helen Burns* being then at Valparaiso, it was agreed that the ship should proceed to Iquique and Pisagua, and the defendants should there load a full cargo of nitrate of soda in bags, which the plaintiffs agreed to convey to Queenstown or Falmouth for orders, and thence to a specified port of discharge as ordered, and there deliver the whole of her cargo, which the defendants agreed to discharge as fast as the custom of the port would allow, with 12*l.* a day demurrage. That the ship arrived at Leith, her specified port of discharge; but the defendants did not discharge the cargo as fast as the custom of the port allowed, but kept the cargo undischarged for thirty-one days beyond that period. The plaintiffs' claim was for thirty-one days demurrage at 12*l.* per day.

On the application of the defendants an order

was made by Master Unthank on the British Agricultural Association (Limited), under Ord. XVI., r. 17, requiring the British Agricultural Association to appear within ten days, and allowing the defendants to serve a notice on the British Agricultural Association accompanied by a copy of the plaintiffs' statement of claim under Ord. XVI., r. 18.

The defendants made an affidavit in support of their application for this order. In the affidavit it was stated that after the loading of the cargo, and before the arrival of the ship at Queenstown or Falmouth, the cargo was purchased from the defendants to arrive (through brokers at Liverpool acting for buyers and sellers) by the British Agricultural Association, Limited, a company carrying on business at Leith, in Scotland, that on the arrival of the ship at Falmouth, the Association ordered her to discharge at Leith, and, on the ship's arrival, the Association took discharge of the cargo over her side, the defendants taking no part in such discharge, and that, by the terms of the agreement of purchase, and according to the custom of the trade, the Association are bound to indemnify the defendants, and repay them any sum due to the plaintiffs for the detention of the ship at her port of discharge.

The notice served by the defendants in pursuance of this order upon the Association set out the nature of the plaintiffs' claim against the defendants, and then stated "The defendants' claim to be indemnified by you against liability in respect of the alleged breach of charter-party, on the ground that, as buyers of the cargo and holders of the bill of lading, you neglected to unload the vessel at Leith, to which port she was ordered, with due dispatch."

The order of Master Unthank, together with he above notice and a copy of the plaintiffs' statement of claim, was served upon the Association at Leith.

The Association applied to Archibald, J., at chambers, to rescind the order of Master Unthank. Archibald, J., referred the matter to the court.

The secretary of the Association made an affidavit in support of the application to rescind, in which it was stated that the Association were only purchasers of the cargo, and not, as alleged in the notice, holders of bills of lading or shipping documents, and were not parties in any way under the contract of charter-party. That the claim of the defendants against the Association arose, if at all, wholly in Scotland, and beyond the jurisdiction of the court, and must, if it exist, all depend upon the custom of the port of Leith.

The contract contained in the "sold note," between the defendants and the British Agricultural Association, was as follows:

British Agricultural Association (Limited).

We have this day bought for you 1100 tons, more or less, being the entire cargo of nitrate of soda expected to arrive per *Helen Burns*, at 11*s.* 6*d.* per cwt., delivered at a safe port in U. K., or 11*s.* 9*d.* in a safe port between Havre and Hamburg. If ordered to U. K., sellers to pay usual charges, according to the custom of the port of discharge. Lighterage, if any, to be paid by buyers. Payment in cash in fourteen days from last day of weighing. Payment before delivery if required.

The Queen's Bench division made an order discharging the order of Master Unthank, and the defendant now appealed against this decision. The case in the Queen's Bench Division will be found fully reported, *ante*, p. 166.

J. C. Mathew for the appellant.—The contract for the sale of the cargo between the defendants and the British Agricultural Association (Limited), is silent as to how the cargo is to be discharged, but the terms of the charter-party between the plaintiffs and the defendants are "to deliver the cargo as fast as the custom of the port should allow." The question is whether the two contracts are *ad idem*. Where there is a common fact which, by calling in the third party, can be settled once for all, and you do not embarrass the plaintiff, you can cite the third party in order to have the common issue tried. No questions are precisely identical, but the British Agricultural Association contract is substantially the same as that between the plaintiffs and the defendants, viz., to deliver within the time limited by the custom of the port of discharge. The measure of damages, no doubt, would be different in each case on breach of the contract, but that does not make any difference, there being an issue common to both contracts. The defendants are entitled to cite the third party, in order to have it settled once for all. Secondly, there is nothing to prevent the British Agricultural Association, residing in Scotland, from being served with an order under rules 17 and 18 of Order XVI. This contract was entered into within the jurisdiction, and service of notice is to be "according to the rules relating to service of writs of summons," which may be served out of the jurisdiction, under Order XI.

Thesiger, Q.C. and *Castle*, for the British Agricultural Association.—As to the second point under rule 20 of Order XVI., if a person served as mentioned in rule 18, desires to dispute the plaintiff's claim in the action as against the defendant, on whose behalf the notice has been given, he must enter an appearance in the action within eight days after the notice has been given. It would in most cases be impossible to appear within the time, when the third party is out of the jurisdiction, and it was not intended by the rules that he should. [Jessel, M.R.—Rule 20 of Order XVI. must be read with rule 4 of Order XI., in which service of a notice out of the jurisdiction is provided for.] As to the first point, the contract between the plaintiff and the defendant is on the charter-party alone. The action is really for damages, and there is nothing to show that the charter-party was brought to the notice of the British Agricultural Association. The contracts differ in this, that the purchaser is not bound to find a place for the discharge of the cargo, while the charterer is.

J. C. Mathew replied.

Jessel, M.R.—This is an appeal from an order made by the Queen's Bench Division, discharging an order made by Master Unthank, allowing the defendants in the action to serve a notice on third persons, who are a company, and not parties to the action. The question is to be decided upon the construction of various rules of Order XVI., and the effect of those rules is this. By rule 17, "When the defendant claims contribution or indemnity, or any other remedy or relief against any other person, or where, from any other cause, it appears to the court or a judge that a question in the action should be determined, not only as between the plaintiff and the defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the court or judge may, upon notice being given to

such last mentioned person, make such order as may be proper for having the question so determined." Under that rule the order complained of by the British Agricultural Association was made. Rule 18 provides the mode in which such notice is to be given; the leave of the court or a judge is required before issuing such notice, and it is to be served "according to the rules relating to the service of writs of summons," and it may be in the form given in the appendix. Form 1, Appendix B., is the form provided, and part of it is that if the third person wishes to dispute the plaintiff's claim he must cause an appearance to be entered within eight days. If the third party desires to appear he can do so, and by rule 20 if he appears, he must do so within eight days, and if he does not cause an appearance to be entered for him, he is bound by the judgment given in the action, but the rule provides that a further time for entering an appearance may be allowed by a judge. Then by rule 21, which is an important one, "If a person not a party to the action, served under these rules, appears pursuant to the notice, the party giving the notice may apply to the court or a judge for directions as to the mode of having the questions in the action determined; and the court or a judge, upon the hearing of such application, may, if it should appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleading to be made, and generally may direct such proceeding to be taken, and give such directions as to the court or a judge shall appear proper for having the question most conveniently determined, and as to the mode or extent in or to which the person so served shall be bound or made liable by the decision of the question." So that a third party can by the aid of the court or a judge under this rule, limit the extent of the decision by which he is bound, and a judge may give directions as to the portion of costs to be borne by the third party, and make the actions distributive.

As to the service of a notice out of the jurisdiction, Rule 1 of Order XI. provides that by leave of the court or a judge, service of a writ may be made, or notice of a writ of summons may be served out of the jurisdiction whenever the contract was made, as was the case here, within the jurisdiction. Rule 4 of Order XI. provides that "any order giving leave to effect such service or give such notice, shall limit a time after such service or notice, within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.

The first objection on the part of the British Agricultural Association is that as the association resides in Scotland, the rule as to the service of notice to third parties does not apply to persons or corporations out of the jurisdiction. The answer to that is that Order XVI., Rule 17, provides that service of the notice shall be "according to the rules relating to the service of writs of summons," and therefore Rule 1 of Order XI. applies. But it is said that by Rule 20 of Order XVI., the time in which a third party served with a notice under Rule 17 may cause an appearance to be entered is within eight days, which is insufficient when the party served resides out of the jurisdiction and in a distant country, and the proviso, as to getting the time extended, would be inapplicable to the case of a person abroad, and, not intended to apply to persons out of the jurisdiction. No doubt when rule 20 was drawn this case of third person out of the jurisdiction was not in the mind of the draftsman. The answer is to be found in rule 4 of Order XI., where it is provided that the order giving leave to serve a notice out of the jurisdiction on the third parties, is to name a time within which a defendant living out of the jurisdiction is to enter an appearance, depending on the place or country where the writ is to be served; and if the number of days allowed for appearance is more than eight, then rule 20 of Order XVI. must be taken to be so far modified that an appearance within the time limited, though more than eight days, would be sufficient.

On the other ground, upon which the Queen's Bench Division seem to have mainly decided, it is said that the whole cause of action between the plaintiffs and defendants, and the defendant and third party must be identical in order to allow the defendants the advantage of rule 17. I do not think that is so; no doubt the question between them must be a substantial "question" in the action, and it is not every fringe of the subject which will do. The court can consider whether the plaintiff if he objects to the introduction of the third party, would be prejudiced or delayed in his action. The plaintiffs do not object here.

The object of these enactments was to prevent the same question being tried twice over, where there is any substantial question common as between the plaintiff and defendant in the action, and as between the defendant and a third person; and in such a case the third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question once for all. And the point really is whether there is such a "question" in the present case, which can advantageously be tried and decided, not only as between the plaintiffs and the defendants, but as between the defendants and the British Agricultural Association.

The action was brought on a charter-party, and the alleged breach is that the defendants failed to discharge the cargo as fast as the custom of the port of Leith would allow according to the terms of the charter-party, and the claim is for 12*l.* a day demurrage during thirty-one days. The defendants say that they sold the cargo to arrive to the British Agricultural Association, and that a sale of cargo to arrive casts upon the purchaser the same obligations as to discharge as the vendor was under, and that that is the usage of trade. There is an affidavit filed which states this, and it is uncontradicted.(*a*) On the other hand it is said that whilst the defendants were bound to discharge the vessel and find a berth for her, the buyer of the cargo "to arrive" has to take delivery only, and that the question might be complicated by having to consider how far the default was the defendants, or how far the default of the defendants' vendees. But by the contract between the defendants and the British Agricultural Associa-

(*a*) His Lordship referred to an affidavit filed for the defendants since the hearing in the Queen's Bench Division, and which after some hesitation, was allowed by the court to be used on appeal.

tion, the latter are to name the port of discharge, and that being so, it seems to me unreasonable, as they might name a place where the defendants had no agent, that they should not find a berth or discharge the ship. This view is strengthened by the fact that the buyers are to pay for lighterage. It appears to me to be the fair construction of the contract that the purchasers were to provide for the discharge, and, I think, therefore, that there is a substantial question common both between the plaintiffs and defendants, and the defendants and the British Agricultural Association as to whether the ship was discharged as fast as the custom of the Port of Leith would allow, and that the defendants may properly cite the third parties in order to have it decided.

Kelly, C.B.—The substantial question to be tried between the plaintiffs and the defendants is whether the cargo of the plaintiffs' ship, the *Helen Burns*, was discharged as fast as the custom of the port of Leith would allow, and there is another question as to whether a berth was found for the ship. If a berth was not found the defendants would be liable. Then the question arises as between the defendants and third persons, whether the British Agricultural Association, in Scotland, is liable on the same ground and to the same extent to the defendants, as the defendants are alleged to be to the plaintiffs. It seems to me that they are. They purchased the cargo to arrive, and by their contract would be liable to discharge it according to the custom of the port. Here then there is a question to be determined between the defendants and the British Agricultural Association, which is really the same as the question between the plaintiffs and the defendants, and the defendants are entitled under the rules which have been referred to under Order XVI. to have the question determined once for all between themselves and the British Agricultural Association. I am of opinion, therefore, that our judgments should be for the defendants, and that the judgment of the Queen's Bench Division should be reversed.

Mellish, L.J.—I am of the same opinion. There is no doubt in this case as to the position of the defendants, who as charterers are sued for not having discharged the cargo as fast as the custom of the port of Leith would allow, and who claim to be indemnified by third persons—the British Agricultural Association, who, the defendants say, ought to have discharged the cargo in the same way as the defendants themselves were bound to do. I think if the defendants make out a *primâ facie* case that the substantial question between themselves and the plaintiffs is the same as between themselves and the third persons, the defendants are entitled to bring in those third persons, so as not to have the same question determined twice over. I do not think that we can now come to any final decision, even on the point whether there is the same obligation as to discharging between the plaintiffs and the defendants and between the defendants and the association; because to settle that question might involve trying the whole case between the defendant and their vendees. If the questions in dispute between the defendants and the third persons were made to appear to us really different, that of course would be a ground upon which the third persons might object to be brought in, and upon which we ought to refuse the order; but the Act, I think, gives no choice in the matter, where, as in this case, there is a clear *primâ facie* case made out by the defendants of the identity of a material question to be determined between the plaintiffs and the defendants, and the latter and the British Agricultural Association, and the plaintiff will not be prejudiced. In the contract between the defendants and the third persons I think it is implied that by the custom of the trade the vendees should discharge the cargo as fast as the custom of the port of discharge would allow, and the vendees are to pay the lighterage (if any), and name the port of discharge, which shows that as far as regards their contract with the defendants, they and not the defendants were to take in hand the discharge of the cargo. The affidavit before us so states, and is not contradicted. Moreover, upon the terms of the contract the buyers are to name the port of discharge and pay lighterage, if any, which goes to show that as between them and the defendants they are the persons to find the berth and conduct the unloading and not the defendants.

It is said that there may be a different measure of damages between the plaintiffs and the defendants, and between the latter and the third persons, because the British Agricultural Association are not bound by the demurrage clause in the charter-party, which is not mentioned or referred to in their contract of sale, and of which they had no knowledge; but the third persons would only be bound to the extent ordered by the judge under rule 21 of Order XVI., and the common question here being only whether or not the cargo was discharged as fast as the custom of the port of Leith would allow, the British Agricultural Association cannot be injured by any other decision in the case.

I am of opinion, too, with the Master of the Rolls, that the notice may be served out of the jurisdiction.

Denman, J.—I am of the same opinion. I think that the order of Master Unthank was rightly made under the 17th and 18th rules of Order XVI. As to the service I agree with the Master of the Rolls. I think that no injustice can be worked, when we look at rules 18 and 21 together, power being given under those rules to limit the effect of the notice on a third party, by directing upon the decision of what question in the action the third party is to be bound so as not to prejudice him.

Order of Queen's Bench Division reversed. Order for service of notice affirmed.

Solicitors for the plaintiffs, *Williamson* and *Co.*, for *H. Field*, Swansea.

Solicitors for the defendants, *Field, Roscoe*, and *Co.*, for *Bateson* and *Co*, Liverpool.

Solicitors for the British Agricultural Association, *Simpson* and *Co.*

Monday, Feb. 28, 1876.

The Belgic.

ON APPEAL FROM THE ADMIRALTY DIVISION.

Damage—Collision leaving dock—Dock master's authority—Pilot—Negligence of person in charge of ship—Insufficiency of equipment.

A vessel leaving dock with a pilot on board, and within the space over which the dock master's

authority extends by statute, is responsible for damage resulting from the use of a tug of insufficient power by her master, even when such tug is in the general employment of the Dock Company, there being no obligation on the Dock Company to supply a tug.

This was a cause of damage instituted in the City of London Court by the Thames Iron Works and Shipbuilding Company (Limited), the owners of the dumb barge or lighter *Kertch* against the screw steamship *Belgic* (belonging to the port of Liverpool), and the Oceanic Steam Navigation Company (Limited) the owners of that vessel for the total loss of the *Kertch*, and her cargo through the alleged negligence of those on board the *Belgic* whilst that vessel was coming out of the Victoria Docks into the Thames on the 25th Nov. 1874. The cause was heard by Mr. Serjeant Petersdorff, deputy judge, on the 23rd July 1875, when it was proved that the *Belgic*, a vessel 370ft. long, was coming out of the Victoria Docks stern first into the river Thames, that there was a pilot on board, who said he was not in charge, but was in readiness to take charge when the vessel got into the river, and that the dock master was on the quay giving directions, that the wind was blowing strong from the S.W. and up the river across the dock entrance, and that it was about an hour before high water, the tides being spring. There was a contradiction of testimony as to the person by whom some of the orders were given to regulate the movements of the ship, but at a time when all the ropes were cast off from the quay, and a tug of about 50-horse power belonging to the Dock Company had a hawser made fast to the starboard quarter of the *Belgic*, and was towing on it down stream, the force of the wind and tide on the *Belgic's* quarter overpowered the tug, and caused the *Belgic's* port quarter to come into contact with some barges lying at the upper pier head waiting to go into dock, crushing and sinking two of them, the *Kertch*, whose owners brought this action, and the *Industry*, whose owners brought a separate action, which it was agreed should be decided by the result of this one. There were a great number of barges lying at the same place, and it was proved that it was not uncommon for barges to lie there when waiting to go into dock, and that the Dock Company's servants were aware that the *Kertch* was lying there and had assisted to make her fast in her then position after moving her a little further from the dock gates than she originally had placed herself. On the quay wall and within a hundred yards of the place where the barges lay was a board and painted on the board:

Notice to Lightermen and others.

No craft or vessel of any kind is allowed to lie at the entrance, or within one hundred yards of the pier head of these docks, except with the permission of the dock master. Lightermen or other persons obstructing by their craft the free access to the landing place by the steam ferry boat, or allowing any barge or other vessel to be within the above limit without such permission, and, failing to remove such craft or vessel as being required to do so by the dock master, are liable to a penalty of five pounds, and a further sum of twenty shillings for every hour the said craft or other vessel is allowed to remain in such position (10 Vict. c. 27, s. 63); and the dock master is empowered to remove such craft or vessel, and hold the same until the cost of such removal is paid by the owner (10 Vic. c. 27, s. 58).

(Signed) Charles Norman, Superintendent.
London and St. Katherine Docks Company.
August 1870.

After the collision the *Belgic* anchored for a few minutes outside the dock gates, and then proceeded on her voyage to New York. She had a cargo, but no passengers on board. The defendants had given notice of the defence of compulsory pilotage in accordance with Order XLIX. of the General Orders (Admiralty Jurisdiction) County Courts 1869, but had given no notice of any other special defence, and the following agreement had been made between plaintiffs and defendants:

In the City of London Court, the *Belgic*.

All the orders of the pilot were properly carried out by the crew of the *Belgic*. No order was given by the master or officers of the *Belgic* to the helmsman or engineer of the vessel, or step taken by them, except by the direction of the pilot or dock master.

Dated this 30th day of June 1875.

(Signed) R. E. Webster, for plaintiffs.
Gainsford Bruce, for defendants.

The learned Deputy Judge, after hearing *Raikes* with him *Webster*, for the plaintiffs, and *Bruce*, with him *Malden*, for the defendants, and consultation with the Nautical Assessors, gave judgment in the following terms: "Having had the very efficient and great assistance of the gentlemen assisting me in this inquiry, I have come to a conclusion, and so far as facts are concerned they agree with me, and we find that in fact the vessel was not under his (*i.e.*, the pilot's) control either immediately before the collision or at the time of the collision or subsequent to it. I do not decide any point of law. I decide upon the evidence, and that evidence is recognised by the two assessors, who think that at the time of the collision the pilot was not the official in control or management of the vessel. With regard to the other point, as to whether there was negligence on the part of the master of the *Belgic*, these gentlemen, who are far more competent than I am to form any opinion upon the subject, have come to the conclusion, as a matter of fact on which they entertain no doubt, that, looking to the time, looking to the state of the tide, and looking to the condition of the wind, the necessary and proper precautions were not taken by the master of the *Belgic*, and that the accident which did happen—the collision which had led to this inquiry—was the result of his fault. We decide no point of law: we simply decide those facts as a matter of fact, without reference to any question that could be discussed of a technical character. Our judgment, therefore, is in favour of the plaintiff."

From this judgment the defendants appealed to the High Court of Admiralty, and on the 16th Nov. 1875 the appeal came on for hearing.

The statutes on which the argument turned as to compulsory pilotage were The Victoria (London) Docks' Act 1853 (16 & 17 Vict. c. cxxxi.).

Sect. 49. That the docks shall be deemed and held to be situate within and part of the Port of London.

The Pilotage Act (6 Geo. 4, c. 125), repealed by the Merchant Shipping Repeal Act 1854 (17 & 18 Vict. c. 120), was as follows:

Sect. 63. Provided always, and be it further enacted, that when any ship or vessel shall have been brought into any port or ports in England by any pilot duly licensed, nothing in this Act contained shall extend, or be construed to extend, to subject to any penalty the master or mate, or other person belonging to such ship or vessel, and having the command thereof, or, if in ballast, any person or persons appointed by any owner, or master, or agent of the owner thereof, for afterwards removing such ship or vessel in such port or ports for the purpose of entering into or going out of any dock, or for charging the moorings of such ship or vessel.

Sect. 72. That any licensed pilot who shall, without lawful excuse, refuse to take charge of any ship wanting a pilot, upon being required so to do by the master, or any person having the command thereof, or being entrusted therewith shall, for every offence, forfeit 100*l*.

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

Sect. 353 continues all exemptions from compulsory pilotage existing at the passing of the Act.

Sect. 365. If any qualified pilot commits any of the following offences: that is to say . . . . (8) refuses or wilfully delays, when not prevented by illness or other reasonable cause, to take charge of any ship within the limits of his licence upon the signal for a pilot being made by such, or upon being required to do so by the master, owner, agent, or consignees thereof, or by any officer of the pilotage authority by whom such pilot is licensed, or by any principal officer of Customs . . . . He shall, for each such offence, in addition to any liability for damages at the suit of the party aggrieved, incur a penalty not exceeding 100*l*. and be liable to suspension or dismissal, &c., &c.

And those on which the argument as to the authority of the dockmaster were: The Harbour Docks and Piers Clauses Act 1847 (10 Vict. c. 27).

Sect. 2. The expression, "The Special Act," used in this Act shall be construed to mean any Act which shall be hereafter passed, authorising the construction or improving of any harbour, dock or pier, and with which this Act shall be incorporated; . . . . and the expression "the prescribed limits," used with reference to the harbour, dock, or pier, shall mean the distance measured from the harbour, dock, or pier, or other local limits (if any), beyond the harbour, dock, or pier, within which the powers of the harbour master, dockmaster, or pier-master, for the regulation of the harbour, dock, or pier, shall by the Special Act be authorised to be exercised . . . . The expression "the harbour master," shall mean with reference to any such harbour, the harbour master, and with reference to any such dock, the dockmaster . . . . respectively appointed by virtue of this or the Special Act, and with respect to all acts authorised or required to be done by such harbour master, dock-master, or pier master, shall include the assistants of every such harbour master, dock master, or pier master.

Sect. 52. The harbour master may give directions for all or any of the following purposes (that is to say), for regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits, if any, and its position, moving or unmoving, placing and removing, whilst therein, &c.

Sect. 53. The master of every vessel within the harbour or dock, or at or near the pier, or within the prescribed limits, if any, shall regulate such vessel according to the directions of the harbour master, made in conformity with this and the Special Act; and any master of a vessel, who, after notice of any such direction by the harbour master served upon him, shall not forthwith regulate such vessel according to such direction shall be liable to a penalty not exceeding 20*l*.

Sect. 58. If the master of any vessel in or at the harbour, dock, or pier, or within the prescribed limits, if any, shall not moor, unmoor, place or remove the same according to the directions of the harbour master, or if there be no person on board of any such vessel to attend to such directions, the harbour master may cause such vessel to be moored, unmoored, placed, or removed, as he shall think fit, within or at the harbour, dock, or pier, or within the prescribed limits, and for that purpose the harbour master may cast off, unloose or cut the rope, or unshackle or break the chain by which any such vessel is moored or fastened: and all expenses attending the mooring, unmooring, placing, or removing of such vessel shall be paid to the undertakers by the masters of such vessel: Provided always, that before the harbour master shall unloose or cut any rope, or unshackle or break any chain, by which any vessel, without any person on board to protect the same, shall be moored or fastened, he shall cause a sufficient number of persons to be put on board such vessel for the protection of the same.

Sect. 63. As soon as the harbour or dock shall be so far completed as to admit vessels to enter therein no vessel, except with the permission of the harbour master, shall lie or be moored in the entrance of the harbour or dock, or within the prescribed limits, and if the master of any vessel either place it or suffer it to remain in the entrance of the harbour or dock, or within the prescribed limits without such permission, and do not, on being required so to do by the harbour master, forthwith proceed to remove such vessel, he shall be liable to a penalty not exceeding 5*l*., and a further sum of 20*s*. for every hour that such vessel shall remain within the limits aforesaid, after a reasonable time for removing the same has expired after such requisition.

The Victoria (London) Docks Act 1853 (16 & 17 Vict. c. cxxxi.).

Sect. 46. That the limits within which the powers of the superintendent and dock master for the regulation of the dock shall be exercised, shall be the dock works and premises of the company, and a distance of 100 yards into the river Thames from the entrance gates of the said docks, such distance to be computed from the centre of the outer lockgates of the said dock: Provided always, that the power of the Lord Mayor, as Conservator of the River Thames, and of the Harbour Masters of the Port of London, within the aforesaid limits, shall not be prejudiced, lessened, or interfered with by this Act.

London and St. Katherine Docks Act 1864 (27 & 28 Vict. c. clxxviii.).

Sect. 3 incorporates the Harbour, Docks, and Pier Clauses Act 1847 (10 Vict. c. 27), with the exception of certain sections other than those set out above.

Sect. 58 vests the Victoria Docks in the London and St. Katherine Docks Company.

Sect. 61 repeals Victoria (London) Docks Act 1853 (16 & 17 Vict. c. cxxxi.).

Sect. 62 saves certain sections set out in schedule 4, part 3, from the general repeal of sect. 61, amongst which are, *inter alia*, Victoria (London) Docks Act 1853 (16 & 17 Vict. c. cxxxi.). Sect. 46 set out above.

Bruce (with him *Butt*, Q.C.) for appellants.—The *Belgic* was by law bound to carry a pilot; she was navigating the waters of the port of London (The Victoria (London) Docks Act 1853, 16 & 17 Vict. c. cxxxi., s. 49), which was not her own port, for she is registered at Liverpool, and she had a pilot on board, who was therefore in charge: (*Lucey* v. *Ingram* 6 M. & W. 302.) She comes within none of the exemptions either of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 379, or of the Pilot Act (6 Geo. 4, c. 125), s. 59. All the orders of the pilot were obeyed. The captain gave no order himself; he only carried out those given by the proper official. Moreover, the order to go astern and to take a tug were given by the dock master at a time when the *Belgic* was within the space over which his authority extends (the Victoria (London) Docks Act 1853, 16 & 17 Vict. c. cxxxi., s. 46), and therefore we were bound to obey the orders of the dockmaster under a penalty, and we did obey them (the Harbour, Dock, and Pier Clauses Act 1847, 10 Vict. c. 27, ss. 52, 53). The relation of master and servant never existed between the dockmaster and ourselves, and therefore we are not liable for the consequences of his acts: (*The Bilboa*, Lush. 149). If anyone is liable for the damage it is the dock company, the dockmaster, or the pilot. The *Kertch* was lying in an improper place in defiance of the Dock Companies Regulations (the Harbour, Dock, and Piers Clauses Act 1847, 16 & 17 Vict. c. cxxxi., s. 63), and consequently was there at her own peril, and is not entitled to recover, as she brought the accident on herself by lying there. It was necessary for the *Belgic* to go out of dock that tide, as she prevented other vessels from going in and coming out, and she would have gone out in safety had it not been for the unforeseen circumstance of a schooner

anchoring just at the time outside the dock entrance, which rendered it impossible for her to go out in the way proposed. When that incident took place the course pursued was the best and most prudent one open to the *Belgic*, and the accident which ensued was under the circumstances inevitable.

Webster and *Raikes* for the respondents.—The pilotage was not compulsory. It has been held that a vessel coming out of dock is within the exemption of The Pilot Act (6 Geo. 4, c. 125), s. 63: (*Lucey* v. *Ingram*, 6 M. & W. 302) In that case, however, the pilot had been required to take charge under sect. 72 of the same statute, and, therefore, was in charge. The whole of 6 Geo. 4, c. 125, was repealed by 17 & 18 Vict. c. 120. But the exemption of sect. 63 is continued by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 353: (*General Steam Navigation Company* v. *British and Colonial Steam Navigation Company*, L. Rep. 4 Ex. 238; 20 L. T. Rep. N. S. 581; *The Earl of Auckland*, Lush 164, and on appeal, *ib.* 387.) The corresponding enactment to 6 Geo. 4, c. 125, s. 72, is 17 & 18 Vict. c. 104, s. 365(8), but here he had never been required to take charge, and, as he has himself sworn, was on board merely in readiness to take charge when the vessel got into the river. Under the circumstances he was not in charge; the order he gave to go ahead was given by him as the mouthpiece of the owners, to avoid a collision with the vessels outside. That order, however, did not cause the collision with the *Kertch*, but on the contrary, brought the *Belgic* again to a position of safety. The immediate cause of the collision was the subsequent employment of a tug of insufficient power. It is not the duty of the dock master to supply a tug. The defendants had a more powerful tug of their own in attendance, and had they used her, in all probability the collision would not have occurred. The dock master did not order the *Belgic* to use the dock company's tug, but suggested that a tug should be used, and offered the assistance of his. That offer was accepted by the *Belgic*, and a prudent man should have foreseen the result of employing so weak a tug by itself to perform such a service in such weather. On the *Belgic's* acceptance of the assistance of the tug, the tug became a portion of her (the *Belgic's*) appliances for going out of dock, and the *Belgic* is responsible for the inadequacy of the tug as much as she would be for the inefficiency of her own engines, or for a collision occasioned by the carrying away of a rope of obviously insufficient strength for the purpose for which it was used. The *Kertch* was lying in a perfectly proper place; she was known to be there by the servants of the dock company, and indeed had been assisted by them to make fast in that place, and therefore, whether within or without the limit of the district over which the dock master's control extends (the Victoria (London) Docks Act 1853, 16 & 17 Vict. c. cxxxi., s. 46), she had a perfect right to be there. The notice to barges not to lie there is habitually disregarded by the dock company themselves, and appears to have been *ultra vires*, as it seems to apply to a district in the river over which the dockmaster's authority does not extend, as it professes to measure 100 yards from the pier head, which is much further out than the centre of the outer dock gates. There was no necessity for the *Belgic* to move at all out of the dock; she could remain as long as she liked on payment of her dues, and it was negligence on the part of her master to allow her to be sent out of dock at all at such a time. Looking to the state of the weather and the tide, this act of negligence was the original *causa causans* of the accident.

Bruce in reply.

Sir Robert Phillimore.—This is an appeal from the City of London Court in a cause of collision.

The *Belgic*, a screw steamer 370 feet long, and of between 2000 and 3000 tons, on the 25th of Nov. last, in the daytime, came stern foremost out of the Victoria Dock and ran into a dumb barge or lighter called the *Kertch*, and sank her, doing also damage to another barge. The *Kertch* brought her action against the *Belgic* in the court below, and obtained the judgment of the court in her favour. The learned judge, assisted by nautical assessors, said that he did not decide any point of law, but that he found as a fact that the pilot was not exercising control over the steamer, and that the master did not take proper precautions in coming out into the river, and therefore was to blame for the collision.

The appellant contends that this judgment ought to be reversed upon three grounds, viz.: First, that the *Kertch* was to blame for lying where she did; secondly, that the *Belgic* was not responsible because she was under the orders of the dockmaster or the pilot; thirdly, that the collision was inevitable.

This last ground may be at once disposed of. The collision was clearly evitable.

Then as to the first ground, the *Kertch* was a dumb barge, laden with wood and iron for a ship in the Victoria Docks. The barge arrived at dead low water near the dock entrance, and brought up outside. There were fifty or sixty barges also lying alongside. Two hours before high water the barge was ordered by the dock company's servants to shift higher up, which order she obeyed, and one of them handed a rope for making her fast after having been on board her, saying, "that will do, Bob; here is something that will hold you." Looking to these and other circumstances, I am of opinion that the barge was not to blame for lying where she did.

The remaining ground of objection is now to be considered. I agree with the opinion of counsel that the learned judge of the court below had not only a question of fact, but also to some extent of law to consider, because, if the master was to blame for this collision, it must be on the ground that neither the authority of the dockmaster nor of the pilot had superseded at the time of the collision the authority of the master. The dockmaster was naturally anxious to get rid of this long steamer in order to admit other vessels waiting to come in. The principal facts appear to be that the gates were opened about an hour and a half before high water. The dockmaster ordered the *Belgic* to go out astern. About this time a schooner dropped her anchor near the mouth of the entrance. The pilot, who says he was not at this time in charge, seeing that a collision with the schooner on the one side or the barge on the other would be inevitable if the *Belgic* went out, took upon himself to order the *Belgic* to go ahead, thereby stopping her

way. Upon this the dockmaster said, "What are you going to do? You can't stop here; you are stopping our work." The pilot said, "We are going to do nothing;" and, after a pause, the dockmaster said, "Well, will you let our tug take hold of you and pull you out?" The pilot said, "As you like." The vessel was pulled out. The tug proved too weak to hold the steamer off, and she ran into the barge. It has been pressed upon me that either the dockmaster or the pilot was in command; the pilot expressly says that he had not as yet taken charge, but I also think that the dockmaster was still exercising his authority.

I do not think it necessary to consider whether a captain would be obliged by the dockmaster to execute an order which manifestly brings about a collision. I think he would not be so obliged, but I need not decide that point, because I am of opinion that no command was given to the captain by the dockmaster. A proposal was made which was accepted on behalf of the captain. The dockmaster is not bound to find a tug for ships, at least no such obligation has been shown to me. The captain chose to adopt the tug as his own motive power for the occasion; it proved too weak, and the captain is as much responsible to the third parties for the consequence as if it had been his own tug.

I decline to reverse the decision of the court below, and I dismiss the appeal with costs.

From this judgment the owners of the *Belgic* again appealed, and the further appeal came on for hearing in the Court of Appeal before Cockburn, C.J., James, L.J., and Baggallay, J.A., on the 28th Feb. 1876.

Butt, Q.C. and *Myburgh*, for the appellants.

Webster and *Raikes* for respondents.

The COURT, without calling on the respondents, dismissed the appeal with costs.

Solicitors for the appellants, *Wood* and *Tinkler*.

Solicitor for respondents, *J. A. Farnfield*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by W. MCKELLAR, Esq., Barrister-at-Law.

Jan. 19 *and* 29, 1877.

LEASK *v.* SCOTT.

Stoppage in transitu—Consideration for transfer of bill of lading—Receipt and delivery after advance made—Vendor's lien.

On the 1st Jan., Geen and Co. obtained from the plaintiff, to whom they were largely indebted, a further advance of 2000l. on condition that they should deliver to plaintiff securities sufficient to cover the whole amount which would then be due from them. On the 3rd Jan. some securities were delivered, but they were not sufficient; and on the 5th Jan., Geen and Co., having that day unexpectedly received a bill of lading of a cargo consigned to them from the defendant abroad, and endorsed in blank (in return for which they accepted a bill of exchange payable in three months for the value), delivered the bill of lading, together with other securities, to the amount agreed to the plaintiff. On the 8th Jan., Geen and Co. became insolvent; and afterwards, but before the arrival of the cargo, the defendant claimed his right of stoppage in transitu in respect thereof:

Held, per Field, J., on motion to enter judgment, that under the circumstances the defendant was entitled to the cargo, the plaintiff's advance of 2000l. not having been made on the faith of the delivery of this bill of lading.

THIS was an interpleader issue, tried at Guildhall, before Field, J., and a special jury. The learned judge adjourned the case for further consideration upon the findings of the jury, under rule 4 of the Rules of the Supreme Court, December 1876 (Order XXXVI., rule 22 a).

Plaintiff was a fruit broker in London, defendant a merchant at Naples. Defendant consigned a cargo of nuts to Geen, Stutchbury, and Co., fruit merchants, in London, a firm indebted largely to the plaintiff. The question raised by the findings of the jury was whether the plaintiff, having *bonâ fide* received the bill of lading of this cargo, was entitled to the value thereof against the defendant's right of stoppage *in transitu*, under the following circumstances:

On Saturday, 1st Jan. 1876, Geen and Co. applied to plaintiff for a further advance of 2000*l.*, and plaintiff made the advance on condition that Geen and Co. would cover their existing liabilities to him, together with the new debt, by sufficient securities.

On Monday, 3rd Jan. Geen and Co. brought certain securities to plaintiff, but they were found to be insufficient, and Geen and Co. undertook to provide others to be added to those already delivered.

On Wednesday, 5th Jan., Geen and Co. received from the defendant's correspondent in London, the bill of lading of this cargo indorsed in blank, and accepted a bill of exchange at three months for the price of the nuts, the amount being something considerably over 2000*l.* No mention of this particular bill of lading had been made to plaintiff when he made his further advance to Geen and Co.

On the same day, Wednesday the 5th, Geen and Co. delivered this bill of lading together with other securities to the plaintiff, and thereby covered their advances from him according to their agreement of the previous Saturday, and their further undertaking of the Monday.

On Saturday, the 8th Jan., Geen and Co. became insolvent.

At some later period, but before the arrival in London, the defendant claimed to exercise his right of stoppage *in transitu* in respect of this cargo.

Jan. 19.—*Murphy*, Q.C. and *Webster*, moved to-day to enter judgment for the defendant.—Although all the plaintiff's proceedings were *bonâ fide*, there is no evidence of any actual consideration to the indorsee for this particular bill of lading; and further, even if there were any valuable consideration at all for the securities delivered, it amounted only to the sum of 2000*l.* The principle is laid down in the notes to *Lickbarrow* v. *Mason* (1 Sm. L. Cas. 7th edit., p. 813), that "the right to stop *in transitu* may be defeated by negotiating the bill of lading with a *bonâ fide* indorsee." It is not suggested here that the advance was made on the faith of this bill of lading, and at the time of the advance Geen and Co. were not indorsees at all. It was held by the

Privy Council in *Rodger* v. *The Comptoir d'Escompte de Paris* (3 Mar. Law Cas. O.S 271; L. Rep. 2 P. C, 393), that the forbearance or release of an antecedent claim is not a good consideration for an indorsement of a bill of lading, so as to defeat an unpaid vendor's right of stoppage *in transitu*. It was also there held that an assignee of any security, except a bill of exchange, stands in the same position as the assignor, as to the equities arising upon it. Authority for the second point may also be found in *Re Westzinthus* (5 B. & Ad. 817), *Spalding* v. *Ruding* (6 Beav. 376), and *Ex parte Alston, re Holland* (L. Rep. 4 Ch. App. 168). In the *Chartered Bank of India, Australia, and China* v. *Henderson* (L. Rep. 5 P. C. 501), the Privy Council followed the principles laid down in *Rodger* v. *The Comptoir d'Escompte de Paris*. See also *Lutscher* v. *The Comptoir d'Escompte de Paris* (L. Rep. 1 Q. B. Div. 709).

J. C. Matthew, for the plaintiff.—The findings of the jury preclude any further contention on the defendant's part. The facts in *Rodger* v. *The Comptoir d'Escompte de Paris* materially differ from those found here, the decision in that case being based mainly on the ground that the party who received the bill of lading knew that insolvency was impending over the transferor. That case is really the only authority which, in any way, throws doubt upon the application of the principle of stoppage in *transitu* to the facts here, and it is not really in point.

Webster was heard in reply. *Cur. adv. vult.*

Jan. 29.—FIELD, J.—This was an interpleader issue, in which the plaintiff, Mr. Leask, affirmed as against the defendant, Mr. Scott, that he was entitled to certain goods which were the subject of a bill of lading, dated 29th Dec. 1875, and the facts of the case shortly were these:—

The plaintiff, Leask, was a fruit broker in the city, and he had as what we may call one of his constituents, a firm of Geen, Stutchbury, and Co., who were fruit merchants in the city, and for many years—four or five—I forget precisely the exact number, Mr. Leask acted as fruit broker for that firm in their various transactions for buying and selling fruit. In the course of that time, the firm had become considerably indebted to him, and I think it may be taken that at Christmas 1875, there was something certainly like 10,000*l.* or 11,000*l.* due to him from the firm of Geen, Stutchbury, and Co. Now the firm did not improve in their pecuniary position during 1875, and very early in the following year they were in such difficulties that on the 1st Jan., which was the prompt day—the day on which they are bound to meet their prompts—they were unable to do so, and were short by a sum of 2000*l.* of the sum required for that purpose. Accordingly, on the morning of Saturday, the 1st Jan., the prompt day, according to the evidence of Mr. Leask, confirmed by Mr. Geen Mr. Geen called upon Mr. Leask (at that time they owed him 10,700*l.*), and what passed is described precisely in the same manner by Mr. Leask and by Mr. Geen. Mr. Geen said "I want 2000*l.*," whereupon Mr. Leask said, "I said you may have it, but you must first cover up your account." Upon that Geen said that he would, and he proceeded upstairs to Mr. Leask's cashier, and there he obtained a cheque for 2000*l.* Now, that was on the Saturday. There was a little doubt as to the exact date on which the bill of lading was deposited, but it could not have been before the Wednesday, because I believe I am right in saying that Geen himself did not obtain the bill until the 5th; at all events he did not obtain the bill later on. On one day, in the early part of the week, Mr. Geen, who had previously entered into a contract with the defendant, Mr. Scott, who was a merchant at Naples, for an unascertained quantity of nuts, in pursuance of that contract, received from Scott's correspondent in London the bill of lading in question, and it was indorsed to him in pursuance of the previous contract, and he accepted in exchange for that endorsement a bill at three months for the price of the goods. On the following day, in pursuance of the promise which had been made on the Saturday to cover up the account, Mr. Geen took this bill, endorsed in blank, to Mr. Leask, and deposited it with him, along with a great many other securities similar in character, for the purpose, as the jury have found, of covering up the account—that is, securing the whole balance due.

Now, at the trial there was no evidence given against the plaintiff, but the learned counsel for Mr. Scott went very fairly and properly into dates. I ought to add, on the 8th, the following Saturday, Geen, Stutchbury, and Co., stopped payment, and were insolvent. The securities that were handed to Mr. Leask were said to be worth something like 5000*l.*

Now, that being so, at the trial, it was denied that it was competent to Mr. Scott, the unpaid vendor, to stop the goods at the time that he did, that is to say, there was no question raised about the *transitus* being at an end. There was no question about Geen, Stutchbury, and Co., being insolvent, and it was conceded that he had a right to stop the goods as against Geen, Stutchbury and Co., but Mr. Leask said: "You have no right to stop the goods as against me because I come within the protection of the law, which says that the indorsee or transferee of the bill of lading for valuable consideration taking it without notice, taking it fairly and honestly, is entitled to the property as against the original vendor." That was contested hotly at the trial.

I left questions to the jury in order to raise the facts of the case, and the jury in answer to my questions gave these answers: "We first of all find that the plaintiff received the bill of lading honestly and fairly. We find that valuable consideration was given on the understanding of security being given, and we also find that the security given was to secure 2000*l.* and also the old account."

Now upon these findings, Mr. Murphy, with Mr. Webster, moved before me to enter the judgment for them. They did not contest the findings of the jury, but they said that the point that they disputed was this: They alleged that although it might be, and after the verdict of the jury must be taken to be, that the plaintiff did receive the bill of lading honestly and fairly, and that he received it in pursuance of that promise that security should be given, yet they said he was not such a transferee or indorsee of the bill for such valuable consideration as entitled him to hold it as against Mr. Scott.

Now in support of that position, they relied upon two cases: One of them is the well-known case of *Rodger* v. *The Comptoir d'Escompte de Paris* (L. Rep. 2 P. C. 393; 3 Mar. Law Cas. O. S. 271). In that case there was a firm of

Lyall and Still, and that they were in the anticipation of receiving certain bills of lading for certain goods which were about, as they expected, to arrive. They were very much pressed for money, and they obtained an advance from the person out at Hong Kong, upon the promise of which he got large advances upon the undertaking to furnish shipping documents for silk cargoes to be ready for the mail of the 15th December from Hong Kong. Now it seems to me, therefore, that case went one step further than this case. That case pointed to a particular class of documents which he was in anticipation of receiving, and he undertook therefore to furnish the cargo on certain shipping documents which he expected to receive. Now in this case it is quite certain that no specific cargo of any kind whatever was in the consideration of Mr. Leask. We do not know whether Mr. Geen on that Saturday expected that bill of lading to come as it did the following week. It may be that he did not. It may be that the documents were so far in advance that he might possibly have expected to get the bill of lading the following week, but he made no specific mention of the bill of lading—he made no specific condition with Mr. Leask that any particular security should be lodged. All he said was, "If you will give me 2000*l.* now, I will cover up the account." Now, that being so, in this case of *Rodger* v. *The Comptoir d'Escompte de Paris*, Lyall and Still were unable or unwilling to complete their promise, whereupon, the manager of the bank insisted, in a very strong letter, that they should give him that security which they promised, holding out a threat of criminal proceedings if they did not do so. There was another banker pressing them also, and the result was that Lyall and Still executed a deed of assignment, by which, after reciting the agreement referred to, and reciting that certain advances had been made on the faith of certain documents, it then proceeded to make over to the bank "the whole of the property, premises, and chattels specified in the schedule at the foot, with all the estate right, title, interest, claim, or demand of Lyall, Still, and Co., therein, or thereto, or arising thereout or therefrom." The schedule included amongst other things "all goods and bills of lading or other documents for all goods now on the way hither to arrive in December, 1866, or January, 1867," being the class of goods which had been referred to when they first made their promise to the banks to find security. Now, after that date the bill of lading which was in question in the case of *Rodger* v. *The Comptoir d'Escompte de Paris* arrived: "The documents arrived on the 27th Dec. 1866, and the 1st Jan. 1867, including the bill of lading for the goods." "These were then indorsed and handed over by Maclean (together with the policies on the goods) to Mr. Kaiser in performance of the agreement." After that the vendor stops the goods, and so the question arose between the indorsee of the bill of lading and the vendor, and the indorsee failed in that he was not assignee for valuable consideration. Now, it is worth while for a minute or two to advert to the important parts of the judgment. After setting out all the facts as I have stated them, it goes on in this way (p. 405): "The general rule so clearly stated and explained by Lord St. Leonards in the case of *Mangles* v. *Dixon* (4 H. L. Cas. 702) is that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This, as a general rule, was not disputed, but it was contended that the case of a bill of lading is exceptional, and must be dealt with on special grounds. Doubtless the holder of an indorsed bill of lading may in the course of commercial dealing transfer a greater right than he himself has; the exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorised possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest. In such a case, if the vendor is unpaid, one of two innocent parties must suffer by the act of a third: and it is reasonable that he who by misplaced confidence has enabled such third person to occasion the loss should sustain it"—and refers to the well-known case of *Lickbarrow* v. *Mason* as to that. Then the court go on to say why in their judgment that principle applies to such a case, but they say, "But in this case, at the time of the assignment, Maclean had not possession of the documents. Nothing was advanced on the faith of them. There is merely a general description of documents expected to arrive, without knowing their contents, or how far they might be limited or qualified. The property of the firm in the goods expected was not only subject to special stipulations in the contracts of sale in the case of two of the three parcels, but was also subject in all the three to the lien of the unpaid vendors"—as it is in this case—"and can it be contended that before Maclean got possession of the documents, when his firm was in a condition of undoubted insolvency, and the terms of the documents were not disclosed, there was conveyed to the respondents by this assignment the benefit of a prospective breach of trust and violation of contract?" And then, proceeding upon the general rule that you must give an honest interpretation and a fair interpretation to the words of any assignment, the court go on to say that they must read the words "all goods and bills of lading or other documents for all goods" to mean this—such a security as I can fairly and honestly give. That is, not any actual property I may have, but subject to the equities between me and anybody else. Then the following observation is made, which I adopt in this case:—"Doubtless the vendor's claim cannot prevail against the claim of a transferee for value given on the faith of a negotiable security fairly and honestly taken; to the extent to which he has so given value he has a prior claim. But the rule is founded on the reason of it as already explained; *cessante ratione cessat ipsa lex.* Where there is no advance made or value given upon the faith of the documents, where the object is simply by a sweeping clause to gather in whatever may be got to recoup the creditor of a debtor who had become insolvent for an improvident advance made upon the faith of a totally different security; where, upon the true construction of the assignment, no interest passed that would place the assignee in a better position than the assignor, and the bills of lading which subsequently came to hand were transferred expressly in performance of the agreement in this assignment, and without other consideration whatever, it appears to their Lordships that a

transfer so made, and under such circumstances, cannot be held sufficient to defeat the vendor's claim."

Now, that case and that principle came into discussion a little later on before the same tribunal, in the case of the *Chartered Bank of India* v. *Henderson* (L. Rep. 5 P. C. 501), and that case is valuable for this. As regards Lyall, Still, and Company, there was a similar promise to furnish shipping documents, a similar failure, and then there was a transfer by endorsement, but on the occasion of the transfer by endorsement of the bill of lading, the vendees, the transferors of the bill, had the bill in their custody, that is, in their possession, and although they had broken their previous promise the court said that the previous promise would not have been enough, but there was a sufficient bargain and agreement on the part of the bank not to proceed—to delay, give time, and to forbear upon the faith of the transfer of the bill of lading. Upon that ground the court, although distinguishing it from *Rodger* v. *The Comptoir d'Escompte de Paris* in every way upheld the principle of that case. Now, that that is the case is very clear from the judgment of Sir Barnes Peacock. I will not go through the case, but he says this (p. 510):—"It appears, then, that the bank purchased bills of exchange to the extent of 15,000*l.* from Messrs. Lyall, Still, and Company, and that they paid them the amount upon the stipulation that Messrs. Lyall, Still, and Co. were to hand them over shipping documents to the extent of the bills." Then they failed to do so. "They were urgently pressed to do so by the defendants; and the said firm, having been threatened by the defendants with immediate legal proceedings in the event of their failing to fulfil their said contract without further delay, promised the defendants that if they would abstain from commencing legal proceedings against them, and would consent to release them from their engagement to furnish the said shipping documents for silk and other China produce, and allow the said sum of 15,000*l.* sterling, which had been paid to them in advance for the said bills upon the faith of their undertaking, to deliver the said shipping documents as aforesaid to constitute an ordinary debt for money lent, they would deposit with the defendants other security for the repayment of the said sum; and they offered to deposit with the defendants at once in part fulfilment of such proposed substituted arrangement a bill of lading for goods of the value of 10,000 dols. or thereabouts," the bill of lading in question in that case. Now, says the judge, "It appears that the bill of lading was indorsed and handed over by Messrs. Lyall, Still, and Co. to the bank in consideration of the bank's releasing them from the obligation which they had come under, to hand over shipping documents of the value of 15,000*l.*, and of their undertaking not to take the legal proceedings, criminal or civil, which they had threatened. It appears, therefore, to their Lordships that there was a sufficient consideration for the indorsement of the bill of lading to Messrs. Lyall, Still, and Co. to the bank. Then the attention of the court was naturally drawn to this case of *Rodger*, and the principles are laid down by Sir Barnes Peacock, in the passage I have already read; but then they say further that this case differs entirely from *Rodger's* case, because the bill of lading in *Rodger's* case was not handed over at the time, but was handed over in pursuance of the agreement generally to hand over all the documents.

Now those being the two cases, and the law having been thus clearly and explicitly laid down, the only question is whether this case falls within the principle of those two cases. I think it does, and in my opinion, the defendant in this case is entitled to my judgment.

Let us compare and see what the thing is. In the present case, as in *Rodger* v. *The Comptoir d'Escompte de Paris*, at the time of the promise made to cover up, which was on the 1st Jan., this bill of lading was not in the authorised possession of Geen, Stutchbury and Company. As I said before, I do not even know that they expected it, but I should think they did. That was the only occasion on which the plaintiff had made any advance. He had made the advance of 2000*l.* How could Mr. Scott be said to enable Geen, Stutchbury and Company to make the advance, when at the very time the advance was made the bill of lading referred to would not have been in the possession of Geen, Stutchbury and Company? How could it be said that Mr. Leask parted with his 2000*l.* on the faith of that endorsement, when in point of fact he knew nothing at all about it? It seems to me, therefore, that the whole consideration in this case came into effect, and had its full legal operation on the 1st Jan. At that time according to the finding of the jury there was a binding bargain between Geen, Stutchbury and Company and Mr. Leask, that further security should be given; and the facts of the case do not show that Mr. Scott has by any act of his enabled Geen, Stutchbury and Company to commit a fraud on Mr. Leask, which undoubtedly has been committed upon him.

Again, it must be observed that the position of the transferee or indorsee of a bill of lading is very different from that of the indorsee of a bill of exchange. The indorsee of a bill of exchange takes the bill freely, fully, and fairly, subject to any equities of the indorser. The indorsee of the bill of lading occupies, on the contrary, a mean position as between the indorsee of a bill of exchange and that of the transferor or indorser of a bill of lading; and as in *Rodger* v. *The Comptoir d'Escompte de Paris*, the indorsee has no better title than the indorser can give.

For these reasons I come to the conclusion that the defendant is entitled to my judgment.

Judgment for defendant with costs.

Solicitors for plaintiff, *Hollams, Son* and *Coward.*

Solicitors for defendant, *Lowless, Nelson, Jones,* and *Thomas.*

COMMON PLEAS DIVISION.

Reported by P. B. HUTCHINS and S. HARE, Esqrs., Barristers-at-Law.

Monday, June 19, 1876.

BRESLAUER *v.* BARWICK.

Charter-party—Mistake—Pleading.

Action by charterer on a charter-party. Defence, that the charter-party was made between defendant and the T. Co., and not plaintiff. Reply, that the agreement was between plaintiff and defendant; that in drawing up the charter-party one of the T. Co.'s printed forms was used, on which the name of the T. Co. appeared as

charterers; that by the mistake of plaintiff and defendant the T. Co.'s name was omitted to be struck out and remained instead of plaintiff's name; that the charter-party was signed by plaintiff and defendant, and it was intended and agreed that plaintiff should be liable and entitled under it.

Held on demurrer that it was unnecessary that the charter-party should be rectified, and that the reply was good.

THIS was an action on a charter-party by the charterer against the owner of the steamer *German Emperor*. The plaintiff alleged in the statement of claim that the defendant's steamer, through the defendant's fault, did not proceed to the port named and load a cargo of ore according to the terms of the charter-party.

Statement of defence, paragraph 2: The said supposed charter-party, if made, which the defendant does not admit, was made by Messrs. Barnett Brothers, assuming to act as agents for the defendant in that behalf, and was between the defendant and a company called the Tharsis Sulphur and Copper Company (Limited), and not the plaintiff. The defendant says that the said Messieurs Barnett Brothers, were not authorised to make the supposed charter-party for the defendant.

Reply, paragraph 2: And as to the allegation in the 2nd paragraph of the statement of defence, that the charter-party was between the defendant and the Tharsis Sulphur and Copper Company (Limited), the plaintiff says, that it was agreed between defendant as the owner of the *German Emperor* (through his duly authorised agents, Barnett Brothers), and the plaintiff as charterer, that the *German Emperor* should be chartered to the plaintiff on the terms and conditions afterwards set out in the said charter-party. And for the purpose of carrying out the said agreement the said charter-party was drawn up. In drawing it up one of the printed forms belonging to the Tharsis Sulphur and Copper Company (Limited), in which their name was printed as charterer, was through the inadvertence of plaintiff and defendant made use of, and by the mistake and oversight of the plaintiff and the defendant the name so printed as charterer was omitted to be struck out, and remained in the charter-party as and instead of plaintiff's name. Plaintiff was not agent for the Tharsis Sulphur and Copper Company in effecting the charter. The company was not intended to be, and was not, the charterer, or in any way concerned in the business, and their name appears only in consequence of the before-mentioned mistake and as representing plaintiff's name. The charter-party as drawn up was signed by the plaintiff in his own name as charterer, and by the defendants (through their agents) as owners of the *German Emperor*, and it was intended by and agreed between the plaintiff and defendant that the plaintiff should be liable on and entitled to the benefit of the charter-party drawn up as aforesaid.

Demurrer on the ground that the reply admits that the written charter-party sued on was not in fact made by the plaintiff, and could not be made binding on him unless reformed, which was not done.

Bray, for the defendant.

French, for the plaintiff.

The following authorities were referred to:

Story on Equity Jurisprudence, sect. 152:
Supreme Court of Judicature Act 1823 (36 & 37 Vict., c. 66), s. 24, sub-sect. 7;
Mostyn v. *The West Mostyn Coal and Iron Company*, 34 L. T. Rep. N.S. 325; L. Rep. 1 C. P. Div. 145; 45 L. J. 40, C. P.;
Wake v. *Harrup*, 1 H. & C. 201;
Truman v. *Loder*, 11 A. & E. 589.

BRETT, J.—I am of opinion that our judgment ought to be for the plaintiff.

The statement of claim asserts that a charter-party was entered into between the plaintiff and the defendant, and the breach alleged is that the defendant's steamer, through the defendant's default, did not proceed to the port named and load a cargo according to the terms of the charter-party. The statement of defence says that the charter-party was not made between the plaintiff and the defendant, but between the defendant and the Tharsis Sulphur and Copper Company; it really amounts to an argumentative traverse of what the statement of claim has asserted. Then the reply explains that there was an agreement between the plaintiff and the defendant, and that it was intended to bind the plaintiff and defendant, but a printed form was used, and the name of the company was by mutual mistake left in, although the charter-party was really intended to bind both the plaintiff and the defendant.

The reply explains and leaves consistent the statements of claim and of defence. It supports the statement of claim, because it shows that the charter-party was intended to bind both parties; and it explains the defence, because it states that the name of the company was left in, and therefore it admits that the defence is colourably true, but it alleges mutual mistake. The defendant demurs, and for the purposes of the demurrer admits the reply to be true; that is, he admits an agreement that the charter-party should be made between himself and the plaintiff, and he admits that it was meant to bind him only as the owner, and that the company's name was left in by mistake. But he says the reply is bad because the plaintiff has not asked to have the pen run through the name of the company in the charter-party. Then it is said that the plaintiff ought to have stated the whole facts in his statement of claim.

Now, I agree that proper pleadings under the Judicature Acts ought to state all the facts, and here, if there had been merely a traverse of the allegation in the statement of claim as to the making of the charter-party, the plaintiff would have been in a difficulty, and must have amended; but this is a colourable defence, and the plaintiff replies so as to explain the facts.

It is also said that this is a departure, for where there is a second pleading it must support the first. The second pleading may add a fact, but must not contradict the first, and in that way I think this reply is not a departure.

It is further said that the reply ought to ask that the charter-party be reformed, and that for this purpose the case be transferred to the Chancery Division; but the decision in *Mostyn* v. *The West Mostyn Coal and Iron Company* (*ubi sup.*) shows that in such a case as this it is not necessary to go through the manual labour of reforming the agreement, but that if such facts are shown as would cause the Chancery Division to reform it, we must treat it as

reformed, and give judgment accordingly. It is true that the Chancery Division would require particular evidence of the facts alleged, and would want it proved that the instrument was drawn in error, and that what happened was caused by mutual mistake. But evidence need not be pleaded, and for the purpose of deciding on this demurrer the document is to be treated as if it were amended.

Mr. French has gone further than this, for he says that the document would not require amendment, and that a replication stating these facts could have been supported before the Judicature Acts. I am not prepared to say how this might be; I express no opinion. I think the circumstances are such as would make the Chancery Division reform the charter-party, that there is no departure, and that the reply is good.

GROVE, J.—I am of the same opinion, but I have had some hesitation. The Judicature Act requires the use of the new form of pleading, and statement of the facts, but not of the evidence. It is desirable fully to state the facts, and this is required so that the party may not get the benefit of the old form of pleading; under the new system he cannot avoid showing what his case is. I should have been inclined not to allow an amendment to get the plaintiff out of the difficulty into which he might have fallen from not fully stating the facts in his statement of claim, at least if it had appeared that this was done intentionally. As it is, I think the replication is not a departure, the whole of the facts are now out, and we ought to give judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Argles* and *Rawlins*.

Solicitors for the defendant, *Oliver* and *Botterell*.

Tuesday, Feb. 6, 1871.

THRIFT *v.* YOULE.

APPEAL FROM INFERIOR COURT.

Shipping—Bill of lading—"Not accountable for leakage.

The common form in a bill of lading "not accountable for leakage" exempts the shipowner only from loss to the leaky package, and not from damage done to the other packages by a liquid escaping.

APPEAL from the City of London Court.

The plaintiff was a shipowner; the defendant an owner of cargo on board the plaintiff's ship.

The action was brought for balance of freight due under a bill of lading under which the plaintiff carried in his ship from Villa Real in Portugal to London 1100 barrels of cardine oil and 106 bundles of palms, undertaking to deliver the same in London of payment of 202*l.* freight. The bill of lading also contained the exception, "Not accountable for rust, leakage, or breakage." The ship duly arrived in London, when it was found that by the leakage of one of the oil casks the palms had been injured, and that the cargo was otherwise damaged. The defendant paid the freight less an amount sufficient to cover the damage sustained. The plaintiff proceeded in the City of London Court for the balance of freight, and the defendant thereupon gave notice under the County Court Orders 1875, Order 10, rule 1, of a counter claim for the damage sustained by bad stowage and the leakage to the amount of 23*l.* 0*s* 6*d.*

At the hearing before Mr. Commissioner Kerr, that learned judge gave judgment for the plaintiff for 6*l.* 15*s.* 9*d.*, finding that the plaintiff was entitled to 12*l.* 10*s.* 10*d.* for balance of freight, but that the defendant was entitled to 5*l.* 15*s.* 1*d.* for the bad stowage, but he held that the damage to the palms by leakage was covered by the bill of lading, and that the plaintiff was not responsible for it, at the same time giving leave to the defendant to move to set aside the verdict and enter judgment for the defendant for 10*l.* 9*s.* 8*d.* The defendant having obtained a rule at chambers accordingly,

Charles Hall, for the plaintiff, showed cause.—The words "leakage and breakage" are not limited to what takes place within the package or cask. Taken in their natural sense they exempt the ship from all liability resulting from leakage or breakage.

The Hélène, 1 Bro. & L. 429; 2 Mar. Law Cas. O. S. 390;

The Nepoter, L. Rep. 2 A. & E. 375; 3 Mar. Law Cas. O. S. 355.

McLeod, for the defendant.—This is the first time it has been contended that this common form of a bill of lading could cover damage done by leakage of other goods. The cases cited are not applicable.

GROVE, J.—I am of opinion that the rule must be made absolute. By the bill of lading the shipowner is "not accountable for rust, leakage, or breakage." That means to say that if casks or packages break or leak the shipowner is not responsible for the damage to those casks or packages or their contents. But there is nothing in the words to release a shipowner from other consequences of that leakage. In the case of "rust" that would be very unlikely to damage anything but the thing itself, and we may fairly conclude that the other words are intended to cover only damage to the package broken, leaking, or rusty, and not the consequences of that damage. The shipowner says he will not undertake that the goods will not rust, break, or leak, but nothing further. To allow a shipowner to avoid the consequences of a leakage from one package to the rest of his cargo would be a very formidable affair, and we are not warranted in doing so upon the authority of the cases cited to us. In *The Hélène* (*ubi sup.*) it was only decided that the loss of oil by leakage, however great, so long as it happened without negligence, was covered by the word "leakage" in the bill of lading. In *The Nepoter* (*ubi sup.*), Sir R. Phillimore held that the words would not cover damage by leakage if it was caused by neglect of proper precautions on the part of the shipowner.

DENMAN, J.—The natural interpretation to be put upon the word "leakage," in the connection in which it appears before us, is the diminution in quantity of the article itself. The word is merely intended to protect shipowners from the liability for damage to packages containing liquids. It is not intended to protect the shipowner from injury to other parts of the cargo resulting from the leakage. The decision of Sir R. Phillimore is in accordance with our views, because he declined to extend the meaning of "leakage," and

confined it to damage to the thing itself. We decline to extend the meaning of the word.

Rule absolute with costs.

Solicitors for the plaintiff, *Henderson* and *Buckle.*

Solicitors for the defendant, *Parker* and *Clarke.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by C. E. MALDEN, J. P. ASPINALL and F. W. RAIKES, Esqs., Barristers-at-Law.

Thursday, Jan. 18, 1877.

(Present: The Right Hons. Lord BLACKBURN, Sir JAMES COLVILE. Sir BARNES PEACOCK, Sir M. SMITH, and Sir R. P. COLLIER)

KLEINWORT AND OTHERS *v.* THE CASSA MARITIMA OF GENOA.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ship — Bottomry Bond — Communication with owners of cargo.

A statement by the master of the injuries sustained by his ship and of the repairs necessary is not a sufficient communication with the owners to justify him in giving a bottomry bond upon the ship and cargo, if unaccompanied by a statement that such bond is necessary.

The mere receipt by the owners of the cargo of general information that the ship is damaged and in need of repairs, does not impose upon them the duty of supplying money for such repairs without further information.

The Onward (*ante*, *vol.* 1, *p.* 540; 38 *L. T. Rep. N. S.* 206; *L. Rep.* 4 *A. & E.* 38) *affirmed and followed.*

Judgment of the court below reversed.

THIS was an appeal from a decree of the Supreme Court of the Island of Ceylon, Dated 15th June 1875, reversing a decree of the district court of Galle, dated 23rd Oct. 1874.

The respondents were the holders of a bottomry bond, dated 12th March 1873, on a ship called the *Maria Luisa*, and her freight and cargo, and given under the following circumstances:

The *Maria Luisa*, an Italian ship of 703 tons register, was by a charter-party dated at London the 19th May 1870, chartered by Messrs J. D. Findlay and Company, of Glasgow, to load a cargo of Rice at Rangoon, for carriage to Queenstown or other ports, for orders to discharge in the United Kingdom, or on the Continent between Havre and Hamburgh.

Under such charter-party the *Maria Luisa* loaded a cargo of rice, shipped by Gerber, Chrestien, and Company, to whom the master delivered a bill of lading, dated 28th June 1872, by which the cargo was made deliverable to their order.

The *Maria Luisa* sailed from Rangoon on the 9th July 1872, on her said voyage, with the said cargo on board her, but on or about the 7th Sept. 1872, put into the port of Trincomalee, in distress.

At Trincomalee, Emanuele Schiaffino, the master of the *Maria Luisa*, executed a bottomry bond, dated the 12th March 1873, on the *Maria Lusia* and her freight, and the said cargo of rice, whereby he bound himself and the *Maria Luisa*, her freight and cargo, to pay the respondents the sum of rs. 42,235 46 c., subject to the conditions that if the *Maria Luisa* should sail from Trincomalee on her intended voyage to Cork or Falmouth for orders, and that without deviation, and if the said master or the owner of the *Maria Luisa* should, within thirty days after her arrival at the port of discharge, pay the said amount, the bond should be void.

The *Maria Luisa* subsequently, on the 15th April 1873, sailed from Trincomalee on her said voyage with the said cargo, but on the 1st May following she put into the port of Point de Galle, with her said cargo, and there remained. The said master there sold, or caused to be sold, the said cargo.

On the 10th Feb. 1874, the respondents commenced an action, No. 35,916, class 6, in the District Court of Galle, upon the said bottomry bond against the said Emanuele Schiaffino, to recover the sum of rs. 42,235 46c. from him, and to obtan a mandate of sequestration to seize and sequester *pendente lite* the proceeds of the said cargo of rice, and to obtain payment to the respondent of the said proceeds. The cause of action alleged was that the *Maria Luisa* had improperly deviated from her voyage, and that the master had abandoned the voyage, and the bond had become payable. The said Emanuele Schiaffino appeared in the said action, and the proceeds of the said cargo of rice were, by mandate of the said court, duly sequestered.

The said action came on for trial, and on the 1st July 1874, judgment was given therein for the respondents, against the said Emanuele Schiaffino, for rs. 42,235 46c., with costs of suit; but it was ordered that the proceeds of the sale of the said cargo should remain under sequestration until the rights of all parties interested therein should have been determined therein.

The appellants, who were consignees of the said cargo and plaintiffs in an action, No. 35,689, then pending in the said court, intervened in the said action, No. 35,916, and proceedings were had between the appellants, as such consignees, and the respondents, as holders of the said bottomry bond, to determine their respective claims to preference in respect of the proceeds of the said cargo.

The appellants contested the validity of the said bond as regarded the cargo, mainly upon the ground that the said Emanuele Schiaffino had executed the said bond without communicating or attempting to communicate with them in any way before executing the same, and without communicating or attempting to communicate to the said Messrs. Gerber, Chrestien, and Co., the shippers thereof, and who remained interested therein, that he had any intention to bottomry the cargo, although he could and ought to have made such respective communications.

It appeared by the evidence of the said master, that after his arrival with the ship at Trincomalee he had telegraphed and written to the said Messrs. Gerber, Chrestien, and Co., telling them of the ship's mishap, and that they communicated with him, asking for all particulars as to what was to be done with the cargo, and for all particulars which might interest them as shippers, but that he had executed the bond in question without informing them of there being any necessity, or of his intention, to bottomry the cargo.

The learned judge of the said District Court of Galle held that the said bond was not valid as against the said cargo, on the ground of want of

communication to the owners of cargo of the master's intention to bottomry the cargo, and on the 23rd Oct. 1874, delivered his judgment, whereby he repelled the claim of the respondents and upheld the claim of the appellants to the said proceeds of the cargo, and directed the respondents to pay the costs of the proceedings between the appellants and respondents.

The respondents appealed from the said judgment of the 23rd Oct. 1874, of the District Court of Galle to the Supreme Court of the Island of Ceylon, which court, by its decree or judgment dated the 15th June 1875 (the judgment appealed from), adjudged that the said judgment of the District Court of Galle be set aside and the claim of the appellants be dismissed with costs, upon the ground that under the particular circumstances of the case communication with the owners of the cargo was not necessary.

On the 31st Aug. 1875, the case having been brought and considered in review before the said Supreme Court, the judgment of the said Supreme Court of the 15th June was confirmed.

The appellants thereupon, pursuant to leave given, appealed to Her Majesty in Council against the said judgment or decree of the Supreme Court of the Island of Ceylon of the 15th June 1875.

The remaining facts of the case are sufficiently set out in the judgment of the court.

Cohen, Q.C. and *Clarkson* appeared for the appellants, and maintained that the bond was invalid because the master had not communicated with the owners of the cargo. See *The Hamburgh* (Br. & Lush. 253; 2 Mar. Law Cas. O. S. 1), *The Onward* (*ante*, vol. 1, p. 540; 28 L. T. Rep. 253; L. Rep. 4 A. & E. 38), and the case there cited. The cases show clearly that the master must communicate to the owners of the cargo his intention to hypothecate it, or show cause why he did not do so. The burden of proof lies on the holders of the bond. In this case there was no necessity to hypothecate the cargo, but it was completely sacrificed to the ship.

Webster (*Milward*, Q.C. with him) for the respondent, argued that sufficient communication had been made, and that, therefore, the master had ample authority to execute the bond.

Cohen, Q.C. was not called upon to reply.

The judgment of their Lordships was delivered by

Sir M. SMITH.—The question in this case is whether a bottomry bond given by the master of the *Maria Luisa* upon the ship and cargo to the respondents, who are a company at Genoa, is a good hypothecation as regards the cargo.

The way in which the case came before the lower court for decision was this.

An action was brought upon the bottomry bond by the respondents against the master of the ship, and judgment was given in favour of the respondents in that action. A second action was brought in the lower court by the present appellants, the owners of the cargo, against the master for what they contended was an unauthorised sale of the cargo. In that action judgment was also given for the plaintiffs, the present appellants, but an order was made that the proceeds of the cargo should be sequestrated until the question as to the validity of the bottomry bond could be decided, and the rights of the plaintiffs, as owners of the cargo, and of the respondents, as the lenders upon the bottomry bond, could be ascertained. It is unnecessary to detail at any length what the proceedings were, but in this latter proceeding the question which has been already stated arose.

It is admitted that the law is now settled, that a master cannot bottomry a ship without communication with his owner, if communication be practicable, and, *à fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable. The law has been thus laid down in several cases which have been referred to at the Bar, and it is only necessary to notice one or two of them. One of those cases was *The Bonaparte* (3 W. Rob. 298; 8 Moo. P.C. 459), in which the judgment was delivered by Lord Justice Knight Bruce. In that judgment, according to the corrected report of it in the subsequent case of *The Hamburgh* (B. & L. 253; 2 Mar. Law Cas. O. S. 1), it was said:—"That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate or even endeavour to communicate with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so." Then follows the sentence which was not correctly reported in the original report of *The Bonaparte*. The passage is this: "If according to the circumstances in which he is placed it be reasonable that he should—if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt." This duty was affirmed, and the cases referred to, in a recent decision of this committee in the case of *The Australasian Steam Navigation Company* v. *Morse* (*ante*, vol. 1, p. 407; L. Rep. 4 P. C. 222; 27 L. T. Rep. N.S. 357). The latest case on the subject, *The Onward ante*, vol. 1, p. 540; L. Rep. 4 A. & E. 38; 28 L. T. Rep. N. S. 206), is in its facts extremely like the present, and there the law was stated by Sir Robert Phillimore. He cites the language of this tribunal in a judgment delivered by Sir John Jervis in the case of *The Oriental* (7 Moo. P. C. 389), to this effect: "There was not only the power of communication, but an absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication in existence which must be taken to be the proper mode or channel of communication, not to send money, as suggested, because the electric telegraph will not carry money, but to send a communication on the one hand and receive an answer on the other. Why, here being the means of communication, and the authority of the master being founded on the impossibility of a communication, their lordships are of opinion that there was no authority in the master to raise money on bottomry." Sir Robert Phillimore's observations following that citation are: "In the opinion, therefore, of this Appellate Court, whose decisions are binding upon me, a mere statement of injuries done to the ship and of the consequent necessity of repairs which would entail considerable expense, unaccompanied by a statement that a bottomry bond must be had recourse to, was not a sufficient communication to

the owners." In this view of the law their lordships entirely agree.

It is not necessary to go at any great length into the facts of the case, but those which are material to be considered are as follow: The cargo, which was of rice, was shipped on board the *Maria Luisa* at Rangoon. The bill of lading stated that it was shipped by Gerber, Chrestien, and Company, who carry on business at Rangoon. The cargo is stated to be "10,700 bags new Rangoon cargo rice, and the destination of the ship was "Queenstown, Plymouth, Falmouth, or Cowes" for orders, and the rice was made deliverable to order, that is, to the order of the shippers. It seems that the *Maria Luisa* sailed from Rangoon in July 1872, and it may be taken that in the course of her voyage she met with bad weather and received considerable damage. On 7th Sept. 1872 she put into Trincomalee, and there, according to the evidence of the master—and he is supported to some extent by other witnesses—the vessel required very considerable repairs, she wanted recoppering, new sails, and other things. For the purposes of the present decision—although their lordships do not intend to affirm the facts—it may be assumed that the ship was in a state of distress requiring considerable repairs, that it was not possible to raise the money upon the personal credit of the owners of the ship or of the master, and that the security of the ship alone was not sufficient for the advances which were required to repair the ship. It seems to have been thought by the learned judges in the court below, that the cargo was in a damaged state, and that money was wanted either for the purpose of carrying the cargo on speedily, or for some necessary expenditure for the purpose of putting the cargo into better condition by drying it, or otherwise. Upon looking at the evidence that appears to be a mistaken view of the facts. According to the master's evidence the cargo was landed at Trincomalee, and remained there for a considerable time until he re-shipped it; but when he did re-ship it the rice was in good condition, and for anything that appears nothing had been done to it except that, of course, when taken out of the ship it had been stored. A small quantity was thrown overboard, which appears to have been at the bottom of the ship, and damaged; but there is no evidence that the bulk of the cargo was in any way damaged so as to require its being carried on speedily, or any expenditure incurred for its preservation. The master being at Trincomalee and under the necessity of raising money—which has been, for the purposes of this decision, assumed—it appears that he communicated with the agents of the present respondents, the *Cassa Maritima*, and agreed with them, on the 10th Dec. 1872, to hypothecate the ship, cargo, and freight. The bottomry bond, which was executed in pursuance of that agreement, is dated the 12th March, 1873. Taking the earlier of these dates, the 10th Dec. their Lordships are of opinion that there was before that time a reasonable possibility of communicating to the owners of the cargo or those who represented the owners what was intended to be done, and that that communication not having been made there was a want of authority on the part of the master to execute the bond on the 12th March, or indeed to enter into the agreement on the previous 10th Dec. It may be stated that the ship sailed from Trincomalee on the 11th April, 1873, having re-shipped the rice; that she put into Point de Galle, in May, 1873; and that in August of that year the cargo, being then, according to surveys made at Galle, in a perishable condition and unfit to be carried on, was sold.

In the present appeal their Lordships have nothing to do with the question whether this sale was a justifiable one or not. The only question before them for determination is whether there was sufficient authority to execute the bottomry bond? The duty of the master to communicate with the owners, or those who may be fairly taken to represent the owners, before taking this extreme step, being plain, let us see what he did.

It appears that he considered Gerber, Chrestien, and Company as the owners of the cargo, and he had reason to do so. He knew no other owners. They were the shippers of the cargo, and had taken the bill of lading from him, making the cargo deliverable to their order, and throughout he appears to treat them as the owners of it until, at a later period, when probably the difficulty was made apparent, he says that he did not know who the real owners were, and therefore could not communicate with them. Mr. Webster, who appeared for the respondents, has very properly admitted that if communication were necessary, Gerber, Chrestien, and Company were the persons to whom it should have been made; and he has not denied that the case resolves itself into the question, whether, they being the persons to whom the communication ought to have been made, that which was in fact made to them was sufficient or not?

The master telegraphed to them shortly after his arrival at Trincomalee, he says two days after the ship had put into that port, that she was leaking, and in want of repair. It appears that Gerber, Chrestien, and Company telegraphed back to him requesting information with more particularity as to the state of the ship and cargo. That telegram is dated the 19th Sept., and no answer appears to have been given by the master to it. An important letter was put in evidence from Gerber, Chrestien, and Company to the master, complaining of his neglect in not giving them further particulars. The letter, dated 1st Nov. 1872, is as follows: "Our telegram of the 19th Sept. requesting you to be so good as to give us particulars of the damage suffered by your cargo, having remained unnoticed, we now beg to request you will be so good as to tell us when you intend to sail from Trincomalee after completing the repairs of your ship; if you are taking on all the rice shipped by us here; or, if any has been sold, how much, and all other particulars which may be of interest to us as shippers of the cargo.

Now what was the duty of the master when he received this letter? If his duty was not clear before, there was now a distinct request by the shippers of the cargo to know what the state of the cargo was; whether it would be taken on; if any had been sold, how much had been sold; and all other particulars which might be of interest to them as shippers of the cargo. The master at the time he received this letter, or shortly after, must have contemplated hypothecating the cargo, and instead of communicating to those whom he knew to be the shippers of the cargo that he was going to hypothecate it, he maintains an absolute silence. This letter is dated the 1st Nov. The agreement to hypothecate is not made until the 10th Dec.,

long after its receipt. The rice was, upon the evidence, receiving no damage, yet the master undertakes to hypothecate it to the *Cassa Maritima* upon this bottomry bond without giving the slightest intimation to the shippers that he was going to do so. This appears to their lordships to be a strong case of dereliction of duty on the part of the master, when about to take the extreme course of hypothecating the cargo for the needs of the ship. If Gerber and Company had been communicated with they might have said, "We will advance the money rather than you should raise it upon bottomry interest;" or they might have given him other directions which it might have been more for their interest that he should have followed, than to have taken this unauthorised course.

Their Lordships cannot but observe that the learned judge who decided this case on appeal from the district judge seems to have given his decision under some mistake as to the facts. In one part of his judgment he says: "The shippers of the cargo therefore knew at a very early period that the cargo had suffered damage, and that the vessel wanted repairs. The telegram was sent, the defendant swore, as soon as he arrived at Trincomalee. Rice, when once heated and fermented, runs rapidly from bad to worse. Mr. Spence, one of the surveyors, says that the rice was much heated and discoloured, and the stench in the hold gave evidence of rapid decay going on in the cargo." It turns out that the rice was not heated and fermented at Trincomalee, although it was subsequently in that condition at Galle; and Mr. Spence was the surveyor not at Trincomalee but at Galle. Thus the learned judge appears to have transposed the state of things which existed at Galle to Trincomalee.

Then he goes on: "The master himself swears that, so far as he knew, the shippers were the owners of the cargo, and this evidence is unrebutted." The learned judge, in that passage, seems properly to have taken the view that Gerber and Company were the right persons to be communicated with. Then he says: "From Sept., when he sent his telegram to Gerber, Chrestien, and Company, till Aug. 1873, when the rice was sold, he received no instructions or offer of funds from them or from parties who now claim the rice as consignees." Their lordships cannot but observe that this passage involves an assumption which is erroneous in point of law. The judgment of the learned judge really amounts to this: That Gerber, Chrestien, and Company were the proper persons to be communicated with, but that the communication made to them was sufficient, and that it became their duty, upon the slight information they had, at once to offer money to the master for the necessary repairs of the ship. Their lordships think no such duty was imposed upon Gerber, Chrestien, and Company, and that they did what men of business might reasonably be expected to do. Upon having the general information that the ship had received damage and wanted repairs, and that the cargo might also be damaged, they wrote to the master to know the particulars, and, as before observed, received no answer to that letter.

Under these circumstances their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, and to affirm the decree of the district judge of Galle. The respondents must pay to the appellants their costs of the proceedings in the Supreme Court, and of the appeal to Her Majesty.

Solicitors for the appellants, *Hollams, Son, and Coward.*

Solicitor for the respondents, *Thomas Cooper.*

Feb. 12 *and* 13, 1877.

(Present: The Right Hons. Sir JAMES W. COLVILE, Sir ROBERT PHILLIMORE, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.)

THE LAKE ST. CLAIR *v.* THE UNDERWRITER.

Collision—Rule of the road—Ship in stays.

When a vessel in tacking misses stays, she is bound to manœuvre in such a way as to come under command again as soon as possible, so as not to embarrass an approaching vessel by remaining in an unmanageable condition.

A vessel on the starboard tack close hauled approaching another, apparently on the port tack, is nevertheless, bound to keep out of the way, so soon as she ascertains that the other vessel is unmanageable and unable to obey the ordinary rule of the road at sea.

Semble, when a vessel is in stays or unmanageable, it is her duty to apprise an approaching vessel of the fact.

THIS was an appeal from the decision of the judge of the Vice-Admiralty Court of Quebec, by the owner of the ship *Underwriter*, by which that vessel had been held alone to blame for a collision which took place between her and the ship *Lake St. Clair*, soon after midnight on the 26th July 1875, in the Gulf of St. Lawrence. The circumstances under which the collision occurred appear sufficiently from the reasons and judgment of the court below.

The witnesses, as in the case of *The Norma* (*ante*, p. 272), had been examined on interrogatories before the registrar of the court previous to the hearing, and the preliminary act on behalf of the *Underwriter* was in the form objected to by the Judicial Committee of the Privy Council in that case, whilst that on behalf of the *Lake St. Clair* contained all the questions and answers of the form in use in the High Court of Justice.

There were cross causes in the court below, which came on for hearing on the 8th Oct. 1875, before the judge of the Vice-Admiralty Court of Quebec, assisted by nautical assessors, and after hearing counsel on both sides, the learned judge reserved judgment.

Nov. 12, 1875.—STUART, J. (stating the reasons assigned by the court for deciding that where there were two sailing ships, one on the starboard and the other on the port tack, and the former had by a rule of navigation the right to keep her course, yet in a case of imminent danger, she was bound to give way, and for not doing so was condemned in damages and costs.) Two ships, the *Lake St. Clair*, an iron ship of 1061 tons, with a general cargo and a crew of thirty-one persons, bound for Montreal, and the *Underwriter*, a ship of 1439 tons in ballast, with a crew of twenty-three persons, bound for Quebec, on the 26th July last, half an hour after midnight, were off Cape Rozier in the Gulf of St. Lawrence. The light at the Cape bore about N.W.

distant about ten miles. The wind was N. of W., and the night clear. While the *Underwriter* was on the starboard tack and the *Lake St. Clair* on the port tack, as contended for by the former, but when she was in stays, as asserted by the latter, the collision happened which has given rise to cross actions, in each of which the question is who was in fault?

The *Lake St. Clair* was struck at about right angles 60ft. from the stern on the starboard side abaft the main rigging by the bow of the *Underwriter*, which passed between her backstays, doing serious damage, in which is included the bulging in of seven plates, the breaking of twelve rivets, and the breaking of two plates in the bulwarks.

The *Underwriter* also sustained considerable damage, in which is comprised the facing piece in front of the stem torn off, the breaking of the bowsprit short off at the knight heads, and the topgallant mast sprung.

The libel for the *Lake St. Clair* states an occurrence which took place an hour before the collision, from which a malicious intent to do her injury has been laid to the charge of the persons on board the *Underwriter*. The *Lake St. Clair*, it is said, had then the starboard tack, and the *Underwriter* was approaching on the port tack, but did not give way, which compelled the *Lake St. Clair*, to avoid a collision, to put her helm down to go about, and missing stays she hailed the *Underwriter* to keep away, and the answer she received from her while passing close under the port quarter was "Look out, I will do for you next time."

The same libel then continues to assert the facts attending the collision. About a quarter of an hour after midnight, the wind having fallen quite light, the *Lake St. Clair* put her helm down and went round on the port tack, and had not gathered headway when a flaw of wind took her almost aback, and then the red light of the *Underwriter* was about three points on the starboard bow, about half a mile off.

That then having her helm up (port) she immediately ordered it "hard a port." That this was done all hands being on deck, that her afteryards were squared and the spanker brailed in, but that she had no headway, was motionless, and would not pay off.

Seeing this she hailed the *Underwriter*, as she was approaching her, to put her helm up and keep away, as she, the *Lake St. Clair*, had no way, and would not steer. At the same time the helm of the *Lake St. Clair* was put down (starboard), her afteryards braced up, and her spanker set. To the warning thus given, and while the *Lake St. Clair* remained motionless, the *Underwriter*, as she approached, answered "Not a damned inch," and when on the lee beam of the *Lake St. Clair* she was heard to order the helm down (port), which caused her to luff and strike the *Lake St. Claire* stem on.

The *Underwriter* has met this charge by alleging that about ten minutes or a quarter of an hour after being on the starboard tack close hauled the green light of the *Lake St. Claire*, distant between two and three miles, was seen on the lee bow. That as the vessels approached the *Underwriter* was kept steady on her course by the wind, and on the green light nearing, the *Lake St. Clair* was hailed to port her helm, to which no attention was paid, that the *Lake St. Clair* held on her course close hauled on the port tack as if to cross the *Underwriter's* bows, and that when a collision was imminent, the helm of the *Underwriter* was put hard a port to bring her up in the wind, and while her sails were shaking she collided with the *Lake St. Clair*, which was struck on the starboard side abaft the mainmast by the bow of the *Underwriter*.

These pleadings suggest the following questions:

1. Was the *Lake St. Clair* in stays while the *Underwriter* was approaching on the starboard tack, or under such command on the port tack as to obey her helm? and if she were not.

2. Did the *Underwriter* receive such notice as to make it imperative on that vessel to avoid her?

The rule of navigation which applies to vessels on different tacks admits of no question. The one on the port tack must give way to another on the starboard tack, and if this case be as represented by the *Underwriter*, that while she was on the starboard tack the *Lake St. Clair*, then under way on the port tack, was attempting to cross her bows, and thus came into collision, the *Lake St. Clair* is alone to blame, but, on the other hand, if the *Lake St. Clair* had been hove in stays the situation of a vessel when she is staying or going about from one tack to another, stationary, or not as yet able to make progress on the new course, the case is quite altered, and if she did not willingly place herself in danger by going into stays, she is exempt from censure.

The *Underwriter* had the starboard tack. Her mate has stated that five minutes before midnight she was put about on that tack, that it took about a quarter of an hour to bring her round, and that the *Lake St. Clair* was from two to three miles ahead, that as the vessels approached the *Lake St. Clair* was on the port tack under full sail, that her sails were not shaking, and that it was while in the act of crossing the bows of the *Underwriter* that the collision occurred. There are four witnesses who give similar testimony, persons on board the *Underwriter*, the master, the second mate, and two seamen.

On the other hand, the officers of the *Lake St. Clair*, followed by eleven other persons on board of her, swear that she was attempting to come round on the port tack, that while in the act of doing so the red light of the *Underwriter* was immediately seen about half a mile or three quarters distant on the starboard bow, that the helm of the *Lake St. Clair* was immediately put "hard a port" in order to keep her away and pass astern of the *Underwriter*, that she also squared in her afteryards and brailed in her spanker, but she had no steerage way, and would not pay off.

In the meantime the *Underwriter* was standing up under the lee of the *Lake St. Clair*, when the helm of the latter was put down (starboard) to keep her to the wind if she got head way.

In weighing this testimony it is to be observed that the persons on board the *Lake St. Clair* were in a better position to see what passed on board of her than persons in another ship at some distance. Then, in point of numbers, the weight of testimony is with the *Lake St. Clair*, and, with this testimony before me, I can come to no other conclusion, subject, however, to such influence as the opinion of nautical assessors may

have with me, than that the *Lake St. Clair* had not gained headway on the port tack, and that it was not in her power to give way to the *Underwriter*.

In coming to this conclusion I have not lost sight of the testimony of the port warden at Quebec, somewhat of an expert. He was brought up for the *Underwriter* to state his opinion from an abrasion on the mizenmast, and from the way in which the bowsprit of the *Underwriter* was broken, that it must have been broken by the mast of the *Lake St. Clair*, an indication that she (the *Lake St. Clair*) was in motion. To give weight to such an opinion, although it would be one to be received with great caution in opposition to the positive testimony of eye witnesses, it should have gone further and to the effect that it was an index to her having been so much in motion as to bring her under obedience to her helm.

The approaching of the *Underwriter* towards the *Lake St. Clair* in her helpless condition could not be otherwise than attended with risk and danger, and, before applying the rule already stated to the facts as they further appear in evidence, it will be well to state how it has been construed in the High Court of Admiralty.

In the case of *The Lady Anne* (15 Jurist 18; 7 Notes of Cases 364), where one vessel was on the starboard tack and the other on the port tack, the right of the vessel on the starboard tack to keep her course was fully admitted. But, said Dr. Lushington, "I have yet to learn that if there be any possible means of avoiding a collision it is not the duty of the vessel on the starboard tack also to port her helm. The rule has been laid down over and over again that if two vessels were approaching each other it was the duty of both to prevent a collision if possible. No doubt there are certain rules as to what they ought to do under particular circumstances, but the first and primary rule is to avoid a collision and the loss of property and life, if it can be effected with safety." And again in another case in the same court, *The Hope* (1 W. Rob. 157), it was held that although a rule of navigation is not to be lightly infringed, no vessel is unnecessarily to incur the probability of a collision by a pertinacious strict adhesion to it.

Guided by this doctrine, I proceed to the testimony showing how far it may go to establish that notice was given to the *Underwriter* of the condition of the *Lake St. Clair* in time to keep clear of a collision.

At half-past eleven o'clock these vessels passed each other, the *Lake St. Clair* standing in towards the coast. She was on the starboard tack, when it was the duty of the *Underwriter* to give way; but in doing so she passed within twenty-four feet of the port quarter of the *Lake St. Clair*, which compelled the latter, in order to avoid the danger incident to such close quarters, to put down her helm to go about, which occasioned her to miss stays, and while in the act of doing so her master hailed the *Underwriter* to keep off; the answer to which was, as sworn to by persons on board the *Lake St. Clair*, "Take your damned ship out of the way. You are a Glasgow clipper, are you? Look out, I will do for you next time." The reply made by the master of the *Lake St. Clair* was, "My friend, you might find we are as hard as you are. Go to bed and take a sleep till you get sober." The spokesman from the *Underwriter* was Breeze Williams, the mate then in charge of her, who, when examined as a witness, while denying the language as stated, admitted that he said, "Never mind, I will have the next tack," and added, "I meant that being on the port tack I had kept away from him, but on the next tack he would have to keep away from me, that when on the starboard tack I would not give way at all unless I was certain that he would not give way or keep away at the same time."

It was but twenty-five minutes after this occurrence that the *Underwriter* was ordered on the starboard tack, and it took fifteen minutes to bring her about upon it. The *Lake St. Clair* was then ahead between two and three miles, and, shortly after, being ordered on the port tack, while endeavouring to come round, the red light of the *Underwriter* bearing about half a point or three-quarters on her starboard bow at a distance of from half a mile to three-quarters, was seen approaching. According to the evidence adduced for the *Lake St. Clair* her helm was immediately put hard a port, in order to keep her away and pass astern of the *Underwriter*, her afteryards were squared and her spanker brailed in, but she had no steerage way and would not pay off. In the meantime the *Underwriter* was standing up under the lee of the *Lake St. Clair* when the helm of the latter was put down (starboard) to keep her to the wind if she got head way. The afteryards were braced up, the spanker was hauled out and set, so as not to deceive the *Underwriter* and to give her an opportunity of keeping away—the only means of safety and of preventing a collision. So soon as the *Underwriter* had approached within a quarter of a mile or less, the master of the *Lake St. Clair* hailed her in these terms, "Put your helm up and keep away a little; our ship is not steering, and won't keep away." The answer of the *Underwriter* was first, "Go to Hell," followed by a second, "Not a damned inch," in answer to a second hailing. The chief mate of the *Lake St. Clair* then ran down to her starboard waist and hailed the *Underwriter* three or four times to keep away, and received the same answers. Instead of starboarding, as requested, the *Underwriter* continued her course, and when about fifty or sixty feet, or perhaps a little more, she ported her helm, luffed up, and struck the *Lake St. Clair* as already stated; but, before she struck, someone on board of her called out, "You will see who is the hardest," and, after she struck, "Now, which do you think is the hardest?" alluding, as the master of the *Lake St. Clair* has sworn, to his answer when the vessels previously passed each other. Immediately after the collision, with the view of clearing the vessels, the master of the *Lake St. Clair* called out to the *Underwriter* to back their yards, when the same voice again answered, "I have done for you now; you are going down easily."

This testimony is to be found in the depositions of the officers and eleven other persons on board of the *Lake St. Clair*. Their testimony is concordant, varying only in the exact words attributed to the *Underwriter*, and uniform. It further appears from it that three minutes after the hailing would have sufficed for the starboarding of her helm, and that there was double that time to do it before she struck, and that then the *Underwriter* would have gone clear. Again, it is said that if, instead of luffing at the last moment, she had starboarded,

she would have gone clear, and some of these witnesses swear that if she had even kept her course she would either have cleared the *Lake St. Clair* or done comparatively but little damage.

This testimony has thus shown that repeated warning was given to the *Underwriter* to avoid a collision, and within time sufficient to do it which was treated not only with neglect but contempt.

To counteract the effect of this evidence there are but four witnesses, from among three-and-twenty persons on board of the *Underwriter*, produced. The master has been examined, in addition to the four, but having come on deck but a moment before the collision he could not have known what took place. The four were, the second mate, in charge at the time, the chief mate, Sullivan, a seaman at the wheel, and Olsen, the look-out. The two first and the last have said that they did not hear the hailing from the *Lake St. Clair* except the call to starboard after the order to port was given by the first and second mate, but this negative testimony meets with a contradiction from the remaining one of the four—Sullivan, the man at the wheel, whose testimony does not accord with that of the second mate. According to his statement, the second mate, while in charge, not only heard the call to starboard from the *Lake St. Clair*, but had made up his mind not to comply with it as the following questions and answers show when put to and answered by Sullivan :—

Question. You have stated that the second mate told you to keep the ship on the course you had got, by the wind, and not to mind what anyone else said. What did anyone else say?

Answer. They were singing out on board the other ship for us to put our helm to starboard. They were singing out forward, but I cannot say whether it was on board the other ship or not.

Question. About eight or ten minutes previous to the collision did you hear much hailing from the *Lake St. Clair*, or forward of you?

Answer. Yes; I heard someone shouting out to put the helm to starboard.

This man, before giving these answers, had stated that he received orders from the second mate to keep the ship by the wind. The first mate has said that when he had given up his watch to the second mate he enjoined him to do so, and this after the light of the *Lake St. Clair* was visible. So determined was the second mate to comply with this order that he went aft and repeated it, while the call to starboard was coming from the *Lake St. Clair*, and he had time not only to do this, but to go forward and return to the wheel before her helm was ported. It is needless to say that the hailing to starboard was not from the *Underwriter*, as her two mates and her look-out ignore having heard the call at all until after the helm of the *Underwriter* was put hard a-port, and therefore must have come from the *Lake St. Clair*, and, as the man at the wheel heard it eight or ten minutes before the collision, there can be no doubt of both the first and second mates having heard it also. Then there is other evidence quite convincing that the hailing from the *Lake St. Clair* was heard by the second mate, to be found in his answer to a question put to him by persons on board the *Lake St. Clair* when he went on board of her after the collision. He then said, not that he did not hear the call to starboard, but that it was too late, and that he was afraid of striking the *Lake St. Clair* further forward, and, on his cross-examination as a witness, when asked if he heard shouting from the *Lake St. Clair* he admitted that he had: and if he did not answer it? his reply was, "Probably I did, but I don't remember," an answer that can bear but one construction.

The evidence of these five witnesses is negative, that they did not hear or do not remember. Opposed to it is the testimony of several who heard the hailing and the answers to it already stated. If this evidence were untrue, it is scarcely credible that out of the twenty-three persons on board the *Underwriter* no one of them could be found to say so by declaring that during the eight or ten minutes before the collision he was in a position to hear, and that no such warning, as has been stated, was given to the *Underwriter*.

The following questions, with the answers to them, put to, and given by the nautical assessors, with whose advice I am aided, apply to the two suits now under consideration.

1. Was the *Lake St. Clair* in stays, helpless and unmanageable, at and before the time of collision, and, if so, how long? Answer. She was: and, according to the evidence, from ten to fifteen minutes before the collision.

2. Was the *Underwriter* notified in sufficient time of the *Lake St. Clair* being in stays, helpless and unmanageable; and, if so, could she have taken any and what steps whereby the collision complained of in this cause would have been prevented? Answer. Yes; and there are two things that she could have done, she could have put her helm a-starboard, or hove everything aback. Either of these courses would have prevented the collision.

3. Was either and which of the above-named vessels to blame for the collision? Answer. We entertain no doubt of its being owing solely to the negligence and unseamanlike conduct of the officers in charge of the *Underwriter*, immediately previous to the collision, that it occurred, and that the persons in charge of the *Lake St. Clair* were in no way to blame for it.

E. D. ASHE, Commander R.N.
P. GOURDEAU, Harbour Master.

A decree must therefore go for the damages and costs sustained by the *Lake St. Clair*, and also a decree dismissing the suit of the *Underwriter* with costs.

In rendering these judgments I wish it to be distinctly understood that due regard has been had to the rule of navigation which has been invoked. It is not the use or the exercise of it which has been prevented, but the abuse of it to the prejudice of another which is disallowed, and the wrong which has been done must have its remedy. The very old but useful maxim, "*Utere tuo ut alienum non lædas*" admits of application as well at sea as on land, and the persons who have abused it and thereby caused this collision will perhaps recollect it to their advantage. While closing these remarks I do not think that I should properly discharge the unpleasant duty I am called upon to perform if I did not characterise as well the conduct as the language of the persons on board the *Underwriter* as they deserve. That the first was negligent and the last disgraceful and intemperate I am compelled to say, and have only to add that if on the occasion of this collision the wind had been perhaps but a breath stronger, and the blow more severe, a heavily laden iron vessel would have been sunk instantaneously, valuable

lives lost, and, in the latter case, after the language preceding and following such a disaster, it might have been difficult for those using it to resist successfully a charge of another description.

From this judgment the owner of the *Underwriter*, by his proctor, on the 26th Nov. 1875, declared in court that he asserted an appeal to Her Majesty in Her Privy Council, and on 20th April 1876 the petition of appeal was transmitted to the Registrar of the Privy Council. The case for the appellants submitted that the decree of the court below was erroneous, and that it ought to be reversed for the following, among other, reasons:

1. Because the learned judge erroneously held that the evidence proved that the collision was purposely and maliciously occasioned by those on board the *Underwriter*.

2. Because the evidence proved that the *Lake St. Clair* was for some time before the collision sailing on the port tack.

3. Because it was the duty of the *Lake St. Clair*, being on the port tack, to take in due time proper measures for getting out of the way of the *Underwriter* which was sailing close hauled by the wind on the starboard tack, and the *Lake St. Clair* failed to perform that duty.

4. Because even if the *Lake St. Clair* had not sufficient way on her to enable her to pay off under a port helm, there was nothing to indicate such inability to the *Underwriter*, and the evidence proved that the *Lake St. Clair* did not adopt the proper measures for avoiding the said collision.

5. Because the evidence proved that the *Underwriter* was not in any way to blame with respect to the said collision.

6. Because the judgment and decree of the court below were in favour of the respondents, whereas upon the evidence they ought to have been in favour of the appellant.

Whilst that for the respondent submitted that it was correct, and ought to be affirmed, for, amongst others, the following reasons:

1. Because it was proved that the *Lake St. Clair* was in stays at the time of the collision, and that the *Underwriter* was aware of this in time to have avoided the collision.

2. Because the collision was solely due to the negligence, improper, and unseamanlike conduct of the officers in charge of the *Underwriter*.

Milward Q.C. and *E. C. Clarkson* for appellant.—If the story told by the *Lake St. Clair*, and believed by the court below, is correct, the collision was the wilful, intentional, and wrongful act of those on board the *Underwriter*, and not an act of negligence for which the owners of that vessel are liable, and therefore the owners must succeed in their appeal, and the suit against them be dismissed. But we were on the starboard tack, and it was our duty to hold our course. The *Lake St. Clair* was, or appeared to us to be on the port tack, and we had a right to expect her to get out of our way. She says that she was in stays to get out of our way, and missed stays and got sternway. If she did so it was improper conduct on her part, so long as we were on the same tack it was our duty to get out of the way if we were overtaking, and she had no right to go into stays under the circumstances. *The Agra* and *The Elizabeth Jenkins* (L. Rep. 1 P. C. 501; 16 L. T. Rep. N. S. 755; 2 Mar. Law Cas. O. S., 532). When the *Underwriter* discovered the condition of the *Lake St. Clair* it was right to put the helm down, as that would have the effect of stopping her way, and would take effect sooner than if it were put up. The fact was the *Lake St. Clair* did not see us soon enough, in consequence of keeping a bad look-out, and so did not take steps to apprise us of her condition. She ought to have seen us before she hauled her foreyard, and if she had done so and let it remain abox, we should have seen her condition, and been able to get out of the way, and she would have paid off, probably have gathered sternway, and the collision would not have happened. If it was true that she had come round on her new tack but was not full, if, when the afteryards were squared and the spanker brailed up, the head yards had been braced aback, she would have paid off, and the collision would have been avoided. On the previous occasion of passing, the *Lake St. Clair* violated the rule of the road by coming up to the wind and losing her headway, and so occasioned risk of a collision, and there is no excuse for the strong language used. There is no evidence that it was used by an officer of the *Underwriter*. The meaning of it was only, "I have had to give way this tack, it will be your duty to do so next tack."

Butt, Q.C. and *Bompas*, Q.C.—The rule as to a starboard tacked vessel keeping her course does not apply when she is approaching a vessel in stays. In fact, she was an overtaking vessel within rule 17, and, therefore, bound to keep out of our way. We gave warning of our position as soon as it was possible to do so, and in time for the *Underwriter* to have avoided the collision. The rule that a port tacked ship should give way, cannot apply till she has got way on the port tack. The conduct of those on board the *Underwriter* was negligent in perversely keeping on their course so long when they might have seen the condition we were in, but does not amount to an actual wilful intent to run us down. It is a case like that of *The Franconia* (*ante*, p. 295; 35 L. T. Rep. N. S. 721); *R.* v. *Keyn*, (L. Rep. 2 Q. B. D. 90; I. Rep. 2 Ex. Div. 63), where the act which occasioned the loss of life was the result of negligence in the navigation of the ship, and not a premeditated crime.

Clarkson, in reply.—The *Underwriter* was not an overtaking ship; considering the state of the weather, a dark night, and the embarrassing circumstances in which we were placed there was no negligence in acting as we did. We put the helm down, which was right, and as soon as we were aware that anything was really amiss with the *Lake St. Clair*.

Feb. 13.—The judgment of the court was delivered by

Sir R. PHILLIMORE.—This is an appeal from the Vice-Admiralty Court of Quebec, in a case of collision which took place between twelve and one o'clock in the morning of the 26th July, in the year 1875.

The place of the collision seems to have been off Cape Rosier, in the Gulf of St. Lawrence. The ships that collided were two large vessels, the *Lake St. Clair*, an iron ship of 1061 tons, with a general cargo and crew of thirty-one hands, bound for Montreal, and the *Underwriter*, a full-rigged ship of 1431 tons, in ballast, with a crew of twenty-eight hands, bound for Quebec. The nature of the damage inflicted was this: the *Lake St. Clair* was struck at about right angles, sixty feet from the stern on the starboard side abaft the main rigging, the bow of the *Underwriter* passing between her main topmast backstays, and mainmast stays. Both these vessels were on tacks beating up the river St. Lawrence, and the learned judge of the court below, after

consulting his nautical assessor, in a judgment which bears the marks of great pains and care, came to the conclusion that the *Underwriter* was alone to blame for this collision.

With that judgment their Lordships are unable wholly to concur.

In the judgment which their Lordships are about to deliver, they are disposed to assume generally the facts stated on behalf of the *Lake St. Clair* as the foundation for that judgment; that is to say, they are of opinion that she had not any way upon her at the time of the collision, though they are also of opinion that the *Underwriter* could not see the state of her canvas, or so discover that she was in that condition. It is unnecessary to go into an earlier part of the history of this case, upon which, though much discussed in the court below, the determination of this appeal it is now admitted does not depend. The vessels had tacked shortly before the occurrence which led to the collision. At that time the *Lake St. Clair* had come round upon the port tack, and the other vessel, the *Underwriter*, was upon the starboard tack, seeing the green light of the *St Clair*.

Now there is no doubt that, according to the general rule of navigation, it is the duty of the port tacked ship to get out of the way of the starboard tacked ship; but her defence in this case was that she had thrown herself into stays, and that she was helpless and unmanageable at the time of the collision; and, therefore, that the other vessel, though, according to the general law it was her duty to keep her course, seeing, as she ought to have seen, and knowing, as she ought to have known, the helpless state of the *Lake St. Clair*, ought to have executed some manœuvre herself—the nature of which will presently be adverted to—which would have prevented the collision.

In this case some nautical questions of considerable difficulty and nicety are raised, and their Lordships have thought it proper to consult very carefully with their nautical assessors, and to put to them certain questions, the results of which I am about to state, so far as they have been adopted by their Lordships.

The first question which requires to be decided appears to be the following: Was the *Lake St. Clair*, in the circumstances of the case, and having regard to her position relatively to the *Underwriter*, justified in tacking at all in the face of that vessel? After consultation with the nautical assessors, this question must be answered, their Lordships think, in the affirmative. They think there was, then, no reason to apprehend that anything would prevent her safely executing their manœuvre at that time. The next question is whether, if the *Lake St. Clair* had come round so as to be fairly on the port tack, and had seen the red light on the *Underwriter*, which is admitted to have been the proper light, and which, according to her own statement, was seen by her at the distance of half to three quarters of a mile, she was right in the manœuvre which she adopted, or whether she might not have taken steps which would have enabled her to get out of the way of the starboard tacked vessel. Their Lordships after consultation with their nautical assessors, are of opinion that the *Lake St. Clair* ought to have braced her head yards abox, and not to have hauled her foreyard, as it is admitted she did, and thus she would have been enabled to give herself sternway; and, moreover, would have allowed the *Underwriter* to go safely ahead.

For these reasons their Lordships think that the *Lake St. Clair* is to blame.

In these circumstances their Lordships have had to consider whether the *Underwriter* was not fairly apprised of the condition in which the *Lake St. Clair* was, and whether, on being so fairly apprised, there were no manœuvres which she could have executed which would have, on her part, prevented the collision; it being perfectly clear that though the port tacked vessel is to get out of the way of the starboard tacked vessel, and the starboard tacked vessel is to keep her course, that rule of navigation does not mean, and never has been construed to mean that the starboard tacked vessel is to obstinately continue on her course when she sees that, in the particular circumstances by a variation from it she can avoid a collision.

It has been already mentioned that their Lordships are of opinion that the *Lake St. Clair* did not apprise the *Underwriter* of her incapacity to take the proper manœuvres incident to a port tacked ship by the state of her canvas; for the fair result of the evidence appears to be, that the state of her canvas was not visible on board the *Underwriter*. But it seems to be a fact in the case which is well established, that those on board the *Lake St. Clair* did hail to those on board the *Underwriter* at a sufficient distance to apprise them of the condition which they were in; this hailing took place when the vessels were, in their Lordships' judgment, so far apart as to allow a sufficient interval of time to warn the *Underwriter* if she had attended to the hailing which reached her. It has been suggested that the *Underwriter* ought to have starboarded her helm, and could so have avoided the collision. Their Lordships, after consultation with their nautical assessors, are of opinion that that would not have been a proper manœuvre, but that the *Underwriter* ought to have executed another manœuvre, namely, to have put her helm down at an earlier period than she did, that is, at the moment when the hailing first reached her, which it is clear she did not do, and which if she had done would have avoided the collision. She would have brought her head to the wind, and there would have been no collision,

Their Lordships are, therefore, compelled to find that the *Underwriter* was also to blame for this collision; and the decree which they will humbly advise Her Majesty to make will be as follows: To reverse both the decrees of the Court below, there being cross suits in this case, and to declare in both suits that both ships are to blame; that the damages be assessed according to the Admiralty rule; and that each party must bear their own costs in the court below and of this appeal.

Solicitor for appellant *Thomas Cooper*.

Solicitors for respondent, *Bischoff*, *Bompas*, and *Bischoff*.

Supreme Court of Judicature.

SITTINGS AT WESTMINSTER.

Reported by W. Appleton, Esq., Barrister-at-Law.

Tuesday, Nov. 14, 1876.

(Before Kelly, C.B., Mellish, L.J., Brett and Amphlett, JJ.A.)

Shand and others *v.* Bowes and others.

Consignment to be shipped in one or both of two months—A small fraction only shipped in the given period—Refusal to accept—Meaning of "to be shipped"—Effect of date of bill of lading.

Defendant bought of plaintiff 600 *tons of rice, "to be shipped during the months of March* $\frac{\text{and}}{\text{or}}$ *April, per Rajah of Cochin." The* 600 *tons were in* 8200 *bags, only fifty of which were put on board in March, the rest being shipped in February, whereupon defendants refused to accept:*

Held (reversing the decision of the Court of Queen's Bench), that this case was undistinguishable from Alexander *v.* Vanderzee (*L. Rep.* 7 *C. P.* 530), *and that there had been no breach of the contract to ship the goods.*

This was an appeal of the plaintiffs against a decision of the Queen's Bench Division (Blackburn, Mellor, and Lush, JJ.), ordering judgment to be entered for the defendants, pursuant to leave reserved at the trial, when the jury found a verdict for the plaintiffs.

A rule *nisi* for a new trial for verdict against evidence had also been obtained, and was now heard.

The plaintiff sought damages for the breach of a contract to buy 600 tons of rice, "to be shipped during the months of March $\frac{\text{and}}{\text{or}}$ April, per *Rajah of Cochin*." There were, in fact, two contracts, each for 300 tons, but nothing turned on that fact, and the case was argued and judgment proceeded as if there had been but one for 600 tons.

The rice was shipped in 8200 bags, in four parcels; a bill of lading being given for each parcel when complete as follows:

February	23	1780 bags.
,,	24	1780 ,,
,,	28	3560 ,,
March	3	1080 ,,
		8200 bags.

Only fifty bags were put on board actually in March. The ship sailed on the 10th March, and on arrival defendant refused to accept, on the ground that the shipment had not been within the time required by the contract.

The case in the court below is reported *ante* p. 208; L. Rep. 1 Q. B. B. 470; 34 L. T. Rep. N. S. 795.

Cohen, Q.C. and *J. C. Matthew*, for plaintiffs.—The court below treat this contract as if the 600 tons could be broken up into parcels for the purpose of shipment. That cannot be done, there can be only one shipment, and that is not complete till the last bill of lading is signed. That must certainly be so when the ship is named, as it is here. In this contract there is no mention of the bill of lading. It was otherwise in *Alexander* v. *Vanderzee* (L. Rep. 6 C. P. 530). The judgment below must go this length, if there is a contract for 300 tons, and nothing said about the bill of lading, and if 100 be shipped in the previous month, and a bill of lading happen to be signed, the rest shipped and a bill of lading as to them signed in the proper months, the contract is broken. [Brett, J.A.—Is not the real point that the judgment below makes the bill of lading a part of the shipment?] It does, but there is no mention of the bill of lading in the contract. The only shipment the purchaser was bound to take was one for 600 tons. [Brett, J.A.—Even if there had been mention of the bill of lading in the contract, would it have made any difference? If three bills had been offered, and not the fourth, he would not have been obliged to have taken them.] The judgment below would admit that if only one bill of lading had been given, and that when all had been shipped, *i.e.*, in March, the shipment would have been good, and yet there was nothing here to prevent the first three bills being withdrawn, and only one given which should cover the whole shipment. That is of frequent occurrence in practice. If this contract is for the court, it must arrive at the same conclusion as did the jury. But it was properly for the jury, for there was ambiguity on the face of the contract, *i.e.*, the phrase was clearly a business phrase:

Smith v. *Thompson*, 8 C. B. 44.

Gainsford Bruce (*Benjamin*, Q.C., with him), for defendants.—If it was for the jury, the evidence was practically all in my favour, and the judge should have directed a verdict for defendants. What is the meaning of a March or April shipment? You are asked to say March means February. A substantial quantity at least should have been shipped in March or April, which was clearly not the case here. In *Alexander* v. *Vanderzee*, (L. Rep. 7 C. P. 530), the contract was substantially for a cargo, and a cargo cannot be said to be shipped till the whole cargo has been put on board. Moreover, in that case, the bulk was put on board within the contract months. There must be something to fix the date of shipment if the time when the goods are put on board does not do so, and the bill of lading does that more conveniently than anything else, for the time when the ship sails is too uncertain. [Brett, J.A.—But the shipment is of 600 tons. It comes to this; is there any shipment of a special amount till the whole is shipped?]

Cohen, Q.C., in reply.—The witnesses had no usage to speak to; each had merely his own opinion on the subject to give. That is the case over and over again. The President of the Rice Association was called, and he said he never knew of such a question, and had never heard of *Alexander* v. *Vanderzee*.

Cur. adv. vult.

Jan. 22.—The judgment of the court was delivered by

Mellish, L.J.—The question we have to determine is whether the Queen's Bench Division have properly held as a matter of law contrary to the finding of the jury, that the defendants were justified in refusing to accept the 600 tons of rice upon the ground that they were not shipped in March $\frac{\text{and}}{\text{or}}$ April, within the meaning of the two contracts between the parties.

The court below came to the conclusion that they were, upon the ground that each parcel of rice must be deemed to have been completely shipped at the time when the bill of

lading for that parcel was signed, and that, therefore, nine-tenths of the whole quantity were shipped in February, and it is obvious that if the whole 600 tons had been shipped under one bill of lading instead of being shipped in four parcels under four different bills of lading, the court below would have come to a different conclusion, and would have held the case to have been governed by *Alexander* v. *Vanderzee* (L. Rep. 7 C. P. 530) because they admit that the 1080 bags included in the last bill of lading ought to be held to have been shipped in March, because the last fifty bags of that parcel were put on board in March.

We have, therefore, to consider whether, having regard to the terms of the two contracts, the circumstances of several bills of lading having been signed for different parcels of the rice, instead of the whole being shipped under one bill of lading makes any difference; and we are of opinion that it does not. A bill of lading is no part of the shipping or shipment of the cargo. It is only a declaration that the cargo mentioned has been shipped, and is to be delivered on certain conditions. The contracts contain no reference whatever to bills of lading. They were contracts to deliver rice ex-quay or ex-warehouse. The first contract might have been fulfilled by the delivery of any 300 tons out of the 600 tons of rice shipped under all the bills of lading, and the second contract by the delivery of the remaining quantity, and we think that the question we have to determine is practically the same (and the parties themselves have treated it so), as if there had been only one contract to sell 600 tons; and that, as the bills of lading were not to be transferred by the vendor to the purchaser, it could not matter whether the goods were shipped by the vendor under one, or under several bills of lading.

The real question is whether, in order to fulfil a contract that the 600 tons should be shipped in March or April, it is necessary that the whole 600 tons should have been put on board in March or April, or whether it is sufficient that the shipment should have been completed in March or April; and this seems to me to be substantially the same question as that which was decided by the Court and jury in *Alexander* v. *Vanderzee* (L. Rep. 7 C. P. 530). The word "shipped" is, we think, capable of both constructions, and if it be admitted that its literal meaning would imply that the whole quantity must be put on board during the specified time, that is a construction which seems to put a great additional burden on the seller without any corresponding benefit to the purchaser, and the consequence of adopting it would, we think, be that purchasers would, without any real reason, frequently obtain an excuse for rejecting contracts when prices had dropped. The sole object of the purchasers of such produce as that in question in this case in confining the sellers to a particular time, within which the goods must have been shipped is, as far as appears, that he may know when the goods are likely to arrive. That object seems as effectually obtained by knowing when the shipment will be or has been completed as by knowing when each part of the goods was put on board. We therefore should entirely agree with the decision in *Alexander* v. *Vanderzee* (L. Rep. 7 C. P. 530), even if that decision was not binding on me. We are of opinion, therefore, that the judgment of the Queen's Bench Division to enter the verdict for the defendants ought to be reversed.

We have next to consider whether the rule granted by the Court of Appeal for a new trial upon the ground that the verdict was against the weight of evidence ought to be made absolute, and on this part of the case we have had considerable doubt. Several witnesses, and amongst others the plaintiff himself have deposed that they understood the word "shipped" to mean put on board, and that the whole quantity sold must be put on board within the specified time; and no witness says that the word in mercantile usage has any other meaning, and the jury appear to have based their verdict upon a distinction which, though made by one or two witnesses, we do not think satisfactory—between contracts in which the ship is named, and contracts which may be fulfilled by delivering goods out of any ship. On the other hand we think it is obvious, on reading through the evidence, that each witness was not speaking to any real mercantile meaning which the word "shipped" or "shipment" bears, but was putting his own construction on the word; and as persons who are not lawyers are apt to do, interpreted the word literally. No witness stated that he had known instances of goods rejected, and such rejection acquiesced in, although the shipment had been completed within the appointed time, because the whole of the goods were not put on board during that time; and this is the sort of evidence which, in my opinion, ought to be given before the rule established by the case of *Alexander* v. *Vanderzee* (L. Rep. 7 C. P. 530), is departed from. I do not believe that if a new trial was ordered, such evidence could be obtained.

I am of opinion, therefore, that the rule for a new trial should be discharged.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Stevens, Wilkinson,* and *Harries.*

Solicitors for the defendants, *Lattey* and *Hart.*

Nov. 15, 1876; *Jan.* 22, 1877.

(Before Kelly, C.B., Mellish, L J., Brett and Amphlett, JJ.A.

Tully *v.* Howling.

Vessel chartered for a stated time—Detention by order of Board of Trade—Refusal of charterer to accept.

The charterer of a vessel chartered for a specified time, commencing on a named day who cannot have the vessel on the day agreed on, is entitled to cancel the charter.

The plaintiff chartered a vessel of the defendant for twelve months from a named day; the vessel was detained by the Board of Trade for repairs, and was not ready for the plaintiff until two months after date.

Held (*affirming the judgment of the Queen's Bench Division*), *that time was the essence of the contract, and that the plaintiff was entitled to repudiate the charter.*

This was an appeal by the defendant from a decision of the Queen's Bench Division, giving judgment for the plaintiff on a claim for money advanced by the plaintiff to the defendant on account of a ship which he had chartered of the

defendant, and which he had refused to load, as the vessel was not ready at the time agreed on.

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

It is this day mutually agreed between L. W. Howling, Esq., owner of the ship or vessel called the Conquest, of London, of the burden of 187 tons register admeasurement, or thereabouts, whereof William Sarson is master, now in Sunderland, bound to London, and Messrs. Charles Tully and Co., merchants and freighters of the said ship, for twelve months, for as many consecutive voyages as the ship can enter upon after the completion of the present voyage at and from Sunderland to London; that the ship being tight, staunch, and strong, and in every way fitted for the voyage, the said master, with the said ship, shall, with the first opportunity, load a full and complete cargo of coals in river or dock, at an approved berth, drops, or staiths, and being so laden shall therewith proceed to London, or so near thereto as she can safely get, and deliver the same to the order of the said freighters or their assigns, he or they paying freight for the same at the rate of 7s. per ton.

On the completion of the first voyage, and when the plaintiffs were ready to load the ship, she was seized and detained by the Board of Trade as unseaworthy. The plaintiffs thereupon declined to carry out the charter-party, and brought an action against the defendants to recover 30*l.* for advances made. The defendant, whilst admitting the plaintiff's claim, set up a counter claim for damages in respect of the plaintiff's refusal to take the ship.

The facts of the case are set out fully in the judgment of the Court of Appeal.

A verdict having been entered at the trial for the defendant for 122*l.* damages, from which the 30*l.* claimed by the plaintiff was to be deducted, the defendant, pursuant to leave reserved, moved the Queen's Bench Division to set aside the judgment for the defendant and enter judgment for the plaintiff for 30*l.*

June 2, 1875.—*Waddy*, Q.C. and *Crompton*, for the plaintiff.

Webster for the defendant.

Cockburn, C.J.—This case seems to my mind perfectly clear. The cases cited by Mr. Webster have no application; they were not cases in which the contract was one that had reference to a given time, or to the use of the ship for a given time, and that is the essence of the present contract. The plaintiff says: "I want a vessel for twelve months from a given date;" or, if you please, "from the termination of a given voyage." I think it is a matter of doubt which of those two is the right construction of the contract, but, taking it either way, what it comes to is this: the bargain is that the plaintiff is to have the use of the ship for twelve months, but the defendant is not in a position to give him the ship for twelve months from the date from which it was agreed the term should begin, whether it was a given date or the termination of a given voyage. He is not in a position to give him the use of the vessel, because she is in such a state that neither the owner nor the charterer would be justified in sending her to sea, and the defendant admits that to be the case, for he takes upon himself to repair the vessel. By the fact of his taking the vessel back on his own hands to repair he makes it impossible for him to perform his part of the contract, which is that the charterer shall have the use of the vessel for twelve months from a given period. Therefore, the result is that, if the charterer is to take the vessel at all, he must take her not for twelve months, but for twelve months less two months. Therefore it cannot be said that there was not a substantial deviation from the contract. I am of opinion that under the circumstances the plaintiff was perfectly justified in saying, "What I bargained for was the use of the ship for a consecutive series of voyages; you cannot give me that, and I am not bound to go into the market to get some other ship and make some other bargain, which may be advantageous or disadvantageous to me." I think these facts distinguish the case from those cited by Mr. Webster, in none of which was time of the essence of the contract.

Mellor, J.—I am of the same opinion. I think there is nothing in the contract to show that the time might be divided into months. The contract which was contemplated was a contract for twelve months. During a substantial part of the twelve months, quite sufficient to frustrate the object of the contract, there was an inability to comply with the bargain which had been come to between the plaintiff and the defendant. Under these circumstances I cannot entertain any doubt that it was such a failure as entitled the plaintiff to say, "I will end the contract and find some other means of carrying out my object.

Lush, J.—I am of the same opinion. The bargain was a bargain for the use of a ship for twelve months, and the owner was not, at the time when the contract began to run, enabled to give the charterer that use, and was unable to give it for two months afterwards. In my opinion, under these circumstances, the charterer may, if he pleases, repudiate the contract, because he contracts for twelve months' service, and he is not bound to take ten months' service. The cases cited by Mr. Webster stand on an entirely different footing. All those were cases of voyage charters. Where a ship is chartered for a voyage without any definite period for the commencement of the voyage, and a delay takes place, the question is, whether that delay is so great as to frustrate the object for which the charterer entered into the charter-party. Here it is not so. The plaintiff cannot have the services of the ship he contracted for during twelve months, and the question is to be determined upon the construction of the contract itself. Here he bargained to have the services of the ship for twelve months from the time when she should return from the voyage from Sunderland to London, which she was about to commence, and she had returned from the voyage on the 23rd March. Then the time began to run for which he stipulated to have the services of the ship. It is then discovered that the ship is in such a state that the owner is not able to take her to sea. Then the order came from the Board of Trade, and it takes two months to repair her. After that time the shipowner says: "You are bound to take her for the rest of the time." But I apprehend that on no principle could he say that. This is entirely different from a case of a voyage charter, where the only question is whether the delay is so great as to make it useless to prosecute the voyage to its intended end. I cannot say that I have the slightest doubt upon the point; therefore the judgment must be set aside, and the judgment entered for the plaintiff.

From this judgment the defendant appealed.

Nov. 15, 1876.—*Philbrick*, Q.C. and *Webster* for the appellant.—The question here is whether time is of the essence of the contract; the contention for the defendant is that there was no contract for

twelve months, beginning at a fixed date. The condition as to the staunchness of the ship is not a condition precedent, and the delay was not such as to completely frustrate the object of the contract, so as to justify the plaintiff's refusal to load. If the judgment of the court below is right even a day's delay would have avoided this contract, and that is in contradiction to the current of authority. If the plaintiff has any claim, it is by a cross action, and even then he cannot show that he has done all in his power to mitigate the damages by hiring a vessel for two months during which the ship was delayed. They cited

Boone v. *Eyre*, 2 W.Bl. 1312;
Hare v. *Rennie*, 5 H. & N. 19;
Tarabochia v. *Hickie*, 1 H. & N. 183;
Havelock v *Geddes*, 10 East, 555;
Dimach v. *Corlett*, 12 Moo. P. C. 199;
Behn v. *Burness*, 3 B. & S. 751;
Jackson v. *Union Marine Insurance Company*, *ante*, vol. 2, p. 435; L. Rep. 8 C. P. 572;
Potter v. *Rankin*, *ante*, vol. 2, p. 65; L. Rep. 6 H. of L. 83;
McAndrew v. *Chapple*, L. Rep. 1 C. P. 643; 2 Mar. Law Cas. O. S. 239.

Crompton (*Waddy*, Q.C. with him) for the plaintiff.—The defendant contracted to supply a named vessel in a specified condition on a fixed date, he has failed to do this, and the plaintiff is consequently free to throw up the charter. The plaintiff was not bound to commit himself to fresh risks by hiring another vessel. This breach goes to the root of the contract, and frustrates the plaintiff's object in hiring the vessel.

Bradford v. *Williams*, L. Rep. 7 Ex. 259.

Webster in reply.

Cur. adv. vult.

Jan. 22, 1877.—The judgment of Kelly, C.B, Mellish, L.J., and Amphlett, J.A. was delivered by

Mellish, L.J.—This was an appeal from a judgment of the Queen's Bench Division ordering a verdict which at the trial had been entered for the defendant on a counter-claim for 92*l.* to be entered for the plaintiff for 30*l.* pursuant to leave reserved.

The defendant admitted that he owed the plaintiff 30*l.*, and the only question in the cause was, whether the defendant under the circumstances proved at the trial was entitled to succeed on a counter-claim by which he sought to recover damages from the plaintiff on account of the plaintiff having refused to perform a charter-party he had entered into with the defendant.

By this charter-party it was agreed that the defendant's vessel, the *Conquest*, then in the port of Sunderland, and bound for London, should be chartered to the plaintiff for twelve months, for as many consecutive voyages between Sunderland and London as the said ship could enter upon after the completion of the then present voyage. The *Conquest* duly completed her then present voyage, and returned to Sunderland in March 1875 On the 8th April the defendant gave notice to the plaintiff that on the 9th April the *Conquest* would be ready to receive her cargo, and it was admitted in the argument before us that the year for which the *Conquest* was chartered began to rnn on the 9th April. The plaintiff endeavoured to procure a cargo for the *Conquest*, but for some time he was unable to procure one. He then determined to load the *Conquest* on his own account, and on the 20th April gave notice to the master that he was ready to load. Before, however, any cargo was actually loaded, the officer of the Board of Trade objected to the vessel taking any cargo on board on account of her being unseaworthy, and on the 7th May a formal order was issued detaining the *Conquest* until she was repaired. Thereupon the plaintiff, on the 9th May, not being able to get the vessel, gave notice to the defendant that he rescinded the charter. The defendant proceeded without delay to repair the *Conquest*, and by the 17th June she was repaired and ready to receive cargo, but the plaintiff refused to load her.

These being the circumstances of the case, it has been decided by the Queen's Bench Division, that the plaintiff was justified in rescinding the charter, and in refusing to load the *Conquest*, and we are of opinion that their judgment ought to be affirmed.

It was admitted in the argument before us, that the year for which the *Conquest* was chartered commenced on the 9th April, and that the *Conquest* was not really ready to receive cargo, so that the plaintiff could have had the use of her until the 17th June, and therefore the question simply is: Is a person who has agreed to charter a vessel for twelve months, commencing from the 9th April, bound to wait until the 17th June before he obtains possession of the vessel, and is he then bound to take her for a period of less than ten months? In other words, in a charter for a stipulated time, is the time of the essence of the contract, or is the charterer bound to take the time specified in the charter? We are of opinion that as in a charter for a voyage, the specified voyage would be of the essence of the contract, and the charterer, if he could not have the use of the vessel for the specified voyage, would not be bound to take her for any other voyage, so in a charter for time, if the charterer cannot have the vessel for the specified time, he is not bound to take the vessel for a shorter time, or a substantially different time, but that if he cannot get the vessel for the specified time he may throw up the charter.

In all contracts which are to be mutually performed, the party who claims performance must be ready to perform his part of the contract, and cannot compel the opposite party to take something substantially different from that which he contracted to give him. If there is an agreement to sell a hundred quarters of wheat, the purchaser is not bound to accept ninety quarters, though the price of wheat has fallen, and it is for his advantage to have the smaller quantity. He can say, "I never agreed to buy a quantity of ninety quarters, and, therefore, I will not take them." So, in the present case, the plaintiff can say, "I never agreed to charter the *Conquest* from the 17th June 1875, to the 9th April, 1876, and therefore I will not take her for that period.

Several cases were referred to, but the only one of them which relate to time charters was the case of *Havelock* v. *Geddes* (*ubi sup.*), In that case, however, it was admitted on the pleadings, as is repeatedly pointed out by Lord Ellenborough in his judgment, that the charterer had had the use of the ship, and that the action was brought to recover freight actually earned, and therefore the court no doubt held that it was no defence that the ship had not been

repaired at the commencement of the charter in due time; but it was not held that a charterer who had chartered a vessel for twelve months is bound to accept the use of the vessel for a substantially different period, nor is any opinion expressed to that effect. The other cases which were cited seem to us to have no bearing on the subject.

Brett, J.A.—I agree, not on the ground that there is in such a charter a warranty that a ship should be seaworthy on the day when the charter is to commence, with a right to reject the ship if the warranty is not complied with, nor on the principle that time was the essence of the contract; but on the ground that, under the circumstances proved at the trial, the jury might, and indeed should, in reason, have found that the ship was not fit for the purpose for which she was chartered, and could not be made fit within any time which would not have frustrated the object of the adventure. *Judgment affirmed.*

Solicitors for appellant, *Lowless* and *Co.*

Solicitor for respondent, *Hickin.*

SITTINGS AT LINCOLN'S INN.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Monday, March 12, 1877.

(Before James and Mellish, L.JJ., and Baggallay, J.A.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

The Swallow.

Collision—Dumb barge—Lights—Inevitable accident—Practice—Materials for appeal—Judgment of Court below—Costs.

When a collision occurs between a dumb barge without lights and a steamer on a dark night in the river Thames, there is no presumption of law that the steamer is to blame. It is in all cases necessary for those who allege negligence, causing a collision, on the part of another vessel, to prove it.

The reasons for judgment of the County Court Judge, as well as for that of the High Court, should be before the Court of Appeal when a further appeal is allowed to that Court.

Costs not allowed when the Court of Appeal reversed the decision of the court below, in an appeal for which permission was necessary.

This was an action for damage sustained by the dumb barge *Rhine* in a collision which took place in Blackwall Reach, in the river Thames, on the 26th Jan. 1876, between that barge and the steamship *Swallow*, belonging to the General Steam Navigation Company. It appeared that the barge was, about 3 a.m., going down with the tide, deeply laden with a cargo of copper ore; she had no lights exhibited. The *Swallow* was coming up the river on a voyage from Ostend, the weather was thick, and those on board the *Swallow* did not see the barge until close to her, owing, it was alleged, to the fact that there was another barge, light, and therefore higher out of the water than the *Rhine*, coming down behind her, which, in the darkness, rendered the *Rhine* invisible until it was too late to avoid a collision. As soon as the light barge was observed, right ahead, the helm of the *Swallow* was ported, and the barge hailed, and on the *Rhine* being distinguished the engines of the *Swallow* were reversed full speed; nevertheless the *Swallow* struck the barge and sunk her.

The cause was originally instituted in the City of London Court, and on the 4th July 1876, came on for hearing before Mr. Commissioner Kerr and nautical assessors, when, after examination of witnesses, and after consultation with the nautical assessors, the learned judge gave judgment for the plaintiffs, on the ground that he was advised by the nautical assessors that the *Swallow* was to blame, adding, however, that "Possibly, if he had had to decide the matter he might have come to a different conclusion."

From this judgment the defendants appealed, and on the 2nd Dec. 1876, the appeal came on for hearing before the judge of the High Court of Admiralty, assisted by Trinity Masters.

Butt, Q.C. and *Phillimore*, for the appellants.

Cohen, Q.C. and *Hall*, for the respondents.

Sir R. Phillimore.—This is an appeal from a judgment of Mr. Commissioner Kerr, in the City of London Court. The facts are very short and simple. The collision took place between the steamship *Swallow* belonging to the General Steam Navigation Company, and a barge called the *Rhine*, on the 20th Jan., at night, when off Blackwall Point, the steamer ran down the barge. The papers laid before the court show that the learned judge himself was of opinion that the steamer was not to blame, but as the nautical assessors, who are admitted to be competent to discharge their duty, came to the conclusion that she was, he thought it right to obey their directions.

Now, unfortunately, there are no reasons stated why the nautical assessors came to this conclusion, and, in this most unsatisfactory state of things, as far as I can gather from the arguments of counsel and from the evidence before us, it appears to be conceded that the barge was in no way to blame.

I have ruled that it was not her duty to carry lights (*The Owen Wallis*, *ante*, vol. 2, p. 206; L. Rep. 4 Ad. & Ecc. 175; 30 L. T. Rep. N.S. 41), and, with that exception, there are no facts which show that she was in any way to blame. It is admitted that the weather was not such as to justify a collision, that both the barge and the steamer were justified in navigating the river, and there was no fog that prevented their seeing each other at such a distance as to have enabled them to take proper precautions. There is no dispute as to the law that it was the duty of the steamer to keep clear of the barge; and, if the barge was not to blame, it seems difficult to avoid the conclusion that the author of the collision, the vessel inflicting the blow, must be the one in fault.

Under these circumstances, I do not think that I can reverse the sentence of the court below. I say this because I have looked, and with some anxious consideration, with the assistance of the Elder Brethren, at the question whether the law with respect to the navigation of the Thames by barges should not undergo some alteration, which is a matter well worthy of consideration; because it may well be that some regulations might be made with regard to carrying lights, and with regard to the weather when they should carry lights. But, looking to the existing law, I do not think I should be justi-

fied in reversing the sentence of the court below, and, therefore, I dismiss the appeal with costs.

I will give permission to appeal. It is very desirable that there should be a further hearing.

From this judgment the defendants, owners of the *Swallow*, in accordance with the permission granted, again appealed.

March 12.—*Butt*, Q.C. and *Clarkson* for appellants.—The tide was running down four knots, and the steamer was only coming up two or three knots an hour over the ground. She could not have come up more carefully; if she had gone slower she would not have been under command. She had a good look out, but was prevented from seeing the *Rhine* in consequence of another barge higher out of the water, behind and in a line with her. Under the circumstances it was the duty of the barge, for the safe navigation of the river by other vessels, to make her position known by some means. It is true that it has been decided that the rules as to lights to be carried by ships do not apply to these dumb barges; but that does not relieve the barge from the duty of informing other vessels by some means or another of her position, *e.g.*, by waving a light or otherwise. The first intimation we had of her position was a hail from her to port our helm, and immediately the order was given on board the *Swallow* "hard a port," but it was already too late to avoid a collision. The learned Judge of the City of London Court did not himself consider that any blame attached to the *Swallow*, but allowed himself to be guided by his nautical assessors, and the learned Judge of the High Court of Admiralty based his judgment in part on a supposed concession that the barge was not to blame, but no such concession was made. It was argued that although the barge need not carry side lights, yet that she was bound to show a light of some sort under such circumstances. [James, L.J.—The fact of a collision taking place does not necessarily involve negligence.] That is true; but here there was nothing to prevent the barge showing a light, and if she had done so no collision would have happened. [James, L.J.—I do not know of any express statute that obliges a carriage using an ordinary highway at night to carry lights.] No; but if a carriage not carrying lights came into collision with one having lights, it would be strong evidence of negligence on the part of the one without lights. At all events, there is no evidence of negligence on the part of the steamer, and if a barge chooses to navigate the river under such conditions without a light, she does so at her own risk.

Cohen, Q.C. (with him *Hall* and *Hannen*), for respondents.—The law does not absolutely, and in all cases, require a steamer to get out of the way of other vessels, but when a collision takes place, the onus of proof is on her to show that she could not have avoided the collision, and she has not satisfied it. [Mellish, L.J.—Do you contend that it is not necessary for the plaintiffs in such a case to prove negligence on the part of the defendant?] The negligence is necessarily inferred from the facts. If there had been a proper lookout the barge would have been seen sooner. A witness on shore says he saw it 250 or 300 yards off. If the *Swallow* had exercised proper vigilance the collision would not have occurred: those on board her were well aware that the tide was running down four knots, and if they were only stemming it, as they say, two knots, yet they knew that they must be approaching barges drifting at the rate of six knots, and that is a state of things requiring an amount of caution not exercised in this case. The nautical assessor in both courts below considered that the facts proved showed negligence, and the Court of Appeal will hesitate to reverse a decision depending upon technical nautical knowledge. There is no duty or obligation on a barge to show a light, and by doing so she would be more likely to embarrass approaching vessels than by not doing so. Those on board the *Rhine* did everything that they ought to do; they hailed the steamer to get out of the way, and the fact of her not doing so establishes a *primâ facie* case of negligence against her. [James, L.J.—The learned judge of the High Court of Admiralty seems to think that there is some question of law in the case.] That is as to the duty of a barge to show a light under any circumstances, with reference to his own decision that they need not do so (The *Owen Wallis*, *ante*, vol. 1, p. 206; L. Rep. 4 Ad. & Ecc. 175; 30 L. T. Rep. N. S. 41.) [Baggallay, J.A.—It is proved that the look-outs were properly stationed on board the *Swallow*, and in the absence of contradiction, it must be assumed that they did their duty.]

Clarkson, in reply, was stopped.

James, L.J.—Do the applicants ask for costs?

Clarkson.—The appeal has been prosecuted by the General Steam Navigation Company as a question of principle; if we succeed we are, I think, according to the practice of the Court, entitled to our costs, but I will not press the claim.

James, L.J.—This case has come before us in a way which I think might deserve some reprehension. There is, no doubt, a question of principle in this case so far as the General Steam Navigation Company is concerned. It is desirable in cases of this kind, upon a question of fact, that the reasons for the decision of the County Court judge, as well as for that of the judge of the Admiralty Court, on coming to us should sufficiently appear. We cannot help saying that the decision of the County Court was not in accordance with the opinion of the judge who tried the case, because he thought himself obliged to decide it otherwise than he would have done if he had had to decide it in a court of common law as an ordinary case, under which circumstances he would have nonsuited the plaintiff. One does not know to what extent the nautical assessors gave their opinion to him about the collision, according to the materials furnished to us, but it is clear that the learned judge of the Court of Admiralty entertained considerable doubt about the matter, and we have got to deal with it in this way, not to overrule the decision of the Admiralty Court, but to review the decisions of each court.

Now, our assessors think that, under the circumstances, having regard to the condition of the night and the position of the vessel, it really was a case of inevitable accident. In these cases the burthen of proof is on the person who alleges the negligence on the part of that person of the result of whose acts he complains. And upon the evidence here, and with the assistance of our assessors, we are of opinion that the plaintiff has not discharged the onus of proof on him—that is, of proving negligence on the part of the defendants; and there is very strong evidence given by

those on board the *Swallow*, that they were using reasonable caution, going at a moderate speed, making little way, and having a proper look out; and they gave further evidence that this particular barge was not seen, while another barge that was further off was seen by those on board the *Swallow*. We cannot help coming to the conclusion that the defendants have exonerated themselves, and that they ought to have had the judgment of the County Court.

With regard to the costs of the hearing of the two appeals, the latter one of which has been successful here—as it really has been a matter of favour to the General Steam Navigation Company to allow them a second appeal at all—we think that the justice of the case will be met by allowing them no costs, while relieving the barge from any costs. The order for payment of costs will be discharged.

MELLISH, L.J. and BAGGALLAY, J.A. concurred.

Solicitors for appellants, *Batham* and *Co.*

Solicitors for respondents, *Farnfield.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by J. M. LELY, Esq., and M. W. MCKELLAR, Esq., Barristers-at-Law.

Friday, Jan. 19, 1877.

SCRUTTON *v.* CHILDS.

Charter-party—Custom—Whether excluded by terms of charter-party—West India ports—Payment of lighterage, whether by shipowner or charterer.

The plaintiffs agreed with the defendant by charter-party that the defendant's ship should load at Barbadoes, St. Kitts, or Trinidad, a full cargo of West India produce, "to be brought to and taken from alongside at merchant's risk and expense." These words, with others, were in print. The charter-party also contained the words "cargo at Trinidad as customary." These words, with others, were in writing.

The custom at Trinidad is, that the ship pays for the lighterage, and the shipowner allows the charterer the reasonable expense thereof. The defendant's ship loaded at Trinidad in the customary manner, but the captain refused to pay the lighterage, whereupon the plaintiffs had to bear the expense of it:

Held, that the stipulation, "cargo at Trinidad as customary," worked an exception to the stipulation as to loading at merchant's risk, and that the plaintiffs were entitled to recover the lighterage from the defendant.

THIS was a special case stated after joinder of issue, under the Judicature Act 1875, Order XXXIV., rule 2, pursuant to the order of Lindley, J.

1. On or about the 26th Feb. 1875, a charter-party was entered into between the plaintiff and the defendant, being a document partly in writing and partly in print, and, save as mentioned in the second paragraph of the case, as follows:

[The written part is printed in italics.]

Memorandum of charter.

London, 26th Feb. 1875.

It is this day mutually agreed between *G. Childs, Esq.*, of the good ship or vessel called *the Elizabeth Childs*, A. 1, of the measurement of 390 tons or thereabouts, now lying in the port of *Greenock*, and *Messrs. Scrutton, Sons, and Co., of London*, merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed proceed *to Barbadoes direct, for owners' benefit, to load there or at St. Kitts or Trinidad. Orders to be given at Barbadoes on arrival. Time occupied in shifting ports not to count as lay days*, or so near thereunto as she may safely get, and shall then and there load from the factors of the said merchants, at the customary places, a full and complete cargo of West India produce, to be brought to and taken from alongside at merchants' risk and expense, with 150 barrels, or equal thereto, for small stowage in tierces and/or barrels. Small stowage shipped in excess of the stipulated quantity, at masters written request, to be at current rate, unless exceeding rate per charter-party.

Charterers have liberty to ship up 500 *bags sugar at* 30*s. per ton*, which said merchants hereby bind *themselves* to ship not exceeding what she can reasonably stow and carry as aforesaid, and being so loaded shall therewith proceed to Queenstown, or any convenient port of call, for orders to discharge at one safe port in United Kingdom. Three clear days to be allowed for transmission of orders, or lay days to count, and discharge in such docks as charterers may appoint, or so near thereto as she may safely get, and deliver the same on being paid freight.

If loaded at Barbadoes, 42*s.* 6*d.* per ton of 20cwt. net delivery for sugar or molasses, *if ordered direct on signing bill of lading.*

" " 45*s. if calling for orders.* Other goods in proportion. *Five guineas gratuity.*

In full of primage or pierage, and all port charges and pilotage the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigations, of whatever nature and kind soever during the said voyage always excepted. The freight to be paid on unloading and right delivery of the cargo at two months date from report.

Thirty running days (Sundays excepted) to be allowed the said merchants for loading *at loading port* and receiving orders *at port of call homewards*, to date from 25*th May* /75, if ready and required, days on demurrage (Sundays excepted) over and above the said laying days, at fourpence per register ton per day.

If not arrived at *loading port* and ready to load on or before the 25*th July* /75, charterers' agents have liberty to cancel this charter.

Sufficient money to be advanced the master for ordinary disbursements at loading port, at the current rate of exchange and free of commission, but subject to insurance, to be deducted from the ship's freight on settlement.

The master to give notice to charterers' agents of the vessel being ready to receive cargo, and to sign bills of lading at any rate of freight required, without prejudice to this charter.

The charterers' responsibility on this charter-party to cease as soon as the cargo is on board, except for such differences as may exist between the freight payable by bills of lading at the port of discharge and the freight due to the vessel by virtue of this charter-party. Penalty for non-performance of this agreement, estimated freight. The ship to be addressed to and reported at the custom house by *C. J. Brightman* and Co., London, or to their agents at the port of discharge, who are to receive a commission of five per cent. on this charter, which is due on signing this agreement, also on dead freight and demurrage, if any, with 2½*l. per cent.* for transacting ship's business *at loading port*, and 2*l.* 2*s.* for reporting inwards at port of discharge.

The vessel to be consigned to charterers' agents, free of commission. Should the vessel return without a full cargo, the charterers are to have the benefit of any reduction in the ordinary dock dues.

Should vessel load at St. Kitts, freight in that case to be 43/9, *if ordered direct, on signing bill of lading;* 2/6 *extra if calling for orders, and if vessel loads at Trinidad freight to be* 47/6, *if to United Kingdom orders or direct,* 10 *per cent. extra, if to Continent between Havre and Hamburgh, and a further* 2/6 *per ton if to St. Nazaire. Cargo to be loaded at Trinidad as customary.*

Sg. Scrutton, Sons, and Co. By authority.
27/ 2/75, *per pro, C. J. Brightman and Co.*
Witness Sd. Charles E. Brightman.
Sg. Charles E. Brightman.

2. The parties are not agreed as to whether the words "to be loaded," in the last clause, were or were not part of the charter-party, and that question is one of those to be tried after the decision of the special case.

3. The plaintiffs allege that the custom at the port of Trinidad, referred to in the last paragraph of the charter-party, whether the words "to be loaded" were in or not, is a custom that the ship pays for the lighterage of the cargo from the shore to the ship, and that the shipowner pays or allows to the charterers the reasonable expenses of all such lighterage, and that if the charterer first pays the same, the shipowner repays to the charterer the amount so disbursed, and the cost and expenses of insuring the same, or to the like purport and effect, and that in consequence of such custom the rate of freight between Trinidad and England is higher than between England and other West India Islands, where, but for such custom, it would be the same. The defendant denies the existence of any such custom, and he also denies that such custom, even if it existed, was meant to be referred to by the charter-party, and the existence of such custom is a question of fact to be tried, but for the purposes only of this special case it is to be taken that the said custom, or a custom to the like effect, existed.

4. The said ship sailed for Barbadoes, in accordance with the said charter-party, and loaded the agreed cargo at Trinidad, and delivered the same at Bristol.

5. The said cargo was brought to the ship at Trinidad in flats or lights, and was loaded therefrom in the customary manner; and if the alleged custom existed, it is submitted that what was done was in accordance therewith.

6. The plaintiffs were put to expenses for such lighterage amounting to 69*l.* 1*s.*

7. The agents of the plaintiffs at Trinidad applied to the captain of the said ship for payment of the said sum of 69*l.* 1*s.*

8. The captain of the said ship refused to pay the said sum or any part thereof, and thereupon the agents of the plaintiffs paid the said sum of 69*l.* 1*s.*, and insured the ship's disbursements, including the said sum of 69*l.* 1*s.* at a cost of 2*l.* 2*s.*

9. The plaintiffs in this action seek to recover the said sum of 69*l.* 1*s.* and 2*l.* 2*s.*

The question for the opinion of the court is, whether, upon the facts above stated, and assuming that the custom is as set out in paragraph 3, or to the like effect, the plaintiffs would be entitled to recover the said sums from the defendant? First, if the words "to be loaded" were included in the charter-party? secondly, if the said words, were not so included? and, thirdly, if in either case the plaintiffs would be entitled to recover. The question of the existence of the custom, and what were the words of the charter-party (if there is a material difference between the two cases), are to be tried; if not, judgment is to be entered for the defendant for his costs.

Arbuthnot (*W. G. Harrison* with him), for the plaintiffs, argued that the custom at the port of Trinidad did not necessarily contradict the terms of the charter-party, and that if it did, the written clause importing the custom ought to prevail. He referred to

Hutchinson v. *Tatham*, 29 L. T. Rep. N. S. 103; L. Rep. 8 C. P. 482; 42 L. J. 260, C. P.

[He was stopped by the court.]

A. L. Smith, for the defendant, argued that the custom mentioned in paragraph 3 of the charter-party was not necessarily incorporated in that document, and that if the charter-party were read as had been suggested on behalf of the plaintiffs that would be equivalent to striking out the words "merchant's risk" altogether. Written words do not override printed words.

McGee v. *Lavell*, 30 L. T. Rep. N. S. 169; L. Rep. 9 C. P. 107; 43 L. J. 131, C.P.

MELLOR, J.—The case of *McGee* v. *Lavell* does not bear upon this point. In that case there was a *falsa demonstratio*. Here the parties appear to have forgotten to strike out the printed words which contradicted the written ones, and the question for us to decide is, which is to prevail of two contradictories? I am of opinion that our judgment ought to be for the plaintiffs.

LUSH, J., concurred.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Nash* and *Field*.

Solicitors for the defendants, *Ingledew*. *Ince*, and *Greening*.

Jan. 11, 18, *and Feb.* 9, 1877.

COHN *v.* DAVIDSON.

Charter-party—Implied warranty—Seaworthiness—Time at which it attaches—Commencement of voyage.

The warranty of seaworthiness implied in a charter party attaches at the time of the ship's sailing, and is not exhausted on the ship's proceeding in a seaworthy condition to her loading berth.

By a charter-party, defendant's ship was to proceed to a good and safe place in the river or dock as ordered, and there take on board a cargo of cement for the plaintiff, and proceed therewith to port of discharge. She loaded according to plaintiff's orders at the usual wharf for such cargo, where, however, she of necessity grounded at low water. From the time of sailing she took in water, and although she proceeded on her voyage, the wind being fair, she foundered just before reaching her destination. The ship was seaworthy when she commenced taking in cargo, but not when she set sail, and she must therefore have received damage in the course of loading. The jury found the master innocent of negligence.

Held, that the implied warranty of seaworthiness was not exhausted on the ship's proceeding to the wharf under the agreement, but attached at the time of sailing, when the underwriters' risk commenced.

THIS was an action upon a charter-party, tried at Liverpool before Lush, J. Leave was reserved to the plaintiff to move for judgment on the findings of the jury. The facts are sufficiently stated in the written judgment of the court.

Jan. 11 *and* 18.—*Herschell*, Q.C. and *Crompton*, for the plaintiff, moved for judgment on the leave reserved, and also moved for a new trial on the ground that the verdict was against the evidence.

Russell, Q.C. and *Gully* showed cause for the defendants against the motion and rule.

The arguments on both sides are fully stated in the following judgment.

Cur. adv. vult.

Feb. 9.—The judgment of the court (Mellor, Lush, and Field, JJ.) was delivered by

FIELD, J.—In this case there were two motions

on the part of the plaintiff, one for judgment under Order XL., r. 2, and the other for a new trial on the ground of misdirection.

The action was tried before Lush, J., at the Liverpool Winter Assize of 1875. It was brought to recover the sum of 500*l.*, being the value of a cargo of cement shipped by the plaintiff on board the *Iola*, of which the defendants were the owners, and which foundered with the cargo on board in St. Andrew's Bay, on the 21st May 1875. The cement was shipped under a charter-party dated the 14th May 1875, and made beween the plaintiff and the master of the ship (which was then at the port of Sunderland), and by the terms of it the ship was to "proceed to a good and safe place or places in the river or south dock as ordered, and there take on board" the cargo in question and proceed therewith to Dundee to discharge.

It appeared at the trial, that at the time of the execution of the charter-party, the plaintiff ordered the ship to load at a wharf in the river (which was part of the port of Sunderland) at which wharf cement is often loaded, but where all vessels of necessity ground on the mud at every low tide. The ship having proceeded to the wharf in obedience to her orders, took the cement on board on the 19th and 20th May; in the afternoon of which latter day (the master having signed a bill of lading of that date in the usual form in pursuance of the ordinary clause in the charter-party requiring him so to do without prejudice to the charter) she was towed out to sea and set sail on her voyage.

Her pumps were sounded on starting, and she was found to have made about 18in. of water; she was then pumped out, but in about an hour she was found to have made 2½ft. of water, and in consequence of this a consultation was held between the master and the crew as to the proper course to be adopted, and it was agreed that it was better to proceed to her destination, as the wind was fair and voyage not very long, rather than return to port with a foul wind.

She accordingly proceeded on her voyage, the pumps being kept at work, and had reached St. Andrew's Bay, within six miles of her place of discharge, when the water having overpowered her pumps, she foundered about a mile and a half from the shore.

Under these circumstances it was contended at the trial on the part of the plaintiff that the loss of his cement was caused by the ship not being seaworthy, in breach of warranty on the part of the shipowner that she should be so, which the plaintiff alleged was necessarily to be implied from the charter.

It was clear that the ship was not in fact seaworthy at the time she set sail; and that as she was found to be seaworthy when she commenced taking in cargo, she must have received damage in the course of loading. The defendant contended that the implied warranty was thereupon satisfied, and that the whole duty of the shipowner thenceforth was to take due and reasonable care, and that under these circumstances of the case the master, who had no reasonable means of ascertaining the existence of the defect which rendered her unseaworthy, was therefore not guilty of any want of care in setting sail in her then condition.

These propositions were denied by the plaintiff, who further set up that, even if they were true, the master was further guilty of negligence in proceeding on his voyage instead of returning to port, after he had discovered the unseaworthiness of his ship.

Evidence was given at the trial on both sides support and contradiction of these propositions, and at the close of the evidence Lush, J. left the following questions to the jury:

1. Was the *Iola* seaworthy at the time she commenced taking in cargo?

2. Were the defendants guilty of negligence in sending her to sea in the condition in which she was?

3. Was the captain guilty of negligence in not returning to port?

In answer to these questions the jury found,

First, that she was seaworthy at the time she commenced taking in the cargo;

Secondly, that the defendants were not guilty of negligence in sending her to sea in the condition in which she was;

Thirdly, that the captain was not guilty of negligence in not returning to port.

Upon these findings the learned judge gave the plaintiff leave to move to enter judgment for 500*l.* if such a warranty as was alleged was to be implied, and if it applied under the circumstances of the case, and the plaintiff's motion for judgment was made under this leave.

Upon the argument before us, Mr. Herschell, in support of it, relied upon the rule of law laid down by this Division in the case of *Kopitoff* v. *Wilson* (*ante*, p. 163; L. Rep. 1 Q. B. Div. 380; 34 L. T. Rep. N. S. 677), decided since the trial of this cause, "that in whatever way a contract for the conveyance of merchandize be made, where there is no agreement to the contrary, the shipowner is by the nature of the contract impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or in ordinary language is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage;" and he contended that, although the jury had found that the *Iola* was seaworthy at the time of her proceeding to the wharf in question, her admitted unseaworthiness at the time of her sailing from the wharf was a breach of this warranty which entitled him to recover. He also contended that a similar warranty was to be implied from the bill of lading which was made on the 20th May, just before she sailed. Mr. Russel, on the part of the defendants, did not dispute the principle laid down in *Kopitoff* v. *Wilson*, but relying upon the finding of the jury that the ship was seaworthy for the voyage when she proceeded to the wharf, he said that warranty attached, and was exhausted at that time; the proceeding from the spot in the port of Sunderland at which she lay at the time of the execution of the charter to the loading berth being, he said, an act done under the charter which formed the commencement of the period at which the warranty attached; and he then argued in accordance with the English rule of law on that head, that if the warranty was thence once complied with, subsequent unseaworthiness, not caused by the negligence of the master, did not give the shipper any right of action. He was unable to

cite any authority directly applicable to the case of a contract of carriage for fixing the application of the warranty within the above rule at this particular stage; the cases he referred to in support of his contention being in truth (as was observed during the argument) cases in which the court, in construing a particular instrument, put a particular construction upon the meaning of the word "voyage," as used with regard to the excepted perils, under the particular circumstances of the case: (*Barker* v. *McAndrew* 18 C. B. N. S., 759; 2 Mar. Law Cas. O. S. 305; *Bruce* v. *Nicolopulo*, 11 Ex. 129); or decided that upon the construction of the instrument then under discussion, the warranty of class was limited to a warranty or representation at the time of using the words, viz., the execution of the charter-party, and did not continue throughout the voyage.

He contended, however, upon principle, that the warranty should be held to attach at that period, because the proceeding from where the ship lay at the time of the execution of the charter-party to the loading berth as ordered was the first act done under the charter, and was equivalent to the commencement of the risk which in cases where an analogous warranty is implied between the underwriter and the assured is the point of time at which the warranty is to be complied with.

But we think a reference to the principles laid down in those cases, and regarding mercantile convenience, which in construing mercantile matters is a thing always to be regarded, that this contention cannot be supported.

Let us first consider what is the nature and object of the warranty of seaworthiness, and under what circumstances it is implied.

The merchant has goods which he considers he can dispose of at a profit at a distant port, and having selected his home port from which to despatch them, he engages or delivers his goods to a ship upon which he may with reasonable safety effect their transport to their place of destination.

Having made his contract of carriage, and the law having implied for him the warranty of the shipowner that the ship is fit to meet the ordinary perils of the voyage, the merchant then insures himself against those perils by the ordinary marine policy.

Now nothing can be clearer than that upon such a policy the warranty of seaworthiness for the voyage, which he, as the assured, comes under in like manner by implication to the underwriter, is a warranty that the ship is or shall be seaworthy at the time of sailing on it. That is the point at which the risk commences, and at which the warranty attaches, and is by the law of England exhausted. No degree of seaworthiness for the voyage at any time anterior to the commencement of the risk will be of any avail to the assured, unless that seaworthiness existed at the time of sailing from the home port of loading. As therefore the merchant in a case like the present would not be entitled to recover against his underwriter, by reason of the breach of warranty in sailing in an unseaworthy ship, it would follow that if the warranty to be implied on the part of the shipowner is to be exhausted by his having the ship seaworthy at an anterior period, the merchant would lose that complete indemnity by means of the two contracts taken together, which it is the universal habit and practice of mercantile men to endeavour to secure. Seaworthiness is well understood to mean that measure of fitness which the particular voyage or particular stage of the voyage requires. A vessel, seaworthy for port and even for loading in port, may be, without any breach of warranty whilst in port, unseaworthy for the voyage (*Annen* v. *Woodman*, 3 Taunt. 299); but if she put to sea in that state the warranty is broken.

Now the degree of seaworthiness which the merchant requires is seaworthiness for the voyage, and surely the most natural period at which the warranty is to attach is that at which the perils are to be encountered which the ship is to be worthy to meet.

The ship is during her stay in port, and whilst loading, and when she sets sail on her voyage in the custody and possession and under the control of the master and crew, and it is most reasonable and convenient to impose upon those who have the best means of knowing the duty of ascertaining her condition, at that critical time when she is about to meet the perils which it is the object of all parties that she should be prepared to meet.

This being our view of the case, it is not necessary for us to express any opinion upon the subsidiary questions raised by Mr. Herschell; but with reference to the motion made by him for a new trial on the ground of misdirection in regard to the question of the alleged negligence of the master in not returning to port on the discovery of the vessel leaking, we think it right to add that we have read carefully the evidence, the summing up of the learned judge, and the comments of counsel by which the evidence was pointed and shaped, and we see no reason whatever, looking at the conduct and course of the trial, to doubt that the learned judge quite sufficiently explained to the jury, and that the jury fully understood, what was the question they had to decide. The result therefore will be that under Mr. Herschell's motion we enter judgment for the plaintiff for the sum of 500l., and discharge his rule for a new trial.

Judgment for plaintiff.

Solicitors for plaintiff, *Maples, Teesdale,* and *Co.*
Solicitor for defendant, *J. W. Hickin.*

COMMON PLEAS DIVISION.

Reported by S. Hare, Esq., Barrister-at-Law.

Jan. 31 *and Feb.* 14, 1877.

Barwick *v.* Burnyeat, Brown, and Company.

Shipping—Charter-party—Bill of lading—Construction—Cesser of charterer's liability on loading—Freight.

A charter-party provided for the cesser of liability of B. and Co., the charterers of a ship, on loading and payment of advance freight at port of shipment. B. and Co. were consignees of the cargo, and the bills of lading made the cargo deliverable "unto order or assigns, he or they paying freight and other conditions as per chart-r-party." The cargo was duly loaded and the advances paid. In an action for balance of freight against B. and Co.

Held, that they were not liable, their liability on the charter-party ceasing on the completion of

the loading, and no new liability being created by the bill of lading.(a)

Demurrer to reply.

This action was brought to recover 24*l.* 15*s.* 3d., a balance of freight due for the carriage of a cargo of coal from Cardiff to Rouen. The defendants were charterers and also consignees of cargo. The statement of defence alleged that the liability of the charterer had, under the charter-party, ceased when the ship sailed.

The material part of the charter-party set out in the statement of defence was as follows:

Freight to be paid at the rate of 8s. per ton of 20cwt. as weighed out at port of discharge, payable as follows: One-third (if required) in cash on signing shippers' bills of lading, less 2½ per cent. for all charges, and the remaining in cash at current rates of exchange, less 2 per cent. discount on the completion of right delivery of the cargo.

Burnyeat, Brown and Co.'s liability to cease when the ship is loaded, and advance of freight with demurrage at Cardiff paid. The captain to sign shipper's bills of lading for the cargo within twenty-four hours after the ship is loaded, &c. Ship to have lien on cargo for freight, &c.

The statement of defence then alleged that the vessel was duly loaded in accordance with the charter-party, and that all advance, freight, and demurrage, &c., had been duly paid at Cardiff, and that all conditions had been fulfilled necessary to entitle the defendants to be freed from their liabilities under the charter-party.

To this defence the plaintiff replied, admitting the charter-party as set out, and the due performance of the various stipulations thereof by the defendants, but alleging liability to pay the freight claimed under the bill of lading signed by the master under the charter-party, and which, so far as material, was as follows:

Shipped in good order and well conditioned by J. B. Ferrier, in and upon the good ship called *The German Emperor* s.s., whereof is master for the present voyage Dixon . . . 1093 tons . . . coal . . . which are to be delivered . . . unto order or to assigns, he or they paying freight for the same and other conditions, as per charter-party, &c.

To this reply the defendant demurred.

Wood Hill, for the demurrer.—When there is a difference between the charter-party and the bill of lading, it is the former which is to stand—*Wegener* v. *Smith* (15 C. B. 285). There an indorsee of a bill of lading was held liable to pay the demurrage by the terms of the charter-party, the bill of lading making the goods deliverable to order "against payment of the agreed freight, and other conditions of the charter-party," one of which was that demurrage (if any), should be paid. Here the charterer's liability ceased with the sailing of the ship. When there is a charter-party, and a subsequent bill of lading in pursuance of that charter-party, the rights of the parties are governed by the charter-party, and not by the bill of lading. Take the case of a ship chartered at a fixed rate, and the charterer afterwards finds that he cannot fill his ship at that rate, but gives bills of lading at a lower rate, there the bills of lading do not form a new contract between the charterer and shipowner.

Maclachlan on Shipping, p. 480;
Faith v. *East India Company*, 4 B. & Ald. 630;
McLean v. *Fleming*, *ante*, vol. 1, p. 160; L. Rep. 2 H. L. (Sc.) 128.

Lanyon, for the plaintiff.—My contention is that there are here two contracts, one between the shipowner and the charterer, and the other between the ship-owner and the consignor. The charter-party says the defendants' liability is to cease with the loading of the ship; the bills of lading say it is to continue until the freight is paid, for the cargo is to be delivered to them, their order or assigns. And it has been held that, where the charter-party stipulates that the charterer's liability is to cease upon the loading of the ship, but the lien is to remain, the charterer is discharged but the consignee continues liable.

Kish v. *Cory*, *ante*, vol. 2, p. 543; 32 L. T. Rep. N. S. 670; L. Rep. 10 Q. B. 559;
French v. *Gerber*, L. Rep. 1 C. P. D. 737. (See *post*.)

The words "or other conditions," mean "performing all other conditions," that is, the charterer is to perform all conditions against himself.

Gray v. *Carr*, *ante*, vol. 1, p. 115; 25 L. T. Rep. N. S. 215; L. Rep. 6 Q. B. 522, 555;
McLean v *Fleming*, *ante*, vol. 1, p. 160.
Wood Hill, in reply.

Cur. adv. vult.

Feb. 14, 1826.—Denman J.—The plaintiff contended that the bill of lading was a different contract from that contained in the charter-party, that it imposed upon the defendants a greater liability than did the charter-party, and that from the liability upon it they are not absolved by the charter-party. Having looked at all the cases cited by the counsel on both sides, it appears to me that none of them bear exactly upon the present case. They all turned upon the liability of a charterer in respect of dead freight, and therefore throw little light upon the present case.

Here, the charter-party does not say that the charterer's, but Burnyeat, Brown, and Co's., liability is to cease. Those words are stronger to release the defendants than the words used in the former cases, here the very names of the persons to be released are made use of.

I do not, however, decide upon that ground; but upon the effect of the two documents taken together. The bill of lading refers to the charter-party in these words, "paying freight for the same and other conditions as per charter-party." Reference must, therefore, be had to the charter-party for all conditions as to payment of freight, &c. The charter-party tells us when there is to be a cesser of liability of the defendants, when the cargo is loaded and the advances of freight paid and the bills of lading are ready to be signed, and provides for everything being ready for a settlement of freight on the landing of the cargo. The meaning of all these conditions is to prevent the liability of the defendants continuing after the loading is complete and all advance freight and demurrage have been paid. All these things were

(a) If this decision were to be carried to its logical conclusion, no charterer under such a charter party, who held bills of lading and was consignee of the cargo he shipped, would be liable for freight, and the only means a master would have of enforcing payment would be by keeping the cargo until he had received payment. It does not seem to have been suggested by or to the court that the existence of the right of lien under the charter-party and the bill of lading, the act of the master in delivering without enforcing his lien, and the acceptance of delivery by the consignees, taken together created an implied contract by the consignees to pay the freight on their getting the cargo. The fact of their being also charterers could scarcely affect their liability under such an implied contract, which arose at a subsequent period.—Ed.

done, and all other conditions precedent were performed by the defendants, and I am therefore of opinion that the demurrer is good.

As to the cases cited, *French* v. *Gerber* (L. Rep. 1 C. P. D. 737; and see *post*) appears to me to be the nearest to this; and there it was held that documents of this sort must be construed according to their plain meaning. The *dicta* in former cases as to the charterer's liability under the bill of lading and charter-party, are shaken by the recent case of *Sanguinetti* v. *Pacific Steam Navigation Company* (*ante*. p. 300; 46 L. J. 105, Q.B.; 35 L. T. Rep. N. S. 658). The two documents are to be read together, and the conditions "as per charter-party" refers to the conditions as to payment of freight, one of which is the cesser of liability of the defendants. Hence the defendants are entitled to judgment on the demurrer.

Demurrer allowed.

Solicitors for the plaintiff. *Oliver* and *Botterell.*

Solicitors for the defendants, *Ingledew, Ince*, and *Greening.*

ADMIRALTY DIVISION.

Reported by JAMES P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Nov. 25 *and* 28, 1876.

THE CYNTHIA.

Damage—Collision entering dock—Dock-master's authority—Negligence of person in charge of ship—The Harbours, Docks, and Piers Clauses Act 1874 (10 *Vict. c.* 27), *ss.* 52, 53, 63—*The London and St. Katharine's Dock Act* 1864 (27 *&* 28 *Vict. c. clxxviii.*) *s.* 122—*The St. Katharine's Dock Act* 1825 (6 *Geo.* 4 *c. cv.*) *ss.* 100, 101.

When a vessel enters docks with the permission and under the general directions of the dock-master, and within the space over which his authority by statute extends, those on board of her are bound to use diligence and care to carry out the directions of the dockmaster in such a manner as to avoid doing damage to other vessels.

THIS was a cause of damage instituted in the City of London Court, by the owner of the skiff *Emily*, against the Mersey Steamship Company (Limited), the owners of the steamship *Cynthia*, for injuries sustained by the *Emily*, through the alleged negligence of those on board the *Cynthia*, whilst the latter vessel was going from the river into the St. Katharine's Dock on the 25th Nov. 1875. The case was heard by Mr. Commissioner Kerr on the 20th April 1876, when, after the examination of the witnesses, and the dockmaster, in cross-examination, having stated that if a rope had been made fast to a buoy to ease the vessel in it would have been of no use, and he would have ordered it to be let go, the learned judge gave judgment for the defendants with costs, on the ground that the dock company were liable for the damages, and not the owners of the *Cynthia*, that vessel being at the time and place of the accident within the district over which the authority of the dockmaster extends: but finding that the skiff was lying in a proper place, that neither the dockmaster nor the pilot knew that she was lying there, but that they might have known it if they had looked, that had they been aware of it they could and would have given orders, which would have avoided the collision. From this judgment the owner of the *Emily* appealed, and on the 25th Nov. 1876 the appeal came on for hearing.

The statutes on which the argument as to the control of the dockmaster turned were the Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27.)

Sect. 2. The expression "The Special Act," used in this Act, shall be construed to mean any Act which shall be hereafter passed authorising the construction or improving of an harbour, dock, or pier, and with which this Act shall be incorporated . . . . and the expression "the prescribed limits," used with reference to the harbour, dock, or pier, shall mean the distance measured from the harbour, dock, or pier, or other local limits (if any) beyond the harbour, dock, or pier, within which the powers of the harbour master, dock master, or pier master, for the regulation of the harbour, dock, or pier, shall by the special Act be authorised to be exercised. . . . . The expression "the harbour master," shall mean, ... with reference to any such dock, the dockmaster.

Sect. 52. The harbour master may give directions for all or any of the following purposes (that is to say): "For regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits (if any), and its position, mooring, or unmooring, placing, and removing, whilst therein: For regulating the position in which any vessels shall take in or discharge its cargo or any part thereof, or shall take in or land its passengers, or shall take in or deliver ballast within or on the harbour, dock, or pier: &c., &c.

Sect. 53. The master of every vessel within the harbour or dock, or at or near the pier, or within the prescribed limits (if any), shall regulate such vessel according to the directions of the harbour master, made in conformity with this and the special Act; and any master of a vessel who, after notice of any such direction by the harbour master served upon him, shall not forthwith regulate such vessel according to such direction, shall be liable to a penalty of not exceeding 20*l.*

Sect. 63. As soon as the harbour or dock shall be so far completed as to admit vessels to enter therein, no vessel, except with the permission of the harbour master, shall lie or be moored in the entrance of the harbour or dock, or within the prescribed limits, and if the master of any vessel either place it or suffer it to remain in the entrance of the harbour or dock, or within the prescribed limits, without such permission, and do not, on being required so to do by the harbour master, forthwith proceed to remove such vessel, he shall be liable to a penalty not exceeding 5*l.*, and a further sum of 20*s.* for every hour that such vessel shall remain within the limits aforesaid, after a reasonable time for removing the same has expired after such requisition.

The London and St. Katharine's Dock Act 1864 (27 & 28 Vict. clxxviii.

Sect. 3. Incorporates The Harbour, Dock, and Piers Clauses Act 1847 (10 Vict. c. 27), except certain sections.

Sect. 10. Repeals, *inter alia*, The St. Katharine's Dock Act 1825 (6 Geo. 4, c. cv.)

Sect. 11. Saves, *inter alia*, certain sections of the St. Katharine's Dock Act 1825 (6 Geo. 4, c. cv.), set out in Sch. 4, part 2, from the general repeal of sect. 10.

Sect. 122. No ship or vessel shall lie at any of the buoys, or make fast to any of the dolphins, mooring posts or mooring craft of the amalgamated company in the river Thames, save only such as are intended to go into, or which within one hour last past came out of, the docks, basins, locks, or cuts, except with the special permission of one of the dockmasters of the amalgamated company; and every master, pilot, or other person having the charge or command of any ship or vessel lying or moored, or having made fast to any of the buoys, dolphins, or mooring posts or craft, shall remove therefrom the ship or vessel under his command within one hour after being required so to do by the dockmaster or his assistants, or failing therein shall for every such offence forfeit not exceeding 20*s.* for every hour the ship or vessel remains at any of the buoys, dolphins, or mooring posts, or craft after the requisition.

Sch. 4, part 2 (*inter alia*) (6 Geo. 4, c. cv.) St. Katharine Docks Act, 1825. Sect. 100. And be it further enacted, that as soon as the said intended dock or docks, basin, and locks are so far completed as to admit ships, vessels, or craft to enter therein, no ship, lighter, barge, craft, boat, or other vessel shall lie within one hundred yards of the entrances of the said docks unless for the purpose of coming in or going out of the said docks, so that at all times the entrances may be kept clear and without obstruction, and over such space the dockmaster or dockmasters shall have control so far as relates to the placing or transporting, removing or stopping ships, barges, lighters, crafts, boats, and other vessels, any law, statute, or usage to the contrary notwithstanding: Provided, that nothing herein contained shall extend to prevent any ship or vessel, lighter or craft from lying in the river Thames alongside of any wharf or wharfs within the said distance of one hundred yards for the purpose of loading or discharging, so nevertheless as not to impede or obstruct the entrance into or departure from the said docks, basins, locks, or cuts.

Sect 101. And for the better making and preserving a free and clear passage and entrance from the river Thames into and out of the said docks, for all ships, vessels, lighters, barges, crafts, and boats of every description, be it further enacted, that if any master or other person having the charge or command of any ship, lighter, barge, craft, boat, or vessel of any description whatsoever, shall place or permit or suffer the same to remain in the river Thames within one hundred yards of any entrance to the said docks, basins, or cuts, or any of them, except as aforesaid, and shall not immediately on being thereunto required by the said dockmaster or dockmasters remove such ship, lighter, barge, craft, boat, or other vessel, every such master and other person so offending shall for every such offence forfeit and pay any sum not exceeding 5*l.*, and also any sum not exceeding 20*s.* for every hour that such obstruction shall remain after such notice; and in case the master or other person having the command of such ship, lighter, barge, craft, boat, or vessel, shall not remove such ship, lighter, barge, craft, boat, or vessel immediately upon being required so to do, it shall be lawful for the said dockmaster or dockmasters and his or their assistants to remove the same.

Webster, with him *W. Pillimore*, for appellants.—The fact that the *Cynthia* was within the limits in which those on board are bound to obey the lawful commands of the dockmaster, does not relieve them from the obligation of taking ordinary and proper precautions for the safety of other vessels. The dockmaster gives an order which they are bound to obey, but the method in which they carry it out is on their own responsibility; here there was negligence in the method of carrying it out; had they got a warp out to ease the stern of the *Cynthia* in, the accident would not have happened. They ought to have foreseen the consequences of coming in in the way they did, and are responsible for damage arising from their negligence in so coming in: (*The Belgic* (*ante*, p. 348; 35 L. T. Rep. N. S. 929.) The case of *The Bilboa* (Lush. 149; 1 Mar. Law Cas. O. S. 5) is not in point; there the question was, whether the collision was occasioned solely by the fault of the dockmaster. The true rule is that laid down by the Judicial Committee of the Privy Council with respect to the duties of the crew of a vessel in charge of a pilot employed by compulsion of law; "In order to entitle the owners to the benefit of the exemption from liability, they must prove that the damage, for which it is sought to make them liable was occasioned exclusively by the default of the pilot. It is not enough for them to prove that there was fault or negligence in the pilot—they must prove, to the satisfaction of the court which has to try the question, that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage:" (*The Iona*, L. Rep. 1 P. C. 426, 432; 16 L. T. Rep. N. S. 158; 2 Mar. Law Cas. O. S. 479.)

Milward, Q.C. and *Bruce* for respondents.—The collision took place within the space over which the dockmaster's control by the Harbours, Docks and Piers Clauses Act (10 Vict. c. 27), s. 52, and the London and St. Katharine's Dock Act 1864 (27 & 28 Vict. c. clxxviii.), schedule 4, part 2 (6 Geo. 4, c. cv., ss. 100, 101) extends; those on board the *Cynthia* were, therefore, obliged to obey his orders, and did so: had they done anything he did not order, they would have been subject to a penalty: (*The Bilboa*, Lush. 149, 1 Mar. Law Cas. O. S. 5; *The Exclsior*, L. Rep. 2 A. & E. 268; 19 L. T. Rep. N. S. 87; 3 Mar. Law Cas. O. S. 151; *The Broeder Trow*, 17 Jur. 94.) Those on board the *Cynthia* could not see the *Emily* as they were coming into dock, and those in charge of the *Emily* must have been aware of the fact, and should have made their presence known. *The Belgic* (*ante*, p. 348; 35 L. T. Rep. N. S. 929) is not in point; there the dockmaster gave no order, but the master of the ship, acting on his own responsibility, accepted a suggestion which he ought to have seen would result in a collision. The damage is altogether too remote. The *Cynthia* could not have foreseen by any possibility that damage would result from the way she came into dock. If they had got out a warp, without the dockmasters' orders, they would have blocked the dock's entrance, and caused themselves and other vessels to lose a tide, and might have been liable for demurrage to them.

Webster, in reply, referred to *Scott* v. *Shepherd* (Smith's Lead. Cas. 6th edit. p. 417) to show that the damage was not too remote.

Cur. adv. vult.

Nov. 28, 1876.—Sir R. PHILLIMORE.—This is an appeal from the City of London Court.

A small skiff, the *Emily*, was lying underneath a crane on the St. Katherine's wharf in the river Thames, taking on goods, and outside of her lay a steamer called the *Vigilant*. Outside the *Vigilant* lay two barges. A steamer called the *Cynthia*, coming into the St. Katherine's dock, fell with her port side against the barges, drove the barges into the *Vigilant*, breaking her bobstay and her figure head, and also driving the *Vigilant* into the skiff, to which she did considerable damage. The learned judge found as a fact that the skiff was in no way to blame, and had a right to recover against the dock company, but not against the *Cynthia*, against whom the action was brought. In his opinion the *Cynthia* was bound by the statutes to which I will presently refer, strictly to obey orders of the dockmaster, and to take no measures except those which he prescribed; that those orders brought about the collision, and therefore the *Cynthia* was not to blame, and he dismissed her from the suit.

There are two points raised for my consideration: first, was the *Cynthia* guilty of negligence which caused this collision with the skiff; secondly, was she relieved from responsibility by being under the control of the dock company, whose orders she obeyed.

As to the first point, I have conferred with the Trinity Masters, and will state their opinion, in which I agree. It is to this effect. The *Cynthia* ought to have had a rope passed to the middle buoy, to have been used if necessary. If she was found

to be swinging on the barges, the rope would have enabled her to keep her quarter off the barges. She was dropping up with the tide, and swinging alongside of the barges. The pilot saw that he would come into collision with the barges, and pointed it out to the dockmaster. The pilot had no right to calculate on touching the barges so lightly as not to cause damage to them or to vessels on the other side of them. With respect to the position of the skiff, we think that she was not in an improper place, but in the exercise of her clear right in lying where she was. As to a contention that if a rope had been there the *Cynthia* could not have got in that tide, in the first place that would not justify her in doing damage to another vessel; in the second place, the Trinity Masters are of a wholly different opinion, thinking, on the contrary, that the rope would have assisted the *Cynthia* to go in without squeezing or damaging any other vessel.

As to the second point the 10 Vict. c. 27. s. 52, and the local Act of the London and St. Katherine Dock (27 & 28 Vict. c. clxxviii), Sch. 4. part II., are relied upon by the respondents. The latter Act extends the distance within which the harbour master's authority can be exercised to a hundred yards. The former statute provides that the harbour master may give directions for regulating the time at which, and the manner in which, any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits; that is to say, the harbour master's authority extends to the manner in which the vessel is to enter the dock, and her position when therein, and for a disobedience to his directions, the 53rd section imposes a penalty of 20*l.*, but the Act did not, in my judgment, intend to exempt the pilot or captain of the vessel from the duty of navigating her with proper caution, so far as other vessels are concerned; in other words, the orders of the harbour master are to be executed with care, and not negligently, as in the present case.

In the analogous case of exemption from liability by reason of having a pilot on board, it has been held by the Privy Council that in construing the Pilotage Acts it is not enough for the owners to prove that there was fault or negligence in the pilot, they must prove to the satisfaction of the court which has to try the question that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage: (*The Iona*, 16 L. T. Rep. N. S, 158; L. Rep. 1 P. C. 432; 2 Mar. Law Cas. O. S. 479).

The authority of the *Bilboa* was cited by the respondents (Lush. 149; 1 Mar. Law Cas. O. S. 5), but that was a case decided on demurrer. I have looked at the papers and find that the defence was as follows: "And the defendants' proctor says, that before and at the time of the damage complained of, those on board the *Bilboa* were acting under the directions given by the dockmaster of the said Victoria Docks, for the said vessel to enter the said docks, and within the aforesaid limits of the authority of the said dockmaster, and that the said damage, if occasioned by any mismanagement of the *Bilboa*, was solely occasioned by the default of the said dockmaster, and that the owners of the said vessel were not responsible in law for the same." It was a datum in that case that the damage was occasioned solely by the dockmaster, whereas in this case it appears that the damage was not caused solely by the orders of the dockmaster, but by carelessness in their execution.

I must reverse the sentence of the court below, and pronounce the *Cynthia* to blame for this collision. Costs for appellant.

Solicitor for the plaintiff, *J. A. Farnfield.*

Solicitors for the respondents, *Flux* and *Co.*

[Note.—The recent case in the House of Lords on compulsory pilotage (*Clyde Navigation Company* v. *Barclay*, L. Rep. 1 App. Cas. 790; see *post*), in which the judgment in *The Iona* (16 L. T. Rep. N. S. 158; L. Rep. 1 P. C. 426), quoted in the above judgment is commented on, was not at this time reported. The effect of that judgment is, where the defence of compulsory pilotage is set up, to throw the onus of proving contributory negligence on the part of the shipowner on the plaintiff, instead of requiring the shipowner to prove that he acted entirely in obedience to the pilot's orders.]

Feb. 14 *and* 15, 1877.

The Julia Fisher.

Collision—Counter claim—Security for costs by defendant—Practice.

A defendant in a collision cause making a counterclaim for the damage sustained by his own vessel, must, if he be resident out of the jurisdiction, give security for the costs, not merely of his counterclaim, but of the whole action.

If he make default in giving security for costs pursuant to order, he will have his counterclaim dismissed.

This was an action of collision brought on behalf of the owners of the Norwegian barque *Velox* against the barque *Julia Fisher* for the recovery of damages caused by a collision between the two vessels on 2nd Aug. 1875.

The owners of both vessels were resident abroad, out of the jurisdiction. The *Julia Fisher* was arrested, and her owners appeared and gave bail in the sum of 2950*l.*, which was the full value of the vessel. The owners of the *Julia Fisher* required the plaintiffs to give security for the costs of the action, which was given to the amount of 300*l.* The plaintiffs then delivered their statement of claim alleging that the collision occurred by the negligence of the *Julia Fisher*, and claiming damages. The owners of the *Julia Fisher* thereupon delivered a statement of defence and counterclaim, denying the negligence of the *Julia Fisher*, and alleging the negligence to be that of the *Velox*, and claiming damages against the *Velox* in respect of the collision, The owners of the *Velox* were then required to, and did give bail, in the sum of 500*l.* to answer the damage sustained by the *Julia Fisher*. A summons was then taken out on behalf of the plaintiffs (the owners of the *Velox*), calling upon the defendants (the owners of the *Julia Fisher*) to show cause why the defendants should not give security for costs in the sum of 300*l.* This summons being referred by the Registrar to the court, the judge, after hearing counsel on both sides, directed the defendants to give bail in the sum of 150*l.* to answer the plaintiffs' costs. The defendants then gave security in the sum of 150*l.* to answer judgment in the action in respect of their counterclaim, and notice was

given on 12th Feb. 1877, that such security had been given.

Feb. 14.—The action came on for hearing.

Milward, Q.C. and *W. G. F. Phillimore* for the plaintiffs contended that as the defendants had only given security for the costs of the counterclaim, they had not complied with the order, and their counterclaim must be dismissed.

E. C. Clarkson and *Myburgh* for the defendants contended that there was no obligation upon defendants to do more than give security for the costs of the counterclaim, and the order did not extend further. Under the old practice, before the Judicature Acts 1873 and 1875, a defendant would only have given security for the costs of his cross action, which was the same as the counterclaim, and he could not have been called upon to give security for the costs of the principal action. There is nothing in the above Acts which alters the practice.

THE COURT directed that the action should proceed to hearing, but intimated that if the defendants were not prepared before judgment to give security for all the plaintiffs' costs, the counterclaim would be dismissed.

Feb. 15.—The action was further heard, and on the plaintiffs' case being ended

Clarkson, for the defendants, stated that the defendants did not propose to give security for costs other than for their counter-claim.

Sir R. PHILLIMORE.—In this case—one of damage by collision—a question has been raised as to the extent to which one of the parties to the action should give security for costs.

The *Julia Fisher* having been arrested at the suit of the *Velox*, bail was given in the action, not however in the full amount claimed, but only to the extent of the value of the ship.

The owners of the *Velox*, the plaintiffs, being foreigners, were then called upon to give, and did give, security for costs, and subsequently, when a counter-claim was set up by the defendants, they gave further bail for the full amount of that counter-claim. By thus setting up a counter-claim, the *Julia Fisher* becomes as much a plaintiff as the party who originated the suit. The pleadings delivered, the evidence to be given, and the arguments of counsel, will all be common to the claim and counter-claim, and in principle it is not easy to distinguish between the costs incident to the one or the other. Under these circumstances the plaintiffs contend that as the owners of the *Julia Fisher* are foreigners likewise, they (the plaintiffs) are entitled to security for costs, and that the security must be for the costs of the action generally. The adverse contention, however, is that the *Julia Fisher* should only give security for costs occasioned by the counter-claim, not for the whole costs of the action. If this contention prevailed, it is manifest that the position of the *Julia Fisher* would be the better of the two, because if the *Julia Fisher* wins, she will have security for damages and all costs; whereas, if the *Velox* wins, she will have security for damages, and only a small portion of her costs. This would clearly be inconsistent with equity.

It may perhaps be said that to require security for the whole costs of the action is requiring the *Julia Fisher*, *qua* defendant, to give security for costs; but it must be remembered that although in actions *in personam* security is not required of a defendant, in actions *in rem* a different practice has always prevailed.

The action is brought, and bail is given as a rule in a sum to cover damages and costs, and both damages and costs are constantly recovered from bail so given by a defendant.

After some consideration, therefore, I arrive at the conclusion that as all the issues now constitute, so to speak, one cause, the party liable to costs is liable to the costs of the whole suit, and the party liable to give security for costs is liable to give security for the whole costs of suit, subject to any special order which the court may in any particular case think proper to make.

In the present case the order already made must be adhered to.

The party being a foreigner, who has set up a counter-claim, and asked for a decree for damages in his own favour, must give security for costs generally, or his counter-claim must be struck out.

As the defendants in the present case now before the court are not prepared to give security for the whole of the plaintiffs' cost, their counter-claim must be dismissed.

Solicitors for plaintiffs, *Waddilove* and *Nutt*.

Solicitor for defendants, *Cooper*.

Monday, Feb. 19, 1877.

THE EXPERT.

Limitation of liability—Collision—Reference—Costs—Practice.

In a collision cause, although the defendant is entitled, upon admission of liability and payment into court of the amount of his liability under the Merchant Shipping Act 1862, *s.* 54. *to a stay of proceedings as against himself, plaintiffs having separate interests may, at the defendant's cost, proceed to a reference to settle the respective amounts due to them, and may tax their costs.*

THIS was an action of collision brought by the owners and the master and crew (proceeding for their personal effects), of the *Mary*, the owners of the cargo, against the *Expert*. After service of the writ, the owners of the *Expert* appeared, and before any pleadings were delivered applied to the court to stay all further proceedings against the defendants (except for the purpose of taxing costs) upon their admitting liability and paying into court a sum sufficient to cover the amount to which they were entitled to limit their liability under the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), s. 54, viz., 8*l.* per registered ton, and a sum to cover interest.

The plaintiffs had given particulars of their names and the nature of their several claims. An affidavit of the defendants in support of the application admitted liability, but alleged that the collision occurred without the actual fault or privity of the owners of the *Expert*, and that there was no loss of life.

J. P. Aspinall, in support of the application, stated that the defendants were willing to take the risk of other claims being made, as they believed the particulars furnished gave all the persons entitled to claim, and contended that as the course proposed would be a great saving of expense, and the plaintiffs could not recover more than the amount offered, the order should be made.

E. C. Clarkson, for the plaintiffs, contended that the order should not be made in the form asked, and the proceedings should not be stayed so as to preclude the amounts of the plaintiffs' several claims being ascertained at a reference. If the defendants paid into court the whole amount of the plaintiffs' claim, the defendants might ask for a stay without a reference; but the defendants are asking, as a favour, to pay a less amount whereby each plaintiff will get less than he is entitled to. Hence it becomes the interest of each plaintiff to reduce the amount of the other plaintiffs' claims to as small an amount as possible, and this must be done by the court, or rather in a reference; and the cost of ascertaining the proper amount ought to be paid by the defendants, whose act in seeking relief from payment of the larger amount makes the reference necessary. If the court makes the order it ought to be a condition that the defendants pay into court a sufficient sum to cover the costs of the reference, and that the plaintiffs' claims be referred to the registrar, and that the action proceed for the purposes of the reference and taxation of costs. If the action of damage proceeded, and the defendants claimed limitation of liability in their pleadings, they would pay the costs of the reference as a matter of course.

J. P. Aspinall, in reply.—The defendants are entitled by law to limit their liability, and they claim limitation as of right not as a favour. The plaintiffs are all represented by one solicitor, and there should be no difficulty in their agreeing as to the amounts of their respective claims, and dividing the money paid in between them. To compel the defendants to pay the costs of the reference is putting them to unnecessary expense.

Sir R. PHILLIMORE directed that upon payment into court of the amount of the defendants' statutory liability at the rate of 8*l.* per ton on the gross tonnage of the *Expert*, and upon the defendants' solicitor giving an undertaking for the payment of costs of action and reference, all further proceedings in the action should be stayed, save as regarded the reference, which was to proceed for the purpose of ascertaining the respective amounts due to the plaintiff, and the taxation of costs.

Solicitors for the plaintiffs, *Ingledew, Ince*, and *Greening*.

Solicitor for the defendants, *Thomas Cooper*.

Tuesday, March 6, 1877.

THE LAKE MEGANTIC.

Security for costs—Insolvency of plaintiff.

Where a plaintiff has recently executed a deed of assignment of all his property to an assignee, he will be required to give security for the costs of suit, unless he satisfies the court that he is solvent. The fact that he is carrying on business is not sufficient proof of his solvency.

THIS was a motion by the defendant, owners of the *Lake Megantic*, requiring the plaintiff, John Athaya, to give security for costs. No pleadings had been delivered, but the writ was indorsed with a claim for 1000*l.* for damage to cargo.

The plaintiff was the owner of a cargo of grain laden on board the *Lake Megantic*, and alleged to have been damaged by a collision between that vessel and the *Lake Superior*, belonging to the same owners, on the 5th March 1876, in the harbour of Baltimore, in the United States of America. The cargo had ultimately been carried to Liverpool and there discharged.

In support of the application, an affidavit was made by H. J. Selkirk, the manager of the Canada Shipping Company (Limited), the owners of the vessels, which, so far as is material, was as follows:

4. The said John Athaya, the plaintiff in this action, and in the writ described as residing at Liverpool, really resides in or near Glasgow, and till shortly, previous to the commencement of this action, carried on business as a commission merchant in Liverpool, under the style or firm of John Athaya and Co., and in Glasgow under the same style or firm.

5. I am informed and verily believe that the said John Athaya, being insolvent on the 28th Aug. last, executed a deed of assignment of his estate and effects, in favour of James Wyllie Gould, of Glasgow, accountant, for the benefit of his creditors. A true copy of such deed is produced and shown to me at the time of making this my affidavit, marked A., and I verily believe from the fact of such deed having been executed that the said John Athaya is insolvent, and that this action is not brought for his own benefit.

In answer to this affidavit another was made by Wilmer Hollingworth, a clerk to Ernest Emil Wendt, underwriters' representative, as follows:

1. The said Ernest Emil Wendt is the agent for the purposes of this action.

2. I have read the affidavit of Henry James Selkirk, sworn on the 17th Feb. 1877, and filed in this action, and referring to the 4th paragraph of such affidavit, I have been informed and verily believe that John Athaya, the said plaintiff, now carries on business as a merchant in co-partnership with his son, both in Liverpool and Glasgow, under the title of John Athaya and Son.

The motion came before the court on Feb. 27 1877, and was ordered to stand over till the next motion day, with leave to the parties to file further affidavits; no further affidavits were however filed, and the motion came on again on March 6.

E. C. Clarkson for defendants.—The affidavit of Selkirk plainly shows that the plaintiff has recently been insolvent, and the affidavit in reply in no way shows that he is solvent. The presumption is that he is still insolvent, and that he is only carrying on the action for the benefit of his assignee, who is, moreover, out of the jurisdiction. The plaintiff assigned all this cause of action together with all his other property by the deed on the 28th Aug. 1876, and in such a case the court will order security for costs to be given: (*Perkins* v. *Adcock*, 14 M. & W. 808.) In that case Pollock, C.B. says: "Where the nominal plaintiff is bankrupt or insolvent, or has assigned the debt, and is suing for the benefit of his assignee, he ought to give security for costs."

W. Phillimore for plaintiff.—The affidavit of Hollingworth shows that the plaintiff is not now insolvent; he is carrying on business in partnership with his son, and has set up that business subsequent to the execution of the deed; that destroys any presumption that he still remains in insolvent circumstances. It is not enough that a plaintiff should have been bankrupt, or insolvent, or have assigned the debt, or cause of action. The head note of *Perkins* v. *Adcock* (14 M. & W. 808), and the observations of Alderson, B. show that Pollock, C.B. must be incorrectly reported. It is plain that he must have meant that the circumstances of plaintiff's insolvency and the assignment of the debt must concur for the court to compel him to give security for costs, and

here they do not concur, as the plaintiff is not now insolvent.

Clarkson in reply.

Sir R. PHILLIMORE.—I shall make the order for the plaintiff to give security for costs to the amount of 300*l*. Under the circumstances of the case it lies on the plaintiff to show that he is now solvent, and I do not consider that the affidavit of Hollingworth is sufficient to show it. Costs of this application to be costs in the cause.

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

Solicitors for the defendant, *Gregory, Rowcliffe*, and *Co*.

March 20, and 21, 1877.

THE ANNANDALE.

Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 103—*Concealing British character—Assuming foreign character—When forfeiture attaches.*

Where an offence is committed by a shipowner or master against sect. 103 *of the Merchant Shipping Act* 1854, *the ship becomes forfeited to Her Majesty, and the forfeiture attaches, and the property in the ship is devested out of the owners, and vested in the Crown from the date of the committing of the offence, and a person purchasing such ship bonâ fide and without knowledge of the offence committed after such date, but before seizure and condemnation, cannot acquire a title which will override the right of the Crown.*

In an action brought by the plaintiff as collector of customs on behalf of the Crown against a British ship for breaches of the 103*rd section of the Merchant Shipping Act* 1854, *the plaintiff in his statement of claim alleged offences committed in* 1874 *and up to July* 1876, *and claimed the ship as forfeited to Her Majesty. The defendant, a foreigner, in his statement of defence, alleged that he became bonâ fide purchaser of the ship on the 6th July* 1876, *without notice of any of the acts done by the former owners of the ship, and that the ship was not seized in the action until the 9th July* 1876.

Held, upon demurrer to the statement of defence, that the defence set up was no answer to the action, as the forfeiture took place on the committing of the offence, and the defendant had acquired no title as against the Crown.

THIS was an action (*in rem.*) brought by William Pugh Gardner, collector of customs at the port of Liverpool, on behalf of himself and on behalf of Her Majesty against the barque *Annandale*, to obtain adjudication upon and forfeiture to Her Majesty of the barque for a breach of the provisions on sub-sect. 2 of sect. 103 of the Merchant Shipping Act 1854, and an award of such portion of the proceeds of the sale of the barque to the plaintiff as the court might think right. The vessel was duly arrested on the 9th July 1876, under a warrant issued out of the Admiralty Division, and remained under arrest. An appearance was entered on the 28th July by one Hans Lows, claiming to be the owner of the vessel.

The plaintiff's statement of claim was, so far as material, as follows:

1. The plaintiff was, on and before the 18th July 1874 and has ever since been, and still is a British officer of the customs within the intent and meaning of the 103rd section of the Merchant Shipping Act 1854.

2. Before and on the 18th July 1874, the barque or vessel *Annandale*, proceeded against in this action, was within the true intent and meaning of the said Act a British ship, and was registered at the Custom House at Newcastle-upon-Tyne as a British ship, in the names of William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, as owners thereof.

3. The said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, who respectively are natural-born British subjects, were, before and on the said 18th July, owners of the said barque.

4. On the 18th July 1874, the said William Perlee Livingston, acting for and on behalf of himself and his said co-owners, and with their authority, and in order that the register of the said barque might be closed as upon a sale of the said barque to foreigners, represented to the registrar of British ships at the Custom House, Newcastle aforesaid, such registrar being a person entitled by British law, to inquire into the character of the said barque, that the said barque had been sold to foreigners, and that the said barque was at sea, but that her register (meaning thereby her certificate of registry) would be handed to the said registrar on her arrival.

5. The said registrar, in pursuance and consequence of such representations as in the last paragraph mentioned, on or about the 28th July 1874, closed the said register, and such register became and was thereby closed, and the said barque ceased to be registered as a British ship.

6. The said barque had not, on or before the 18th July 1874, been sold to any foreigners or foreigner, and the representation so made, as aforesaid, by the said William Parlee Livingston, was false. The said barque, before and on the said 18th July 1874, was and subsequently continued to be owned by the said owners hereinbefore named, and on such day and subsequently thereto she was and continued to be a British ship within the true intent and meaning of the 103rd section of the said Act.

7. On or subsequently to the said 18th July 1874 the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple procured or caused or permitted to be procured, and carried or caused or permitted to be carried on board the said barque a document or foreign certificate of registry or foreign provisional certificate of registry known as a *Lettre de mer Provisoire*, by which it was stated and represented that the said barque had been bought by one Henry Thomas Watson, of Antwerp, and that she was then a Belgian ship.

8. The said statements and representations in the said document lastly mentioned were untrue. The said barque had not, as therein stated and represented, been bought by the said Henry Thomas Watson, nor was she then a Belgian ship, but she was then, and long after such document was procured or caused or permitted to be procured as aforesaid, she continued to be, a British ship within the true intent and meaning of the 103rd section of the said Act, and owned by the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, or some or one of them.

9. On about the 19th Sept. 1874, the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, although the said barque continued to be and then was a British ship, within the true intent and meaning of the said Act, procured or caused or permitted to be procured at Newcastle aforesaid a certificate of British tonnage, for the said barque as for a foreign vessel, belonging to Antwerp, in the Kingdom of Belgium.

10. On the 6th July 1876, one John Stevens, the then master of the said barque, by and with the knowledge and permission of the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, and of the other persons or person, if any, then being owners or owner of the said barque, made a report to the plaintiff at Liverpool, or to his deputy or representative the plaintiff, and such deputy and representative respectively being persons entitled by British law to inquire into the character of the said barque, by which re-

port the said John Stephens, as such master, stated and represented that the country to which the said barque belonged was Antwerp, meaning thereby Belgium. Such statement and representation was untrue. The said barque was, and continued to be, a British ship within the true intent and meaning of the said Act, and owned by the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, or some or one of them.

11. The said barque subsequently to the said 18th July 1874, and whilst she still continued to be a British ship within the true intent and meaning of the 103rd section, and owned by the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, or some or one of them or by some or one of them conjointly with some other person or persons whose names are not known to the plaintiff, was sailed by or with the permission of the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, and such other persons or person, or by and with the permission of such of them the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, and such other person or persons as aforesaid as were then her owners under a foreign flag, to wit the Belgian flag.

12. The several matters and things hereinbefore alleged to have been done by the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, or by them or some or one of them, or by them or some or one of them conjointly with such other person or persons as aforesaid, or by the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, or some or one of them, or by them or some or one of them conjointly as aforesaid, caused or permitted to be done, or some or one of such matters and things were respectively matters or things, or a matter or thing done or permitted to be done by the owners or owner of the said British barque *Annandale*, with intent to conceal the British character of the said barque from the plaintiff and from the said registrar at Newcastle, and from others the collectors and officers of customs at divers British Ports, and from the officials of the Board of Trade defined by the said Act, or from some or one of such Acts, all such persons being persons entitled by British law to inquire into the character of the said barque, or with intent to assume a foreign character, or with intent to deceive such persons as aforesaid or some or one of them, and whereby the said barque became and is forfeited to Her Majesty.

13. The plaintiff, as a British officer of customs, has seized and detained the said barque as having become subject to forfeiture to Her Majesty, and has brought her for adjudication before this court pursuant to the said section.

The plaintiff in his statement then claimed (1) a declaration and judgment that the said barque *Annandale* had become and was forfeited to Her Majesty; (2) a sale of the said barque *Annandale* by the marshal of the court; (3) an award to the plaintiff out of the proceeds of the sale of such portion thereof as the court might think right; (4) and the condemnation of the defendant in the cost of the action.

The defendant delivered a statement of defence which, so far as material, was as follows:

1. The defendant in this action is Hans Lows, a Norwegian, and is the owner of the barque *Annandale*.

2. The defendant does not admit the allegations in paragraphs 4, 5, and 6 of the statement of claim contained, and says, that on or about and after the 18th July 1874, the barque *Annandale*, proceeded against in this action, was not owned by William Perlee Livingston, William Pearson, Henry James Livingston, Henry Watson, William Harrison, and William Hepple. And that on or about the said 18th July 1874, the said barque was transferred to foreigners, and ceased to be a British ship, with the true intent and meaning of the 103rd section of the Merchant Shipping Act 1854.

3. The defendant denies the allegations in paragraphs 7 and 8 of the statement of claims contained, and says that the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple did not procure or cause to be procured, and carry or cause or permit to be carried on board the same barque a document or foreign certificate of registry, known as a *Lettre de mer Provisoire* by which it was represented that the said barque had been bought by one, Henry Thomas Watson, of Antwerp, and that she was then a Belgian ship, or, in the alternative, if such certificate of registry, was by them procured and permitted to be carried on board the said vessel, they had reasonable grounds to believe that what was therein contained was true.

4. The defendant denies the allegations in paragraph 9 of the statement of claim contained, and says that the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple did not on the 19th Sept. 1874, procure or cause or permit to be procured at Newcastle a certificate of British tonnage for the said barque as for a foreign vessel belonging to Antwerp, in the Kingdom of Belgium, or, in the alternative, if such certificate of British tonnage was by them obtained as aforesaid, they had good and reasonable grounds to believe that the said vessel was a foreign vessel belonging to Antwerp, in the kingdom of Belgium.

5. As to the allegations in paragraph 10 of the statement of claim contained, the defendant denies that John Stevens was on the 6th July 1876, master of the said vessel by and with the knowledge of the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple. And the defendant denies that the said John Stephens, with the knowledge or permission of any person or persons, then owner or owners of the said vessel, made a report to the plaintiff, or to his deputy or representative at Liverpool representing that the said vessel belonged to Antwerp in the kingdom of Belgium, or, in the alternative, if the said John Stevens so reported the said barque, he had good and reasonable grounds to believe that the said barque belonged to Antwerp in the kingdom of Belgium.

6. The defendant denies the allegations in paragraph 9 of the statement of claim contained, and says that subsequently to the 18th July 1874, the said barque was not sailed by or with the permission of the said William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, of or by any one of them conjointly with others under a foreign flag, to wit the Belgian flag.

7. And as to the said several matters in the statement of claim contained and alleged to have been done by the persons and in the ways and with the intents respectively alleged in the statement of claim, and defendant says that on the 6th July 1876, he became *bonâ fide* purchaser of the *Annandale* for valuable consideration, and that at the time he became such *bonâ fide* purchaser he had no notice or knowledge whatsoever in the said statement of claim contained, or any one of them, or of the said matters having been done by the said persons in the way and with the intents in the said statement of claim mentioned or of the said matters having been done at all.

And by way of counter-claim the defendant says:

That the barque *Annandale* was seized by the plaintiff on the 9th July 1876, and from that date is still detained, without reasonable grounds for such seizure and detention. From the 9th July 1876, the defendant has been and still is deprived of the use of the said vessel and the advantages and profits which would otherwise have accrued from the sailing and use of the said vessel.

And the defendant claimed: (1.) Damages for the seizure and detention of the said barque *Annandale*; (2) The condemnation of the plaintiff in the costs of the action.

To the above statement of defence the plaintiff replied and demurred as follows:

1. The plaintiff joins issue with the defendant, Hans Lows, on his statement of defence.

2. The plaintiff further says that if the said defendant became such purchaser for valuable consideration as in the statement of defence alleged, yet the said defendant

became such purchaser for valuable consideration had notice or knowledge of the matters in the statement of claim mentioned or some of them, and of the said matters and some of them having been done by the persons and in the way and with the intents in the said statement of claim mentioned, the plaintiff admits that the *Annandale* was arrested by him on the 9th July 1876, by warrant of this court, and that she has since been detained, and he says that there was and is reasonable ground for such seizure and detention. It is not the fact that the defendant has been or still is deprived of the use of the advantages or profits which would otherwise have occurred from the sailing or use of the said vessel.

4. The plaintiff demurs to the 7th paragraph of the statement of defence, and says that the same is bad in law, on the ground that a purchase for valuable consideration effected after the commission of the offence cannot operate to bar a forfeiture under the 103rd section of the Merchant Shipping Act 1854, and upon other grounds sufficient in law to sustain the demurrer.

The demurrer now came on for argument.

March 20.—The *Attorney General* (Sir J. Holker, Q.C.) and *E. C. Clarkson* for the plaintiff in support of the demurrer.—In the statement of claim, the defendant is charged with divers breaches of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104, sect. 103, sub-sect. 2), which provides that "if the master or owner of any British ship does, or permits to be done, any matter or thing, or carries, or permits to be carried, any papers or documents, with intent to conceal the British character of such ship from any person entitled by British laws to inquire into the same, or to assume a foreign character, or with intent to deceive any such person as lastly hereinbefore mentioned, such ship shall be forfeited to Her Majesty." The vessel was seized for these breaches on July 9th, 1876. The defendant, in his statement of defence, pleads, that on July 6th, 1876, he became *bona fide* purchaser for value of the vessel without notice or knowledge of the committing of the breaches. To this defence the plaintiff demurs, and we submit that such a defence is not good, because, assuming everything proved as alleged, the property in the vessel passed to the Crown, and she became forfeited at the moment when the acts alleged were committed, and not merely upon seizure. The title of the owner became vested in the Crown when, as alleged in the statement of claim, the then owners in July 1874, represented the ship as sold to foreigners. The process of the Court is only invoked to perfect the forfeiture and give legality to the proceedings. The act in itself is enough to divest the owners of the property and vest it in the Crown.

Roberts v. *Withered*, 1 Salk. 323.
Wilkins v. *Despard*, 5 T. R. 112.

Those two decisions were both under a statute (12 Car. 2, c. 18), by which it was provided that no goods should be imported into or exported out of His Majesty's possession in Asia, Africa, or America in any other ship or ships, but in such ship as belonged to British subjects, under the *penalty of the forfeiture* of all the goods and commodities imported or exported, and of the ship, one-third part thereof to His Majesty, one-third to the governor of the possession where the default was committed, and one-third to the person seizing, suing, or informing. In *Wilkins* v. *Despard* (5 T.R. 112), the governor of a colony was sued in trespass for taking the plaintiff's ship with its cargo, whereupon the defendant pleaded that the ship was seized under the statute as forfeited to the use of His Majesty and the defendant; the plaintiff replied that the defendant had sold without bringing ship and cargo into a competent court for condemnation, and to this replication the defendant demurred; the court —following the former case in Salkeld—held that the property ceased to be in the plaintiff on committing the act occasioning forfeiture, and that condemnation was not necessary. In the United States the exact point has been decided in cases which clearly point out that the forfeiture takes place at the moment of the commission of the offence, and that a subsequent purchaser without notice cannot acquire a title overruling the forfeiture.

Gelston v. *Hoyt*, 3 Wheaton U.S. Sup. Ct. Rep. 311; *The United States* v 1960 *Bags of Coffee*, 8 Cranch U.S. Sup. Ct. Rep. 398.

If this were not the rule the Merchant Shipping Act could always be infringed with impunity, as the owners who had committed the offence could always evade punishment by selling before seizure. [Sir R. PHILLIMORE.—The principle laid down in those cases seems to me to be that the taint of the offence travels with the vessel, as in cases of collision the liability goes with the vessel, even if she changes hands twenty-times over, and that the forfeiture occurs when the offence is committed.]

Murphy, Q.C. and *Milvain*, for the defendant.—The construction contended for by the plaintiff would make it practically impossible for anyone to buy a share in a British ship, in consequence of risk of some question arising between the purchaser and the Crown, which would result in forfeiture. However many hands the vessel passed through she would still remain liable to forfeiture. Such a construction would be a great hardship upon shipowners. Before the Merchant Shipping Act, 1854, no such contention could have been maintained by the Crown. Until that Act the rule of law was, as we submit, that forfeiture did not take place until condemnation, or at any rate until seizure. In *Reg.* v. *McCleverty*, *The Telegrafo* (*ante* vol. 1, p. 63; 24 L. T. Rep. N. S. 748; L. Rep. 3 C. P. 673), it was held that the taint of piracy does not travel with a ship like a maritime lien through her transfers to different owners, and that a *bonâ fide* purchaser without notice had a good title as against the Crown, and the court there say, "There is no authority, their Lordships think, to be derived from principle or precedent for the position that a ship duly sold before any proceeding taken on the part of the Crown against her, by public auction to a *bona fide* and innocent purchaser, can afterwards be arrested and condemned, on account of former piratical acts, to the Crown. The consequences flowing from an opposite doctrine are very alarming. In this case, six months have elapsed between the sale and the arrest, but upon the principle contended for, six or any number of years, and any number of *bona fide* sales and purchases, would leave the vessel liable to condemnation on account of her original sin. Their Lordships are of opinion that the taint of piracy does not, in the absence of conviction or condemnation, continue like a maritime lien to travel with the ship through her transfers to various owners." Then has the Merchant Shipping Act 1854 altered the rule of law? Has the Legislature used apt words to work a forfeiture of vessels tainted with the original sin of an offence against that Act? By sect. 103 it is first of all provided that the offence committed against that section shall be

"punishable" as therein provided; the word there used implies that something more is to be done to complete the forfeiture than the mere commission of the offence. Again, at the end of the same section provision is made for the seizing and detaining by government officers of "any ship which has become subject to forfeiture." Why "subject" to forfeiture, if the forfeiture has already operated? These words show that the intention was that some proceeding should be taken by the Government before the forfeiture takes place. Seizure at least is necessary. If the reading of the Act is right, then the operative words in the sub-sect. 2 of that section, viz, "shall be forfeited" must be read as "shall be subject to forfeiture," and there is no forfeiture on the commission of the offence. If the Legislature had intended to so enact, the Act would have expressly provided that the forfeiture should take place at the time of the offence committed, and then the sentence of condemnation would have had relation back to the committing of the offence. Provisions and language of that nature are well known in one statute, as in bankruptcy the title of the trustee relates back to the committing of the act of Bankruptcy (32 & 33 Vict. c. 71, s. 11). Again, in sect. 106, a British ship even where not entitled to British privileges is made "liable to pains and penalties" as if a recognised British ship, and this also points to proceedings for enforcing those pains and penalties. Both the American cases cited are upon the words of the same act of Congress, which materially differ from this Act and the later case (*Gelston* v. *Hoyt*, 3 Wheat 311) follows the earlier case (*U. S.* v. 1960 *Bags of coffee*, 8 Cranch 398). The words in the American statute are given in Cranch's Reps. p. 399, and are as follows: "That *whenever* any articles, the importation of which is prohibited by this Act shall, after the 20th of May next, be imported into the United States," . . . . "all such articles" . . . . "shall be forfeited." That Act, by the word "whenever," fixes a time for the forfeiture, namely, on the importation; but the Merchant Shipping Act only says "if" certain things are done, the forfeiture shall take place, but fixes no date on which it shall happen. In *U. S.* v. 1960 *Bags of coffee* (8 Cranch 398), Johnson, J. bases the judgment of the court wholly upon the statute; saying, that "it is expressly declared that the forfeiture shall take place upon the commission of the offence." There being no express declaration to that effect, except in the word "whenever," the decision must turn upon the construction of that word, which is absent from the English statute. In *Wilkins* v. *Despard* (5 T. R. 112) and the other English cases cited, there was a seizure by the Crown or its officers, and the actions only decided the right of the seizor to detain the property from the date of the seizure. These cases do not decide any right to exist in the Crown to seizure after the property has passed to a *bonâ fide* purchaser; in effect, they go no further than showing that the title of the Crown relates to the date of seizure; they show no title relating back to the time of the Act committed. To give such relation back, the Act should contain stronger words. If the argument on the part of the Crown be right, then even a seizure and sale by this court in an action *in rem* would not avail against the forfeiture under the Merchant Shipping Act.

Mar. 21.—The *Attorney-General* in reply.—In *Reg.* v. *McCleverty, The Telegrafo*, there is a distinction drawn between the forfeiture for piracy, which is a common law forfeiture taking place only on conviction or condemnation, and other forfeitures. In that case the forfeiture took place for an offence against the *jus gentium*, and consequently, if forfeiture attached to the ship from the time of the committing of the act of piracy, the ship, when forfeited, would pass, not to any particular nation, but to all nations, and become common property; hence in piracy there must be seizure and condemnation to procure forfeiture to one nation. Mere seizure will not operate to perfect a forfeiture if the wrongful act itself does not cause it; condemnation must follow unless the act itself is sufficient. Where there is an inquisition of escheat, and a jury finds that the property is escheated, the Crown may convey, unless the finding is reserved, because the jury finds that the property has become vested in the Crown by the act done; the right of the Crown to convey does not depend upon any act of the court vesting the property. Here the statute itself is clear. Sect. 103, sub-sec. 1 provides any ship improperly using the British flag, "shall be forfeited to Her Majesty," and enacts that, "in any proceeding for enforcing any such forfeiture," the burden of proof of the right to use the flag shall lie upon the person using the flag, thus assuming that the forfeiture takes place at the time of using the flag. Sub-sect. 2 also uses the same words, "shall be forfeited to Her Majesty," and these words also imply forfeiture on committing the offence. Again, the words in the section quoted for the defendant, viz., "has become subject to forfeiture," clearly imply that the ship has become forfeited before the seizure prescribed by the section. [Sir R. PHILLIMORE.—Your contention is that the property in the ship is devested at the time of the wrongful act done, and on this, I think *Wilkins* v. *Despard* is almost conclusive.] The American decisions continue to enforce the same rule (*Henderson* v. *Distilled Spirits*, &c., 14 Wall U. S. Sup. Ct. Rep. 44). It has been expressly decided that the Crown cannot claim forfeiture of a ship after a sale by the Admiralty Court, because such a sale is notice to all the world: (*The Attorney-General* v. *Norstedt*, 3 Price 97.)

Sir R. PHILLIMORE.—This is a proceeding on behalf of the Crown against a barque called the *Annandale*, in order to obtain a decree or sentence of forfeiture under the provisions of the Merchant Shipping Act (17 & 18 Vict. c. 104.)

The 103rd section, sub-sect. 1. enacts, "If any person uses the British flag and assumes the British national character on board any ship owned in whole or in part by any person not entitled by law to own British ships, for the purpose of making such ship appear to be a British ship, such ship shall be forfeited to her Majesty": then other provisions follow in the sub-section, which it is unnecessary to mention. The second sub-section provides, "If the master or owner of any British ship does or permits to be done any matter or thing, or carries or permits to be carried any papers or documents, with intent to conceal the British character of such ship from any person entitled by British law to inquire into the same, or to assume a foreign character, or with intent to deceive, and such person as lastly

hereinbefore mentioned, such ship shall be forfeited to her Majesty."

Now, it must be taken to be admitted for the purposes of this demurrer that on July 18, 1874, the barque *Annandale* was fraudulently represented by the owners at the Custom House to have been sold to foreigners, and that in fact she never was sold to foreigners, and therefore she falls under the provisions of the Merchant Shipping Act, which I have just read. The defence sets up, amongst other grounds, the following in the seventh paragraph: "And as to the said several matters in the statement of claim contained and alleged to have been done by the persons, and in the ways and with the intents respectively alleged in the statement of claim, the defendant says that on the 6th July, 1876, he became *bonâ fide* purchaser of the barque *Annandale* for valuable consideration, and that at the time he became such *bonâ fide* purchaser he had no notice or knowledge whatsoever of the said matters in the statement of claim contained, or any of them, or of the said matters having been done by the said persons in the ways and with the intents in the said statement of claim mentioned, or of the said matters having been done at all." And then he goes on to state "that the barque *Annandale* was seized by the plaintiff on the 9th July, 1876, and from that date is still detained."

The plaintiff only demurs to the seventh paragraph in the statement of defence, and it is contended on behalf of the crown that the property in this case was devested at the time when the owners committed the fraudulent act to which I have adverted. On the other hand, it has been contended on behalf of the owners that the property was not devested until the seizure. It is admitted that it is not necessary to have a sentence of condemnation, but it is contended that seizure was necessary in order to divest the owners of the property.

The court has been referred to various cases in the courts of this country, but it is not, in my judgment, necessary to do more than state the substance of the decisions come to by these courts. The case that is principally relied on is *Wilkins* v. *Despard* (5 T. Rep. 112), which appears to have followed an earlier decision, which are referred to *Robert* v. *Witherhed* (12 Mod. 92: Salk. 223; 5 Mod. 195; Comb. 361). The principle laid down in this case, and adopted in *Wilkins* v. *Despard* (5 T. Rep. 112), is, that, before seizure and before any suit, the forfeiture accrued at the time when the illegal and fraudulent act was done, and that act devested out of the owners the property which they had in it, and that the seizure related back to the act which was the cause of the forfeiture.

I am of opinion that this position is a sound one in law, looking to the cases that I have adverted to, and the demurrer must be sustained in this case on the ground that the forfeiture accrued at the time when the illegal act was done, and that the seizure relates back to the time of the commission of the offence. It will, therefore, be for the defendants to consider whether they will amend their defence.

Judgment for the plaintiff on the demurrer.

Solicitor for the plaintiff, *G. C. Toller* for *Murton*, Solicitor to the Board of Trade.

Solicitors for the defendant: *Oliver* and *Bottrerell*.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

Monday, March 12, 1877.

Ex parte BARROW; *Re* WORSDELL.

Unpaid vendor—Arrival of goods at destination—Stoppage in transitu.

B. sold and shipped goods to W. at F. per steamship company. The goods were in due course delivered at F. to C., who acted in the double capacity of agent for the company to collect freights, and of wharfinger and carrier for consignees of all goods landed at F. by the company. C's course of business was to advise consignees of the arrival of their goods, and to hold the same to their order and at their risk, and until the freight was paid. Before the goods arrived at F., B. committed an act of bankruptcy upon which he was adjudicated bankrupt. W. claimed the goods as an unpaid vendor before they were claimed by the trustee in bankruptcy.

Held that, as B. had claimed the ogods before notice of their arrival had been communicated to W., and before they had been claimed by the trustee, his right of stoppage in transitu was not lost, although the goods had arrived at the place of their destination.

THIS was an appeal from the decision of the judge of the County Court of Cornwall, holden at Falmouth.

In the month of October 1876, Barrow and Son, leather merchants, in London, sold to Jonathan Worsdell the younger, a shoemaker at Falmouth, leathers to the value of 208*l.* 3*s.* 6*d.* In part payment of the money J. Worsdell gave Barrow and Son a post-dated cheque of the 10th Nov. 1876 for 50*l.*, and promised to accept a bill for the remainder.

On the 27th Oct. Barrow and Son sent an invoice of the goods to J. Worsdell, jun., and not having received any directions as to how they were to be forwarded, delivered them to Wright and Jackson, wharfingers, in London, addressed to "Worsdell, Killigrew-street, Falmouth," and on the same day handed to Wright and Jackson a forwarding note in these terms:

Spa Road, Bermondsey, S.E.,
West Kent Wharf, Oct. 27th, 1871.

Please receive from Jonathan Worsdell jun., Killigrew-street, Falmouth, 9 bales and 2 trusses fully addressed.

On the 29th Oct. Wright and Jackson shipped the goods per the British and Irish Steam Packet Company's steamer *The Countess of Dublin*, which sailed the same day and arrived at Falmouth on the 31st Oct., where the goods were discharged at the wharf of Messrs. Carne and Co., the agents of the company, who placed them in their warehouse.

The ship's "manifest" of the goodsw as sent off by Wright and Jackson on the 31st Oct. and reached Carne and Co. the same evening, and was as follows:

West Kent Wharf, London.

Manifest of the Countess of Dublin from London to Falmouth 1876. Voyage sailed the 29th Oct., No. 3, 9 bales leather, and No. 5, 2 trusses leather. Consignee, Worsdell. Amount to pay, 1*l.* 8*s.* 9*d.* Place, Falmouth.

On the 30th Oct. J. Worsdell, jun. absconded, and on the 2nd Nov. a bankruptcy petition was presented against him, the act of bankruptcy being "departing from his dwelling house or otherwise absenting himself," whereupon he

was adjudicated bankrupt on the 4th Nov. On the same day Messrs. Barrow and Son having heard that Worsdell had absconded telegraphed to Carne and Co. to stop the goods, and not to deliver them to anybody, as they claimed them as unpaid vendors. Later on the same day the bailiff of the County Court claimed the goods on behalf of the trustee in bankruptcy, but Carne and Co. declined to give them up.

On the 6th Nov. Carne and Co. wrote Barrow and Son that the goods were still in their possession, and would be retained by them until they were quite sure that they should fall into the right hands.

On the 16th Feb. 1877, the County Court judge, upon the application of the trustee, made an order declaring that the goods belonged to the trustee.

Against this order Barrow and Son appealed.

Carne and Co. deposed that they were the shipping agents at Falmouth of the steamship company for the purposes respectively of procuring and collecting freights for them, and as such agents they also had the exclusive right of delivering goods from their warehouses, and this they invariably did upon receipt of an order from the consignee; in this respect they acted solely on their own account as carriers for the consignee, and quite independently and apart from their agency for the company; that if goods were consigned to strangers not resident at Falmouth, they sent to them a freight note to the effect that the goods had arrived and were at the consignee's risk after landing, and if not immediately removed would be stored at the owner's risk and expense; that if the consignee resided at Falmouth they, as a matter of convenience, sent a verbal message instead of a freight note, and throughout acted as agents for the consignee; that the "manifest" of the goods in question was sent to them by Wright and Jackson, and reached them the same evening, and was in the usual form, and stated that 1*l.* 8*s.* 9*d.* was the freight to be paid by the consignee, and that they knew nothing of the consignors until they received the telegram on the 4th Nov.

The other material facts sufficiently appear in the arguments, and in the judgment.

Horne Payne appeared for the appellant.—It is clear from the authorities that it is immaterial who pays the freight and charges, and that an unpaid vendor's right of stoppage *in transitu* overrides a carrier's lien for a general balance, though not the special charges on the goods sold.

Benjamin on Sales, 695;
Oppenhein v. *Russell*, 3 Bos. & Pul. 42;
Lickbarrow v. *Mason*, 6 East, 21.

The respondents might rely upon the fact that his clients had received part payment, but the bill of exchange, which was sent to the bankrupt for acceptance, was never accepted, and the cheque was worthless, there being no assets; but even if they had received part payment, it had been decided that a vendor's right of stoppage *in transitu* was not lost either by part payment or a conditional payment.

Hodson v. *Ley*. 7 Term Rep. 445:
Feise v. *Wray*, 3 East, 39;
Edwards v. *Brewer*, 2 M. & W. 375.

Lastly, the real question was, whether the goods had reached the hands of a person in Falmouth, who ceased to hold them as wharfinger and carrier, and held them by agreement between himself and the consignee no longer as carrier, but as agent for and on behalf of the consignee, retaining them on a bill of deposit. He contended that the evidence failed to prove any such agreement, the arrival of the goods never having been communicated to the bankrupt, who had, in fact, absconded before they had arrived, and that Carne and Co. held them only as warehousemen in the ordinary course. He referred to

Benjamin on Sales, p. 707;
James v. *Griffin*, 2 M & W. 623.

De Gex, Q.C., and *Northmore Lawrence*, for the trustee, contended that the *transitus* was ended when the steam packet company brought the goods to Falmouth, that being the destination named in the invoice sent to Worsdell by Barrow and Sons. The steam packet company were the only carriers employed. Their practice was not to deliver the goods, but to leave them on the wharf at Falmouth, where they remained until some new destination was communicated to them at the instance of the consignee. The *transitus* named in the invoice, therefore, was determined by their arrival at Falmouth. They cited

Wentworth v. *Outhwaite*, 10 M. & W. 436;
Whitehead v. *Anderson*, 9 M. & W. 534.

Carne and Co. never were carriers for Worsdell. They were merely candidates for being his carriers. He might have sent his own carts and taken them away [The CHIEF JUDGE.—Suppose there had been no Carne and Co. in existence and no warehouse, nothing but the open sky above, and then the goods had been shot out upon the wharf, and before any one could come and lay a hand upon them and say "They are mine," the unpaid vendor claimed them.] Then we say that is too late, because they are delivered at their destination, and the *transitus* is at an end. The steamship company undertook to carry them no further than the wharf at Falmouth, and the *transitus* was completely at an end when the goods arrived at the agent's warehouse, who is to keep them until he receives the further orders of the consignee.

Dixon v. *Baldwin*, 5 East, 175;
Ex parte Gibbes; *Re Whitworth*, L. Rep. 1 Ch. D. 191; 33 L. T. Rep. N. S. 479.

The CHIEF JUDGE.—All these cases are extremely nice no doubt; but, notwithstanding the multitude of the cases upon the subject, there is a very clear precedent to be deduced.

The facts of this case unquestionably are these: The goods are sold and shipped in London to be delivered to Worsdell at Falmouth; the vessel goes to Falmouth; the goods are transferred from the ship to the shore, and that operation is performed by Carne and Co., who are so far the agents of the shipping company. They are not to part with the possession of the goods until they are paid the freight charges. That is clear. The goods are lying on the quay, and they take them into their warehouse. I do not think that has very much to do with it. If the weather would destroy them, or injure them, it would be a very business-like mode of proceeding that they should take them into the warehouse; but whether on the quay or in the warehouse, that is the place to which, I think, the goods had so far been carried. Whether the *transitus* ended there, so that an unpaid vendor cannot claim his right to stoppage *in transitu* is what I have to decide.

Now the shipping brokers say that they sustain two characters. First, they are agents for the shipping company, and then having possession

of the goods for the shipping company, their next duty is one of a different kind; it is to announce to the consignee that they hold his goods, first, that they may get payment of the freight, and next that they may deal with the goods as the consignee directs them. But until that is done can it be said that the right of stoppage *in transitu* is gone? The shipping company would not allow the goods to be parted with until their charges were paid, and the agents would never suffer Worsdell to take them until the charges were paid, if he desired to have them. As Carne and Co. say, their course of business was, that the person living at a distance would receive a written notice, and anyone living in Falmouth would receive a verbal notice. Neither the one nor the other was done in this case. The fact seems to be established that, at the time the goods were shot out upon the quay, the purchaser had absconded, so that any notice would have produced no result. At any rate he was not forthcoming; he was not there either to claim the goods, or to have a notice delivered to him that the goods had arrived, or to direct the fresh destination of them.

That makes this case very different from the case of *Wentworth* v. *Outhwaite* (10 M. & W. 436). In that case not only was there an end of the *transitus*, but there had been actual possession. Carts had been sent to carry away one half of the flax, and the other half remained because there was not time enough, or there were not carts enough, to carry away the remainder. But the *transitus* was at an end, and the purchaser was the owner of the goods, and no other person alive, paid or unpaid, could claim the ownership.

Then in the case which was decided by myself (*Ex parte Gibbes, re Whitworth*, L. Rep. 1 Ch. Div. 101), the facts were, that the goods upon their arrival at Liverpool were paid for by bills, which were not good bills by reason of subsequent failure. The goods having arrived at Liverpool the purchaser acquired a right, from having accepted the bills and performed the condition, to demand from the shipmaster the delivery of the goods. He exercised that right, and the argument was that they remained *in transitu* after that. I could not allow that argument.

Then I have had read to me several extracts from Mr. Benjamin's work. Of course that is only to be taken as a learned person's exposition of the law, not as an authority; but it is so clear and points out so clearly the difficulties which beset this question, and the conclusion which ought to be drawn from decided cases, that I feel compelled to refer to it. I read from page 707, the other questions of stoppage *in transitu* having been discussed in the previous part of the volume: "Next come the cases where the goods have reached their ultimate destination, and the controversy is whether they still remain in the hands of the carrier, *quâ* carrier, or, if landed, whether the wharfinger or warehouseman is the agent of the buyer to receive and hold them for the buyer's account. Blackburn on Sales has this passage, "In none of these cases, it may be observed, was there any doubt as to the law; the question was one of fact, namely, in what capacity did the different agents hold possession?' This question becomes still more difficult to answer when the party holding goods acts in two capacities, as for instance, a carrier, who also acts as a warehouseman, and who may, therefore, have goods in his warehouse either as a place of deposit connected with the carriage, or as a place of deposit subject to the orders of the buyer, or as a wharfinger who sometimes receives goods as agent of the shipowner and sometimes as agent of the consignee. In all such cases, as the leading fact, namely the possession of the goods, is in itself ambigious, it is necessary to gather the intention of the parties from their minor acts. If the possessor of the goods has the intention to hold them for the buyer, and not as an agent to forward, and the buyer intends the possessor so to hold them for him, the *transitus* is at end; but I apprehend that both these intents must concur, and that neither can the carrier of his own will convert himself into a warehouseman so as to terminate the *transitus* without the agreeing mind of the buyer, nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatsoever to retain possession against the buyer." For this he quotes the cases of *James* v. *Griffin* (2. M. & W. 623), and *Jackson* v. *Nichol* (5 Bing., N. C., 508). Then he says, "This view of the law has received confirmation in subsequent cases."

Now if Messrs. Carne and Co. say they were the agents of the buyer, I ask who constituted them such agents? What right had they to make themselves the buyers agents? It was their duty to receive the goods, and it was their duty not to part with them until they were paid for the freight. I do not think it was the less their duty to put them in a place where they could not be injured. Beyond that they had nothing more to do with them than I had. There was no communication of any intention on the part of the buyer, but the goods remained in Carne and Co.'s possession. The unpaid vendor tries to get possession of them, finding that his purchaser has failed and cannot be found.

The case differs much from the two cases which have been relied upon, and seems to me to come within the principle of law which is mentioned in Mr. Benjamin's work, and which is supported by the authorities to which he refers, and every other authority which I know of which applies to this subject. The *transitus* ends at Falmouth no doubt. The *transitus* might so end that the buyer could acquire possession, but until the buyer does something to evince an intention of taking possession, in my opinion the right of an unpaid vendor to stop those goods which had never left his hands except to go on board the ship remained untouched, and that, therefore, the order which has been appealed against ought to be discharged.

Horne Payne asked for the costs of the appeal.

The CHIEF JUDGE.—It is a very nice question indeed, and I do not think I ought to give you the costs.

Solicitors for the appellants, *Gregory, Rowcliffe, and Co.*

Solicitor for the respondent, *H. Montagu.*

HOUSE OF LORDS.

Reported by C. E. MALDEN and A. H. POYSER, Esqs., Barristers-at-Law.

May 22, 23, *and* 30, 1876.

(Before Lords CHELMSFORD, HATHERLEY, and SELBORNE.)

CLYDE NAVIGATION COMPANY. *v.* BARCLAY AND OTHERS.

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

Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 388—*Compulsory pilotage—Collision—Contributory negligence—Burden of proof—Trial trip—Bye laws.*

In cases of collision, if it be proved on the part of the defendants that the accident occurred through the fault of a pilot compulsorily employed, the burden of proving that the defendants have been guilty of contributory negligence lies on the plaintiffs, and they must show such negligence either by direct proof adduced by themselves or from facts proved in the defendants' evidence.(a)

The Iona (16 *L. T. Rep. N. S*, 158; *L. Rep.* 1 *P. C.* 426; 2 *Mar. Law Cas. O. S.* 479) *explained.*

The sending a new steamer, not yet out of the builders' hands, on a trial trip, manned by a sufficient number of men to work the ship, and in charge of a duly licensed pilot, but without regularly constituted officers and crew, does not amount to contributory negligence.

A bye-law of a local pilot board enacted that all steamers navigating the river should be manned by an "experienced captain or sailing master, and a sufficient number of able bodied and experienced men."

Held, that a pilot compulsorily employed might be considered a sailing master within the meaning of the bye-law.

Quære, how far such bye-law was applicable to a vessel on a trial trip.

THIS was an appeal from a judgment of the second division of the court of session in Scotland, delivered on 18th June 1875, by the Lord Justice Clerk (Lord Moncrieff), and Lord Neaves (Lord Ormidale dissenting), affirming a judgment of the Lord Ordinary (Lord Mackenzie), in an action brought by the appellants against the respondents.

The case is reported in 2 Court of Session Cases (4th series), 842.

The action arose out of a collision which occurred in the Clyde, on 19th Feb. 1873, between the *Colina*, a large steamer of 2000 tons, the property of the respondents, and a dredger, the property of the appellants, by which the latter was sunk.

The *Colina* was a new ship, and was on her trial trip when the accident occurred, and she was manned by a crew of twenty-five hands, including the persons who were afterwards, when she was completed, respectively her master and first and second mates; and these persons were acting as officers on board the ship, which was in charge of a duly licensed pilot. By the Clyde Navigation Consolidation Act 1858, sect. 128, *et. seq.* pilotage is made compulsory upon all vessels over 60 tons register navigating the Clyde. The defence raised by the respondents was under the Merchant Shipping Act 1854 (Stat. 17 & 18 Vict. c. 104), s. 388, that she was under the compulsory charge of a licensed pilot, and that the accident occurred by his default, without any contributory negligence on their part; and on the evidence the Lord Ordinary decided in their favour, and his judgment was affirmed as above mentioned.

Cotton, Q.C. and *Benjamin*, Q.C., appeared for the appellants.

Butt, Q.C. and *Herschell*, Q.C., for the respondents.

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

Lord CHELMSFORD.—My Lords, the only question upon which there is any dispute in this case is whether the owners of the *Colina* have done, or omitted to do, any Act which contributed to the collision for which they are sought to be made answerable. Their defence is founded on the Merchant Shipping Act 1854 (Stat. 17 & 18 Vict. c. 104) which enacts (sect. 388) that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage sustained by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

But although an accident may have been attributable originally to a pilot, yet, if any fault of the owner or master of the vessel has contributed to it, his responsibility still remains.

There has been some little confusion in the cases as to the *onus probandi*. In the case of the *Iona* (L. Rep. 1 P. C. 426; 16 L. T. Rep. N. S 158; 2 Mar. Law Cas. O. S. 479) which was relied upon in the judgment of the court below, and mentioned in the argument at the bar, Kindersley, V. C. is reported to have said: "It is not enough for the owners to prove that there was fault or negligence in the pilot; they must prove to the satisfaction of the court which has to try the question that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage,"

The learned Vice-Chancellor imposes on the owners a species of negative proof which it is impossible for them to give. If, instead of saying "They must prove that there was no default," he had said, "It must be proved that there was no fault on the part of the officers and crew," he would have been perfectly correct.

The condition of exception that the owners should prove that the accident arose entirely from the fault of the pilot, is one which must be fairly and reasonably interpreted. The owners having proved fault on the part of the pilot sufficient to cause, and in fact causing, the calamity, must therefore, in absence of proof of contributory fault of the crew, be held to have satisfied the condition on which exemption depends, and are not to be called on to adduce proof of a negative character, to exclude the mere possibility of contributory default. It may be that in the course of the evidence of the owners to fix the responsibility solely upon the pilot, certain acts or omissions on the part of the crew may come out; and it will then be incumbent on the owners to show satisfactorily

(a) This decision will have the effect of considerably varying the practice in collision cases where compulsory pilotage is pleaded, as it will be no longer necessary for a defendant to show more than that the negligent act complained of resulted from the act of the pilot in charge. See *The Cynthia, ante* p. 378.—ED.

that those acts or omissions in no degree contributed to the accident.

There are certain facts which are clear in this case. The *Colina* was under the compulsory charge of a licensed pilot, and he was the main cause of the damage which occurred, which is attributable to his improper steering of the vessel at the critical time when danger was imminent, when he appears not to have had complete command of himself. The original cause of the accident is beyond a doubt. Is the pilot then alone responsible, or were there any acts or omissions which contributed to the accident attributable to the owners or crew of the *Colina?* This vessel had just been built, and had not been delivered by the shipbuilders to the owners, but was on her trial trip on the Clyde, having on board three persons who afterwards became the master and the first and second mates, and a crew employed for the occasion consisting of twenty-five men. The first act of contributory negligence imputed to the owners is the having a crew of this description, and the bye laws of the Clyde Pilot Board and the evidence of the pilot are referred to.

The bye laws require that "All steam vessels must be supplied with a captain or sailing master who shall be an experienced seaman; and must also be manned with a sufficient number of able bodied and experienced seamen for the safe navigation of the vessel."

The judges who were in favour of the defenders spoke disparagingly of the state of things on board the *Colina*. The Lord Justice Clerk says, "The vessel was still the property of Barclay, Curle, and Co. (the builders), and she was manned on this her trial trip by officers and men who had no regular commission, but were there for the purpose of the trial trip. It is said that this is not sufficient compliance with the bye law. I think it was a slovenly state of matters, and not one to be commended."

And Lord Ormidale says, "The evidence shows that the *Colina* was, as regards her officers and crew, in a very deplorable condition; so much so that it is not in the least surprising that an accident occurred."

With respect to the bye law one can only observe that it was totally inapplicable to the present case. The *Colina* was still in the shipbuilders' hands, and therefore could not have any captain, or sailing master, or established crew of seamen, and this may account for what was observed in the course of the argument that no charge is made by the trustees of the Clyde navigation of any fault by the non-observance of it. With respect to the constitution of the crew, it was necessarily one collected for the occasion, and could not include a master and officers strictly so called. There is no doubt that upon the trial trip of a vessel, although she cannot be officered and manned like a ship on a voyage, every provision must be made to navigate safely, and every precaution taken to avoid danger to other vessels. All that was necessary was that the pilot should be assisted by a sufficient crew to obey his orders, and carry them out promptly and efficiently; and certainly so far as number was concerned there was a sufficient crew, for it appears that the *Colina* would, if properly manned have a complement of sixteen men, whereas on the occasion of this trial trip there was no less a number than twenty-five. But assuming any objection to arise from the constitution of the crew, the point to be established against the owner is that the accident was occasioned in some degree by this circumstance.

It was said that the accident was partly owing to the want of proper assistance given to the pilot. It is said that the master ought to have been on the bridge to advise him. There was, as I have said, no master strictly so called; but there is no magic in the word "master," and it appears that a man who was to be one of the officers of the *Colina* was on the bridge, and did what was necessary. It is further objected that the chief officer was not at the bow to repeat the pilot's orders; and it is said that if he had been there the hawser of the tug would have been sooner cast off. But the pilot says expressly that he did not want assistance for hailing the tug, and, in another part of his evidence, that all his orders were obeyed.

Lord Ormidale sums up his objections to the conduct of the owners as contributing to the accident in these terms: "I am of opinion that in respect of want of promptitude in seeing that the order of the pilot to throw off the tug was carried into effect, and failure to keep a proper look out, the defenders have failed to exonerate themselves."

Now, with regard to the "failure to keep a proper look out," there is not the slightest evidence that there was not a proper look out kept; and with respect to the "want of promptitude in seeing that the order of the pilot was carried into effect," it is already answered by the pilot's evidence to which I have directed your Lordships' attention.

Under these circumstances I think your Lordships will be clearly of opinion that there is no ground for this appeal, and that the interlocutors appealed from ought to be affirmed.

Lord HATHERLEY.—My Lords, I am entirely of the same opinion.

The law has been laid down with perhaps a little want of his usual carefulness by Kindersley, V.C. in the case of the *Iona* (L. Rep. 1 P. C. 426: 2 Mar. Law Cas. O. S. 479). I apprehend that the true rule is that the mode of proof will be this: In order to exempt yourself, by virtue of the provisions of the statute, from that which is a general common law liability, you who desire the exemption must bring yourself within the provisions of the statute; and the burden is, therefore, thrown upon you of proving that the mischief was occasioned by the pilot. But the other side may prove that although the mischief was occasioned in one sense by the bad management of the pilot, yet there was a default on the part of the owners of the ship, which default conduced to the accident.

The pilot seems evidently to have been assisted in every way. He says that every order he gave was attended to, there is no doubt about that; so that nothing whatever could be attributed to any defect on the part of those who were on board to assist him. Any danger or difficulty that did arise must have arisen from the unfortunately erroneous orders of the pilot. It seems to me, therefore that, under the circumstances, there is no pretence for saying that the defenders contributed to the injury complained of.

Lord SELBORNE.—My Lords, I see no reason for inferring the existence of any special or peculiar

principle applicable to the burden of proof in this class of cases.

Your Lordships will observe that there are three things necessary to be proved; first, that a qualified pilot was acting in charge of the ship; secondly, that that charge was compulsory; and thirdly, that it was his fault or incapacity which occasioned the damage.

I apprehend that if a defender proves all these three propositions, and proves nothing more, then the burden is upon the pursuer, not upon the defender, to lay some foundation, at all events, for alleging that notwithstanding the proof given that there was a qualified pilot in charge, and that compulsorily, and that he committed some fault or showed some incapacity, by which loss or damage were occasioned, yet there was also contributing to the loss or damage other causes for which the owners of the ship were responsible. Some foundation for such a case of contributory negligence must be laid, and the question is upon whom it lies to show that. I apprehend it is clear that the burden of laying that foundation rests upon the pursuer, and not upon the defender, on general principles. The defender, if he has simply proved what he was obliged to prove to exonerate himself, and proved nothing more, is not obliged to travel into the indefinite region of negatives, or to anticipate by denial that for which no foundation is laid to call upon him to deal with it. No doubt the pursuer may discharge the onus lying upon him in that respect either by direct proof tendered by himself, or by showing that in the proofs brought forward on the part of the defenders, there are matters appearing from which fault or negligence which may have contributed to the mischief is legitimately and reasonably to be inferred. Unless he does that he does nothing. When that is done no doubt a further *onus probandi* is thrown upon the defender to rebut the *primâ facie* evidence which has been given of contributory negligence on his part.

Whatever may be the precise expressions to be found in any of the judgments, I see no reason whatever, referring them, as they ought to be referred, to the facts of the particular cases in which the expressions were used, for supposing that an arbitrary rule was meant to be laid down, inverting the general principles of *onus probandi* as applied to this particular class of cases. The Lord Justice Clerk seems to me to have expressed the matter very properly, with the exception of perhaps one single word, when he says: "I should prefer to state the law to be that it is not enough for the owners to show that the damage arose through the fault of the pilot, if there is reasonable room for saying that there was contributory fault on the part of the master and crew." I confess I should not have used the word "room," I should have used the word "ground." The proof of circumstances which *primâ facie* show such reasonable ground for saying that there was contributory fault on the part of the master or crew no doubt would throw upon the defender the burden of explaining those circumstances so as to satisfy the court that in point of fact the *primâ facie* conclusion from those circumstances is not correct. If he fails to do that, he fails altogether. When the principles of law are correctly understood, there is no difficulty in applying them to the facts of this case.

The question has ultimately turned upon the want of proper officers on board the ship. In the first instance the argument took, perhaps, a wider range, and it was said that the ship was not properly manned and officered; but ultimately it was reduced, and reference was made to the byelaws issued for the navigation of the Clyde. After having studied those byelaws, I must say that even if it were clear that they did apply to trial trips, as well as to other occasions, in all respects, I am by no means satisfied that there is any proof whatever given in this case that they were not strictly complied with, substantially complied with, at all events.

These byelaws are two. The first is: "Every vessel shall during the daytime have one person, and from sunset to sunrise, or in time of fogs, two persons, properly qualified, stationed at the bow as a look-out, to give notice in due time of any obstruction or danger, who shall be furnished with a trumpet, or horn, or whistle, to be used when there is reason to believe another vessel is near." I do not know whether the words, "stationed at the bow," point to anything different from being stationed on the bridge, but in this case the evidence makes it quite clear that the proper place for the look-out was the bridge; and as a matter of fact the evidence is that this accident occurred during the daytime, when, according to that byelaw, one person alone would be sufficient for the look-out, for there was plenty of light, and no fog. The pilot and another person, who practically acted as an officer, were on the bridge the whole of the time, to say nothing of a third person, whom I will mention presently, who was there too, but who may not perhaps have been properly qualified. But that the pilot and the other person were properly qualified for this purpose is perfectly clear; they were there in the proper place during the whole time, and there was a trumpet to give proper notice. Therefore it seems to me that the byelaw, at all events, was duly complied with in this case.

The second byelaw is: "Every steamer navigating the river shall be manned by an experienced captain or sailing master, and a sufficient number of able bodied and experienced men, and shall in all cases have a person or persons stationed as a look out in terms of article 2." There was a person, in fact there were two persons, stationed as a look out. It is now admitted that no case can be made of a want of a proper crew of seamen. The sole question, therefore, upon that byelaw would be reduced to this: Was the requirement that every steamer should be manned by an experienced captain or sailing master duly complied with?

My Lords, I venture to say that the pilot was the sailing master in this case; and if there be nothing more than the mere language of that byelaw, considered as applicable at all events to a trial trip, I cannot conceive any ground for saying that a pilot might not be a sufficient sailing master within the meaning of the byelaw. So much with regard to the byelaws.

Now I come to the pleadings, and it does seem to me that if ever there was a case in which the pursuers were to be bound by the inferences to be drawn from their own pleading this is a case of that description. For who are these pursuers? They are a public

body who have made these byelaws, a body expressly charged with the care of the navigation of the River Clyde. It is not alleged that they discovered, after these pleadings were put in, any fact which they did not know before. They knew, therefore, both what was usual in the case of trial trips, and what was reasonably to be required and expected whether under their own byelaws or otherwise, in respect of the efficiency and manning of the vessel. And knowing all the facts, they distinctly put upon the pleadings this averment, that the accident was due to two causes, or to one or other of those causes, not alleging any other cause besides. Those two causes were, first, "negligence, or want of proper care or skill on the part of those navigating or steering the vessel." That is one, and the other cause is, "gross and culpable defects in her construction and apparelling, and in the hull, machinery, steering gear, or other appliances." Therefore they distinctly allege two causes, one improper steering and navigation at the time; and the other improper construction and fitting up of the vessel itself. But there is a total absence of allegation either that the ship was improperly manned or not properly officered, or that the want of proper manning or proper officering had anything to do with the accident which occurred.

It is impossible for me to doubt that they would have alleged a want of proper manning and proper officering if, when the pleadings were put in, they had taken that view of the subject which, in default of anything else to rely upon, has been pressed on their behalf at the bar. And when I look at the evidence, bearing in mind that such is the pleading of the pursurers themselves, I cannot but come to the conclusion that if there were any doubtful points in the evidence, any ambiguous points, any room for the suggestion, or possible inferences leading to the conclusion that the ship was improperly officered, all doubt and all ambiguity upon that subject ought to be removed, when we bear in mind that those who best understood the matter, and whose interest it was to suggest these objections, if there were any ground for them, have themselves made no such suggestions, and have shown that they did not rely upon that view of the case.

I think it would be most unreasonable to suppose that you should for a trial trip put on board a crew and officers engaged and commissioned in the same way as when the ship is to be sent to sea; and this at a time when she is still only in the hands of the builders, when a temporary purpose is in view, and when she is not delivered over to those whose business it will be to engage the officers and crew.

Your Lordships have this evidence, that the pilot was in sole charge; and I apprehend, in order to give the defenders the benefit of the exemption under the statute, it was necessary that he should have been so; he was in sole charge, but he had, as has been pointed out, the assistance, not only of a competent crew, and of four men at the wheel, one of them "quartermaster," but also of two persons who were in substance acting as officers, though not having the engagements of officers at that time. Did they or did they not do all that was needful; and were they or were they not in such a position as to make it a right and reasonable conclusion that the pilot had all the assistance which he could possibly require? The pilot, whose interest it was, as has been pointed out, rather to exonerate himself than otherwise, says as the result of his evidence that he had no reason whatever to doubt that all his orders were properly obeyed and attended to, and that he needed no assistance with which he was not provided.

Therefore I entirely agree that this appeal must be dismissed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, *W. A. Loch*, agent for *Webster* and *Will*, Edinburgh.

Solicitors for the respondents, *Grahames* and *Wardlaw*, agents for *Frasers, Stoddart*, and *Mackenzie*, Edinburgh.

Friday, March 23, 1877.

(Present the LORD CHANCELLOR (Cairns), Lord PENZANCE, Lord O'HAGAN, Lord BLACKBURN, and Lord GORDON).

DUDGEON *v.* PEMBROKE.

Marine insurance—Time policy—Implied warranty of seaworthiness—Perils insured against.

In an ordinary time policy there is no implied warranty that the vessel should be seaworthy at any period of the risk.

In ascertaining whether a ship was lost by perils of the sea, causa proxima non remota, spectatur, *therefore any loss caused by the perils of the sea is within the policy although it would not have occurred but for the concurrent action of some other cause which is not within it.*

Plaintiffs insured their steamer which was then in dock by a time policy for a year, which was underwritten by the defendant; she crossed the North Sea in fine weather but made water; and on her return, being waterlogged in bad weather, she stranded, and became a total loss.

At the trial the jury could not agree whether she was seaworthy at the beginning of the first voyage, nor whether unseaworthiness was the cause of her loss. They found, however, that the plaintiffs did not know she was unseaworthy, and it was admitted that the loss was due immediately to perils of the sea. The verdict was entered for the plaintiff.

Held (*reversing the decision of the majority of the Exchequer Chamber, and affirming the original judgment of the Court of Queen's Bench*), *that the verdict was rightly entered for the plaintiff, as the ship was lost by perils insured against, and that as this was a time policy there was no implied warranty of seaworthiness at any period of the risk.*

Gibson *v.* Small (4 *H. of L. Cas.* 353), *followed.*

THE action was brought to recover a total loss upon a time policy of insurance for twelve months effected by the plaintiffs on the steamship *Frances*, in the sum of 5800*l.*, on a ship valued at 8000*l.* and machinery at 4000*l.*, the particulars of which action and the facts relating thereto are fully set forth in the reports of the case in the courts below (*ante*, vol. 2, p. 323; *ante*, p. 101).

The case was heard before Blackburn, J. and a special jury at Guildhall in Oct. 1873, and the verdict entered for the plaintiffs

A rule *nisi* for a new trial was obtained, and upon argument was discharged by the Court of Queen's Bench (Blackburn and Quain, JJ.). On appeal to the Exchequer Chamber this judgment was reversed by Lord Coleridge, C.J., and Cleasby and Pollock, BB., Brett, J., and Amphlett, B. dissenting.

The case was then brought up on error to the House of Lords.

Milward, Q.C., *Watkin Williams*, Q.C., and *A. L. Smith* for the appellants.

Butt, Q.C. and *Cohen*, Q.C. for the respondents. —During the argument the judgments in the courts below were discussed, and the following cases were referred to:

Gibson v. *Small*, 4 H. L. Cas. 353; 21 L. T. Rep., O. S. 240;
Thompson v. *Hopper*, 6 E. & B,, 172, 937; 28 L. T. Rep., O. S., 142;
Fawcus v. *Sarsfield*, 6 El. & Bl. 192;
Hollingsworth v. *Brodrick*, 4 A. & E. 646;
Douglas v. *Scougall*, 4 Dow's App. Cas. 276;
Wilkes v. *Geddes*, 3 Dow's App. Cas. 60.

Lord PENZANCE.—In this case, my Lords, the action was brought by the appellant upon a policy of insurance by which the steamship *Frances* was insured for a year for the sum of 5800*l.*, the ship being valued at 8000*l.* and the machinery at 4000*l.* Several pleas were pleaded by the underwriters, the present respondents. The cause was tried, and several questions were eventually put to the jury by the learned judge, who, upon the answers of the jury, directed the verdict to be entered for the plaintiffs. A rule was obtained to set aside this verdict for a new trial, or to enter the verdict for the defendants upon the third plea. This rule was discharged after argument by the Court of Queen's Bench, and an appeal was then made to the Court of Exchequer Chamber upon a special case stated by the parties. The result of this appeal was, that the judgment of the Queen's Bench was reversed, and a new trial granted. It is against this judgment that the appellants have appealed to your Lordships' house; and the questions raised in the house, though not numerous, are of extreme importance in the administration of the law of marine insurance.

My Lords, the policy in this case is a time and not a voyage policy, and not only so, but an ordinary time policy. There can, I apprehend, be no doubt upon that point. It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods, as well as to the ship, the policy is something less or something more than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they intend to describe and limit the risk intended to be insured against without striking out the printed words, which may be applicable to a larger or different contract, is too well known, and has been too constantly recognised in courts of law to permit of any such conclusion.

The policy then, being a time policy, the first question raised for your Lordships' determination is whether the law implies in such a contract any warranty that the vessel should be seaworthy at any period of the risk, and if so at what period or periods.

My Lords, this is no new question. It was raised in the case of *Gibson* v. *Small* (4 H. of L. Cas. 415), which was determined by your Lordships' House in the year 1854, and has been the subject of more than one subsequent decision. I do not propose to trouble your Lordships by reviewing the arguments on this question, because I consider that the case of *Gibson* v. *Small*, supplemented as it was by the two cases of *Thompson* v. *Hopper* (6 E. & B. 172, 937), and *Fawcus* v. *Sarsfield* (6 E. & B. 192), must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy any warranty that the vessel at any particular time shall have been seaworthy.

In pronouncing the judgment of the majority of the court in the latter case Lord Campbell said, "For the reason which I gave in the case of *Gibson* v. *Small*. and which I have given in the case of *Thompson* v. *Hopper*, I think there is no implied warranty of seaworthiness in any time policy."

From that time, upwards of twenty years ago, to the present, these decisions have been acted upon and submitted to, and millions probably of time policies have been effected, and losses adjusted under them, and whatever may be argued as to the soundness of the conclusions then arrived at, or, hower, desirable it may be, as a matter of public policy and concern that some such obligation of keeping his vessel as far as it is within his power, seaworthy, should be cast on a shipowner, the law must, I submit to your Lordships, be considered as settled by these decisions, and any change made in it must be by legislative authority alone.

It was next contended that the vessel in this case was not lost by perils of the sea, and that some question ought to have been put to the jury by the learned judge upon this subject. The circumstances of the vessel's loss are detailed in the special case. It is only necessary to quote a few sentences of it. "The *Frances* laboured heavily, and began to make water to such an extent, that in sixteen hours the fires were extinguished. A portion of the deals which formed the deck cargo was used for relighting the fires, and the rest was thrown or washed overboard. After about twelve hours pumping the pumps got choked with the oats, and all hands had to be employed in baling the ship. There was evidence given by the defendant that had the screw tunnel been in proper order the pumps would not have got choked as they did. On the night of the 14th Feb., those on board the *Frances* having sighted the Spurn Lights, endeavoured to get her into Hull, the ship, at the time being water logged, did not readily answer her helm. Partly from this and partly from the thickness of the weather, which at the time was very dense, on the following morning, at about 5 a.m., the ship having been in a state of distress since the morning of the 12th Feb., went ashore under Didlington Heights upon the coast of Yorkshire. One of the boats was swamped, but the crew were all saved by a smack. Part of the cargo was afterwards saved, but the vessel could not be got off, and subsequently broke in two and finally, after some months, went completely to pieces."

These facts require no argument. If ever a

vessel was lost "by perils of the sea," understanding those words in the sense which the courts of this country have uniformly ascribed to them, this vessel undoubtedly was so, and the real question intended to be raised therefore is, whether a vessel not strong enough to resist the perils of the sea (in other words unseaworthy) can be properly said to be lost by perils of the sea, because it was by the force of the winds and waves that she went ashore, and finally broke up and went to pieces. The question, therefore, is one of law and not of fact, and the learned judge was quite justified in entering the verdict as he said without asking the jury any further question as to the loss about which there was no fact in dispute, subject to the determination of the question of law raised.

In discussing such a question it must be assumed, as it was admitted by the appellant that it should be, for the sake of argument, that the vessel was not seaworthy, and that her want of seaworthiness caused her to be unable to encounter successfully the perils of the sea and so to perish. The question therefore is in substance the same as that raised by the sixth plea, or rather so much of it as the jury found to be proved, namely that the "vessel sailed from London in a wholly unseaworthy condition on the voyage on which she was lost," and that the ship "was lost as alleged by reason of such unseaworthiness." For this plea must be understood to mean not that the vessel did not perish immediately by the action of the winds and waves (if it did it was certainly not sustained by the facts), but that the loss by these perils of the sea was brought about by the vessel's unseaworthiness. It will at once occur to your Lordships upon the raising of such a question that in regard to a voyage policy as to a time policy, if a loss proximately caused by the sea, but more remotely and substantially brought about by the condition of the ship, is a loss for which the underwriters are not liable, then quite independent of the warranty of seaworthiness which applies only to the commencement of the risk ("in its several gradations" as Mr. Justice Erle, in *Thompson* v. *Hopper* (6 E. & B. 172) called them) the underwriters would be at liberty in every case of a voyage policy to raise and litigate the question whether at the time the loss happened the vessel was by reason of any insufficiency at the time of her last leaving a port where she might have been repaired, unable to meet the perils of the sea, and was lost by reason of that inability. If such be the law, my Lords, the underwriters have been signally supine in availing themselves of it, for there is no case that I am aware of except those to which I have referred, in which anything like such a defence as this has been set up. The materials for such a defence must have existed in countless instances, and yet there is no trace of it in any case which has been brought to your Lordships' notice, still less any decision upholding such a doctrine.

The case of *Fawcus* v. *Sarsfield* (6 E. & B. 192) was relied upon at the bar, but that was a case of partial loss in which the question was whether the underwriters were liable for certain repairs, and the court held that the arbitrators had found that the necessity for repairs did not arise from any peril insured against, but from the vice of the subject of insurance.

In the total absence then of all authority, and in the fact that this defence is a new one, I find sufficient reason for advising your Lordships, not now for the first time to sanction a doctrine which would entirely alter the hitherto accepted obligations between underwriter and assured.

It was said by one of the learned judges in the Exchequer Chamber that the unseaworthiness of the ship at the commencement of the voyage which really causes the loss is a fact the consequences of which are imputed to the assured and were to be borne by him and not the underwriters. But the question as it seems to me is not what losses ought in the abstract to be borne by the assured as being imputable to him or his agents on the one hand, or by the underwriters as being caused by the elements on the other hand, but what losses they have mutually agreed should be borne by the underwriters in return for the premium they have received. These losses are in the contract of the insurance amongst others declared to be all losses by perils of the sea. A long course of decisions in the courts of this country have established that *causa proxima non remota spectatur* is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent actions of some other cause which is not within it. It is I conceive far too late for your Lordships now to question this construction of the underwriter's obligations, if indeed you were disposed to do so. The only exception which has hitherto been established to the underwriter's liability thus construed, is to be found in the case of *Thompson* v. *Hopper*, where it was alleged that the shipowner himself knowingly and wilfully sent the ship to sea in an unseaworthy state, and that she was lost in consequence. It is only necessary to observe upon that case that the knowledge and wilful misconduct of the assured himself was an essential element in the decision arrived at. There is no case that warrants your Lordships in going further, and on the other hand it is easy to see that the arguments employed in this case, if sanctioned by judicial decision, would result in relieving the underwriters from many other losses to which they have hitherto been liable. For instance, the assured has always been held protected from loss from the perils insured against, though that loss was brought about through the negligence of his captain or crew. Now, the captain has the entire control of the vessel in respect of repair in foreign ports as of everything else, and if the 6th plea in this case were held to be sufficient, without proof of the shipowner's knowledge and wilfulness, the result would be that whenever the captain failed in his duty in fitly repairing the vessel in a foreign port, and the loss, though caused by perils of the sea, could be traced to the ship's defective condition, the assured would lose the benefit of his policy. Such a doctrine once established would extend equally to the negligent conduct of the ship in the course sailed by her, or her careless management in emergency, or the absence of reasonable and proper exertion on the part of the captain or crew.

For these reasons, my Lords, I submit to the house that the judgment of the Court of Exchequer Chamber ought to be reversed. My Lords, I may state that my noble and learned friend, the Lord Chancellor has been aware of the judgment I was about to deliver in this case, and that he desires me to say that he entirely agrees with it, and does not wish to add anything to it.

Lord O'Hagan.—My Lords, having had the advantage of perusing the opinion delivered by my noble and learned friend who has just addressed your Lordships, and adopting it after sufficient consideration without any reserve, I do not propose to go over again the reasons on which it is grounded.

I would only say a word with reference to one of the judgments we are reviewing, with which I am unable to concur. Notwithstanding the suggestion of that judgment, I think that the policy in this case was a time policy, and nothing else, and I would urge upon your Lordships the importance of abiding by the well considered decision in *Gibson* v. *Small* (4 H. of L. Cas. 353), followed by subsequent cases of high authority, and accepted as the rule of mercantile action for so many years, which determined that in such a policy framed in the usual terms, there is no implied warranty of seaworthiness. That decision was wise, convenient, and safe. It was in accordance with the sound principle which forbids the importation into a written contract, save in exceptional cases which are familiar to us, of material terms which the parties to it have not thought fit to insert. It was convenient as furnishing one of these plain rules without qualification or exception which Lord Campbell has there described most desirable in commercial transactions, avoiding extreme refinements or the superfluous raising of difficult questions from special circumstances, and it was safe because express stipulation can always be introduced when needful. The want of implied warranty does not protect the insured against the consequences of his own fraud for wilful concealment in nullifying the insurance, or deprive the insurer of his protection against such malversation of the security as he may derive from the inspection which he has the opportunity of making for himself, The only case to which Lord St. Leonards referred (in *Gibson* v. *Small*, 4 H. of L. Cas. 417), as possibly justifying the implication of a warranty in a time policy, was when it is effected on a vessel about to sail on a particular voyage.

In the case before the House, the jury have expressly negatived all knowledge of the alleged unseaworthiness on the part of the insurers, and there is no proof of fraud of any kind. The principle so long established cannot be disturbed merely upon the suggestion of one of the learned judges that it is desirable to put difficulties in the way of those who either criminally or negligently send unworthy ships on dangerous voyages. If the public interest, for that or any other reason, requires a change in a law so well established it should be made by the authority of the Legislature. As to the loss of the vessel by the perils of the sea, I can add nothing to the observations of my noble and learned friend.

Lord Blackburn.—My Lords, I also had an opportunity of perusing the opinion of the noble and learned Lord who moved the judgment of the House in this case, and I perfectly and thoroughly concur in it. I will say no more than that I agree both in the reasoning and in the conclusion.

Lord Gordon.—My Lords, I am of the same opinion. I think the case of *Gibson* v. *Small* is decisive of the question in this case. There may be questions as to the propriety of the principle thus affirmed, but if a change is desirable it can only be made by the action of the Legislature; and if any proposition to that effect were brought forward it would probably give rise to considerable dissension.

Judgment of the Court of Exchequer Chamber reversed.—Appellant to be entitled to the costs of this appeal.

Solicitors for appellant, *Cattarns, Jehu,* and *Hughes.*

Solicitors for respondent, *Hollams, Son,* and *Coward.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by H. Peat, E. Stewart Roche, James P. Aspinall and F. W. Raikes, Esqs., Barristers-at-Law.

Thursday, Feb. 15, 1877.

(Before James, L.J., and Baggallay and Bramwell, JJ.A.)

Ex parte Watson; *Re* Love.

Vendor and purchaser—Stoppage in transitu—End of transitus—Constructive delivery—Agreement that vendor should have lien on bills of lading and goods—Destination of goods—Bankruptcy of purchaser before goods reached destination—Rights of vendor and trustee in bankruptcy.

By an agreement under seal, W., a manufacturer at Bradford, agreed from time to time to supply goods to L., so that he might, during the continuance of the agreement, have a credit to a certain amount, for which W. was to draw bills of exchange which L. should accept from time to time for the invoice price of the goods; that L. should ship all goods purchased under this agreement to R. and Co., of Shanghai, for sale on his account, the bills of lading to be sent by L. immediately on receipt, by post, to R. and Co. to whose order the bills of lading were to be made out; that W. should have a lien on the bills of lading, and each shipment of goods, in transit outwards, such lien to extend only to the particular shipment, &c.

Under this agreement, L. purchased of W. certain goods which W. sent in the ordinary course to a packer at Bradford to be packed and forwarded to L. for shipment. In accordance with instructions received from L. the packer sent the goods by rail, carriage paid, to a London station for shipment on board the Gordon Castle, for Shanghai. The railway company gave notice to L. of the arrival of the goods in London, and stated that they would forward them to the ship, which they accordingly did. L. accepted a bill at six months for the price of the goods. The bills of lading were made out by L's directions to the order of himself or assigns, and signed by the shippers, who retained them because L. did not pay the freight. L. stopped payment just before the ship sailed with the goods, and a week afterwards W. telegraphed to R. and Co. to deliver the goods to his agents at Shanghai. On the following day, L. filed a liquidation petition, and he was afterwards adjudicated a bankrupt. Before the goods arrived at Shanghai, W. demanded of

the shippers the bills of lading, which were also claimed by the trustee in L.'s bankruptcy:

Held, that the agreement did not deprive W. of the ordinary vendor's right to stop in transitu, and that inasmuch as the transitus had not ended before the arrival of the goods at Shanghai (Rodger *v.* The Comptoir d'Escompte de Paris, 21 *L. T. Rep. N. S.* 33; *L. Rep.* 2 *P. C.* 393) *and as he had given effectual notice of stoppage before the end of the transitus, W. was entitled to the goods or the proceeds of their sale.*

Held also, that the agreement was not a bill of sale within the 1*st section of the Bills of Sale Act* 1854.

This was an appeal from a decision of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy.

The facts of the case were as follows:

By an agreement under seal made on the 10th Feb. 1876 between Robert Efford Love, of Parklane, in the county of London, merchant and shipowner of the one part, and William Watson, of the other part, after reciting that Love had for some time past purchased from Watson from time to time and was still purchasing Manchester goods for shipment to China, Watson drawing upon Love and the latter accepting bills of exchange for the invoice price of such goods; and that Watson had applied to Love, and the latter had agreed to give him security for the due payment of the bills of exchange at maturity and for all sums which might from time to time become due from him to Watson upon account current not exceeding the sum of 5000*l.*; and that in pursuance of such agreement Love had, by three several mortgages or bills of sale bearing even date with the present agreement, transferred to Watson by way of mortgage thirty-two sixty-fourth shares of ship *Ousieri*, thirty-two sixty-fourths of the ship *Sing Fai* and thirty-two sixty-fourths of the ship *Rowena*, of which vessels Love was the owner in the proportions aforesaid, in consideration of the premises the parties agreed as follows: (1.) That Watson should from time to time supply to Love goods according to his selection, so that he might, during the continuance of the agreement, have a credit to the extent of 5000*l.*, for which Watson should draw upon and Love should accept bills of exchange from time to time for the invoice price of such goods; (2) that Love should ship all goods purchased under clause 1 to Messrs. Rothwell, Love, and Co. of Shanghai, China, for sale on his account; that the bills of lading of all such goods should be sent by Love immediately on receipt by ordinary post to Rothwell, Love, and Co., to whose order all such bills of lading should be made out; that Watson should have a lien upon the bills of lading and each shipment of such goods in transit outwards or in the hands of the consignees or any other persons, and also upon the proceeds or produce purchased with the proceeds of each such shipment in the hands of the consignees or any other persons, or in transit homewards; that such lien, however, should not be a general one, but should extend only to the particular shipment, and should cease when the bills of exchange which had been given by Love for such particular shipment should have been paid; (3) that Love should insure from time to time to the full value thereof for the benefit of Watson primarily as such mortgagee and pledgee as aforesaid, and subject thereto for his own benefit, all the goods to be shipped as before mentioned and also the mortgaged ships, &c.

No notice of this agreement was given to Rothwell, Love, and Co.

On the 1st March 1876, Love ordered of Watson, under the above mentioned agreement, ten bales of lastings of the value of 443*l.* 10*s.*, which goods Watson forwarded in the ordinary course to James Copperthwaite, of Bradford, a packer, to be packed and forwarded to Love.

On the 20th March Copperthwaite wrote to Love, saying, "I beg to hand you particulars of ten bales waiting your forwarding instructions," and appending the particulars of the goods.

On the 22nd March Watson invoiced the goods to Love, and the following day Love wrote to Copperthwaite: "Please send the ten bales lastings to the *Gordon Castle*, loading in the South West India Dock for Shanghai. I enclose card of the vessel. I should have sent forwarding instructions before, but there was no vessel ready."

On the 24th March the goods were forwarded by Copperthwaite from Bradford (carriage paid) by the Great Northern Railway to their Poplar Dock Station, for shipment on board the *Gordon Castle*, for Shanghai, and, on the 25th March, Love received from the Great Northern Railway Company, the following "advice of goods": "The undermentioned goods consigned to you have arrived at this (Poplar Dock) station. I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company, not as common carriers, but as warehousemen at owner's sole risk of loss or damage, by deterioration or fire, and subject to the usual warehouse charges in addition to the charges now advised." Then followed a description of the goods, under which was written, "Will be sent to the *Gordon Castle*, S. W. I. Docks."

On the 24th March Watson drew upon Love for 443*l.* 10*s.*, the price of the goods, at six months date.

On the 28th March the goods were shipped on board the *Gordon Castle*, and on the same day Love sent to Messrs. Skinner and Co., the owners of the ship, the bills of lading of the goods in three parts, exclusive of the master's copy, for signature, and Skinner and Co., on the 29th March, signed them to the order of Love, but they were never delivered over to him, inasmuch as he failed to pay the freight.

On the 4th April, Love, through his solicitors, sent notice to his creditors that he must suspend payment.

On the 6th April H. F. Jörss, of Manchester, wrote to W. Pustau at Hamburgh as follows, in German: I request you to telegraph immediately to your Shanghai house to attach the following goods sent by Wm. Watson and Co. to Rothwell and Co., and in any case to get delivery of the bills of lading of the still afloat lots. The goods are"—(*inter alia*) the ten bales shipped in the *Gordon Castle*—"and then sell the goods for account of Wm. Watson and Co. at the best possible prices."

On the 8th April the *Gordon Castle* sailed with the goods on board.

On the 11th April Watson telegraphed to Roth-

well, Love, and Co. to deliver the goods to his agents at Shanghai.

On the 12th April, Love filed a petition for liquidation of his affairs by arrangement.

On the 30th May, Love was adjudicated a bankrupt, and on the 21st June a trustee was appointed.

The bills of lading of the goods still remained in the hands of Skinner and Co., of whom Watson demanded them before the goods arrived at Shanghai. A counter-claim was set up by the trustee in Love's bankruptcy. Ultimately it was arranged that the goods should be sold by the agents of Skinner and Co. at Shanghai, and the proceeds paid to the person who should be held entitled thereto.

The Registrar having held that the trustee in Love's bankruptcy was entitled to the proceeds of sale, Watson appealed from his decision.

Horne Payne, for the appellant.—The agreement made between the vendor and purchaser in Feb. 1876, was not a bill of sale within the meaning of the 1st section of the Bills of Sale Act (17 & 18 Vict. c. 36). But even if it was a bill of sale, the goods were not in the apparent possession of the bankrupt at the time of his bankruptcy:

Williams on Bankruptcy, p. 103;
Load v. *Green*, 15 M. & W. 216;
Smith v. *Hudson*, 12 L. T. Rep. N. S. 377;
Joy v. *Campbell*, 1 Sch. & Lef. 336;
Ex parte Montague; Re O'Brien, 34 L. T. Rep. N. S. 197; L. Rep. 1 Ch. D. 554;
Townley v. *Crump*, 4 Ad. & Ell. 58;
Holroyd v. *Marshall*, 10 H. of L. Cas. 191;
Edwards v. *Edwards*, 34 L. T. Rep. N. S. 472; L. Rep. 2 Ch. D. 291.

[Bramwell, J.A., referred to *Belcher* v. *Bellamy* (2 Ex. 303).] At all events, the agreement did not deprive us of our ordinary vendor's right of stoppage *in transitu*, and we duly exercised that right before the goods reached Shanghai, for the case in the Privy Council of *Rodger* v. *The Comptoir d'Escompte de Paris* (21 L. T. Rep. N. S. 33; L. Rep. 2 C. P. 393) shows clearly that the transitus continued till the goods reached Shanghai. We are, therefore, entitled to the proceeds of sale of the goods.

Everitt and *R. T. Reid*, for the trustee.—*Rodger* v. *The Comptoir d'Escompte de Paris* is distinguishable from this case, for there the bills of lading were made out to the bankrupt. As Mr. Benjamin in his work on sales says (at p. 703): "The question, and the sole question, for determining whether the transitus is ended, is, In what capacity the goods are held by him who has the custody? Is he the buyer's agent to keep the goods, or the buyer's agent to forward them to the destination intended at the time the goods were put in transit?" In the present case, when the goods arrived at the railway station in London, there was nothing to prevent the purchaser from taking possession of them. The transitus was broken there: (*Valpy* v. *Gibson*, 4 C. B. 837; *Dixon* v. *Baldwen*, 15 East, 175.) They also cited:

Meux v. *Jacobs*, 32 L. T. Rep. N. S. 171; L. Rep. 7 E. & I. 481;
Ancona v. *Rogers*, 35 L. T. Rep. N. S. 115; L. Rep. 1 Ex. D. 285;
Ex parte Banner; Re Tappenbeck, 34 L. T. Rep. N. S. 199; L. Rep. 2 Ch. C. 278.

Horne Payne, in reply.

James, L.J.—Notwithstanding the length of time this case has occupied, and the great number of very nice points which have been raised, I am satisfied that the case ought to be determined simply upon the last point. Independently of any right which the vendor had under the agreement, he had his original right of a vendor to stoppage *in transitu* when his purchaser failed; and there was nothing in the agreement, there was nothing in the bargain between the parties, at all events, which was to diminish the vendor's right to stoppage *in transitu*.

Then the question is, has he stopped *in transitu?* I am of opinion that the transit did, in truth and in fact, continue, and was intended, in truth and in fact, to continue all the way from the railway station in the north, through the docks in London, and on board the ship to Shanghai. It is quite clear that the bargain between the vendor and the purchaser, for reasons essential to the interests of the vendor, was that that should be the transit, and that was the transit that actually was made from one place to the other. That is, it was to extend from Bradford to Shanghai, by railway and ship. The goods have by this time, subject of course to the perils of the sea, reached Shanghai. It was said that there was some break in the *transitus*, that it was interrupted, and that some right had accrued as to the stoppage, and that that vested in the purchaser some different character in some way or other. That did not, I think, affect the goods when they reached the packer's hands. The packer was the man employed by the vendor to pack; and when the goods reached the railway, when they reached London, no doubt the railway company, being both warehousemen and carriers, said: "We hold them at your disposal;" but they had the goods marked, and sent to them for the purpose of being forwarded to the *Gordon Castle*, and in that very note in which they ask for orders and say, "We hold them at your risk," and so on, it is said that they "will be sent to the *Gordon Castle*." Therefore it is quite clear that they must have received notice at the time that the *Gordon Castle* was the proper destination for the goods; and the goods themselves had the word "Shanghai" marked upon them. Therefore that was the rightful course which the thing ought to have taken.

We are of opinion that we must consider that that which was the rightful course was intended to be taken, and was taken, that is to say, to send them on to Shanghai. Of this I am quite certain, that if the vendors had found out that the goods were going to be sent anywhere else than to Shanghai, and by any other means than that particular ship, they could have applied at once to the Chancery Division of the High Court of Justice, and they would have been entitled to obtain and would have obtained an injunction to restrain the goods from being sent in any other mode to any other place. Therefore they would have been entitled to require that to be done which has been done.

That having been done, has the *transitus* been stopped? It so happens, luckily for these gentlemen, that the documents of title have never left the shippers' possession; owing to some little mistake about a charge of three guineas on the goods, nobody has ever acquired any right to take the goods out of the shippers' hands; and

while they are on board the ship, with no valid right in anybody to take them out of the shippers' possession, the vendor comes to the shippers and says, "Now deliver those goods to me," and the shippers have undertaken to sell the goods and deliver the proceeds to the real owner.

I am of opinion that the goods have been effectually stopped *in transitu*, because the shippers have been directed to sell them according to the legal and equitable rights of the parties; and if the vendors had gone out in time they could have stopped the goods *in transitu* before they were delivered out of the ship at Shanghai, but they were relieved from that trouble by the fact of the shipowner being here and saying: "I will sell the goods for the rightful owner." I am of opinion that there was a right to stoppage *in transitu*, and that there has been *de facto* a stoppage *in transitu* which completes the title of the owner of the goods, who sold them to a person who has become bankrupt before they were delivered.

That, I think, is sufficient to dispose of the real point in the case. There is really nothing in the other point. We are all of opinion that this is clearly not a case within the Bills of Sale Act. That point has been very much argued, and we think it right to say, having regard to the words and spirit of the Bills of Sale Act, that a contract of this kind is not "a bill of sale or other assurance of personal chattels whereby the grantee or holder has power to seize or take possession of" them within the meaning of that Act. It is a right connected with the vendor's lien, or of that nature more than anything else; but certainly it is not a bill of sale of personal chattels within the meaning of that Act. Then the other point was as to the reputed ownership. If the case depended upon that, it is quite clear that the bankrupt was the true owner of the goods, subject to an equitable charge, and certainly that equitable charge would, in my opinion, have been impeachable, and impeached by reason of there being nothing whatever to show that the owner of the goods was not absolutely free from any incumbrance, for the person entitled to the equitable charge would have to show that the real possessor of the goods was in some way prevented from holding himself out to the world as being the owner of the goods, free from trust, incumbrance or charge. It seems to me that if the vendors' case had depended upon that point it would have failed.

However, it is sufficient to say that they have succeeded upon the point of stoppage *in transitu*.

Baggallay, J.A.—I am of the same opinion. So far as the question of the duration of the *transitus* is concerned, I am quite unable to distinguish the facts of this case from the facts of the case of *Rodger* v. *The Comptoir d'Escompte de Paris* (*ubi sup.*), decided by the Privy Council. In that case it was held that the *transitus* continued so long as the goods were in the charge of a third party who had contracted with the carrier for the purpose of forwarding them. Applying the decision in that case to the present case, it would follow that these goods would have remained *in transitu* until such time as they had arrived at Shanghai, and were delivered over by the shipowner, or other persons who acted as the carriers. It has so happened in this case that, by reason of the bills of lading never having been sent from England, there was no person in Shanghai to whom the goods could have been delivered by the carriers, and consequently they remained in the possession of the carriers and the *transitus* was, therefore, not completed. Before that *transitus* was completed, if ever indeed it has been completed in the present case, an arrangement was come to by all parties, that is to say, the trustee of the bankrupt, Mr. Watson the claimant, and the shipowners, that the goods should be sold and the proceeds disposed of according to the rights of the parties as they existed at the time the agreement was entered into. I think, therefore, that in this case the goods have been effectually stopped *in transitu*.

Bramwell, J.A.—I am entirely of the same opinion and for the same reasons. The only observation I wish to make is upon the stoppage *in transitu* question, if the *transitus* lasted until the goods got to Shanghai. Now, what are the facts? The goods are in the possession of Copperthwaite, an agent of Watson, the seller, and by the direction of the bankrupt they set out on a journey which was to begin at Bradford and end at Shanghai, where the goods were to be delivered to people who would have been under an obligation to Watson if he had thought fit to give notice to them of his rights. They set out on that journey, and no further instructions are required, nor is anything necessary from the beginning to the end of the journey, except the receipts, getting the bills of lading, and so forth. It seems to me, so far as there is any reason in the doctrine of stoppage *in transitu*, the *transitus* in this case would be from Bradford to Shanghai; and, as Sir Richard Baggallay has said, I cannot distinguish this case from the case in the Privy Council.

James, L.J.—The appeal will be allowed with costs both here and below.

Solicitor for the appellant, *Walter Webb*, agent for *George Robinson*, Skipton.

Solicitors for the respondents, *Murray*, *Hutchins*, and *Co.*

March 9 *and* 27, 1877.

(Before James, Mellish, and Baggallay, L.JJ.)

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

The Parana.

Damages and cargo—24 Vict. c. 10—*Measure of damages—Fall in price—Loss of market.*

Where, through the negligence of a carrier by sea, goods carried by him are not delivered in a reasonable time, the owner of the goods or assignee of the bill of lading for the goods is not entitled to recover, as damages from the shipowner, the difference between the market value of the goods when they ought to have been delivered and the market value when they actually were delivered.

Decision of the court below reversed.

Semble, the measure of damages recoverable in such a case is interest at the ordinary commercial rate on the value of the goods for the period of the delay in delivery.

This was an appeal from the decision of the judge of the Admiralty Division, in which he sustained an objection to the report of the registrar of that court, assisted by merchants, and held that when undue delay in the prosecution of a voyage has taken place, the shipowner is liable

to the consignee of goods for a fall in price of the goods between the time at which they ought to have arrived and the time at which they actually did arrive. The facts, arguments, and judgment in the court below are fully reported, *ante*, p. 220.

Watkin Williams, Q.C. and *Cohen*, Q.C. (with them *G. Bruce*), for appellants.—To enable the plaintiffs to recover they must show that the loss was sustained by the fall in the price of hemp was either a matter which at the time of making the contract the defendants knew, or that they had notice of some other contract contingent on the fulfilment of this one by a certain date. They are entitled to recover, as found by the registrar, the interest on the value of the cargo during the time they were kept out of possession of it, but nothing more; that represents the reasonable profit they might be expected to make, and which might be supposed to be in the contemplation of the parties when the contract was made: (*Smeed* v. *Foord*, 1 El. & El. 602.) There, although there were special circumstances which might possibly have led the defendant to contemplate a fall in the market price, it was held that a fall which actually did occur could not be recovered, and the rule laid down in *Hadley* v. *Baxendale* (9 Ex. 341) is approved. If the fall of the market was the actual consequence of the delay, as, for example, in the case of a cargo of ice to arrive in the summer season and delayed beyond, such a fall might, perhaps, be recovered; but it is not alleged that there is any regular fluctuation in the price of hemp. The time of arrival from a long voyage like this must be, in any case, a matter of uncertainty, and the margin of uncertainty was at least equal to the thirty-seven days' delay which actually took place. In *Fletcher* v. *Tayleur* (17 C. B. 21, 29), Willes, J. says: "No matter what the amount of inconvenience sustained by the plaintiffs in the case of nonpayment of money, the measure of damages is the interest of the money only, and it might be a convenient rule if, as suggested by my Lord, the measure of damages in such a case as this was held by analogy to be the average profit made;" that is, the usual commercial rate of interest on the value of the hemp, which the Registrar allowed. In *Cory* v. *Thames Ironworks and Ship Building Company* (*Limited*) (L. Rep. 3 Q. B. 181; 17 L. T. Rep. N. S. 495), a sort of rough estimated rental value for the chattel, a ship of peculiar construction, was allowed, and not the actual loss sustained by the purchaser through the non-delivery of her; and in *British Columbia Saw Mill Company* v. *Nettleship* (L. Rep. 3 C. P. 499, 507; 18 L. T. Rep. N. S. 291, 604; 3 Mar. Law Cas. O. S. 65) it was held that special damages sustained by the non-delivery of a chattel could not be recovered. Bovill, C.J., says: "It is difficult to see the proper way of compensating the plaintiffs for the damage they have suffered except by applying the rule which obtains in the case of non-payment of money, viz., by allowing interest on the value of the goods." [Mellish, L.J.—Has any case been found in which a loss of market, purely speculative, has been allowed?] In *Wilson* v. *Lancashire and Yorkshire Railway Company* (9 C. B., N. S., 632), the plaintiffs recovered for a fall in price where there was a delay in delivery; but that was a consignment of caps to a seaside place, and it must have been known by the defendants that the market for caps would cease with the termination of the seaside season. In *Re Trent and Humber Company. Ex parte Cambrian Steam Packet Company* (L. Rep. 4 Ch. App. 112, 117; 19 L. T. Rep. N. S. 465; 3 Mar. Law Cas. O. S. 119) which was an action for delay in delivering a ship, Lord Cairns, L.C., said that, in estimating the damages, he had proceeded on the principle that "the measure of damages is, *primâ facie*, the sum which would have been earned in the ordinary course of the employment of the chattel in the time." There is moreover, a great distinction between the contracts of land and water carriage. When goods are sent by train, the object is manifestly to secure a punctual delivery by a certain date; but in a long voyage by sea, there is of necessity a great uncertainty in the date of arrival, and this is recognised by the American case, *The Lively* (1 Gall. 315, 327). Story, J. says: "Upon the whole, I am well satisfied that the profits, upon the supposition of a prosperous termination of the voyage, ought not in any case to constitute an item of damage." They also referred to

Sedgwick on Damages, 6th edit., 81, 430;
Massé Droit Commercial, 2nd edit., vol. 3, lib. 5, tit. 1, Ch. 3, sect. 4, § 1, p. 240;
Code Napoleon, Art. 1149, 1150;
Ward v. *New York Central Railroad Company*, 45 N. Y. 29.

Clarkson (with him *Butt*, Q.C. and *Davidson*), for respondents.—The loss of market must be held to be in contemplation of the parties in this instance in case of delay. Why should the plaintiff select a steamer at a higher freight instead of a sailing ship, unless he wishes to insure dispatch and punctuality? He calculates that his goods arriving at a certain date, he will sell for a certain price, and if they do not arrive at that date he is entitled to recover for the loss sustained: (Sedgwick on Damages, 6th edit., p. 430.) The measure of damages for delay in delivery is always the difference in price between the time when the goods ought to be delivered and the time when they actually are delivered, and this is shown by the fact that where there is no fall of market the plaintiffs can recover nothing: (*Great Western Railway Company* v. *Redmayne*, L. Rep. 1 C. P. 329.) *Collard* v. *South-Eastern Railway Company* (7 H. & N. 79; 4 L. T. Rep. N. S. 410), is directly in point, there the contract was to deliver by railway on a certain day, on which the plaintiffs might anticipate a sale at a certain price. Here the plaintiff employs a steamship with the view of having his goods delivered at and within a reasonable time, and at which time also, from his knowledge of the state of the market and trade reports of cargoes afloat, he could estimate the sale of his goods at a particular price, and by the breach of the contract of carriage by the defendants he has not been able to realise that price. This question is quite independent of that of interest; he is entitled to interest as well. He should be put in the same position as he would have been had the cargo been delivered at the proper time; that is, to have the money for which it would have sold at that time, and because he did not get it then, but has been kept out of it, and unable to use it profitably, he is entitled to interest on it whilst he is so deprived of it. They also referred to

Horne v. *Midland Railway Company*, L. Rep. 8 C. P. 131; 28 L. T. Rep. N.S. 312;
O'Hanlan v. *Great Western Railway Company*, 6 B. & S. 484; 12 L. T. Rep. N.S. 490;

Berries v. *Hutchinson*, 18 C. B., N. S., 445; 11 L. T. Rep. N. S. 771.

W. Williams, Q.C., in reply.—The plaintiff was neither shipper nor consignee. The action is founded on a bill of lading, and the property in the goods only passed to the plaintiff when the bill of lading was handed to him. He knew nothing about the ship or her date of arrival, he did not even know when she sailed. In addition to the former authorities, *Rice* v. *Baxendale* (7 H. & N. 97) was cited.

Cur. adv. vult.

March 27, 1877.—The judgment of the court was read by

Mellish, L.J.— This is an appeal from the Admiralty Division, which is brought by the assignees of some bills of lading, under the Admiralty Court Act, for the purpose of recovering damages against the shipowner for breach of contract of carriage contained in, I think, two bills of lading of certain quantities of sugar and certain quantities of hemp from Manilla to London. The breach alleged was, that the boilers of the *Parana* were in a bad condition, and that by reason thereof a very undue delay took place during the voyage. The breach was admitted, and an inquiry was ordered before the registrar and merchants to assess the amount of damages, and they came to the conclusion that a delay of thirty-six days might be imputed to the shipowner, and that he was liable for the damage occasioned by that delay. They then proceeded to assess the damages, and gave a certain sum for the additional leakage of the sugar that had taken place in consequence of the length of the voyage; and also interest at 5 per cent. on the value of the hemp and sugar.

But the further question arose whether in addition the plaintiff was entitled to recover damages in respect of a fall in the price of the hemp, which he alleged had taken place between the time when the cargo ought to have arrived and the time when it did arrive; the registrar and merchants had to find what the total amount of damages would be, including the fall of price, if the plaintiff was entitled to it, and they came to the conclusion that damages for the fall of price ought not to be recovered, and reported accordingly. Their report was objected to before the Judge of the Admiralty Division, and he sustained the objection, and allowed the damages claimed for the fall in price. From that decision there is an appeal to us, and therefore the question we have to decide is, whether, if there is undue delay in the carriage of goods on a long voyage by sea, it follows as a matter of course that if there has been a fall in the price of these goods between the time when they ought to have arrived and the time when they do arrive, damages can be recovered.

Now there really is no difficulty as to the general principles upon which the courts assess damages. They are accurately stated in two or three places in the judgment of Sir Robert Phillimore, as where he cites the last case on the subject, *Simpson* v. *London and North-Western Railway Company* (L. Rep. 1 Q. B. 274; 33 L. T. Rep. N. S. 805): "The principle is now settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object." He also cites the judgment of the Lord Chief Baron in *Horne* v. *Midland Railway Company* (L. Rep. 8 C. P. 131, 137: 28 L. T. Rep. N. S. 312): "Damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally—*i. e.*, according to the usual course of things—from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." The difficulty, of course, arises in the application of those principles.

We took time to consider our judgment, because a great many authorities were cited, both in the court below and before us: but the result of them is, that there is no decision which can at all be said to be directly in point. There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long voyage by sea, where there has been what may be called a merely accidental fall in price between the time when the goods ought to have arrived and the time when they did arrive—no case that I can discover where such damages have been recovered; and the question is, whether we ought to hold that they ought to be recovered? If goods are sent by a railway for sale at that day's market in Smithfield or Billingsgate, and by reason of a breach of contract on the part of the carrier they have not arrived in time for that market, no doubt damages for the loss of market may be recovered. So, again, if goods are sent for the purpose of being sold at a higher price than they are at other times, and if by reason of breach of contract they do not arrive in time, damages for loss of market may be recovered; or if the facts are known to both parties; or where it is known *à priori* that they well sell at a better price than if they arrived later. But there is no evidence in this case of anything of that kind, as far as I can discover from the facts; it is only said, when they arrived in November they were likely to sell for less than if they had arrived in October, that the market was lower. But besides the case of consignment of goods to be sold at a particular market, cases were cited, and it was upon them the court below proceeded, of the carriage of goods by a railway, where damages for loss sustained on account of the fall in price of the goods have been recovered, and it was said there could be no difference between the carriage of goods by railway and the carriage of goods by sea. But it appears to us that there may be a material difference between the two cases; when goods are conveyed by railway, if they are known to be conveyed for the purpose of sale at all, they are usually conveyed for the purpose of immediate sale, and if the cases are examined, I think it will be found that in all of them the courts treated the question as if the goods were consigned for the purpose of immediate sale. No doubt, if goods are consigned to a railway company under such circumstances, the railway company may be reasonably supposed to know that they are consigned for the purpose of immediate sale; and, if by breach of contract on the part of the carrier,

they do not arrive in time to be sold when the owner intends them to be sold, that may be a ground for giving damages for what is called "loss of market." The strongest case in favour of the opinion of the court below is that about the hops: (*Collard* v. *S. E. Ry. Co.*, 7 H. & N. 79; 4 L. T. Rep. N. S. 710.) The goods in that case were actually consigned to a hop merchant in the Borough, I think to fulfil a particular contract. The damages arising from the non-fulfilment of that particular contract could not be recovered, because the railway company would know nothing about it; but the judge came to the conclusion, I think, that it might be treated as if the goods were being consigned for the purpose of immediate sale; there were, apparently, violent fluctuations going on in the hop market at that time, and that it might be taken that the owner had selected his own time for selling his hops, when he thought the price was at its best, and by reason of a breach of contract on the part of the railway company, which consisted, it is to be observed, not in delay in delivering the hops, but in actual damage to the hops, the hops were damaged and had to be dried, and that it might be considered there was a loss of market. The words used in the judgment (*Collard* v *South-Eastern Railway Company*, 7 H. & N. 86) are: "It is said the defendants had no notice of the purpose for which the hops were sent to London; but I think they must have known they were sent for one or two purposes, either for consumption by the person to whom they were sent, or, as was more likely to be the case, to be sold for profit. It seems to me that *Hadley* v. *Baxendale* (9 Ex. 343) has no bearing in this case, and I think that *Smeed* v. *Ford* (1 El. & El. 602) is correctly decided. In my judgment the plaintiff is entitled to recover for this damage, because it is a direct and immediate loss consequent on the defendants' breach of duty." Then it proceeded, "If this case should be taken to the court of error"—showing a doubt about the principle it was laying down—"I hope that the court will be able to put the rule on an intelligible footing; but at present we must do the best we can with each particular case, and decide it upon principles of reason and good sense." The other case on which the learned judge of the court below more particularly relied was an American one (*Ward* v. *New York Central Railway Company*, 47 N. Y. 79), which appears to have been a consignment of some pigs, and damages were allowed to be recovered for loss of market. The precise circumstances it is not very easy to gather, but I should certainly conjecture that they were pigs sent for the purpose of being sold at once.

The difference between cases of that kind and cases of the import of goods from a long distance by sea seems to me to be very obvious. In order that damages may be recovered we must come, I think, to the conclusion, first, that it was reasonably certain that the goods would not be sold until they arrived; or, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier when the bills of lading were signed. It appears to me that nothing could be more uncertain than either of those two assumptions. Goods imported by sea may be, and are, every day sold whilst they are at sea. If the man who is importing the goods finds the market high, and is afraid that the price may fall, he is not prevented, as an ordinary rule, from selling his goods because they are at sea. The sale of goods "to arrive" on transfer of bills of lading, with costs, bills, and insurances, is a common mercantile contract made every day. It may be that from not having samples of the goods, or from not knowing what particular quality his goods are, he may have a difficulty in selling them before arrival, but the carrier would not necessarily know that.

The plaintiff in this case is not himself the original consignee, but a man who had acquired the goods, apparently by the consignment of the bill of lading, whilst the goods were at sea. We are told that he was a person that advanced money on the security of the bills of lading. That possibly may be the case; but whether he has done that, or is the purchaser, would make no difference. It was said that, if the goods were sold, the person who sells them does not suffer the damage, but that the purchaser would. But this is pure speculation. If a man purchases goods while they are at sea, no person can say for what purpose he purchases them. He may purchase them because he thinks if he keeps them for six months they will sell for a better sum; or he may want to use them in his trade. It is pure speculation to enter into the question for what purposes he purchases them. In this particular case the plaintiff did not sell the goods as they arrived; he sold them some months afterwards, when a further fall had taken place in the market. Of course he does not seek to recover from the defendant that additional loss, but it serves to illustrate how uncertain it is whether he would have sold them had they arrived in proper time, if he did not sell them when they did arrive, but kept them because he thought the market would rise. How can we tell he would not have done exactly the same thing if the goods had arrived in time?

Therefore, it seems to me that to give these damages would be to give speculative damages—to give damages when we cannot be certain that the plaintiff would not just as much have suffered if the goods had arrived in time; and I think, according to the principles on which the courts have acted in all speculative and uncertain cases of this kind, that damages ought not to be recovered. Therefore, upon the whole we come to the conclusion that the report of the registrar and merchants—which, besides quoting the common law authorities, says that though it constantly happens, of course, that by collision goods were delayed in their arrival, yet it never had been the custom in the Court of Admiralty to include in damages the loss of market—was right.

The consequence therefore must be, that the judgment of the court below must be reversed. As to costs, the registrar and merchants reported that each party ought to pay his own costs of the inquiry before them, and we think that ought also to be retained, and the appellant should have his costs of the arguments in the court below.

James, L.J.—I am of the same opinion. The very expression "loss of a market" is a striking illustration of the principle laid down.

Baggallay, L.J. concurred.

Appeal allowed.

Solicitors for appellants, *Parker* and *Clarke*.

Solicitors for respondents, *Stibbard* and *Cronshey*.

SITTINGS AT WESTMINSTER.

Reported by P. B. Hutchins, Esq., Barrister-at-Law.

Tuesday, Feb. 6th, 1877.

(Before Mellish, L.J., and Baggallay and Bramwell, JJ.A.).

French and another *v.* Gerber and others.

Charter-party—Clauses as to cesser of charterer's liability.

Defendants chartered plaintiff's ship to carry a cargo from Akyab. By the charter-party the ship was to call at Queenstown or Falmouth for orders, which were to be forwarded within forty-eight hours after notice to defendants' agents of her arrival, or lay-days to count, and to discharge at a good and safe port.

The charter-party contained this clause: "The liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage which they shall be bound to exercise." Defendants sold the cargo before the ship's arrival. Plaintiffs sued on the charter-party for not giving orders as to port of discharge, and for giving orders to proceed to an unsafe port.

Held (affirming the judgment of the Common Pleas Division), that the above clause exempted defendants from all liability, irrespective of plaintiffs' lien.

Appeal from the judgment of the Common Pleas Division on demurrer in an action by shipowners against charterers.

The declaration alleged that the plaintiffs by the master of the *Theresa* and the defendants by Burot, Gerber, and Co., their agents at Akyab, entered into a charter-party, of which the following are the material parts: "It is this day mutually agreed between Mr. R. C. Downie, in command of the good ship or vessel called the *Theresa* . . . now off Akyab, and Messrs. Burot, Gerber, and Co., of Akyab, merchants and freighters, that the said ship . . . shall with all convenient speed sail and proceed to a loading berth in the port of Akyab or so near thereunto as she may safely get always afloat and there . . . load from the agents of the freighters who may direct the ship to the most convenient safe anchorage a full and complete cargo of rice in bags as usual . . . and being so loaded shall therewith proceed with all dispatch to Queenstown or Falmouth (at the option of the master) for orders, to be forwarded within forty-eight hours after notice of the said arrival, or lay-days to count, to discharge at a good and safe port in the United Kingdom, or on the Continent between Bordeaux and Hamburgh, both inclusive, or so near thereunto as she may safely get, and deliver the same in any dock freighters may appoint always afloat, agreeably to bills of lading on being paid freight in full of all port charges, pilotage, and primage, at and after the rate of 60*s.* per ton of 20 cwt. net delivered, the Act of God, &c. . . . . always excepted. The freight to be paid on right delivery of the cargo. . . . . Twelve working laying days (Sundays excepted) are to be allowed the freighters for loading the said ship at port of loading, and waiting for orders at port of call in Europe, to commence and to be computed twenty-four hours after the master has given notice in writing to charterers' agents that the ship is ready to receive cargo, and fifteen days on demurrage are allowed over and above the said laying days at 4*d.* per register ton per day. The homeward cargo to be received when the vessel is at her port of discharge with all possible dispatch, and according to the custom of the port. All goods to be brought to and taken from alongside at the expense and risk of the freighters. The captain to sign bills of lading for his cargo at no lower rate of freight than stipulated in this charter-party; failing which charterers shall not be responsible for such difference. The vessel to be consigned at ports of loading and discharge to charterer's agents free of commission under this charter-party. All questions of general average to be settled according to the custom of the London underwriters at Lloyds. Freighters to have the power of underletting the whole or part of the vessel. Freighters to have the option of cancelling this charter-party if the vessel be not arrived at port of loading, and be ready to take in cargo, at or before noon of the 15th April next ensuing, retaining consignment; such option to be availed of within twenty-four hours after ship's arrival. It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise, sufficient cash for ship's ordinary disbursements to be advanced the master by freighter's agents at port of loading, at the current rate of exchange, to the extent of 600*l.* for the due appropriation of which freighters shall not be responsible; such advance to be on account of chartered freight, and to be indorsed on bills of lading, including costs of assurance and $2\frac{1}{2}$ per cent. commission, and deducted from freight on settlement thereof. . . . . Penalty for non-performance of this agreement, estimated amount of chartered freight." . . . .

The declaration went on to allege that the *Theresa* was loaded with a cargo of rice and sailed to Falmouth, and on her arrival there due notice of her arrival was given to and received by the defendants and their agents, and all conditions were fulfilled, &c., to entitle the plaintiffs to have orders for the *Theresa* to proceed to a port of discharge given by the defendants or their agents in accordance with the terms of the charter-party, yet the defendants or their agents did not give, and refused to give, any orders as to the *Theresa's* port of discharge in accordance with the terms of the charter-party, whereby the plaintiffs were delayed, prevented, and hindered from earning the freight on the *Theresa's* cargo payable under the charter-party, and incurred divers expenses in and about the unloading of the said cargo, and in endeavouring to obtain and in obtaining payment of the said freight.

In the second count it was alleged that the defendants or their agents did not give orders for the *Theresa's* port of discharge in accordance with the terms of the charter-party, and gave orders that the *Theresa* should proceed to and discharge at a port which was not a good and safe port within the meaning of the said charter-party, and where and as near whereunto she could not deliver the said cargo, always afloat, or in any dock always afloat, according to the terms of the said charter-party (same special damage as in the first count).

Fifth plea, that the charter-party was made subject to the condition therein contained, that the liability of the defendants should cease as soon as the cargo was on board, provided the same was worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage which they should be bound to exercise; that the cargo was shipped on board the said vessel, and before the arrival of the same was sold by the defendants, that the same was worth the freight at the port of discharge, and that by reason of the premises the defendants' liability upon and under the charter-party ceased.

The sixth plea was similar to the fifth, with the additional allegation that the alleged breaches were caused by the acts of the buyers of the cargo and not by the acts of the defendants.

Demurrer to the fifth and sixth pleas on the ground that the facts stated did not affect the defendants' liability under the charter-party.

Feb. 17, 1876.—The demurrers came on for argument in the Common Pleas Division.

French for the plaintiff.

W. Williams, Q.C. (*J. C. Matthew* with him) for the defendants.

The arguments were the same as in the Court of Appeal. *Cur. adv. vult.*

June 14, 1876.—The judgment of that Court (Brett, Archibald, and Lindley, JJ.) was delivered by

Brett, J.—In this case the judgment of the court is to be given upon a record on which there are demurrers to two pleas, the fifth and sixth. We cannot doubt that, if the declaration is good, the pleas are bad. If the stipulation in the charter-party does not of itself upon the loading of the cargo absolve the defendants in respect of the breaches relied on in the declaration, the other facts set forth in the pleas respectively cannot absolve them. The defendants are bound by the contract unless they are absolved by the contract. The real question, therefore, in this case is whether the declaration is sufficient.

The material points to be noticed seem to be, that the defendants must be assumed to be the real freighters, that there is an implied contract by them that orders shall be forwarded to Queenstown or Falmouth, that time for the waiting of the ship for such orders is expressly allowed in the lay days, and that beyond the lay days, which include such waiting and the period of loading at the port of loading, fifteen days or demurrage are allowed at 4*d.* per register ton per day. The homeward cargo is to be received when the vessel is at her place of discharge with all possible dispatch, and according to the custom of the port.

The breach in the first count is, for not giving any orders as to the port of discharge, whereby and in consequence whereof the plaintiffs were delayed, prevented, and hindered from earning the freight on the cargo payable under the charter-party, and incurred divers expenses in and about the unloading of the said cargo, and in endeavouring to obtain, and in obtaining payment of the said freight. The breach in the second count is, that the orders given were not in accordance with the terms of the charter-party, but were orders that the *Theresa* should proceed to and discharge at a port which was not a good and safe port within the meaning of the said charter-party, whereby, &c. (the same consequences as in the first count).

The real grievance then complained of is, not that the plaintiffs did not earn the freight, but that they were delayed and put to expense in earning it by reason of two alleged breaches of the charter-party occurring at Falmouth. Even though the mere delay of the ship by not giving orders at Falmouth might be treated as subject to the demurrage rate, and, therefore, in such a charter-party as the present subject to the lien for demurrage, as suggested by some of the judges in *Kish* v. *Cory* (2 Asp. Mar. Law Cas. 593), yet the other damages sued for cannot, we think, be brought within such a rule. A part of the damages sued for are obviously unascertained or unliquidated damages. For such part there is no lien, such part is not the freight, dead freight, or demurrage, for which a lien is given in this charter-party.

The question, therefore, is, whether in the case of a charterer who is himself the real principal, the clause under discussion absolves from breaches occurring after the loading of the ship in respect of which no remedy is given against the consignees; or, in other words, whether, upon such a charter-party, the shipowner must be held to have agreed to make no claim for damages for omissions occurring after the loading of the vessel, which, but for the clause, would give him a right to damages? If the latter be the true construction, the result is that upon such charter-parties as the present, the shipowner, in order to secure freight as on a full cargo, and compensation for delay, strictly to be called demurrage delay, and perhaps for further delay, giving damages in the nature of demurrage delay occurring before or during the loading of his ship, undertakes the risk of all defaults of the charterer or his agents happening after the ship is loaded.

So far as the damages which are claimed are covered by the lien, we think there can be no doubt that the charterers are absolved. The question is as to the part of the damages which is not so covered. The rule must be deduced from, or, at all events, cannot properly be declared without considering the decided cases. The question has always been whether the liability sued for was of those which was to cease as soon as the cargo was on board: see *Oglesby* v. *Yglesias* (27 L. J. 366, Q.B.); and in *Milvain* v. *Perez* (3 L. T. Rep. N.S. 736; 3 L. J. 90 Q. B.), the liability sued for occurred before or during the loading, but the clause was in terms applicable to "all matters and things as well before as after the shipping of the said cargo." It was, therefore, held that the charterers were by express terms absolved upon the loading in respect of all liabilities, whether they occurred before or after the loading, and this without reference to whether the liability was or was not transferred to the consignees by the medium of a right of lien given to the shipowner, for, in the first case, the claim was for demurrage, but in the second was for damages for not loading in regular turn or in a reasonable time.

In *Bannister* v. *Breslauer* (L. Rep. 2 C. P. 497; 2 Mar. Law Cas. O. S. 490) the claim was for not loading with all dispatch or within a reasonable time. The clause was: "The charterer's liability to cease when the cargo is shipped, provided the same is worth the freight, on arrival at the port of discharge, the captain having an absolute lien on it for freight, dead freight, and demurrage, &c. The defendants were not said to be agents. The

court held that the clause absolved the defendants. But it cannot be denied that the decision has been since doubted, on the ground that apparently no lien was given for the damages sued for. In *Pedersen* v. *Lotinga* (28 L. T. Rep. O. S. 267) the claim was for delay in loading. The clause was, that "the charter being concluded by the charterer on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and master agreeing to rest solely on their lien on the cargo for freight and demurrage." The court held that the defendants were not absolved in respect of the liability for delay in loading, and that the clause absolved only from future liabilities.

In *Gray* v. *Carr* (L. Rep. 6 Q.B.; 1 Asp. Mar. Law Cas. 115) in error, the second part of the clause was in question. The action was against the consignee as upon a lien for dead freight and demurrage and detention at the port of lading. It was held that a lien was given for demurrage, but that no lien was given for the damages occasioned by the detention at the port of lading beyond the demurrage days. The clause, therefore, as to the absolution of the charterer, must be construed subject to such decision as to the limits of the lien against the consignee. In *Christoffersen* v. *Hansen* (L. Rep. 7 Q. B. 509; 1 Asp. Mar. Law Cas, 305), the clause was for delay in loading. It was assumed that no lien was given for such delay. It was held that consequently the true construction was that the charterer, though in fact an agent, was only absolved from liability which might accrue after the loading, and was not absolved from liability for delay in loading. In *Francesco* v. *Massey* (L. Rep. 8 Ex. 101; 2 Asp. Mar. Law Cas. 594*n*), the claim was against the charterers, as principals in fact, for five days' demurrage, and damages for fourteen days' further detention at the port of loading. The liability for the detention was admitted, but it was argued that because there was a lien for the demurrage against the consignee, the true construction was that the charterer was absolved in respect of it, although it was antecedent to the loading. And the court held for the defendants. In *Lister* v. *Van Huansbergen* (L. Rep. 1 Q. B. Div. 269), the claim was for delay in loading. It was held that the claim did not absolve the charterers. In *Kish* v. *Cory* (L. Rep. 10 Q. B. 553; 2 Asp. Mar. Law Cas. 593) in error, the claim was for demurrage at the port of loading. It was held that the clause absolved the charterer, though principal in fact. The court approved of the decision in *Francesco* v. *Massey* (*ubi sup.*), and held that the absolution applied to past liabilities, where a lien was given in respect of them. The inclination of many of the judges in face of the increasing number of such charter-parties made in ordinary course of business, seemed to be to extend the lien rather than to diminish the absolution. In all the cases, then, it will be seen the dispute has been as to the extent of the absolution in respect of liabilities accruing before the loading; in every case it has been assumed, or expressly declared, that it is complete as to liabilities which might otherwise accrue after the loading. The words of the clause must necessarily absolve from all future liability, or mean nothing. The rule, therefore, seems to be that where the words of the absolving part of the clause plainly show that all liability is to cease on loading, it is so to cease both as to antecedent and future liabilities, and without regard to any lien, but, where the words of the absolving part are open to either interpretation, then without regard to lien, liability as to future transactions is not to accrue, but liability as to antecedent breaches is to cease only so far as an equivalent lien is given.

It follows that, in the present case, the defendants are absolved by the clause in respect of all the damages sued for, whether a lien be or be not given as to part of them. Judgment on the whole record must, therefore, be given for the defendants.

Judgment for the defendants.

The plaintiffs appealed.

Feb. 6, 1877.—*French*, for the plaintiffs.—Looking at the whole of the charter-party, the words "the liability of the charterers shall cease as soon as the cargo is on board," &c., mean that the liability shall cease so far as relates to freight, dead freight and demurrage, which are expressly referred to in the same clause in the charter-party, and as to which a lien is given to the shipowners. The true meaning is, that the cessation of the charterers' liability is to be co-extensive with the lien given to the owners. The form of the clause in *Sanguinetti* v. *The Pacific Steam Navigation Company* (*ante*, p. 300; 35 L. T. Rep. N. S. 658) was very different from that of the clause here. If the other clauses of the charter-party are examined they show that it cannot have been the intention of the parties that the cesser of the charterers' liability should be absolute. He also cited

Francesco v. *Massey*, *ante*, vol. 2, p. 594n.; L. Rep. 8 Ex. 101; 42 L. J. 75, Ex.;
Gray v. *Carr*, *ante*, vol. 1, p. 115; 25 L. T. Rep. N. S. 215; L. Rep. 6 Q. B. 522; 40 L. J. 257, Q. B.;
Kish v. *Cory*, *ante*, vol. 2, p. 593; 32 L. T. Rep. N. S. 670; L. Rep. 10 Q. B. 553;
Milvain v. *Perez*, 3 L. T. Rep. N. S. 736; 3 E. & E. 495; 30 L. J. 90, Q. B.;
Christoffersen v. *Hansen* *ante*, vol. 1, p. 305; 25 L. T. Rep. N. S. 547; L. Rep. 7 Q. B. 509.

J. C. Mathew for the defendants.—The meaning of the words "the liability of the charterers is to cease," &c. is perfectly clear and unambiguous, and there is nothing in any of the other clauses of the charter-party to restrict the natural meaning of the words. The tendency of the decisions has been gradually to extend the meaning of such words as these, and they are now held to apply alike to past and future liability.

French, in reply.

MELLISH, L J.—I am of opinion that the judgment in this case ought to be affirmed.

The action is brought by the shipowners against the charterers on a charter-party, and two breaches are alleged, first that the defendants or their agents did not give, and refused to give, any orders as to the ship's port of discharge, in accordance with the terms of the charter-party, in consequence of which the plaintiffs suffered certain special damage, and secondly, that the defendants, or their agents, ordered the ship to proceed to a port which was not safe, and this second breach is also followed by an allegation of special damage. The defendants set up a clause in the charter-party, which is as follows: "It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of

the ship to have an absolute lien on the cargo for all freight, dead freight and demurrage, which they shall be bound to exercise." The pleas then go on to allege that the vessel arrived after the cargo which had been shipped on board her had been sold by the defendants, and that the cargo was worth the freight at the port of discharge. The question is, does this make a defence?

There are a number of cases relating to clauses of this description, in some of which it has been thrown out that the limitation of liability is not to be extended beyond the breaches for which a lien is given so far as relates to what takes place before the loading. The court ought to give the charter-party a reasonable construction, using the words in their natural sense, and see how far the lien may be extended, so as to give the shipowner a proper remedy.

In the present case the breaches exclusively relate to the charterers not giving proper orders at the port of call. As to this the charter party does provide a remedy, independently of an action for breach of the contract, in the clause by which the ship is to "proceed with all despatch to Queenstown or Falmouth for orders to be forwarded within forty-eight hours after notice of said arrival has been given to and received by charterers' agents in London, or lay-days to count." This clause provides a remedy, for if the charterers do not give orders within forty-eight hours, then the lay days begin to count; but it does not stop there, for further on in the charter-party it is provided that "Twelve working laying days (Sundays excepted) are to be allowed the freighters for loading the said ship at port of loading and waiting for orders at port of call in Europe, to commence and to be computed twenty-four hours after the master has given notice in writing to charterers' agents, that the ship is ready to receive cargo, and fifteen days on demurrage are allowed over and above the said laying days at 4d. per registered ton per day." May not the parties have reasonably supposed that this would provide a sufficient remedy? Probably it was in their contemplation that the charterers might sell the cargo on the passage, for that appears to be the ordinary course of business in transactions of this nature. The object may have been to free the charterers from liability when the cargo was sold, and that the owners should look to their remedy against the buyer. If there would have been no remedy according to this interpretation of the charter-party, I should have struggled to make it bear a meaning which would not have taken away the remedy; but if we look at the breaches alleged here we find it provided for in such a way that there may be a remedy, by saying that the days during which orders are not given after the expiration of forty-eight hours after notice of the ship's arrival shall count as lay days. I think this clause was purposely inserted in order to provide a remedy for the owners, and I thing it would be wrong to hold the charterers still liable.

Mr. French, who has argued the case with great ability, went through the various clauses of the charter-party for the purpose of showing that the defendants were not discharged from liability, but I cannot find that the charter-party in substance contains any clause which is not covered by the lien, so that we can say that the charterers were not exonerated for future breaches.

I am, therefore, of opinion that the defendants are entitled to judgment on these demurrers, and that the decision of the court below should be affirmed.

BAGGALLAY, J.A.—Both my learned colleagues concur that the judgment ought to be affirmed, and, therefore, it is immaterial whether my doubts are well founded or not; still I do entertain some doubt in this case. I think the strength of the argument which has been addressed to us by Mr. French on behalf of the plaintiffs rests principally on the exoneration clause itself, and not so much on the other clauses in the charter-party. The effect of the decisions in cases of this kind appears to be that the exoneration is co-extensive with the lien, but I do not feel satisfied that there is any distinction in this respect between liability for breaches before or after loading. No case has been cited showing that any such distinction in reality exists, and I am not prepared to assent to the principle on which the alleged distinction is founded. I entertain a further doubt whether, assuming that the exemption is limited to breaches for which a lien is given, the damage in the present case are not covered by the lien. As to these questions I do not feel clear.

BRAMWELL, J.A.—If I had known of the doubt entertained by Sir Richard Baggallay, I should have wished to take time to consider before giving judgment, but, as it is, having formed an opinion on the case I am bound to express it.

I think there was a contract to give notice within a reasonable time (or rather what would have been a contract had it not been for the clause providing for cessation of liability), and then the question is whether, supposing there would have been a contract but for the clause in question, that shows that the defendants' liability has ceased under the circumstances of the present case. Mr. French wants us to insert further words in the clause, and make the effect of it that liability is to cease as to all matters as to which a lien is given, but I think that ought not to be done unless it can be shown that it is absolutely necessary to adopt that construction. Mr. French further relies on other matters which he says are not provided for in the charter-party, but the Lord Justice has already dealt with that argument.

Then it is said that the authorities show that the cessation of liability in such clauses as this extends only to things for which a lien is given, but I think this is not so. It is contended that it is reasonable to say that a clause like this cannot relieve the charterer from a right of action which has once vested. It is said does it not stand to reason that this must be so, because otherwise either what has already become a contract is prevented from continuing to be a contract, or else although it is a contract the effect of the clause is that there is no remedy. But I think it is not unreasonable to suppose that this question may have been discussed between the parties, and, practically, as Mr. Mathew said in his very satisfactory address, in ninety-nine cases out of a hundred no question could arise. The clause as to lay days would generally afford ample protection from all reasonable risk likely to fall upon the shipowners. In all probability the parties had this in their contemplation when they entered into the charter-party.

I am satisfied that the view we take gives the right construction, and therefore I think the judgment ought to be affirmed.

Judgment affirmed.

Solicitors for plaintiffs, *Vizard, Crowder,* and *Co.* for *Yates, Son* and *Co.*, Liverpool.

Solicitors for defendants, *Hollams, Son,* and *Coward.*

Wednesday, April 11, 1877.

(Before Lord Coleridge, C.J., and Bramwell and Brett, JJ.A.)

Robinson *v.* Price and others.

General average — Donkey engine — Spars and cargo.

The plaintiff's ship sailed from Quebec to London with a cargo of timber, of which the defendants owned part. There was on board, although it was not the common practice to have such a thing with such a cargo, a donkey engine for loading and discharging, which might be used for pumping the ship; and there was sufficient coal on board, not only for the ordinary purposes of the ship, but also for pumping under ordinary circumstances.

The ship sprang a leak, and the crew having become worn out by pumping, the master was obliged to use the engine for that purpose in order to preserve the ship and cargo. The coals were insufficient to continue the working of the engine, and the master used for fuel some of the spars of the ship, and part of the cargo, until he procured a supply of coal from a passing steamship. The master did what was proper and necessary for the preservation of ship and cargo, and if he had not burnt the spars and cargo the ship would probably have been lost.

Held (affirming the judgment of the Queen's Bench Division), that these circumstances constituted a general average loss, and that the plaintiff was entitled to contribution from the defendants in respect thereof.

Appeal by the defendants from the judgment of the Queen's Bench Division (Mellor and Lush, JJ.) in favour of the plaintiff on a special case stated in an action brought to recover money alleged to be payable by the defendants to the plaintiff for general average. The special case is set out in the report in the court below (*ante* p. 321).

French (*Seth Smith* with him), for the defendants, referred to

Nicholls v. *Warren*, 6 Q. B. 615;
Harrison v. *The Bank of Australasia*, *ante* vol. 1, p. 198; 25 L.T. Rep. N.S. 944; L. Rep. 7 Ex. 39; 41 L. J. 36, Ex.

Gainsford Bruce, for the plaintiff, was not called on.

The Court unanimously affirmed the judgment of the Queen's Bench Division.

Judgment affirmed.

Solicitor for the plaintiff, *H. C. Coote*, for *Tinley, Adamson*, and *Adamson*, North Shields.

Solicitors for the defendants, *Argles* and *Rawlins.*

Friday, April 27, 1877.

(Before Lord Coleridge, C.J., Bramwell and Brett, L.JJ.)

Metcalfe *v.* Britannia Ironworks Company.

Charter-party—Delivery short of destination—Freight pro ratâ itineris.

By charter-party between plaintiff, shipowner, and defendants, charterers, plaintiff agreed that his steamship should load a cargo of iron rails at an English port and proceed to Taganrog in the Sea of Azov, or as near thereto as she might safely get, and deliver the same. The captain on arrival in December found the Sea of Azov closed by ice, and, notwithstanding defendants' protest, landed the cargo at Kertch and left it at the Custom House there, where it was subsequently taken possession of by the consignees named in the bills of lading. Kertch is 220 *miles by sea and* 700 *by land from Taganrog, and is as near as the ship could have got before April.*

In an action for freight,

Held (affirming the judgment of the Queen's Bench Division), that plaintiff was not entitled to freight either under the charter party or pro ratâ itineris.

Appeal by the plaintiff from the judgment of the Queen's Bench Division in favour of the defendants on a special case stated in an action brought by a shipowner against charterers for freight. The plaintiff's ship loaded a cargo of railway iron under two charter parties, by which the cargo was to be delivered at Taganrog, or as near thereto as she could safely get. On arriving at Kertch, at the mouth of the Sea of Azov, the captain found the navigation stopped by ice, and the buoys, &c., removed for the winter. The defendants' agents telegraphed to the captain, "If you discharge, your steamer will be held responsible all consequences infraction charter-party;" but the captain landed the cargo at Kertch, and left it in the custody of the Custom-house authorities there. It was taken possession of by an agent for the railway company, who were named as consignees in the bill of lading.

The question for the opinion of the court, who had power to draw inferences of fact, was, whether the plaintiff was entitled to be paid the chartered freight, or any and what amount, for the carriage of the railway iron to Kertch.

The Divisional Court unanimously held that the plaintiff was not entitled to the chartered freight, and Mellor and Quain, JJ. held that he was not entitled to recover anything, Cockburn, C.J., being of opinion that he was entitled to freight *pro ratâ itineris*. Judgment was accordingly entered for the defendants, and the plaintiff appealed.

The judgments in the court below are reported *ante*, p. 313, where the special case is set out in full.

The distance between the ports of Kertch and Taganrog was not stated in the special case, but on the argument in the court below it was agreed that they were about thirty miles apart, and the argument and judgment proceeded on that assumption. When the case came before the Court of Appeal a chart was produced from which it appeared that the distance between the two ports across the Sea of Azov was about 220 miles, while the journey from Kertch to Taganrog round the sea of Azov by land would probably be at least 700 miles.

The case came on during the Michaelmas Sittings 1876, but owing to the illness of some of the judges the arguments could not be concluded, and the Court directed it to be re-argued.

Cohen, Q.C. (*Beresford* with him) for the plaintiff.—The judgment of the court below was wrong, and the plaintiff was entitled to full freight under the charter-parties. The true effect of the clause giving a lien is, that the master had a right to retain the cargo until he received the certificate which is set out in paragraph 17 of the special case, and when he had received that certificate the owner was entitled to full freight. The fact that the Rostoff and Wladikowkese Railway Company were the consignees named in the bill of lading makes full freight due if the goods are accepted by them anywhere short of the port of destination. The duty of the carrier is completely performed when the goods are delivered to the consignee: (*London and North-Western Railway Company* v. *Bartlett* 7 H. & N. 400, 31 L. J. 92, Ex.; *Cork Distillery Company* v. *Great Southern and Western Railway Company*, L. Rep. 7 H. of L. 269.) If the goods are delivered anywhere, and the consignee takes them under the charter-party, full freight is payable. The judgment of Lord Campbell, C.J., in *Schilizzi* v. *Derry* (4 E. & B. 873; 24 L.J. 193, Q.B.) is not good law, for it goes to the extent of holding that as near to the port as the ship can safely get means the same as into the port. All that was necessary for the decision of that case was, that the master ought under the circumstances to have waited until the obstacle was removed. The master may do whatever is reasonable under the circumstances, and in the present case he could not be expected to keep the iron on board all the winter or to take it back to England. If he had landed the goods with the intention of communicating with the owner in order that a ship might be sent out in the spring to take on the cargo, he would not have committed any breach of the charter-party. The consignees took the goods voluntarily under the charter-party, and gave a certificate of delivery, and the consignor did not object to the goods being landed at Kertch. [Brett, L.J.—The telegram set out in paragraph 16 amounts to an objection, and the certificate is not a certificate of *right* delivery.] Right delivery does not mean delivery at the right place: it means delivery in good order and condition, and of the proper quantity: (*The Norway*, 2 Mar. Law Cas. O. S. 17, 168, 254; 3 Moore's P. C. Cas. N. S. 245; 13 L. T. Rep. N. S. 50.) Secondly, if the plaintiff is not entitled to full freight for the voyage, he is entitled to *pro ratâ* freight for the carriage of the cargo as far as Kertch. In *Soblomsten* (2 Mar. Law Cas. O. S. 436; L. Rep. 1 A. & E. 297: 15 L. V. Rep. N. S. 394) it is laid down by Dr. Lushington, "that to justify a claim for *pro ratâ* freight there must be a voluntary acceptance of the goods by their owner at an intermediate port in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with;" and for this proposition *Vlierboom* v. *Chapman* (13 M. & W. 230) is cited. The facts of the present case bring it within the rule laid down by Dr. Lushington.

Watkin Williams, Q.C. (*Hollams* with him) for the defendants.—[Lord Coleridge, C.J.—Consider the last passage of the judgment of Mellor and Quain, JJ., in the court below.] The case depends on a proper appreciation of the facts. The captain might have laid up the ship at Kertch, and completed the voyage when the ice broke up; but he had determined to put an end to the voyage at Kertch, which he had no right to do, and he did so in spite of the defendants' remonstrance contained in the telegram. There was not a right delivery of the cargo. The certificate given by Deopik is not inconsistent with the defendants' views of the effect of what was done. Even if the landing of the cargo was with the consent of the consignee, that gives no right as against the consignor. The consignee cannot alter the contract so as to bind the consignor. The case in the court below was argued and decided on the mistaken assumption that the distance between Kertch and Taganrog is only thirty miles; but the distance is in fact so great that iron delivered at Kertch would be no use to the railway company at Taganrog.

Cohen, Q.C., in reply.

Lord Coleridge, C.J.—In this case there was a difference of opinion among the judges in the court below as to whether, on the facts stated in this special case, the plaintiff was entitled to freight *pro ratâ itineris* for so much of the voyage as had been performed, *i.e.*, from Middlesborough-on-Tees to Kertch. I do not gather that there was any difference of opinion on the question whether the voyage had been performed so as to make the whole freight due to the plaintiff. Mr. Cohen, for the plaintiff, now contends that the whole freight is due, and, further, that if the whole is not due, then freight *pro ratâ* is payable.

The circumstances under which these two questions arise are short and simple. The ship started for Taganrog with a cargo of railway iron shipped under two charter-parties, and on 17th Dec. 1873 she arrived at Kertch. As we now learn, it is 220 miles by sea from Kertch to Taganrog, and the journey by land round the sea of Azov would probably be about 800 or 900 miles. It is admitted that under the circumstances the captain had a right to stop at Kertch. It is found in the case that the Sea of Azov was then closed by ice, the navigation of the port of Taganrog was effectually closed, and all the buoys, lightships, and other marks for navigation had been removed for the winter. Therefore probably there was an absolute physical obstruction which would have rendered it literally impossible for the vessel to continue her voyage as far as Taganrog; but however that may be, there was such a practical obstruction as to render it extremely difficult and dangerous to attempt the further prosecution of the voyage, and this was quite sufficient to justify the captain in remaining at Kertch. So far, therefore, the captain was right in what he did: but then he proceeded to discharge the cargo at Kertch, and in his protest, the material parts of which are set out in paragraph 11 of the case, he states the circumstances under which he did so. Now, I apprehend on the statement contained in that protest, that the captain thought the voyage was done, and the discharge of the cargo was within the terms of the charter-party, considering, no doubt, that Kertch was the nearest point to Taganrog to which he could safely get within the meaning of the charter-party. The discharge of the cargo was an absolute and final discharge, for, as I read the captain's statement in the protest, I understand that he thinks he is discharging in com-

pliance with the contract contained in the charter-party. He goes on with the discharge of the cargo after he had received from the defendants' agents the telegram of 19th Dec., set out in paragraph 12 of the case; when expanded it means that the defendants' agents considered the discharge of the cargo at Kertch to be an infraction of the charter-party, and intended, if the captain insisted on discharging, to claim against the shipowner for any loss which the charterers might be put to in consequence of his doing so. The cargo was then discharged, and was put into the hands of the Russian Government officials, and remained under their protection. When the iron was in the custody and under the authority of the Russian Custom House officials, a person named Deopik, acting under a power of attorney from the Rostoff and Wladikowkese Railway Company, calls on the authorities to give up the iron to him. The authorities do so, although the captain claims to retain it for the plaintiff until the freight is paid, and Deopik gives a receipt on which some stress is laid by the Lord Chief Justice in delivering judgment in the court below.

It is contended, secondly, that these circumstances though they do not justify the contention that the ship had fulfilled the contract entered into by the charter-party and that therefore the whole freight is payable, yet are sufficient to entitle the plaintiff to freight *pro ratâ*.

As to the first point, all the judges in the court below were of opinion that the view that the captain had fulfilled the terms of the charter-party, and the whole freight was due, could not be sustained, and without hesitation decided against the plaintiff on that question. I am clearly of opinion that their decision was correct. According to the facts stated in the case, there was merely a temporary obstruction to the prosecution of the voyage, and one which would necessarily be incidental to every autumn contract for a voyage to a part of the world where the sea is frozen in the winter. The word "there" or "at the time of the ship's arrival," or some other expression to the like effect, cannot be incorporated with the charter-party to qualify the words "so near thereto as she can safely get." Such a construction would be astonishing to all mercantile minds. I am of opinion, therefore, that the contract was not performed, and the plaintiff is not entitled to freight for the entire voyage.

Then it is said that, at any rate, the plaintiff is entitled to freight *pro ratâ*, the vessel having proceeded on the voyage as far as Kertch. The law as to payment of freight *pro ratâ* is thus laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Vlierbloom* v. *Chapman* (13 M. & W. 238): "The true principle upon which this description of freight is due is, that a new contract may be implied to pay it from the acceptance by the consignee of his goods delivered at an intermediate port instead of the destined port of delivery." That is, there must be either a real practical fulfilment of the old contract, or a new contract between the same parties, for a new contract between different parties cannot bind one who does not consent to it. Then a little further on he adds: "To justify a claim for *pro ratâ* freight there must be a voluntary acceptance of the goods at an intermediate port in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with,"—that is by some one who has power to represent the original contractor. In that case, circumstances existed which warranted the language used in the judgment, for the consignee and consignor were the same person, and therefore the general language used, when applied to the facts of the particular case, is correct. Then at page 240 he says: "The shipowner was not ready to carry forward to the port of destination in his own or another ship, and consequently no inference could arise that the shippers were willing to dispense with the further carriage, and accept the delivery at the intermediate instead of the destined port." The last passage which I have quoted shows that the idea in the mind of Parke, B., was, that the new contract under which *pro ratâ* freight would be payable must be made between the same parties as the old contract.

Those are the principles of law as to the liability to pay freight *pro ratâ*, and how do the facts of the present case suit them? As I read the facts, there was no voluntary acceptance of the cargo short of its original destination. The discharge was made once for all at Kertch against the protest of the defendants' agents. The consignees had to consider what was best to be done under the circumstances—whether they should leave the iron alone and refuse to have anything to do with it, or should take it and do the best they could with it, and they elected to take it. The captain did not in any way qualify his absolute discharge of the cargo; he only said that as he had kept his contract for the carriage (as he thought he had), therefore he was entitled to hold the iron until the freight was paid. The fact of taking the iron under the circumstances stated did not amount to a voluntary acceptance short of its destination, and a dispensation with a complete performance of the contract. There never was a voluntary acceptance or such an intention to dispense with a complete performance as must exist as a condition precedent to liability to pay *pro ratâ* freight; therefore the facts do not come within the admitted principles on which alone such freight can be claimed.

It is said that the Lord Chief Justice, in his learned and elaborate judgment in the court below, has gone beyond the facts, and has held on the general principles of maritime law, and on the authority of the decision in *Luke* v. *Lyle* (2 Burr. 882), that there was a valid claim for freight *pro ratâ* here. If it were necessary to discuss the point, I should differ from the conclusions of law at which he has arrived; but it is not necessary to go into this question, because I do not so read the facts so as to bring the case within the principles on which alone *pro ratâ* freight is payable. There was not a dispensation with performance of the contract, and therefore the conclusion in fact at which I arrive is, that the case does not come within the principles to which I have referred. I differ from the conclusions arrived at by the Lord Chief Justice in the court below.

Then there is the argument as to the general equity of the case, that it is only fair that the charterer should pay freight *pro ratâ*. The Lord Chief Justice states that it would be inequitable that, where the charterer had the benefit of the conveyance for nearly the whole of the voyage agreed on, the shipowner should receive

nothing; but this view of the matter appears to be founded on the concession that Kertch was so near to Taganrog as to bring it within that class of cases in which delivery at one station on a railway has been substituted for delivery at another. It seems to have been assumed that Kertch was near Taganrog, but we find the contrary to be the case. So far as the reasoning on that assumed fact goes, we find that the fact was too hastily conceded.

On these grounds, therefore, I am of opinion that the view taken by the majority of the court below was correct, and the judgment ought to be affirmed.

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

The plaintiff cannot show that he has performed a condition precedent to his right to recover freight on the charter-party, and therefore, in order to recover he must either show a new contract or a dispensation with performance of the terms of the original contract. I am inclined to think that the law is, as Mr. Cohen said it is, that the consignee can dispense with the performance of the contract under the charter-party, and might say to the shipowner, "Land the cargo at Kertch," and by so saying might waive all claim to have it carried on further. I do not wish to give a final opinion as to this point; but if this is so, the shipowner must make it out in fact that the further carriage was dispensed with. The burden of proof is on the plaintiff, and he must make out that the consignees dispensed with the carriage of the iron on to Taganrog. To my mind there is no evidence at all of this.

The facts are that the captain, under a mistaken notion that he has done what is required of him by the charter-party, lands the cargo at Kertch, at the risk and leaves it at the cost of the consignees, and indicates no intention of taking it on to Taganrog. I agree that by putting into Kertch he did not act wrongly, and he did not break his contract at that time, for he was prevented by the ice in the Sea of Azov from proceeding further on his voyage; but by landing the cargo under the circumstances under which it was landed I think he did commit a breach of the contract. We need not go to *Hochster* v. *Delatour* (2 E. & B. 678) and that class of cases, to show this, for when the captain unshipped the goods, and said, "There are the goods for the consignees," he gave the consignees a right to take them, and indeed he almost necessitated their taking them. It might be that the consignees had paid for the goods beforehand, but at any rate the consignees would have a right to take the goods, and I do not care whether or not the captain had authority to come back later and offer to carry on the goods to Taganrog, for that would not affect the right of the consignees to take possession.

The argument on behalf of the plaintiff is, that the consignees were doing a voluntary act in taking the iron when it was landed; but it is something like the case of a man who is turned out of a cab in the middle of a journey for which he has hired it, and walks on instead of remaining where he is. In one sense it may be said to have been a voluntary act, for perhaps there was no law to compel them to take away the iron; but practically it was impossible to help it. The telegram sent to the captain was no consent so far as the charterers were concerned, nor was the certificate given by Deopik. There is complete silence as to any agreement to dispense with performance of the condition contained in the charter-party, and to pay freight. What strikes me especially is this; why should the charterers be willing to pay the freight? Mr. Cohen says because they wanted the goods at once; but the answer to that is, that they did not get them at once. There is not a word said as to paying freight, and it seems manifest that there was no dispensation with performance of the terms of the charter-party.

Then, as to *pro ratâ* freight, my opinion is that it is only payable under a new contract, and here if there was a new contract it was a contract by the consignees, and they had no authority to bind the charterers; but I am of opinion that there was no new contract, and my former observations on the other question in the case show how I come to this conclusion. We are asked to infer that because the captain broke the old contract, therefore there was a new one; but there is no evidence of the existence of a new contract, nor that the charterers would be bound if there were one.

On these grounds I am of opinion that the judgment of the majority of the court below ought to be affirmed; but I think it is due to the Lord Chief Justice to show why I do not agree with the judgment which he delivered.

He goes on two grounds. First, he says that a new contract ought to be implied, but he does not advert to the difficulty that the consignees cannot bind the charterers, he cites cases where *pro ratâ* freight has been held to be payable, but they are cases where there was no breach of contract on the part of the shipowner, and that is not the present case. In some instances perhaps a contract to pay *pro ratâ* freight ought to be implied, but it would be on a different state of facts from this. His second ground is this. He says: "But beside this, when the facts are closely looked at, an acceptance of the cargo at Kertch by the consignees, and a dispensation of the further conveyance of it may properly be inferred." I have said so much as to this point that I will not repeat it. I cannot say that these facts would raise the inference. The consignees do not ask for the cargo, and the master is not compelled to give possession of it to them. Towards the conclusion of his judgment the Lord Chief Justice says that the plaintiff was deprived of a *tempus pœnitentiæ*, during which he might have made arrangements for bringing on the cargo, by the act of the consignees in obtaining possession of the iron; but suppose that instead of iron this had been some perishable commodity, what would the consignees have to do so as to give a *tempus pœnitentiæ*? For these reasons I cannot agree with the judgment of the Lord Chief Justice in the court below as to the question of *pro ratâ* freight.

Then it is said that these cases are hard on the shipowner. Mr. Cohen says there is great hardship, and therefore the courts ought always to imply a contract to pay freight *pro ratâ*. I do not much sympathise with that line of argument, for if people mean freight to be paid they can put it in the agreement; but I should very much like to see such a charter-party as would embody the contract proposed to be implied there, saying that if the master breaks his contract by landing the cargo short of its destination freight is to be

payable, and to hear what would be said as to such a stipulation.

In my judgment the majority in the court below were right, and the decision ought to be affirmed.

Brett, L.J.—This was an action by a shipowner against charterers for freight, and it was argued for the plaintiff that the charter-party freight was payable, or, if not, then that he was entitled to freight *pro ratâ*. In my opinion neither is payable.

The charter-party is in the ordinary form, and it is a condition precedent to the recovery of the charter-party freight that the goods should be carried to their destination and there delivered. It seems that freight under the charter-party cannot be recovered unless this condition is fulfilled, or its fulfilment is waived by the charterers or by someone authorised to act on their behalf. Construing the words "as near thereto as she can safely get" according to the meaning given to them by the decided cases, it is obvious that this condition was not fulfilled. It was not waived by the charterers, for as to that the telegram is conclusive; and, to my mind, it was not waived by the consignees, for it seems to me to be clear that the consignees only took the cargo at Kertch because the captain left it there with a declaration that he would not go further. They had a right to treat this as a breach of the contract, and they did so in fact. If the consignees had agreed to what the captain did, in my opinion they could not bind the charterers so as to make them liable to pay *pro ratâ* freight. In my opinion the consignees are not agents to bind the charterers. They may accept the cargo short of its destination, and possibly if they do so the charterers cannot sue the shipowner for not carrying it on; certainly the charterers could not sue for breach of a contract of which the shipowner had no notice: that is the whole effect of the decision in the House of Lords which has been referred to (*Cork Distilleries Company* v. *Great Southern and Western Railway Company* (*ubi sup.*) But the charterers are not liable to pay freight under the charter-party where right delivery of the cargo is not waived. If the consignees take delivery short of the port of destination, it depends on the terms of their dealing what the new contract between the shipowner and the consignees is; but the only thing which could make the charterers liable to pay freight would be either a substantial fulfilment of the terms of the charter-party or a waiver, and the consignees are not agents for the charterers so as to be entitled to waive the conditions of the charter-party on their behalf, and to bind them by such waiver. I think therefore that the defendants in this case are not liable to pay freight under the charter-party.

As to the freight *pro ratâ*, the Lord Chief Justice, in delivering judgment in the court below, expressed an opinion that *Luke* v. *Lyde* (2 Burr. 882) determines that on the broad principle of maritime law, and not upon any fiction of a substituted contract, the merchant taking the goods short of the port of destination must pay freight *pro ratâ*, and then he goes on to distinguish or disapprove of certain other cases in which freight *pro ratâ* has been held not to be payable. But I cannot see how *pro ratâ* freight can be payable except on a new and substituted contract. If it is necessary that there should be a new contract, there may be a contract between the shipowner and the charterers or between the shipowner and the consignees, and it may be either express or implied. It is unnecessary for the purposes of the present case to consider under what circumstances a new contract would be implied, for here there was no contract. There are no circumstances from which a contract could be implied between the shipowner and the charterers. There is no express contract under which freight *pro ratâ* would become payable, and there are no facts from which we can imply one. Therefore it seems to me that there was no contract with anybody, and if one could have been implied with the consignees the plaintiff could not sue the defendants on it, for the consignees are not agents to bind the charterers. In my opinion, the plaintiff fails to establish a claim to the charter-party freight, and fails equally as to his claim to be paid freight *pro ratâ*.

I think, therefore, that the decision of the majority of the judges in the court below is right, and that the judgment ought to be affirmed.

Judgment affirmed.

Solicitors for plaintiff, *C. C. Ellis* and *Co.*

Solicitors for defendants, *Hollams, Son,* and *Coward.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Reported by G. Welby King, Esq., Barrister-at-Law.

(Before the Master of the Rolls.)

Jan. 31, *Feb.* 1 *and* 6, 1877.

Original Hartlepool Collieries Company (Limited) *v.* Gibb.

Navigable river — Obstruction — Counter-claim— Damages.

The plaintiffs and the defendant were respectively owners of adjoining wharves on the Thames, the plaintiffs' wharf having a frontage of 125 *feet to the river. The defendant used his wharf as an entrance to a dock where he carried on the business of repairing vessels. The plaintiffs owned a collier* 176 *feet* 6 *inches long, which was in the habit of coming to their wharf to discharge its cargo, and then necessarily projected over the defendant's wharf. In order to prevent the vessel from overlapping his wharf, the defendant moored a raft of timber, which was used in his business, opposite his wharf, in such a way as to prevent the collier coming to her berth.*

Held, that the plaintiff's vessel had a right to lay alongside their wharf, although it projected over the defendant's wharf, so long as it did not prevent vessels passing in or out of the defendant's dock, and that the raft was an illegal obstruction to the navigation of the river.

A defendant cannot by a counter-claim make a claim for damages which accrued after the date of the issue of the writ in the action.

The Original Hartlepool Collieries Company were the owners of Keepier Wharf, Limehouse, with a frontage of 125ft. to the river Thames, and the defendant was the owner of the adjoining wharf, which was used by him as the entrance to a dock where he carried on the business of repairing ships. The plaintiffs owned a screw collier, called the *Ludworth*, which was 176ft. 6in. long over all, and which was laid alongside their wharf about once

a week for the purpose of unloading coals there, and at such times the vessel necessarily projected over the defendant's wharf. For some time prior to the 10th of Oct. 1875, the plaintiffs moored the collier opposite their own wharf, but about 25ft. from it, under a written agreement with the defendant for that purpose, which expired on that day, and was not renewed, nevertheless the vessel was at intervals moored as before, and occupied from sixteen to twenty hours in unloading. The defendant kept a raft of timber for use in his business on the river in front of his wharf, and after the expiration of the agreement, in order to prevent the vessel from overlapping his wharf, he moored his raft in such a way as to prevent the *Ludworth* from coming to her berth, and this action was then brought to restrain him from so doing.

The defendant put in a counter claim asking for an injunction, and for damages sustained by the defendant on account of the vessel interfering with the access to the dock both before and after the date of the issue of the writ.

Roxburgh, Q.C., *Caldecott*, and *Edward Ford*, for the plaintiffs, contended that the defendant's raft was an illegal obstruction of the river. They referred to

Lyon v. *The Fishmongers' Company*, 35 L. T. Rep., N. S., 569; L. Rep. 1 App. Cas. 662;
Reg. v. *Leech*, 6 Mod. 145;
Rex v. *Russell*, 6 East, 427;
Rex v. *Cross*, 3 Camp. 224;
Rose v. *Groves*, 5 M. & G. 613;
Webber v. *Sparkes*, 10 Mee. & W. 485.

Chitty, Q.C., *Laing*, and *R. E. Webster*, for the defendant, argued that the plaintiffs were not entitled to moor a vessel of this length opposite their wharf which must necessarily project over the defendant's wharf, and that the raft was fixed to the defendant's wharf simply to protect him against the wrongful act of the plaintiffs.

The evidence having been taken it was proposed to give evidence of damage having been sustained by the defendant since the date of the writ in the action, and the question arose whether this evidence was admissible.

JESSEL, M.R.—My present impression is that it is confined to the writ. I will give the reasons why I think it is so in order that if this goes elsewhere, the court above may decide what the rule properly means. A counter claim, as I understand it, is to entitle the defendant who has a claim against the plaintiff, either sounding in debt or damages, to set it off against the plaintiff's claim so as to destroy it or to get in a surplus, if a surplus is coming to him in one action, so that he may not be compelled to bring a second action. Of course where it relates to the same matter it is very convenient to try it, as here, but where it does not relate to the same matter, it may be inconvenient to try it, and the court may refuse permission to the defendant to avail himself of the action under Order XIX., r. 3. The counter claim should have the same effect as a statement of claim in a cross-action. Now, in what cross-action? It obviously means in the original action. Where a plaintiff issues a writ for damages, he claims damages up to the time of issuing his writ, and where a defendant brings a counter claim for damages, it is his statement of claim in the same action, and that is up to the issuing of the writ, and as far as I can see, it being a cross claim and not a defence to the original claim, there is no reason why, if he adopts the plaintiff's writ, he should go beyond the issuing of the writ for damages, because that would not be justice. If the defendant can get damages in respect of another matter up to the date of his counter claim, the plaintiff ought to have the same right, so as to increase his damages. If it is a continuous act, injuring the plaintiff, and the plaintiff says, "I am entitled to 500*l.* damages up to the issuing of the writ, and 500*l.* more to the time of your putting in counter claim," and the defendant says, "I am entitled to 600*l.* damages subsequently to the issuing of the writ," he would get a verdict for 100*l.*; although the plaintiff was entitled to 400*l.* damages, the plaintiff is estopped and the defendant is not. That does not seem to be consistent with justice. When I look at Order XX., I find it headed—"Pleading matters arising pending the action." Now, if it had been intended that the counter claim should include matters pending the action, it would have said so; but I find it is carefully restricted to this—"Any ground of defence arising after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence, and if after a statement of defence has been delivered any ground of defence arises to any set off or counter claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply either alone or together with any other ground of reply." So that it is carefully restricted to defence either to an action or to a counter claim. The only way in which you could allege that a counter claim was within the rule would be by saying that the counter claim was a defence, but that is not the way it is treated throughout the rule. It is always treated as a cross action, not as a defence, the rule being that you must set off the damages in the cross action against those in the action. It seems to me, therefore, that the defendant cannot bring his counter claim for damages which accrued after the writ any more than the plaintiff can get damages that accrued after the writ. By the leave of the court you can do anything, but that is another matter, because the court can give leave to amend on both sides, and can easily amend the writ. That being my opinion upon the general rule, I think in strictness that no action for damages or cross action for damages can be maintained by the defendant after the date of the writ. But I will let the evidence go in so that if the defendant is desirous of taking another opinion upon the subject he may do so, and therefore I will let him give evidence of damage up to the date of his counter claim.

Chitty, Q.C., for the defendant, then elected not to put in evidence of damage to the defendant between the date of the issuing of the writ and the delivery of the counter claim, and the Master of the Rolls proceeded to give judgment on the whole case.

JESSEL, M.R.—I will consider in the first place what the law is as regards obstructions.

The plaintiffs say the Thames is a public highway, navigable by all Her Majesty's subjects in a reasonable manner and for reasonable purposes; and that they navigate it in a reasonable manner and for reasonable purposes, and the defendant has no right to obstruct

the highway. Now, do the plaintiffs navigate it in a "reasonable manner and for a reasonable purpose," Unquestionably they do. The vessel they use is not a long vessel, compared with others in the trade in which it is used. It is not denied that it is a vessel of ordinary length. It comes for a reasonable and proper purpose to bring coal to the Thames, where coal has been delivered now for ages, and it comes to a wharf which has been used as a coal wharf certainly for twenty-three years, and probably for longer. Therefore they are using the river for a reasonable purpose with a reasonable vessel and in a reasonable way. They have a right to go to their own wharf, and not the less a right because in mooring the vessel out in the stream twenty-five feet from the shore, the vessel projects over some other wharf, or some other part of the shore. There is no law which says that your vessel shall be the exact length of your wharf and no longer, any more than there is any law that your carriage or waggon shall be the exact length of the breadth of your street door or your frontage to the street. Consequently all that the plaintiffs have done was perfectly legal, perfectly right, and perfectly usual, subject to what I am going to say.

In ascertaining, however, the reasonableness of the acts of the plaintiff, one consideration must not be overlooked. Besides a reasonable right of access, they have a reasonable right of stopping. Going, returning, and stopping is the use of the highway. But what is a reasonable right of stopping? That must depend upon circumstances. For instance, if a wheel came off an omnibus in the middle of a highway, a blacksmith might be sent for to put the wheel on, and the omnibus might lawfully stop there until it was done, if that were the best mode of getting it out of the way and reasonable and usual. But if a blacksmith carried on his trade of repairing omnibuses in the highway immediately opposite to his own house, although no one omnibus was kept there more than a reasonable time for the repairs to be done, that would be an obstruction of the highway, and would be a nuisance. The circumstances must always be regarded. So, again, it is perfectly reasonable that A. shall put his carriage before his house door, even although it may overlap his neighbour's door. For instance, take the houses in Portland-place—that is a familiar instance—where two doors immediately adjoin. It is impossible to draw up a carriage to the one door without overlapping the other. There is no doubt that it is quite reasonable to stop a carriage there for the purpose of taking up and setting down, or even for the purpose of waiting there a reasonable time. But suppose the next door neighbour's carriage comes up and wants either to take up or set down, it would be monstrous to hold that the coachman of the first carriage should not move out of the way. It would then become unreasonable. When he sees the neighbour's carriage coming up, he is then bound to get out of the way, and he is guilty of a private nuisance to his neighbour, in the nature of a public nuisance, by stopping before his door and preventing his coming up, he not requiring to stop there. In that case, therefore, if he persisted in doing this day after day, I have no doubt that his neighbour might bring an action against him and get damages, although no doubt nominal damages; but nominal damages would establish the right and carry the costs. That is a simple illustration of what I mean. In the same way, it is not unreasonable that your neighbour should give an evening party occasionally, and that there should be a file of carriages running across your door or opposite your door. It would be very unreasonable if anybody did not break the file to allow your carriage to come up to your own door, and still more unreasonable if, instead of giving parties occasionally, he, for some purpose of his own, turned his house into an assembly room or for some private purpose, in consequence of which a file of carriages came every day and obstructed the carriage way to your house. I only give these as illustrations. The law is quite clear. The question of reasonableness has been said to be a question for a jury. It must be reasonable user and nothing else.

Now, let me try this question of reasonable user as regards the collier, as I will afterwards do with respect to what is alleged in the counter claim. Is it reasonable when one man has a wharf on the Thames of a certain length, and another man has a wharf adjoining it, and the length of the first wharf is less than the length of the steam collier which comes opposite to it, that that steam collier should stop opposite his neighbour's wharf and impede the access to it? I say that it is utterly unreasonable. Each man has a property in his wharf, a profitable property, and he has a reasonable right of access, the same as his neighbour; and, therefore, if he were using the wharf for vessels alongside of it as his neighbour was using the wharf for vessels alongside of it, what right has the one to impede the access of the other? As a general rule he has no such right. Where, however, the one is not using his wharf for that purpose, which is the case here, he cannot object to his neighbour's vessel lying opposite in the river, because it does not injure him. If this defendant had been carrying on the business of a wharfinger, and using it for vessels coming up the river, I should have held it most unreasonable for the collier to stand in the way so as to prevent his carrying on his trade in the regular way. It would be, in fact, attempting to appropriate, without payment, the use of the defendant's wharf to the plaintiff, if they both carried on the same trade. But, in the present case, it is not so. The defendant has never used his wharf as a wharf, but has merely made use of his property as a kind of dry dock for the repairing of vessels, and the only access he wants is useful and commodious access for his vessels through the gates of the dry dock when he is docking and undocking vessels. It follows from what I have said that the plaintiffs had no right to come and stop there so as to impede that access—the access he really uses. If they do come there and stop before his wharf so as to impede his reasonable access to his dock gates, I should say it was a nuisance, and that they were liable to an action. Now, what does that mean? It means this, that they must not stop there during the hours he (defendant) wants to use the approach to his dock. He does not want it every day. This is proved by the defendant's own evidence. The effect of his evidence was that he opens his dock gates about 100 days in the year. It follows that on every other day in the year except those 100 days the plaintiffs have a clear right, which ought not to be interfered with, because the defen-

dant does not use his wharf for any other purpose; and even on these 100 days he does not use it all day. According to his account, he wants it for two and a half or three hours before the flood tide only. Therefore, the steamer has a right to be there, as far as the defendant is concerned, for all the other hours of the day. But supposing it is lying opposite the defendant's dock gates when he wants to dock or undock, when it is asked to go out of the way it should do so; and even without asking, when it appears that a vessel is coming up to be docked or undocked. But, still, it has a right to be there, moving out of the way when it is impeding access to the dock. It is merely lying in the river—a public highway—for a lawful purpose, for discharging its cargo; and, therefore, it has a right to be there. That being so, it follows that the defendant had no right to stop the access of the vessel to its berth. The steam collier had a right to go to her berth—a right to navigate the river and to lie in the river, and she had a clear right to do so two-thirds of the days in the year, and for nine-tenths of every day of the remaining days.

Now what the defendant has done is this: he has stopped her getting to her berth at all; he has put an obstruction in the river which prevents her getting there any day of the year or at anytime, which clearly is wrong. As to the way the obstruction is fastened, that does not matter. The defendant himself said it was fastened to the wharf in such a way, and purposely so fastened, that the plaintiff's vessel could not get up at all to her berth. It was intended to be so. That was clearly an illegal obstruction in the public highway. I need not discuss the exact nature of the obstruction or how it was fastened, because it was admitted that it was fastened in such a way as to prevent and did prevent the collier getting up. Therefore that obstruction was unlawful.

Now I will notice the two justifications, or attempted justifications, which were made for putting it there.

First of all it was said that it was in fact a raft of timber logs which were used by the defendant in his business as a repairer of ships, and that he had a right to put his logs there. Now, that, in my opinion, is no defence at all. You have no right to obstruct a public highway; whether it is useful to yourself or not is quite immaterial. It is no answer to say that you use it for carrying on your business. The answer is that the Thames is not a timber pond. You have no right to make that use of the Thames which is a navigable highway. No doubt it may be done where it does not interfere with the access of the public—It may happen on other parts of the river where it does not interfere with the vessels going or returning, passing or repassing, because the conservators may not interfere and may allow you to moor timber. But it is quite plain that that is not the proper mode of using the highway. It is not a reasonable use of the highway to keep your timber logs there for a longer time than is necessary to take them to your dock. You must not keep them there as a reserve to be used in the same manner as a timber dock. Then if you do you must not fix them in such a way that vessels cannot get up; because the real point in the case and the gravamen of the charge against the defendant is that he prevents the access of the plaintiff's vessel.

The other ground of defence, which struck me as a very odd one, was this, that the defendant knew the plaintiffs' vessel would stay there for a long time, and therefore he had a right to obstruct her. The answer is, he could not know beforehand that it would stay there so as to interfere with his rights, because, as I have said before, the access might have been obstructed for two-thirds of the days in the year, and it would have been no injury to him if she did not stay an unreasonable time; and even on other days, how could he tell beforehand that she was going to stay an unreasonable time? She might have been there fourteen hours, sixteen hours, twenty hours, or twenty-four hours; she might go away more than three hours before the flood, and, therefore, it is impossible that he could tell beforehand that she was going to stay an unreasonable time and interfere with his rights. It seems to me to be no defence whatever as regards the action, which in my view of the law is a purely undefended action.

Now I come to the counter claim. I have already ruled that the counter claim, as regards damages, must be confined to the period prior to the date of the writ; but even if it could be extended to the date of the counter claim, it is admitted that there is only one case, and they did not think that worth proving. Now the counter claim is founded, as I understand, upon nuisance. If even less than is alleged in the counter claim were proved, the defendant would be entitled to succeed on it. I do not say that it is necessary to prove a case of danger. Interference with reasonable access to his own property is, in my opinion, such a nuisance as would maintain an action by the defendant. But as a good deal of evidence has been gone into upon that point of danger, I must say that in my opinion, although I think there was some slight additional risk, there was really nothing of any importance as regards danger, and I think the defendant's own conduct shows it. He is a reasonable man of business, and if there had been any serious danger he would not have allowed the vessels to be docked and undocked whilst the collier was there. I think more of men's conduct than of men's opinions. But, as regards expense, there was clearly additional expense. The plaintiffs have no right to impose even an additional expense of two men for two or three hours on the defendant, if there is such an additional expense; and they have no right, as I said before, to interfere with his reasonable access, and if this had been proved, I should have given the defendant damages, although, no doubt, very small damages because the wages of the two additional men must have been something very small. I should not have granted an injunction, for this reason, that the plaintiffs do not claim a right to obstruct. They deny the obstruction. They do not claim the right to keep a vessel there so as to obstruct, nor do they claim the right to put the vessel there so as to obstruct the use of the wharf if the defendant ever uses the wharf. Therefore there is no question of right to be tried. The only question between the parties to be tried, if evidence had been adduced, would have been the simple question of fact as to whether or not upon any given day when the collier was there, it did not move out of the way, and thereby obstructed the defendant in the reasonable use of his waterside premises; a question of fact which I am relieved from going into by the defendant's counsel declining to offer any further evidence.

This being the state of the matter, although I think the defendant's contention reasonable to this extent—that he has a right to say that the plaintiffs shall not deprive him of a valuable property which belongs to him by keeping their collier opposite his wharf for an unreasonable time and for an unreasonable purpose; still, as he has not made out that case at present—whatever future use he may make of his wharf I do not know—it appears to me that he has no grounds upon which I can give him judgment on his counter claim.

Solicitors: *Harcourt* and *Macarthur; Markby, Tarry*, and *Stewart*.

ADMIRALTY DIVISION.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

March 24 *and April* 17, 1877.

THE FRANCONIA.

Collision—Lord Campbell's Act—Action in rem—Jurisdiction.

The High Court of Justice (Admiralty Division) has jurisdiction to entertain an action in rem brought by the personal representatives of a deceased person killed by the negligence of those on board a foreign ship in a collision between that ship and a British ship on the high seas below high water mark.

THIS was action brought by Ann Jeffrey, the widow and administratrix of John Jeffrey, deceased, late a mariner on board the steamship *Strathclyde*, against the *Franconia* to recover damages for loss of his clothes and effects and compensation for the injury sustained by the plaintiff by reason of his death, resulting from a collision between the two vessels. As appeared from affidavits filed on behalf of the defendants, the collision took place in the Straits of Dover, about two miles and a half from the English Coast off Dover, and consequently below high water mark on that coast. The full facts of the collision will be found reported in *The Franconia* (*ante*, p. 295; 35 L. T. Rep. N. S. 360), *Reg.* v. *Keyn* (L. Rep. 2 Ex. Div. 63). The writ was issued *in rem* against the *Franconia* claiming damages as before mentioned. An action had previously been brought and decided in this division against the *Franconia* in respect of the loss of the *Strathclyde* and her cargo (see *ante*, p. 295; 35 L. T. Rep. N. S. 360), and the *Franconia* was then released upon bail upon terms that 8*l*. per ton of the registered tonnage of the *Franconia* should be paid into court to answer damages for loss of cargo; that bail should be given in two other actions then pending; and, thirdly, that the solicitors for the owners of the *Franconia* should give an undertaking to appear and give bail in any action or actions for loss of life or personal injury which might be instituted by the then plaintiff's solicitor, or pay into court 7*l*. per ton in addition to the 8*l*. paid in as aforesaid, but without prejudice to any objection which might be taken to the jurisdiction of the court or claims for loss of life or personal injury. It was consequently admitted by the defendants that, although the vessel had not been arrested in this action, the present proceedings must be treated as if the ship was under arrest and the action was regularly *in rem*, and the defendants in the course of the argument agreed to give bail in the action in pursuance of the undertaking.

After the writ had been issued and served upon the defendants' solicitor, and before any pleadings, the case came before the court upon motion by the defendants to set aside so much of the writ as claimed damages for loss of life.

Phillimore (*Benjamin*, Q.C. with him) in support of the defendants' motion.—The High Court of Justice has no jurisdiction to enforce proceedings *in rem*, which could not have been enforced by some court existing prior to the Judicature Acts 1873 and 1875, and by these Acts amalgamated with the High Court. The Judicature Acts give no greater jurisdiction than existed before except in a few instances not material here. No court ever exercised jurisdiction *in rem* prior to the Judicature Acts except the High Court of Admiralty, and that court never could have exercised jurisdiction, or have been supposed to exercise it, in actions for loss of life and personal injury before the passing of the Admiralty Court Act 1861 (24 Vict. c. 10), which by sect. 7 gave "jurisdiction over any claim for damage done by any ship" to be exercised (sect. 35) either *in personam* or *in rem*. The jurisdiction of all English courts in such claims was created by Lord Campbell's Act (9 & 10 Vict. c. 93) in 1846, and it did not at that time exist in the Admiralty Court; and as Lord Campbell's Act expressly provides the mode in which damages are to be recoverable, and that mode is inconsistent with the then existing Admiralty practice, it may be fairly assumed that Lord Campbell's Act gave the Admiralty no such jurisdiction. Then do the words "damage done by any ship" include loss of life and personal injury? Even if they do, it is submitted that the jurisdiction should not be exercised *in rem*, but *in personam*; but the class of damage is not within the section. According to the decisions of the High Court of Admiralty, the word "damage" no doubt includes personal injury:

The Sylph, L. Rep. 2 Adm. & Ecc. 24; 17 L. T. Rep. N. S. 519; 3 Mar. Law Cas. O. S. 37;
The Beta, L. Rep. 2 P. C. 447; 20 L. T. Rep. N. S. 988;

and even for loss of life:

The Guldfaxe, L. Rep. 2 Ad. & Ecc. 325; 19 L. T. Rep. N. S. 748; 3 Mar. Law Cas. O. S. 201;
The Explorer, L. Rep. 3 Ad. 359; 23 L. T. Rep. N. S. 405; 3 Mar. Law Cas. O. S. 507.

There is a distinction between the two classes of case, because in claims for loss of life the jurisdiction is purely statutory, whilst the claims for personal injury are common law rights. *The Explorer* (*ubi sup.*) went up to the Privy Council, but that court, upon the question of jurisdiction being raised, intimated that the proper course in such a case was for the defendants to move for a prohibition, and directed the case to stand over for that purpose. The plaintiffs then withdrew their claims for loss of life. On the other hand, this question has been expressly raised and decided by the Court of Queen's Bench; and the Court of Admiralty was prohibited from entertaining a claim for loss of life (*Smith* v. *Brown*, L. Rep. 6 Q.B. 729; 24 L. T. Rep. N.S. 808; 1 Asp. Mar. Law Cas. O. S. 56); and although that exact question has not been again raised, that decision has been approved in the following cases:

James v. *The London and South-Western Railway Company*, L. Rep. 7 Ex. 195; 26 L. T. Rep. N. S. 187; 1 Asp. Mar. Law Cas. 228;
Simpson v. *Blues*, L. Rep. 7 C. P. 290; 26 L. T. Rep. N. S. 697; 1 Asp. Mar. Law Cas. 360;
Gunnestad v. *Price*, L. Rep. 10 Ex. 65; 32 L. T. Rep. N.S. 499; 2 Asp. Mar. Law Cas. 545;

and has been disapproved in one only, viz, *Cargo* v. *Argos* (L. Rep. 5 C. P. 134: 28 L. T. Rep. N. S. 77; 1 Asp. Mar. Law Cas. 519) in the Privy Council. The result of the authorities is, that *The Guldfaxe* (*ubi sup.*) is the only case in support of the jurisdiction asked for, and that was dissented from by the Queen's Bench, in *Smith* v. *Brown* (*ubi sup.*). The court ought to follow the latter decision.

Butt, Q.C. and *E. C. Clarkson*, for the plaintiff, *contra*.—The question has already been expressly decided by the High Court of Admiralty in *The Guldfaxe* (*ubi sup.*), and the real point here is whether the court will consider that that authority is overruled by *Smith* v. *Brown* (*ubi sup.*). The latter case turned entirely on the meaning of the word "damage" in the Admiralty Court Act 1861, sect. 7, which the Court of Queen's Bench held to mean damage to property only, and not damage to person; and this being the *ratio decidendi*, the Queen's Bench held that they, sitting in prohibition, must overrule the decision of the Privy Council in *The Beta* (*ubi sup.*), where it was decided that "damage" included personal injury. Which decision is to be followed? It is clear that if "damage," as used in that section, can be shown to mean damage to person, the Queen's Bench were wrong. Now, in ordinary speech, "damage" clearly includes damage to person, and in the dictionaries it is given as synonymous with "injury," "hurt," "detriment," and "loss." Again, in *Smith* v. *Brown* (*ubi sup.*), it is said that "damage" does not include injury to the person, because "the Legislature in two recent acts *in pari materiâ*, both having reference to the liability of shipowners in respect of injury or damage, namely, the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), and the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), has, in a series of sections, carefully observed this distinctive phraseology, speaking in distinct terms in the same section of loss of life and personal injury on the one hand, and loss or damage done to ships goods or other property on the other; and in these Acts the term "damage" is nowhere used as applicable to injuries done to the person—it is applied only to property and inanimate things. Now this is not an accurate representation of the provisions of the Merchant Shipping Acts. No doubt it is so in sect. 504 of the Merchant Shipping Act 1854, and in sect. 54 of the Merchant Shipping Act Amendment Act 1862; but in sect. 505 of the Merchant Shipping Act 1854, the words "loss or damage" are used as including loss of life and personal injury as well as damage to goods; by sect. 515 "all sums of money paid for or on account of any loss or damage in respect whereof the liability of the owners of any ship is limited" are to be accounted for between the owners; here the word "loss" clearly does not include personal injury, and as the sections equally clearly cover all the classes of injury referred to in the previously mentioned sections, hence the word "damage" must, in sects. 505, 515, be taken to include personal injury. Again, it must be assumed that the Legislature in passing the Admiralty Court Act 1861, an Act dealing exclusively with the Admiralty Court, intentionally used words in the sense in which they were ordinarily used in the High Court of Admiralty, and that the word "damage," having a special meaning in that court, the Legislature used it with that special meaning. Now in the Admiralty Court, the word "damage" included not only the damage to property, but also personal injury. *The Ruckers* (4 C. Rob. 73) was a suit instituted by a passenger against the master of the ship for an assault on the high seas, and in giving judgment Lord Stowell said, "In this case the person bringing the action is described as a passenger, and the action is in a cause of damage;" clearly showing that "damage" included personal injury. The Admiralty Court Act 1861 was passed for the express purpose of enlarging the jurisdiction and of giving remedies where none existed previously; hence, as a matter of public policy, it is a fair inference that it was intended to give this jurisdiction. Moreover, unless it is held that the court has jurisdiction *in rem* in this case the plaintiff will be absolutely deprived of all remedy; because the owners of the ship, being a foreign company domiciled abroad, no writ can be served upon them out of the jurisdiction under the rules of the Supreme Court, Order XI., rule 1, unless the act . . . for which damages are sought to be recovered was . . . done . . . within the jurisdiction;" and it has been held that a place on the high seas below high water mark is not within the jurisdiction: (*Reg.* v. *Keyn*, L. Rep. 2 Ex. Div. 13), and this decision has been followed by the Court of Common Pleas, who set aside an order made for the service or notice of writ *in personam* out of the jurisdiction in a similar action brought against the owners of the *Franconia*, who are now moving to set aside the writ in this action. The court, as we submit, should follow the Privy Council rather than the Queen's Bench, in case of a conflict of decisions: and as *The Beta* (*ubi sup.*) lays down that there is a right of action *in rem*, or case of personal injury, there must also be the right in case of loss of life. If there is any difficulty about the case not being tried by jury in this division, there is now power to send any case for trial by jury under the Judicature Acts and the rules thereunder. It is moreover clear that the Legislature deemed the High Court of Admiralty a proper tribunal to exercise such jurisdiction in many cases, because by sect. 13 of the Admiralty Court Act 1861, it is provided that "Whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of the Merchant Shipping Act 1854;" that is to say, that the court acquired jurisdiction under the Merchant Shipping Acts to limit the liability of shipowners, and where necessary (under sect. 514 of the Act of 1854) to ascertain the amount of damages payable in respect of loss of life and personal injury, and to distribute the same among the several claimants. So that if the defendants had come to this decision whilst the ship was under arrest in the former action, and had sought to limit their liability, the court would have had to assess the amount of the damage sustained by the defendants, in effect

do that to which the defendants are now objecting. [Sir R. PHILLIMORE.—That argument seems to dispose of any contention as to the capacity of the machinery of the court to entertain such claims.] The Queen's Bench, in *Smith* v. *Crown* (*ubi sup.*) seem to suggest that the attention of the Privy Council in *The Beta* (*ubi sup.*) was not called to the above-mentioned points; but this is clearly a mistake, as appears from the report (L. Rep. 2 P. C. 447). The decisions of that tribunal have always been treated with the utmost respect by the courts of common law, and in many cases have been followed in preference to common law decisions. See

The General Steam Navigation Company v. *The British and Colonial Steamship Company*, L. Rep. 3 Ex. 330; 19 L. T. Rep. N. S. 357; 3 Mar. Law Cas. O. S, 168, 237.

Phillimore, in reply.

Cur adv vult.

April 17.—Sir R. PHILLIMORE.—In this case Ann Jeffery, the widow and administratrix of James Jeffery, deceased, claims the sum of 1000*l.* against the steamship or vessel *Franconia*, for damages for the death of the said James Jeffery and loss of his goods, occasioned by a collision which took place in the Straits of Dover between the *Franconia* and the *Strathclyde*, on which he was a mariner, in the month of February of last year, the collision being caused by the negligence of those on board the *Franconia*. The defendants, the owners of the *Franconia*, now move the court to set aside so much of the writ of summons issued in this action as claims damages for loss of life.

It is not disputed that the court has jurisdiction so far as damages for the loss of goods are concerned, but two questions appear to be raised in these proceedings: First, "Whether the court can entertain an action for damages on account of the death of a an action for damages on account of the death of a party?" and, secondly, "whether the claimant may proceed *in rem*, that is, against the ship, for such damages."

The ship was not arrested in this action, but when she was arrested in other actions, it was agreed that she should be released on certain terms, which made it necessary for the defendants to appear and give bail in this action. These terms were: First, "8*l.* per ton to be paid into court for ship; secondly, bail in two other actions; and, thirdly, to appear and give bail in every action for loss of life, personal injury." The case is to be considered as if the ship was under arrest, and the proceedings were *in rem*, the right being reserved to contest the jurisdiction.

The 7th section of the 24 Vict. c. 10 of the Admiralty Jurisdiction Act is as follows: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The construction of this section has been the subject of much litigation, and, unfortunately, of conflicting decisions. The 9th & 10th Vict. c. 93, and 27 and 28 Vict. c. 95, s. 2, first created the right of action at common law for compensating the families of persons killed by accident. These Acts did not confer jurisdiction in this matter upon the High Court of Admiralty. It is the 7th section of the 24 Vict. c. 10, to which I have just referred, which confers, if any Act does confer, such jurisdiction upon that court.

I think it right to observe *in limine* that in certain cases it is clear that the Court of Admiralty would have jurisdiction to award and distribute damages in consequence for loss of life or personal injury happening in a collision. The Merchant Shipping Act 1854, s. 514, gives jurisdiction in such a matter to the Court of Chancery and other courts, and the Admiralty Court Act of 1861, s. 13, confers the same jurisdiction on the High Court of Admiralty when the ship or proceeds are under arrest; and, as I observed in the case of *The Guldfaxe* (*ubi sup.*), it is clear therefore that, if in this very case of damage there had been several claimants, including the present plaintiff, and if the defendant had instituted a suit in this court for the purpose of limiting the amount of his liability, and for the distribution of such amount rateably amongst the claimants, it would have been the duty of the court to have entertained the suit.

I will now briefly refer to the principal judgments on this subject. In the case of *The Sylph* (3 Mar. Law Cas. O. S. 37), decided in 1867, I ruled, following the opinion of Dr. Lushington, that this court had jurisdiction under the Admiralty Court Act, to entertain a cause for personal damage done by a ship, and I stated my reasons. This judgment was not appealed from. In the following year, 1868, I again had reason to consider the question in *The Guldfaxe* (3 Mar. Law Cas. O. S. 301), and stated my reasons at length for considering that the court had jurisdiction to entertain a suit for the recovery of damages by personal representative of a person killed in a collision between two vessels. In 1869, in the case of *The Beta* (L. Rep. 3 P. C. 447), I again held that this court had jurisdiction in a cause of damage instituted against a ship for personal damage. From this judgment, an appeal was presented to the Privy Council in 1869, and that court, consisting of Lord Romilly, Sir W. Erle, Sir James Colvile, and Sir Joseph Napier, said that the words of the 7th section of the Admiralty Court Jurisdiction Act which had been referred to clearly include every possible kind of damage. Personal injuries are undoubtedly within the word "damage" done by any ship. The case of *The Sylph* (*ubi sup.*), which had been referred to, and in which it was so held, has not been appealed from. In 1870, in the case of *The Explorer* (3 Mar. Law Cas. O. S. 507) I entertained the suit brought against a foreign ship by the personal representatives of a person killed in a collision. There was, I believe, an appeal to the Privy Council, but it was never prosecuted.

If the cases on this subject ended here, I should have no difficulty in re-affirming the principle laid down by Dr. Lushington, myself, and the Privy Council; but in the case of *The Black Swan* (*Smith* v. *Brown*, 1 Asp. Mar. Law Cas. 56), in 1871, where injury and death had been caused by collision at sea, and the suit had been entertained by the court, and application was made to the Court of Queen's Bench for a prohibition, which was granted, I need not say that to such a court it is my inclination, as well as my duty, to pay the highest possible respect; but the unfortunate conflict between this judgment and that of the Privy Council, compels me to consider the circumstances attending it, and the grounds upon which it was formed. The case was heard before Cockburn, C.J. Hannen, J. and Blackburn, J. The latter learned judge said: "I have entertained doubts in this case not altogether removed, but which are not strong enough to make me dis-

sent from this judgment, or even to make me to require further time for consideration." The Lord Chief Justice and Hannen, J., considered the question one of considerable difficulty, but decided in favour of the prohibition. It appears to me that the main ground—I will not say the *ratio decidendi*—of the Lord Chief Justice's judgment was that the word "damage" was used with reference to mischief done to property, and not to injuries done to the person; and his Lordship said "that the distinction is not a matter of mere verbal criticism, but is of a substantial character, and necessary to be attended to, is apparent from the fact that the Legislature in two recent Acts in *pari materiâ*, both having reference to the liability of shipowners in respect of injury or damage, namely, the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104, part ix.), the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63, sect. 54), has, in a series of sections, carefully observed this distinctive phraseology, speaking in distinct terms in the same section of loss of life and personal injury on the one hand, and loss and damage done to ship, goods, or other property, on the other. In these Acts the term 'damage' is nowhere used as applicable to injuries done to the person; it is applied only to property and inanimate things. We see no reason to suppose that the Legislature, in using the term in the enactment we are considering, had lost sight of the distinction uniformly observed in the preceding statutes." The Merchant Shipping Act contains no less than 548 sections; and I venture to think that a close inspection of the language of the various clauses will show that this sharp distinction between "damage" and "injury" can hardly be maintained; but, as was admitted by the counsel for the defendant, "damage" and "injury" are sometimes interchangeably used; certainly, in the 527th section "injury to property" is spoken of, and in sects. 505 and 515 the words "loss or damage" must apply to all the cases mentioned in sect. 504, among which are loss of life and personal injury.

It is also to be observed that the Court of Queen's Bench seem to distinguish, in fine, between the difference of respect due to the Judicial Committee of the Privy Council as an appellate tribunal and that due to it in a question of prohibition. It is in the former character that I have to consider it.

It is not improper, perhaps, to remark in this place that the High Court of Admiralty had jurisdiction in a matter of personal assault committed on the high seas by a master upon a passenger. The action in such a suit was always described as in a "cause of damage." The decision of Lord Stowell on this subject will be found in the case of *The Ruckers* (4 Rob. 76).

Lastly, I think it worthy of consideration that the 7th and 13th sections of the Admiralty Court Jurisdiction Act must be read together, and then the result is that the High Court of Admiralty has jurisdiction over any claim for damage done by any ship, and that, wherever any ship or the proceeds are under arrest in that court, it has the same jurisdiction that the court of Chancery has by the Merchant Shipping Act, to which I have already adverted in the beginning of this judgment.

Upon the whole, I think it my duty to adhere to the decision of the Privy Council, and to reject the motion.

Solicitors for the plaintiff, *Gellatly, Son,* and *Wharton.* Solicitors for the defendant, *Stokes, Saunders,* and *Stokes.*

April 10 *and* 17, 1877.

The Aneroid.

Material men—Equipment—British ship—Lien—Purchaser with notice—Demurrer.

A material man, who supplies stores and materials for the equipment of a British ship, having no maritime lien, cannot enforce his claim against the ship in the hands of a subsequent purchaser thereof, even though such purchaser has notice at the time of purchase that the claim is still unpaid.

This was an action brought by Daniel Jones, a merchant, of Swansea, *in rem* against the British vessel *Aneroid* to recover, as appeared by the indorsement on the writ, "221*l.* 16*s.* 2*d.* for the part equipment and repair of the vessel *Aneroid* at the port of Swansea between the 24th Oct. 1874 and the 3rd Dec. 1874." Appearances were entered and bail given on behalf of Abraham Hopkins, as part owner, and T. R. Davison, as another part owner.

The plaintiff's statement of claim was, so far as material, as follows:

1. The *Aneroid* was and is a brigantine belonging to the port of Swansea, and the writ in this action was issued whilst she was under arrest of this honourable court.

2. In the months of October, November, and December 1874, the plaintiff was employed by Thomas Picton Richards and Samuel Browning Power, or one of them, to supply certain stores and materials necessary for the equipment of the said brigantine. The said stores and materials were accordingly supplied to the said brigantine, as part of her equipment, and all things were done and happened to entitle the plaintiff to be paid by the said Thomas Picton Richards and Samuel Browning Power or one of them 221*l.* 16*s.* 2*d.* for the equipping of the said brigantine as aforesaid, the said Thomas Picton Richards and Samuel Browning Power, or one of them, being then the owner or owners of sixty-four 64th shares in the said brigantine.

3. On the 22nd March 1875, John Roberts, William Evans, David Rees, and Robert Williams, trading under the style of the Tyrllandwr Company, became the owners of twelve of the said 64th shares in the said brigantine. At the time the said Tyrllandwr Company became owners of the said twelve 64th shares the said sum of 221*l.* 16*s.* 2*d.* was still due and unpaid to the plaintiff.

4. On the 21st Sept. 1876, the said Thomas Picton Richards and Samuel Browning Power transferred forty-three of the said 64th shares in the said brigantine to Abraham Hopkins, who has appeared as a defendant in this action. The said Abraham Hopkins on the same day mortgaged the said forty-three 64th shares to the said Thomas Picton Richards and Samuel Browning Power. At the time of the last-mentioned transfer, and at the time of the said mortgage, the said sum of 221*l.* 16*s.* 2*d.* was still due and unpaid to the plaintiff, and the said Abraham Hopkins had knowledge and notice of the same, and that the plaintiff claimed to be paid the same, and the said Abraham Hopkins thereby became owner of the said forty-three 64th shares subject to the said claim of the plaintiff.

5. The remaining nine 64th shares in the said brigantine were, on the 21st Sept. 1876, transferred to Thomas Rammohun Roy Davison, manager of the Swansea Bank (Limited), and were acquired by the said bank without knowledge or notice of the plaintiff's claim, and the plaintiff does not further prosecute his suit as against the said Thomas Rammohun Roy Davison or as against his interest in the said brigantine.

6. The said sum of 221*l.* 16*s.* 2*d.* is still due to the

plaintiff, and the plaintiff cannot obtain payment thereof without the assistance of this honourable court. The value of the said brigantine was increased by reason of the said equipment, and the persons who now are the owners of the said brigantine have derived benefit and advantage therefrom:

The plaintiff claims:

1. A declaration pronouncing for the claim of the plaintiff.

2. The condemnation of the defendant Abraham Hopkins and of his bail in such amount as the court may direct with costs.

3. Such further relief as the nature of the case requires.

To this statement of claim the defendant Abraham Hopkins demurred, upon the ground that the statement showed no right of action against the vessel *Aneroid* in the hands of her then present owners.

The plaintiff's points for argument were:

1. Because the defendants purchased the vessel with notice of the claim of the plaintiff.

2. Because the defendants cannot claim the advantage of the increased value of the vessel arising from the repairs without bearing the burthen of the cost of the repairs.

The defendant's points for argument were:

1. That the plaintiff has no maritime lien for the stores and materials supplied and claimed for in this action.

2. That any right or claim which the plaintiff may have against the *res* can have arisen only on the arrest of the *res*.

3. That such right or claim is subject to all rights and claims upon or against the *res* existing at time of the arrest in favour of persons other than those ordering or being personally liable for such supplies.

4. That the owners of the *res* at the time of the arrest are not shown to have ordered or to have been personally liable for such supplies.

5. That the holders of shares in a ship who have become *bonâ fide* transferees of such shares after supplies made and before arrest of the *res*, and who are not personally responsible for such supplies, have a right or claim upon and against the *res* existing at the time of the arrest, and taking priority of the claim of the person making the supplies.

6. That knowledge or notice of such supplies having been made does not affect the rights of such transferees.

7. That the statement of claim shows no right of action against the *Aneroid* in the hands of her present owners.

8. That such right of action is not given either by common or statute law.

April 10, 1876.—*J. P. Aspinall*, for the defendant Abraham Hopkins, in support of the demurrer.—There is no maritime lien. Prior to the passing of the Admiralty Court Act 1861 (24 Vict. c. 10), the plaintiff would not have been able to proceed in any way against the ship; his right, if any, exists under that statute only. This being a claim for equipping the *Aneroid*, the plaintiff proceeds under sect. 4 of the above Act, which provides that "the High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court." The right to proceed *in rem* therefore depends upon the wholly fortuitous circumstances of the ship being under the arrest of the court. This in itself is enough to preclude the idea of a maritime lien, which is a claim attaching to the *res* from the moment the obligation arises, and travelling with the *res* into whosesoever possession it may come: (*The Bold Buccleugh*, 7 Moore P. C. C. 267.) But, further than this, the question was raised and decided on the succeeding section of the Act, in *The Two Ellens* (1 Asp. Mar. Law Cas. 208; 36 L. T. Rep. N. S. 1; L. Rep. 4 P. C. 168). The 5th section of the Act provides that "the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales;" and it was held that, there being no maritime lien for necessaries supplied to a British ship prior to this Act becoming law, the 5th section gave no such lien, and that a mortgagee took precedence of the material man. In the course of the judgment in *The Two Ellens* (*ubi sup.*), the Judicial Commitee say with reference to the 4th section, "Now it certainly would be absurd to say that the question whether the mortgagee is or is not to take precedence over a person who had either built or repaired or equipped a ship, should depend upon the accidental circumstance whether some third person had happened to commence a suit in the Court of Admiralty and arrest the ship. That would certainly be a most irrational construction, and therefore it seems clear that that section at any rate does not give any maritime lien, but merely entitles the person who has done the repairs or built the ship to be paid out of the proceeds, in preference at any rate to the owner, to whom the proceeds would otherwise be given up." Then, there being no maritime lien, the claim of the plaintiff to be paid out of the *res* can only arise on the commencement of the action and the arrest of the ship therein, and consequently the claim of the plaintiff is subject to all the claims existing at the time of the arrest. In *The Two Ellens* (*ubi sup.*) the Judicial Committee says, "Therefore their lordships think that it is quite sufficient to say that, according to the true construction of the section, the *res*, the ship, does not become chargeable with the debt for necessaries until the suit is actually instituted, and *that all valid charges on the ship to which any person other than the owner of the ship, who is liable for the necessaries, is entitled, must take precedence.*" The defendant is not liable for the necessaries, and he has a valid charge upon the ship by virtue of his purchase. In *The Two Ellens*, the defendant intervening was a mortgagee only; here he is a purchaser; the position of a purchaser must be even stronger than that of a mortgagee, as it might be said that the security of the latter was improved by the supplies and repairs: whereas a purchaser pays over to the vendor, who is liable for the supplies, the full price of the vessel including the value of such supplies. It is admitted that a purchaser without notice of the material man's claim takes the ship without any liability attaching to it, but it is contended the defendant having had notice takes subject to the claim. There being no lien, the plaintiff can only support his contention by showing that he has some equitable right to be paid out of the *res*, and that such right existed at the time of the transfer to the defendant. But the position of things at the time of the purchase was that the plaintiff had no right as against the ship at all; his chance of even proceeding against the ship depended on the contingency of her arrest in another suit, which might never have happened. At the time of the transfer the plaintiff had (and still has) a right of action against the vendors of the ship, personally, but there is no rule of law or equity which makes the liability run with the chattel sold. A ship,

once clear of maritime liens, is not different from any other chattel, and may be sold without the purchaser taking over any of the vendor's liabilities in respect thereof. Take the instance of a carriage sent by the owner to a carriage builder's for repairs repaired, and left with him; if the owner chooses to sell the carriage to a third person to whom the carriage builder delivers it, informing the purchaser that the carriage has been repaired and the repairs are not paid for, the purchaser does not incur any liability in respect of the repairs; and as the builder has parted with possession, he loses all claim against the carriage or its purchaser. I submit that the Admiralty Court Act gives no right of action against the ship when it has passed out of the hands of the owners ordering the repairs, and that no such right arises in any other way.

G. Bruce, for the plaintiff.—The fallacy running through the defendant's contention is that he says that there is no equitable right to be paid out of the *res* unless it is founded on a lien. I admit the authority of *The Two Ellens* (*ubi sup.*), and that there is no maritime lien. If there were a maritime lien, the question of notice or no notice would be wholly immaterial, there being no lien, the question of notice is important. My whole contention is based upon what I say is the equitable right of a person having a claim or burden attaching to a thing to claim payment from a purchaser who takes with notice of the claim and takes the benefit of the supplies made by the person having the claim. There can be no doubt that the ship would be liable in the hands of her former owners; and I submit that the defendant having taken the ship with the knowledge of the plaintiff's claim, and having derived the benefit of the supplies, is bound in equity to discharge the debt due in respect thereof. Where a person receives a benefit he must bear the burden attached thereto. If the purchase-money can be said to include the value of the supplies, then I submit that the purchaser was bound to see that the value of the supplies was paid to the material man out of the purchase-money. The liability of purchasers with notice is indicated by Dr. Lushington in *The Alexander* (1 W. Rob. 288, 294) where, speaking of the earlier Act (3 & 4 Vict. c, 65, s. 6) giving jurisdiction over necessaries supplied to a foreign ship, he says, "Secondly, the court having this jurisdiction conceded to it, would be bound to exercise that jurisdiction equitably, and in so doing it would protect the interests of all persons having a *bonâ fide* lien upon the property, as for instance, subsequent purchasers without notice;" this indicating that purchasers with notice took subject to the claim. Again, the Judicial Committee in *The Pieve Superiore* (2 Asp. Mar. Law Cas. 319; 30 L. T. Rep. N. S. 887; L. Rep. 5 P. C. 482), speaking of the Admiralty Court Act 1861, say, "The arrest, however, there being no maratime lien, could not avail against any valid charges on the ship, nor against a *bonâ fide* purchaser," that is to say against a purchaser taking without notice; because, as I submit, a purchaser who takes with notice is not *bonâ fide* in the true sense of those words. In *Hooper* v. *Gumm* (L. Rep. 2 Ch. App. 282), it was held that a purchaser of a ship is bound to enquire into the vendor's title, and that if he fails to do so and there is any burden on the ship he is taken to be affected with notice and must bear the burden. Here there was distinct notice of the burden, and there was no better established rule that he who obtains the benefit of a contract must bear its burden.

Bristow v. *Whitmore*, 46 L. J. 467, *Ch.*;
2 White and Tudor's Leading Cases in Equity, p. 38, 2nd edit.

I submit that I have a claim to be paid, and that this court has jurisdiction to enforce that payment. [Sir R. PHILLIMORE.—Your claim was originally against the owners of the ship when the supplies were ordered, and now you say it goes with the ship, and that the defendant is liable. Must you not go the length of contending that the defendant is personally liable? How can the *res* be liable unless he is also liable?] I do submit that I might proceed *in personam* against the defendant and that he is personally liable; the attachment of the *res* is not necessary to entitle me to payment by the defendant. I have an equitable right which may be enforced either *in personam* or *in rem*.

J. P. Aspinall in reply.—The whole of the plaintiffs argument assumes that there is some debt or liability attaching to and going with the *res*. This is erroneous, as the plaintiff never has acquired any right to be paid out of the *res*. A vendor cannot acquire an equitable right to be paid his debt by a person with whom he never had any contract, expressed or implied. In this particular case the defendant took no benefit from the materials supplied, as they were two years old when he purchased his shares.

Cur. adv. vult.

April 17.—Sir R. PHILLIMORE.—This is a demurrer to the statement of claim. The statement of claim alleges that the plaintiff supplied certain stores and materials as part of her equipment to the brigantine *Aneroid*; that Richards and Power were then the owners, that they transferred forty-three sixty-fourth shares to Abraham Hopkins, the defendant, the other shares being otherwise disposed of; and that at the time of the transfer the vendee had notice that the plaintiffs account was still unpaid. It also alleges that the vessel was under arrest in some other action when this action was brought. The writ is *in rem*, and is endorsed for 221*l.* 16*s.* 2*d.*, and the claim is for the condemnation of the defendant and his suit in such amount as the court may direct, with costs.

The question is whether a person supplying materials for the equipment of a ship is entitled to payment out of the *res*, when that has been sold to a purchaser who has knowledge that the tradesman's claim is unpaid, but who purchases before any arrest of the ship. If this question be answered in the affirmative, it must be upon the ground that a tradesman has a lien which travels with the *res* after it has become the property of other owners. Now it was admitted that *The Two Ellens* (1 Asp. Mar. Law Cas. 208), was decisive as to there being no maritime lien. There is no question of an ordinary possessory lien. It is said there is an equitable lien, and certain cases were cited in support of this position. But in my judgment they do not support it. It would be difficult to see what principle of equity could render the purchaser—who, it must be presumed, had paid the full value of the repaired ship—liable for the debt of the vendee to the repairing tradesman, with whom the vendee had no contract at all. I do not think that the fact of notice being given

can create a lien which is neither maritime nor possessory.

I must pronounce for the demurrer with costs.

Solicitors for the plaintiffs, *Nelson, Son,* and *Hastings.*

Solicitor for the defendant, *H. C. Coote.*

May 5, 15, *and* 29, 1877.

THE HORLOCK.

Pleadings—Fraud — Demurrer — Merchant Shipping Act 1854. *sect.* 43—*Merchant Shipping Act* 1862, *sect.* 3—*Injunction to restrain dealing in shares of ships pendente lite—Supreme Court of Judicature Act* 1873, *sect.* 25—*Supreme Court of Judicature Act* 1875, *schedule* 1, *Order LII., rr.* 3, 4.

An original owner of shares in a ship cannot enforce his title to those shares against a registered owner who has purchased them bonâ fide for value from a person whose name was on the register as owner, even though such person had been registered through fraud on the original owner.

A statement of defence alleging fraudulent registration of the plaintiff's predecessor in title was demurred to, and the demurrer sustained, on the ground that a fraudulent registration on the part of an intermediate transferee is no defence to an action for possession by a bona fide purchaser for value, without notice of the fraud.

An injunction granted ex parte, on application of the plaintiff to prevent defendant dealing, and to restrain the registrar of shipping from registering any dealings, in shares of a ship the subject of a co-ownership action pendente lite.

THIS was a demurrer by the plaintiff to the defendant's statement of defence, in an action of co-ownership. The plaintiff, in his statement of claim, alleged as follows:

2. By a bill of sale duly registered on the 11th June 1867, the defendant; John Horlock, who was the sole owner of the above-named ship *Horlock* transferred to one Thomas Worraker, of Malden, in the county of Essex, thirty-two 64th parts of shares of the ship for the sum of 320*l.*

3. By a subsequent bill of sale duly registered on the 16th Dec. 1876, the said Thomas Worraker transferred his said thirty-two 64th shares of the ship to George Wright, the plaintiff; for the sum of 175*l.*

And after proceeding to allege that the defendant had had the entire management of the ship, and had not rendered proper accounts, claimed:

(1) That the court may direct the sale of the said ship *Horlock.*

(2) That an account may be taken of the earnings of the said ship, and that the defendant may be condemned in the amount which shall be found due to the plaintiff in respect thereof, and in the costs of this suit.

(3) Such further and other relief as the nature of the case may require.

To this statement of claim the defendant delivered a defence pleading *inter alia*:

2. The defendant further says that he never, at any time, signed any bill of sale transferring any shares whatever of the said ship *Horlock* to the said Thomas Worraker, and further says that if any such bill of sale was registered, as alleged, on June 11, 1867, in the said second paragraph (which the defendant denies), the same was made and registered fraudulently, and without the knowledge, consent, or authority of the defendant.

3 The defendant does not admit the allegations contained in the third paragraph of the statement of claim, and says, that if the said Thomas Worraker transferred any shares of the said ship to the plaintiff, as alleged (which the defendant does not admit), he did so wrongfully and unlawfully, and that he had not any possession of, or right to, or in respect of or concerning the said shares:

and proceeded to traverse the remainder of the statement of claim. On this defence the plaintiff joined issue simply.

May 5, 1877.—The cause came on for hearing.

On the bills of sale and a copy of the register being offered as evidence of the plaintiff's title, and proof being required of the signatures to them, and the circumstances under which they were given,

G. Bruce (with him *Poyser*), for the plaintiff, objected that sect. 43 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), made the register the only evidence of title necessary, and that it was not competent to the court to go behind the register to inquire into the circumstances under which an intermediate transferee got on the register. Even on the supposition that a previous transferee got on the register fraudulently, it is not alleged that the plaintiff had notice of the fraud, and he is a *bonâ fide* purchaser for value, and being registered owner, has a good title against all the world.

Hall (with him *Willis*, Q.C. and *F. W. Raikes*) for the defendant.—The statement of defence alleges fraud explicitly, and the plaintiff has merely joined issue on the charge of fraud, and that is the issue now to be tried. Sect. 43 of the Merchant Shipping Act refers only to the right of a "registered owner" to dispose absolutely of the shares in a ship; but we allege that the intermediate transferee of these shares, though registered, was never a *bonâ fide* owner of the shares, and could not therefore give a title under that section.

G. Bruce in reply.

Sir R. PHILLIMORE.—The question turns upon the construction of sect. 43 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), which has been referred to. I shall not decide this case upon the present pleadings, but it must be argued on demurrer to the statement of defence, so that the court may have the question fully discussed. I direct the question to be argued on demurrer, and adjourn the cross-examination of the witness I make no order as to costs.

On the application of the defendants both the bills of sale were ordered to be kept in the custody of the court.

The plaintiff entered a demurrer as follows:

The plaintiff demurs to so much of the defendant's statement of defence as alleges that the bill of sale registered on the 11th June 1867 was made and registered fraudulently and without the knowledge, consent, or authority of the defendant, and says that the same is bad in law on the ground that, as it is not alleged that the plaintiff was party to or had notice of the said matters alleged, the said matters alleged afford no defence to the action, and on the ground that the plaintiff having purchased from the registered owner the shares claimed for a valuable consideration, and without any notice of fraud, has a good and equitable title, and is entitled, notwithstanding the said matters alleged, to the relief sought for in this action, and on other grounds sufficient in law to sustain the demurrer.

It was admitted subsequently that the date assigned for the registration of the bill of sale was a mistake; that the date there given was that on which the bill of sale was alleged to have been executed, and that it was not registered till some time afterwards.

May 15, 1877.—*G. Bruce* and *Poyser* in support of the demurrer.—The plaintiff claims through Worraker, who had been on the register of the ship as owner of 32-64ths for years. Supposing the court has power to look behind the register in case of the alleged fraud of a person claiming title by it, it is at all events not competent to the court to inquire into the title of a person from whom the plaintiff purchased *bonâ fide* and without notice of any fraud or irregularity. Sect. 43 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) is express and gives a good title to a purchaser from a registered owner who has power "absolutely to dispose" of any ship, or share of a ship, of which he is a registered owner. Sect. 3 of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) makes no difference in this respect; it allows equities to be taken into consideration by the court in examining the titles of a registered owner, but the claim here is one which a court of equity would not have sanctioned. *Primâ facie* the register gives a good legal title, and a *bonâ fide* purchaser is not bound to make further inquiries when he sees that the vendor is registered owner. Fraud on the part of a person so registered does not make the transaction of registration void, but only voidable against him, and does not affect the position of a *bonâ fide* purchaser from him: (*White* v. *Garden*, 10 C.B. 919; 15 Jur. 630; 20 L. J., 166 C.P.) Where a person has acquired a legal title through a transaction which is only voidable, a court of equity will not interfere to avoid the contract when to do so would injure a *bonâ fide* purchaser, without notice, that is, if there has been some consideration, in itself legal, moving from him: (*Scholefield* v. *Templer*, 4 De G. & J. 429; *Heath* v. *Crealock*, L. Rep. 10 Ch. App. 22; 31 L. T. Rep. N. S. 650.) It is quite true that a title defective in itself cannot be strengthened by any fraudulent proceeding on the part of the vendee; but here the title is in itself good, and there is no allegation of fraud or a knowledge of any defect in it on the part of the plaintiff: (*Pilcher* v. *Rawlings*, L. Rep. 7 Ch. App. 259, 269, 274; 25 L. T. Rep. N. T. 721.) Supposing the sale from Worraker to the plaintiff to have been in itself invalid, that is, if the purchaser had been a party to any fraud, the mere fact of his registering himself as owner would not make the sale a valid one, nor give a good title to the ship: (*Orr* v. *Dickenson* (28 L. J. 516, Ch.; 5 Jur. N. S. 672), but that is not the case here. In *The Empress* (Swa. 160) Dr. Lushington set aside the sale of a ship to a *bonâ fide* purchaser, but then there was forgery on the part of the vendor, who, as a matter of fact, was never on the register at all. Another person of the same name was, and the vendor personated him, but was not in truth ever the registered owner of the ship, and so was not able to give an absolute title. The cases are all consistent with the result that when a person has acquired a legal title, the court will not interfere. In no single case has the court in examining the title of ships looked further than the names actually on the register, and the *bonâ fides* of the manner in which they came to be registered.

Willis, Q.C. and *F. W. Raikes* (with them *C. Hall*), for the defendant, in opposition to the demurrer.—The defence of fraud on the part of an intermediate transferee, is a perfectly good one. Cases which have been cited previous to the Merchant Shipping Act 1854, are no authority now. The tendency of the navigation laws and laws of registration previous to 1854, were to restrict to or protect commerce in British ships; and as an incident to that end, the dealings in British ships; for that purpose the 8 & 9 Vict. c. 89, s. 38, under which the earlier cases were decided served; but since the passing of the Merchant Shipping Act 1854, a different principle has governed the decisions. The Registration Acts were repealed by the Merchant Shipping Repeal Act 1854 (17 & 18 Vict. c. 120), and the question solely turns on the proper construction of the Merchant Shipping Acts at present in force. The effect of sect. 3 of the Merchant Shipping Act 1862, is to modify and explain the provisions of sect. 43 of the Merchant Shipping Act 1854. The judgment delivered by Pollock, C.B., in *Stapleton* v. *Hayman* (12 W. R. 317), expressly lays down that principle, and disposes of the cases cited as authorities by the plaintiff antecedent to that date. Before the amending Act of 1862, there was a doubt as to the power of the court to look behind the register, but that Act was passed expressly to set at rest that doubt. It preserves the form of the register given by the Act of 1854, but enacts that notwithstanding no notice can appear on the register of trusts, yet that the courts shall take cognisance of all equities arising. How can the courts take cognisance of equities which do not appear on the face of the register, except by going behind it? The case of *The Empress* (Swab. 160) was decided by Dr. Lushington under the Act of 1854, and is a case directly in point. It cannot be distinguished on the ground alleged by the plaintiff, that it was an absolute forgery; it was a fraud of the grossest description, but it was one of which the purchaser was absolutely ignorant, and yet he was declared to have acquired no title by registration after a *bonâ fide* purchase from a person whose name appeared on the register, and was dispossessed in favour of the father of the person from whom he had innocently purchased. [SIR ROBERT PHILLIMORE referred to *Follett* v. *Delany* (2 De G. & S. 235.)] That case was decided in 1848, under the repealed statutes. The fact that the present plaintiff was no party to the fraud, assuming it to be true, does not confer a good title on him; had he made proper inquiries he might have ascertained the circumstances under which his predecessor in title was on the register, the length of time during which the alleged first bill of sale remained unregistered was in itself so suspicious a a circumstance as to put him on his guard. They also referred to:

Donaldson v. *Gillot*, L. Rep. 3 Eq. 274;
Eyre v. *Burmester*, 10 H. of L. Cas. 90; 8 Jur. N. S. 1019; 6 L. T. Rep. N. S. 107;
White and Tudor, Lg. Cas. Eq. vol. 2, 6th edit. p. 25.

In addition to the cases cited above the following were referred to in the course of the argument:

The Margaret Mitchell, Swa. 382;
Holderness v. *Rankin*, 28 Beav. 180;
Holderness v. *Lamport*, 29 Beav. 160, 30 L.J. 487, Ch.;
The Innisfallen, L. Rep. 1 A. & E. 72; 12 Jur. N. S. 653; 35 L. J. 110, Ad.;
The Rose, 1 Asp. Mar. Law. Cas. 567; L. Rep. 4 A. & E. 6; 28 L. T. Rep. N. S. 291;
The Spirit of the Ocean, 34 L.J. 74, Ad.; 12 L. T. Rep. N. S. 239; 2 Mar. Law. Cas. O. S. 192;
Hooper v. *Gumm*, L. Rep. 2 Ch. Ap. 282; 16 L.T. Rep. N. S. 107; 2 Mar. Law. Cas. O.S. 258, 481;

Bell v. *Blythe*, L. Rep. 4 Ch. Ap. 136; 19 L. T. Rep. N. S. 662; 3 Mar. Law. Cas. O. S. 182.
Ward v. *Beck*, 13 C. B., N. S., 668.

Sir ROBERT PHILLIMORE—This is a case on demurrer, and it is necessary to make a short statement of the facts which were before the court on the former occasion.

It appears from the statement of claim that the *Horlock* was a sailing ship, trading between London and Ipswich; and by a bill of sale, duly registered on the 11th June, 1867, the defendant, John Horlock, who was then sole owner of the *Horlock*, transferred to Thomas Worraker 32-64th shares of the ship for the sum of 320*l*. It appears by the plaintiff's statement that by a subsequent bill of sale Thomas Worraker transferred his 32-64th shares in the *Horlock* to George Wright, the plaintiff, for the sum of 175*l*. Now the defendant states, amongst other things conveying a general denial of the allegation of the plaintiff, that he never at any time signed any bill of sale, transferring any shares whatever in the ship *Horlock*; that he never sold any shares to Thomas Worraker; and, if any such bill of sale was registered, or authorised to be registered, it was fraudulently so registered, and without his knowledge, consent or authority. Some evidence was taken before the court on the former occasion, when these averments underwent discussion, and the court suggested that the more expedient course would be to raise the question of law which appeared to result from the evidence on demurrer; and that suggestion being adopted by the counsel on both sides, a demurrer has been put upon the file of the court, and the question which I have now to decide is whether it be valid, or whether it should be rejected.

The demurrer is "to so much of the defendant's statement of defence as alleges that the bill of sale registered on the 11th June 1867, was made and registered fraudulently, and without the knowledge, consent, or authority of the defendant," and says "that the same is bad in law, on the ground that as it is not alleged that the plaintiff was party to or had knowledge or notice of the said matters alleged, the said matters alleged afford no defence to the action on the ground that the plaintiff having purchased from the registered owner the shares claimed for a valuable consideration, and without any notice of fraud, has a good legal, and equitable title, and is entitled, notwithstanding the said matters alleged to the relief sought for in this action, and on other grounds, sufficient in law to sustain the demurrer." It is to be assumed, therefore, for the purpose of discussing the validity of this demurrer, that the bill of sale was fraudulently entered without the knowledge of the defendant, and the question arises whether the plaintiff, who is to be assumed also to have purchased from the registered owner certain shares for a valuable consideration, and without notice of fraud, has a good legal and equitable title?

Now the section, the construction of which governs this case, is sect. 43 of the first Merchant Shipping Act (17 & 18 Vict. c. 104) which was passed in 1854. The words of that section are: "No notice of any trust, expressed, implied, or constructive, shall be entered in the register book, or receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any ship, or share therein, shall have power absolutely to dispose, in manner herein mentioned of such ship or share, and to give effectual receipts for any money paid or advanced by way of consideration.

Now, a great number of cases which the ingenuity and industry of counsel have furnished to the court have been cited, bearing upon the general question of fraud in analogous cases, but I hope it will not be considered any disrespect to the learning and industry of the counsel, to whom I am greatly indebted for their research, if I decline to enter into a consideration of those cases, because the material point in the case must turn upon the plain meaning of the section of the Act of Parliament to which I have referred; and in spite of all that has been said on the more colourable part of it, there is not much difficulty in its construction. I know of no case which has been cited to me to the contrary; at all events I am satisfied that the predominance of authority in the cases cited before me would sustain this proposition, that the person purchasing from an owner of registered property, for a valuable consideration, without any notice of fraud, and combining, therefore, a legal and equitable title, could not be divested by any court of that title on the ground of fraud to which he was no party, but between the person who appeared on the register as owner and another person. I should observe that the bill of sale is here upon the register.

Now, the law appears to be concisely laid down in the case of *Heath* v *Crealock* (L. Rep. 10 Ch. App. 22) in 1874, by the Appellate Court. The passage to which I am about to refer is what was said by James, L.J., upon the general question. He says: "with regard to the purchasers, it appears to me that there are two cardinal principles and rules of this court involved both on one side and the other. The first I take to be this—which in my opinion is a rule without an exception—that from a purchaser for value without notice this court takes away nothing which that purchaser has honestly acquired." That term in the judgment appears to govern this case. Here is a purchaser for value, without notice, honestly acquiring some interest in these shares. His Lordship goes on to say, "If the purchaser has got possession of a piece of parchment, or of property, or of anything else which he thought he was getting honestly, this court, in my opinion, has no right to interfere with him, and it would be, in my judgment, interfering with him if, by a form of decree directing a sale instead of a foreclosure or anything of that kind, it merely did indirectly that which it could not do directly, deprive him of possession of land or deeds in favour of the plaintiff." I do not know what words can more exactly apply to the present case, and I assume that to be a correct enunciation of the law; and if that be, generally speaking, a correct statement of the law, it is, if I may say so, *à fortiori* applicable to a case arising under the 43rd section of the Act in question, because the object of the Act, as it appears to me, was to give evidence of title by the name appearing upon the register.

It is not necessary that I should say that in no case would the court inquire into whether a bill of sale, as is alleged in this case, transferring shares had been registered in fraud. It is not necessary that I

should decide that question; but the question which I have to decide, and which I desire to be understood alone to decide, is that, assuming the purchaser in this case buying without notice of fraud, for a valuable consideration under this bill of sale, has become possessed of these shares, and also—which is a point that should not be omitted, but which I mentioned early in the course of the discussion—has put his name upon the register, in such case it is not competent to the court (and I use the phrase ordinarily used in this discussion) to look behind the register for the purpose of dispossessing an innocent purchaser, whose name is on the register. He combines, in my judgment, both a legal and equitable title which it is not competent for this court to dispossess him of.

I must, therefore, sustain the demurrer. The costs of the demurrer will be costs in the cause. Time allowed for appeal ten days.

May 29.—*Poyser*, for the plaintiff, moved *ex parte*, under the Supreme Court of Judicature Act 1873, s. 25 (36 & 37 Vict. c. 66) and the Supreme Court of Judicature Act 1875 (38 & 39 Vict. c. 77), sch. 1, Order LII., rule 4, for an injunction to restrain the defendants from dealing with the shares in the ship pending the trial of the action, and also to restrain the Registrar of Shipping of the port of London from entering any transfers or making any alterations in the register of the said ship, pointing out in support of his application that a *bonâ fide* purchaser of the shares of the defendant in the ship would on getting registered as owner have a good title, and possibly create prejudice to the plaintiff's right to enforce his claim, should he be held on the trial of the cause to be entitled to it. The plaintiff wished to sell the ship, so as to recover his claim from the proceeds; but he might not, even if the sale of the ship was ordered, be able to recover from the proceeds, should the ship or shares in her have been in the mean time transferred to a third party.

Sir Robert Phillimore.—I grant the application, the injunction to last for three months, subject, as the motion is *ex parte* and without notice, to any application that may be made by the defendant.

Solicitor for plaintiff, *F. B. Jennings.*

Solicitor for defendant, *J. T. Moss.*

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by H. Peat, Esq., Barrister-at-Law.

Friday, Feb. 2, 1877.

(Before James, L.J., and Brett and Amphlett, JJ.A.)

Re The Rio Grande do Sul Steamship Company (Limited).

Company—Winding-up—Maritime lien—Disbursements by master of ship—Ship owned by company in winding-up—Mortgagee in possession of ship—Leave to proceed in Court of Admiralty—Costs.

The master of a ship which belonged to a company, requiring certain necessaries for the ship's use, drew a bill of exchange upon the company in favour of the material men, and gave the same to them in payment of such necessaries. The bill was accepted by the company, but was dishonoured at maturity, and was paid by the master after an action had been commenced against him by the holder of the bill.

The company was subsequently ordered to be wound-up, and possession was taken of the ship by mortgagees.

An order was made in chambers on the application of the master giving him leave to proceed in the Court of Admiralty to enforce his maritime lien; but that order was varied at the instance of the liquidator, and the Vice-Chancellor ordered that the liquidator should pay 150l. into court to answer the master's claim, the master undertaking not to proceed to the Court of Admiralty, but without prejudice to any application by the master to increase that amount, if it should be insufficient:

Held, that as the court had no jurisdiction in the winding-up over the mortgagees of the ship, the order made in chambers giving the master leave to proceed in the Court of Admiralty was right.

Re The Australian Direct Steam Navigation Company (*L. Rep.* 20 *Eq.* 325), *distinguished.*

Held, also, that the master was entitled, not only to be repaid the amount paid by him on the bill of exchange with interest, but also to be paid his costs, charges, and expenses properly incurred in the winding-up, and that the fund in court must be increased to an amount sufficient to cover those costs, charges, and expenses; but that he was not entitled to the costs of consulting his solicitor whether he had any defence to the action brought against him on the bill of exchange.

Order of Bacon, V.C. varied.

This was an appeal from a decision of Bacon, V.C.

The facts of the case were as follows:

The Rio Grande do Sul Steamship Company (Limited) were the owners of the British Steamship *Conde d'Eu*, of which Captain B. B. Turner was the master, and which was mortgaged to Messrs. W. Hamilton and Co., of Glasgow, to secure 8000*l.*, and also a current account.

In July 1875, the ship being on a voyage from South America to London, touched at the port of Santa Crux, in the Island of Teneriffe, and the master requiring coals and other necessaries for the ship's service, obtained them from Messrs. Bruce, Hamilton, and Co. of that port, at a cost of 126*l.* 9*s.* 4*d.*, and, in order to pay for them he drew a bill of exchange for that sum upon the company in favour of Messrs. Bruce, Hamilton, and Co., and delivered it to them.

This bill of exchange was endorsed by Messrs. Bruce, Hamilton, and Co. to the order of George Bruce, and on the 4th Aug. 1875, was accepted by the company.

The bill fell due on the 6th Sept. 1875, and was presented for payment, but was dishonoured by the company.

On the 8th Sept. George Bruce applied for payment of the bill to Captain Turner, who was then in London. He at first refused to pay, and Bruce thereupon commenced an action against him. On the 17th Sept. however, he paid Bruce 129*l.* 6*s.* 5*d.* for the amount of the bill, with interest and costs, having consulted his solicitor in the meantime, and been advised that he had no defence to the action.

On the 16th Sept. the mortgagees took posses-

sion of the ship, and their solicitor wrote to Captain Turner, informing him of the fact, and stating that he might consider himself from that time in their employment as master of the ship, and from that time he received his pay as master from the mortgagees.

His solicitors afterwards applied to the mortgagees for repayment of the 129*l.* 6*s.* 5*d.*, and not receiving the amount, they threatened to take immediate proceedings in the Court of Admiralty to arrest the ship.

On the 21st Sept. an order was made by Bacon, V.C. for the winding-up of the company.

On the 23rd Sept. the solicitor of the mortgagees wrote to Captain Turner's solicitor, and called his attention to the decision of the Master of the Rolls in *Re The Australian Direct Steam Navigation Company* (L. Rep. 20 Eq. 325), as an authority that the proper course for Capt. Turner to adopt was to proceed in the winding-up, and not in the Court of Admiralty.

Accordingly, on the 28th Sept., Capt. Turner took out a summons in the winding-up, asking that the 126*l.* 9*s.* 5*d.*, and the amount of his costs of and incidental to the action, and of and incidental to the summons, might be forthwith paid in full out of the company's assets, or a sufficient security given by the liquidator for payment in full, or that the ship might be sold, and the amount of his disbursements and costs paid to him out of the proceeds of sale or that he might be at liberty to proceed in the Court of Admiralty against the ship, and, so far as might be necessary, against the company, and the liquidator and the mortgagees, or to take and pursue such other remedies in the Admiralty Court as he was entitled to.

On the 1st Oct. an order was made in chambers by the Chief Clerk that Capt. Turner should be at liberty to institute a suit in the Court of Admiralty against the ship, and so far as might be necessary, against the company and the liquidator, to recover the 126*l.* 9*s.* 5*d.*, and his costs of and incidental to the action and the summons, and of and incidental to the suit in the Court of Admiralty.

On the 5th Oct., on a motion made in the winding-up by the provisional liquidator to vary this order, Bacon, V.C., made an order that Capt. Turner undertaking not to institute a suit in the Court of Admiralty, the provisional liquidator or the official liquidator for the time being should, out of the first moneys that should come to his hands, pay the sum of 150*l.* into court to the credit of a separate account to answer Capt. Turner's claim, but that this payment should be without prejudice to any application Capt. Turner might make to increase the amount in case it should be insufficient to satisfy his claim.

In compliance with this order the 150*l.* was paid into court.

On the 4th Aug. 1876, Capt. Turner took out a summons in the winding-up to increase the 150*l.* to a sum sufficient to meet the taxed costs incurred by him in defending the action against him on the bill of exchange, and the costs of and incidental to the summons of the 28th Sept. 1875, and the proceedings subsequent thereto, and of and incidental to the motion of the 5th Oct. 1875.

This summons was adjourned into court, and came on for hearing on the 28th Nov. 1876, when Bacon, V.C., refused to allow Capt. Turner any costs of defending the action or of the summonses and other proceedings in the winding-up, but ordered that out of the 150*l.* standing in court, the sum of 126*l.* 9*s.* 5*d.*, with interest thereon at the rate of 5 per cent. per annum to the 31st Dec. 1876, should be paid to him, and that the residue of the 150*l.* should be paid to the official liquidator.

From that part of the order which refused to give him any costs, Capt. Turner appealed.

Fischer, Q. C. and *Stirling*, for the appellant.—The case of *Re The Australian Direct Steam Navigation Company* (L. Rep. 20 Eq. 325), upon which the Vice-Chancellor founded his decision, is in many respects distinguishable from the present case. Here the appellant had a valid lien before the commencement of the winding-up, and he obtained the leave of the court to institute a suit in the Court of Admiralty, while in that case the master of the ship proceeded without the leave of the court, and there were no mortgagees, but all the parties were before the court in the winding-up. The appellant was justified in taking the proceedings which he did in the winding-up, and therefore he is entitled to the costs of all those proceedings. He is also entitled to his costs of defending the action on the bill of exchange, and also the cost of consulting his solicitor whether he could successfully defend that action: (*Smith* v. *Howell*, 6 Ex. 730-6.) It is well settled that a master of a ship is entitled to a lien on the ship for his disbursements for necessaries supplied to the ship, and that his lien is paramount to everything but the lien of the seamen for their wages:

The Mary Anne, 13 L. T. Rep. N. S. 384; L. Rep. 1 Ad. & E. 13; 2 Mar. Law. Cas. O. S. 294;
The Bold Buccleuch, 7 Moore P. C. 267;
The Feronia, L. Rep. 2 Ad. & E. 65; 3 Mar. Law. Cas. O. S. 54.

It may be objected that this is a mere appeal for costs, but it involves a question of principle:

Cotterell v. *Stratton*, 28 L. T. Rep. N. S. 218; L. Rep. 8 Ch. 295.

They also referred to

Addison on Contracts, 1085.

Kay, Q.C., and *Speed*, for the respondent.—Except as regards the cost of the action on the bill of exchange, this is a mere appeal for costs in a matter which was within the discretion of the Vice-Chancellor. As to the action, the appellant, as drawer of the bill, was clearly liable, and was not justified in incurring any costs. And the decision of the Master of the Rolls in *Re The Australian Direct Steam Navigation Company* is a direct authority that costs should not be given to the appellant.

No reply was called for.

James, L.J.—Though it has been argued that this is merely an appeal for costs, it really involves an important question of law and principle.

The appellant drew a bill of exchange upon the company for expenses which, it was not disputed, were properly incurred by him on behalf of the ship. Beyond all question he had a lien on the ship for the amount of those expenses, and his lien was paramount to the claim of the mortgagees. The bill was dishonoured at maturity, and the appellant paid it, as he was bound to do. Thereupon he was minded to take proceedings against the ship in the Court of Admiralty, as he lawfully might do as against both the mortgagees and the company, who were the owners of the equity of redemption. In this state of things

he received a letter from the solicitors of the mortgagees, directing his attention to the decision of the Master of the Rolls in *Re The Australian Direct Steam Navigation Company* (L. Rep. 20 Eq. 325), where it was held that the proper mode of enforcing a maritime lien on a vessel belonging to a company which has been ordered to be wound-up, is by a proceeding in the winding-up, and not by a proceeding *in rem* in the Admiralty Court. The appellant acted upon the information thus given to him, and, in accordance with that decision, he took out a summons in the winding-up, varied as the circumstances of the case required, because the mortgagees were not parties to the proceedings in the winding-up. The court had no jurisdiction in the winding-up to summon the mortgagees before it, or to decide any question as between the appellant and them. Therefore he took out a summons, asking for an alternative order, either that his claim and costs might be paid or secured in the winding-up, or that he might be at liberty to institute proceedings in the Court of Admiralty. An order was accordingly made in chambers, on the 1st Oct. giving him leave to institute proceedings in the Court of Admiralty, and I feel bound to say that, in my opinion, notwithstanding everything that has been said to the contrary, that order was precisely the right order to make, unless the liquidator had then been able and willing to give the appellant sufficient security for the saitsfaction of his claim, and his costs, charges, and expenses properly incurred as an incumbrancer of the ship. It appears to me that that order was a right order, and that the appellant's costs of obtaining that order were costs properly incurred by him as an incumbrancer. Afterwards the liquidator took out a summons to have that order discharged, but the order has never been in fact discharged, and there has been no adjudication that it was not a right order. With all deference to the opinion of the learned Vice-Chancellor, it seems to me that the order of the 5th Oct. could only have been made with the consent of the parties, and that the effect of it was only to provide that the appellant's claim should be secured in another way. The Vice-Chancellor thereby ordered that 155*l.* should be brought into court by the liquidator to answer the appellant's claim, and the order was expressly made without prejudice to any application by him to increase the amount. So far from the Vice-Chancellor's order of the 5th Oct. being a judicial decision that the order made in chambers on the 1st Oct. was incorrect, it proceeded on the footing that it were correct, for the proceedings under it were stayed only upon the terms of the liquidator giving the appellant all that which he would have got in the Court of Admiralty. In that court his lien on the ship would have been held to include all costs, charges, and expenses properly incurred in enforcing it. It seems to me that the object of the order of the 5th Oct. was to bring into court a sufficient sum as a security for that which he would have been entitled to as against the ship.

The appellant is, therefore, entitled to be repaid the money paid by him on the bill of exchange, and to be paid his costs in the winding-up proceedings, that is to say, his costs beginning with the order made in chambers on the first summons and his costs of all subsequent proceedings, down to and including his costs of the present appeal.

As to the costs of the action against him on the bill of exchange, the Vice-Chancellor was of opinion that he could not be entitled to the costs of ascertaining whether he could successfully defend the action. The utmost he can have properly expended in that way would be 6*s.* 8*d.*, for asking his solicitor whether he had any defence. There will, therefore, be no order with respect to the cost of that action, but the Vice-Chancellor's order must be varied by giving the appellant his costs, charges, and expenses properly incurred of the proceedings in the winding-up, and if necessary the amount paid into court must be increased.

Brett, J.A.—I am of the same opinion.

The only reasonable costs of defending the action on the bill of exchange would have been 6*s.* 8*d.* for asking a question which any solicitor's clerk could have answered at once. As for the costs in the winding-up proceedings, when the master of the ship had paid the bill of exchange he was in the same position as if he had actually paid for the necessary disbursement for which the bill was given. The fact that here the mortgagees are in possession makes an important difference, and is sufficient to distinguish this case from the case before the Master of the Rolls; (*Re The Australian Direct Steam Navigation Company*, L. Rep. 20 Eq. 325.) That decision would seem to show that in a case like this it would be necessary to obtain the leave of the Court of Chancery to institute proceedings in the Court of Admiralty. Then, as the Court of Chancery had no jurisdiction in the winding-up over the mortgagees, the master of the ship could not obtain all that he was entitled to unless he proceeded in the Court of Admiralty. He was therefore, as a matter of law, entitled to have leave to proceed in that court. As a favour to the liquidator, the order giving him that leave was afterwards altered by the order of the 5th Oct., which, in my opinion, was practically a consent order, though in form it was not so.

The appellant is, therefore, entitled to be paid, not only what he has paid on the bill of exchange, but also his costs, charges, and expenses as a mortgagee in the usual way.

Amphlett, J.A.—I am of the same opinion.

Order of Bacon, V.C., accordingly varied.

Solicitor for the appellant, *Barnes* and *Bernard.*

Solicitor for the respondent, *Nicol, Son,* and *Jones.*

SITTINGS AT WESTMINSTER.

Reported by J. P. Aspinall, F. W. Raikes, and P. B. Hutchins, Esqrs., Barristers-at-Law.

Feb. 5 *and* 6, 1877.

(Before Mellish, L.J. and Baggallay and Bramwell, JJ.A.)

Keith and another *v.* Burrows and another.

Mortgage of ship—Rights of mortgagee—Freight.

The mortgagee of a ship is only entitled to such freight as is accruing due by a contract existing when he takes possession.

M. mortgaged his ship to plaintiffs. M. through P. bought a cargo in California on account of ship; bills of lading to P.'s order were drawn for a nominal freight of 1*s. per ton. During the voyage defendants, without notice of plaintiffs' mortgage, which was not registered, advanced money to M. on the security of the cargo. Defendants and M. sold the cargo to J. by a contract*

containing the following clause, "As cargo is coming on ship's account freight is to be computed at 55s. per ton, and invoice to be rendered accordingly." Defendants made further advances to M., who paid for the cargo, received the bills of lading, and handed them to defendants with an assignment indorsed of M.'s interest in "the within freight," expressed to be "at the rate of 55s. per ton, and not the nominal amount of 1s. per ton." Plaintiffs registered their mortgage. The ship arrived, and plaintiffs took possession and claimed 55s. per ton freight. Defendants by arrangement acquired J.'s rights.

Held (reversing the judgment of the Common Pleas Division), that the 55s. per ton was not really freight, but part of the price of the cargo, that there was no freight beyond 1s. per ton accruing when plaintiffs took possession, and therefore plaintiffs were not entitled to freight beyond 1s. per ton.

APPEAL from the judgment of the Common Pleas Division in favour of the plaintiffs on the following special case:

1. The plaintiffs are merchants carrying on business under the style or firm of James Wyllie and Co., in London. The defendants are corn-factors and brokers carrying on business under the style or firm of Burrows and Perks, in London. The action is brought by the plaintiffs who claim as mortgagees in possession of the ship *Stonehouse* to recover moneys alleged to have become due and payable in respect of freight from the defendants under the circumstances hereinafter appearing.

2. Mr. John Morison, of Billiter-street, trading under the style or firm of John Morison and Co., was, during the period covered by this case, the registered owner of sixty sixty-fourths of the *Stonehouse*, Mr. Bley, the captain, being the registered owner of the remaining four sixty-fourths.

3. On the 1st Dec. 1874, Morison executed a mortgage of his sixty sixty-fourths of the ship in favour of the plaintiffs to secure 7500*l.* and interest in account current, and any further sum which might become due.

4. The *Stonehouse* was at this time at San Francisco seeking employment, and the freight market being disorganised owing to a recent commercial failure, her captain, Bley, determined, rather than accept the low offers of freight which were being made in the thick of the crisis, to load a cargo of wheat "on account of the ship" hoping by its sale in England to realise a better margin than what was available as freight at the port of loading.

5. Accordingly a cargo of 23,644 sacks of wheat (being the cargo in respect of which the present claim arises) was obtained through Messrs. Parrott and Co., merchants at San Francisco, and shipped on board the *Stonehouse*. The invoice, dated the 2nd Dec. 1874, stated that the wheat was shipped by Parrott and Co. on board the *Stonehouse* bound to Falmouth or Downs for orders, consigned to order, that is to the order of Parrot and Co. (they, thus keeping control over the cargo until the money found by them for the purchase thereof should be paid) by order of John Morison and Co. for account and risk of whom it might concern.

6. Bills of lading were made out for the wheat deliverable to the order of and were handed to Parrott and Co., stating the freight payable on delivery to be 1s. per ton. Parrott and Co. simultaneously drew bills of Exchange on Morison at sixty days' sight against the wheat, to recoup themselves for the price of the wheat and their commission, and sold the bills of exchange with three bills of lading indorsed by Parrott and Co., attached thereto to the Bank of British North America.

7. It is a common practice in many places for foreign shippers, when a cargo is to be shipped "for the account of the ship," to draw bills of lading for a nominal instead of a blank freight, there being an opinion among merchants that a blank freight is not a desirable thing.

8. On or about the 3rd Dec. 1874, the *Stonehouse* sailed from San Francisco. The rate of freight general at this date at San Francisco was only 55s. per ton; but the plaintiffs were informed by Morison that they would receive 5000*l.* to 6000*l.* for the freight of the *Stonehouse*. The defendants, however, did not know that Morison had given the plaintiffs any information on the subject or that they had any interest in the ship.

9. On the 21st Dec. 1874, Morison accepted the bills of exchange payable at the London and County Bank on the 22nd Feb. 1875.

10. On the 1st Jan. 1875, Morison effected two policies of insurance in respect of the *Stonehouse* on freight valued at 4000*l.* and 1000*l.* respectively.

11. The sum necessary to meet the bills of exchange at maturity was 10,364*l.* 19*s.* 4*d.*; and at some time in December or the beginning of January it had been arranged between Morison and the defendants, that the defendants should advance to Morison the money necessary for the purpose, that the defendants in turn should be at liberty to sell the cargo, and receive the proceeds of sale on Morison's account, and that the bills of lading and policies of insurance should be deposited with the defendants as security for their advances.

12. Before making and carrying out this arrangement with Morison, the defendants searched the ship's register at the Custom House, and found that sixty sixty-fourths were registered in Morison's name, and that there was no incumbrance whatever on the register. The defendants had no notice in any way that Morison had mortgaged his shares in the *Stonehouse*.

13. On the 4th Jan. 1875, the defendants advanced to Morison 3000*l.*, and shortly afterwards, in pursuance of the arrangements then made, received from him the former of the two policies, being the policy on freight valued at 4000*l.*

14. On the 2nd Feb. 1875, Morison executed another mortgage in similar terms of his interest in the ship to the plaintiffs to secure 4000*l.* and further advances. Morison, subsequently on the 2nd March 1875, further mortgaged his interest in the *Stonehouse* to Joseph Harrold, who registered his mortgage on the 3rd March 1875, and thus became the first mortgagee, the plaintiffs not having registered their mortgages until the 6th March 1875, as hereinafter mentioned.

15. On or about the 16th Feb. 1875, the defendants offered the cargo of wheat for sale to divers persons on cost freight and insurance terms, but did not succeed in obtaining a purchaser until on the 19th Feb., they effected a sale of the cargo on the terms hereinafter appearing.

16. On the 19th Feb. 1875, the defendants, on

behalf of Morison and on their own account to the extent of their advances, sold the cargo to Henry Jump and Sons, of Liverpool. The following is a copy of the contract signed by Harris Brothers and Co., brokers, on behalf of the buyers:

London, 19th Feb. 1875.

Bought of Messrs. John Morison and Co., through Messrs. Burrows and Perks, for Messrs. Henry Jump and Sons, Liverpool, a cargo of Californian wheat of fair average quality, of the season's shipment when shipped.

Shipped per Stonehouse, first class, from San Francisco, bill of lading dated about 2nd Dec. 1874, say 23,644 bags, containing 3,089,775lb., at the price of 43*s.* 6*d.* per qr. of 500lb. shipped; bags weighed and paid for as wheat, including freight and insurance to any safe port in the United Kingdom of Great Britain and Ireland, calling at Falmouth or the Downs for orders. Vessel to discharge afloat. No charge for dunnage or bags. Payment cash in London within seven days, less discount for unexpired portion of two months from this date at 5 per cent. per annum in exchange for bill of lading and policies of insurance (free of war risk) effected with approved underwriter's, but for whose solvency sellers are not responsible. Damage by sea water or otherwise (if any) to be taken as sound.

Invoice quantity is to be final; sellers to pay our brokerage of ½ per cent., contract cancelled or not cancelled. Any average incurred before this date to be for account of and settled by sellers; sellers to give policies of insurance for 2 per cent. over the invoice, amount including the ½ per cent., and any amount over this to be for sellers' account; three days for waiting orders at port of call; to discharge according to the custom of the port. Should any dispute arise, it is agreed by buyer and seller to leave the same to be settled by two London cornfactors respectively chosen, with power to call in an umpire, whose decision is to be final.

As cargo is coming on ship's account, freight is to be computed at 55s. per ton of 2240lb., and invoice to be rendered accordingly.

HARRIS BROTHERS AND Co., Brokers.

17. The defendant would have had a difficulty in disposing of the cargo without allowing an amount equivalent to freight to remain unpaid until the vessels' arrival, and would not have obtained so large a price for it.

18. In accordance with the above contract an invoice was subsequently made out by Morison, of which the following is a copy:

Invoice of cargo wheat per *Stonehouse* at San Francisco sold to Messrs. Henry Jump and Sons, Liverpool, as per contract of 19th Feb. 1875:

	£.	s.	d.
23,644 sacks wheat, weighing 3,089,775lb. =6179$\frac{275}{500}$qrs., at 43s. 6d. per 500lb. ...	13,440	10	5
Freight on tons 1397 : 7 : 1 : 3, 55s. per 2240lb.	3,793	5	0
	9,647	5	5
Brokerage, ½ per cent.	67	4	0
	9,580	1	5
Interest from 26th Feb. to 19th April, fifty-two days at 5%	68	4	10
	£9,511	16	7

BURROWS AND PERKS.

London, 22nd Feb. 1875.

19. On the 22nd Feb. 1875 Morison obtained a further advance from the defendants of 9000*l.*, making, with the sum of 3000*l.* previously advanced, the sum of 12,000*l.* With such advance he paid the said bills of exchange at maturity, and received the bills of exchange and the bills of lading thereto attached from the London and County Bank, as arranged with the defendants.

20. On the 23rd Feb. 1875, in pursuance of such last mentioned arrangement, Morison handed the bills of exchange, with the three bills of lading attached, to the defendants, and the following memorandum was endorsed on the bills of lading, and signed by Morison:

We assign our interest in the within freight to Messrs. Burrows and Perks, London, whose receipt or that of their appointed agent, will be sufficient discharge. The freight assigned is at the rate of 55s. per ton, and not the nominal amount of 1s. per ton.

24th Feb. 1875. J. MORISON and Co.

Such endorsement, although dated the 24th Feb. 1875, was not really made and signed until about the 26th Feb.

21. At the same time Morison handed to the defendants the aforesaid invoice, made out in pursuance of the contract with Messrs. H. Jump and Sons for transmission to the buyers, together with a letter to the defendants themselves, dated the 25th Feb. 1875, and enclosing the policies therein referred to, which letter was as follows:

21, Billiter-street, 25th Feb. 1875.

Messrs. Burrows and Perks.

Dear Sirs,—We further give you in security policy of insurance on wheat 1500*l.* and on freights 100*l.*, both in the *Stonehouse*. Should this vessel be lost, we trust you will give us the collection on them as well as on the former policies.

J. MORISON AND Co.

Both of the above policies are in the Marine Insurance Company.

22. The invoice was duly forwarded by the defendants to H. Jump and Sons, who thereupon paid the balance thereon appearing of 9511*l.* 16*s.* 7*d.* in pursuance of their contract. The cargo was subsequently resold by Jump and Sons to Ross T. Smythe and Co, of Liverpool.

23. On the 6th March 1875, the plaintiffs duly registered their mortgages.

24. On the 13th of April, 1875, the *Stonehouse* arrived at Falmouth for orders. She was then taken possession of by Mr. Harrold and the plaintiffs, as first and second mortgagees respectively. Mr. Harrold's debt being more than secured by the ship, he had no claim to the freight. The *Stonehouse* proceeded in the possession of Harrold and the plaintiffs, to Liverpool, where she arrived on 19th April 1875, on which day Messrs. Lowless and Co, on behalf of the defendants, wrote a letter to the plaintiffs' attorneys, Messrs. Freshfields and Williams, as follows:

Dear Sirs,—We have a telegram that this vessel (*Stonehouse*) is now off the port, and that the market is a falling one. Should there, therefore, be any difficulty in obtaining delivery, the purchasers may repudiate their bargain, and a loss of 1000*l.* might easily be sustained, in addition to the charges for landing and warehousing—will you, therefore, please let us have your determination instantly. We are obliged to give you notice that our clients will seek to recover all damages sustained from Messrs. Wyllie and Co., and we have given you special notice of the circumstances, in order that our clients may be entitled to recover. We hope, however, that there will be no necessity for this.

LOWLESS AND Co.

25. The plaintiffs refused to allow Messrs. Ross, T. Smythe and Co., to take delivery of the cargo, except on payment of freight at 55*s.* per ton, and were prepared to protect themselves in the manner indicated in the Merchant Shipping Amendment Act 1862, but to avoid such detention of the cargo and the deterioration and the expenses which would have been the result of it, the following agreement was made between the plaintiffs and the defendants, through their respective attorneys:

It is hereby agreed between Messrs. Freshfields and

Williams, as representing Messrs. James Wyllie and Co., and Messrs. Lowless and Co., and representing Messrs. Burrows and Perks that 3500*l.*, being the amount of freight on the cargo of the ship *Stonehouse*, claimed by Messrs. James Wyllie and Co., as second mortgagees in possession of the *Stonehouse*, shall be paid into the London and Westminster Bank, in the joint names of Messrs. Freshfields and Williams, and Messrs. Lowless and Co., to abide the result of an action to be brought by Messrs. James Wyllie and Co., against Messrs. Burrows and Perks, who hereby admit for the purposes of the action, that they are the owners of the cargo under the bill of lading thereof, and liable to pay whatever freight may be due thereon. The action to be commenced within thirty days from this date and duly prosecuted. In the event of no action being brought within the time aforesaid, or of Messrs. James Wyllie and Co. not obtaining a verdict in the said action, the amount so deposited with any interest thereon is to be paid to Messrs. Burrows and Perks, or order; and in the event of Messrs. James Wyllie and Co. recovering a verdict for the said sum of 3500*l.*, or any part thereof, the amount of such verdict is to be paid to them or order out of the sum deposited, and the balance (if any) to Messrs. Burrows and Perks, or order. It is admitted, for the purposes of the said action, that the amount of freight specified in the bill or bills of lading has been tendered Messrs. James Wyllie and Co. to withdraw any stop which they may have put upon the goods on the money being deposited. Messrs. Burrows and Perks to have the same right of recovering interest on the sum to be deposited as if the money had been paid at the proper time into a wharfinger's hands under the provisions of the Merchant Shipping Amendment Act.

FRESHFIELDS AND WILLIAMS.
LOWLESS AND CO.

Dated 19th April, 1875.

26. It was subsequently found that freight at 55*s.* per ton amounted to 3577*l.* 5*s.* 7*d.*, and upon the execution of the agreement and the payment of the 3577*l.* 5*s.* 7*d.*, as subsequently agreed, instead of 3500*l.* into the London and Westminster Bank, the plaintiffs gave delivery of the cargo. The question for the opinion of the court (who were to have liberty to draw all inferences of fact) was, whether the plaintiffs were entitled to refuse delivery except on payment of freight at the rate of 55*s.* per ton, or whether any freight was due on the said cargo beyond freight at the rate of 1*s.* per ton. If the opinion of the court on either point should be in the affirmative, judgment was to be entered for the plaintiffs for 3577*l.* 5*s.* 7*d.* with costs; if in the negative, for the defendants.

The Common Pleas Division (Brett, Archibald, and Lindley, JJ.) gave judgment for the plaintiffs, and the defendants appealed.

The judgment of the court below is reported *ante* p. 280.

R. E. Webster for the defendants (*Thesiger*, Q. C., with him).—There is no freight payable on which the mortgagee can claim. He is not entitled to freight as shipowner until he takes possession. Suppose freight payable in advance, the mortgagee could then have no lien on the cargo. In *Brown* v. *Tanner* (18 L. T. Rep. N. S. 624; L. Rep. 3 Ch. 597) the mortgagee had taken possession of the ship before the freight became payable. A document creating freight of which the mortgagee can claim the benefit must be either a freight note or shipping document, or some kind of contract in respect of the carrying of the goods:

Mercantile and Exchange Bank v. *Gladstone*, 18 L. T. Rep. N. S. 641; L. Rep. 3 Ex. 233; 3 Mar. Law Cas. O. S., 89;
Howard v. *Tucker*, 1 B. & Ad. 712;
Gumm v. *Tyrid*, 33 L. J. 97, Q. B.; 34 L. J. 124, Q. B.; 4 B. & S. 680, and 6 B. & S. 298.

In the judgment of the court below the fact is not noticed that Morrison received the cargo, and dealt with it. [He was stopped by the court.]

Herschell, Q.C., for the plaintiffs.—As between mortgagor and mortgagee, upon the latter's taking possession, a contract to pay a reasonable freight arises. The law regards the enhanced value of the cargo as freight, because the ship, although carrying the owner's goods is really earning freight by enhancing the value of the cargo. That value can be insured as freight: (*Flint* v. *Flemyng*, 1 B. & Ad. 45.) Supposing that, in fact, during the voyage, the ownership of the goods becomes different from the ownership of the ship, why should not the freight follow the ordinary rule and go with the ship. When the owner of the ship ceases to be the owner of the cargo, you must deal with the question of freight as if the ownership had all along been distinct.

R. E. Webster in reply.

MELLISH, L.J.—As we have not heard any argument on the second point we are bound to assume that the plaintiffs have all the rights of a mortgagee of a ship who has taken possession of the ship; and these rights are, as it is well settled, these; he has a right to all the accruing freight which he finds accruing at the time he takes possession; and if he finds any cargo on board in respect of which freight has accrued, and on which the mortgagor has a lien, the mortgagee succeeds to that lien, and can enforce it in a court of law. And the question to be determined in this case is whether there was any accruing freight to which the mortgagees were so entitled.

It was argued by Mr. Herschell as the foundation of this case, that the mortgagee has a greater right than that, and that if the mortgagor had carried a cargo on his own account, which cargo the mortgagee found on board when he came to take possession, the mortgagee would be entitled to a lien on it for the freight as against the mortgagor, although it is obvious that in that case there is no contract of any kind, because the mortgagor would have carried the goods on his own account. Now I am clearly of opinion that the mortgagee has no such right. The mortgagee does not become the owner of the ship until he takes possession, and there is a clause in the Merchant Shipping Act (17 & 18 Vict. c. 104, sect. 70) to that effect. Mr. Herschell seemed to argue that he ought to have that right; but, assuming this was true as far as this particular case was concerned, that the mortgagee was mortgagee before the voyage commenced, he seemed to argue that the goods had, in fact, been carried in the mortgagee's ship. But that was an entirely accidental circumstance; the rights of the mortgagee would be exactly the same whether the mortgage happened to have been created prior to the commencement of the voyage or the very day before he took possession of the ship. Therefore it is not true that the goods have been carried in the mortgagee's ship; the ship was the mortgagor's until the mortgagee took possession, and the mortgagee has in my opinion no further rights than the purchaser of a ship has, the difference being that the purchaser takes a right to all accruing freight and to all profits of the ship from the time of the assignment and the transfer of the ship to him, whereas the mortgagee only has such right from the time he takes possession. Now, if the mortgagor were

carrying goods in his own ship, and nothing remained to be done with the goods except to land them, and he were to sell the ship and transfer it by bill of sale to a purchaser, can it be contended that there would be any freight to be paid to the purchaser in respect of the voyage that had been already performed? Therefore I am clear that the mortgagee has no right to the accruing freight, unless he can find a contract in existence at the time when he takes possession, by which freight was to be paid to the mortgagor.

Now we must examine the facts of this particular case. The goods were shipped in California on owner's account, but Messrs. Parrott did not part with the property of their goods in California, because they were to be paid by bills drawn by the master on London, but they took a bill of lading making the goods deliverable to their own order; and, therefore, it is quite clear that the property in the goods would never pass to Morison until the bills of exchange were paid. In the meantime there was a perfectly good contract to carry between Morison and Parrott, which was witnessed in the ordinary way by the bill of lading, making the goods deliverable on payment of a nominal freight. Now it is obvious why this was so, because otherwise Parrott would have had no good security for his goods; if he had inserted in the bill of lading the ordinary freight from California to England, he would have run the entire risk of any fall in price during the voyage; therefore he inserted a merely nominal freight, so that unless the fall in the price of wheat was so great that the price in England actually fell below what was its price in California, he would be secured. Now it was admitted by Mr. Herschell, and he could not but admit it, that as far as that contract was concerned, it was perfectly valid, and the security of Parrott never could be interfered with by the alleged rights of the mortgagee taking possession of the freight; and that if these bills had been dishonoured and never taken up, Parrott would have been entitled to have obtained the goods on payment of the nominal freight for his security, in order to obtain his purchase-money. That being the state of things while the goods were in the course of the voyage, Morison entered into a contract for the purpose of providing the money to take up these bills of exchange, and the nature of that contract is stated in the 11th paragraph of the case. The contract in substance is this, that in consideration of the defendants advancing the money necessary to pay off Parrott, they were to receive Parrott's security, and the bills of lading were to be assigned to them. Now there is not a question, as it appears to me, that it was perfectly competent to Morison to make that contract, and that the mortgagees of the ship could not interfere with it at all; when he came to borrow money for taking up the bills it was perfectly competent to him to put the persons who advanced it in the same position as Parrott was, namely, that they should have a security upon the entire price of the goods, subject only to the nominal freight.

But then we find that the defendants not only advanced the sum necessary to take up the bills, but they advanced a further sum upon the same security. And the whole case for the plaintiffs depends upon this, that it is said, by the blundering mode in which Morison and the defendants carried out that contract, they failed in giving the defendants the full security on the whole value of the goods; but, without the smallest necessity, made a new contract for the carriage of the goods for freight, so as to enable the mortgagees when they took possession of the goods to say, "that freight belongs to us, it is an accruing freight, we are entitled to it." Now this question depends entirely on the construction to be put on the document of 19th Feb. 1875. It was part of the arrangement that the defendants were to sell the goods; and accordingly they sold them in the ordinary way in which goods at sea are sold; they made a contract for cost freight and insurance, and there can be no question that this document is in substance a contract of sale by Morison, made through the agency of Burrows and Perks, the defendants, to Henry Jump and Sons. It begins "Bought of Messrs. John Morison and Co. through Messrs. Burrows and Perks for Messrs. Henry Jump and Sons, Liverpool, a cargo of Californian wheat," &c., which is as plain as anything can be, a contract for sale and nothing else, "Shipped per *Stonehouse* . . . . for orders." Now if it had stopped there it is perfectly plain that it would be a contract for the sale of the whole of this quantity of wheat at the rate of 43*s.* 6*d.* a quarter, which was to include cost, freight, and insurance, that is to say, the purchase-money was to be 43*s.* 6*d.*, and in respect of that purchase-money the purchaser was to be entitled to have the goods delivered to him, and was entitled to have policies of insurance, securing him against the risk of the goods being lost at sea, and the whole of that 43*s.* 6*d.* per quarter was to be purchase-money. But then it goes on "Vessel to discharge afloat," &c., "Invoice quantity . . . . whose decision is to be final." Now if the contract had stopped there it would be simply a contract in the ordinary way of sale for cost, freight, and insurance, and the only freight to be paid would have been the nominal freight; and the purchaser would have had to pay the whole of the rest of the price, except the nominal freight on transfer of the bill of lading and policies of insurance. But there is an objection to this, for when a man buys for cost, freight and insurance, he expects that there will be a considerable portion of the purchase-money to be devoted to the payment of the freight, and that it will not be necessary for him to pay that portion of the purchase-money until the goods actually arrive. Of course in the ordinary case of a contract for cost, freight, and insurance, it is all purchase-money as between the vendor and the purchaser, but a part of the purchase-money has to be applied in paying the freight which is alleged to be due from the vendor to the shipowner, and the charge on the goods which is necessary to be paid in respect of the same. Then, inasmuch as the purchaser would expect the ordinary amount of freight not to be paid until the ship's arrival, and only to be paid on the delivery of the goods this cause has been inserted (and the whole of the case in my opinion turns on the construction to be put upon this clause): "As cargo is coming on ship's account freight is to be computed at 55*s.* per ton of 2240lb., and invoice to be rendered accordingly." What does this mean? The object of it is perfectly plain; it is explained by the next paragraph (17). The object was that the purchaser might have the usual advantage of having a sum equal to the amount of the freight not pay-

able until the arrival of the ship and delivery of the goods; that is the sole object which the parties had to accomplish.

Now, the question is, is it freight although it is called freight? In my opinion it is not freight unless it involves a contract to carry. If there is no contract for the carrying of the goods, although you may call the sum to be paid freight, in my opinion it is not in point of law freight within the rule that the mortgagee is entitled to the accruing freight. Now, Mr. Herschell argued with great ingenuity and ability that it was a contract for freight for this reason: he said the goods are shipped on owner's account; there is no contract for carriage therefore at all, but whilst the goods are at sea if the shipper chooses to sell there is nothing to prevent him, being the shipowner as well as the owner of the goods; when he sells the goods that passes the property, and he enters into a contract for the carriage of the goods for freight; and it is said that there was a new contract for carriage from the time when the contract of sale was executed. Now, I am of opinion that is not the true effect of the instrument for this reason: the argument seems altogether to overlook the fact that it is quite incorrect to say that in this case there was no previous contract of carriage. There was a perfectly good contract of carriage contained in the bill of lading, and, as I have already shown, it was not a mere sham, as if the goods had been really the shipowner's own goods at the time he shipped them. A bill of lading under those circumstances is often executed, but still in point of fact it would be a sham, and would not be any evidence of any real contract whatever. If it operated as a contract it would only operate as a contract by way of estoppel. But that was not the case here. There was a perfectly good contract between Morison and Parrott as witnessed by these bills of lading, and the purchasers of the goods, Jump and Sons, were, according to the true construction of this contract, to have the bills of lading transferred to them as soon as the bills of exchange were taken up. Until the bills of exchange were taken up the goods remained in point of law the property of Parrott. The moment the bills of exchange were taken up the bills of lading were to be transferred to Jump and Sons, the purchasers, and they obtained the bills of lading, and they admitted the contract to carry, and if it had become necessary for them to maintain an action on the ground of the goods having been damaged by some fault of the shipowner at sea, or if he did not deliver them in the like good order and condition in which he received them, the damage not having been caused by any of the excepted perils, they could have maintained an action on the bills of lading under the Bills of Lading Act (18 & 19 Vict. c. 111.) And what could they want with a new contract to carry, the effect of which would be that there would be two contracts of carriage, one assignable, contained in the bill of lading, which Jump and Sons could and did transfer by transferring the bill of lading; and the other an untransferrable contract of carriage, because, not being contained in the bill of lading or in a negotiable document, it could not be transferred? therefore that would be a contract of carriage wholly without necessity, and the only reason for it is that they describe this sum, which is really purchase-money, as freight. I am of opinion that the court must look at what it really is, and what it really is is purchase-money. The real effect of the contract is simply this, that the purchase-money being 43*s.* 6d. per quarter, a certain sum is to be paid at once, and the remainder, namely, a sum amounting to 55*s.* per ton, is only to be paid on the arrival of the ship. That was the only object they had to effect, and the mere fact that they called the money freight ought not to prevent the carrying out of their object, particularly as the effect of not construing the contract in that way would be to deprive the defendants of the security which Morison was perfectly entitled to give them, and which they have got. That being the true construction, Morison, no doubt for the purpose of securing the defendants, executes the instrument set out in paragraph 20 of the case. There, again, the money is called freight, but its being called freight cannot alter the real nature of the thing; it still was part of the purchase-money, and nothing else; it was part of the value of the goods which, by previous arrangement with the defendants, Morison had agreed should be assigned to them in consideration of their lending him the full amount of the purchase-money, and enabling him to take up the bills. Then the defendants had advanced the rest of the money to pay the bills, and some sum beyond, and to secure them they were to receive the rest of the purchase-money, and this assignment, though they call it freight, is for that purpose, as is shown by this, that it expressly authorises Jump and Sons to pay this sum, which they call freight, to Burrows and Perks. Therefore, though it is perfectly true that there was a cargo on board, and that Morison had a lien on that cargo in respect of the sum of money to be paid on its delivery, in my opinion he had that lien, not as shipowner in respect of freight due to him on the contract of carriage, but as being the unpaid vendor for that portion of the purchase-money.

That being so, I am of opinion that there was no freight except the nominal freight on the bills of lading; there was no accruing freight in respect of the cargo at the time when the mortgagees took possession. Therefore, I am of opinion that as there was no accruing freight the court was not bound to construe this as being a contract for freight for the purpose of giving the mortgagee of the ship a better security to the prejudice of the defendants.

BAGGALLAY, L.J.—I am entirely of the same opinion, for the same reasons.

BRAMWELL, L.J.—I am entirely of the same opinion.

A mortgagee or shipowner taking possession of a ship before the voyage is ended, and finding goods on board which have been carried on the terms that freight should be paid, and on which there is a lien, is entitled to that freight, and so the plaintiffs were here. The question is whether they were entitled to 1*s.* per ton or 55*s.*; in my judgment they were entitled to 1*s.* only. Now, freight supposes a contract, and two parties to it, a debtor and a creditor; the one who is to carry the goods, and the other who is to pay freight for them. Is that the case here? Mr. Herschell says, "Yes, it is; there has been a contract of carriage entered into between these two parties, Morison, the shipowner, and Jump and Sons the buyers of the goods, and it was this contract, "that whereas my ship and the cargo on board are now in mid-ocean,

I will undertake to carry the goods from wherever they are in that ship, and deliver them to you, Jump, at a freight of 55*s*., putting myself in the situation of a carrier, the voyage commencing wherever the ship may be at the time the contract of sale is entered into, and putting you in the situation of the freighter." That is a very ingenious argument, but it is wholly unfounded in fact, and it results from looking at a word instead of looking at the substance of the thing. There really is no pretence for saying that in reality there was a contract for carriage between these two parties, so that Jump would be entitled to say, "I gave you 55*s*. a ton; you have not performed your contract of carriage duly because something has been done wrong by the captain and the sailors, which has damaged my goods, not within the excepted perils." There was no such intention in their minds, but they have used the word "freight," for a reason which is obvious, because when a person buys a floating cargo, as a rule, if it is not the cargo of the shipowner, he does not pay the freight unless the cargo arrives, and does not pay it until the cargo arrives. Therefore, Jump and Sons desired to purchase the cargo upon the same terms as they would have done if Morison had not been the shipowner. That is why this is put in, and it is so stated. Suppose, instead of putting in the word "freight" they had put in "a sum to be in the light of "freight," or some such expression (that is to say, the sum not to be payable unless the ship arrives, and only when the ship does arrive), "shall be taken at 55*s*.," what then? The word "freight," which is the very word that has given rise to this controversy, would not have existed, but they use the word, as is commonly done, by people not foreseeing the mischievous consequences which may arise from want of precision in their expressions. The truth is that this is a contract for the sale of goods. If, as Lord Justice Mellish says, Jump and Sons had resold the cargo (which they did), the same expression would be used; and yet would it be pretended that the purchaser of the cargo intended to enter into any contract of affreightment, or for paying freight as such? And what difference is there that in this case the purchase is from Morison? And why should we put a different interpretation upon this contract to what we should upon any other contract for the purchase of goods from a shipper who was not a shipowner?

Now any lien that the defendants or Morison would have had in this case would, in my opinion, have been a lien for freight to the extent of 1*s*. per ton only, and as to the rest, a lien as an unpaid vendor of the goods. And it should be remembered, in considering this case as to the interpretation of this contract, to which the plaintiffs are no party, that the defendants' title had accrued. The sale was on the 19th Feb., and the bills were not paid until the 22nd, but the agreement between Morison and the defendants, under which the title accrues, was some time in December or the beginning of January, as is seen in paragraph 11, and accordingly, on the 4th Jan. the defendants advanced to Morison 3000*l*., and shortly afterwards, in pursuance of the arrangement then made received the policies, so that the defendants' title accrued certainly as early as the 4th Jan.; and at that time, of course, they would have been entitled to say to Morison, "You shall not sell upon any terms to make a larger sum than 1*s*. per ton payable for freight." They would be entitled to say so obviously, or they would have lost their security. If that be so, the suggestion is that the defendants nevertheless have flung away security to the extent of upwards of 3000*l*. I am of opinion that is not so, and that there was no contract of freight here except for the 1*s*. per ton. And it is a convenient thing that we should hold this to be so, because, although no doubt it may be very useful that people should be encouraged to lend money on mortgage of ships, yet, if they choose to leave the mortgagors in possession, it is also very desirable that the mortgagors should have the power to deal with the ships in the most advantageous way; and there can be no doubt that occasionally it is very advantageous that shipowners who cannot get a freight should themselves have a mercantile venture, as in this case. Now Parrott in this case would not have shipped unless there had been this margin, for the reasons given, and the defendants would not have taken up these bills unless they knew there was a safe margin. They knew they could get Californian wheat here freight free, which was a guarantee against any loss, unless there was a very outrageous fall indeed. Now, suppose these bills had been dishonoured, what freight would have been payable then? Suppose the defendants had not advanced the money to take them up, though the contract of sale had taken place, the shipper's agent in that case would have been only held liable for 1*s*. per ton; then why should the defendants be liable for more?

Upon those grounds I am of opinion that the judgment should be reversed.

But there is another point to which I should like to call attention. (It is respectful to the court below to say that this matter in their judgment was almost assumed, and as it seems to me without adequate reason being given for it.) The cases show that freight cannot be assigned as against the mortgagee of the ship, that is to say, if Morison had been minded to raise money upon his right to the 1*s*. freight, he could not have done so to the injury of the mortgagees. But this is not an assignment of freight. I think, as I have said already, that it is not a creation of freight at all, but, assuming that freight was created, we must take it that it was created by a contract between Morison and Jump and Sons, by which Jump and Sons are to pay freight not to Morison but to the defendants. It is not the case therefore of assigning freight and giving an equity, but it is a case of making a sort of trilateral bargain, by which, to my mind, the defendants would be entitled to the freight from Jump and Sons. It seems to me that although if the 55*s*. freight had previously been brought into existence it could not have been assigned to the detriment of the mortgagees, yet it might be brought into existence upon the terms that Morison should never have it, but the defendants should. I am of opinion that there was no contract of carriage except for 1*s*. per ton, and if in any point of view it can be said there was, the freight was brought into existence to be paid not to the shipowner but to the defendants.

Judgment reversed.

Solicitors for plaintiffs, *Freshfield* and *Williams*.
Solicitors for defendants, *Lowless* and *Co*.

(Before James, Baggallay, Bramwell, and Brett, L.JJ.)

April 30 *and May* 1, 1877.

Turnbull and others *v.* Janson.

Marine insurance—Warranty of seaworthiness—Vessel built for inland navigation—Insurance for ocean voyage.

Where a vessel built for inland navigation is insured for an ocean voyage there is an implied warranty that she shall be made as seaworthy for the voyage as such a vessel can be made by ordinary available means.

A steamer of light construction, built for inland navigation in Trinidad, was insured for the voyage out. On the voyage she broke in two at sea, and went down. In an action on the policy the jury found that the vessel was not seaworthy as an ocean going vessel, and was not made as seaworthy as she might have been by ordinary available means.

Held, affirming the judgment of Cleasby, B., that on these findings the defendant was entitled to judgment.

Appeal from the judgment of Cleasby, B. at the trial. The action was brought on a valued policy of insurance, "at and from Clyde to Trinidad, and while in port for thirty days after arrival thereat, including risks of trial trips," on the steamer *Mary*, to recover for a total loss. The defendant pleaded unseaworthiness, that the ship was not lost by the perils insured against, and misrepresentation and concealment. The vessel was described as follows in a letter written on the 22nd Sept. 1874 by the plaintiffs' firm to the brokers employed to effect the insurance, and shown by them to the defendant: "This is a new passenger steamer of light draught such as *Arthur*, *Alice*, &c., dimensions 210ft. long, 25ft. broad, and 8ft. 6in. deep. . . . . She is strong with iron hull and deck, and will be made snug in every respect." The brokers also, in consequence of another letter received from the plaintiffs, told the defendant that she was very strong in scantling. The *Mary* was built for navigation in shallow water, being intended to carry mails and passengers in the Gulf of Paria, which is an almost land locked gulf in the Island of Trinidad. Her draught of water was only 2ft. 3in., and this fact was not expressly communicated to the defendant. The *Arthur* and the *Alice* were vessels which had been previously built for similar employment to that for which the *Mary* was intended, and had been sent out to Trinidad. The *Arthur* drew 3ft. 6in. of water and the *Alice* 2ft. 7in. The premium charged by the defendant was 40*s.* per cent.; for a large sea going steamer the premium would not have been more than 20*s.* per cent. for the same voyage. By the terms of the policy the vessel was warranted to sail on or before the 15th Oct. 1874. The *Mary* sailed from the Clyde on the 14th Oct.; owing to heavy weather she put into Belfast Lough, and afterwards into Kingstown Harbour. She left Kingstown on the morning of the 19th Oct., and proceeded on her voyage, until about 4 p.m. on the 21st, when she suddenly broke in two in the open sea, and immediately went down. The weather was fine at the time, and there was not a great deal of wind, but rather a heavy sea. At the trial, which took place in December 1876, at Guildhall, before Cleasby B. and a special jury, a number of witnesses were called on both sides who gave evidence as to the strength of the vessel and as to the means which were adopted to strengthen her for the ocean voyage, and as to what other means might have been adopted for that purpose.

The following are the questions which the learned judge left to the jury, and the answers which the jury gave to them:

1. Was the vessel proposed for insurance correctly described as very strong in scantling, having regard to the particulars given in the letter of 22nd Sept.? Yes.

2. Was the draught of the vessel, 2ft. 3in., a fact material to the risk in this case, in addition to the facts communicated to the underwriters? No.

3. Were the facts stated to the underwriters equivalent to the statement that the vessel had a draught of 27in.? Yes.

4. Was the vessel seaworthy as an ordinary ocean-going sea vessel? No.

5. Was she made as seaworthy as she might have been by ordinary available means; No.

6. Was the loss of the vessel caused by the unseaworthiness of the ship, or by any perils of the sea? Perils of the sea.

On these findings the verdict was entered for the defendant.

Sir *Henry James*, Q.C., and *Watkin Williams*, Q.C. (*J. C. Mathew* with them) for the plaintiffs.—The warranty of seaworthiness for an ocean voyage is not to be implied in a case like this where everything is known and disclosed. It was brought to the knowledge of the underwriters that this was a vessel intended for inland navigation, and they were content to take the risk with that knowledge. The reason why a warranty of seaworthiness is implied in a voyage policy is explained by Maule, J., in *Gibson* v. *Small* (4 H. L. C., at p. 388), where he says: "It appears to me that the foundation of the admitted rule that in a policy on a voyage there is an implied condition or warranty that the ship was seaworthy at the beginning of the voyage is that the parties to the policy are to be considered as contracting with reference to what is usual and of course in the transaction which is the subject of the policy: and that it is usual and a matter of course to make a ship seaworthy before the commencement of a voyage." This reasoning does not apply to an exceptional case like the present. In *Burgess* v. *Wickham* (1 Mar. Law Cas. O. S. 303; 3 B. & S 669; 33 L. J. 17, Q. B.), which was a case of a vessel very similar to this, the plaintiffs were held entitled to recover, although she was not seaworthy as an ocean going vessel The expression used by Cockburn in that case (3 B. & S., at p. 680) that the "underwriter is entitled to expect that the ship would be as seaworthy as it could be," is only an *obiter dictum*. There is no implied warranty that the owner is bound to use all possible means to strengthen the ship. The reasons given in the House of Lords in *Dudgeon* v. *Pembroke* (*ante*, p. 393; 36 L. T. Rep. N. S. 382; L. Rep. 2, App. Cas. 284) to show why there is no implied warranty of seaworthiness on a time policy apply also to a case like the present. [James, L.J.—Can you say that there is no implied warranty of seaworthiness at all?] They also referred to

Arnould on Marine Insurance, vol. 2, part 2, c. 4.
2 Duer on Marine Insurance, 566.
Clapham v. *Langton*, 2 Mar. Law Cas. O. S. 54; 5 B. & S. 729; 34 L. J. 46, Q. B.; 10 L. T. Rep. N. S. 875.

[Brett, L.J., referred to *Biccard* v. *Shepherd* (14 Moore P. C. Cas. 471; 5 L. T. Rep. N. S. 504).]

Butt, Q.C., *Cohen*, Q.C., and *Macleod* for the defendant, were not called on.

James, L.J.—I am of opinion that the point in this case is settled by the decision in *Burgess* v. *Wickham* (*ubi sup.*), and it is settled according to common sense and sound principle. The facts there were nearly the same as the facts in this case. It must be held that there is in every voyage policy an implied warranty of seaworthiness, but in that case a distinction was made in favour of the shipowner, for the court said that it was not an inflexible warranty, but must be considered with regard to the subject matter of the insurance, and looking at the nature of the ship, or of the voyage it might be limited to a certain extent. As Blackburn, J. said, it is a warranty *secundum quid*. That exception was introduced in favour of the shipowner, and here it is tried on behalf of the shipowner to extend the limitation so as to make it amount to an absolute exclusion of the warranty of seaworthiness in the present case. I put the question in the course of the argument whether the contention on the part of the plaintiffs was meant to go as far as that, but I could get no direct answer. According to the true meaning of the argument it is said that there was no warranty, but we cannot carry the limitation of the general doctrine to that extent. The proper qualification, which is expressed in *Burgess* v. *Wickham*, and on which the question put by Cleasby, B. to the jury is founded, is that the ship need only be as seaworthy as such a ship ought to be made for such a voyage. It is true she was meant to pass her life in a gulf when she got to Trinidad, but she had to get there, and she ought to have been made as seaworthy as she reasonably could be made for the voyage out there, which was the voyage for which she was insured. I am of opinion that the question put to the jury was right, and their finding excludes the plaintiff's contention.

Baggallay, L.J.—I am of the same opinion for the same reasons.

Bramwell, L.J.—I am of the same opinion, and for the same reasons certainly, but I wish to add a few observations with regard to the difficulty that has been raised as to the introduction of parol evidence.(*a*) This is an insurance of a particular vessel, and I think the policy may be read as if the vessel were described in it as well as named, and if that were done why should there be no warranty of seaworthiness? What would there be in the terms of the policy inconsistent with a modified warranty of seaworthiness, and why must not that vessel which is named or described in the policy be made as seaworthy as such a vessel can be made for the voyage for which she is insured? I think the expression used by Cleasby, B. in leaving the case to the jury was a happy one, and where is the contradiction between the words which he used and the terms of the policy? It is true that the vessel need not be made as seaworthy as an ocean-going vessel ought to be for such a voyage, but if the argument for the plaintiffs were correct the consequences which would follow would be absurd, for the vessel might go to sea without a compass, if a compass would not be required in the gulf where it was intended that she should be used when she got to Trinidad, or with a crew which would be enough for what she had to do out there, but would be too few for the ocean voyage. These are unreasonable consequences, and there is no reason why they should exist, and there is nothing to exclude the warranty of seaworthiness, which is an ordinary incident of a voyage policy. If the question were whether in her permanent build she had to be built more strongly, because she was built in this country than she would have been if she had been built at Trinidad, I should have some misgiving and doubt, but that is not the objection taken here. The defendant here says that the plaintiffs did not make the vessel stronger by temporary practicable means, that is by putting in temporary strengthening for the voyage, which could be removed afterwards. I am of opinion that there is a warranty of seaworthiness here just as much as there is a warranty to take out a sufficient crew for the voyage, and both on reason and authority the defendant is entitled to judgment.

Brett, L.J.—If this had been the first time the present question had been raised, I should have wished for the assistance of Mr. Butt and Mr. Cohen to enable me to arrive at a right conclusion, but the point has already been discussed in *Burgess* v. *Wickham*, in *Clapham* v. *Langton*, and in *Dudgeon* v. *Pembroke*. I am of opinion that in every voyage policy, unless the contrary is expressed, there is an implied warranty of seaworthiness. There is not such a warranty in a time policy, unless it is expressly so stated. All voyage policies are in the same general terms, but the warranty is probably implied from custom, because it is held that all reasonable shipowners and underwriters would contract on such an understanding. But however it arose, now, as a matter of law, every voyage policy contains a warranty of seaworthiness, unless it is otherwise expressed. The warranty is to be applied to the subject-matter of the particular policy, and there are different degrees of seaworthiness: it varies according to the place, according to the voyage, according to the time of year, according to the nature of the cargo, and of the ship herself, and it must be fulfilled so far as a ship of the kind insured in the particular policy can be made to fulfil it. If a ship of twenty-four tons is insured for a voyage from Liverpool to New York, she cannot be made seaworthy in the same degree as a ship of 400 tons sailing on the same voyage would be, but she must be made as seaworthy for the voyage as a ship of twenty-four tons can be made, and the same would apply to vessels of the class of the vessel in the present case. The plaintiffs were not asked to make her another vessel, but only to alter her for the voyage. There are means of strengthening her for the voyage so as to leave her the same kind of vessel, and the evidence shows how easily this could have been done. It was done in *Burgess* v. *Wickham*, and in *Clapham* v. *Langton*, and the jury have found that it could easily have been done here, but the plaintiffs did not do it, and therefore did not fulfil the warranty. Blackburn, J., in *Burgess* v. *Wickham*, states the law upon this question, and that judgment is affirmed by the decision of the Court of Exchequer Chamber in *Clapham* v. *Langton*. We could not decide in favour of the plaintiffs here without overruling both these cases,

(*a*) See *Clapham* v *Langham* (*ubi sup.*).

and therefore, I am of opinion that the defendant is entitled to judgment, and the decision of Cleasby, B., ought to be affirmed.

Judgment affirmed.

Solicitors for plaintiffs, *Parker* and *Clarke*.

Solicitors for defendants, *Waltons*, *Bubb*, and *Walton*.

May 2, *and June* 2, 1877.

(Before James, Baggallay, Bramwell, and Brett, L.JJ.)

The Franconia.

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

Collision—Lord Campbell's Act—Admiralty Court Act 1861—*Action in rem—Jurisdiction.*

On appeal from the decision of the Probate, Divorce, and Admiralty Division (Admiralty) refusing a motion to set aside so much of a writ of summons in rem as claimed compensation for the loss sustained by the plaintiff, in consequence of the death of a person of whom she was administratrix, and who, whilst serving on board a British ship, had lost his life through a collision between his vessel and a foreign ship on the high seas, caused by the negligence of those on board the foreign ship.

Held, per James and Baggallay, L.JJ. (approving the decision of the court below), that the judge of the Admiralty Division has jurisdiction to entertain a suit in rem under Lord Campbell's Act (9 & 10 Vict. c. 93).

Per Bramwell and Brett, L.JJ. (disapproving the decision of the court below) that the jurisdiction given by the Admiralty Court Act 1861, *s.* 7 *does not include claims under Lord Campbell's Act.*

The court being equally divided the decision of the court below remains, and the appeal is dismissed with costs.

This was an appeal from the Probate, Divorce, and Admiralty Division (Admiralty) in which, following the opinion of the Judicial Committee of the Privy Council in *The Beta* (L. Rep. 2 P. C. 447; 20 L. T. Rep. N. S. 988), the learned judge decided that he had jurisdiction to try a cause instituted *in rem* against a foreign vessel by the representatives of a person on board a British ship killed by a collision on the high seas occasioned by the negligence of those on board the foreign vessel, and refused a motion to set aside so much of a writ of summons *in rem* as claimed damages for loss of life. The arguments and judgments in the court below will be found fully reported *ante*, p. 415. On the 2nd May 1877 the appeal came on for argument.

Benjamin, Q.C. and *Cohen*, Q.C. (with them *Phillimore*) for the appellants, defendants below.—This is an action under the special statute, usually called Lord Campbell's Act (9 & 10 Vict. c. 93), that Act gave no jurisdiction to the Admiralty Court in such a case and certainly none to extend its peculiar jurisdiction *in rem*. The statute can only apply to British subjects, and to those within the jurisdiction of the Crown of Great Britain at the time the cause of action arose, and therefore owing an allegiance permanent or temporary to its laws. It has already been decided that in this case those on board the *Franconia* were not within the jurisdiction: (*Reg.* v. *Keyn*, L. Rep. 2 Ex. Div. 63; L. Rep. 2 Q. B. D. 90.) The Court of Admiralty had jurisdiction over a cause of damage to property the result of a collision on the high seas even between two foreign vessels in the event of the *res* coming within the territorial limits of Great Britain; but that was in consequence of the consent of nations that courts of admiralty should exercise such jurisdiction, but such consent has never been given to extend the operation of a British municipal law to foreign vessels. Suppose both vessels had been foreign and one had after the collision come into a British port it could be said in such a case that Lord Campbell's Act applied. [Bramwell, L.J.—You say it would be as if two carriages had come into collision through negligence in France, and someone had been killed and the owner of the carriage causing the death had subsequently come into England, and was proceeded against under Lord Campbell's Act.] But apart altogether from the question of the nationality of the ships there is no jurisdiction to proceed *in rem* under Lord Campbell's Act. The case in which the Privy Council has held that the Court of Admiralty had jurisdiction was one of personal damage (*The Beta*, L. Rep. 1 P. C. 447; 20 L. T. Rep. N. S. 988), and the claim was for the *injuria* done to the plaintiff and not for the *damnum* suffered by his estate. The Common Law Courts have always held that the Court of Admiralty had no jurisdiction *in rem* in any case of personal damage, and have prohibited it from proceeding in such cases: (*Smith* v. *Brown*, L. Rep. 6 Q. B. 729; 24 L. T. Rep. N. S. 808; 1 Asp. Mar. Law Cas. 56; *James* v. *London and South-Western Railway Company*, L. Rep. 7 Ex. 195; 26 L. T. Rep. N. S. 187; 1 Asp. Mar. Law Cas. 228.) But there is no conflict of opinion between the Judicial Committee and the Common Law Courts, when the question was one of damage to the estate of the deceased under this Act, as no such case has come before the Privy Council. *The Ruckers* (4 Rob. 76) is not in point. That was a purely personal cause of damage arising on board a British ship on the high seas, and therefore within the admiralty jurisdiction, and was not a cause *in rem* at all. The only cases in which the Court of Admiralty ever exercised the jurisdiction (*The Guldfaxe*, L. Rep. 2 Ad. & Ecc. 325; 19 L. T. Rep. N. S. 748; 3 Mar. Law Cas. O. S. 201; (*The Explorer*, L. Rep. 3 Ad. & Ecc. 357; 23 L. T. Rep. N. S. 405; 3 Mar. Law Cas. O. S. 507) were before the prohibition of the Queen's Bench in *Smith* v. *Brown* (*ubi sup.*) and in the *Explorer* (*ubi sup.*) when the question was raised in the Privy Council the claim was withdrawn. The Courts of Common Law have also held that statutes giving admiralty jurisdiction, as *e.g.*, to the County Courts over claims for damage to cargo, and granting an appeal to the Court of Admiralty do not, for want of express words extend the jurisdiction of the Court of Admiralty to matters over which, before the passing of those statutes (31 & 32 Vict. c. 71; 31 & 33 Vict. c. 51) it would not have had jurisdiction: (*Simpson* v. *Blues*, L. Rep. 7 C. P. 290; 26 L. T. Rep. N. S. 647; 1 Asp. Mar. Law Cas. 360; *Gunestead* v. *Price*, L. Rep. 10 Ex. 65; 32 L. T. Rep. N. S. 499; 2 Asp. Mar. Law Cas. 545.) To hold the defendants liable in the case is to say that a municipal law is extended without express words to a foreigner in his own country, that is on board of a foreign ship on the high seas. By the civil law, which is the law administered by the

Court of Admiralty apart from express statutes, all causes of personal action fall with the death of the person, and there is nothing to show that by the law of Germany to which the defendant owes allegiance there is any provision for such a claim as this, and therefore neither by the civil law as administered by the Admiralty, sitting as a court of international law, nor by the *lex loci, i.e.*, the German law, can this claim be supported.

Butt, Q.C. and *Clarkson* for respondents.—There is high authority for saying that this damage could be recovered by the law of Germany as also under the Code Napoleon. The cases before the passing of the Judicature Acts are not in point, the *ratio decidendi* of those cases was that the Admiralty Court Acts (3 & 4 Vict. c. 65, and 24 Vict. c. 10), and County Courts Admiralty Jurisdiction Acts (31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51), did not give the Court of Admiralty any new jurisdiction, but there is no doubt that under the Judicature Acts it is open to a plaintiff to choose in what division he will bring his action, and that division will use its ordinary machinery to do justice between the parties. An action was instituted in one of the cases arising out of this collision in the Common Pleas Division, but leave to serve the writ out of the jurisdiction was refused on the ground that the cause of action also arose out of the jurisdiction. In the Court of Admiralty an action lies for causes of action arising on the high seas, by the mutual consent of nations, and is prosecuted, not by serving the writ out of the jurisdiction, but by the detention of the property within the jurisdiction, to answer the claim, and that has been done here, the property was under arrest, and was only released on an undertaking to answer any claim to which it would have been liable if still under arrest. If this appeal is granted it will amount to an absolute denial of justice to the plaintiff, as there is no other process by which compensation can be obtained open to her in this country. It is admitted that the court has jurisdiction so far as the loss of the personal property of the deceased is concerned; why, then, should it not have jurisdiction in a case of much more strictly personal damage? [Brett, L.J.—Could a ship be arrested in any other country for such a claim as this?] I don't profess to know what the law of other countries may be on the point, but so far as the method of proceeding is concerned it is clearly governed by the *lex fori*, and that in the admiralty division is by an action *in rem* if the *res* is within the jurisdiction. The distinction drawn by the Lord Chief Justice Cockburn between damage and injury in *Smith* v. *Brown* (1 Asp. Mar. Law Cas. 56) cannot be sustained when other sections of the Acts in which the expressions are used are considered: (Merchant Shipping Act 1854, sects. 299, 504, 505, 515, 527; Merchant Shipping Act 1862, sects. 28, 54.) The word "damage" cannot be confined to damage to property: *Ashby* v. *White*, Smith's Leading Cases, 7th edit., vol. i., at p. 296; Broom's Legal Maxims, 5th edit., 365 *et seq.*; Acts of the Apostles, ch. xxvii., v. 10, where the word "damage" expressly applies to the lives of those on board the ship.) [Brett, L.J.—Was not the reason of the prohibition by the courts of common law in the cases cited that Lord Campbell's Act requires the assessment of damages by a jury, and there was no jury in the admiralty division?] That could not be the reason, because the Court of Chancery assesses damages and apportions claims in suits for limitation of liability, and that jurisdiction of the Court of Chancery was extended to the Court of Admiralty, when the ship was under arrest, by sect. 13 of the Admiralty Court Act 1861. [Brett, L.J.—Suppose in the Court of Admiralty both vessels were found to blame, and therefore the damages were divided, could a claim of this description be recovered, and against whom?] The case might occasion some difficulty, but it does not arise here. In this case there is no doubt about who is liable for all the damage which is done, and the claim constitutes a part of the damage.

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

June 2.—Brett, L.J., read the judgment of

James, L.J.—Both in the Admiralty Division and upon the hearing of the appeal, the case of the appellant was based upon the contention that the Admiralty Division had no jurisdiction to entertain a claim for damages in respect of loss of life; and the substantial question for decision is, whether the Court of Admiralty, previously to the coming into operation of the Judicature Acts, had jurisdiction to entertain any such claim, for, notwithstanding the general transfer of jurisdiction to the High Court of Justice, it is provided by sect. 11, sub-sect. 3 of the Supreme Court of Judicature Act 1875 (38 & 39 Vict. c. 77), that no person shall assign any cause or matter to the Admiralty Division unless he would have been entitled to commence the same in the Court of Admiralty if that Act had not passed. It is admitted that if the Court of Admiralty had any such jurisdiction, it was conferred upon it by the Admiralty Jurisdiction Act of 1861 (24 Vict. c. 10), the 7th section of which enacts that "the High Court of Admiralty shall have jurisdiction over any claims for damage done by any ship."

The question whether the term "damage," as used in that section, is applicable to injury to the person as well as to injury to property has been the subject of frequent discussion and of conflicting decisions. The Court of Admiralty, in the case of *The Sylph* (L. Rep. 2 Adm. 24; 17 L. T. Rep. N. S. 519; 3 Mar. Law Cas. O. S. 37, held that it had jurisdiction to entertain a claim for damages in respect of personal injury not resulting in death, and this view was adopted by the Judicial Committee of the Privy Council in the case of *The Beta* (L. Rep. 2 C. P. 447; 20 L. T. Rep. N. S. 988; 38 L. J. 50, Adm.); and in the case of *The Guldfaxe* (L. Rep. 2 Adm. 325; 19 L. T. Rep. N. S. 748; 2 Mar. Law Cas. O. S. 201), the Court of Admiralty held that it had a like jurisdiction in respect of loss of life occasioned by a collision. On the other hand, the Court of Queen's Bench, in the case of *Smith* v. *Brown* (1 Asp. Mar. Law Cas. 56; L. Rep. 6 Q. B. 729; 24 L. T. Rep. N. S. 808), expressly dissented from the decision of the Judicial Committee in the case of *The Beta* (*ubi sup.*), and held that personal injury occasioned by the collision of two ships was not included in the word "damage" as used in the 7th section of the Admiralty Jurisdiction Act, and that the Court of Admiralty had no jurisdiction to entertain a claim for damage in respect of personal injury resulting in death; and a general concurrence in this decision of the Court of Queen's Bench has been expressed by the Court of Common Pleas in the case of *Simpson* v. *Blues* (1 Asp. Mar. Law Cas. 310 L. Rep. 7 C. P. 290;

26 L. T. Rep. N. S. 697), and by the Court of Exchequer, and on appeal by the Exchequer Chamber in the case of *James* v. *London and South-Western Railway Company* (1 Asp. Mar. Law Cas. 228; L. Rep. 7 Ex. 187, 287; 26 L. T. Rep. N. S. 187; 27 L. T. Rep. N. S. 382). But in neither of the last two cases did the question turn upon the construction of this section.

I am unable to concur in the construction of the Admiralty Jurisdiction Act which has been so adopted by the Queen's Bench, and apparently concurred in by the other courts to which I have just referred. It appears to me that the view taken by the Court of Admiralty and the Judicial Committee is the more correct. The words of the 7th section are perfectly general; taken by themselves they would appear to confer a jurisdiction upon the Court of Admiralty to entertain all claims in respect of damage done by a ship, whatever may be the nature of the damage, whether to person or to property. There is nothing in the context of the section to suggest that the word "damage" should be limited in its meaning, and the statute, being remedial of a grievance, should receive a liberal rather than a narrow construction. This principle was acted upon by Dr. Lushington in the case of *The Bahia* (Bro. & Lush. 61), and by the Judicial Committee in the case of The *Pieve Superiore* (L. Rep. 5 P. C. 482; 29 L. T. Rep. N. S. 702; 30 L. T. Rep. N. S. 887; 43 L. J. 1, 20, Adm.) We have only to look at the sections of the Act which follow the 7th to see that it was the intention of the Legislature to give to the Court of Admiralty a jurisdiction to enable it to do complete justice in the cases which might come under its consideration. The 13th section in particular confers a jurisdiction under which, in many cases, it would be necessary that the Court of Admiralty should assess the amount of damages in respect of loss of life or personal injury, and the nature of the jurisdiction conferred by this section (to which I shall have occasion to refer again presently) appears to me to negative any construction of the Act which would limit the jurisdiction thereby conferred to the subject matters that were previously under its cognisance—a view of the case which has been suggested in the course of the argument. It is further to be observed, that if the 7th section is to receive the limited construction which has been suggested, it is difficult to understand why it was introduced into the Act, seeing that in such a case the extension of jurisdiction would have been of a very trifling character, as the Court of Admiralty already had undoubted jurisdiction in respect of damage to property occasioned by collision.

It has, however, been urged, on the part of the appellant, that, notwithstanding the general terms in which the 7th section is expressed, the word "damage" ought, for reasons which will be presently mentioned, to be limited in construction to damage done to property, or, at any rate, that it ought not to be construed so as to include loss of life. As similar arguments found favour with the Court of Queen's Bench in the case of *Smith* v. *Brown* (*ubi sup.*), and as two of my colleagues think that our decision in the present appeal ought to be in favour of the appellant, I proceed to express my opinion upon the point so pressed upon us; and I do it with more diffidence, differing as my opinion does from the opinion of those for whose knowledge and experience I entertain the most profound respect, and in differing from whom I cannot but entertain doubt as to the correctness of my own conclusions.

In support of the view that the word "damage," as used in the 7th section of the Admiralty Jurisdiction Act, should be limited in construction to damage to property, it is contended that not only is there no legislative sanction for the use of the word as denoting injury to the person, but that the Legislature has, in other recent Acts, *in pari materia* adopted the use of the word "damage" as applicable exclusively to injury to property, and that it must be assumed that the Legislature, in passing the Act in question, did not lose sight of the distinction we have recognised in its other enactments. If it were so, I should feel strongly the force of the arguments based upon them; but I do not so read the Merchant Shipping Acts of 1854 (17 & 18 Vict. c. 104), and 1862 (25 & 26 Vict. c. 63), which are the Statutes to which reference has been made. The latter Statute, it will be observed, was passed after the Admiralty Jurisdiction Act 1861. It is quite true that in the sections of the Merchant Shipping Act of 1854, which have reference to the limitation of the liability of shipowners, the expressions "loss of life" and "personal injury" are used with reference to injury to the person, whilst the word "damage" is used with reference to injury to property; but under the provisions of these sections a different scale of liability was fixed in respect of injuries to the person from that in respect of injury to property, and it was convenient (though I admit not necessary) to use different forms of expression to distinguish one kind of injury from the other; but if the 7th section of the Admiralty Jurisdiction Act was intended to apply to injury to the person as well as injury to property, there was neither necessity for using, nor any convenience in using, more than one expression to denote both kinds of injury. But this limited use of the word damage is not observed throughout the Merchant Shipping Act 1854. In the 515th section, the words "loss or damage" are used in reference to three classes of injury, and as the word "loss" would be wholly inapplicable to personal injury not resulting in death, the word "damage" in the 7th section must have reference to personal injury as well as injury to property. Again, if we turn to the 290th section of the same statute, which is the last of a series of sections enacting various rules for the prevention of accidents, we find that it commences with the words, "In case any damage to person or property arises from the non-observance of any ship of any of the said rules." Here we have a clear unquestionable use of the word "damage" in the sense applicable to injury to the person as well as to property. In the 527th section we find the expression "injury to property," which is suggestive, at least, of the words "damage" and "injury" being to some extent interchangeably used. And so, again, in the other Act referred to (the Merchant Shipping Act 1862), whilst, on the one hand, we find the expressions "loss of life," "personal injury," and "damage to property" used in the sections modifying the provisions of the Act of 1854 as to the liability of shipowners, we, on the other hand, find in the 20th section the expression "damage to person or property" applied to injuries occasioned by breaches of regula-

tions therein referred to. So far, then, from there being no legislative sanction for the use of the word "damage" as denoting injury to the person, and from the Legislature having adopted the use of the word as exclusively applicable to property, it appears to me that the very statutes referred to as supporting this provision afford extensive evidence to the contrary. And here I would refer to a statement made by Sir R. Phillimore in the course of his judgment in this case in the Admiralty Division, which appears to be borne out by the report of the case of *The Ruckers* (4 C. Rob. 73), before Lord Stowell, to the effect that an action commenced in the Court of Admiralty in respect of a personal assault committed on the high seas by the master of a ship on a passenger was, previously to the Act of 1861, always described as a "cause of damage."

But the further argument remains to be considered, namely, that, assuming it cannot be maintained that such a limited meaning as suggested ought to be given to the word "damage," by reason of the legislative use of the word in the Merchant Shipping Acts, the meaning of the word ought not to be so extended as to include loss of life. This argument is based upon the provisions of Lord Campbell's Act (9 & 10 Vict. c. 93), and it is contended that, inasmuch as the right of action created by this Act is extended or modified by the subsequent statute (27 & 28 Vict. c. 95), where obtaining compensation for the families of persons killed by accident was confined to actions brought in the courts of common law, and that great practical inconvenience and possible injustice might arise from an exercise by the Court of Admiralty of jurisdiction in such matters, it is impossible to suppose that the Legislature intended under a general statute, such as that we are now considering, to effect so great a change in the rights and relative positions of the parties to such actions. In support of this view it has been urged that the transfer of jurisdiction to the Court of Admiralty would not only deprive the parties of the Common Law procedure and the mode of trial pointed out by the Act, but might also materially affect their relative rights, having regard to the fact that the Court of Admiralty, in dealing with claims for damage arising from collision, acts upon principles unknown to the Common Law—as, for instance, in dividing the loss where both parties are to blame. It is quite possible that some such inconveniences as those suggested might have arisen from an exercise by the Court of Admiralty of the jurisdiction in question, or may arise from an exercise of the like jurisdiction by the Admiralty Division; though, having regard to sect. 25, sub-sect. 9 of the Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66), I much doubt whether any such conflict between the civil and the Common Law, as was suggested by Lord Blackburn, in *Smith* v. *Brown* (*ubi sup.*), could arise after that Act came into operation; but, however this may be, the Legislature has thought fit to enact that under certain circumstances of a similar character, at least as likely to occur similar inconveniences must be submitted to. The right of action given by Lord Campbell's Act is in certain cases modified and restricted by the sections of the Merchant Shipping Act already referred to, and the jurisdiction for assessing the amount of damages in such cases, as regards injury to the person as well as injury to property, has been conferred on the Court of Chancery, and by the 13th section of the Admiralty Jurisdiction Act, the jurisdiction which, by the Merchant Shipping Act of 1854, was conferred upon the Court of Chancery has been extended to the Court of Admiralty whenever the ship, or the proceeds thereof, are under arrest. In this very case, though the ship was not arrested in this action, she had been arrested in other actions, and, as I understand the facts, it was agreed that the case should be treated and dealt with as if she were under arrest and the proceedings were *in rem*; but, however this may be, she might have been under arrest, and, if she had been the Admiralty Division would have been bound, under the 13th section, to entertain an action at the instance of the owners of the ship for the distribution of the amount of their liability amongst the claimants, and in such case to assess the amount of damages, payable to the plaintiffs, and to ascertain the proportions thereof payable to the different members of Jeffery's family. Every inconvenience and every injustice which has been suggested as likely or possible to occur if the present action had been brought in the Court of Admiralty, would, or might, equally arise in such an action as has been suggested. It appears to me that the arguments based upon the probability or possibility of such possible inconvenience or injustice cannot be maintained.

Upon the whole I am of opinion that the judgment of the Admiralty Court should be affirmed.

Baggallay, L.J. concurred with the judgment of James, L.J.

The judgment of Brett and Bramwell, L.JJ., was read by

Bramwell, L.J.—I will now deliver the judgment of my brother Brett and myself.

We are of opinion that this appeal should be allowed and that the Admiralty Division has no jurisdiction *in rem* in a case in which the right of action is under Lord Campbell's Act (9 & 10 Vict. c. 93). We offer no opinion as to whether it would have jurisdiction in a case of personal hurt where there was no death, and the person hurt was the plaintiff. We proceed upon the ground that the action given (by 9 & 10 Vict. c. 93) is not within the words and meaning of sect. 7 of the Admiralty Jurisdiction Act 1861 (24 Vict. c. 10). The Legislature, it is true, has given power to the Admiralty Court to assess and apportion the damages in such cases, under certain circumstances, under the Merchant Shipping Acts; and in such case it necessarily follows that the machinery for assessing was dispensed with. It is true that a jury can now be had in the Admiralty Court; and, as Mr. Butt pointed out, that the word "damage" in sect. 7 of 24 Vict., c. 10, includes the damage done to goods. It is also true that, under the Judicature Acts, any action *in personam* may, as matter of jurisdiction, be brought in the Admiralty Division as well as in any other; yet, looking to the terms of Lord Campbell's Act, and sect. 7 of the Admiralty Court Act 1861, and construing them as at the time the latter was passed, we are of opinion that sect. 7 of the latter Act gave no jurisdiction *in rem*, which is the question now under discussion. Lord Campbell's Act is express. It says: "The jury may give such damages as they may think proportioned to the injury, &c., and the

amount shall be divided in such shares as the jury, by their verdict, shall find and direct." As to the words "the jury may give," &c., that might possibly be held to mean "jury" where there was a jury, and "court" where there was not. We do not say it could be; but, whether or no, we are of opinion that under that section it must be a jury who are to find and direct the division in shares. (*a*) The words are express. Suppose Lord Campbell's Act had said such actions should only be brought in a court where there was a jury, would sect. 7 of the Admiralty Court Act 1861 have repealed that? But it does say so in effect, and the argument is that it is repealed. Suppose that the relatives had assigned their right of action, would the assignees have maintained a suit in Equity?—Would an action lie in a County Court without a jury? No; the jury is essential. But it is remarkable that no jurisdiction is given in a case of bodily hurt to a passenger, or trespass to his goods for injury done in a ship. We think there is great weight in the argument that the words of sect. 7 of the Admiralty Court Act 1861, are not apt words to include a case under Lord Campbell's Act. Such a claim as this is neither properly nor strictly speaking a claim for damages done by a ship. It is a claim for compensation for loss sustained partly by a death caused by a ship, and partly by something else which may or may not happen, as well as the death, but which must also happen in order to substantiate a claim or relief. It is a claim not proportioned to the act done. Of course, though we have thought it right to make the above remarks, we avail ourselves of the judgment and reasons in *Brown* v. *Smith* (*ubi sup.*), especially on account of the difficulty arising from the difference between the Admiralty and Common Law. As to contributory negligence, would the Court of Admiralty have to give up its view or grant an action when Lord Campbell's Act did not? We are of opinion that the appeal should be allowed.

The court being equally divided, the appeal was dismissed with costs.

Solicitors for appellants, *Stokes*, *Saunders*, and *Stokes*.

Solicitors for respondents, *Gellatly* and *Warton*.

SITTINGS AT LINCOLN'S INN.

(Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Dec. 7 *and* 11, 1876; *and April*, 21, 1877.

(Before James, L.J., Baggallay and Brett, JJ.A.)

Cargo ex Schiller.

Salvage of life—Liability of cargo—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104) *sects.* 458, 459.

Where life salvage is performed, cargo, subsequently salved from the same vessel as the lives, but by persons employed by the owners for the purpose and wholly distinct from the life salvors, is liable to contribute towards the reward due to the life salvors under the provisions of the Merchant Shipping Act, 1854, *sects.* 458, 459.

This was an appeal from a judgment of the High Court of Justice (Admiralty Division) in a cause of salvage instituted against the cargo of the German steamship *Schiller* by the owners, masters, and crews of some pilot cutters and boats, to recover reward for services rendered in saving the lives of some of the passengers in that vessel. The *Schiller* was wrecked on the Retarrier Reef among the Scilly Islands. The plaintiffs saved only the lives, and rendered no service to the vessel or the cargo; no part of the cargo was saved at the time of the plaintiffs' services, but some time afterwards, when the owners of part of the cargo (bullion) engaged a staff of divers and workmen, and with their assistance succeeded in getting up a considerable quantity of specie. This cargo the plaintiffs now proceeded against. The court below held that the cargo was liable to pay salvage reward in respect of the services in saving life. From this judgment the defendants, the owners of the specie, appealed.

The facts, and the judgment of the court below, will be found fully reported. *ante*, p. 226.

Dec. 7, 1876.—*Butt*, Q.C. and *Lodge* for the appellants.—Here the lives and the cargo were saved at different times and by different persons. In *The Fusilier* (B. & L. 341; 12 L. T. Rep. N. S. 186; 2 Mar. Law Cas. O. S. 177) it was held by the Privy Council, that where cargo and lives are saved at the same time, the cargo is liable for the salvage of life. That case is so far against the appellants, unless it can be argued that the decision is wrong and this court is not bound by it. [James, L. J.—We are sitting here in the place of the Judicial Committee, of the Privy Council on appeal from an Admiralty decision, and are exercising the jurisdiction formerly exercised by them. I think we must consider ourselves bound by their decisions in Admiralty matters. Good reasons may be given why we should not be so bound, and the question may be raised, but my present opinion is that we are bound.] We submit that the court is not bound by that decision; but even if it is, the present case is distinguishable. The first question is, What was the Admiralty jurisdiction to award salvage of life before the Merchant Shipping 1854 (17 & 18 Vict. c. 104)? Unless ship or cargo, or both, were saved there was no salvage reward payable for merely saving life; where life was saved together with ship and cargo, it was customary to give a larger reward than if property only had been saved. Then the Merchant Shipping Act 1854 (sects. 458, 459) deals with the question by enacting that the salvage in respect of life shall be payable by the ship from which the lives are taken; it is not payable by the cargo, but by the ship; even if these salvors had saved the cargo at the same time as the lives, they could not recover against the cargo. Brett, J. A.—Sect. 459, in making the salvage of life "payable by the owners of the ship or boat," seems to assume that the shipowner is to pay for the lives even though the ship is not saved.] The Legislature did not mean to fix personal liability upon any person unless the ship or cargo is saved. The intention

(*a*) It does not seem to have been pointed out to the court that the Court of Admiralty had, and the Admiralty Division still has, the power under 3 & 4 Vict. c. 65, sect. 11, to direct a trial by jury of any issue or issues before a judge of a superior court of common law sitting in London or Middlesex, or a judge of assize, and that this power is still further extended by the Judicature Act of 1875, sect. 70, and the Supreme Court Rules, Order XXXVI., rule 29. These enactments would empower the Admiralty judge to direct and issue to be tried whether "A. was entitled to any, and, if so, what sum under Lord Campbell's Act," or some such issue.—Ed.

was, that on the ship being saved life salvage should be paid out of the ship, but not otherwise. The sections, on the face of them, no doubt, give the right to proceed even if everything is lost and never recovered; but if that section gives such right, then the salvors might sue in a common law action as soon as they had saved life. This would be an absurdity, as some property must be saved before any claim can be made for life salvage; and if anything must be saved, then the claim can only be against the ship under sect. 459. Here no property of any sort has been "saved" in the sense in which that word is used in the Merchant Shipping Act 1854; the work of the recovery of the cargo was done by the owners of the cargo themselves, and consequently there were no salvors and no salvage of cargo. This distinguishes the case from *The Fusilier* (2 Mar. Law Cas. O.S. 177) where there was a salvage of ship and cargo at the same time as a salvage of life. The cargo has nothing in common with the passengers, and before its owner should be condemned in salvage for lives the words of the Act making him liable ought to be so strong that the court is coerced so to decide; whereas the effect of the Merchant Shipping Act is merely to give a direct right to salvage where no right existed before, and salvors only obtained their reward indirectly. Salvors are not without their means of reward in the case of the ship being of no value, because they can, under sect. 459, claim reward out of the Mercantile Marine Fund, and by this section this is the remedy to be taken on the loss of the *ship*; there is no mention of the cargo.

Dec. 11, 1876.—*The Admiralty Advocate* (Dr. Deane, Q.C.) and *W. G. F. Phillimore* for the respondent.—By sect. 443 of the Merchant Shipping Act 1854, all cargo washed ashore from any ship, or lost or taken from such ship must be delivered to the receiver of wreck, and any person, whether he be owner or not, secreting or keeping possession of and not delivering such cargo to the receiver is liable to a penalty. The receiver has the right to the possession of all wreck, and to hold the same until security be given for payment of salvage (sect. 468); and "wreck" covers flotsam, jetsam, lagan, derelict, and everything else taken out of the sea or from the shore (sect. 2). Hence, even where owners save their own property, the receiver is entitled to possession if there are any claims of salvage against it, and that for the purpose of obtaining security for salvage. But here there was actual salvage of the specie, because the owners did not do the work themselves, but they entered into agreement with or hired divers to recover the property, and these divers might, if they had not been paid, have proceeded in Admiralty to recover their stipulated reward. The owners are in the position of subsequent salvors. The Merchant Shipping Act (sect. 459) does not leave the right to life salvage dependent upon the saving of the ship, but such salvage is recoverable in any case, whether the ship be lost or not; if any other construction is put upon the Act, then on the loss of the ship life salvage is recoverable only against the Mercantile Marine Fund, and this would place life salvors in a worse position than they were before that Act. [James, L.J.—Under the old law the ship and cargo were liable only where they were saved with the lives. Did not the Privy Council, in *The Fusilier* (2 Mar. Law Cas. O.S. 177) hold that the Merchant Shipping Act only gave power to enforce claims for salvage of life where there would have been a right to such salvage prior to the Act, and that the right to seize ship or cargo for life salvage was under the Act made an absolute right, but only in cases where the court would previously have had power to award against ship and cargo in their hands?] We submit that the Act gives much greater rights than existed before the Act; life salvors acquire a right to salvage as against ship and cargo, and this right exists under the Act, so as to be enforceable independently of the salvage of ship and cargo. In *The Cairo* (L. Rep. 4 Adm. & Ecc. 184: 30 L. T. Rep. N. S. 535; 2 Asp. Mar. Law Cas. 257), it was held that a ship was liable for the salvage of the lives of part of her crew who had left her in boats in consequence of a collision, and afterwards got into danger. [Brett, L.J.—That case was decided after *The Fusilier* (2 Mar. Law Cas. O.S. 177). But how can it be that salvage of life is payable out of cargo when saved by its own owner? Does not sect. 458 make each separate thing liable for its own salvage except life, the payment for that being provided for by sect. 459? James, L.J.—Sect. 458 seems to make salvage for ship, cargo, and life payable by the owners of ship and cargo indiscriminately.] The question has been determined so long that it can scarcely now be reopened. In 1857 Dr. Lushington, in *The Coromandel* (Swab. 205) decided that salvors of life were entitled to be paid salvage in priority to all other claims, even in a case where they had not contributed to the saving of the property. Before the Act the cargo always contributed to life salvage, as it paid its proportion of the increased reward: (*The Fusilier*, 8 Mar. Law Cas. O.S. 177). The same principle was applied in *The William III.* (25 L. T. Rep. N. S. 386; L. Rep. 3 Adm. & Ecc. 487; 1 Asp. Mar. Law Cas. 129). [Brett, L.J.—The foundation of the right to salvage is, according to Dr. Lushington, the proceeding *in rem*: (*The Fusilier.*) What is there in the statute to say that property saved by owners themselves may be seized by the Admiralty Court for life salvage only where it could not have been seized under the old law?] By sect. 468 the receiver has power to seize and detain ship and cargo until payment is made or security is given for salvage due, whether for ship, cargo, or lives.

Butt, Q.C. in reply.—If the respondents' interpretation of sect. 458 is right, an owner of cargo is liable for services rendered to ship, and owner of ship for services rendered to cargo; the only way to avoid difficulty is to read sect. 459 *reddendo singula singulis*, and to make each thing saved pay its own salvage. [Baggallay, L.J.—If you apply that principle, who, under sect. 458 standing alone, would be liable to pay for life salvage? Either no one, or the persons whose lives were saved; but reading the section with sect. 459, the liability rests upon the owners of ship. In none of the cases cited was the cargo saved wholly apart from the lives, and they are therefore distinguishable.

Cur. adv. vult.

April 21, 1877.—Brett, L.J.—In this case, whilst ship and cargo were in danger, the plaintiffs saved the lives of fifteen persons, some of whom were the crew of the ship, and others were passengers on board her: but after such lives had been saved, the ship and cargo sunk in deep water, and all who had at any time tried to save

ship or cargo abandoned any further attempt to do so. Some time afterwards the defendants, who were owners of a part of the sunken cargo, which was valuable specie, engaged a staff of divers and workmen, and at great expense raised and recovered four barrels of such specie of the value of 40,000*l*. The claim in the suit was made against the defendants as owners of the specie by the plaintiffs as life salvors only. No part of the ship or cargo was therefore saved by any one who could, in respect of having saved it, have claimed salvage; the specie was not saved by any one who could claim salvage for saving it; the specie was liable to be seized into and retained by the Admiralty in respect of any claim which could be made for saving it.

The question is, whether under the statutes the plaintiffs can enforce any claim against the specie for life salvage. In order to determine the true construction of the statute, let us first consider whether this specie was when it was raised from the bottom of the sea "Wreck" even within the extended meaning given to the term in the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 2; "Wreck shall include jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water" (17 & 18 Vict. c. 104, s. 2); it was not "wreck" in the common law meaning of that word; "nothing shall be said to be wreckum maris," *i.e.* wreck, "but such goods only which are cast or left on the land by the sea: *Constable's case*, 5 Rep. 106 a.) The case then goes on to say: "Flotsam is when a ship is sunk or otherwise perished and the goods float on the sea; jetsam is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding, the ship perish; lagan (*vel potius ligan*) is when the goods, which are so cast into the sea, and afterwards the ship perish, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or a cork, or such other thing that will not sink, so that they may find them again." This specie never was within any of these definitions, and, if it ever were, would be taken out of them by the fact of its being in possession of the owner before it was or could be taken possession of by any one else, for in the same case in Coke (5 Rep. 108 b) the reason is given why such things were given to the King as follows: "Note, reader, at first the common law gave as well wreck, jetsam, flotsam, lagan on the sea, as estray, &c., treasure trove, and the like to the king, because by the rule of the common law, where no man can claim property in any goods, the King shall have them by his prerogative." Applying this principle to the former definitions, it seems to me that nothing can be considered to be flotsam, jetsam, or lagan, within any effective legal definition of those things, which never has been taken possession of by anyone but the true owner. This specie was once derelict, but ceased to be so the moment the true owners of it resumed the exercise of their rights of ownership, and began to endeavour to recover it whilst no one else was endeavouring to save it. This specie was therefore, in my opinion, not "wreck" within the meaning of the statute at the time when it was recovered by its owners; if so, no receiver of wreck could legally interfere with it, or the owners of it, in any respect, even if it were wreck within the meaning of the statute at the time when it was recovered, the only relation to it of a receiver of wreck would be that he would be entitled to have notice, under sect. 450 of 17 & 18 Vict. c. 104, that the owner had found it, and had taken possession of it.

The next matter to be substantiated is, that independently of the statute no claim for salvage of any kind could be enforced against the specie by anybody. It is true that an action *in personam* might under certain circumstances be maintained in the Admiralty Court for salvage: (See *The Hope*, 3 C. Rob. 215, and *The Trelawny* in a note to the same, it being understood that the monition spoken of in those cases was then the mode of instituting a suit *in personam* in the Admiralty.) But in both these cases property had been saved so as to give a claim for salvage. In both, therefore, if the property had come within the jurisdiction of the Admiralty Court, it might have been seized, and an action *in rem* have been prosecuted. Both are therefore consistent with what was said in *The Thetis* (3 Hagg. 14) and *The Neptune* (1 Hagg. 227), that salvage is the service which volunteer adventurers spontaneously render the owners on the recovery of property from loss or damage at sea, under the responsibility of making restitution, and with a lien for their reward. This shows that the foundation of the Admiralty jurisdiction in the awarding of salvage is the power of enforcing the maritime lien obtained on property saved by salvors. This is in terms declared to be the foundation of the jurisdiction in *The Zephyrus* (1 W. Rob. 331): "The jurisdiction of the court in salvage causes is founded on a proceeding against property which has been salved." The importance of thus defining the foundation of the jurisdiction in salvage matters is that it shows why the Admiralty had no jurisdiction to entertain claims for life salvage. In *The Fusilier* (B. & L. 344: 2 Mar. Law. Cas. O. S, 177), Dr. Lushington thus summed up the law and the reasons for it: "I will begin by stating what was the law of the court respecting life salvage before any statute was passed on the subject of salvage. Where no property had been saved, and life alone had been preserved from destruction, no suit for salvage reward could be maintained. One reason for this state of the law was, that no property could be arrested applicable to the purpose. There could be no proceeding *in rem*, the ancient foundation of a salvage suit. In some cases it happened that one set of persons exclusively saved life, and another wholly distinct set saved the ship and cargo; but in this case also salvors of life could not render the property amenable to their claims. But where life and property had been saved by one set of salvors it was the practice of the court to give a larger amount of salvage than if the property only had been saved; and this doctrine rests on high authority. The practice too was that all the property saved should be liable to pay such increased rate of salvage—the ship, the freight, and the cargo, each in proportion to its value." It seems to me obvious that in this recapitulation of the law of salvage the word saved is used in the sense of salved, that is, saved by salvors: the reasoning depends on that meaning being given to the word "saved;" and in all cases and books dealing with this branch of law the word "saved" is, as I believe, used in the sense of

salved; and this statement of the law shows clearly that, independently of the statute, no claim could be substantiated in the present case, because no property has been salved by anyone. There is no property, which, irrespective of the statute, could be seized by way of lien, so as to give the Admiralty Court any jurisdiction to enforce any lien against it, or to deal with it at all. The question is whether the statute has given any right to the Court of Admiralty to deal with any property with which it could not have dealt at all before the statute, which it had no jurisdiction to seize or detain before the statute.

The former statute (9 & 10 Vict. c. 99, ss. 1-5) enacts that "every person who shall act or be employed in any way whatsoever on the saving or preserving of any ship, or any part of the cargo thereof, or of the life of any person on board the same, shall be paid a reasonable reward of compensation by way of salvage for such service by the commander or owner of the said ship, or by the merchant whose ship, vessel, or cargo shall be so saved as aforesaid." If the reward to be paid had been simply a money reward it would have been unnecessary to use the phrase "by way of salvage;" that phrase, introduces the law of salvage, The enactment that the reward shall be by way of salvage gives jurisdiction to the Admiralty. But that jurisdiction is founded on the possibility of a proceeding *in rem*. Moreover, among the classes to pay are the owners of a ship saved, the owner of ship or cargo saved; so that the whole section is founded on the assumption that property has been saved. It cannot, as it seems to me, be doubted that "saved" is used for "salved by salvors" when the compensation is to be "by way of salvage." The enactment does not give a new subject-matter on which the Admiralty may enforce a lien, but gives a new clause or service in respect of which the Admiralty may enforce a lien upon the same subject-matter as before. The sections 458 and 459 of 17 & 18 Vict. c. 104, seem to me to use the same technical phraseology in dealing with the doctrine of salvage as has been invariably used in every case, treatise, and statute on salvage. The word "saved," in such phraseology, is used for "salved," *i.e.*, "salved by salvors." This is shown in sect. 458 by the statement that "there shall be payable to the person by whom such services, or any of them, are rendered a reasonable amount of salvage." It is not said "a reasonable compensation," but "a reasonable amount of salvage." So in sect 459, it is salvage which is payable, not compensation, and the mode of enforcing the claim in the last resort is by sale under sect. 469; the whole remedy is evidently founded on the Admiralty remedy, which though it does not absolutely shut out a remedy by suit *in personam*, either in the Admiralty Court, or it may be perhaps in some other division of the High Court, yet shows that it is a remedy for a salvage claim which imports, as is stated in *The Zephyrus* (1 W. Rob. 329) and in *The Fusilier* (2 Mar. Law Cas. O. S. 177) the possibility of a suit *in rem*. The case of *The Fusilier* is in its facts consistent with this view of the statute. In it cargo was salved. It is not, therefore, as to its facts, an authority against the defence in this cause; neither, as it seems to me, is any of the reasoning adverse to the contention of the defendants in the present case. The decision in *The Fusilier* is in reality founded on the view that the statute was dealing with the causes or services for which salvage reward might be awarded, and not with the subject-matter on which the reward was to take effect. That is the reason why the strong dicision is arrived at that the omission of the word "cargo" in sect. 459 does not alter the law that cargo was one subject matter of a grant of salvage reward. If it did not alter the law as to what was the subject-matter of a salvage lien in that case, it does not in this court. The case of *The Cairo* (L. Rep. 4 Ad. & Ecc. 184), upon the facts stated in the judgment, goes on further than *The Fusilier*. The ship had received salvage services. If it is taken as a decision that the mere saving of life, where the ship itself had received no salvage service and had been in no danger, entitled the salvors of life to seize the ship and cargo, it must result in this, that whenever a man is lost overboard, whether by his own negligence or otherwise, the ship and cargo can be seized. That seems to be a result so destructive of maritime adventure that no such construction ought to be put upon the statute if it can be avoided. "The construction," says Dr. Lushington in *The Fusilier* (B. & L. 346), "that cargo should not contribute to life salvage would work a great change in the law and go beyond the grievance which existed." "The Legislature," says Lord Chelmsford (*The Fusilier*, B. & L. 351), "in dealing with the subject of life salvage, must be taken to have been aware of this practice, and to have intended to confer upon the Court of Admiralty a power of doing that directly which they had been so long in the habit of doing indirectly." But what the Admiralty had been in the habit of doing indirectly was to give reward for life salvage when it could be paid out of or borne by any of the property which had itself been saved in the sense of having been salved by salvors. The Admiralty had never assumed jurisdiction to deal with property which had never been salved by any salvor. The doctrine, therefore, does not include the present case. There is ample scope for the application of the statute within the doctrine, without holding that it includes the present case. It seems to me contrary to the ordinary principles of construction to say that, without words more express than any used in this statute, property, which before the statute was not the subject-matter of any salvage suit, which was not capable of being properly brought within any jurisdiction of the Admiralty Court, should now be swept into such jurisdiction and be made the subject of such a suit. It is true that colour is given to a contrary view by Dr. Lushington in the *Coromandel* (Swab. 207): "I apprehend," he says, "the Legislature, in the first place, was well aware that there were many instances in which life was saved and property entirely lost, and that consequently there was no reward which could, as a matter of right, be claimed by those who, perhaps at the risk of their own lives had saved the lives of others, and they meant to provide for that contingency in the first instance." My belief is that Dr. Lushington was there alluding to the power given to the Board of Trade to award a sum of money where no property or an insufficient amount of property is salved; if not, the facts of the case did not raise the point, for the ship was salved. In such view the statement would be a dictum of authority and no more, and I could not agree with it.

Upon that which I apprehend to be the true construction of the statute arrived at from the

consideration stated above, I am of opinion that no salvage claim could be legally enforced against the specie or its owners in this case, and therefore that the judgment appealed against should be reversed.

Baggallay, L.J.—The state of the law affecting life salvage as it existed or was recognised prior to the passing of the Merchant Shipping Act 1854 was described by Dr. Lushington in the passages of his judgment in the case of *The Fusilier* (2 Mar. Law Cas. O.S. 177) to which Sir Baliol Brett has referred, and it is unnecessary for me to add to the description so given; nor do I propose to refer further to the circumstances of the present case than to observe that the claim of the plaintiffs is resisted by the defendants upon the grounds, first, that having regard to the provisions of the Act of 1854, the claims of life salvors can, in no case, be enforced against the owners of cargo, but only against the owners of the ship, or failing that, against the Mercantile Marine Fund; and secondly, that, if such claims can, to any extent, be enforced against the owners of cargo, life salvors are not by law entitled to any remuneration as against cargo which has not been salved, in the ordinary acceptance of the expression, either by themselves or any other persons, but has been subsequently recovered by agents employed by the owners for that purpose. As regards the first of these points, it was admitted that adverse decisions had been given both in the Court of Admiralty and in the Privy Council; but it was urged upon us, as it had been upon the judge of the Admiralty Court, that these decisions should be reviewed. The judge of the Admiralty Court gave judgment in favour of the plaintiffs, and I am of opinion that his judgment should be affirmed.

The substantial questions for our consideration are as to the effect of the provisions of the Act of 1854, and to that I propose at once to address myself. Now, omitting the references to the saving of wreck, which do not appear to me to have any bearing upon the questions now under consideration, the 458th section enacts that "whenever any ship or boat is stranded or otherwise in distress . . . and services are rendered by any person, (1) in assisting such ship or boat; (2) in saving the lives of the persons belonging to such ship or boat; (3) in saving the cargo or apparel of such ship or boat or any portion thereof . . . there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services, or any of them, are rendered . . . a reasonable amount of salvage . . . ." Now, these words are very wide. If any of the three classes of services is rendered—for instance, if the saving of life is the only service—the owners of the several classes of property—ship, cargo, and apparel—are all made liable to pay a reasonable amount of salvage to the person rendering the service. This is the grammatical meaning of the words used in sect. 458. I am unable to follow the argument that has been addressed to us, that the words creating or declaring the liability are to be read *reddendo singula singulis*. If the service of saving life had been omitted there might have been some weight in the argument that the owners of ship, cargo, and apparel were to be respectively liable to the salvors of the property of which they were respectively the owners; but upon whom, if this principle is to be adopted, is the liability to be imposed in cases of the salvage being confined to life? It is clear, from the terms of the section, that the burden is to fall somewhere; and why, so far as the provisions of this section are concerned, should it be imposed upon the owners of the ship any more than upon the owners of the cargo. If the solution of the question depended upon the proper effect to be given to sect. 438, and upon that alone, I think there could be no question as to the liability being imposed upon the owners of cargo as well as upon the owners of the ship.

But what is the nature and extent of the liability imposed? In the terms of the section, it is a liability to pay "a reasonable amount of salvage;" but is this to be construed as a general personal liability to be enforced against the owners under any circumstances, whether the ship and cargo are lost or not, or as a liability capable of being enforced against, and therefore limited to the value of, the property, whether ship or cargo be saved from destruction? and if the latter be the true construction, is the liability limited to the value of the ship or cargo "saved by salvors," as the expression is ordinarily understood; or does it extend to ship or cargo saved from destruction by other means, as by reason of the ship riding out the storm, or of the cargo being recovered through the exertions of the owners, or of persons specially employed by the owners for that purpose?

The subsequent sections of the Act, when taken in connection with the 458th, throw much light upon these questions. In sect. 459 we find a provision which at first sight gives rise to a doubt, whether it was or not the intention of the Legislature to provide that the liability to the payment of life salvage should be confined to the owners of the ship, and should not extend to the owners of the cargo; and this view, as I have already said, has been pressed upon us by the counsel for the appellants. The provision in question is to the effect that life salvage "shall be payable by the owners of the ship in priority to all other claims of salvage, and in cases where such ship or boat is destroyed, or where the value thereof is insufficient to pay the amount of salvage in respect of any life or lives, the Board of Trade may, in its discretion, award to the salvors, out of the Mercantile Marine Fund, such sum as it deems fit, in whole or in part satisfaction of any amount of salvage so left unpaid in respect of such life or lives." Now it is, in the first place, to be remarked that, if it had been the intention of the Legislature that liability in respect of life salvage should be confined to the owners of the ship, it is somewhat strange that it has not said so in plain terms, but has left it to be inferred from the terms of two sections which, in this view of the case, would be conflicting. Again, if the 459th section is to have the effect contended for by the appellants, it would follow that, in cases in which ship, cargo, and life are all saved by the same salvors (for the section is not confined to cases in which life alone is saved), the owners of cargo would be relieved from the liability to which under the old law, they would have been subject; a result which would be contrary to the whole scope and scheme of the enactment which was to increase, and not to diminish the rewards for life salvage. But some reliance has been placed by the appellant upon that portion of sect. 459 which provides that where the ship is destroyed, or where the value thereof is insufficient to meet the amount of life salvage, the Board of Trade may

award to the salvors, out of the Mercantile Marine Fund, such sums as it may deem fit, in whole or in part satisfaction of the amount of salvage payable. Now the words taken *per se* do not, in my opinion, carry the argument that the owners of the ship are alone liable, any further than the earlier words in the section, to which I have already adverted; but they appear to me to negative any general personal liability of the owners of the ship; for, if it had been intended by the Legislature that there should be any such general liability of the owners, it is difficult to understand why, in the event of the ship being wholly or partially destroyed, they should be relieved from a liability primarily cast upon them, and that it should be imposed upon the Mercantile Marine Fund. Upon the whole, it appears to me that the true effect of sect. 459 is merely to give as against the ship a priority to claims in respect of life salvage over all other salvage claims whatever, and to leave as well to life salvors as to salvors of property all such other rights and remedies as they might be entitled to either under the old law or under the Merchant Shipping Act; and if it be the case that upon the true construction of sects. 458 and 459, the liability of the owners of the ship is not a general liability, but is limited to the value of the property saved, it must follow that the same construction will hold good as regards the liability of the owners of the cargo, for in 458th section which created the liability, no distinction is drawn between the nature of the liability of the owners of the ship and the owners of the cargo. But any doubts to which the words of the 459th section may give rise as regards the liability of the owners of the cargo are, in my opinion, removed by the language of the 468th section, which provides for the detention of the ship and the cargo, and apparel belonging thereto, whenever any salvage is due in respect of services rendered in assisting such ship or saving the lives of the persons belonging to the same, or in saving the cargo or apparel thereof; thus following the three several services enumerated in sect. 458. Why should the cargo be detained in cases in which there has been life salvage only, if the owners of such cargo are under no liability to pay or contribute to the amount due in respect of such life salvage?

The 469th section also has the same bearing, for it provides for the sale of any ship, cargo, or apparel which has been so detained, and for the payment of the amount due.

Upon a consideration of these several sections of the Act, I am of opinion that the liabilty to pay a reasonable amount of salvage to life salvors is imposed upon owners of cargo as well as upon owners of the ship, and that such liability is not a general personal liability to be enforced under any circumstance, whether the ship and cargo are lost or not; but a liability limited to the value of the property saved from destruction. The question remains to be considered, what is to be included in "property saved from destruction?" And I am of opinion that, as regards the right of life salvors to claim a reasonable amount of salvage, it is immaterial whether the property saved from destruction has been saved by salvors, as the expression is ordinarily understood, or by other means. The words of the 458th section of the Act, which creates the liability, appear to me to apply equally to the one class of property as to the other. Reliance has been placed upon the use of the word "salvage," as indicating that the claim must be in respect of property saved by salvors as recognised by the old law, and that no right was conferred by the Act upon the life salvors against or in respect of any property which would not have been subject to claims for salvage under the old law; but having regard to the provisions and scope of the Act of 1854, and the 9 & 10 Vict. c, 99, which preceded it, I do not think that the word was used in the 458th section in the limited sense suggested. Indeed, the section appears to me to contain a clear indication of the contrary; for the owners of the ship and cargo are made liable when any one of the three services is rendered and consequently when life had been saved, and there has been no salvage, in the limited acceptance of the term, of either ship or cargo; and in the 459th section the word "salvage" is clearly used to measure the reward or compensation to which the life salvor is entitled in cases in which by reason of the total loss of the ship no claim for salvage could have been enforced under the old law. In the result, I am of opinion that it was the intention of the Legislature, in passing the Merchant Shipping Act of 1854, not only to give a legislative sanction to the existing practice of indirectly rewarding salvors of life when they were salvors of property also, but to remedy the injustice of the existing law and practice, so far as they failed to provide reward for saving of life, when unaccompanied by a saving of property; and that under the provisions of the Act the owners of all property saved, whether ship, cargo, or apparel, and however saved, are rendered liable, to the extent of the value of the property saved, for a reasonable amount of salvage in respect of life saved, even though the life salvors have in no respect assisted in the salvage of either ship or cargo. If the views which I have expressed of the changes effected by the Merchant Shipping Act in the law of life salvage are correct, it would follow that, in the present case, the plaintiffs' claim for salvage is well founded and that the decision of the judge of the Admiralty Court should be affirmed.

It has been suggested in the course of the argument that the property recovered in the present case was "wreck." I do not think that it was wreck within the meaning of the statute; but it appears to me to be immaterial to consider whether it was so or not. It was a portion of the property saved from destruction. If it was "wreck" a question might arise whether the life salvor's claim was against more than the owners' interest in the "wreck;" that is, whether it was not postponed to the fees of the receiver of wreck, and possibly to other payments under the wreck clauses of the Act. The value of the recovered portions of the cargo is, however, much more than sufficient to meet all those claims and demands, and it is immaterial to consider their respective priorities.

Several cases have been cited in the course of this argument, but I do not think it necessary to refer to them further than to say that, in my opinion they do not support any views opposed to those which I have expressed. The case of *The Pusitier* (*ubi sup*) is the one which has been most discussed. In that case assistance had been rendered by a life boat, by two luggers, and by a steam tug. The services rendered by them were distinct, and were different in character. The

luggers claimed in respect of assistance rendered to ship and cargo, and made no claim for saving life. The life boat service was in saving life alone; whilst the tug claimed both for saving life, and for assistance rendered to ship and cargo. It was contended on behalf of owners of cargo that, as regards so much of the claim of the tug as was in respect of saving life, and as regards the entire claim of the life boat, the liability to pay salvage was limited by the Merchant Shipping Act to the owners of the ship; but the Court of Admiralty in the first instance, and the Judicial Committee on appeal, decided adversely to this contention, and salvage was awarded against the owners of cargo as well as against the owners of the ship. To this extent the same questions were raised in the case of *The Fusilier* as have been raised in the present case, and were decided adversely to the owners of cargo. In the views expressed in that case by Dr. Lushington in the Court of Admiralty, and by Lord Chelmsford in the Privy Council, I entirely concur.

James, L.J.—I am also of opinion that the judgment of the judge of the Admiralty Court ought to be affirmed, The Act of Parliament in plain words says that a life salvor is to be paid salvage, and that such salvage is to be paid by the ship and cargo—the only fund from which it could be paid. The judgment of Dr. Lushington, affirmed by the Privy Council, has established this, that (notwithstanding some apparent difficulty raised by the succeeding sections) such salvage is not to be thrown exclusively on the ship, but is to be borne rateably by the ship and cargo. There is nothing in the Act of Parliament which says, and nothing from which in my opinion it is reasonably to be implied, that the right of the life salvors is subject to a condition precedent that some salvage service should be rendered by some one to the ship or cargo or either. No doubt the language of the Privy Council is "ship and cargo saved," but it does not say, and in my judgment could not have meant to say the ship and cargo salved by the aid of a salvor. The word "saved" there means, according to my view of the language, that the ship and cargo has escaped from the peril in which it was, or has come to shore whether as wreck or otherwise. There is nothing unreasonable in making the owners of the ship and cargo pay for the salvage of the lives on board, any more than there would be anything unreasonable in a man making a householder pay for the salvage of the lives of his inmates from a fire; but it would be most unreasonable to make the right of the life salvors to salvage depend on the fortuitous circumstance that some other salvor unconnected with him succeeded in rendering to ship or cargo salvage services unconnected with the life salvage.

In *The Coromandel* (Swab. 205) the life salvage was rendered to a boat load of men who had escaped from the ship; the other salvage was rendered miles away and hours afterwards by a totally distinct body of salvors. In *The Fusilier* (2 Mar. Law Cas. O. S., 177) some of the life salvors afterwards had something to do with the salvage of the ship and cargo, but that was a mere accident; the latter part of their services was of the slightest kind; and, moreover the owners of a boat which had nothing whatever to do with the salvage of ship or cargo were decreed to participate in the life salvage paid by the ship and cargo. This seems to me quite in accordance with reason and principle. If a ship is in distress, and the persons who go to its reacue busy themselves in the first instance, as they ought to do, exclusively with the salvage of lives, and while they are doing this, by a change of weather, a rising tide and a favourable breeze lift the ship and waft her into a safe cove, surely it is quite as reasonable and right that the ship and cargo saved by the aid of God and without further expense, should pay the life salvors as if they had been saved by a steam tug coming up at the critical moment, or by some other salvage services for which they would have further to pay. In this case the ship was not saved, but cargo was saved; that is to say, it remained in a place to which the owners had access, and from which they are able to get it. It appears to me to make no difference that the bullion has been brought to the surface by the divers paid by the owners.

Doubtless, in estimating the value of the wreck, a large deduction might have to be made—a very liberal allowance—for the fact that the owners had to pay for somewhat special and speculative services in realising it. But then there can be no doubt in this case, that with the largest possible allowance on this head, the value of the cargo was very large, indeed so large that the amount of salvage awarded would appear to be a moderate percentage.

I base my decision on the words of the statute as they would be understood by plain men who know nothing of the technical rule of the Court of Admiralty, or of flotsam, jetsam, or lagan, The Legislature tells mariners that, if they exert themselves personally to save life, they shall receive a reward on the principles of salvage; and to put a technical meaning on the words, so as to limit the operation of the enactment, would be "to keep the word of promise to the ear, and break it to the hope."

Judgment affirmed.

Solicitors for the appellants, *Walton, Bubb,* and *Walton.*

Solicitors for the respondent *Lowless* and *Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKellar and J. M. Lely, Esqs. Barristers-at-Law.

June 12, 15, *and* 25.

Lohre *v.* Aitchison and another.

Marine insurance—Policy on ship—Partial loss—Repairs—Amount recoverable.

An underwriter's liability under a policy on ship when the ship has sustained damage which the assured, although entitled to abandon elects to repair, must be measured by the cost of the repairs necessitated by the perils insured against less one-third new for old, notwithstanding the underwriter is thereby made liable for more than the assured could have claimed for a total loss with benefit of salvage, and the assured obtains more than an indemnity for his loss.

A ship worth 3000*l.*, *and valued at* 2600*l.*, *was insured for* 1200*l. Having sustained sea damage, she was repaired at a cost of* 4414*l.* 18*s.* 11*d.*

Adding certain other particular average charges, and deducting one-third new for old material the amount of underwriter's liability on ship was 3178*l.* 11*s.* 7*d. The ship was new metalled, and had other new work done to her, and as fully repaired was worth* 7000*l. Salvage expenses were paid by the plaintiff, amounting to* 519*l.* 0*s.* 1*d., which added to* 3178*l.* 11*s.* 7*d., made* 3697*l.* 11*s.* 8*d. The plaintiff claimed to be paid* 1770*l. as a proportion of that amount. The defendants paid into court* 1080*l. as a proportion of* 2340*l., the amount of a total loss with benefit of salvage.*

Held, first, that the amount paid for salvage could not be taken into the estimate; but as the amount of proportion on the estimate of the repairs exceeded 1200*l.*

Held, secondly that the plaintiff was entitled to recover the 1200*l.*

THIS was an action upon a policy of marine insurance upon the ship *Crimea*, afterwards called the *Alf*. The declaration contained a count on the policy, stating the interest to be in the plaintiff, and alleging a total loss of the subject matter of the insurance by the perils insured against, and further alleging that the plaintiff necessarily incurred certain charges and expenses under the suing and labouring clause in the policy; and there were also common money counts. The plaintiff, by his particulars, showed that he claimed the sum of 1707*l.*, being the defendants' proportion of a total sum or claim of 3697*l.* 11*s.* 8*d.* The defendants pleaded to the whole declaration, bringing into court the sum of 1080*l.*, being the defendants' proportion of a total sum of 2340*l.*, and saying that it was enough to satisfy the plaintiff's claim. The plaintiff, by his replication, denied that it was enough.

By consent of the parties, and by an order of Brett, J., made the 27th Feb., 1875, the facts were stated for the opinion of the court in the form of the following

CASE.

1. The plaintiff was throughout the whole period hereinafter referred to, and is, the sole owner of the above mentioned *Crimea* afterwards *Alf*.

2. On the 25th Sept., 1872, Messrs. Potter and Co., being the agents for the plaintiff for that purpose, effected the policy on which this action is brought for 1200*l.* upon the said ship valued at 2600*l.* against the usual sea risks on an out and home voyage from the Clyde to Quebec or St. John's, whilst there and thence to any port or ports, place or places of call and (or) discharge in the United Kingdom. The policy contains the usual suing and labouring clause. The policy was duly signed by the defendants, who are two of the directors of the Marine Insurance Company, on behalf of the said company; and the policy was effected for the purpose of covering the interest of the plaintiff in the said ship on the said voyage. The ship was fully insured up to the agreed value, the balance of the sum of 2600*l.* being covered by other policies.

3. The ship safely performed the outward voyage, and duly arrived at St. John's. While there, she was, on the 7th Nov. 1872, chartered by the master to Messrs. Guy, Stewart, and Co., merchants of that place, to load a cargo of deals and battens, and therewith proceed to Dublin and there deliver the same.

4. On the 1st Jan. 1873, the said ship, being in every respect in seaworthy condition, and sufficiently found and manned, sailed from St. John's on her homeward voyage under the charter, with her cargo of deals and battens on board. On the 3rd and 5th Jan. the ship met with heavy weather, and during the 18th, 19th, 20th, and 21st Jan. she encountered most violent storms and gales of wind, with tremendous seas, by which her boats were stove or carried away, and many of her sails were blown away and great damage was done, and she was reduced to a leaky and waterlogged condition.

5. On the 30th Jan. the ship, being then in great danger of being completely lost, and being without fresh water or provisions, and in a helpless position, and not capable of being navigated, those on board of her sighted the steamship *Texas*, which ultimately took her in tow, without any agreement being come to as to remuneration for the service, and took her into Queenstown, and on or before the 11th March she was placed for safety near the wharf of the Victoria Dry Dock Company.

6. For the above mentioned services the owners of the steamship *Texas* subsequently demanded a sum of 3000*l.*, and they caused the ship *Crimea* or *Alf*, her cargo and freight, to be arrested under a warrant of the High Court of Admiralty in Ireland in a salvage suit, instituted *in rem* against the ship, cargo, and freight.

7. By the plaintiff's instructions, the admiralty suit was defended on behalf of the plaintiff and the parties interested in the cargo, and an appearance was duly entered on behalf of the plaintiff and the owners of cargo. A sum of 500*l.* was, by the answer tendered in satisfaction of the claims of the owners of the *Texas*, which sum was not accepted, and the suit accordingly came on for hearing. In the result, the court awarded to the owners of the *Texas* a sum of 800*l.* in respect of the services rendered, and condemned the defendants in the suit in costs.

8. In the course of the Admiralty suit affidavits of the value of the ship and cargo were filed on behalf of the now plaintiff, and by those affidavits the value of the ship as she then lay was shown to be 998*l.*, and the value of the cargo, without deducting freight, 3780*l.*

9. The ship was surveyed and examined (so far as she could be examined in her then condition) as she lay at Queenstown, where the *Texas* had left her, by a competent surveyor, who, on the 11th of March 1873, made a report of his survey, in which he described the condition of the ship as far as he could then ascertain, and recommended that the ship should be placed on a mud bank, and that she should then be pumped out, if possible, so that she could be discharged and placed in a dry dock for further examination and repairs, to put her into a seaworthy state.

10. The ship was placed on the mud accordingly, and the water pumped out of her, and a part of the cargo discharged. A further survey was then on the 30th April, made by the same surveyor as before, of which he reported the result. In this report, he further described the state of the ship, and recommended the bottom to be caulked and secured, so as to enable the vessel to be taken out of dock, that the cargo might all be discharged, and then docked if required, to ascertain if possible the full extent of the damage she had sustained, by further examination.

11. The recommendations of the last mentioned

report were carried out, and the ship was then again surveyed by the same surveyor as before, and another competent surveyor from the 6th to the 12th June, and on the 12th June those surveyors reported as the result of their survey what they considered necessary for the repair of the ship.

12. The plaintiff thereupon applied for estimates of the expense of doing the work so specified. The lowest estimate obtained was that of the managers of the Royal Victoria Dockyard, belonging to the Cork Harbour Docks and Warehouse Company, who on the 16th of June estimated the cost of repairing the ship at 2982*l*., not including sails, rigging, or equipment, or certain other work mentioned in the survey. On the 9th July the plaintiff accepted that estimate, and a formal contract for the work specified therein at the sum of 2982*l*., was signed between the plaintiff and the said company. The plaintiff at the same time obtained estimates for the necessary rigging, &c., amounting so 988*l*. 14*s*. 5*d*.

13. The ship was accordingly repaired under the said contract. Besides the work included in the said contract for 2982*l*., the ship's rigging, sails, and equipment were made good, as specified in the survey, and other work therein described was done to her. She was at the time metalled (not having been metalled before the loss) and, in addition, certain other work was done to her, included neither in the survey nor in the contract for 2982*l*., the cost of which amounted to about 65*l*. With the exception of this last mentioned 65*l*., and the metalling above mentioned, all the work done to the ship was specified in the survey, or included in the contract for 2982*l*. Of the work hereinbefore described, it is admitted that the metalling, the cost of which was 695*l*. 17*s*. 10*d*., and certain other matters, the cost of which amounted to about 500*l*., were new work, and not properly repairs, and no claim is made in respect of them.

14. All the works mentioned in the last paragraph (except the metalling and the works covered by the last mentioned sum of about 500*l*.) were undertaken for the purpose of making the ship staunch and strong, and seaworthy, which she had ceased to be by reason of the sea damage she had sustained, as hereinbefore described, and they were reasonably necessary for that purpose. The effect of those works was to make the ship a very much stronger and better ship, and of very much greater value than she had been before she sustained damage.

15. Divers general average charges were incurred to which the ship was liable to contribute, and which were covered by the policy, and divers particular average charges were incurred other than those for repairs which were covered by the policy.

16. The ship at the time of the loss was fifteen or sixteen years old. Her value in her undamaged condition before the loss was 3000*l*. Her value as she lay in her damaged condition was 998*l*. The amount of the salvage and general average expenses borne by the ship was 519*l*. 0*s*. 1*d*. The amount expended on the ship (exclusive of the said sum of 695*l*. 17*s*. 10*d*. for metalling, and of the said sum of about 500*l*. for work admitted not to be repairs, but new work) was 4414*l*. 18*s*. 11*d*. The last mentioned amount (after deducting therefrom one-third new for old in all matters to which such deduction is properly applicable) added to the amount of the other particular average charges on ship amounted to 3178*l*. 11*s*. 7*d*. The value of the ship after repairs was 7000*l*.

17. The plaintiff contends that upon the facts hereinbefore stated he is entitled to recover 1707*l*., a sum arrived at in the following manner. The said sum of 519*l*. 0*s*. 1*d*., being the ship's proportion of salvage and general average charges, and the said sum of 3178*l*. 11*s*. 7*d*., made up of the costs of repairs after deducting the one-third new for old as above stated, and of the other particular average charges upon the ship added together, made the aggregate sum of 3697*l*. 11*s*. 8*d*., and 1707*l*. bears the same proportion to 3697*l* 11*s*. 8*d*., which 1200*l*., the amount insured, does to 2600*l*., the valuation in the policy. If this contention be right the amount paid into court is deficient.

18. The defendants contend that the above repairs cannot be allowed in particular average or as a measure of the depreciation of the vessel, and that in any event the underwriters are not liable for more than a total loss with benefit of salvage, deducting from such salvage the ship's proportion of all salvage and general average charges.

The court may draw inferences of fact, and may refer to any documents hereinbefore mentioned.

The question for the opinion of the court is whether the plaintiff's contention or the defendants' contention is correct, or upon what principle the defendants' liability is to be estimated.

After the decision of the court upon the above special case it is agreed that the matter shall be remitted to the arbitrator to settle the figures upon the footing laid down by the court.

Cohen, Q.C. (*Hollams* with him), for the plaintiff, relied on the principle that a contract of insurance is a contract of indemnity. He cited

Arnould on Marine Insurance, 4th edit., vol. 2 p. 934;

Peele v. *Merchant Insurance Company*, 3 Mason's Reports, 27.

Benjamin, Q.C. (*Crofton* with him), for the defendants, argued that the contention of the plaintiff was inconsistent with the first principles of insurance law, as involving the underwriter in a greater liability for a partial than for a total loss. He cited

Lidgett v. *Secretan*, 1 Asp. Mar. Law Cas. 95; L Rep. 6 C. P. at p. 600;

North of England Iron Steamship Company v. *Armstrong*, L. Rep. 5 Q. B. 244;

Stewart v. *Steele*, 5 Scott, N. R. 927;

Knight v. *Faith*, 15 Q. B. 649;

Phillips on Insurance, vol. 2, pars. 1742, 1743.

Cohen, Q.C., was heard in reply.

Cur. adv. vult.

June 25.—The written judgment of the court, Mellor and Lush, J.J., was delivered as follows by

LUSH, J.—This case raises the following questions for our decision: 1. Whether the liability of the underwriter on a ship, which has been repaired by the assured, is to be measured by the cost of the repairs, or by the depreciation of the vessel as a saleable chattel; 2, whether in the case of a partial loss, the assured can be liable for more than a total loss with benefit of salvage. [The learned judge then stated the facts, and proceeded]:

If the loss is to be estimated by the depreciation of the ship as a saleable chattel, the defendants have paid more than enough into court. For deducting from the value of the hull the cost of bringing her to port, and supposing this to be 519*l*. the balance, 479*l*., represents the salvage: and, deducting that sum from the 3000*l*.,

her value when she sailed, the depreciation by sea damage would be 2521*l.*, or about 84 per cent.; which, upon 1200*l.*, would be 1008*l.* This is the principle on which damage to cargo is estimated, and this, the defendants contend, is all that they are liable to pay. And what lends additional force to the defendants' contention is that, even with this percentage, the plaintiff will be more than indemnified. He has paid altogether, in order to get the ship up to her present value of 7000*l.*, sums for repairs amounting to 4414*l.* 18*s.* 11*d.*, for metalling 695*l.* 17*s.* 10*d.*, for other new work 500*l.*, and for salvage and average charges 519*l.*, making altogether 6129*l.* If he receives 84 per cent. on 2600*l.* he will realize 2184*l.*, which, deducted from 6129*l.*, leaves 3945*l.* as the total outlay to be borne by him. Adding to this the original value of the ship (3000*l.*), the aggregate falls short of what the ship is now worth by 55*l.*; and if he recovers from the underwriters the full amount of his insurance he will be about 500*l.* in pocket. This is certainly a startling result, and one which gives great moral force to the defendants' argument. But although it happens in this particular case that the plaintiff will not only be indemnified, but will be a considerable gainer, the contract cannot receive a different construction from that which it could have received if the result had been loss instead of gain to him. For the indemnity intended by the contract of insurance is the making good to the owner the loss he sustained by sea damage during the voyage insured. Whether the owner will ultimately be a gainer or a loser by the transaction is a matter beyond the scope of the contract, and one with which the underwriter has no concern. The circumstance that in this case the owner happens to be, in the result, in a better position than he would have been if the accident had not happened cannot, therefore, be taken into account. We must, consequently, return to the only question we have to consider: What is the measure of damage which the underwriter on a ship engages to pay in the case of a partial loss? Is the ship, for the purpose of this computation, to be viewed in its damaged, or in its repaired, condition? If ships were kept merely for sale, it might reasonably be contended that the same principle ought to be applied which is applied to damaged goods. But a ship is intended to be used for profit. The owner is in many contingencies bound to repair. He has always the right to repair, and it is in the contemplation of both parties that if damage happens the ship will be repaired if it is worth the expense. If, instead of repairing, the owner chooses to sell the ship in her damaged condition, he fixes his loss at the difference between what she was worth and what she is sold for; but if he elects to repair, the loss is ascertained by the cost of the repairs less a proper deduction on account of having new timber for old. There is no authority for the position that where the repairs have been done their cost (with the qualification mentioned) is not the proper measure for damage.

The anomaly in this case is really caused by the arbitrary rule which has been established of estimating the benefit which the owner receives from having new timbers in the place of old at one-third of their cost. If it were allowable to enter into what, in the present case, should be the proportion, a much larger allowance—perhaps two-thirds—would be nearer to the reality, and that would have reduced the claim on the underwriter to the dimensions of the ordinary partial loss. But that, we think, cannot be done. To prevent the disputes and difficulties, which such an inquiry in each particular case would cause, an average rate of allowance has been adopted, and the usage has been so long established and so uniformly applied that it has become practically incorporated into the contract. (See *Da Costa* v. *Newnham*, 2 T. Rep. 407; *Poingdestre* v. *Royal Exchange Assurance Company*, Ry. & Moo. 378; *Fenwick* v. *Robinson*, 3 C. & P. 324). For repairs to ships which in the language of marine insurance are termed "new"—that is, ships on their first voyage or which are less than a year old (for it does not seem to be settled what the precise test of novelty is)—no allowance is made, for they cannot be the better for the repairs. But, as to all other ships the rule applies, whatever may be their age or the state of their timbers. If the ship is, like the *Crimea*, an old ship the rule operates greatly in favour of the owner: if the ship is a sound, newly built ship the underwriter has a great advantage. It is clearly for the benefit of all parties that some fixed rule of allowance should be established, and as this has prevailed so long it may be presumed that, on the whole, and in the long run, justice is done. At all events, being so established, and being by implication part of the contract, it cannot be varied to meet the exigences of a particular case. The contention that underwriters are not liable for more than a total loss with benefit of salvage is founded on a misconception of the contract, which is a contract of indemnity. When the assured abandons and claims for a total loss, the underwriter is entitled to salvage. But the owner is not bound to abandon. He may always repair if he pleases, and claim for a partial loss; and when he does so, the salvage belongs to him. The contract is not to pay 1200*l.* in the event of a total loss only, and a smaller sum if the loss is only a partial one. If this had been the intention, it should have been expressed. What the underwriter engages is to pay any loss which the assured may incur from the perils insured against, not exceeding the specified amount.

The claim for a proportion of the salvage expenses, over and above the 1200*l.*, is one which cannot be allowed. It is true the policy contains the usual suing and labouring clause, which is a separate contract, and by which the underwriter engages to contribute towards the expenses of "labour and travel for, in, or about the defence, safeguard, and recovery of the said ship." But these salvage services were not employed with any view to the benefit of the underwriter; nor did they enure to his benefit. The damage done was so great as already to exhaust the policy, and the underwriter could gain nothing from the effort used to save the ship from sinking, unless the plaintiff abandoned. If he had abandoned, the defendants would have had the benefit of the services in having the hull, which was preserved by them, and then he must have paid for them. But as the assured refused to abandon, he elected to appropriate those services to his own use, and having done so, he cannot charge them against the underwriter. *Judgment for the plaintiff.*

Solicitors: for the plaintiff, *Hollams, Son, and Coward*; for the defendants, *Waltons, Bubb, and Walton.*

COMMON PLEAS DIVISION.

Reported by S. Hare, and A. H. Bittleston, Esqrs., Barristers-at-Law.

Thursday, April 19, 1877.

Allkins and another *v.* Jupe, Pembroke, Oppenheim, and Choisy.

*Marine insurance—Wagering policy—Open policy on profits and commission—Without benefit of salvage, "but to pay loss on such part as shall not arrive"—Illegality—*19 *Geo.* 2, *c.* 37*—Return of premiums.*

An assured under open policies of marine insurance on profits and commission on goods to be shipped containing the clauses "warranted free from all average," and "without benefit of salvage," "but to pay loss upon such part as shall not arrive," declared upon a number of British ships, one of which was lost.

Held, that the policies were within 19 *Geo.* 2, *c.* 27, *and void. Return of premium refused.*

Four actions were brought by the plaintiffs against the four defendants.

The first action was on two policies of insurance, dated respectively the 12th Jan. 1874, and the 6th March 1874, and underwritten by Jupe for the sum of 100*l.*

The second action was on the said policy of the 12th Jan. 1874, against Pembroke, for the sum of 100*l.* underwritten by him.

The third action was on a policy dated the 16th Feb. 1874, and underwritten for the sum of 125*l.* by Oppenheim.

The fourth action was on the said policy of the 6th March 1874, underwritten by Choisy for 50*l.*

These actions were ordered to be consolidated in one special case by a master.

The special policies of insurance were voyage policies on commission $\frac{\text{and}}{\text{or}}$ profits on goods, in ship $\frac{\text{and}}{\text{or}}$ ship, steamer $\frac{\text{and}}{\text{or}}$ steamers, warranted free from all average, and without benefit of salvage, but to pay loss on such part as does not arrive; with a return of 9*s.* 6*d.* per cent. for interest by steamers.

Indorsed were the following declarations, &c.:

13/2. *Woosung* (s.), Calcutta to London, reported March 4, 120*l.*

Settled, a total loss per *Woosung* (s.) on this policy of 120*l.*, or 12 per cent.

Settled, a return for interest by steamers on this policy, &c.

The case stated as follows: The plaintiffs were agents, who bought and sold shellac for account of principals.

The following is a specimen form of the sold note used by the plaintiffs in all the contracts of sale hereinafter mentioned:

We have this day sold by your order and for your account, J.E., about 200 cases orange shellac, at 11*l.* per cwt., without an allowance for block, quality to be fair average of the marks. If inferior, allowance to be made. To be shipped from Calcutta to London during January $\frac{\text{and}}{\text{or}}$ February '74, by sailing vessel or steamers. Should the vessel or vessels applying to this contract be lost before or after declaration this contract to be cancelled, so far as regards such vessel or vessels on production of the bill or bills of lading as soon as practicable after the loss is ascertained, ship or ship's name to be declared as soon as known to sellers. Should the shellac, or any portion thereof, be transferred to any other vessel or vessels and arrive, this contract to hold good. To be landed at a London dock or wharf, and worked as usual at seller's expense. All disputes to be settled by selling brokers. Customary allowances and conditions prompt three months from final day of landing. Discount. Deposit 20 per cent. on presentation of weight notes.

The names of the principals on either side were not disclosed by the plaintiffs. They effected for the benefit of the buyers insurances on the profits expected on the shellac bought, and they also insured their own commission as brokers.

On the 12th Jan. the plaintiffs instructed their insurance brokers to procure an open policy on commission and profits for 1000*l.* by ships or steamers from Calcutta to London, and the policy of that date declared on was accordingly effected. In like manner, the policies declared on of the 16th Feb. and the 6th March 1874, for 500*l.* and 1000*l.* respectively, were effected. The premiums paid were 10*l.* 13*s.* 1*d.*, 7*l.* 11*s.* 3*d.*, and 15*l.* 2*s.* 6*d.* respectively.

On the 8th Jan. the plaintiffs sold to a Mr. Watkins 200 cases of orange shellac for Messrs. Schultze and Mohr, at 11*l.* per cwt., and on the 16th Jan. resold 150 to Messrs. O. J. Peall and Company for 11*l.* 15*s.* per cwt.

On the 2nd Feb. Schultze and Mohr declared to the plaintiffs that 75 cases out of the 200 would arrive by the *Woosung*, and on the 12th Feb. the plaintiffs declared to Watkins and to Peall and Co. to the same effect.

The commission on the sale of the 75 cases sold on the 8th Jan. amounted to 15*l.*, and on the 16th Jan. to 15*l.* 15*s.* The profit of 15*s.* per cwt. on the resale amounted to 67*l.* 10*s.*

The news of the loss of the *Woosung* reached London about the 4th March. She had been expected to arrive on the 25th March, by which time the price had risen to over 13*l.* per cwt.

On the 12th Jan. the plaintiffs sold 50 cases of garnet shellac for Schultze and Mohr to Palmer and Co. at 9*l.* 15*s.* per cwt., and on the 19th Jan. resold the same to Parratt, Lodge, and Co. for 10*l.* 2*s.* 6*d.* per cwt.

On the 2nd Feb. the *Woosung* was declared to each purchaser as the ship by which the 50 cases would arrive.

The plaintiffs' commissions on those sales were 10*l.* 10*s.* and 11*l.* 4*s.* Palmer and Co.'s profit was 27*l.* On the 25th March the price of garnet shellac was above 11*l.*

On the 12th Feb. the plaintiffs declared an interest on the policy of the 12th Jan. to the extent of 120*l.* on the *Woosung* to cover the said profits and commissions. After receiving the news of her loss, they declared on the policy of the 16th Feb. an interest on the ship of 180*l.* to cover any profits and commissions not covered by the 120*l.*, and profits and commissions by intended resales by Peall and Co. and Parratt, Lodge, and Co.

The *Woosung* was a British vessel. Some portion of the shellac shipped in her reached London so damaged as to be incapable of identification, and subject to a heavy claim for salvage. The vendors gave notice that their contracts were void, and the shellac salved was sold for the benefit of the underwriters on cargo.

A similar case arose with respect to shellac on board the *Queen Elizabeth*.

The questions for the opinion of the court were: First, whether the policies declared on were null and void under 19 Geo. 2, c. 37, or whether they were good on commission or profits, or both; secondly, whether, if the policies were null and void, the plaintiffs were entitled to recover the premiums paid, or any part thereof.

Other questions were submitted, but they depended upon the foregoing ones.

Benjamin, Q.C., *Watkin Williams*, Q.C. and *Channell*, for the plaintiffs.—We admit that the cases of

Smith v. *Reynolds*, 1 H. & N. 221;
De Mattos v. *North*, 3 Mar. Law Cas. O. S. 141; 18 L. T. Rep. N. S. 797; L. Rep. 3 Ex. 185;
Mortimer v. *Broadwood*, 3 Mar. Law Cas. O. S. 229; 20 L. T. Rep. N. S. 398;

are against us to a certain extent; but in all of them the *ratio decidendi* was that the words "without benefit of salvage" vitiated the policy. And in all of them a particular ship was named, whilst here the policy is an open one. *Thellusson* v. *Fletcher* (1 Doug. 315) and *André* v. *Fletcher* (2 T. R. 161) decide that the statute in question is not applicable to other than British ships. This policy was not necessarily on a British ship, though the ship turned out eventually to be so. The policy also contains a statement with regard to a return for interest, which takes it out of the statute. [Grove, J.—Is not the real meaning of the expression this, that there being less risk in a steamer than in a sailing vessel, the underwriters will take less premium?] On the face of the policy itself there is a declaration that it was not a wager policy, but on things in which the assured had an interest. The words "without benefit of salvage" are a mere stereotyped form. Besides, here they are overridden by the clause "to pay loss on such part as shall not arrive." Therefore, there is a benefit of salvage upon such parts as do arrive, and it is obvious there can be none on goods which do not arrive. The preamble of the statute refers to secret and concealed assurances: there is no such thing in this case, and the *raison d'être* of the statute does not apply. The leading case upon the subject is *Lucena* v. *Crawford* (2 Bos. & P. N. R. 269). At p. 310 the judges give their answer to the 7th question put to them by the House of Lords, which was to this effect, whether the plaintiffs had any interest capable of abandonment? and if not, whether that fact affected the validity of the assurance? The majority of the judges answered that the want of power to abandon was not a certain criterion of insurable interest. Here, the assured are not the owners of the goods, and could not insure them; but they have an interest, which is, that the goods shall arrive. The same view is taken in Phillips on Insurance, sect. 1503, where it is said that "a policy on expected profits does not seem to offer anything upon which an abandonment can operate, and it does not appear . . . . that an abandonment of this interest can be of any importance to the underwriters, otherwise than as a notice that a total loss is claimed; and, if this is its only effect, an abandonment is not necessary." In *Mortimer* v. *Broadwood* (3 Mar. Law Cas. O. S. 229) Montague Smith, J. said: "If you can show that no circumstances could possibly occur under which the underwriters would obtain salvage on an insurance of profits, you might be entitled to strike these words out." And Bovill, C.J. was of the same opinion. The policies are double: on profits, and on commission too. There can be no salvage of commission. Phillips on Insurance, sect. 1504: "The right of abandonment depends upon the same principles as in the case of freight. . . . . The assured may, by an abandonment, transfer to the insurers the right of receiving his commissions in the event of the cargo arriving; but he cannot abandon the right of earning commission." No notice of abandonment to the underwriters on freight is necessary: (*Rankin* v. *Potter*, 2 Asp. Mar. Law Cas. 65; L. Rep. 6 H. L. 83.) The insurance on commission is not within the words of the statute; that on profits is, because profits are part of the goods themselves. They also referred to Parsons on Insurance, 1 vol. pp. 193, 195, and 601; and 2 vol. pp. 170, 171, and 311. Upon the question of the return of the premiums paid, *André* v. *Fletcher* decided that they could not be recovered when the policy was illegal; but in this case the policy is not illegal upon the face of it, and only became so subsequently.

Cohen, Q.C. and *Gainsford Bruce* for the defendants.—Suppose an owner of goods insures the goods with one and the profits with another, and part of the goods are lost, but part arrive and are sold at a profit, that is a salvage of profits. There can, therefore, be a salvage on profits, and it belongs to the underwriters on profits. The case of *De Mattos* v. *North* (3 Mar. Law Cas. O. S. 141) decided that an insurance on profits without benefit of salvage is illegal. The clause "to pay loss on such part as shall not arrive," is no more than a modification of the clause "without benefit of salvage." If this policy were on goods without the words "to pay loss," &c., if some of the goods did not arrive the underwriters would not be liable. The object of the clause is that the underwriters are to be liable, not for damage, but for non-arrival. A salvage on commission is also possible. For instance; goods, profits, and commission are insured; the ship is captured, a claim is made for a total loss, which is paid; then occur a recapture and sale in England, or the ship is abandoned but the derelict is afterwards saved; in either case there is a salvage of profits and commission. This policy is illegal. The statute intended that certain forms of policy should presume a want of interest, and that such a presumption should be irrebuttable—the forms being those usually inserted in wagering policies: (Arnould on Marine Insurance, 111.) The clause "warranted free from average" means that the underwriters are only to be liable if no goods arrive. The words "to pay loss," &c., means that the underwriters are to be liable if any part arrive. They do not confer a benefit upon the underwriters, but increase their liability. There is to be no benefit of salvage at all. They cited also

Lozano v. *Janson*, 2 E. & E. 170;
Phillips on Marine Insurance, sect. 1657.

The return of the premium cannot be conceded. If the policy was not illegal at its inception, it was made so by the declarations.

Channell, in reply.

Grove, J.—In this case I am of opinion that the defendants are entitled to the judgment of the court.

The policy in question was a policy by which Allkins (one policy is clearly enough to take as an example) "in *their* own names and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause *themselves*, and them, and every of them to be insured, lost or not lost, as and from *Calcutta to Liverpool, viâ Cape or*

Suez Canal, with leave to call," &c.; and the policy subsequently goes on "upon any kind of goods," &c., "of and in the good ship or vessel called the . . . . *ship* and/or *ships, steamer* and/or *steamers, whereof* is master, under God for the present voyage . . . . or whosoever shall go for master in the said ship." So that the policy of insurance is on commission and profits by any ship, whether British or foreign, whether steamer or not, and, I may say, with any master. The policy then goes on to say, "Warranted free from all average, and without benefit of salvage, but to pay loss on such part as does not arrive." Now, by the statute 19 Geo. 2, c. 37, which is intituled "An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandise or effects laden thereon," and which recites that "Whereas it has been found by experience that the making assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices," it is enacted "that from and after the 1st Aug. 1746, no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty or any of his subjects, or on any goods, merchandises, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer: and that every such assurance shall be null and void to all intents and purposes."

Now, this policy is not upon goods or merchandises, but upon profits, and it has this clause, "without benefit of salvage, but to pay loss upon such parts as shall not arrive." No doubt the words in themselves are not identical with the words of the statute, because they do not contain, after the word "salvage," the words "to the assurer;" but I think the words, when we come to look at the next clause, are perfectly clear. When we read the whole clause, it can only mean, "without benefit of salvage" to the insurer, "but he (the insurer) is to pay loss on such part as shall not arrive."

That being the policy, three points were made by Mr. Benjamin. I will take the second point first, simply in order to dispose of it at once, because it does not arise in this case. He says this is not a policy by which, upon the face of it, any proof of interest is required. And he says the word "interest" is used in the policy, because in one part of it it says, "to return 9*s.* 6*d.* for interest by steamers." Whether that would affect the matter it is not important to decide, for our decision does not proceed upon the ground that the policy is one in which there is either the existence or absence of a clause showing that the parties are not to have an insurable interest or to pay for an insurable interest. Then Mr. Benjamin says the statute, as it is, is intended to apply in terms only to British ships, that is, to ships belonging to "His Majesty, or any of his subjects." He says the statute does not apply to this case, because the ship might have been either a British or a foreign one.

I am of opinion it is within the words of that statute. The words "ship" and/or ships, steamer and/or steamers" may include a British ship, and would constitute a good policy upon goods carried by a British ship, as well as by a foreign one. What else is the object or intent of this policy looking at the face of it? Clearly to give the assured the option of bringing their goods by any vessels, British or foreign. And that is within the meaning of the statute, and in effect within its words. Otherwise, the statute could easily be evaded. The general form of language used, "every such assurance shall be null and void to all intents and purposes," implies that the policy shall be void if it comes within the prohibition of the statute; and it appears to me that a contract which enables a person to insure goods either by British or foreign ships is not the less within the statute because it may happen that the goods may come by a foreign ship. Therefore, so far as that point is concerned, if the policy is open to that construction, it does fall within the statute. A British ship is not in any way excluded; in fact, the nationality of the ship would to some extent depend upon the port of shipment. Even if we were to hold otherwise, it would only make Mr. Cohen's argument applicable, namely, that the act of shipment on board a British ship vitiated the policy.

The great contest in this case, however, is whether the words "without benefit of salvage," as used in this policy, are within the statute. We are of opinion in the affirmative.

Upon this point the first question is, whether the words "goods, merchandise, or effects" include an insurance on profits. Mr. Benjamin at first admitted that the cases of *Smith* v. *Reynolds* (1 H. & N. 221), *De Mattos* v. *North* (3 Mar. Law Cas. O.S. 141), and *Mortimer* v. *Broadwood* (3 Mar. Law Cas. O.S. 229), have decided that they do. He afterwards sought to argue that the first two cases, not mentioning the case of *Lucena* v. *Crawford* (2 B. & P. N. R. 269), were not to be taken as sound decisions. Such a proposition, however, we cannot accept. The decisions are those of courts of concurrent jurisdiction, and have been treated as law. *Mortimer* v. *Broadwood* was sought to be distinguished by remarking that it was a case of an insurance upon goods to arrive by a particular ship; and that, if they arrived by another ship, there might be a salvage in respect of them. Then, the words "without benefit of salvage" were assumed throughout to mean to the insurers, if not to both parties; and the words "but to pay loss on such part as does not arrive," were said so to qualify the clause "without benefit of salvage" as to take the case out of the statute, because the reason of it could not apply. For, if the underwriters or insurers were to pay upon such goods only as did not arrive, there would be no object in that clause; and the words would be redundant, because the assured could only get indemnity for their loss. They could get only either the goods in specie if they did arrive, or such salvage as might arrive, or else an indemnity for what might be lost. They could not get both payment from the underwriters, and also a benefit of salvage, and so recover more than an indemnity—getting the goods, if the insurance is on goods, or the profits, if it is on profits, and also payment from the underwriters.

The statute prohibits all policies by way of gaming or wagering, and policies which are without benefit of salvage to the insurers are of that description, because the assured can, by their

means, get more than an indemnity. No doubt it also intended to obliterate a clause which had been found injurious and inequitable in its operation; and, for that purpose, it enacts that no policy shall contain such a clause. We cannot get out of that unambiguous enactment, because we think that in a particular case hardship would arise. As to the words of the policy themselves: "warranted free from all average" means that the underwriters have only to pay where there is either a total loss, or a constructive total loss. Where there is a constructive total loss, and there is salvage, the salvage goes to the underwriters. They pay upon the whole loss, and they take whatever is saved. Where the words are "warranted free from all average, and without benefit of salvage"—that is, as I read it, to the insurer—there the underwriters would have to pay for a total loss, and would not get the salvage, which would go to the assured, who would therefore get something more than an indemnity, a case clearly within the statute. The words "but to pay loss upon such part as shall not arrive" present some difficulty. It is clear that the underwriters would have to pay upon such goods as never arrive at all. But take the case of certain goods arriving by the vessels in which they are expected to arrive in specie, and in a saleable state, they would not have to pay upon them. Then suppose part of the goods are apparently lost, so that the underwriters pay upon them, but they afterwards get into the hands of the persons to whom they belong, two questions would arise: First, would the underwriters be entitled to recover back the money paid upon those goods? and then, what would be the effect of the words used in this policy? Would the underwriters have a right to recover their money only upon such goods as arrived in specie, or upon such goods and damaged goods also? Would they have a right to recover *pro tanto* upon all? Supposing they might recover on all, there might be a somewhat difficult question, because, if they are to recover on all (taking away the words "without benefit of salvage"), how can the words "warranted free from all average" be construed consistently with the words "to pay loss upon such part as shall not arrive?"

The interpretation I put upon the whole is this: the underwriters are to pay, not a total loss upon the whole, but only upon such goods as shall not arrive in the condition in which they are expected to arrive; and then the words "warranted free from all average" would apply to such goods as did not arrive in a damaged state. I should be inclined to go further, and to say that the words "to pay loss upon such part as shall not arrive" mean, to pay not on such goods as shall never arrive in any sense at any time, but upon such goods as shall appear to have been lost in the ordinary way in which persons would contemplate such a loss, and do not mean that the underwriters are to be recouped because at some subsequent period some goods turned up whether damaged or not. That construction seems to me to give effect to all the words. If it is right the statute clearly applies, because the assured may get, not merely an indemnity from the underwriters, but a considerable profit if the goods themselves turn up. He might get the whole value of his goods, and the goods themselves. If this construction is not right, and the underwriters can recover their money at some remote period, it can only be by process of law; and, if the assured be practically insolvent, the underwriters will get very little good by such means. The statute may have been intended to prevent this, and to enact that, where the underwriters have fully paid, they are to get whatever benefit may arise at once, instead of in a circuitous way. What I have said hitherto has related to an insurance on goods.

Mr. Benjamin argued that there is no such thing as a salvage on profit; but that contention is inconsistent with the case of *Mortimer* v. *Broadwood* (3 Mar. Law Cas. O.S. 229). The words are not "without salvage," that is, applying only to salvage in specie, but "without benefit of salvage." No doubt parties may get the benefit of salvage in a case of this sort, for, if goods to arrive are sold at a profit, and are lost, but afterwards arrive there would be a benefit of salvage to the party into whose hands they come, though of course they might arrive in such a state that there could be no profit. The object of the statute equally applies to an insurance on profits. The case of *Mortimer* v. *Broadwood* decided that point. That being so, the policy is clearly within the Act; and I should have been inclined to have based my decision upon that ground alone. It is difficult to exhaust the subject. Other contingencies may arise; Mr. Cohen has mentioned several. In the case of *Lozano* v. *Janson* (2 E. & E. 170), which was a case of recapture, the judgment of the Court of Queen's Bench was overruled by the Privy Council. It was there decided that the underwriters were not bound to pay, because the ship had not been a lawful capture. It does not seem to me that that case supports the argument that the underwriters, who have paid as for a total loss, can at all times recover fragments of their payments on fragments of the goods arriving at different times.

Everything I have said with regard to an insurance on profits applies equally to an insurance on commission, only perhaps in a less degree.

There is only one other point as to the return of the premium. I do not like to lay down general principles, which might in some cases be inapplicable; therefore I do not say that no case might arise where the premium might be returnable. But here the premium is paid upon the contract which I hold to be null and void. Where there was no blame on either party the premium might have to be returned; but in this case both parties are equally to blame, and, in my opinion, the assured are not entitled to repayment.

Lindley, J.—I am of the same opinion, and will state briefly my reasons.

What we have to do is, first, to understand the policy and the statute, and then to apply the one to the other. If we examine the policy we shall see that it is on "ship $\frac{\text{and}}{\text{or}}$ ships," which expression obviously includes, at least, an English ship, though no nationalty is specified. It is then on either English or foreign ships. It seems to me, therefore, that there is nothing in Mr. Benjamin's first point.

Then, as to the question of profits on goods. For the reasons given by my brother Grove, and also for those given by Mr. Cohen, which I adopt upon this point, I do not think the policy can be divided into two, namely, one on profits and another on

commission. By so doing neither party would gain anything. It is true that there is no actual decision that this statute applies to policies on commission; but, if we could split the policy into two, I should hold that a policy on commission would have to follow the fate of a policy on profits.

Next we have the words upon which everything turns, "warranted free from all average, and without benefit of salvage, but to pay loss upon such part as does not arrive." What do those words mean? Three points are made: Warranted free from all average," means that the underwriter is not to pay for an average loss—that one understands perfectly well; "without benefit of salvage" means (if it means anything) that if there can be any salvage the underwriter is not to have it. Then the other words "but to pay loss upon such part as does not arrive," are subject to an observation clearly intelligible, though there is an element which is left in doubt, and to which I will allude hereafter. Let us see what we have to deal with. We have a policy of insurance containing the words "without benefit of salvage." We are asked to strike them out because they have, it is said, no particular meaning. But upon what principle can we do that? Here is a contract which, upon the face of it, is illegal, and one of the parties to it asks us to strike out the words rendering it so. If they had no meaning at all, that might be done. If it could be proved that the words were inserted by mistake that might be done. But I am not satisfied that either case is capable of proof, and I think I can show that the words were inserted for a purpose. I agree with Mr. Channell that the mere fact that you find in a policy the words "without benefit of salvage" is not sufficient to render it void. But here the parties all meant, if they meant anything, what they have said. We have, therefore, a policy on profits without benefit of salvage, which is a case covered by authority, for the cases cited pre-suppose that the statute applies to policies on profits, and that there may be salvage of profits.

Now, it is sought to distinguish this case from those which have been cited, because it contains the words "but to pay loss upon such part as does not arrive." Leaving out, for the moment, the words "without benefit of salvage," what is the true construction of the policy? Or, in other words what are the underwriters to pay upon? I think it means that they are to pay only in respect of profits on goods which do not arrive. But when is this payment to be made? We are left to answer that question upon general principles. Looking at the policy from that point of view, I apprehend that the payments must be made at the time at which such payments are usually made in transactions of this kind. The question of arrival or non-arrival must be determined with reference to that time, and not to some subsequent time. If the goods have arrived at that time payment is not to be made; if they have not arrived at the usual business time, then payment must be made for those which have not arrived, and those only. Now, suppose payment to have been so made, can it be contended that, if goods subsequently arrive, any of the money is to be returned? I see no legal or equitable principle for such a contention. It is not a question of mistake. The payment is not made upon the supposition that the goods will never arrive. There is not a mutual mistake of the parties, nor, as in *Lozano* v. *Janson* (2 E. & E. 170), a mistake of the court, for there the court proceeded upon the mistake that an actual condemnation had passed. If there is salvage the policy says it is not to go to the underwriters, and so the statute applies. I should be very slow to believe that business men like underwriters, and persons effecting policies, deliberately put in words of this kind which had no meaning. I think I see the meaning plainly enough, though perhaps I do not see everything. This is an open policy, and if the ship declared on were foreign, the words "without benefit of salvage" might have some effect; and it strikes me both parties knew this. There is, at all events, a combination of circumstances under which these words would have a meaning and render the policy illegal if the court should take the view that its legality or otherwise depended on the declaration, in which latter event the court might be applied to to strike them out. That view is, to say the least, a possible one. However that may be, according to the principles laid down in the case of *Murphy* v. *Bell* (4 Bing. 567), where the policy was one of "interest or no interest," I come to the conclusion that this policy is null and void within the meaning of the statute.

Lastly, can the premiums be recovered back? If I am right that the policy is an illegal one, there is no doubt whatever about it. And if the true construction of the policy is that it may be legal or illegal according to the use made of it, then it became illegal by the act of the plaintiffs, and not by that of the underwriters. I doubt whether the latter is the true view. I prefer the first one.

I think the first two questions ought to be answered in favour of the defendants.

Judgment for the defendants.

Solicitor for the plaintiffs, *J. Rae.*

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

Monday, June 11, 1877.

(Before Lord COLERIDGE, C.J., and DENMAN, J.)

BAYLEY AND OTHERS v. CHADWICK,

Earning of commission—Proximate cause—"In consequence of."

A. employed B. to sell a ship, and agreed that if a sale was effected to any person "led to make such offer in consequence of" B.'s mention or publication of it, B. should be paid a commission:

Held that B. was entitled to his commission, although neither the purchaser nor his agent had seen B.'s publication, as he had been led to make an offer by hearing of it.

THE plaintiffs in this case were ship auctioneers, and the defendant employed them to sell by public auction or otherwise the steamship *Bessemer*. It was agreed that if the ship was not sold by auction, but a sale was subsequently effected "to any person or firm introduced by" the plaintiffs, "or led to make such offer in consequence of" plaintiffs' "mention or publication of the ship for auction purposes," the plaintiffs should be paid a commission of one per cent. on the purchase-money. At the trial, Lord Coleridge, C.J., ruled that these words included a sale which was the indirect consequence of advertisements published by the plaintiffs for auction purposes. The evidence showed that, though the purchaser must

have made his offer through hearing of the advertisement, neither he nor his agent had themselves seen it. The jury found for the plaintiffs.

A rule for a new trial on the ground of misdirection having been obtained, *Edwyn Jones* now showed cause.

Reid, in support of the rule. The Lord Chief Justice was wrong in directing the jury that the plaintiff would be entitled to recover, although the purchase was only an indirect consequence of the advertisements. *Causa proxima, non remota, spectatur* is a maxim that the court will apply in construing all contracts. He cited

Gibson v. *Crick*, 31 L. J. 304, Ex.;
Ionides v. *Universal Marine Assurance Company*, 14 C. B., N. S., 259; 32 L. J. 170, C. P.

Denman, J.—I am of opinion that this rule should be discharged. The words of the contract are peculiar and do not enable the court to ascertain very accurately what the parties contemplated. The question is whether the Lord Chief Justice was wrong in ruling that there was evidence to go to the jury on the question whether the purchaser of the ship was led to make the offer that he did make in consequence of the publication of advertisements by the plaintiff. It appears to me that the very able argument of Mr. Reid failed to show any legal necessity for construing the words in the manner he suggested. The words "in consequence of" are very large words, and I think are amply sufficient to include indirect as well as direct consequence. The person who made the offer could not have done so unless he had in some way become aware that the ship was for sale; and if he became aware of it through this advertisement having been seen by someone else, it would be far too narrow a construction to hold that the offer was not made in consequence of the publication of the advertisement. Mr. Reid argued that the word "led" required that the person making the offer should be actually seised with personal knowlege. But that also appears to me to be putting too narrow a construction on the words of this agreement. I think it is unnecessary that the publication should have been actually seen by the purchaser or his agent; and that if the jury could reasonably find that the offer would never have been made but for the publication for auction purposes, that is sufficient to entitle the plaintiff to recover under this agreement. The cases cited by Mr. Reid do not assist us in this case. The first turns on quite different words, and the other is a marine insurance case, and also quite different. A case more like the present than either of those cited is *Mansell* v. *Clements* (L. Rep. 9 C. P. 139). Cases, however, do not help us in this question. All that we have to say is whether there was evidence to go to the jury that the purchaser was induced to make his offer by the publication for auction purposes. I think this was purely a case for the jury, and that the rule should be discharged.

Lord Coleridge, C.J.—Two points are raised by the argument. First, as to the construction of the contract in this case; secondly, as to whether there was evidence to go to the jury that the sale was even the indirect consequence of the advertisement. On the first point, I held at the trial that "any person led to make such offer in consequence of publication," was not limited to a person making an offer in consequence of his, personally or by his agent, seeing the publication, but included the case of an offer in consequence of the person offering or his agent hearing of the publication. Upon consideration, I am unable to see that I was wrong. Looked at fairly, "in consequence of" must include indirect as well as direct consequence. That may make the contract an indiscreet one, but that does not affect the question. By the very collocation of the words in this contract it seems to be reasonably clear that the parties did intend very indirect consequence indeed, The most narrow construction of the words would make this paragraph provide for the payment of commission at a time when, in ordinary cases, all claim to it would have ceased. I agree with my brother Denman that the cases cited are not in point. The other question is whether there was any evidence to go to the jury that this advertisement for auction purposes did indirectly lead to the offer that resulted in a purchase. I am of opinion that there was, and that this rule should be discharged. *Rule discharged.*

Solicitors for the plaintiffs, *Lowless* and *Co.*
Solicitor for the defendant, *Chambers.*

EXCHEQUER DIVISION.

Reported by H. F. Dickens, Esq., Barrister-at-Law.

Wednesday, June 13, 1877.

General Steam Navigation Company v. London and Edinburgh Shipping Company.

Practice—Costs—Collision—Defence of compulsory pilotage—Order LV.

In an action by the plaintiffs for damages sustained by their ship in a collision with the defendants' ship, the defendants set up the defence, among others, that their ship at the time of the collision was by compulsion of law under the charge of a pilot. Upon this defence they succeeded and obtained judgment. No application as to costs was made at the trial, but the plaintiffs afterwards applied to the court under Order LV., for an order to deprive the defendants of costs on the ground that formerly in the High Court of Admiralty and in the present Probate, Divorce, and Admiralty Division the practice was and is uniform to disallow the defendant costs in cases where he succeeds in the defence of compulsory pilotage alone, if besides that he has raised other defences.

Held, without deciding whether the court had power under Order LV. to make an order as to costs at all, that the practice of the Admiralty Division applied to cases in that Division alone, and could not upset the general and well-established rule that the successful party is entitled to his costs.

Per Huddleston. B.—The court has power to make such an order.

Action by the plaintiffs who were owners of the ship *Florence*, against the defendants, the owners of the *Marmion*, to recover damages for injury sustained by the *Florence* through being run down while at anchor by the defendants' ship. The *Marmion* at the time of the collision was in charge of a pilot by compulsion of law. The defendants denied the alleged negligence, pleaded inevitable accident, and also set up the defence of compulsory pilotage. The cause was heard before Kelly, C.B., at the sittings in London, on the 2nd June 1876, when the jury found that the collision was wholly due to the negligence of the pilot. The verdict

was thereupon entered for the plaintiffs, with leave to the defendants to move to enter it for them; and a rule was afterwards made absolute to enter the verdict for the defendants on the ground that the pilot by whose negligence the collision was caused was compulsorily employed.

Butt, Q.C. and *Webster*, now moved for an order that the defendants should have no costs of the cause.—The application is made under Order LV. No application as to costs was made at the trial, but this court has power to make such an order under the words "or the court." That this is the interpretation of the order is clear. In the case of *Baker* v. *Oakes* (L. Rep. 2 Q.B. Div. 171; 35 L. T. Rep. N. S. 671, 832), Cockburn, C.J., said, "If the application had been to the court itself, I think there can be no doubt it would have had power to deal with the costs." If it does not bear the interpretation we put upon it, viz., that the court has a substantive and independent power to make an order as to costs, then we are driven to the interpretation that it means, "The Court of Appeal." But that cannot be the interpretation, as the Act says there is to be no appeal upon a question of costs only which is a matter of discretion. The words "or the court" must either be wholly unmeaning therefore, or must bear the interpretation we put upon them. Assuming, therefore, that the court has power to make such an order, the circumstances of the case are such as to justify the court in doing so. In the Court of Admiralty it has been the uniform practice to disallow the defendant his costs where he succeeds solely on the defence of compulsory pilotage, if besides that he raises other defences. When the Court of Admiralty was a separate court that practice existed; that court has now become a Division of the High Court, and the appeal is the same in that as in other divisions. The Court of Appeal has decided that in Admiralty causes, where the defendant succeeds on such a plea, it will follow the practice of the Admiralty Court: (*The Daoiz*, Weekly Notes, April 28, 1877, p. 93; and see *post*). That, no doubt, only decides that in proceedings in Admiralty the Court of Appeal will follow the Admiralty practice in this respect; but it would be a great inconvenience that there should be two distinct practices in the Divisions of the High Court.

Murphy, Q.C. for the defendants, was not called upon.

Kelly, C.B.—This is an application under Order LV., by which the court is asked to make an order depriving the defendants of their costs on an issue or plea in an action for collision on which they succeed, in which the defence set up was that of compulsory pilotage under the Merchant Shipping Act. The case was tried some time ago, and at the trial I entered the verdict for the plaintiffs on that defence, and leave to the defendants to move to enter it for them. That rule has been argued and has been made absolute, so that the verdict now stands for the defendants.

Now Order LV. is in these terms: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the court: . . . Provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown, the judge before whom such action or issue is tried, or the court, shall otherwise order." No application was made to me at the trial to make this order depriving the defendants of costs in this issue, nor has any been made, for the reason that none could be made with any effect since the trial. But it is contended that the latter words give this court a substantive and independent power to make this order, notwithstanding anything that may or may not have taken place at the trial. That is undoubtedly a question of great importance, and as far as I know, it is one which has not yet been determined. But as I do not think I am bound in this case to decide that question, and as I think it unnecessary to do so, I forbear to enter further into the question. For the purpose of this case I assume that the court has power to make such an order. Assuming that be so, then, what are the grounds on which we are asked to make this order.

The law for centuries has been that where a plaintiff or defendant succeeds in an action and obtains a verdict, he is entitled to costs as a matter of course, unless he is deprived of them by some Act of Parliament. That is still the law, and that must prevail in this case, unless the defendants can be deprived of costs under this rule. Now we ought not to, nor can we make an order depriving the defendants of their costs without good cause shown. What is the cause shown in this case? It is simply this: that it was a practice of the Admiralty Court while it existed as a separate court, and is now a practice of the Probate, Divorce, and Admiralty Division in cases of collision in which the collision has been occasioned by a ship under the command of a compulsory pilot, where that defence is set up with other defences and successfully established by the defendant, to disallow the defendant his costs of such defence. It is urged upon us that the Court of Appeal have affirmed that practice and have held that it is to prevail, and that we are, therefore, bound by that decision to make this order. We are, in fact, called upon to accept that decision as a decision of the law and practice not only of the Probate, Admiralty, and Divorce Division, but as also deciding that the practice and the law of that division is to be the law and practice of every other division of the High Court. That would be to say that, because the practice has prevailed in the Admiralty Court, whether that practice be good or bad, it is for the future to be the practice of every division. That, however, is not so. It has nothing to do with the practice or law of other courts at Westminster. It may be desirable that the Legislature should assimilate the practice and law in the several courts in Westminster Hall, and that the practice of one should be made conformable to the practice in the others, but it is only by the Legislature that that can be effected. That has been done by the Legislature in relation to cases of collision in any of the divisions, where it appears that both ships are in fault, the Legislature enacting that in such a case the damage should be divided, which was the old Admiralty practice, but in the practice now under consideration the Legislature have done no such thing. We come back, then, to the question whether there is any ground for our making this order. Nothing has been urged as a reason for our doing so, except that such is the practice of the Admiralty Court, and is the decision of the Court of Appeal. I repeat that was an appeal from the Court of Admiralty, or rather the Pro-

bate, Divorce, and Admiralty Division, and that is no sufficient reason. The only other cause shown was that put by Mr. Webster, viz., that other pleas and defences were raised, viz., a denial of the alleged negligence, &c. If that be so the question whether the defendants are entitled to costs on these issues, on which the plaintiffs have succeeded, it would be premature to pronounce any opinion, because, when the case goes before the master for taxation, if he refused to allow the plaintiffs the costs on these issues, a motion could be made to review the taxation.

For these reasons I think this application should be refused.

Huddleston, B.—I am of the same opinion.

The application is one under Order LV. that the defendant should have no costs. One point raised before us was that the court had no power to enter into the question at all. I do not entertain any doubt on that subject, not only from the words of the order, but from decisions upon it. There are two tribunals who may make an order to take the case out of the ordinary rule as to costs, the judge at the trial and the court; and where there has been no order by the judge, it is not the court upon appeal, but the court to whom the application may be made, and which may decide it on the merits. On that I can entertain no doubt when I read the case of *Baker* v. *Oakes* (L. Rep. 2 Q. B. Div. 171), in which the judges construed the order in that way. In the course of the argument Brett, J.A., said, "The omission of 'or a judge' was designedly intended to confine the jurisdiction to the court, who alone should have power, if the judge at the trial made no order, to deprive a successful party of what was otherwise his absolute right to costs." And Cockburn, C.J., in his judgment, said, "If the application had been to the court itself, I think there can be no doubt it would have had power to deal with the costs."

We then come to the question whether Mr. Butt has shown sufficient ground to influence this court in its discretion to depart from the general rule. He does not go on the merits of the case. He says there is a rule invariably adopted by the Admiralty Court that the defendant, under such circumstances as those of the present case, would, though successful, be deprived of costs. That is a rule prevailing in the Probate, Divorce, and Admiralty Division of the High Court of Justice, and as Mr. Webster put it, the Court of Appeal is a Court of Appeal from all five divisions, and that Court has decided that the practice is in future to be that in all cases of collision in whatever division it may be this practice is to prevail. If I thought that that was really the decision, much as I should feel disinclined to deviate from the practice of this and the other divisions, I should follow it. But I do not think that is the result. I understand the decision to be this. The Master of the Rolls said, as we understand, that the universal practice in the Probate, Divorce, and Admiralty Division is that which it was before the Judicature Act, that costs should not be given, it is convenient in such cases that on appeal from that division that that practice should prevail, but he never laid it down that in appeal from other divisions that was to be so. The Master of the Rolls said, as we gather from the Weekly Notes for April 28, 1877, "The rule acted on in the Admiralty Court in cases like the present was, that when the owners of a ship were relieved from liability on the ground of compulsory pilotage, no costs were given on either side, and the same rule ought to apply in the Court of Appeal." That decision, then, is not binding upon us; there is no reason why we should depart from the rule of practice that the successful party is entitled to his costs, and this application must therefore be refused.

Application refused. Leave to appeal was refused.

Solicitor for plaintiff, *W. Batham.*

Solicitor for defendant, *T. Cooper.*

AMERICAN REPORTS.

UNITED STATES SOUTHERN DISTRICT COURT OF NEW YORK.

Reported by R. D. Benedict, Proctor and Advocate in Admiralty.

The Barque Carlotta; Bliss *v.* Gomez et al.

Charter-party and bill of lading—Damage to cargo—Rats—Petroleum—Sale of cargo to arrive—Parties—Rebate of duties—Recoupment.

The barque C. was chartered in New York by G. and A. to bring a cargo of fruit from Mediterranean ports to New York. The charter contained this clause: "It is understood that said vessel is now bound to Barcelona with a cargo of refined petroleum in barrels. Thence she shall proceed, immediately after discharge of outward cargo, to enter upon this charter. Vessel to be cleared as customary previous to loading homeward cargo." The vessel made the outward voyage, and, having discharged her outward cargo, was cleansed and fumigated for the purpose of removing the scent of petroleum, and also of killing any rats. After this she took on board a cargo of almonds and other fruits, and made the voyage under the charter. After being at sea some days, rats were noticed on board, and on discharge of the cargo at New York some of the bags of almonds were found to have been gnawed by rats. The vessel had on board on the voyage a cat, and also a rat terrier. Other portions of the cargo on discharge were found to have been damaged by contact with petroleum, and other portions were scented with petroleum. The owner of the vessel, B., filed a libel against G. and A., the charterers, to recover charter money, and G. and A. filed a libel against the barque to recover the damage to the almonds. It appeared that previous to the filing of their libel, G. and A. had sold the almonds for a sound price, which had been paid them in full. It also appeared that they had made an application to the Government for a rebate of duties on the almonds by reason of their damaged condition, and had received such a rebate. In the suit against them to recover the charter money, G. and A. set up the failure of the barque to perform the charter, in that not only was the cargo that was delivered damaged, but that some was not delivered. The charter-party contained no provision for the giving of bills of lading, but bills of lading for the almonds were given by the master to the shippers, who were the agents of the charterers, by which the almonds were to be delivered to G. and A., and the libel of G. and A. against the barque was based on these

bills of lading. There was no exception of damage by rats in the bill of lading.

Held, that the bills of lading must be taken to be the contract between the parties as far as the damage by rats was concerned.

That the damage by rats was not a peril of the sea, and that it was not made to appear that the damage to the almonds by rats was a thing against which it was impossible to guard.

That as to damage by petroleum the provisions in the charter must govern, and that the effect of the clause about petroleum would be that if the vessel was cleansed in the customary manner the barque should not be liable for any damage resulting from the petroleum cargo which she carried out; but that as it appeared that vessels were cleansed after carrying petroleum cargoes, so that the cargo subsequently carried showed no indication of being damaged by petroleum, the fact that these almonds showed such injury was evidence that the barque was not cleansed as customary.

That G. and A. were entitled to sue for the damage to the almonds, notwithstanding their sale of them before arrival.

That G. and A. must give credit, as against any claim for the damage to the cargo, for any rebate of duties received by reason of such damage.

That the owner of the vessel was entitled to a decree for the charter money, less the value of any cargo not delivered; and that G. and A. were entitled to a decree against the vessel for any damage to the almonds, less the rebate of duty.

Blatchford, J.—William Bliss, as owner of the barque *Carlotta*, filed a libel on the 13th Feb., 1874, against Raphael M. Gomez and Daniel V. Arguimban to recover the amount due on a written charter of the barque *Carlotta* to the respondents.

The libel alleges that the vessel performed the charter in all respects and became entitled to receive the charter money therein specified, and that 1000 dollars, or thereabouts, still remain due thereon. The charter-party, which was made at New York on the 8th August, 1873, between the agents of the owner of the vessel, then lying at New York, and the said respondents, under the co-partnership name of Gomez and Arguimban, charters the vessel to the respondents "for a voyage from two ports in Spain, between Barcelona and Malaga, both inclusive, and including Ivica, to New York—charterers have privilege also of taking part cargo at Barcelona, and then using two ports to load if required—on the terms following." Among those terms are the payment by the charterers, as charter-money, of 2500 dollars in United States currency; and that "it is understood that said vessel is now bound to Barcelona, with a cargo of refined petroleum in barrels, thence she shall proceed immediately after discharge of outward cargo to enter upon this charter—vessel to be cleaned as customary previous to loading homeward cargo."

The answer of Gomez and Arguimban to the libel of Bliss was filed on the 26th March, 1875. It admits the execution and contents of the charter-party, as set forth in the libel, and avers that under said charter-party the respondents delivered to the master of the vessel certain merchandise in barrels, bales, and bags, to be transported to the port of New York from Spain; that such merchandise was shipped and received on board of said vessel under certain bills of lading, which recited that said merchandise was received in good order, and by which the master and owners of the vessel promised to deliver the same to the respondents at the port of New York in the like good order and condition as received, on payment of freight as therein provided; and that the masters and employés of said vessel took so little and such bad care in putting said cargo on board and in storing it and in attending to it while on board and while landing it, that a large part of said cargo was badly stained by petroleum or other such substance, and also impregnated by the smell arising therefrom, and thus rendered unmerchantable, and many of the bags and packages containing said merchandise, and the contents thereof, were badly eaten by rats, or other vermin, and in other ways the said cargo was so badly damaged by the negligence of said masters and owners that part of said cargo was wholly lost and other parts damaged to the amount altogether of at least 2000 dollars.

On the 17th Feb. 1874, Gomez and Arguimban filed a libel against the barque *Carlotta*.

It alleges that in Nov. 1873. the said barque then lying in the port of Tarragona, in Spain, and in other ports, various parties shipped on board of her various quantities of almonds, for which the master signed bills of lading, which admitted the receipt of the goods on board in good order and well conditioned, and by which he agreed to carry the goods to New York and there deliver them to Gomez and Arguimban, with certain exceptions in the bills of lading specified; that the said barque arrived in the port of New York and the libellants demanded the delivery of said merchandise to them, but the employers of said barque took so little and such bad care, not only in attention to said vessel, but in putting said cargo on board, and in stowing it and in the care of it while on board, and in landing it in the port of New York and in the care of it after it was landed, that a large part of it was badly stained by petroleum or some other such substance, and also impregnated by the smell arising therefrom, and the bags and contents in which said cargo was delivered were damaged by being eaten by rats, and a large part of said cargo was wholly lost to the libellants or only delivered in a damaged condition, whereby the libellants were damaged to the amount of 2000 dollars and upwards, and that the libellants are ready to pay said freight upon the proper delivery of said cargo. The libel prays a decree against said barque for said damages.

The answer of the owner of the barque to the last named libel denies all its allegations as to negligence and damage except the allegation that some of the bags were eaten and damaged by rats, and alleges that the libellants were the charterers of the barque under the written charter before mentioned, and that all of the said goods were put on board under said charter, and that the provisions of said charter and of the bills of lading were in all things complied with on behalf of said barque, and any loss or damage or injury to said cargo was caused by perils excepted and without any negligence or fault on the part of said bark.

It is set up in the answer in the *in personam* suit that many of the bags and packages containing the merchandise and the contents thereof were badly eaten by rats or other vermin, and that

such injury was the result of want of care on the part of the master and employers of the vessel.

In the libel against the vessel the allegation is only of damage by rats to bags and contents of bags through want of care on the part of the employés of the vessel.

On the evidence a claim is made for loss by rat damage, by the gnawing by rats of holes in some of the bags containing almonds in the shell, and by the eating of some such almonds by rats, and by the loss of others of such almonds through holes gnawed in such bags by rats.

It is contended on the part of the consignees that the vessel is liable for the damage by rats, because there is no exception in the charter-party or the bill of lading which can relieve the vessel from liability for such damage occurring during the voyage, that such damage is not the act of God nor a peril of the sea, and that the vessel is liable in the absence of an excepting clause in the contract.

For the vessel it is contended that a carrier is not responsible for damage from natural causes against which he is unable to guard, that it is the natural tendency of rats to gnaw, that the vessel was fumigated before taking in cargo, and had on board a cat and a rat terrier, that nothing more could have been done, and that the rats were probably brought on board in the cargo.

The charter-party provides that the vessel shall be in every way fitted for the voyage, and specified fruit is a contemplated cargo. It contains no other provisions which refer to damage to cargo, and no provision as to the giving of bills of lading. It is signed by both of the parties to it. Three of the four bills of lading cover almonds in the shell in bags. One of them specifies 750 bags of soft almonds in the shell as received on board in good condition, and the master by it promises and undertakes, "God taking me in safety with the said vessel to the said port, to deliver in the same terms," The second specifies 425 bags and 850 half bags of soft shell almonds as shipped in good order and well conditioned in and upon the vessel, and states that they are to be delivered in the like good order and well conditioned, "the acts of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, excepted." The third specifies 157 bags of almonds as shipped in good order and well conditioned on board the vessel, and states that they are to be delivered in like good order and well conditioned, "the dangers of the sea only excepted."

In the case of *Aymar* v. *Astor* (6 Cowen, 267) the owners of a vessel were sued for damages sustained by the owners of goods shipped on board of it through the destruction of them by rats. The bill of lading signed by the master stated that the goods were to be delivered in good order and well conditioned, "the dangers of the seas" excepted. At the trial evidence was given on the question whether the vessel was prudently managed for the avoiding of rats, or whether the master had been negligent in that respect; but the court charged the jurors that the defendants were common carriers and liable as such for damage done, unless by the act of God or the perils of the sea, excepted in the bill of lading, and that damage by rats was not a peril of the sea. On a writ of error the Supreme Court held that the master of a vessel is not responsible, like a common carrier, for all losses, except they happen by the act of God, or the enemies of the country; and that it ought to have been submitted to the jury, whether the master had used ordinary care and diligence in carrying the goods in question. This exception in favour of a carrier by water is repudiated by the same court in *McArthur* v. *Sears* (21 Wendell, 190), and the statement of the exception in *Aymar* v. *Astor* is called a *dictum*. See also *Allen* v. *Sewell* (2 Wend. 327.) In *Laveroni* v. *Drury* (8 Ex. 166: 22 L. J. 2, Ex.), in 1853 cheese was shipped in a general ship, under bills of lading, whereby the master bound himself to deliver the cheese free from damage, "the act of God, the Queen's enemies, fire and all and every other danger and accidents of the seas, rivers, and navigation," &c., "excepted." The cheese was eaten and damaged by rats on the voyage. The master had two cats on board, and it was contended by the owners of the vessel that it was for the jury to say whether the keeping of the cats relieved the defendants from the charge of negligence. The court, at the trial, held that the question was not one for the jury, and instructed the jury that damage by rats was not within the exception contained in the bills of lading, and that if the cheese had been eaten and damaged by rats in the course of the voyage, the defendants were liable. On a motion by the defendants for a new trial the Court of Exchequer said: "We are of opinion that this direction was right. By the law of England, the master and owner of a general ship are common carriers for hire and responsible as such. This, according to the well-known rule, renders them liable for every damage which occurs during the voyage, except that caused by the act of God and the Queen's enemies. They, however, almost universally receive goods under bills of lading signed by the master; and, in such case, the liability depends upon and is governed by the terms of the bill of lading, it being the express contract between the parties, the owner of the goods on the one hand and the master and owner of the ship on the other." As to the exception in the bills of lading the court said: "The true question is, whether damage by rats falls within this exception, and we are clearly of opinion that it does not. The only part of the exception under which it possibly could be contended to fall, is as a danger or accident of the sea and navigation; but this, we think, includes only a danger or accident of the sea or navigation properly so-called, namely, one caused by the violence of the winds and waves (a *vis major*) acting upon a seaworthy and substantial ship, and does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea." The court further said, that the only true rule for ascertaining with accuracy and certainty the liability of the master and owner of a general ship is, "that *primâ facie* he is a common carrier, but that his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one, and that the question whether the defendant is liable or not is to be ascertained by the terms of this document, when it exists." In the case of *The Fame*, in this court, in 1861, a vessel was libelled to recover for the damages sustained by the loss of part of a cargo of coffee from Rio

Janeiro, by the gnawing of the packages by rats, on the voyage. The coffee was carried under a bill of lading which excepted "the dangers and accidents of the seas and navigation." It was set up in defence that the vessel had two cats on board, and that, in view of that fact, the damage by the rats was covered by the exceptions. The court (Shipman, J.), reviewed the authorities and adopted the view that damage by rats was not a peril of the sea, but was damage arising from the negligence of the carrier, and might be prevented by due care, and was within the control of human prudence and sagacity. Independently of that view, the court was of opinion that the master of the vessel had not proved due diligence on his part, because, it being shown that Rio Janeiro was a very bad port for rats, it was not proved that he had fumigated his vessel. In the case of *The Miletus* (5 Blatchf. C. C. R. 335), in the Circuit Court for this district, in 1866, it was held by Mr. Justice Nelson "that damages occasioned by vermin on board of a ship, to a cargo, in the course of a voyage, are not the result of a peril of the sea, or of any of the dangers or accidents of navigation, within an exception to that effect in a bill of lading, but are damages for which the ship and its owners are liable, as insurers of the safe conveyance of the cargo." In *Kay* v. *Wheeler* (2 Mar. Law Cas. O. S. 236; L. Rep. 2 C. P. 302), in 1867, in the Exchequer Chamber, on error from the Common Pleas, coffee was shipped under a bill of lading which excepted "the act of God, the Queen's enemies, fire, and all and every other damages and accidents of the seas, rivers and navigation, of what nature and kind soever." The bags were gnawed by rats during the voyage, and the contents were partly eaten and damaged by them. The vessel had on board during the time she was at the place of shipment, and on leaving that place, two cats and two ferrets, and the vessel had, before leaving for that place been cleared of rats by a professed rat killer, and every possible precaution was taken to keep rats out of the vessel after that. It was contended for the defendants, that the injury by rats was a peril of navigation, because it was a danger which could not be guarded against, as it had been shown that the defendants had used every possible means to prevent the injury to the goods. The court held that the question depended on the contract contained in the bill of lading, that the defendants had thereby bound themselves to deliver the goods in the good order and condition in which they were shipped, except in the four cases therein specified; that damage by rats was not within any one of those exceptions; that the defendants had delivered the goods in a very different condition from that in which they received them, and had therefore broken their contract, and that the plaintiffs were entitled to recover. In the recent case of *Nugent* v. *Smith* (*ante*, pp. 87, 198; L. Rep. 1 C. P. Div. 19), it is laid down as the true rule, that "every shipowner or master, who carries goods on board his vessel for hire is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God, or the Queen's enemies," and that "it is not only such shipowners as have made themselves in all senses common carriers who are so liable, but all shipowners who carry goods for hire, whether inland, coastwise, or abroad, outward or inward."

In the present case, the shippers having, notwithstanding the charter-party, accepted bills of lading for the goods, and brought suit thereon, and the owner of the vessel having, notwithstanding the charter-party, entered into special contracts, through the master, by means of the bills of lading, in respect to the carriage and delivery of the goods, the bills of lading must be regarded as the contract by which the rights of the parties are to be governed, so far as respects the matters provided for therein. There is nothing in the bills of lading, in respect to the carriage and delivery of the cargo covered by them, that is inconsistent with anything in the charter-party.

As regards a contract in a bill of lading for the carriage and delivery of cargo covered by it, it must be regarded as settled by the case of *Clark* v. *Barnwell* (12 Howard, 272), that where a bill of lading admits the shipment of cargo in good order, and binds the carrier to deliver the same in like good order, certain specified dangers and accidents excepted, the carrier may be answerable for damage to the goods, although no negligence on his part be shown, unless he brings the case within a danger or accident so excepted; that, in considering whether the carrier is liable for a particular damage, the question is not whether it happened by reason of the negligence of the persons in the employ of the carrier, but whether it was occasioned by any of those causes which, either according to the general rules of law, or the particular stipulations of the parties, afford an excuse for the non-performance of the contract, and that, after damage to the goods has been established, the burden lies on the carrier, in the case of such a bill of lading, to show that such damage was occasioned by one of the perils from which he was exempted by the bill of lading. This principle is also held in *Transportation Company* v. *Donner* (11 Wallace, 129). It is the same principle as that decided in *Laveroni* v. *Drury* (8 Ex. 166). and in *Kay* v. *Wheeler* (2 Mar. Law Cas. O. S. 231; L. Rep. 2 C. P. 302).

In the present case the bills of lading, which cover almonds in the shell in bags, admit that the goods were received on board in good condition, and undertake that they shall be delivered in like good order. In two of them there are specified exceptions, but loss or damage by rats is not within any of the exceptions specified. It is not an act of God, nor is it a danger or accident of the sea. The definition of the expression "the act of God" is well given in *Nugent* v. *Smith* (*sup.*) thus: "The damage or loss in question must have been caused directly and exclusively by such a direct, and sudden, and violent, and irresistible act of nature as the defendant could not by any amount of ability foresee would happen, or, if he could foresee that it would happen, could not by any amount of care and skill resist, so as to prevent its effect. It lies upon the defendant to show that a damage or loss for which he would otherwise be liable is brought within this exception." It is impossible to say that no human ability could have prevented the presence of rats on the vessel, or could have rid the vessel of rats. It is alleged that the vessel had on board a cat and a rat terrier, and that she was fumigated or smoked in Barcelona before she took on board any cargo. But the cat and the

terrier could have been of but little service in catching rats which were down in the hold among the cargo. As to the fumigation, the presence of rats after fumigation must be accepted as evidence that the fumigation was not so thorough and effective as to destroy all rats. The fact that no rats were seen, after the fumigation, until after the vessel left Malaga, and that they were known to be on board after she left Malaga, is not sufficient evidence that they were not on board before the fumigation, or that the fumigation was effective, or that the rats were not on board from Barcelona to Malaga, or that they came on board at Malaga. There is evidence that there were rats on board on the voyage from New York to Barcelona, and there is no evidence that the rats came on board in the cargo of fruit. The fact that the vessel was in the stream when she received her cargo at Barcelona and at Iviza, does not go to show that she was free from rats at Barcelona. In a word, it is not shown that the vessel could not, by any amount of care and skill, have been rid of the rats. As to perils of the sea, the eating of almonds by rats, or the gnawing of holes in bags by rats, is not a thing peculiar to the sea or to navigation, or arising directly from navigation, for rats do those things on land as well as in a vessel at sea. I think there is satisfactory evidence that the rats did damage by gnawing holes in the bags. What was the extent of the loss and damage to bags and almonds by such gnawing is another question.

It is claimed that there was damage to the cargo by its contact with petroleum, and by its being impregnated with the odour of petroleum. Full notice is given in the charter-party that the vessel was, at the time of the making of the charter-party, bound on a voyage from New York to Barcelona, with a cargo of refined petroleum in barrels, and it is provided in the charter-party that the homeward cargo may be fruit, and that the vessel is "to be cleansed as customary previous to loading homeward cargo." It is not to be presumed that Gomez and Arguimban, persons experienced in the trade in question, would have arranged to bring home a cargo of fruit in a vessel which had carried out a cargo of petroleum in barrels, unless they had understood that a cleansing of the vessel in the customary manner, after the discharge of the cargo of petroleum, would have enabled the vessel to bring home the cargo of fruit in good order, free from the stains of or the odour of petroleum. The evidence is very distinct that the almonds, more or less of them, were found, on their arrival here, to be impregnated with the taste and smell of petroleum, so as to lessen their value, and that such taste and smell came from the petroleum which was in the vessel. There is not in any of the bills of lading any exception as to petroleum damage; but the rights of the parties, so far as petroleum damage is concerned, must be governed by the provisions of the charter-party as to petroleum. The effect of the provisions of the charter-party is, that the vessel being about to carry out petroleum in barrels, she shall, "if cleansed as customary" before loading the return cargo of fruit, not be liable for damage by petroleum to such return cargo; and that Gomez and Arguimban, having notice of such carriage of petroleum, take the risk of damage to such return cargo from the petroleum, if the vessel be cleansed in the customary manner before loading such return cargo. Much testimony has been taken as to the manner in which the vessel was cleansed. But the evidence is very clear that vessels which have carried out petroleum in packages do, after being cleansed in a proper manner, bring back cargoes of such fruit as this vessel had without the fruit being damaged by having the taste or odour of petroleum. The fact of such damage in the present case must be accepted as evidence that this vessel was not cleansed in the customary or proper manner. The master of this vessel had never carried a cargo of petroleum before, and had never seen a ship cleansed that had carried petroleum, and made inquiries of another master as to the mode of cleansing. It does not alter the case that some or all of the damage may have arisen from the sweat of the hold dropping upon the cargo. The complaint is not that the cargo was damaged by being wet, or that it became musty therefrom, but that, whether the water of the sweat was the vehicle or not, the taste and odour of the petroleum were conveyed to and left with the cargo, when that would not have happened if the vessel had been properly cleansed. The sweat and the water thereof would have produced no damage if they had not been conveyers of petroleum taste and odour, and they would not have conveyed such taste and odour if the vessel had been thoroughly cleansed in the proper and customary manner.

In *Clark* v. *Barnwell* (12 Howard, 272) the damage was mould and mildew caused by the sweat of the hold, a peril of the sea. The libellants in that case failed to show that the damage could have been prevented by the use of proper precautionary measures, or that there had been a neglect of the customary methods of prevention. But, in the present case, it is established, I think, that the petroleum damage would not have occurred if the customary and proper mode of cleansing the vessel had been thoroughly used, whether the damage arose from dunnage saturated or impregnated with petroleum, or from the presence of petroleum in the bilge water, or from the conveyance of petroleum or its ingredients by the water of the sweat of the hold.

As to all the merchandise that is alleged to have been damaged by rats or petroleum, except the almonds not in the shell, it appears that such merchandise was sold by Gomez and Arguimban to arrive, for a price based on undamaged goods, and that the purchasers have paid that price in full to Gomez and Arguimban. The damage alleged in the libel filed by Gomez and Arguimban is a damage to themselves. It is contended, for the vessel, that they cannot recover any such damage in respect to the merchandise for which they were so paid a sound price, for the reason that they have sustained no damage. While it is true that *primâ facie* the consignee of goods under a bill of lading has the legal title to, and a beneficial interest in, the goods, and may sue the carrier for the non-delivery thereof (*Lawrence* v. *Minturn*, 17 Howard, 100; *McKinley* v. *Morrish* 21 Id. 355); yet such *primâ facie* right of action may be displaced: (*Grove* v. *Brien*, 8 Howard, 429); *Lawrence* v. *Minturn* (*sup.*). In the present case the goods were the property of Gomez and Arguimban when shipped. They sold them to arrive, it is true, but it is not shown that the right of property and the right of possession were not in them when the breach of contract, or neglect of duty complained of, occurred. The contract of the master in the bills of lading was

with Gomez and Arguimban, or their assignees, and it is not shown that the bills of lading were ever formally assigned or indorsed by Gomez and Arguimban. I am of opinion, therefore, that Gomez and Arguimban can maintain the action.

If any sum of money has been received either by Gomez and Arguimban, or by any purchaser from them, from the Government, as a rebate of duties for loss or damage in respect of any goods as to which an allowance shall be found due for loss or damage in the suit brought by Gomez and Arguimban, they must be charged with such sum.

A failure on the part of the vessel to deliver some of the cargo is admitted, the cause of the failure not being due to either rats or petroleum. In the suit brought by the owner of the vessel there will be a reference to ascertain what cargo was not delivered, and its value, and the reference will cover such goods, if any, as were not delivered because of the action of rats or petroleum, as well as those which for any other reason were not delivered. Such value, when ascertained, will be deducted from the amount remaining due on the charter-party, and there will be a decree for the remainder.

In the suit brought by Gomez and Arguimban, there will be a reference to ascertain the amount of the damage by rats or the taste or odour of petroleum to such of the cargo as was delivered.

The question as to the costs in both suits is reserved.

Beebe, Wilcox, and *Hobbs*, for Gomez and Arguimban.

Benedict, Taft, and *Benedict*, for Bliss, and the *Carlotta*.

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

June 7 and 8, 1877.

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY, O'HAGAN, BLACKBURN, and GORDON.)

BOWES AND OTHERS *v.* SHAND AND OTHERS.

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL IN ENGLAND.

Mercantile contract — Construction — "Shipped during March and April"—Evidence of mercantile usage.

The appellants, by contracts dated London, March 17th, 1874, bought of the respondents "about 600 tons of Madras, rice to be shipped during the months of March and April, per Rajah of Cochin."

About four tons only of the rice was shipped in March, the remainder having been shipped in February. The appellants refused to accept it, as not complying with the contract.

Held (reversing the judgment of the court below), that the words of the contract being clear, and there being no evidence of any mercantile usage in such case, the appellants were justified in not accepting the rice, it not being a March or April shipment.

Alexander *v.* Vandersee (*L. Rep.* 7 *C. P.* 530) *explained and distinguished.*

THIS was an action for not accepting a cargo of rice, in accordance with two contracts dated London, March 17th and 24th 1874, by each of which the appellants, Shand and Co., bought of the respondents, Bowes and Co., about "300 tons of Madras rice, to be shipped at Madras, or coast for this port during the months of March and April 1874, per *Rajah of Cochin*, at 11*s.* 10½*d.* per cwt. for fair pinky."

The rice was shipped in 8200 bags in four parcels, a separate bill of lading being given for each parcel as follows: For 1780 bags on Feb. 23rd; for 1780 bags on Feb. 24th; for 3560 bags on Feb. 28th; for 1080 bags on March 3rd. But of this last parcel all but fifty bags were put on board before the end of February.

The action was tried before Brett, J., and a special jury, at the Michaelmas sittings in London in 1875. Evidence was given that rice shipped in February would be of as good quality as rice shipped in March or April, and the learned judge left the question to the jury whether it was a shipment in March and April in the ordinary business sense of the words, the loading being completed in these months. The jury found a verdict for the plaintiffs (the present respondents) for the agreed sum of 1636*l.* 18*s.*

The defendants moved to enter judgment for them pursuant to leave reserved, and the Court (Blackburn, Mellor, and Lush, JJ.) acceded to the motion (*ante*, p. 208; 1 Q. B. Div. 470; 34 L. T. Rep. N. S. 795). The plaintiffs appealed, and the decision of the Queen's Bench Division was reversed by the Court of Appeal (Kelly, C.B., Mellish, Brett, and Amphlett, L.JJ.) on the authority of the case of *Alexander* v. *Vandersee* (L. Rep. 7 C. P. 530), as reported *ante*, p. 367; 2 Q. B. Div. 112; 36 L. T. Rep. N. S. 161. This appeal was then brought to the House of Lords.

Benjamin, Q.C. and *Gainsford Bruce* for the appellants, argued that the case of *Alexander* v. *Vandersee* was distinguishable, being for whole cargoes. In this case the rice was not a March or April shipment within the meaning of the contract. The stipulation in the contract was a condition precedent:

Graves v. *Legg*, 9 Exch. 709;
Bush v. *Spence*, 4 Camp, 329.

Cohen, Q.C. and *J. C. Mathew* for the respondents contended that the case was governed by *Alexander* v. *Vandersee*. The ship being named the whole must be one shipment. The date of the shipment was not a condition precedent, as it did not go to the root of the matter: (*Bettini* v. *Gye*, 1 Q. B. Div. 183; 34 L. T. Rep. N. S. 246.) The jury were right in the view they took of the words used in a business sense.

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

The LORD CHANCELLOR (Cairns).—My Lords, I have to propose to your Lordships to dissent from the unanimous decision of the Court of Appeal in this case; and if I entertained any doubt, or if I had found that your Lordships entertained any doubt as to the conclusion at which you should arrive, I certainly should have suggested that time should be taken for further consideration of the case. But I think your Lordships have no hesitation in arriving at the conclusion which I shall ask you to arrive at. The case appears to me, when properly considered, to be an extremely simple one.

The action is brought upon two contracts for the sale of rice, which differ only in respect of the date

and, therefore, it will be sufficient that I should refer to one of them. The first of the two contracts is dated the 17th March 1874, and the sold note which is written to the respondents, Shand and Co., runs in these words: "We have this day sold for your account to Bowes, Martin and Kent, the following Madras rice, to be shipped at Madras or coast, for this port, during the months of March and April 1874, about 300 (three hundred) tons, per *Rajah of Cochin*, 11*s*. 10½*d*. per cwt. for fair pinky." That sentence includes all that for the present purpose it is material that I should refer to.

Now, so far as the construction of the contract expressed in these words is concerned, unless there be something peculiar to the words by reason of the custom of the trade to which the contract relates, the construction of the contract is for the court. That has been said so often that I need not refer your Lordships to any authority on the subject. I shall assume, in the first place, that there is no word in this contract which is proved by the custom of the trade to have any particular meaning. I shall afterwards consider whether it has been proved that there is any custom attaching a particular meaning to the words used. Looking at the construction of these words, I put aside in the first place some which, to anyone unaccustomed to a contract of this kind, might appear peculiar, the words "$\frac{\text{and}}{\text{or}}$" inasmuch as no question has been raised on those words, and it is agreed upon both sides that they simply are a mercantile way of expressing that something is to be done in the months of March and April, or either of them. Putting that aside, and looking still at what would be the ordinary and grammatical meaning of the words, it will, I think, occur to your Lordships that it is possible that the words which I have read may mean one of two things. It might be held that they mean that the rice which is spoken of is to be put on board the ship which is mentioned during some part of the two months specified, the months of March and April 1874, and that is the meaning of the words "to be shipped" during those months, or it might be held that they mean that the shipment is to be made continuously, and in such a way as that it is to come to a conclusion in one of the months in question, and that a bill of lading representing the shipment and the contract made on the shipment is to be given inside one of these months for the whole of the rice in question. If that is the natural meaning of the words, it does not appear to me to be a question for your Lordships, or for any court to consider whether that is a contract which has upon the face of it some reason, some explanation, why it was made in that form and why the stipulation is made that the shipment should be made during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts, stipulations to which they do not attach some value and some importance, and that alone might be a sufficient answer.

But, if necessary, a further answer is obtained from some other considerations. It is quite obvious that merchants making contracts for the purchase of rice, contracts which oblige them to pay in a certain manner for the rice purchased, and to be ready with the funds for making that payment, may well be desirous both that the rice should be forthcoming to them not later than a certain time, and also that the rice shall not be forthcoming to them at a time earlier than it suits them to be ready with funds for its payment. Therefore, it may be well that a merchant making a number of rice contracts ranging over several months of the year, will be desirous of expressing that the rice shall come forward at such times and at such intervals of time as that will be convenient for him to make the payments, and it may well be that a merchant will consider that he has attained that end if he provides for the shipment of the rice during a particular month, or during particular months, and that he will know that, provided he has made that stipulation the rice will not be forthcoming at a time when it will be inconvenient for him to provide the money for the payment.

There is still another explanation, because sufficient appears upon the evidence to show that these contracts were made for the purpose of satisfying and fulfilling other contracts which Bowes and Co. had made with other persons; and it is at least doubtful whether, if they had made a contract in any other form than that which is before your Lordships, a contract made without this stipulation as to the shipment during these months, would have been a fulfilment of those other contracts which they desired to be in a position to fulfil.

Therefore, still dwelling merely upon the natural meaning of these words, and without any evidence as to their having any particular or customary meaning, I should say without hesitation, that the meaning of this contract must be one of two things. *Primâ facie* I should say it meant that the shipment must be made, that the rice must be put on board, during the two specified months, and neither before nor after those months. But if the contract does not mean that, the only other meaning which it appears to me it could have is (and as to that, I think evidence would be required to show that by usage it had obtained that meaning), that the shipment should be made in a manner which would be described as continuous, and that it should come to a consummation or completion in one of those months which are here mentioned, and that the bill of lading should be given for the whole and complete shipment at that time. If those two meanings be the only possible and natural meanings of the contract, then, according to neither meaning was the rice in this case put on board in such a way that it could be tendered in fulfilment of the contract, because the whole of the rice was actually on board, not merely at the time when this contract was made, but during the month of February, with the exception of fifty bags which were put on board on 2nd March, and bills of lading had been given during the month of February for all the parcel of rice with the exception of 1080 of the bags, in respect of which a bill of lading was given on March 3rd. Accordingly therefore to neither of those constructions would the rice have been put on board in such a way as to make it a tender in fulfilment of the contract.

Still dwelling upon the case without reference to what took place at the trial, or to any evidence with regard to any custom, I now turn from this construction, which I submit to your Lordships is the natural and only possible construction literally of the words, to the construction which

the contract has received in the Court of Appeal. Mellish, L.J. on this subject speaks in this way. He says, "The real question is whether in order to fulfil a contract that 600 tons of rice should be shipped in March or April, it is necessary that the whole 600 tons should have been put on board in March or April, or whether it is sufficient that the shipment should have been completed in March or April." He then refers to a case which I shall afterwards have to refer to, and continues, "The word 'shipped' is we think capable of both constructions, and even if it be admitted that its literal meaning would imply that the whole quantity must be put on board during the specified time, that is a construction which seems to put a fresh additional burden on the seller, without any corrresponding benefit to the purchaser, and the consequence of adopting it would, we think, be that purchasers would without any real reason frequently obtain an excuse for rejecting contracts when prices had dropped:" (*ante*, p. 368; 36 L. T. Rep. N. S. 163; 2 Q.B. Div. 115.) I must submit to your Lordships that if it be admitted, as the Lord Justice is willing to admit, that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace that literal meaning to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real reason, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled. The Lord Justice continues, "The sole object of the purchaser of such produce as this in confining the seller to a particular time within which the goods must have been shipped is, as far as appears, that he may know when the goods are likely to arrive." The Lord Justice takes no notice whatever of those other reasons to which I have referred, namely, that the merchant may not desire to be called upon before a certain time to pay the money, or that he may, in entering into a contract of this kind, have in view the fulfilment of some other contract with an analogous stipulation, which a contract in any different form would not fulfil. The Lord Justice continues, "That object seems as effectually obtained by knowing when the shipment will be, or has been completed as by knowing when each part of the goods was put on board. We therefore should entirely agree with the decision in *Alexander* v. *Vandersee* (L. Rep. 7 C. P. 530) even if that decision was not binding on us."

Now that makes it right that I should refer for a moment to the decision in *Alexander* v. *Vandersee*. The Court of Appeal in the present case seem to have thought that there was some rule of general application laid down by the decision of that case in the Exchequer Chamber, and that that rule was binding, or ought to have been held binding, in the court below in the present case. I do not find there was anything that could be called a rule laid down in the case of *Alexander* v. *Vendersee*, It was a case in which a contract somewhat similar to the present, but of Danubian maize, was made; and the contract was that the maize was to be shipped in the month of June, and, in point of fact, what took place was this, a great part of the maize was shipped in the month of May that is to say, was put on board in the month of May. The remaining part was put on board in the month of June, and a bill of lading was given on the completion of the shipment for the whole parcel of maize. Then it appears that at the trial of this case, the question was left to the jury: Was a shipment of maize under those circumstances, commenced in May, concluded in June, and the bill of lading for the whole given in June, a June shipment according to the understanding of the trade? The jury in that case found that it was a June shipment, and the majority of the Court of Exchequer Chamber were of opinion that that question was properly left to the jury, and that, the jury having answered it as they did, that disposed of the case. Your Lordships have not now to decide, and cannot now decide whether what took place in the case of *Alexander* v. *Vandersee* (L. Rep. 7 C. P. 530) was the course which ought properly to have been taken with respect to the conduct of the case, We have not before us the evidence which was before the jury, or the form in which the question was left to the jury; but in that particular case that question, which I have stated, seems in some form or other to have been left to the jury, and they, as I have said, found that the shipment was a June shipment. I will assume that that decision was right, and that the mode in which that case was treated, was the correct mode. It has no application to the present case. Your lordships have not here what occurred in the case of *Alexnder* v. *Vandersee*, a continuous shipment going on up to the period of completion, the completion being in the month specified, and a bill of lading given in that month. The case, therefore, of *Alexander* v. *Vandersee* in the first place laid down no general rule; it proceeded on the finding of the jury in that particular case, and whether it laid down a rule or not, the rule would not be applicable to a case like the present, in which the facts are different from the facts which occurred there.

Before leaving that part of the case, I must advert to a suggestion which was made at the bar on behalf of the respondents, although it does not appear to have been made in the court below. It was suggested that even if the construction of the contract be as I have stated, still, if the rice was not put on board in the particular month, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the month in question. I cannot think that there is any foundation whatever for that argument. If the construction of the contract be, as I have said, that it means that the rice is to be put on board in the months in question, that is part of the description of the subject matter of what is sold. What is sold is not 300 tons of rice in gross, or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. The construction may be shown by evidence to be

different from what I have supposed: but if the construction be that which I have supposed, the plaintiff who sues upon that contract has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show this, he cannot claim any damages for the non-fulfilment of the contract.

Now, having submitted to your Lordships what I understand to be the natural and literal meaning of this contract, I ask how is that, the natural meaning to be got rid of? I conceive in this way, and only in this way. It was, of course, competent for those who were resisting the application of this natural construction of the contract to have said, "We will prove by evidence that, according to the custom of the trade, these words which have this natural signification, are used in a wider, or in a different sense. The natural meaning of the words no doubt, is that the rice shall be shipped during these two particular months, but we will show that, by the custom of the trade, a latitude is allowed, and that provided the shipment has been conducted in such a way as that the ship will be able to sail during these two months, that means, by the custom of the trade, the shipping of rice on board during the months in question." That, of course, would—according to the well-known rule of law which admits parol evidence not to contradict but to explain the words used in a document; to be as it were the mercantile dictionary, in which you are to find the mercantile meaning of the words which are used—be a legitimate and well-known mode of construing the document.

Now, has any evidence of that kind been adduced here? It is a case which is certainly one of the most singular I have ever observed in this respect. The defendants in the action put upon the record pleas which repeated the stipulations in the contract with regard to the shipment being made during the particular months, and the plea averred not only that the stipulation had that meaning, that the goods were to be put on board during those months, but that negatively they should not be put on board at any other time; and the parties went to trial upon those issues among others. The plaintiffs did not propose to adduce and did not themselves adduce, any evidence as to any custom which would put upon the words in question any meaning different from whatever might be their ordinary or natural meaning. But the defendants not merely rested upon what they contended to be, and what as it seems to me was, the natural meaning of the words, but they proceed to give evidence that that which was the natural meaning of the words was understood by the trade to be their meaning, and to be the meaning which the trade was in the habit of acting upon. This appears to me to have been, on the part of the defendants, a taking upon themselves an *onus*, and an effort to discharge an *onus*, which, if it pointed to the producing of evidence at all was an *onus* that lay on the other side. It was for the plaintiffs, if they had any evidence of a custom controlling or explaining the natural meaning of the words in the contract, to have produced their evidence, and it was hardly necessary for the defendants to produce evidence which only professed to show that the words meant what naturally they would have appeared to have meant. However, evidence was so produced, and very strong evidence was produced by the defendants to that effect, and what is still more remarkable, one of the very strongest pieces of evidence the defendants had on that point was the evidence of one of the plaintiffs, who upon cross examination said, with at least as much distinctness and force as any of the other witnesses, that he would not consider rice put on board the ship during any months other than the two months specified to be a tender within the meaning of this contract. In that state of things, so far from any evidence being produced by the plaintiffs to alter the natural meaning of the words, all the evidence was evidence going to show that the words ought to receive, and would in the trade receive their natural and ordinary construction, and I think the counsel for the respondents at your Lordships' bar admitted with great fairness, and they could not have done otherwise than admit, that if the question were asked, Was there any evidence to go to the jury of a custom placing upon those words a meaning different from their natural and ordinary meaning? the answer must be that there was no evidence of that kind to go to the jury.

Therefore, I submit to your Lordships that that which appears to me to have been the only mode of controlling the natural construction of this contract, was not a mode which was resorted to, or could be resorted to in this case. There was nothing whatever in the evidence to go to the jury entitling the plaintiffs to say that a construction different from the ordinary meaning of the words should be put upon the contract. That is the more important as bearing upon some other observations of the Lord Justice in the Court of Appeal.

Your Lordships will remember that there were in substance two applications to the Court of Appeal. One was with reference to whether the verdict should be entered for the defendants; the other was with reference to a motion for a new trial; and with regard to the motion for a new trial on the ground that the verdict was against the weight of evidence, Mellish, L.J. thus expressed himself: "Several witnesses, and amongst them the plaintiff himself, have deposed that they understood the word "shipped" to mean "put on board," and that the whole quantity sold must be put on board within the specified time, and no witness says that the word in mercantile usage has any other meaning, and the jury appear to have based their verdict upon a distinction which, though made by one or two witnesses, we do not think satisfactory, between contracts in which the ship is named, and contracts which may be fulfilled by delivering goods out of any ship. On the other hand we think it is obvious on reading through the evidence that each witness was not speaking of any real mercantile meaning which the word "shipped" or "shipment" bears, but was putting his own construction on the word, and, as persons who are not lawyers are apt to do, interpreted the word literally. No witness stated that he had known instances of goods rejected, and such rejection acquiesced in when the shipment had been completed within the appointed time, because the whole of the goods were not put on board during that time; and this is the sort of evidence which in our opinion ought to be given before the rule established by the case of *Alexander* v. *Vandersee* (L. Rep. 7 C. P. 530) is departed from. I have already referred to that

case, and to the supposition that it established any rule; but with reference to these observations of the Lord Justice I desire to point out to your Lordships that they appear to me to be based upon a degree of forgetfulness of what really was the state of things at the trial of the present case. The Lord Justice speaks as if witnesses had been brought forward to establish a custom controlling or altering the natural meaning of the words. Had that been the case I agree that it would have been extremely proper to have examined with minuteness and with criticism the evidence so given, to look upon it with suspicion, at all events with care, as you must always do upon evidence which proposes to fix upon words a non-natural meaning or an acquired meaning. But these witnesses were not brought forward to fix upon words a non-natural or an acquired meaning. They were brought forward for the very simple and innocent purpose of saying that they had always understood that the words bore their natural meaning, and had no acquired or secondary meaning in the trade. Under these circumstances I am myself at a loss to conceive how witnesses could have said anything else than that in general terms that was their opinion of the meaning of the words, and that was the way in which in the course of their trade they had always known them to be acted upon.

That really disposes of the whole of the case. If there had been any conflict of evidence, if there had been any evidence opposed to that given by the defendants, your Lordships might have had here to consider whether there ought not to have been a new trial; but it being the case, and it being in fact admitted, that there was no evidence the other way, that there was no evidence to go to the jury of the words having any unnatural signification, the question resolves itself simply into the ordinary and natural construction of the contract as a document the construction of which must be placed upon it by the court.

Then, I repeat, the case of *Alexander* v. *Vandersee* (L. Rep. 7 C. P. 530) has not laid down any rule of construction applicable to the present case, and the document lies before your Lordships for you to put the natural and ordinary construction on the words. That natural and ordinary construction appears to me to be free from doubt and ambiguity, and it will and must give to the contract a meaning showing that it has not been complied with in this case, and that the goods tendered are not goods which were shipped according to the contract.

I therefore submit that the plaintiffs have failed in making out their case. That was the opinion of the Court of Queen's Bench, before whom the case came in the first instance. In my opinion the determination of the Court of Queen's Bench was correct, and the Court of Appeal ought to have dismissed the appeal which was made from that decision. Your Lordships, if you take that view, will now hold that the Court of Appeal ought to have dismissed with costs the application made to them, and you will restore the judgment of the Court of Queen's Bench. And, acting upon a principle upon which your Lordships have already professed your intention to act in proceedings under the new Judicature Act, you will, I think, couple with that the awarding to the appellants in this case the costs of this appeal.

Lord HATHERLEY.—My Lords, I entirely concur in the result at which my noble and learned friend has arrived.

I pass altogether from the case of *Alexander* v. *Vandersee* (L. Rep. 1 C. P. 520), because, for the reasons which have been already assigned, it appears to me to be distinguishable from this case, and to have laid down no rule whatsoever which can be usefully applied to the case which we have for our present decision.

Looking at the case before us, the first observation which strikes one upon the very aspect of the contract, I think, is that it is a carefully prepared contract. There are traces in the evidence before us of its being a contract of no unusual character, from which I infer that a course of dealing and practice has been established which we ought to be very careful in no way to interfere with. I apprehend that nothing can be more unbecoming in a court of justice than an endeavour in any way, by any strained rule of construction, to get rid of the plain and simple effect of the contracts which they have to construe. Our duty as judges in cases of this description, as contrasted with the duty of a jury, is this: if the contract bears a plain natural sense and meaning, nothing should make us deviate from that plain natural sense and meaning but the strongest evidence, not of the opinion of this or that witness, but of a custom of the trade or business which forms the subject-matter of the contract, which has given an unusual, and as it has been called a non-natural meaning to the contract. No evidence of that description has been produced in this case. We have got, as it appears to me, plainly and simply to construe this contract according to the words we there find. The only word in the contract which would admit, as it appears to me, of any technical interpretation is the word "shipped." It may be well with regard to a word which was not sufficiently understood before, or with regard to words which have a special and technical force, to have established, if it can be established, upon evidence, any usage which has attributed to such words any special or peculiar force. It does not appear to me, however, that in the present case any such evidence is needed. I think the meaning of the word "shipped" is sufficiently understood by this time in commerce. But if it were needed, I think we have sufficient evidence before us that by "shipped," all the witnesses understood "put on board." I read the contract, therefore, as if it said, "put on board" at Madras or coast for this port during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874. Now your Lordships will observe that it is not "*in*" the months of March $\frac{\text{and}}{\text{or}}$ April, it is not that the goods are to find themselves on board, and to be there within that period, but it is that they are to be shipped, that is to say, to be put on board "*during*" those months, implying a continuous act of shipping, by which these goods are to be placed in the position in which they are to be placed according to the meaning of the contract. It is not surprising that a state of things has arisen upon which there might be some controversy, for this reason. Owing to the distance of the district from which the goods were to come, the parties to the contract of 17th March could not

ascertain the exact state of things at the date of the contract, and in truth the goods which have been tendered to the defendants were all on board at the very date of the contract itself. They had, therefore, been put there of course with no reference whatever to the contract and its terms, and it is not surprising that this shipment or embarkation of the goods, made before the contract was entered into, and without knowledge of the contract, should not be found to square with that instrument. The consequence is that we have here, as it seems to me, an engagement to supply rice to the defendants, the character of which rice was to be this, it was to be rice shipped during these two particular months, or either of them, and not otherwise.

Now under these circumstances, and with the plain meaning of the contract lying, as it appears to me, on its surface, we are not entitled to speculate on the reasons and motives which have induced those who are engaged in this particular trade to frame their contracts in the manner which pleases them best. We must assume that it is owing to the custom of the trade that they have determined to frame them in this fashion. They do not stipulate either that the goods shall be found on board at such a time, or that the goods shall be on board before the end of the month of April; that would have been a very simple mode of expressing it, if that was what they intended; but they do expressly say that the goods shall be shipped, that is to say, put on board, during these two particular months, or one of them.

Now the learned judge who tried the case and addressed the jury in the first instance, appears to have reasoned upon the motives which might probably have induced such a contract to be entered into, and also Mellish, L.J., in the Court of Appeal, did in some degree consider how far in his judgment a reason could be assigned for such a form of contract. Brett, J., in addressing the jury, seemed to read the contract in fact as I have just expressed, as if it had been that the ship should be loaded before the end of April; that is the construction which in his view of it, expressed as he expressed it, it would convey. The view that I take of the contract I confess is this, that it is not the article "rice" only that is sold, but the thing that is sold is the article "rice shipped in March or April," and the article "rice shipped in February" is not the article which has been purchased by the defendants. The Lord Justice says, in very much the same phraseology, that the word "shipped" is capable of the two constructions, of meaning either "begun and finished to be put on board," or "the putting on board completed," in March or April. (His Lordship read the passage from the judgment of Mellish, L.J., quoted by the Lord Chancellor, and continued:] Now with the greatest possible respect, and I am sure no one judge ever entertained more respect for another than I entertain for Mellish, L.J., I do think that that is a very hazardous way of construing a contract, namely, to say in a class of contracts having a great range that the judge can see upon the face of the contract, relating to a class of business upon which he may or may not have been well informed, a sufficient reason to reject what may be the literal interpretation, if otherwise there would be an excuse afforded to parties for rejecting contracts. The danger of such a construction is extreme, because it is impossible to know all the causes which may have induced the persons to put words into a contract. If the words have a certain definite meaning, it is dangerous to depart from that meaning, until you can arrive at any sound ground upon which you should do so: it is dangerous to depart from it upon a conjecture that it can make no difference to the parties; and specially you cannot reject the literal construction, as it appears to me because you think that unless you reject it you may be affording an opportunity for an evasive purchaser to escape from his bargain. Of course, as has been already observed in many cases, if a purchaser is desirous of escaping from his bargain, and if he finds that the bargain which it is attempted to enforce as against him is not only burdensome, but is against the letter of his contract, there is nothing in our law which prevents his availing himself of the answer to the case made against him, namely, that he has not entered into the engagement you allege, and if you seek to fasten it upon him, you must first bring him within the four corners of the contract. What Mellish, L.J., says, is very much like what Brett, J., said. Assuming in the first place that the only object in view is to know when the ship may arrive, he further assumes that the object is to know the latest period at which it may arrive.

Now I apprehend that it is important to persons entering into contracts of this description to arrange all their contracts for the whole course of the year after the calculations they may have made as to what particular times they will be in funds to meet their engagements, and it is just as important to them to know how long it will be before their ship arrives, as to know how soon it will be that she will arrive. They do not wish the goods to arrive sooner than the time when they have made their arrangements for them, and they do not wish them to arrive later than the time they have made their arrangements for, and if they have specifically named the months of March and April, they mean those two months. They do not mean to purchase goods placed on board in the previous month, February, which therefore would, or might, arrive at a different season from that at which they specially engaged by the contract to accept the goods, which goods by the nature of the contract are to be paid for immediately on the ship's arrival.

That really seems to me to amount to the whole case, because as regards the evidence which has been produced, I entirely agree with what has been already said, that that evidence, if it was required at all, or if it is admissible at all, has, if anything, strengthened what appears to be the natural construction of the contract, that "March" does mean "March," and "April" does mean "April," and that the loading "during the months of March and April," does mean a loading during those months.

Without detaining your Lordships any longer upon the case, which has been so fully and amply gone into, I am content to say that I do not think this case is at all governed by the case of *Alexander* v. *Vandersee* (L. Rep. 7 C. P. 530), nor do I think it necessary to say any thing whatever upon that case. I think it is plain upon the construction of the contract that we have before us, that that contract was not performed in such a manner as that the defendants

were compelled to accept the tender of goods which were shipped in the month of February, instead of goods which were shipped in the months of March and April, or one of them. The February shipment applied to the whole of the goods, with the exception simply of fifty bags, and we have it in evidence, that these fifty bags amounted to four tons out of 300 tons. It appears to me that the defendants could not be obliged to accept a tender of those bags separate and distinct from the complete contract they had entered into for the whole 300 tons, almost the entirety of which was shipped in a different month from that which they had contracted for, and therefore was not of such a character as to be deliverable to them in fulfilment of the contract they had entered into.

Lord O'HAGAN.—My Lords, I have reached the same conclusion, and substantially for the same reasons. I shall not repeat those reasons, nor go again through facts and documents that have been already abundantly discussed. The question is of public importance, and the conflict of judicial opinion upon it shows that it is not without serious difficulty, but the grounds of decision lie within a very narrow compass, and for myself I shall state them in a very few words.

As to the authority mainly vouched by the plaintiffs, I concur with my noble and learned friends that it is distinguishable, and does not rule this case, which must be dealt with on its own special circumstances. We have to consider a written contract, carefully prepared, and deliberately acted upon, the terms of which are clear and intelligible, and convey very distinctly the purpose of the parties to it. Regarded in themselves, these terms are the proper subject of construction by a court and not by a jury, and they appear to me fully to sustain the contention of the defendants. Commercial usage, or the well established understanding amongst mercantile men, may sometimes be applied to put on words apparently distinct a sense other than that which reasonably and naturally belongs to them. But of such a usage or understanding the plaintiffs have given no proof whatever, leaving the words employed to the interpretation of the court according to their ordinary import and effect. On the other hand the defendants have relied upon a considerable body of testimony to prove that the sense commonly attributed to the words is that which is put upon them by commercial people. This testimony, if it was needed, would be of much weight and persuasiveness. I do not think that it was. I think that if oral evidence was given at all it should have come from those who wish your Lordships to interpret plain phraseology against its common import. But it is striking and curious that all the witnesses are of one way of thinking, and all of them declare that the literal meaning is the true meaning, and recognized universally as such by those whose occupations and interests bring them continually into relation with agreements of the kind. I thought for a time that there must be a re-investigation of the case, and that the verdict of the jury should be set aside as against evidence, if not for misdirection. But having satisfied myself that the decision properly rested with the court, and that nothing had been offered on either side to raise a jury issue, and deeming the words of the contract plain and unequivocal, I feel bound to adopt the proposal of my noble and learned friend, and advise your Lordships to allow the appeal. I do not think that we are at liberty to speculate as to motives, or to consider what comparative benefit might have arisen from a shipment in February or a shipment in March. I can see good reason at least for the stipulation that it should definitely be in the one month or in the other. But the plain fact is that the defendants bargained for a shipment during March or April, and for nothing else; and as that which was offered to them was substantially a shipment in February they were not bound to accept it.

The appeal must be allowed with costs, and the judgment of the Queen's Bench affirmed.

Lord BLACKBURN.—My Lords, I am entirely of the same opinion.

The question arises upon a contract by which the one party bound himself to buy, and the other party to sell, "Madras rice, to be shipped at Madras or coast for this port during the months of March $\frac{\text{and}}{\text{or}}$ April 1874, about 300 tons per *Rajah of Cochin*."

The first question that arises is, what was it that, according to that contract the plaintiff was to supply, and the defendant was bound to take? It was argued on one point that it was enough that it was rice, and that it was immaterial when it was shipped as far as the subject matter of the contract went, its being shipped at another and a different time being only a breach of a stipulation which could be compensated for in damages. But I think that that is quite untenable. I think, to adopt an illustration which was used a long time ago by Lord Abinger, C.B., and always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. The truth is, as he has said, that if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north, or a little to the south of the coast of Madras; and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April; and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say, "We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship;" and before the defendants can be compelled to take anything in fulfilment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it.

That being so, the question which arises in this case is whether the rice here tendered was shipped within the period stipulated for or not. That evidently involves in it two questions: first, what is meant by the word "shipped" as used in this contract? and, secondly, the

question of fact whether the things which are proved in evidence to have taken place as regards these defendants did amount to a shipping of the rice within the meaning which ought to be put upon the contract. Before saying a word about the evidence which was given with regard to usage and custom, I will proceed to consider what is the meaning which your lordships should, in the absence of any evidence of mercantile usage, put upon the word "shipped" in a contract of this sort. Supposing we had no help from mercantile usage, and nothing to guide us but that general knowledge of dealing and of what takes place which judges judicially possess and take notice of, what would that contract mean? It seems to me that where a parcel of goods is begun to be put on board on or after March 1st, and they are all finally put on board, so that the shipping is entirely completed before March 31st, and nothing then remains but to take the bill of lading for them, there can be no doubt that that is a March shipment; the whole shipment is completed in that month. But there would be a great deal more difficulty in saying whether it was a March shipment or not if the case were this: suppose the shipment of a large parcel of goods goes on as one transaction which occupies several days; suppose, for example, the shipment of a large parcel of goods which may take ten days or so to put on board, has been begun before the end of the month of February, and has been proceeded with continuously with reasonable despatch and in the ordinary way as a matter of fair dealing, and the completion of the shipment is in March, although the commencement was in February, and the bill of lading is taken in March, I think the materiality of the bill of lading would only be as evidence to show that the shipment was then completed. I do not think the delaying of the bill of lading for a fortnight would make the date of the shipment a fortnight later. I think the material thing is the completion of the putting the goods on board, which would entitle you to the bill of lading, but the bill of lading would be strong, and in most cases conclusive evidence of the date when the shipment was really completed. I think in a case of the sort I have supposed there is a serious and grave question whether or no the shipment may be considered as being made partly in one month and partly in the other, or whether it may not be considered as made at the time when the one indivisible transaction of putting those bags of rice on board was ended and completed, resulting in the whole parcel being on board, so that there is now a right to say, We have shipped this cargo, or portion of cargo, and we are now entitled to a bill of lading.

That was the case which arose in *Alexander* v. *Vandersee* (L. Rep. 7 C. P. 530). I do not mean to say more upon that than to point out that that was the case which arose there. The majority of the Court of Exchequer Chamber, Kelly, C.B., dissenting, said that that was a sufficiently ambiguous matter to make it a proper question to ask the jury whether this was a shipment in June or not, that being the month when it ended, having begun in May. The decision was that it was a proper case to take the opinion of the jury upon. I see that I am reported to have said (L. Rep. 7 C. P. 534), standing as far as I can perceive alone in that respect, that without the aid of the finding of the jury I should have come to the same conclusion. I do not mean to say more about the case than this, that, without saying I was wrong upon that, I have very considerable hesitation and doubt in saying now that I was right. I pass by that case with merely that observation, and leave it as it stands. When this case came before the Queen's Bench Division, and I had to give judgment, I could not consider whether the decision in *Alexander* v. *Vandersee* (L. Rep. 7 C. P. 530) was right or wrong. Being a decision of the Court of Exchequer Chamber it bound me, and consequently it was absolutely necessary for the purpose of the decision there to distinguish this case, and show that it was not the same as *Alexander* v. *Vandersee*. Now, when I am advising your Lordships in the House of Lords that is no longer so, I am not bound to say that the decision in *Alexander* v. *Vandersee* is good, but it is quite enough for the purpose of advising your Lordships what conclusion you should arrive at here to say that I do distinguish the present case from *Alexander* v. *Vandersee*, and that I think it is distinguishable now for the same reasons as those for which I distinguished it in the Court of Queen's Bench below, where it was absolutely necessary to distinguish it.

The facts are here that the great bulk of this rice was put on board during the month of February. For nine-tenths of it bills of lading were signed in February. With regard to the remaining tenth, a large part of that was put on board in February, but a small portion, amounting, I think, to four tons, was put on board in March, and the bill of lading for the last parcel was signed in March. Under these circumstances it seems to me that, putting aside the mercantile evidence altogether, it is quite clear that as far as regards those nine-tenths which were put on board in February, and the shipment of which was completed in February, as was indicated by the taking of the bills of lading then, it was not part of a continuous operation eked out by putting on board four tons more in March. It seems to me that it was so completely a February shipment that, had this contract said "shipped in February" instead of saying "shipped in March $\frac{\text{and}}{\text{or}}$ April," the defendants clearly could not have rejected it. I think that equally applies to the present case; being a February shipment it cannot be a March shipment. I observe that in delivering the judgment of the Court of Appeal, Mellish, L.J.—and I suppose I need hardly say that every word which comes from him I consider with the greatest respect, and do not differ from without thinking over it very much,—takes a different view. I quite agree with him that a bill of lading is no essential part of the shipping of a cargo or parcel of goods. A parcel of goods may be put on board a ship without a bill of lading at all; it is no necessary part, therefore, of the shipment. But when the question is whether there has been a shipment within a particular time or not, the fact that a bill of lading has been made out and signed is to my mind evidence, and until a mercantile man appears to tell me that it makes no difference I should regard it as conclusive evidence, that so far as regards that portion of the shipment for which it is signed, it is then completed and is at an end. It is in that way that I consider it as being a decisive and important question, and I must say that, to my mind, the reasoning of

Mellish, L.J. and of the other learned justices of appeal who agreed with him on that point is not sound.

I think, therefore, that it comes round to this, that *primâ facie* in the absence of mercantile evidence or the like, the true construction of the contract is that "shipped in March" bears such a meaning that the portions or parcels of goods put on board in this case in February, and so completely put on board and shipped that bills of lading were signed for them, were not March shipments, and consequently, in the absence of mercantile usage, the defendants are entitled to judgment.

As to the mercantile usage, I will say scarcely anything upon that subject, for it really comes round to this, that the plaintiffs did not attempt to give any mercantile evidence. They said the construction of the contract without mercantile usage was in their favour. The defendants might have rested upon that; but the jury having found in *Alexander* v. *Vandersee* (L. Rep. 7 C. P. 530) that in that particular case there was a different mercantile meaning to the thing, they were afraid of that, and they took upon themselves to prove the negative. Taking up that position you could hardly expect them to give instances of it. They took upon themselves to prove that there was no custom. Nobody was trying to prove that there was a custom the other way, and I think your Lordships are bound to act without regard to the question which was asked, and to which no answer was given, as to whether or no there was any difference in the meaning of this contract established by mercantile usage, of which certainly no evidence was given.

Taking that view of the case it seems to me that the judgment should be for the defendants, as it was originally given in the Queen's Bench Division, and I perfectly agree with what the noble and learned Lord on the woolsack has proposed, that the costs should, now and in future cases, give an indemnity, and therefore include the costs in this House as well as in the court below.

Lord Gordon concurred.

Judgment of the Court of Appeal reversed. Judgment of the Queen's Bench Division restored with costs.

Solicitors for the appellants, *Lattey* and *Hart*.

Solicitors for the respondents, *Stevens, Wilkinson* and *Harries*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by W. Appleton, Esq., Barrister-at-Law.

(Before Coleridge, C.J., Bramwell and Brett, L.JJ.)

April 16, 17, *and May* 5, 1877.

Leask *v.* Scott.

Bill of lading—Assignment of—Consideration for—Stoppage in transitu—Unpaid vendor.

The transfer of a bill of lading for valuable consideration defeats the right of stoppage in transitu, and it makes no difference that no part of the consideration for the transfer arose out of such bill of lading.

G. and Co., the consignees of certain goods from the defendant from abroad, for which they had accepted a bill of exchange at three months, being already indebted to the plaintiff, obtained a further loan on the condition of giving security. They delivered to him the bill of lading of the goods, together with other securities to the amount required. After this and before the arrival of the goods, G. and Co. became insolvent.

Held (*reversing the decision of Field, J.*) *that the defendant was not entitled to stop the goods in transitu, for that it was not necessary that the consideration for the assignment of the bill of lading should be obtained by means of the bill of lading, and that there is in such a case no difference between a past and present consideration.*

Rodger *v.* Comptoir d'Escompte de Paris (*L. Rep.* 2 *P. C.* 393; 3 *Mar. Law Cas. O. S.* 271) *dissented from.*

This was an appeal by the plaintiff from a decision of Field, J., directing judgment to be entered for the defendant.

The facts of the case, which will be found in the report of the case in the court below (*ante*, p. 352) are sufficiently set out in the judgment of the Court of Appeal.

Williams, Q.C. (with him *Matthew*) for the appellant.—The transfer of a bill of lading to a *bonâ fide* transferee on account of an existing debt with the intention of passing the property of the goods therein contained, does in fact pass the property, and even if this were not so, there was in this case something more to support the transfer than an existing debt; there was an indorsement made and given in pursuance of a binding obligation. The judgment of the court below was founded on the decision in *Rodger* v. *The Comptoir d'Escompte* (3 Mar. Law Cas. O. S. 271; L. Rep. 2 P. C. 393), but that case can be distinguished as to the facts from the present case. There was there first a promise to make an advance, and then a fresh contract to assign the whole property, and this was the contract for which there was no consideration; that there was *mala fides* is an essential ingredient in that decision as may be seen from the judgment at p. 406. The decision in *The Marie Joseph* (L. Rep. 1 P. C. 219; 2 Mar. Law Cas. O. S. 109, 394) is to the effect that a transferee of a bill of lading for valuable consideration is entitled to the goods before an unpaid vendor, and this favours the appellant's contention. In the present case, as in *The Chartered Bank of India* v. *Henderson* (L. Rep. 5 P. C. 501), a bill of lading has been indorsed for valuable consideration, and a distinction between such a case and that of *Rodger* v. *The Comptoir d'Escompte*, is pointed out at p. 512 of the judgment of Sir B. Peacock. They also cited:

Hibbert v. *Carter*, 1 T. R. 745;
Lempriere v. *Pasley*, 2 T. R. 485;
Lickbarrow v. *Mason*, 1 Sm. L. C. 757;
Ex parte Norton, L. Rep. 16 Eq. 397;
Holroyd v. *Marshall*, 10 H. L. Cas. 191;
Currie v. *Misa*, L. Rep. 10 Ex. 153;
Alliance Bank v. *Broom*, 34 L. J. 256. Ch.

Webster (with him *Murphy*, Q.C.) for the defendant.—Even if the plaintiff is entitled as against Geen and his assignee, he can have no right against Scott, the unpaid vendor, for there was no consideration for the indorsement of the bill of

lading. The only consideration was the antecedent debt, and that being a past consideration will not suffice to defeat the right of the unpaid vendor to stop *in transitu;* no advance was made on the faith of this bill of lading, and so no part of the consideration arose out of it. *Rodger* v. *Comptoir d'Escompte de Paris* (3 Mar. Law Cas. O. S. 271) is clear on this point. In *Lickbarrow* v. *Mason* (1 Sm. L. C. 757) it is said that the right here claimed may be defeated by the negotiation of a bill of lading, but in that case there was a handing over for present value, and it does not decide that a transfer in pursuance of a general agreement to give security will give as good a title to a transferee, and that is what has been done here. The question of past consideration did not arise in *The Marie Joseph* (L. Rep. 6 P. C. 219; 2 Mar. Law Cas. O. S. 190, 394); and *Currie* v. *Misa* (L. Rep. 10 Ex., 153) does not apply, because there can be no stoppage *in transitu* in the case of cheques. The assignee of this bill can only be in the same position as regards the defendant as were the assignors, Geen and Co., and the equitable right which the defendant had against Geen and Co., he also had against the plaintiff. Specific performance of this contract would not have been decreed; an order might have been made that security should be given, not that this bill of lading should be handed over. He cited also:

Spalding v. *Ruding*, 6 Beav. 376;
Re Westzinthus, 5 B. & Ad. 817;
Mangles v. *Dixon*, 3 H. of L. Cas. 702;
Gurney v. *Behrend*, 3 E. & B. 622

Williams, Q.C., in reply, cited:
Twyne's Case, 1 Sm. L. C. 1.

Cur. adv. vult.

May 5.—The judgment of the Court was delivered by

Bramwell, L.J.—The defendant has stopped *in transitu* the goods the subject of this proceeding. He has done so effectually and rightfully, unless the plaintiff has obtained a title to them which cannot be defeated by such a stoppage. Whether he has is the question.

The facts are few, and as follows: Geen and Co., the consignees of the goods were indebted to the plaintiff. On Saturday 30th Dec. they applied to the plaintiff for a further advance, which he agreed to make on being first covered. Geen and Co. promised to give him cover, not naming anything in particular, and the plaintiff advanced them a further sum of 2000*l.*, the plaintiff being content with their promise. On the following Tuesday the bill of lading of the goods in question consigned by the defendant to Geen and Co. came to the possession of the latter, who on the following day, Wednesday, deposited it and other property with the plaintiff in fulfilment of their promise to cover him. No question turns on the quantity of property so handed over, nor in any way as to the validity of the transfer; for the jury on this have found entirely in favour of the plaintiff.

This being so, the plaintiff contended that he was a *bonâ fide* holder of the bill of lading for valuable consideration by transfer from the former lawful holder and proprietor thereof, and of the goods mentioned in it. This was not denied by the defendant. His contention was that, though the plaintiff was such holder effectually as against Geen and Co. and their assignees if they had become bankrupt, or anyone claiming through or against them except him, the defendant, yet he, the defendant, had not lost his right to stop *in transitu;* that the right of stoppage *in transitu* is available and is effectual against everyone except against the assignees of a bill of lading for valuable consideration and against them unless that valuable consideration has been got by means of the bill of lading; that if the consideration was past, it was not such a consideration, and the title gained by it was not such a title as would defeat the equitable right of stoppage *in transitu*; that such right was only defeated where there was a transfer for present consideration; that it was so in such a case, because the consignor or stopper *in transitu* had by parting with the bill of lading enabled the consignee to get valuable consideration by means of it; and so had indirectly caused the giving of the consideration by the assignee of the bill of lading; but that that was not so where the consideration was past. There the giver of the valuable consideration was not prejudiced by means of the bill of lading, and consequently there was no reason why the equitable right of stoppage *in transitu* should be lost.

It was first argued for the defendant that the equitable right of the consignor should prevail against the equitable right of the transferee of the bill of lading. But on its being pointed out that the title of the transferee was legal, the argument was changed to what is above mentioned, viz., that the equitable right of stoppage prevailed against a legal title acquired by receiving the bill of lading for a consideration, no part of which was caused to be given by the bill of lading. The distinction between the two propositions is material. In support of this argument, *Rodger* v. *The Comptoir d'Escompte de Paris* (3 Mar. Law Cas. O. S. 271) was cited. We think that case justifies the argument, and is in point. There may be differences in the facts of the two cases, but the *ratio decidendi* was clearly founded on the principle which is advanced for the defendant in the present case. We are not bound by its authority, but need hardly say that we should treat any decision of the Privy Council with the greatest respect, and rejoice if we could agree with it. But we cannot. There is not a trace of any such distinction between cases of past and present consideration to be found in the books. It is true there is no decision the other way. But wherever the rule is laid down, it is laid down without qualification, viz., that a transfer of a bill of lading for valuable consideration to a *bonâ fide* transferee defeats the right of stoppage *in transitu*. It is true, no doubt, that opinions must be taken *secundum subjectam materiam*, but it is strange that no judge, no counsel, no writer, ever guarded himself against appearing to lay down the rule too widely, by mentioning this qualification if he thought it existed. We cannot help saying then, that not only is the case a novelty, but it is a novelty opposed to what may be called the silent authority of all previous judges and writers who have dealt with the subject. More than that, in *Vertue* v. *Jewell* (4 Camp. 31), where Lord Ellenborough goes out of his way to say that the plaintiff was not a transferee for valuable consideration so as to defeat the right of stoppage, he puts it, not on the ground that the consideration was past, as was

the fact, but on the ground that the transferees had notice of the transferor's insolvency. Further, it is noticeable, that this point does not seem to have been mentioned in *Rodger* v. *Comptoir d'Escompte* (3 Mar. Law Cas. O. S. 271) till the reply. The cases cited in the argument at the opening of counsel in that case seem directed to the question of *bona fides*. Still further, with all respect be it said, the reason given in the judgment is not satisfactory. It is said, "The general rule so clearly stated and explained by Lord St. Leonard's in the case of *Mangles* v. *Dixon* is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. "No doubt. But that rule does not apply here. Lord St. Leonards said that in reference to a case where the title was to a *chose in action*, an equitable title only, or, dropping such an expression, a right against a person liable on a contract; and he held that the assignee of that right was in the same situation as the assignor. Here the plaintiff's title is, as it was in *Rodger* v. *The Comptoir d'Escompte*, a title to property in ownership, and, to use the old expression, a legal right.

If, besides dealing with the authorities. we look at the reason of the thing, we are led, with deference, to the same conclusion. All the arguments used by Mr. Justice Buller in *Lickbarrow* v. *Mason* (1 Sm. L. C. 757) apply to such a case as the one before us. Practically, such a past consideration as is now under discussion, has always a present operation, for it stays the hand of the creditor. If the plaintiff had agreed on the day the bill of lading was handed to him to give a week's time, there would have been a present consideration. Is it necessary there should be a formal agreement in lieu of that which, whether it would support legal proceedings, as was contended by the defendant, or not, was no doubt such an understanding, that if the plaintiff had taken proceedings against the defendant the day after he had received the security, he would have committed a breach of faith? If in this case the plaintiff had bought the goods out and out, and paid part of his debt with the price, the consideration would have sufficed if the transaction was not colourable. If the plaintiff had said "I cannot take this bill of lading safely, as the consideration would be past, do it with the broker next door and give me his cheque," that would have been valid. Is it then desirable to introduce such niceties into commercial law? Moreover, there really always is a present consideration. It is not necessary to consider whether specific performance would be decreed as to this document; which was not specified to the plaintiff; but the case of *Alliance Bank* v. *Broom* (34 L.J. 356, Ch.) shows that a general performance would be decreed, and certainly an action would lie for not covering. Therefore the assignor for such a consideration as this always gets the benefit of performing his contract, and so saving himself from a cause of action. If Geen and Co. in this particular case had said that this bill of lading was coming forward, and that they would hand it to the plaintiff, then value would have been obtained by means of the bill of lading; so also if they had said generally that they had securities coming forward and would deposit them; and what is the difference between a promise with such a statement and a promise without it? In the analogous cases of goods obtained under a fraudulent contract, where the vendor loses his title if there is a transfer for value, there is no case to show that a past value is not sufficient.

On these grounds we are unable to concur in the opinion of the judicial committee in *Rodger* v. *The Comptoir d'Escompte* (3 Mar. Law Cas. O.S. 271), nor with the argument for the defendant. As to the judgment of Field, J. it is enough to say that it proceeds wholly on that case and in deference to it.

We are of opinion that judgment should be reversed and ours given for the plaintiff.

Judgment reversed.

Solicitors for the plaintiff, *Hollams, Son,* and *Coward.*

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

April 21, 23, 24, *and* 26, 1877.

The Earl of Eglinton v. Norman and another.

Shipping—Wreck—Obstruction to harbour—Removal of—Harbours Act 1847 (10 *&* 11 *Vict. c.* 27), *s.* 56—"*Owner*," *who is—Owner's liability over to underwriters for expenses of removal.*

By sect. 56 *of the Harbours Act* 1847, *the harbour master may remove any wreck or other obstruction to a harbour or its approaches, and may recover the expenses of such removal from the "owner." Plaintiff, under a private Act, which incorporated the Harbours Act* 1847, *was harbour master of Ardrossan harbour. A ship belonging to the defendant N., broke up in a storm outside the harbour, one-half of the vessel floated into the harbour and was taken possession of by N., the other portion sank and became an obstruction to the harbour and its approaches. N. had insured the ship with E. another defendant, and on the wreck happening E. paid as on a total loss of the ship. No notice of abandonment of the wreck was given by N. to E. Plaintiff, having removed the obstructing portion of the ship, brought an action against N. and E. to recover the expenses.*

Held (*affirming the decision of the Queen's Bench Division*), *that N. was liable as "owner" of the ship within sect.* 56, *and that he was not entitled to recover the expenses of removal over against E. the underwriter.*

This was an action to recover the expenses incurred by the plaintiff as harbour master of Ardrossan harbour, in removing part of a ship which had sunk in a storm, and caused an obstruction to the harbour.

The plaintiff, by virtue of a private Act of Parliament, with which the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) is incorporated, was owner and harbour master of the harbour of Ardrossan. The ship *Chusan*, belonging to the defendant Norman, was broken in two in a violent storm, but her two parts being watertight drifted into the harbour of Ardrossan. The fore part of the ship came into the harbour without doing any damage, and was taken possession of by the defendant Norman. The after part of the ship sank at the entrance of the harbour, and blocked the navigation. The plaintiff, as harbour master, raised and removed the wreck under the powers of the Harbours, Docks and Piers Clauses Act 1847 (10 & 11 Vict. 27), sect. 56. The opera-

tion was completed in Feb. 1875, but in Nov. 1874 the defendant Norman's underwriters had paid him as for a total loss. The plaintiff in this action sued the defendant Norman to recover the cost of the removal of the wreck. The defendant pleaded that the obstruction being caused by the act of God, there was no liability; and that even if there was liability, the underwriters only were liable, as they had become owners of the wreck from the time of their payment for a total loss. Norman joined one of the underwriters as a defendant. No notice of abandonment has been given to the underwriters.

At the trial before Cleasby, B., the learned judge gave judgment for the plaintiff as against the defendant Norman, who now appealed.

By the Harbours Act 1847 (10 & 11 Vict. c. 27), s. 56:

> The harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, or floating timber shall be repaired by the owner of the same, and the harbour master may detain such wreck or floating timber for securing the expenses, and on non-payment of such expenses, on demand, may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses rendering the overplus, if any, to the owner on demand.

Butt, Q.C. and *Benjamin*, Q.C. (*A. E. Hardy* with them) for defendant Norman.—The shipowner is not liable under sect. 56 of the Harbours Act 1847, where there has been no negligence on his part. The Ardrossan Harbour Act incorporates the Harbours Act 1847 and under sect. 74 of the latter Act the shipowner is only liable for obstructing the harbour where there has been negligence: (*River Wear Commissioners* v. *Adamson*, *ante*, p. 242; 35 L. T. Rep. N. S. 118; L. Rep. 1 Q. B. D. 546.) The same principle ought to be applied to sect. 56. The statute did not intend to impose upon the shipowner a liability greater than he had at common law. The underwriters were really the owners of the wreck; except for certain purposes the fact of one man being registered owner does not prevent another being the real owner. Besides, this was a wreck, and therefore registration was at an end:

White v. *Crisp*, 10 Ex. 312; 23 L. J. 317, Ex.;
Brown v. *Mallett*, 5 C. B. 599.

The effect of paying for a total loss operates as a transfer of the property to the underwriters:

Emerigon, vol. 2, c. 17, p. 205;
Case v. *Davidson*, 5 Man. & Sel. 79;
Miller v. *Woodfall*, 27 L. J. 120, Q. B.; 8 E. & B. 493;
Phillips on Insurance, sects. 1717, 1723, 1726;
Arnould on Marine Insurance, 4th edit., p. 866, 868 (vol. 2).

[Lord Coleridge.—The passage from Arnould is adopted by the court in *Cammell* v. *Sewell* (5 H. & N. 728; 6 Jur. N. S. 918; 29 L. J. 350, Ex..] In *Micklereid* v. *West* (L. Rep. 1 Q. B. D. 428) "owner" in the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) was held to mean charterer. When the facts on which *Brown* v. *Mallett* (5 C. B. 594) was decided (in 1848) occurred, the 19 Geo. 2, c. 22, s. 3 was in force. Sect. 56 of the Harbours Act 1847 says that the harbour master may remove, not that the owner shall remove. When the owner has abandoned, he has ceased to be owner, and the section does not apply. The case of the owner of the ship having abandoned the wreck, and the wreck, not being worth the expense of removal is a *casus omissus*.

Watkin Williams, Q.C. and *Macleod* (*Lodge* with them) for the underwriters.—The sole question is what is the meaning of "owner" in the section. This is not a case of mere wreck, as wreck which has drifted in as flotsam and jetsam, which causes an obstruction. Under sect. 56: "wreck or other obstruction" means obstruction *ejusdem generis* as wreck. This was not a "wreck" within the meaning of the section. The ship was of a peculiar construction being built in watertight compartments. The owners treated it as a "ship" after the casualty occurred and the section does not intend the harbour master's power to arise whilst the ship is under the owner's control. Sect. 3 of the 19 Geo. 2, c. 22 deals only with ships sunk or stranded, showing that the Legislature does not assume, except in cases of undoubted wreck, that the harbour master should supersede the owner's right. As to the definition of a "wreck," see Coke's Inst. (pt. 2) p. 166; Comyn's Digest, Title "wreck." It is admittted that by paying upon a total loss the underwriters are placed in the position, for some purposes, of having the property passed to them from the time of the event which caused the loss: (Arnould on Insurance pp. 1178 and 1181); but for the purposes of sect. 56 of the statute of 1847, the underwriter has never in any sense been the "owner." He may refuse to take the property. At any rate he must do some unequivocal Act showing that he means to take it: (Phillips on Insurance, p. 73; *Xenos* v. *Fox*, 19 L. T. Rep. N. S. 84; L. Rep. 3 C. P. 630). There is an obvious distinction between payment on a total loss when compelled, and accepting notice of abandonment. In the latter case there is some evidence of the underwriter's acquiescence in the passing of the property to him.

Sir *H. James*, Q.C. and *Cohen*, Q.C. (*J. C. Mathew* with them) for the plaintiff.—The defendant Norman is primarily liable. He was the registered and actual owner at the time of the obstruction, and afterwards he held himself out as the owner. Under sect. 56 "owner" is the owner at the time of the casualty; if not, there is very great difficulty in determining at what period of time ownership imposes liability under the section. There is no hardship in making the registered owner at the time of the casualty liable. If he is not liable, then an owner by a transfer to a mere voluntary transferee (and the underwriter is no more) can evade his liability. There can be no renunciation of the property where the ship goes down in the harbour. *The River Wear Commissioners* v. *Adamson* (*sup.*) differs from the present case, because the subject matter with reference to which sect. 74 was passed, was injury by means of one vessel coming into collision with another, which supposes negligence. Sect. 56 contemplates a wreck through stress of weather which is the act of God. Whether the casualty occurred by accident or not, there would be a lien against the owner under sect. 56. The liability is imposed by the Act: (*Cammell* v. *Sewell* (*sup.*)

A. E. Hardy, for the defendant Norman, replied.—The court can, if it thinks fit, make an order over against the underwriters under rule 13 of Order XVI. of the Judicature Act of 1875. There is no liability under sect. 56 until the removal of the obstruction is completed, nor is there any lien

on the property until, at any rate, the removal has commenced. The harbour master may remove the obstruction cheaply, as by blowing it up, or expensively, as by employing divers with a view to save cargo. If the construction contended for by the plaintiff is correct, if the owner sells the property, the harbour master might saddle him with the costs of removing the obstruction in the most expensive way, leaving the vendee to reap the benefit. "Owner" means the person beneficially entitled to the obstructing property at the time when the harbour master objects to its remaining. The underwriters are primarily liable because they have not disclaimed the property: Phillips on Insurances, 1717.

Lord Coleridge, C.J.—This case has given rise to a number of interesting questions, many of which, as far as I know, arise for the first time.

It appears to me that the whole matter in dispute reduces itself to a single point, to be considered, perhaps, under two heads, namely, what is the true construction of sect. 56 of the 10 & 11 Vict. c. 27, in respect to the word "owner," or who is the true "owner" within the meaning of the Act? and at what point of time does the ownership exist for the purpose of fixing him with the liability which is incurred under the section?

Now the words of the Act are these. [His Lordship here read sect. 56.]

In this case the plaintiff was the owner of a harbour, private in the sense that he had the benefit of the tolls of it, but public in the sense that he was bound to allow any ships to come into and take the benefit of it. Of that harbour he was harbour master. The ship in question broke up near the entrance of the harbour, and having been built in watertight compartments, part of it floated into the harbour, and did not sink at all. This part was taken possession of, and gives rise to no question under the section. The other portion of the ship, upon the wreck taking place, stuck fast at the entrance of the harbour, and was undoubtedly an obstruction to the harbour, dock, and pier, and their approaches. It was properly removed by the harbour master under the powers given him by sect. 56, and the simple question for our determination is, who is the person liable over to the harbour master for the expense of such removal? There is no dispute before us as to the amount of those expenses or of the extent to which they may be recovered against the "owner," whosoever he may be. We have simply to treat these expenses as an unascertained quantity for the present purpose, and decide on principle on whom does the burden fall. The owner of the ship upon her voyage, and up to the moment of her striking on the rock, was the defendant Norman, one of the partners of Messrs. Baring. The ship was insured for a large sum with certain underwriters, and one underwriter, representing the insurers under one policy, has been made a defendant in the action, and the main question for us is, whether the owner before the accident, or the insurer afterwards, is, under the circumstances I will next mention, the proper person to be made liable for the amount of the expenses under the words "owner of the same" in sect. 56. The only other facts I need mention are these:—Some considerable time—three weeks or a month—after the casualty, the underwriters paid as for a total loss.

Now, it is admitted under well-known principles of law that for certain purposes, and in regard to certain persons, the underwriters paying that total loss would have vested in them, as from the time of the casualty, the subject matter of the policy in respect of which they had paid the total loss. The question is whether, applying that principle of law to the unquestioned facts of this case, they are the owners of the wreck or obstruction for the purpose of being liable to the harbour master under the 56th section. I am of opinion that they are not, and that the true construction of this section is to fix the ownership on whoever is the owner of the wreck or obstruction at the time of the casualty, when the ship first becomes a wreck which obstructs the harbour. The section is by no means free from difficulties, and those difficulties of interpretation have been very ably put in the course of the arguments before us. The difficulty in construing this section is that which applies to many sections, expressed in general terms of many Acts of Parliament, namely, that we have to construe it with reference to a particular state of facts which manifestly was not in the mind of the framer of the section at the time when the Act was passed. We have, therefore, to deduce a meaning by applying legal principles and rules of interpretation.

The section empowers the harbour master to remove something which by supposition is already in a state of wreck and obstruction. He is empowered to remove, for the benefit of the public, or the general advantage of the harbour, that which, at the moment he has to deal with it, becomes a wreck and an obstruction. He is first to remove, and then to recover, if he can, the expense from the owner. Now, who in reason is the owner? There is a hardship in a certain sense on whomsoever is made the owner, that is to say, a burden is imposed upon some one whose property has been injured by no fault or negligence of his own, and on the other hand the harbour master has his harbour obstructed by no fault of his own. On whom is the hardship to fall? It seems to me that the policy of the act is to make the person liable whose property has caused the obstruction, *i.e.*, the persons whose property the ship was when it became in such a state as to cause the powers given by the section to the harbour master to apply. That construction gets rid of the powerful argument founded on the case of *The River Weir Commissioners* v. *Adamson* (*ante*, p. 252), an argument which, until I considered it more fully, had great weight with me. That case was lately heard in this court, and a decision was pronounced upon the 74th section of this Act that under that section the owner of a vessel, or floating timber, was to be answerable to the undertaker for damage done to the harbour, dock, or pier, but that if the damage, although done by the ship in the sense that the ship was the instrument, was yet done without any fault or negligence on the part of the owner, or by some force against which the owner could not provide, and could not control, that damage is exempted from the operation of sect 74 (although the liability is by statute), as it would have been exempted from liability at common law. But under sect 56, we are not dealing with an injury directly produced upon property by what has been called *Actus Dei*, but with an obstruction which is the result of, although not directly consequent on, the

Actus Dei. In the present case, for example, if the ship, instead of breaking up on a rock a little way from the pier, had dashed upon the pier and injured it, and had afterwards been washed away from the pier and gone down in the fairway of the harbour, then, as I understand the decision in *The River Weir Commissioners* v. *Adamson*, Lord Eglinton would not have been able to recover from the owners of the ship the damage done to the pier, because it was the direct and immediate result of the *Actus Dei;* but the *Actus Dei* being at an end, and the consequence being a continued obstruction to the harbour, the harbour master must remove the obstruction, and somebody must pay the expense.

On the whole, I come to the conclusion that the true interpretation of the word "owner" in sect. 56, is "owner" at the time when the casualty happens, and that he must thereupon repay to the harbour master the expenses of removal. That being the decision to which I have come, it is unnecessary to decide a great many questions that were properly raised in argument, because Norman was undoubtedly the owner of the ship at the time of the casualty. At that time the rights of the harbour master against the owners vested. He had a right at that time to begin to remove the obstruction, and to remove it at the expense of the persons who were at that time the owners. In my judgment it would be carrying the doctrine of relation too far to say that, in this case, the property related back to the underwriters, who had either received or accepted notice of abandonment, or paid upon a total loss after receiving such notice. It would be carrying the doctrine too far to hold that any such consequence of law could divest an already vested right of action in a person who might have already begun, and in this case has begun, to act upon that right. I do not question the effect of the relation back as between the underwriters and the assured.

The only other question is one which I agree with Mr. Hardy in thinking is properly before us under the rules of the Judicature Act, and, as far as I understand the shorthand writer's notes of what took place before Baron Cleasby is before us by agreement between the parties. That question is, whether the owner has a right over against the underwriters to recover the expenses of removal. Now anything I am about to say has reference only to the circumstances of this case. I think the liability here is a risk which the owner might have, but has not insured against. It is a risk which is not covered by any words in this policy unless it can be supposed to come under the suing and labouring clause. In my judgment it is far beyond the meaning of that clause that such a liability as this could be recovered under it. I do not think there is any ground either upon the facts, or under the policy to fix the underwriters with any such liability as has been attempted to be placed upon them.

For these reasons I am of opinion that Cleasby, B.'s judgment is right, and must be affirmed.

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

The plaintiff's case is a very simple and short one. "He says, "there was an obstruction which I have removed. I have been put to expense, which the owner must pay, and the owner is either Norman, or the underwriters." The first answer to this was made by Mr. Butt, and it would be an answer for both sets of defendants if it were a well founded one. He says, "the storm which wrecked the vessel, and caused the calamity is the act of God, and he claims that the decision in the case of the *River Weir Commissioners* v. *Adamson* (*ante*, p. 242), is in his favour on that point. I concur in that decision, and think it was perfectly right, but I think that case entirely distinguishable from this, because, as Lord Coleridge has said, if the vessel in this case had done the damage to the pier and sunk just outside, the owner would not be liable. But here it is not the mere sinking, but the sinking and continuance there which makes him liable. Sect. 56 contemplates the continuance there as a wrong, and as a thing to be removed and obviated.

The next argument, which was used by Mr. Benjamin, would also have answered for both sets of defendants. He says that the authorities show (and I agree with him that they do) that if the owner of a wrecked vessel abandon it and renounce all property in it, he is not bound at common law to remove it, although, by continuing where it is, it is an obstruction to navigation. Here, he says, the wreck was caused by the act of God without negligence on the owner's part, and when he abandons the property, the case does not come within sect. 56. I think that if Mr. Benjamin could make out the last part of this argument as a matter of fact it would be a good answer, because I think the Legislature did not intend to alter the substantive law of the country with reference to harbours constructed under this Act of Parliament. If the Legislature thought it right when the vessel sank without default of the owner, and continued there an obstruction to the navigation that the owner, although he renounced all property in it, should be liable to remove the wreck, it seems to me they ought to have made it the general law of the land applicable to all harbours in all times. They have not done so, and I am inclined to think that sect. 56, does not intend to alter the substance of the law, but to enable harbour masters to remove a nuisance. It seems more a matter of procedure than of substance. I am inclined to think that Mr. Benjamin's argument would have been well founded if he could have made out that there was an abandonment by the owner, but he has failed to do so. It is perfectly clear that Norman was interested in the property after the wreck, and conducted himself in such a way that if the harbour master had treated the property as abandoned, and proposed to blow it up so as to get rid of it in the cheapest way, Norman could have said, "I have not abandoned the property, and you have no right to deal with it on that assumption." I therefore cannot agree with the argument founded on abandonment.

I think the plaintiff has shown his cause of action against one of the two defendants, and the question is, which? I think that depends entirely on the construction of sect. 56, and that "owner" in that section means "owner at the time the wreck becomes an obstruction to the harbour." I think that if the vessel was wrecked in such a way as not to cause an obstruction at first, but afterwards became an obstruction, by slipping off a rock for instance into the channel, you would have to inquire who was the owner at the time of the obstruction. The same with respect to floating

timber, you must look to the owner at the time of the obstruction. There are difficulties, no doubt, attached to this definition; one is, if the person who was the owner, has assigned his right in the property. There you must determine the owner by finding out who is the person to whom you have to render the overplus if there be one, and it follows that the assignee is entitled to the overplus and is therefore the owner. Then there is another difficulty suggested in the case of floating timber, which has been sold after the obstruction. There I think you must find out who is the person who ought to remove it. He is the continuing owner, and the owner contemplated by the Act of Parliament. The next difficulty is, I think, a very striking one. Supposing the wreck is an obstruction, and the owner sells it, then is the person who was owner at the time of the obstruction to be consulted about the removal, or can the new owner remove it in such a way as to make it as beneficial salvage as possible, or charge the original owner with the expense, or is the new owner liable himself? I think the answer is, that a purchaser, under those circumstances, has a right to have a voice in the matter, but it does not follow that the original owner is not the person to whom the harbour master must look. But it seems to me that we ought here not so much to decide an abstract proposition of law, as to consider the circumstances of the particular case. It is said that the underwriters paid, and so became entitled as owners to the wreck, and that their ownerships related back I suppose, to the happening of the disaster. Now, I do not agree that they are owners in any sense; to my mind a man cannot become the owner of anything without his assenting to the ownership. I think they had a right to the ownership which they could elect to exercise or not. If they did not, they might lose that right, but until they did they were not owners. To my mind, in this case there is no evidence of their intending to be owners of this property. I agree with a remark of Mr. Cohen's, that assuming them to be owners, a question might arise between them and Mr. Norman, but there could be no question between them and Lord Eglinton. Suppose the underwriters here had not paid the money, but had insisted upon an action being brought against them, and judgment had not been obtained until eighteen months afterwards, would the cause of action which Lord Eglinton had against Mr. Norman have been divested, and a new cause of action have accrued against the underwriters, because the underwriters a long time after had been compelled to pay the money? I think it could not be so.

It seems to me, therefore, that when we consider the circumstances of this case, the difficulties incident to putting a construction in the abstract upon sect. 56 do not arise, or at any rate not so prominently. Mr. Norman was the owner of the ship when she went down and when the obstruction began, and he was also the owner beyond all question when they first began to remove it. To my mind he has continued the owner to the present moment, because the utmost that has happened with respect to the underwriters only gave them a right of ownership which they have not exercised. I therefore hold that, within the meaning of sect. 56, Mr. Norman is the owner, and the underwriters are not.

Then another question arises, suppose Mr. Norman liable, has he any remedy over against the underwriters? I have my misgivings as to whether the question is open to us here, and I pronounce no opinion upon that, but I think, as to Mr. Norman's remedy over, that it depends upon the underwriters dealing with the wreck as a question of salvage after the casualty had occurred. In my mind, the underwriter would be liable if he had thought fit to take the benefit of the salvage, that is to say, if the harbour master had removed the wreck and sold it, and there was a surplus after paying the expenses of removal, which the underwriter claimed, but here the latter has not chosen to take to the wreck, and as far as he is concerned, he has abandoned, and done nothing to render himself subject to the liability I have mentioned. Another observation is, that the expenses incurred have not been of removal of the obstruction merely, but have also been certain expenses incurred by arrangement for the preservation of the property, and I do not see how the underwriter could be liable for them.

I am of opinion that the plaintiff is entitled to our judgment against Mr. Norman, and not against the underwriters, and that Mr. Norman has no remedy over against the underwriters.

Brett, L.J.—The main question is on the construction of sect. 56, and the first thing to determine is whether the case is within the section at all. The conditions which bring it within the section are that there should be a "wreck or other obstruction." There must not only be a wreck, but a wreck, or some other thing not included in the term wreck, such as floating timber, which is an obstruction to the harbour and impedes the navigation. As soon as the conditions exist the section comes into play, and a power is given to one person, and one person only, and a burden is thrown upon one other person and one other person only. The power is given to the harbour master, who has to exercise his judgment whether the thing is an obstruction or not, and, if it is, he has to remove it; the burden is laid upon another person, and I can see no contemplation in the section of a transfer of that burden to another. The burden is laid upon the owner, and, considering that the power is given to the harbour master the moment the condition exists, I can see no reason why the burden is not placed upon the owner at the very same moment. The power and the burden are created the moment the conditions exist. In this view the "owner," therefore, is the owner of the property which is the obstruction, and which may be removed when it first becomes an obstruction to the harbour. That being the construction of the section as to time, it seems to me that almost every other question that has been raised falls to the ground.

There is Mr. Butt's contention that the obstruction must be caused by negligence, but the section does not come into play until that which has caused the casualty has produced its effect. Whether that which is a wreck or obstruction was brought there by negligence, or the act of God, or by accident, which is not the act of God, the result has been brought about before the section comes into play. The negligence may have existed, or the casualty may have occurred, long before there is a wreck or obstruction. I see nothing in the section which has any reference either to the cause by or through which

the thing becomes an obstruction. The section applies the moment the thing is an obstruction, however caused. If that be so, any decision with reference to sect. 74 is inapplicable, because sect. 74 applies to a state of things which has existed before sect 56 comes into play. Sect. 74 applies to the time of the casualty, and in the case of *Adamson* v. *The River Weir Commissioners* (*ante*, p. 242), where the damage done was to a pier, the damage existed before the obstruction occurred. I express no opinion upon whether I should have decided the *Weir Commissioners'* case in the way it was decided, although Lord Justice Bramwell has added his great authority to that decision.

I cannot agree with Mr. Benjamin's argument that if there was no negligence there was a renunciation of the property by the owner, and that, therefore, sect 56 does not apply; I confess I cannot agree with that, even supposing there had been a renunciation. That renunciation takes place after the rights of one party and the burdens of the other have accrued. If that renunciation made the owner cease to be owner, he would so cease at a time when the burden has already been cast upon him, and after the time when sect. 56 applies, that is, after the right and the burden have accrued. I entirely agree, however, that there was no such renunciation in this case.

Then it is said that the underwriters were owners at the time when sect. 56 was applicable, and this would be so if it were true that by a payment in full the underwriters, to all the world, and for all purposes, become the owners, and have the property in them, and are subrogated into the position of owners from the time of the casualty, because the casualty which makes the underwriters liable may have occurred before there is an obstruction, and before sect, 56 applies at all. But I do not think it necessary to determine whether the underwriters can, without their own consent, become owners. I am inclined to think that by paying the total loss, or by accepting notice of abandonment, they had, as between them and the assured, become owners at the time of the casualty, but I think that is a relation existing between them by virtue of the contract into which they had entered, and not a relation which can affect an existing, though it be an accruing, right of a third person. I think, therefore that they cannot, by reason of that contract, divest the existing right of the harbour master, or escape from the burden which was upon the owner at the time of the casualty. My brother Bramwell seemed to think that if the underwriters took to the salvage they would be liable to the burden. For the reasons I have just given I do not agree with him. I cannot think that anything which the underwriters do, or which the owner does after the time when the harbour master's right has accrued or begun to accrue, can affect the position of the harbour master.

Then, in answer to Mr. Hardy's question as to which owner is to say how the wreck is to be removed, I say that the harbour master ought not to consider the interest of either party. He has to consider the interest of the harbour only, and get rid of the obstruction in a reasonable way. He must not destroy property unreasonably, but he has no right to entertain the question of who will be most injured or benefited by the mode in which he performs his duty. The result, so far as the construction and application of sect 56 is concerned, is that Mr. Norman is liable, and, at all events, primarily liable.

Then comes the question whether we ought to say that the underwriters were liable over to Mr. Norman. I confess I think Order XVI., r. 13, was intended for the very purpose of meeting such a case as this. There are several questions arising between different parties all out of the same casualty or transaction. I cannot help thinking that in the Court of Chancery formerly the underwriters might have been brought in so that the rights of everybody might be adjudicated upon. Rule 13 says that the court may, in every action, "deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." I apprehend that word "actually" was put in to meet such a case, and I think that meaniug is made plainer by what follows: "The court or a judge may, at any stage of the proceedings, either upon or without, the application of either party, and on such terms as may appear to the court or a judge to be just, order that the name of or names of any parties or party whether as plaintiffs or defendants improperly joined be struck out, and that the name or names of any party or parties whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added." I apprehend that rule was passed for the very purpose of making it one action instead of two, and therefore, under the rule itself, I should have thought that we have a right to make an order as between the two defendants; but here there is more; I think it clearly made out that by the consent of the parties, and by the order of Cleasby, B. made upon that consent, that the court was to make an order here as between the two defendants, and the only question which could arise between the two defendants, as distinguished from any question which might arise between the plaintiff and either of them, is this very question, whether the underwriters are liable over.

I think the underwriters here are not answerable over. First of all it is said they were liable over by the suing and labouring clause. The assured here have not sued and laboured at all. It is a right which the harbour master has, and which he has exercised as against them and it cannot, to my mind, be brought within the clause. Mr. Hardy, in his ingenious suggestion, certainly did for a moment stagger one by the 1717th section in Phillips on Insurance (3rd edit., vol. II.): "Where the salvage is encumbered with a lien arising out of the perils insured against, the insurers take it subject to such charge." I think the case is not brought within that section, because I think the lien here if it exists, does not arise out of the peril insured against. There would be no lien except there was a new and independent action of the harbour master; that new and independent action was a right given to him by the statute, and the exercise of the right was not a peril insured against at all. This is a peril, if this decision be correct, which shipowners will now understand they are liable to; it is a peril against which they can insure, but it is a peril against which I presume

they have not hitherto insured, and certainly not under this contract.

Judgment for plaintiff. Judgment affirmed.

Solicitors for the plaintiff, *Hollams, Son,* and *Coward.*

Solicitors for the defendant Norman, *Markby, Tarry,* and *Stewart.*

Solicitors for the underwriter, *Walton, Bubb,* and *Walton.*

SITTINGS AT LINCOLN'S INN.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

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

Friday, March 9, 1877.

(Before James, Mellish, and Baggallay, L.JJ.)

Wednesday, April 18, 1877.

(Before Jessel, M.R., James Mellish, and Baggallay, L.JJ.)

The Daioz.

Compulsory pilotage—Onus of proof—Costs—Merchant Shipping Act 1854, *s.* 388.

When the defence of compulsory pilotage is relied upon in a collision cause, the onus of proving negligence on the part of the defendants or their servants causing or contributing to the collision, is on the plaintiff.

Clyde Navigation Company *v.* Barclay (1 *App. Cas.* 790; 36 *L. T. Rep. N. S.* 379) *followed. The* Iona (*L. Rep.* 1 *P. C.* 432; 16 *L. T. Rep. N. S.* 158) *disapproved.*

When a suit (instituted in Admiralty Division) is dismissed, or an appeal succeeds on the ground that the defence of compulsory pilotage is established, no order will be made as to costs either below or on appeal. (*a*)

The Schwann (*L. Rep.* 4 *Ad. & Ecc.* 187; 30 *L. T. Rep. N. S.* 537) *followed.*

This was a motion made by leave of the court as to costs. The cause was instituted in the Probate, Divorce, and Admiralty Division (Admiralty) by the General Steam Navigation Company owners of the steamship *Pilot,* against the Spanish steamship *Daioz* for damages occasioned by a collision between these vessels which took place in the Downs on the 25th Nov. 1875. The defence of the *Daoiz* alleged (1) that the collision was occasioned by the negligence of the *Pilot* steamship, (2) that it was the result of inevitable accident, (3) that the *Daoiz* was at the time in charge of a pilot employed by compulsion of law, and that if any blame attached to the *Daoiz* for the collision it was solely attributable to the fault and incapacity of the pilot, and not to any neglect or default on the part of the master and crew, and that under the circumstances the defendants were exempted from liability by sect. 388 of the Merchant Shipping Act 1854.

The plaintiffs joined issue simply on these defences, and on the 19th June 1876, the cause came on for hearing before Sir R. Phillimore assisted by Trinity Masters. In the course of the case it was admitted by the defendants, that their vessel the *Daoiz* was to blame for the collision, and the only question which the court had to decide was whether the defendants were exempt from liability by reason of the orders of the pilot, whose employment was compulsory, being obeyed.

Butt, Q.C. and *Clarkson* for plaintiffs.

Webster and *W. Phillimore* for defendants.

Sir Robert Phillimore, following the principle of the *Iona* (L. Rep. 1 P. C. 432; 19 L. T. Rep. N. S. 158) and the *Velasquez* (L. Rep. 1 P. C. 494; 16 L. T. Rep. N. S. 777) held that the onus of proof lay on defendants, setting up the defence of compulsory pilotage, to show that the pilot's orders were understood and obeyed, and decided that the proof was not conclusively made out, adding: "It appears to me, for the reasons I have already given, to be a matter not of certainty at all, but of doubt, and therefore I must pronounce what was formerly called a *deficit probatio,* that there is not that sufficient proof which the exigency of the law requires in the case."

From this judgment the owners of the *Daoiz* appealed, and on the 9th March 1877, the appeal was heard before James and Mellish, L.JJ. and Baggallay, J. A., when the court, following the decision of the House of Lords in *Clyde Navigation Company* v. *Barclay* (*ante,* p. 390; L. Rep. 1 App. Cas. 790; 36 L. T. Rep. N. S. 379) (which case was not at the time of the decision of the court below reported) held that the pilot in charge of the *Daoiz* was primarily responsible for the collision, and that the owners were therefore exempt from liability, the plaintiffs not having shown contributory negligence on their part, and accordingly reversed the decree of the court below on that ground. In drawing up the decree of the court a question arose with regard to the costs of the cause below and on appeal, and on the 18th April 1877, an application was made to the court, consisting of Jessel, M.R., James, Mellish, and Baggallay, L.JJ., for direction on the point.

Webster, for the owners of the *Daoiz,* contended that as it was the universal rule in the Court of Appeal (Practice of the Court, W. N. 1875 pp. 185, 186) that costs should follow the event, there was no reason why a defendant, succeeding on the defence of compulsory pilotage, should not be entitled to his costs.

Clarkson.—It has been the universal rule in the Court of Admiralty and in the Privy Council in Admiralty Appeals that where a defendant succeeded on the ground of compulsory pilotage, no costs were given. The *Schwann* (2 Asp. Mar. Law Cas. 259; L. Rep. 4 Ad. & Ecc. 187; 30 L. T. Rep. N. S. 537) and this court will, in Admiralty Appeals, follow the practice of the Privy Council.

The City of Cambridge, ante, p. 307; 35 L. T. Rep. N. S. 781;

The Corinna, ante p. 307; 35 L. T. Rep. N. S. 781.

Webster in reply.

Jessel, M.R.—The rule acted on in the Admiralty Court in cases like the present was that when the owners of a vessel were relieved from liability on the ground of compulsory pilotage, no costs were given on either side, and the same rule ought to apply in the Court of Appeal; there will, therefore, be no costs on either side in the Court below or in the Court of Appeal.

James, Mellish, and Baggallay, L.JJ., concurred.

Solicitors: *Lowless* and *Co.; Batham.*

(*a*) It would appear that this rule as to costs only applies to cases in the Admiralty Division or on appeal from that division, where the suit is instituted in another division of the High Court, the ordinary rule that costs follow the event holds good. (See *The General Steam Navigation Company* v. *London and Edinburgh Shipping Company,* 36 L. T. Rep. N. S. 743.)

ADMIRALTY DIVISION.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqs., Barristers-at-Law.

Tuesday, July 31, 1877.

THE JONES BROTHERS.

*Judgment debt—Interest—Salvage award—*1 *&* 2 *Vict. c.* 110, *s.* 17—*The Supreme Court of Judicature Act* 1873, *s.* 76.

Since the incorporation of the High Court of Admiralty in the High Court of Justice, an award of salvage is a judgment debt, and as such bears interest from the date of entry of judgment, the taxed costs bearing interest from the date of signing of the allocatur. (*a*)

THIS was an application on behalf of certain salvors, that the owners of the *Jones Brothers* and their bail should be ordered to pay interest to the plaintiffs on the amount of salvage awarded by the court to be due to them for services rendered to the *Jones Brothers*, and also on the salvors' taxed bill of costs.

W. Phillimore, for the plaintiffs, admitted that it had not been the practice in the High Court of Admiralty to allow interest on awards of salvage, and that 1 & 2 Vict. c. 110, s. 17, did not apply to that Court, but since the passing of the Judicature Acts, sect. 76 of the Act of 1873 extends the operation of the first-named statute to all judgments of the High Court, and therefore to an award of salvage.

Pritchard for the defendants, owners of the *Jones Brothers*.—The practice of the High Court of Admiralty will be followed by this Division where no special rule is made to the contrary. An enactment referring to other courts cannot apply to a case of salvage, which is still in the exclusive jurisdiction of the division.

Sir R. PHILLIMORE.—Since the passing of the Judicature Acts this court is bound to follow the practice laid down for the High Court of Justice; and by sect. 76 of the Act of 1873, the Act 1 & 2 Vict. c. 110 applies to every Division of the High Court, and sect. 17 of that Act enacts that judgment debts shall bear interest from date of entry. I shall allow interest on this judgment from the 2nd June, the day on which it was entered, and on the costs from the 11th July, the day on which the allocatur was signed. I shall not allow the costs of this application, as the question is a new one in this court.

Solicitors for the plaintiffs, *Fielder* and *Sumner*. Solicitors for the defendants, *Pritchard* and *Sons*.

(*a*) Apart from 1 & 2 Vict. c. 110, s. 17, interest on a judgment debt in any division from date of entry can now be levied by the sheriff under the provisions of the Supreme Court of Judicature Act 1875, Sch. I, Order XLII., rule 14, which is itself almost identical with R.G.H.T. 1853, rule 76, which carried out the principle of 1 & 2 Vict. c. 110, s. 17, so far as the courts of common law were concerned.

1 & 2 Vict. c. 110, s. 17, enacts, "that every judgment shall carry interest at the rate of 4*l.* per cent. per annum, from the time of entering up the judgment, or from the time of the commencement of this Act (1st Oct. 1838), in cases of judgment then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.

Sects. 18 and 21 of the same Act, whilst extending the Act to decrees, &c., of the Court of Chancery and judgments of the Courts of Common Pleas of Lancaster, and Pleas at Durham, and to orders as to costs and other matters, make no mention of the High Court of Admiralty or the judges thereof.

The Supreme Court of Judicature Act 1873, s. 76, enacts that "All Acts of Parliament relating to the several courts and judges, whose jurisdiction is hereby transferred to the said High Court of Justice . . . . or wherein any of such courts or judges are mentioned shall be construed and take effect so far as relates to anything done, or to be done, after the commencement of the Act, as if the said High Court of Justice . . . . and the judges thereof respectively, as the case may be had been named therein instead of such courts or judges whose jurisdiction is so transferred respectively."

May 8, *June* 22, *and July* 17.

THE CYBELE.

Salvage—Pleading—Loss of prospective earnings —Right of vessels in the civil service of a Government department to salvage—"Her Majesty's ships"—The Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 484, 485—*The Harbour and Passing Tolls, &c., Act* 1861 (24 *&* 25 *Vict. c.* 47).

A paragraph in a statement of claim for salvage, stating that by rendering the salvage service the salving vessel had been prevented from obtaining information which would have resulted in profitable employment, ordered to be struck out, as relating to matters which the court could not take into consideration in estimating the value of the services.

The Board of Trade can claim salvage in respect of services rendered by vessels employed by them in and about a public harbour, the property in which is vested in the Board of Trade. Such vessels are not "Her Majesty's ships" within the meaning of sects. 484, 485 *of the Merchant Shipping Act* 1854, *and the commanders and crews of such vessels are entitled to sue for and obtain salvage reward for their services without obtaining the previous consent of the Admiralty to their so doing.*

Amount awarded as salvage ordered to be paid into court pending appeal.

THIS was a cause of salvage instituted on behalf of the owners, masters, and crew of the steamship *Ben Achie*, against the screw steamer *Cybele* and her cargo, for services rendered to her on the 24th and 25th Dec. 1876, by the *Ben Achie* and the steamtug *Vulcan*, and lifeboat *Bradford*,

The owners of the *Cybele* and of the cargo on board her intervened and served notices under the Supreme Court of Judicature Act 1875, Sch. I, Order XVI., r. 17, on the Board of Trade, as owners of the steamtug *Vulcan* and lifeboat *Bradford*, and appearances were entered on behalf of the Board of Trade and the masters and crews of the *Vulcan* and *Bradford*.

The statement of claim on behalf of the *Ben Achie*, delivered on the 26th April 1877, alleged (*inter alia*).

On the 24th of Dec. 1876, while the *Ben Achie* was lying at anchor off Deal Pier awaiting orders from her managing owner in reply to her master's telegram to such owner, the attention of those on board her was, at about 10.30 p.m., attracted by signals from the Gull light vessel.

And then, after proceeding to describe the nature of the salvage services, and the share in rendering them taken by the *Vulcan* and *Bradford* proceeded as follows:

31. On arriving off Deal the master of the *Ben Achie* received the expected telegram from his managing owner directing him to proceed to Weymouth to fulfil an engage-

ment, from which the sum of £165 would have been realised. This telegram would have been received on the previous evening had the *Ben Achie* remained at her anchorage. The *Cybele*, being deprived of her steam power, and having only one anchor, the master of the *Ben Achie* determined to remain by the *Cybele*, and did not attempt to fulfil the said Weymouth engagement, it being then too late to do so.

33. By rendering her said services, the *Ben Achie's* hawser was damaged to the extent of £50, *and she lost the benefit of her said Weymouth engagement*, and the *Vulcan* lost a hawser worth £25.

36. The owners, masters, and crews of the *Vulcan* and *Bradford* have appeared in this action, and claim salvage for their services.

On 8th May 1877, *W. G. F. Phillimore*, for the defendants, moved the court under the Supreme Court of Judicature Act 1875, Sch. I., Order XXVII., rule 1, to strike out the 31st paragraph and the clause printed above in italics in the 33rd paragraph of the statement of claim, as embarrassing and irrelevant. A loss of market is not recoverable in an action of tort (*The Parana, ante*, p. 399; L. Rep. 2 P. D. 118; 36 L. T. Rep. N. S. 388), and therefore, *à fortiori*, it is not recoverable in an action of contract; besides, it raises a side issue altogether, as to whether the *Ben Achie* could, or could not, have earned the money, and is therefore embarrassing.

E. C. Clarkson for the plaintiffs.—The pleading is precisely similar in nature to that which is common where a salvage service is rendered by fishing boats which, in consequence of rendering it, lose their voyage; the plaintiffs do not claim to be entitled to that particular amount, but only that the loss of it should be taken into consideration in reckoning the amount of salvage due to them.

W. G. F. Phillimore in reply.

Sir R. PHILLIMORE granted the application on the ground that the paragraphs objected to asserted a claim of too remote a nature for the court to take into consideration in awarding salvage, and ordered paragraph 31 and the portions of paragraph 33 objected to to be struck out with costs, and gave the defendants a week to plead.

On May 14 the defendants delivered their statement of defence, alleging (*inter alia*)

10. The Board of Trade are the owners of the *Vulcan*, and the National Lifeboat Institution are the owners of the *Bradford*. Neither the Board of Trade, nor the National Lifeboat Institution, have made or could make any claim in this action in respect of their ownership of their respective vessels, and the tackle belonging to them.

To this statement of defence the plaintiffs replied after amendment (*inter alia*), that the Board of Trade, and not the National Lifeboat Institution, were owners of the *Bradford*; that the Board of Trade could make, and did make, a claim in respect of both vessels and their tackle, and to this reply the defendants rejoined:

1. The defendants join issue on so much of the 2nd paragraph of the reply as relates to the National Lifeboat Institution.

2. The defendants demur to so much of the 2nd paragraph of the reply as relates to the Board of Trade, and say that the same is bad in law, on the ground that it is contrary to the provisions of the Merchant Shipping Act 1854.

June 22.—The demurrer came on for argument. For the purposes of the argument it was taken for granted that the *Bradford* as well as the *Vulcan* belonged to the Board of Trade.

The argument turned on the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) (*a*) and the Harbours and Passing Tolls, &c., Act 1861 (24 & 25 Vict. c. 47) (*b*).

(*a*) Sect. 484. In cases where salvage services are rendered by any ships belonging to Her Majesty, or by the commander or crew thereof, no claim shall be made or allowed for any loss, damage, or risk thereby caused to such ship, or to the stores, tackle, or furniture thereof, or for the use of any stores or other articles belonging to Her Majesty supplied in order to effect such services, or for any other expenses or loss sustained by Her Majesty by reason of such services.

Sect. 485. No claim whatever on account of any salvage services rendered to any ship or cargo, or to the appurtenances of any ship, by the commander or crew or part of the crew of any of Her Majesty's ship shall be finally adjudicated upon unless the consent of the Admiralty has first been obtained, such consent to be signified by writing under the hand of the Secretary to the Admiralty, and if any person who has originated proceedings in respect of any such claim fails to prove such consent to the satisfaction of the court, his suit shall stand dismissed, and he shall pay all the costs of such proceedings; provided that any document purporting to give such consent and to be signed by the Secretary to the Admiralty shall be *primâ facie* evidence of such consent having been given.

(*b*) Sect. 2. In the construction of this Act the following expressions shall have the meanings hereby assigned to them, unless such meanings are inconsistent with the context.

The expression "Board of Trade" shall mean the committee of Privy Council appointed for the consideration of matters relating to trade and forming plantations, &c.

Sect. 22. On and after the 1st Jan. 1862 the harbour of Ramsgate and the soil thereof and, all property, real and personal, vested in the trustees of the said harbour, or in any person in trust for the purposes of the said harbour, with their actual and reputed appurtenances, subject to all leases, contracts, charges, or other liabilities affecting the same, shall be transferred to and are hereby vested in the Board of Trade.

Sect. 23. All powers, rights, and privileges of imposing, collecting, or recovering any taxes or rates, of purchasing any lands, or of doing any other matter or thing relating to the said harbour of Ramsgate, or the property belonging thereto, which may by virtue of any Act of Parliament, charter or otherwise be vested in or exerciseable by the trustees of Ramsgate Harbour, shall be transferred to and are hereby vested in the Board of Trade.

Sect. 28. On and after the 1st Jan. 1862 the Board of Trade shall be entitled to receive a percentage of 5*l.* in the hundred on all salvage paid or liable to be paid in respect of any ship, or boat, or cargo, or apparel of any ship or boat, or any wreck or property, which may be brought into the said harbour; and such percentage shall be deducted from the salvage, and shall be paid to the Board of Trade before the remainder of the salvage is paid over to the salvors, and shall be recoverable by the same means by which the salvage is recoverable.

Sect. 32. The Board of Trade shall, whilst Ramsgate Harbour remains in their hands, render to the Commissioners of Her Majesty's Treasury periodical accounts of the whole of the receipts and expenditure in respect thereof; such accounts to be signed and declared to by the accountant appointed by the Board of Trade for that purpose, and the said commissioners shall cause the same to be examined and audited in such manner as they think fit.

Sect. 36. If at any time whilst the harbour of Ramsgate is vested in the Board of Trade, the income and revenue applicable to the purposes of managing, maintaining, and improving the said harbour of Ramsgate are insufficient for such purposes, or for the other purposes to which the said Ramsgate Harbour fund is applicable, it shall be lawful for the commissioners of Her Majesty's Treasury to advance such sums as may be requisite for the said purposes out of moneys to be provided for the purpose by Parliament.

Sect. 39. For the purposes of Ramsgate Harbour, "The Harbours, Docks, and Piers Clauses Act 1847" shall be deemed to be incorporated with this Act, and

Myburgh and *W. G. F. Phillimore*, for the defendants, in support of the demurrer.—The *Vulcan* and *Bradford* are vessels in the service of the Crown, and as such are precluded from recovering for salvage services by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 484. Their crews are salvors, but probably are precluded from having any salvage remuneration allotted to them, unless they have previously the consent of the Admiralty to sue for it in accordance with the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 485. That question, however, does not arise at present, though it may become important hereafter. [Sir R. PHILLIMORE.—It is important to this extent, that if I have not power to award salvage you cannot give it me.] These vessels under the Board of Trade are in the same situation as revenue cruisers under the Custom-house. It may be that the leave of the Admiralty is necessary to enable the crews to recover, but the Board of Trade are by sect. 484 precluded in any case from recovering for the services rendered by the ships as distinguished from the crews. Sect. 484 is not confined even to ships, but to all stores the property of Her Majesty, *e.g.*, ropes from a gun wharf, &c., and under that comprehensive definition these vessels must come, though sect. 485 may only apply to the crews of Her Majesty's ships commonly so called, *i.e.*, vessels in the military marine service of the Crown. Sect. 484 is not confined to such vessels; a vessel in the civil service of the Indian Government, commanded by a person without a commission from the Crown, is within it: (*The Cargo ex Woosung*, 1 P. D. 260; 35 L. T. Rep. N. S. 8; 3 Asp. Mar. Law Cas. 239.) The *ratio decidendi* there was, that the ship was ordered on the service by the representative of the Government, and her services being gratuitous, an agreement made by her captain including those services was inequitable. This is the same case, except that there is no agreement. The vessel belonging to Her Majesty must give its services gratuitously, whether by special order or not, and therefore cannot recover in respect of them. Even independently of the Merchant Shipping Act it is contrary to public policy that a vessel in any sense belonging to the public should receive salvage for her services: (*H.M.S. Thetis*, 3 Hagg. 61; *The Lord Dufferin*, 7 Notes of Cases, Sup. XXXIII.). The property in these vessels is vested absolutely in the Board of Trade by sect. 22 of the Harbours and Passing Tolls, &c., Act 1861 (24 & 25 Vict. c. 47), as defined by sect. 2 of the same Act, and to show that it was the intention of the Legislature to preserve generally the provisions of the Merchant Shipping Act, a special provision as to salvage is made by sect. 28, which allows the Board of Trade a percentage of 5 per cent. on all salvage earned: this provision would be meaningless if their own vessels could earn salvage. If an award be made in respect of the vessels' services the Board of Trade can only claim under the statute 5 per cent.; and what becomes of the remaining 95 per cent.? The Act refers to several other harbours, but makes provisions for those harbours different from those made for Ramsgate Harbour. Sects. 32 and 36 show that it was the intention of the Legislature that Ramsgate Harbour, with all its appurtenances, should be a public harbour, and therefore the Board of Trade, as owning it, are acting as the trustees of the public, that is as the officers of the Crown.

E. C. Clarkson (with him *Cohen*, Q.C.) for the plaintiffs.—The *Vulcan* has already on several occasions been awarded salvage. The intention of the Harbours and Passing Tolls Act was only to simplify the previously troublesome provisions for keeping up harbours of refuge at Ramsgate and other places by levying tolls on passing ships; and for that object the property in the harbour, and its appurtenances, including this tug, was vested in the Board of Trade as trustees for the preservation of the harbour, but all the rights of the predecessors in title are preserved by sect. 23, and amongst those rights is the ordinary right of a private shipowner to salvage. Sect. 28 shows expressly that the Board of Trade has a right to a percentage on salvage earned by third parties, who, in the course of the salvage service, make use of the harbour, *i.e.* of the stores, &c., belonging to the Board of Trade, but that, whilst it removes any doubts that might arise as to the right of the Board of Trade to salvage with respect to the use of the harbour generally, does not interfere with their right as owners to salvage earned by their own vessels: they have 5 per cent. on all salvage earned by those using the harbour, and can recover it as salvage is recovered, which shows that it was contemplated that they should be able to recover salvage. They may very possibly be entitled to 5 per cent. on the salvage earned by the master and crew of the tug and lifeboat; but if so, that is in addition to, and not in substitution for, any salvage they may be entitled to in respect of the services of the vessels themselves. Sect. 39, which declares that the Board of Trade shall *quâ* Ramsgate Harbour be deemed the "undertakers" within the meaning of the Harbour Docks and Piers Clauses Act 1847, shows that they are to be considered, so far as the ownership of property is concerned, as private individuals, and not as the servants of the Crown. The master of the *Vulcan*, an ordinary steamtug employed for harbour and general purposes, cannot be called a commander in Her Majesty's service within the meaning of sect. 484 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104).

Myburgh in reply.

Sir R. PHILLIMORE.—In this case a question of some curiosity and nicety is raised for the first time in this court as to the construction of certain sections of the Merchant Shipping Act 1854, in connection with the provisions of 24 & 25 Vict. c. 47, entitled "An Act to facilitate the Construction and Improvement of Harbours by authorising Loans to Harbour Authorities; to abolish Passing Tolls, and for other purposes."

Now, it must be taken as admitted for the purpose of the present discussion, that the *Vulcan* steamship and the *Bradford* lifeboat both belonged to Ramsgate Harbour, and that they came out of harbour to render salvage services. These facts being already admitted, the question to be decided on the demurrer, is whether the *Vulcan* and the *Bradford* are Her Majesty's ships in the sense in which that phrase is used in the Merchant Ship-

for the purposes of such incorporation this Act shall be deemed to be "the Special Act." The rates and moneys hereby made leviable on account of the harbour of Ramsgate shall be deemed to be "the rates authorised to be levied by the Special Act;" and the Board of Trade shall be deemed to be the undertakers.

ping Act 1854, sects. 484, 485. If they are such ships no remuneration at all can be claimed in respect of the vessels themselves, and the crews of both vessels and master of the *Vulcan* can only obtain remuneration for salvage services after obtaining the permission of the Lords of the Admiralty to make such a claim. (His Lordship then read the sections of the Merchant Shipping Act referred to and set out above, and proceeded:)

The first question is whether there is any distinction between "ships belonging to Her Majesty," in sect. 484, and "Her Majesty's ships," in sect. 485. I am unable to see any distinction between these expressions, and think that the two sections are *in pari materiâ*, and that they both relate to those of Her Majesty's ships in regard to which it is declared that no salvage reward shall be paid, so far as their commanders and crews are concerned, without the consent of the Lords of the Admiralty to the claim. The contention of the defendants in support of the demurrer is now brought forward for the first time; but the fact that the *Vulcan* is not what may be called a *novus hospes* in this court does not dispose of any difficulty that may arise on the construction of the above section. How, then, is the construction of these provisions of the Merchant Shipping Act 1854 affected by the Harbours and Passing Tolls, &c., Act 1861? It is said that the most material words in the later Act relating to the present question are those which (sects. 2, 22, 23, *ante*) provide that the harbour of Ramsgate, till that time vested in the trustees of the harbour, shall be transferred, with all its incidents, to the Board of Trade, who are, it is contended, the trustees of Ramsgate Harbour. Then follows a provision which appears to me very adverse to the contention of the defendants (sect. 28), providing that the Board of Trade shall receive a percentage on salvage earned by all vessels using the harbour—not by any vessel belonging to the harbour, but in respect of any vessel brought into the harbour. I cannot come to any conclusion otherwise than in favour of the plaintiffs, though I admit the case may be plausibly stated the other way. I cannot think, on examination of those sections of the 24 & 25 Vict., c. 47, which relate to Ramsgate Harbour, that it was the intention of the Legislature to place the lifeboat and steamtug belonging to Ramsgate Harbour, which before the Act were owned by the trustees of the harbour, and therefore must now be owned by the Board of Trade, in the category of Her Majesty's ships. It is true that in one sense the *Vulcan* and the *Bradford* are to be considered as belonging to the Crown because they belong to the Board of Trade, and the Board of Trade is a department under the Crown; but still Acts of Parliament must be read in the light of common sense, and looking to the wording of the sections I have referred to, I am of opinion that this attempt to place the tug and the lifeboat belonging to Ramsgate harbour in the category of Her Majesty's ships, and therefore within the provisions of the sections of the Merchant Shipping Act 1854 relating to salvage services rendered by such ships cannot be successfully maintained.

I must therefore pronounce against the demurrer.

The case was then heard on the merits, before the judge, assisted by two of the Elder Brethren of the Trinity House. It was proved that the *Bradford* was the property of the Board of Trade, and not of the National Lifeboat Institution; there was no evidence that the consent of the Admiralty had been obtained by the master of the *Vulcan* and crew of that vessel and the *Bradford* to the prosecution of their claims. After hearing the evidence as to the nature of the services rendered,

The COURT awarded 500*l.* to the owners, master, and crew of the *Ben Achie*, and 1200*l.* to the Board of Trade, as owners, and to the masters and crews of the *Vulcan* and *Bradford*.

July 17.—*W. G. F. Phillimore* moved the court for a stay of execution pending appeal to the Court of Appeal as to the right of the Board of Trade to recover salvage in respect of the *Vulcan* and *Bradford*.

E. C. Clarkson, contra.

The COURT directed execution to be stayed till the second week in November, and subsequently, on the application of *E. C. Clarkson*, ordered the money awarded to be brought into court and applied to the purchase of Exchequer Bonds.

Solicitors for plaintiffs, *Clarkson, Son*, and *Greenwell*.

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

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

July 10 *and* 12, 1877.

(Before the LORD CHANCELLOR (Cairns), Lords PENZANCE, O'HAGAN, BLACKBURN, and GORDON.)

KEITH AND ANOTHER *v.* BURROWS AND ANOTHER.

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL.

Ship — Rights of mortgagee — Cargo on ship's account—Nominal freight.

A mortgagee of a ship has no general right to a proportionate share of the earnings of the ship; he is only entitled to such freight as is accruing due and has been actually contracted for, before he takes possession.

M. mortgaged his ship, then in California, to the appellants, but the mortgage was not registered. A cargo was afterwards put on board in California on account of the ship, and bills of lading were drawn for a nominal freight of 1s. per ton. Before the ship arrived in England the respondents, without notice of the mortgage, advanced money to M. on the security of the cargo, and then sold the cargo to J. by a contract containing the following clause: "As cargo is coming on ship's account, freight is to be computed at 55s. per ton, and invoice to be rendered accordingly." M. paid for the cargo, and received the bills of lading, and handed them to the respondents with an assignment indorsed of his interest in "the within freight" expressed to be "at the rate of 55s. per ton, and not the nominal amount of 1s. per ton." The appellants registered their mortgage, and on the arrival of the ship took possession, and claimed freight at the rate of 55s. per ton.

Held (affirming the judgment of the court below), that the sum of 55s. per ton was not really freight, but was part of the price of the cargo kept back till the arrival of the ship, and that the

mortgagees were not entitled to more than 1*s. per ton, the freight specified in the bills of lading.*

THIS was an appeal from a judgment of the Court of Appeal (Mellish, Baggallay, and Bramwell, L.JJ.), reported *ante*, p. 426, and L. Rep. 2 C. P. Div. 163, reversing a decision of the Common Pleas Division (Brett, Archibald, and Lindley, J.J.), reported in *ante*, p. 280, and L. Rep. 1 C. P. Div. 722), in favour of the appellants (plaintiffs) on a special case.

The special case is set out at length in the report in the court below, and the facts appear briefly in the head-note above.

Bowen (*Herschell*, Q.C. with him), for the appellants, argued that the judgment of the court below was erroneous in holding that the sum of 55*s.* per ton was not really "freight," but only part of the purchase money of the cargo. *Miller* v. *Woodfall* (8 E. & B. 493) appears to be against our contention, but it is really a different case. The contention of the respondents would open the way to frauds on the part of captains. The right to the freight is a necessary incident of the property in the ship. See

Hickie v. *Rhodocanachi*, 28 L. J. 273, Ex.; 4 H. & N. 455;
Stewart v. *Greenock Marine Insurance Company* 1 Macq. 328;
Scottish Marine Insurance Company v. *Turner*, 1 Macq. 334.

All advantages accruing and everything earned during the voyage belong to the mortgagee: (*Westerdell* v. *Dale*, 7 T. Rep. 306.) The intention was to earn freight, and everyone connected with the matter regarded it as such, as appears plainly from the case. The object of the nominal entry in the bill of lading having been attained, the actual rate of freight at San Francisco was recognised. The respondents are not the ordinary indorsees of a bill of lading, but claim under a bill in which the true rate of freight was inserted. No doubt it is a hardship on them, but the blame rests with Morison, not with the appellants. The fact that he effected an insurance on freight shows that he regarded it as such. What all believed the ship to be earning must belong to the mortgagee:

Case v. *Davison*, 5 M. & S. 79;
Morrison v. *Parsons*, 2 Taunt. 407;
Camden v. *Anderson*, 5 T. Rep. 709.

[Lord PENZANCE.—Those are all cases of contract.] We say there was a new contract in this case. The question was discussed in *Brown* v. *North* (8 Ex. 1; 22 L. J. 49, Ex.). See also

Flint v. *Flemyng*, 1 B. & Ad. 45;
Gumm v. *Tyrie*, 4 B. & S. 680; 6 B. & S. 298;
Weguelin v. *Cellier*, L. Rep. 6 H. L. 286.

The case of the *Mercantile Bank* v. *Gladstone* (18 L. T. Rep. N. S. 641; L. Rep. 3 Ex. 233; 3 Mar. Law Cas. O. S. 87), relied on by the other side, is distinguishable and not in point.

Webster (*Thesiger* Q.C., with him), for the respondents, maintained that the case must follow the established rule that a mortgagee on taking possession can only claim freight when it exists under such circumstances that the owner could claim it. The mortgage gives no further right. The contention on the other side is too wide; for example, a mortgagee cannot claim freight paid in advance: (see *Brown* v. *Tanner*, 3 Mar. Law Cas. O. S. 94; 18 L. T. Rep. N. S. 621; L. Rep. 3 Chan. 597.) *Brown* v. *North* (*ubi sup.*) is a direct authority in our favour. The captain in this case was owner of 4-64ths, and he did not contemplate freight at 55*s.* per ton. So how could the mortgagees in respect of their 60-64ths? *Gumm* v. *Tyrie* (*ubi sup.*) follows *Brown* v. *North*. The case of *The Mercantile Bank* v. *Gladstone* (*ubi sup.*) is not a direct authority, but it shows the rights of a mortgagor over his own ship. *Weguelin* v. *Cellier* (*ubi sup.*) is in our favour, as is all authority. The mere verbal inaccuracy of calling the balance of the purchase money "freight" cannot affect the respondents' rights.

Bowen in reply.—None of the authorities except *Miller* v. *Woodfall* go further than that the holder of a bill of lading has a right to the goods on payment of the freight. *The Mercantile Bank* v. *Gladstone* and *Brown* v. *North* are beside the point. The computing a sum of 55*s.* per ton for freight is in effect a new contract for freight at that rate. See also

Rusden v. *Pope*, 3 Mar. Law Cas. 91; 18 L. T. Rep. N. S. 651; L. Rep. 3 Ex. 269;
Liverpool Marine Credit Company v. *Wilson*, 1 Asp. Mar. Law Cas. 323; 26 L. T. Rep. N. S. 717; L. Rep. 7 Chan. 507;
Wilson v. *Wilson*, 1 Asp. Mar. Law Cas. 265; 26 L. T. Rep. N. S. 346; L. Rep. 14 Eq. 32.

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

The LORD CHANCELLOR (Cairns).—My Lords, after the able and ingenious arguments of Mr. Bowen, and after hearing everything that can possibly be said in support of the contention of the respondents, I do not think there can be any doubt in your Lordships' mind as to the decision at which you ought to arrive in this case.

I will say at the outset that there is after all not much conflict of opinion between the judges in the two courts below. It is true that the Common Pleas Division determined the case in favour of the present appellants; but, as I read the judgments, the court appears to have been occupied not so much with the question which has been argued before your Lordships as with the question of the registration of the mortgage, and the former point was disposed of in a very few words.

The question now arises as to the rights of a mortgagee on taking possession of a ship, both generally and with reference to the particular circumstances of this case. As to the general rule, there can be no doubt that the mortgagee obtains at the time of the mortgage no transfer of the accruing freight; nor does the mortgagor undertake to earn any particular amount of freight for the ship; he may either earn a substantial freight, or he may attach a nominal amount of freight, or he may contract to carry cargo at less than the market rate of freight. All these rights are incident to the interest which a mortgagor has in his ship, and he is *dominus* until the mortgagee takes possession. These propositions being beyond dispute, it is further not denied in the present case (a nominal freight of 1*s.* per ton having been inserted in the bill of lading), that the master had a right to insert freight at such a rate, and that, if the bill of lading had been handed over to third parties, such transferees would have been entitled to take possession of the goods on payment of the nominal freight; nor was it denied that if the owner of the goods had demanded the cargo from the mortgagee he would have been entitled to receive it on payment

of the same amount. A mortgagee on taking possession of a ship is entitled to everything that belongs to the ship: but his rights are checked by this limitation, that he can only receive what the ship has earned under an express contract for freight, or by conveying goods on a *quantum meruit*.

Now, it is argued on behalf of the appellants that, though the bills of lading were drawn for a nominal freight, and although the goods would have had to be delivered on payment of that amount, yet that a different state of things arose during the voyage. The bills of exchange drawn against the cargo were forwarded to England, and in order to get possession of the bills of lading Morison, the owner of the ship, had to provide a sum of more than 10,000*l*. to meet the bills of exchange. Not being prepared to do this, he arranged with the respondents to advance the necessary funds, and the sale was put into their hands. They sold the cargo to Jump and Sons, and it is upon the wording of the documents at this stage of the case that the present difficulty arises. I must remark that the documents are not very happily expressed, but there seems to me to be no real doubt as to what was intended. They are three in number, but though they bear different dates they must be construed together. The first is the contract of sale by the respondents to Jump and Sons, dated 19th Feb. 1875. I need not read it at length. In the middle of it are the words "including freight and insurance," but the last clause explains the meaning of the word "freight," and we must read the whole contract as if the last clause was inserted to explain what was meant, bearing in mind what was known to both parties as to the terms of the bills of lading. The words are "as cargo is coming on ship's account freight is to be computed at 55*s*. per ton of 2240 pounds, and invoice to be rendered accordingly," and I read them as meaning that as the cargo was on account of the ship the rate in the bill of lading was understood to be nominal. But there is a virtual statement that though there was a nominal freight, the parties meant by including a larger and different sum of 55*s*. per ton to be computed as if for freight, not that this should be the substituted rate of freight, but that a deduction of an amount equivalent to freight should be made, which should remain unpaid until the vessel arrived in England. An estimate was accordingly made and inserted in the invoice of the whole price at 43*s*. 6*d*. per quarter, and a deduction was made by way of a computation of freight as well as the usual reckoning of brokerage, and the result is a balance of 9580*l*. 1*s*. 5*d*. On 23rd Feb. 1875, Morison handed over the bills of exchange, with the three bills of lading attached, to the defendants, and signed this memorandum, which was indorsed on the bill of lading, and is the third of the documents referred to: "We assign our interest in the within freight to Messrs. Burrows and Perks, London, whose receipt, or that of their appointed agent will be sufficient discharge. The freight assigned is at the rate of 55*s*. per ton, and not the nominal amount of 1*s*. per ton." Now, was this memorandum intended to cancel the original arrangement for freight at 1*s*. per ton, and to substitute a contract by which Morison engaged to carry the cargo at the higher rate of 55*s*. per ton? I cannot find anything which can indicate such an intention on the part of Morison or the respondents. It seems to have been a necessary subject of arrangement that the payment for the cargo should be divided into two parts, the first instalment to be paid within seven days from the date of the contract of sale, and payment of the remainder, being calculated as equal to freight at 55*s*. per ton, to be postponed till the arrival of the goods; but there does not seem to me to have been any act done, or any intention in the minds of the parties, to create a contract for freight at 55*s*. per ton.

I cannot, therefore, find anything which would entitle the mortgagee to any higher rate of freight than was named in the bill of lading, and I propose to your Lordships that the appeal be dismissed with costs.

Lord PENZANCE.—My Lords, this case has been very ably argued on both sides. When the appellant's case was first brought before your Lordships it appeared to be put upon the simple ground that where goods have been put on board a ship by the master, and no freight, or only a nominal amount of freight, is named in the bill of lading, a mortgagee taking possession of the ship may look upon its earnings as his property, and that although there was no contract to pay anything in respect of the carriage of the goods, yet as the ship had earned something, the mortgagee was entitled to a proportionate benefit. There is no doubt that in such a case the owner receives in the shape of increased value something which corresponds to freight, and there is no doubt that in the abstract the ship has earned something; but has it ever been held that a mortgagee is entitled to anything in respect of such implied earnings?

Several cases have been cited, among others *Brown* v. *North* (8 Ex. 1; 22 L. J. 49, Ex.) and *Miller* v. *Woodfall* (8 E. & B. 493). In the latter case goods had been shipped on the owner's account, and the property in the cargo had passed to an abandonee, who claimed credit for freight, though the cargo had been shipped on the owner's account, and no freight was named in the bills of lading; but it was held that he could not maintain any such claim. That judgment is opposed to the principle contended for by the appellants. Another authority cited was *The Mercantile and Exchange Bank* v. *Gladstone* (3 Mar. Law Cas. O. S. 87; 18 L. T. Rep. N. S. 641; L. Rep. 3 Ex. 233) which was the case of a vendee claiming a sum equivalent to freight where the goods had been shipped on the owner's account at a nominal rate of freight; but it was held that he was not so entitled.

Looking at these cases I think that the appellants' argument as to the general right of a mortgagee to a proportionate share of a ship's earnings must fail. But it is urged that, assuming that the mortgagee is only entitled to freight which has been actually contracted for, yet the case shows this state of things: only a small amount of freight was originally provided for, but there was afterwards an agreement to vary this arrangement, and to fix the freight at the higher rate of 55*s*. per ton. The question then is, Do the facts disclosed in this special case justify this contention? The whole question turns on the document of 19th Feb. The respondents had agreed to make advances to Morison in order that he might take up the bills of

exchange, and then to secure themselves by selling the goods. They accordingly sold them to Jump and Co., and the bargain is an ordinary sale of a floating cargo. It is admitted that if it had not been for the last clause the purchaser would have been bound to pay the whole sum named, holding back only a sufficient sum for the nominal freight. The obvious reason for the insertion of the clause at the end of the contract was this: a round sum was to be paid for the goods, being their original value at the time of the sale, plus the cost of discharge; and if the cargo had not arrived the buyer would still have had to pay for the carriage. To protect him against such a risk a certain sum was to be kept back; but was there at the same time a new contract to pay for the carriage at an increased price? The parties might have arranged for payment of freight at a new rate, but instead of that they say that "freight is to be computed at 55*s.* per ton." That shows, in my opinion, that as a matter of account 55*s.* per ton was to be taken to represent the amount which the purchaser was to be entitled to hold back until the arrival of the cargo, and if that be so, no alteration was ever made in the terms of the bills of lading.

I concur in thinking that the appeal ought to be dismissed.

Lord O'HAGAN.—My Lords, in the course of the argument of this case there have been several changes of ground. It was first argued that though there was no contract for freight, yet there might be a right on the part of the mortgagee to a proportionate benefit from the goods which have been actually conveyed, but that point has been cleared away, and the case seems to be narrowed to one question. It is now established that the mortgagor of a ship may use it for his own purposes to any extent, and in this case that is what was done. The goods were shipped at a merely nominal tariff, and paragraph 4 of the special case states the reason for the course adopted, namely, that owing to a commercial crisis at San Francisco, and the low offers of freight which were made there, the master determined to load a cargo on the ship's account. It is clear that a freight was actually avoided, and that the vessel was loaded entirely for the owner's benefit, and that a nominal amount of freight was accordingly inserted in the bills of lading. That being clear, the question to be determined is, What were the rights of the mortgagee? I think it is established that he has a right not only to the ship, but to all the benefits which had accrued to it at the time of making the mortgage. If there had been an actual contract for the payment of freight, the mortgagee would have been clearly entitled to the benefit of it; but it seems clear to me that nothing of the sort was intended here, and that the appellants cannot succeed unless more than I have mentioned appears from the case. If the defendants had declined to advance any money to Morison, and the bills of exchange had been dishonoured, no more than 1*s.* a ton would have been payable for freight, and the mortgagee could not possibly have received any more, and indeed Mr. Bowen conceded that he must fail in his contention unless he could satisfy your Lordships that there had been a variation of the contract. I need not add to what has already been said. The whole difficulty in the case has arisen from the unfortunate use of the word "freight," for what was not really freight at all. It was to be "computed" as freight, but it was really only a part of the purchase-money set aside for a special purpose. I concur in the opinions which have been already expressed.

Lord BLACKBURN.—My Lords, I am of the same opinion.

I understand Mr. Bowen to claim for the mortgagee a *quantum meruit* for the use of the ship; but I think that point is concluded against him by authority. Whenever a ship is transferred while on the voyage the transferee takes all benefit accruing at the completion of the voyage; but it is established that when the voyage is still pending, and a sum of money is payable only if the voyage is completed, such sum does not pass at the time of the transfer.

The attention of your Lordships has been called to *Case* v. *Davidson* (5 M. & S. 79) and other instances of a transfer in consequence of a total loss. The latest case was *Stewart* v. *The Greenock Marine Insurance Company* (1 Macq. 328), where the ship was wrecked near the entrance to the docks at Liverpool, but actually kept together till the goods were delivered. It was decided that as the last hundred yards to the actual place of discharge were traversed after the constructive total loss, the underwriters were entitled to the whole of the freight, which must be taken to have been earned by them. That was no doubt an exceedingly hard case for the owner, as he did not recover the insurance of the freight. Mr. Bowen, as I understand him, further contended that, as the ship was taken possession of by the mortgagee, he was entitled not only to a *quantum meruit*, but to its whole earnings; but that is not the law. It is obvious here that Parrott and Co. (the drawers of the bills of exchange) had stipulated that if the bills were not met, only a nominal freight should be paid, and if the bills had been dishonoured it could not be said that a mortgagee taking possession before the end of the voyage could have received the whole freight at 55*s.* per ton. In *Miller* v. *Woodfall* (*ubi sup.*) the Court of Queen's Bench held that the taking possession of a ship does not create a contract for the payment of the carriage of the shipowner's goods. I was counsel in that case, and I endeavoured to convince the court that the profit earned by the owner by conveying his own goods was in the nature of freight, but my contention was unsuccessful.

But Mr. Bowen urged in his reply that though the computing of a sum of 55*s.* for freight did not (as it was held by the judges of the Common Pleas Division) operate as an estoppel, yet that it was a contract for freight at that rate. Let us look at the facts of the case. We must remember that Parrott and Co. had a right to hold the goods as security. I read the arrangement named in paragraph 11 of the special case as an agreement by the respondents to furnish money to meet the bills of exchange, receiving the bills of lading and the policies of insurance as security, and having also the sale of the cargo. On 4th Jan. they advanced the money, on 22nd Feb. the bills fell due, and Morison took them up with the money advanced, and handed them over to the respondents. In the meantime, on 19th Feb., it had been agreed that the respondents should be entitled to the bills of lading. The earlier part of

the contract with Jump and Co. was doubtless written on a lithographed form, being of an ordinary nature, well understood by merchants. The buyers were to pay cost, freight, and insurance, but they were not liable to pay anything until they received the shipping documents. The parties put down the whole price in the invoice, and made a deduction from the contract price to be computed as freight. The ordinary rate was 55*s*, per ton at that time, and it was thought fair to keep back that sum till the ship arrived, that being the amount necessary to be paid before the buyers could receive the goods. The arrangement was a very intelligible one, and Jump and Co. stipulated that Morison should indorse on the bills of lading a notice that the respondents were entitled to the freight, and that their receipt was to be a discharge. How can it be said that this was a fresh contract? It does not purport to be a new bill of lading, but it only gives notice that the respondents are entitled to receive the freight. The mortgagee urges that this amount of freight was created by the original contract, and belongs to him, but I am of opinion that there is no such rule of law, and no proof of any such intention as was contended for.

Lord GORDON concurred.

Judgment appealed from affirmed, and appeal dismissed, with costs.

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

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

July 12, 13, 17, *and* 27.

(Before the LORD CHANCELLOR (Cairns), Lords O'HAGAN, BLACKBURN, and GORDON.)

DOOLAN *v.* THE MIDLAND RAILWAY COMPANY.

ON APPEAL FROM THE COURT OF EXCHEQUER CHAMBER IN IRELAND.

Railway company—Sea transit—Through booking—Exemption from liability—Reasonable condition—Railway and Canal Traffic Act 1854 (17 *&* 18 *Vict. c.* 31), *s.* 7—*Regulation of Railways Act* 1868 (31 *&* 32 *Vict. c.* 119), *s.* 16—*Regulation of Railways Act* 1871 (34 *&* 35 *Vict. c.* 78), *s.* 12.

Sect. 16 *of the Regulation of Railways Act* 1868 *extends the provisions of the Railway and Canal Traffic Act* 1854 *to all classes of steamship traffic.*

Sect. 12 *of the Regulation of Railways Act* 1871 *extends the provisions of the Act of* 1868 *s.* 16 *to railway companies carrying goods under a contract in steam vessels not belonging to the company.*

The respondent company contracted with the appellant to carry cattle from Ireland to England. They had no steamships of their own, and they procured a steam packet company to carry the cattle on the sea passage. During the voyage they were lost by the negligence of the servants of the steam packet company. The contract was made subject to a condition that the respondents should not be "accountable or responsible for the loss of, or any damage or injury, to animals, goods, or property entrusted to them arising from the dangers or accidents of the sea, &c., improper, careless, or unskilful navigation, or any default or negligence of the master or any of the officers or crew of the company's vessels."

Held (reversing the judgment of the court below), that the contract was governed by sect. 7 *of the Railway and Canal Traffic Act of* 1854, *as extended by the later Acts, and that the condition was consequently void and the respondents liable for the loss.*

Cohen v. *S.E. Railway Co.* (2 *Ex. Div.* 253; 36 *L. T. Rep. N.S.* 130) *approved.*

THIS was an appeal from a judgment of the Court of Exchequer Chamber in Ireland, which had reversed a judgment of the Court of Common Pleas in favour of the appellant, the plaintiff below.

The plaintiff was a cattle dealer in the county of Carlow, and he had entered into a contract with defendant company to carry sixty-three head of cattle from Dublin to St. Ives, in Huntingdonshire. The contract was a through contract, and made subject to the following condition in writing:

> The company will not be accountable for any injury to horses, cattle, or other live stock, while shipping, during the sea passage, or landing, but will give free passage by sea to the owners or others sent to take charge of such animals on the passage. With respect to any animals, luggage, parcels, goods, or other articles booked through by them or their agents, partly by sea and partly by railway, or partly by canal and partly by sea, such animals, luggage, parcels, goods, or other articles will only be so conveyed on the condition that the company shall be exempt from liability for any loss or damage which may arise during the carriage of such animals, luggage, parcels, goods, or other articles by sea, from the act of God, the Queen's enemies, fire, accidents from machinery, boilers, and steam, and all other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition, nor will the company be accountable or responsible for loss of, or any damage or injury to, animals, goods, or property entrusted to them, arising from the dangers or accidents of the sea, or of steam navigation, the act of God, the Queen's enemies, jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master, or any of the officers or crews of the company's vessels.

The defendant company did not own any steam vessels of their own, and the cattle were accordingly put on board the *St. Columba*, a vessel belonging to the City of Dublin Steam Packet Company, under a through booking arrangement. On the passage the ship was wrecked on the Skerries Rock, near Holyhead. The plaintiff then brought this action to recover the value of the cattle.

The case was tried before Palles, C.B., at the Kildare Summer Assizes in 1874, when the jury found that the loss was occasioned by the negligence of the crew of the *St. Columba*, and gave a verdict for the plaintiff for 76*l*. The defendants obtained a rule to enter a nonsuit or a verdict for them, on the ground that they were exempted from liability for negligence by the condition set out above; but upon argument the rule was discharged by the Court of Common Pleas, on the ground that the condition was rendered void by the Railway Regulation Acts.

The defendants appealed to the Court of Exchequer Chamber, where the decision of the Court of Common Pleas was reversed by Palles, C.B., Fitzgerald, Deasy, and Dowse, B.B., and Fitzgerald and Parry, J.J., Whiteside, C.J., dissenting. This appeal was then brought to the

House of Lords. The case is reported below in Ir. Rep. 10 C.L. 47.

Macdonough, Q.C. (of the Irish Bar), *Benjamin*, Q.C., and *Fitzgerald* appeared for the appellant.

Walker, Q.C. (of the Irish Bar), *Watkin Williams*, Q.C., and *Robertson* (of the Irish Bar) for the respondents.

The argument turned upon the construction of the sections of the Acts of 1854, 1868, and 1871.

The following cases were cited or referred to;

Peek v. *The North Staffordshire Railway Company*, 10 H. of L. Cas. 473; 8 L. T. Rep. N. S. 768;
Moore v. *Midland Railway Company*, Ir. Rep. 9 C. L. 20;
Cohen v. *South-Eastern Railway Company*, *ante* p. 248; L. Rep. 2 Ex. Div. 253; 36 L. T. Rep. N. S. 130;
Le Conteur v. *London and South-Western Railway Company*, L. Rep. 1 Q. B. 54; 13 L. T. Rep. N. S. 325;
The Normandy, 3 Mar. Law Cas. O. S. 519; L. Rep. 3 A. & E. 152; 23 L. T. Rep. N. S. 631;
The South Wales Railway Company v. *Redmond*, 10 C. B., N. S., 675; 4 L. T. Rep. N. S. 619;
Aldridge v. *Great Western Railway Company*, 15 C. B., N. S., 582;
Zunz v. *South-Eastern Railway Company*. L. Rep. 4 Q. B. 539; 20 L. T. Rep. N. S. 873;
Machu v. *London and South-Western Railway Company*, 2 Ex. 415.

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

July 27.—Their Lordships gave judgment as follows:

Lord BLACKBURN.—My Lords,—The Midland Railway Company, the defendant in the court below, which is an ordinary railway company, having no special powers for building or working steam vessels, at an office which it has in Dublin, made a contract with the plaintiff to carry sixty-three head of cattle for him from Dublin to St. Ives for reward. The railway company procured the City of Dublin Steam Packet Company to carry the cattle for them in one of their steam vessels called the *St Columba*. The jury found that the cattle were lost not by any peril of the sea, but by the negligence of the crew of the *St Columba*. Had this been all, the railway company would plainly have been answerable to the plaintiff. But the contract was in writing and signed by the plaintiff, and contained a condition that the Midland Railway Company were exempt from liability for any loss or damages which may arise during the carriage of such animals arising from the dangers or accidents of the sea, or of steam navigation, the act of God, the Queen's enemies, jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master, or any of the officers or crews of the company's vessels. If, therefore, this condition is valid, it protects the company from liability for the loss which happened.

The contention on behalf of the plaintiff is that the 12th section of the Regulation of Railways Act 1871 (34 & 35 Vic. c. 78, s. 12) renders this condition void; the contention of the railway company is that the enactment has not that effect. This is the one issue wrapped up in the voluminous pleadings.

But the construction of this section is not a simple matter. It provides that, "Where a railway company under a contract for carrying persons, animals, or goods by sea procure the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages in respect of loss of life, or personal injury, or in respect of loss or damage to animals or goods, in like manner and to the same amount as the railway company would be answerable if the vessel had belonged to the railway company; provided that such loss of life, or personal injury, or loss or damage to animals or goods, happens to the person, animals, or goods (as the case may be) during the carriage of the same in such vessel; the proof to the contrary to lie upon the railway company." The Act is, by sect. 1, to be construed as one with the Regulation of Railways Act 1868 (31 & 32 Vict. c. 119), the 16th section of which extends the provisions of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) to steam vessels and the traffic carried on thereby; and it was settled by the decision of this House in *Peek* v. *The North Staffordshire Railway Company* (10 H. of L. Cas. 473; 8 L. T. Rep. N. S. 768) that a condition having the effect of exempting the carrier from responsibility for the negligence or fraud of his own servants is not just and reasonable within sect. 7 of the last-named statute. If, therefore, the Act of 1854 is applicable to the contract in the present case, the railway company cannot successfully plead the special conditions under which it was entered into.

The first matter to be inquired into is, what is the true construction of the Railways Regulation Act 1868 (31 & 32 Vict. c. 119), sect. 16, which applies the Railway and Canal Traffic Act 1854 to the traffic carried on by railway companies on steam vessels which the railway companies themselves own or work. The Court of Common Pleas in Ireland in *Moore* v. *Midland Railway Company* (Ir. Rep. 9 C. L. 20), and the Court of Exchequer and the Court of Appeal in England in *Cohen* v. *South-Eastern Railway Company* (*ante* p. 248) have unanimously held that the whole of the Railway and Canal Traffic Act 1854 is extended to the whole of the traffic on such steamboats. The majority of the judges of the Irish Court of Appeal have in the present case held that the passenger traffic on the steamboats was alone meant, and consequently that only the portion of the Railway and Canal Traffic Act 1854 applicable to passengers is extended, thus excluding sect. 7. I cannot agree with them.

In the present case the Midland Railway Company did not own or work the steam vessel. They were not, therefore, brought within the provisions of the Railway Regulation Act 1868, sect. 16. They did, however, under a contract for carrying animals, procure them to be carried in a steam vessel not belonging to the railway company, and the question mainly argued at your Lordships' bar was whether the Railway Regulation Act 1871, sect. 12, was or was not to be construed as extending the provisions of the Railway Regulation Act 1868, sect. 16, applicable to railway companies under a contract carrying goods by sea in their own steam vessels, to railway companies under a similar contract procuring them to be carried in steam vessels not belonging to the railway company.

I will state briefly the effect of the various enactments on this subject. The decision of this House in *Peek* v. *North Staffordshire Railway Company* (*ubi sup.*) upon sect. 7 of the Railway and Canal Traffic Act 1854 only affected traffic which was

conveyed exclusively by railway. At that time it was *ultra vires* for railway companies to use and work steam vessels; but in 1863 provision was for the first time made for cases where railway companies were authorised by any future enactment incorporating that Act to buy, hire, or use, or to enter into arrangements for the buying, hiring, or using of steam vessels. Sects. 30 to 35 of the Railway Clauses Act 1863 (26 & 27 Vict. c. 92) refer to this subject, and sect. 31 expressly extends the provisions of the Act of 1854 "to steam vessels and to the traffic carried thereby." Sect. 16 of the Act of 1868 concludes with precisely the same provisions, the earlier part of the section containing the following words: "Where a company is authorised to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, and to take tolls in respect of such 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." The railway interest sought to take advantage of the pendency of the Railway Regulation Bill 1871, to introduce an enactment making their liability when they were procuring other ship owners to carry for them no greater than if they were carrying in their own ship, the burden of proof that the misfortune happened while the goods were on the ship being on the company. This called attention to the fact that the existing Railway Regulation Act 1868 left a railway company at liberty to impose any conditions when they procured other shipowners to carry for them. It was thought that the restriction on the liberty of contract already imposed on railway companies when carrying the traffic on their own steamers should be extended to such a case; and that if the railway company had contracted to carry partly by rail, partly by steam, and partly by coach or other conveyance on which they might by contract impose any condition, the burden of proof that the misfortune happened after the goods had got out of the steamship ought to lie on the railway company. In my opinion both objects were perfectly reasonable, and I think the Legislature intended to give effect to both; it ought, however, to have expressed its intention in two separate clauses, one for each object. And it is the unfortunate attempt to make one clause serve two purposes that has created the obscurity. As the enactment is actually worded, there is, I think, some difficulty in finding apt words to limit the liability of the railway company for loss of life or injury to the person to the aggregate amount, though I cannot doubt that was intended. That, however, is not the question before your Lordships. I think there are quite sufficient words to express the intention of the Legislature to extend the restriction on liberty of contract to contracts by railway companies to carry by sea, executed by procuring other steamship owners to do the sea carriage. Whether this be politic or not, the Legislature thought it politic. The proviso as to which so much has been said is applicable to this, and to this alone.

I may here dispose of a point which was relied upon by the learned counsel for the respondents—namely, that, as the Midland Railway Company are not authorised by any Act of Parliament to use, maintain, and work steam vessels, or to enter into arrangements for using, maintaining, or working them, they were not affected by sect. 16 of the Act of 1868, and consequently sect. 7 of the Act of 1854 did not apply in the present case; but I cannot believe that the Legislature intended to place companies with no Parliamentary powers in a better position than those who have obtained statutory authority to carry on this class of traffic. In the case of *Cohen* v. *South-Eastern Railway Company* (*ante*, p. 248) the defendants carried on their traffic by their own steamers, and therefore the question of the negligence of other parties did not arise; but I think that decision was right, so far as it decides that the Act of 1854 is extended by sect. 16 of the Act of 1868 to all classes of steamship traffic.

As to what seems to have weighed with some of the judges below, that the railway company may contrive, by acting as booking agents for the Dublin Steam Packet Company, to evade the Act, I can only say that they are free to try. I doubt if it will be found practicable to have the benefit of an office of their own in Dublin, and at the same time to avoid the responsibility. If they succeed in doing so, and in a future Railway Regulation Act a clause is inserted to prevent it, I hope it may be more artistically framed.

The only remaining question is whether this clause is to be adjudged reasonable. And as the condition now before your Lordships tries to exempt the company from all liability for the negligence of their *employés*, if any condition can be unreasonable within the decision in *Peek* v. *The North Staffordshire Railway Company*, this is.

I therefore advise your Lordships to reverse the judgment, and allow the appeal with costs.

THE LORD CHANCELLOR (Cairns), Lords O'HAGAN and GORDON concurred; the LORD CHANCELLOR observing that their Lordships had fully made up their minds on the question at the time the case was argued, and had only reserved judgment in consequence of the great complexity of the statutes.

Judgment of the Court of Exchequer Chamber in Ireland reversed, and appeal allowed with costs.

Solicitors for the appellant, *Sherwood, Grubbe, Pritt* and *Cameron*, agents for *Dillon* and *Co.*, Dublin.

Solicitors for the respondents, *Carlisle* and *Ordell*, agents for *Watson* and *Co.*, Dublin.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by James P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Friday, July 13.

(Before James, Baggallay, and Cotton, L.JJ.)

The Amstel.

Right of appeal—Matter in discretion of judge—Supreme Court of Judicature Act 1873, *sects.* 19, 45, 49—*Appellate Jurisdiction Act* 1876, *sect.* 20—*County Courts Admiralty Jurisdiction Act* 1868 (31 *&* 32 *Vict. c.* 71), *sects.* 27, 29—*County Courts Act* 1875 (38 *&* 39 *Vict. c.* 50), *sects.* 10, 12.

Sect. 19 *of the Supreme Court of Judicature Act* 1873, *does not give the Court of Appeal jurisdiction to entertain an appeal from a judge of the High Court with reference to a matter which before the passing of the Judicature Acts was in the absolute discretion of the judge.*

Leave to extend the time for appealing from a County Court in the exercise of its Admiralty Jurisdiction, is by sect. 27 *of the County Courts Act* 1878, *a matter within the absolute discretion of the judge of the Admiralty Division, and from his decision no appeal lies to the Court of Appeal.*

This was an appeal from the decision of the judge of the Probate, Divorce, and Admiralty Division (Admiralty) refusing to extend the time for lodging an appeal from a decision of a County Court in the exercise of admiralty jurisdiction.

A cause of damage was instituted in the Glamorganshire County Court by the owners of the foreign ship *Amstel* against the *Flying Fish*, a steamtug, to recover the damages arising out of a collision between the *Amstel* and the Greek barque *Aghios Spiridion*, which was occasioned, it was alleged, by the negligence of the *Flying Fish* whilst towing the *Amstel* under a contract of towage.

The cause was heard in the County Court on 20th March 1877, when the learned judge decided that both the tug and the tow were to blame for the collision, and condemned each of those vessels in a moiety of the damage, and on the 14th April 1877, the learned judge of the County Court delivered a judgment, assigning his reasons for the decree of the 19th March 1877.

On the 19th March 1877, the owners of the *Aghios Spiridion* instituted a cause *in rem* against the *Amstel* in the Admiralty Division of the High Court of Justice for damages arising out of the same collision. In that cause the owners of the *Amstel* claimed to be entitled to contribution from the owners of the *Flying Fish*, and on April 16th obtained leave to serve notice under the Supreme Court of Judicature Act 1875, Schedule I., Order XVI., rule 18, on them, and thereupon the owners of the *Flying Fish* entered an appearance. The owners of the *Amstel* then filed an admission of their liability, and applied to the registrar for a transfer of the cause in the County Court to the High Court, and under the Supreme Court of Judicature Act 1875, Schedule I., Order XVI., rule 19, for directions as to the mode of determining the questions between the *Amstel* and *Flying Fish*, in the action already pending in the High Court. This application was on 13th May refused with costs.

The owners of the *Amstel* then applied to the Judge of the Admiralty Division for leave to appeal from the decree of the County Court, notwithstanding that the ordinary time for doing so had expired, and on 29th May the motion came on for hearing. The principal enactments to which reference was made in the arguments and judgment were as follows:

County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71).

Sect. 27. No appeal shall be allowed unless the instrument of appeal is lodged in the registry of the High Court of Admiralty within ten days from the date of the decree or order appealed from, but the judge of the High Court of Admiralty of England may, on sufficient cause being shown to his satisfaction for such omission, allow an appeal to be prosecuted, notwithstanding that the instrument of appeal has not been lodged within that time.

Sect. 29. There shall be no appeal from a decree or order of the High Court of Admiralty of England made on appeal from a County Court, except by express permission of the Judge of the High Court of Admiralty.

The County Courts Act 1875 (38 & 39 Vict. c. 50).

Sect. 10. There shall be no appeal from a decree or order of the High Court of Admiralty of England made on appeal from the County Court when such decree or order affirms the judgment of the County Court, except by express permission of the judge of the High Court of Admiralty. When upon an appeal the High Court of Admiralty alters the judgment of the County Court no leave to appeal to her Majesty in Council shall be necessary.

Sect. 12 repeals various enactments enumerated in Schedule C. of the Act, amongst which is, *inter alia* (31 & 32 Vict. c. 71), s. 29 above.

G. Bruce in support of motion.—The time for appeal is not absolutely limited to ten days, in this case there is "sufficient cause" for extending it. Until the registrar refused our application we had no reason for appealing, we saved expense by not doing so, as our application to have the question in the action brought by the *Aghios Spiridion* against the *Amstel*, and in which the owners of the *Flying Fish* have appeared, determined as between the *Amstel* and the *Flying Fish*, would, if granted have settled the whole question of liability. If an appeal is not now allowed, there will be an absolute denial of justice to the owners of the *Amstel*, notwithstanding that we have a judgment to the effect that the *Flying Fish* is, at all events, jointly liable with the *Amstel* for the collision. Besides there is a question of law as to application of the Admiralty rule of damages to cases where the claim is not merely between the colliding vessels, but between them and third parties.

Webster, for the owners of the *Flying Fish*, against the motion.—There is no ground to induce the court to allow this appeal. The *Amstel* has admitted her liability in the action in this court, and cannot call on us for contribution; there is no contribution amongst *tort feasors*, and the rules of Order XVI. do not apply to such a case as this, and if the appeal was allowed no portion of the damages for which the *Amstel* has admitted her liability could be recovered against the *Flying Fish*. The appeal would be simply whether the Judge of the County Court was right or wrong in deciding that both vessels were to blame for the

damage done to the *Amstel*, and there was as much reason for that appeal on the 20th March as now.

G. Bruce in reply.—We did not know the reasons of the learned judge below for his decree till 14th April, and dating from that day we were within our time by taking action to make the *Flying Fish* contribute.

Sir R. Phillimore.—I think Mr. Webster's contention is correct, and that there has not been "sufficient reason" shown for extending the time, I must refuse the application. The owners of the *Flying Fish* are entitled to costs.

From this decision the owners of the *Amstel* appealed, and on the 13th July the appeal came on for hearing.

G. Bruce, for appellants (after an intimation from the court to show that he had a right of appeal).—Sect. 19 of the Supreme Court of Judicature Act 1873 gives jurisdiction to the Court of Appeal to entertain an appeal from any judgment or order of the High Court, except in "cases hereinafter mentioned," and this is not one of the cases mentioned in sect. 49 or elsewhere in the Act. Formerly under sect. 29 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) no appeal could be brought except by the leave of the Judge of the Admiralty Court, but that section was repealed by the County Courts Act 1875 (38 & 39 Vict. c. 50), s. 12, and sect. 10 of the latter Act does not apply to the present case, as the learned Judge of the Admiralty Division neither "affirmed," nor "altered" the judgment of the County Court, but refused an interlocutory application having no bearing on the merits of the cause, but in which he had original jurisdiction. For the same reasons the Supreme Court of Judicature Act 1873, s. 45 does not apply, and his decision in such a matter was not final within the meaning of the Appellate Jurisdiction Act 1876, s. 20.

Milward, Q.C., for the respondents, owners of the *Flying Fish*, was not called on.

James, L.J.—The Court of Appeal has no jurisdiction to entertain this application. Sect. 19 of the Supreme Court of Judicature Act 1873, it is true gives in general terms an appeal from every judgment or order of the High Court, but permission to extend the time for appeal from a County Court in the exercise of its Admiralty jurisdiction is left by sect. 27 of County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) strictly and entirely within the discretion of the Judge of the Admiralty Division, and there is no power given to the Court of Appeal to interfere in such a matter.

Baggallay and Cotton, L.JJ. concurred.

Appeal dismissed with costs.

Solicitors for the appellants, *Ingledew, Ince*, and *Greening*.

Solicitors for the respondents, *Wynne*.

Tuesday, July 17.

(Before James, Baggallay, and Cotton, L.JJ.)

The Annandale.

Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104) *sect.* 103—*Concealing British character—Forfeiture—Bonâ fide purchaser—When forfeiture attaches.*

Where an offence is committed by a shipowner or master against sect. 103 *of the Merchant Shipping Act* 1854, *the ship becomes forfeited to H. M., and the forfeiture attaches, and the property in the ship is divested out of the owners and vested in the Crown from the date of the committing of the offence; and a person purchasing such ship bonâ fide, and without knowledge of the offence committed, after such date but before seizure and condemnation, cannot acquire a title which will override the right of the Crown.*

This was an appeal from an interlocutory judgment or decree of the High Court of Justice (Admiralty Division) in favour of the plaintiff on a demurrer. The action was brought by the plaintiff, an officer of Her Majesty's Customs, against the ship *Annandale, in rem*, to obtain a condemnation and forfeiture of the ship for breaches of the provisions of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) sect. 103, sub-sect 2, and the statement of claim set out the specific offences charged, alleged that the ship had been seized by the plaintiff and brought in for adjudication, and claimed a forfeiture and sale.

The statement of defence alleged amongst other things that after the dates of the offence charged in the statement of claim and before seizure by the plaintiff, the defendant had become a *bonâ fide* purchaser for valuable consideration and without notice or knowledge of the matters charged to have been done by the former owners of the ship.

To this part of the statement of defence the plaintiff demurred, and the court below pronounced in favour of the demurrer.

The pleadings and the judgment of the court below will be found fully reported, *ante*, p. 383.

Patchett, Q.C. and *Milvain* for the appellant.—By the Merchant Shipping Act 1854, s. 103, it is (*inter alia*) provided that if "the master or owner of any British ship does, or permits to be done, any matter or thing, or carries, or permits to be carried, any papers or documents, with intent to conceal the British character of such ship from any person entitled to inquire into the same, or to assume a foreign character with intent to deceive any such person as lastly hereinbefore mentioned, such ship shall be forfeited to Her Majesty." The question raised on this appeal is whether the defendant, having purchased the ship without notice or knowledge of any offence having been committed against that statute, and before process issuing against the ship, has not got a title which defeats the right of the Crown to forfeiture, or did the acts alleged to have been done by the former owners vest the property in the ship in the Crown at once so that there could not be valid conveyance to the defendant. [James, L.J.—If the owner can convey the ship at all after the committal of any such acts as those

alleged he can give a good title whether there be notice or no notice.] In the case of a common law forfeiture no property vests in the Crown until conviction, so here no property vests till condemnation. [James, L.J.—Before the sale the Crown clearly had a right to seize the ship; when did the Crown lose that right?] On the sale itself. In *United States* v. 1960 *Bags of Coffee* (8 Cranch 398) Story, J. expresses the strongest opinion that in such a case there is no forfeiture until condemnation. The language of the section is not "is forfeited," but "shall be forfeited," *i.e.*, shall be forfeited on seizure and condemnation. There must be some step taken to take away the owners' right to give a good title. In *Reg.* v. *McCleverty; the Telegrafo* (L. Rep. 3 C. P. 673; 24 L. T. Rep. N. S. 748; 1 Asp. Mar. Law Cas. 63) it was held that a forfeiture for piracy could not be enforced as against a *bonâ fide* purchaser. [James, L.J.—Forfeiture for piracy is a punishment awarded by the court on conviction. There is no statute law prescribing the forfeiture or showing when it operates.] The case shows that the court will protect *bonâ fide* purchasers for value. Some step must be taken by Government before the forfeiture attaches; otherwise a vessel might be chartered, insured, and earn freight, and the Crown would have a right to step in and say that all profits and moneys due in respect of the ship must be paid to the Crown in their right as owners. It is true that the majority of the court in *United States* v. 1960 *Bags of Coffee* (8 Cranch 398) was in favour of the forfeiture, but there the words of the statute were "whenever" an Act against the statute is committed forfeiture shall ensue, thus fixing the time; whereas here the word is "if" such Act is committed the forfeiture shall ensue; thus, in the English statute no time is fixed, and as the statute being penal must be construed strictly in favour of the shipowner the time to be implied is seizure or condemnation. Again, the section provides for the detention of ships which have become "subject to forfeiture;" that is to say liable to be forfeited on condemnation; not forfeited already. [James, L.J.—Those words imply that the ship have already become subject to forfeiture.] But not forfeited. The forfeiture clauses ought to be strictly construed: (*Hubbard* v. *Johnstone*, 3 Taunt. 177.)

The *Admiralty Advocate* (Dr. *Deane*, Q.C.) and *E. C. Clarkson* (The *Attorney-General* with them) for the respondent.—The forfeiture takes place on the committing of the offence, and the ownership of the property then becomes vested in the Crown:

Wilkins v. *Despard*, 5 T. Rep. 112;
Gelstin v. *Hoyt*, 3 Wheaton, 311;
Henderson's Distilled Spirits, 14 Wallace, 44.

To decide against the Crown in this case would be to enable all offenders to evade the penalties of the statute, by setting up a fictitious sale as having taken place before seizure.

Patchett, Q.C. in reply.

James, L.J.—I think we must confirm the decision of the learned judge of the Court of Admiralty in this case. He proceeded upon the authority of two cases—two old English cases—which seem to have decided almost the same point, that is to say, that the property is divested upon the committal of the act, by reason of which the forfeiture is claimed; and upon some cases decided after very great consideration by the Supreme Court of the United States of America: *The United States* v. 1960 *Bags of Coffee* (8 Cranch, 398), in which Mr. Justice Story delivered an elaborate disquisition (for that is certainly what it is), which we have heard to day, dissenting from the decision of the majority of the court. Those authorities seem to me to be very strong, and I agree with the language, if I may say so, of the Chief Justice of the United States, that the question really turns upon the language of the statute. It seems to me that the language of the statute is substantially the same in this case as the language of the statute in the others; and it is that, if a certain offence is committed, the ship "shall be forfeited." It does not say it "shall be liable on conviction of the offence to be forfeited," but that the ship shall by reason of the offence be forfeited; and it goes on to say that the officer of the customs shall seize the ship, and shall bring her into court for adjudication. Therefore it is impossible to deny that by the offence the ship has made herself liable to forfeiture, and has been seized under that liability, and I cannot see how that liability is got over by any dealing with the person who is the owner and who has committed the offence for which liability attaches. It may be said it is a hard case, and those hardships are dwelt upon at great length by Mr. Justice Story (8 Cranch. 401), who speaks of the hardships of innocent purchasers, and of the hardships and inconveniences affecting all their transactions; but those hardships are reduced in a great number of cases, and practically we do not find that any injustice arises upon that. Purchasers do not often get into a difficulty of this kind, or even into that which is more common, the case of purchasing property which has been stolen. However, that is an inconvenience men must suffer if they do buy property which happens to be in the possession of a person who is not the rightful owner.

According to the view of the law which has been taken upon cases such as the present, the property of the owner is divested the moment he commits the offence for which the law prescribes a forfeiture, and being divested, he cannot vest it in anybody else unless there is a statutory provision to that effect, such as does exist in our law, with regard to the sale of stolen goods in market overt, where a person who has no title does give a title to a purchaser. The person whose title is divested, could not give a title to any other person, however innocent that person might be. However, if there is any case of hardship, no doubt the Crown will always take that into its merciful consideration.

I am of opinion, therefore, that the decision in the court below should be affirmed.

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

It appears to me that the opposite construction of the 2nd subsection of the 103rd section of the Act would substantially render that section a dead letter; for though the defence is raised on behalf of a purchaser without notice, after an alleged forfeiture, or act occasioning the forfeiture, the claim for protection is based upon this, and there is no actual forfeiture until adjudication, or at any rate until seizure; and if that were the true construction of the Act, no distinction could be drawn in the case of a

purchaser for value with or without notice. If that be the case, as in almost every instance where this act is done, which is made punishable under the 2nd sub-section, it is done in secret, it would not be impossible to make a sale of the ship before the time when any seizure could be made, or before the time when adjudication could be brought about. Reliance has been placed on the provisions in the latter part of the section in which directions are given as to the seizure of ships, and by which adjudication is obtained, but it appears to me those provisions are for the benefit of the shipowner in order to afford him the opportunity to show that the seizure was improper. If he can show that the vessel was not liable to forfeiture at the time, then it could not be treated as a forfeiture, and then in that case, if the officer of the customs had not good ground for making the seizure, the officer is to be subjected to make amends as the court may think fit to direct. (Sect. 104.)

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

The section which applies to this case is the 2nd subsection of the 103rd section of the Act, aided by the proviso at the end of it. That second sub-section is to the effect that if a master shall so offend the ship shall be forfeited, and not, as has been contended, that it shall on adjudication be forfeited. The forfeiture results immediately on the offence being committed, and if there is any argument raised as to the construction of the words "ship which has become subject to forfeiture," then I say those words are not sufficient to alter what, in my opinion, is the true construction of the 2nd sub-division of the 103rd clause, which is that the forfeiture takes place when the act is committed. There is nothing, therefore, to show that the decision that the person conveying to the appellant had no title is wrong, and in my opinion the judgment of the court below is right.

I should mention that in the case of *Wilkins* v. *Despard* (5 T. R. 112), there are similar provisions with regard to proceedings to be taken before the Admiralty Court, for by 12 Car. 2, c. 18, sect. 1, it is provided that in respect of any ships offending against that Act and liable to forfeiture, "all admirals, &c., are authorised and required to seize and bring in as prizes all such ships and vessels as shall have offended contrary hereunto, and deliver them to the Court of Admiralty, there to be proceeded against." I should say that is even stronger than the words of the present section, and I should be unwilling, even if my opinion were contrary to what it is, to decide contrary to the decision in the appeal after the words contained in *Wilkins* v. *Despard*, but I am of opinion that on the commission of the offence the ship was forfeited, and that the forfeiture was not a subsequent thing.

Appeal dismissed with costs.

Solicitors for the appellant, *Oliver* and *Botterell.*

Solicitor for the respondent, *G. C. Toller*, for *Murton*, Solicitor to the Board of Trade.

July 20 *and* 23,

(Before James, Baggallay, and Cotton, L.JJ.)

The City of Berlin.

Appeal as to amount of salvage award—Costs. The Court of Appeal will increase the amount of a salvage award, if in their opinion, considering the value of the property salved, and of the salving vessel, the award of the court below is insufficient. A successful appellant in a cause of salvage, will get his costs of appeal, following the ordinary custom of the Court of Appeal, notwithstanding the former practice in the Privy Council, in such appeals, to the contrary.

This was an appeal from the decision of the judge of the Admiralty Division, by which, on 25th June 1877, he had awarded the sum of 2000*l.* to the owners and crew of the *Spain* for salvage services rendered by that vessel to the *City of Berlin* on June 10th—13th, 1877, in towing her from a point in the Atlantic Ocean, in lat. 49°23′ N., long. 23°20′ W. to a position of safety outside Queenstown, a distance of about 594 miles. The appeal was entered by the owners of the *Spain* to increase the amount of salvage awarded.

The *City of Berlin* was a screw steamship of 5491 tons gross and 2960 tons register, she was, in addition to her engine power, rigged as a full rigged ship, and was manned by a crew of 137 hands all told, and, including her cargo and freight, was of a value of 221,920*l.*, and she had on board when the services were rendered 472 passengers. The *Spain* was a screw steamship of 4512 tons gross and 2876 tons register, propelled by engines of 600 horse power nominal and manned by a crew of 110 hands all told, and including her cargo and freight, was of a value of 154,634*l.*, and she had on board when the services were rendered 240 passengers. A considerable proportion of the cargo of both vessels was of a perishable nature. On 8th June at 8.34 p.m. the screw shaft of the *City of Berlin* suddenly broke in two, and the wind being too light for the ship to get steerage way under sail she lay with her head to the southward drifting slowly till taken in tow by the *Spain*, on the 10th June, at 8.50 a.m. In the interval a sailing vessel had been requested to give notice of the position of the *City of Berlin* to any steamer she saw, and during the night distress rockets had been fired. The *Spain* and the *City of Berlin* were both bound for Liverpool. The service was rendered by the *Spain* without express agreement as to the amount to be paid for it, and during the passage to Queenstown, where the vessels arrived at 4 p.m. on the 13th June, the weather continued fine, with light winds. For the service the owners of the *City of Berlin* tendered and paid into court the sum of 1200*l.* which the owners of the *Spain* considered insufficient, and which amount was, on the hearing of the cause by the Judge of the Admiralty Division, assisted by two of the Elder Brethren of the Trinity House, increased to 2000*l.*, with costs.

July 20.—*Aspinall*, Q.C. and *Myburg*, for the appellants, contended that the amount of the award was altogether insufficient, considering the

value of both vessels, the inconvenience and risk arising from the delay both to the cargo and passengers of the *Spain*, and which would have been incurred by the cargo and passengers of the *City of Berlin* had the services not been rendered; it does not amount to 1 per cent. on the value of the salved property alone, and is not equal to the commission which a broker would earn for merely selling the cargo.

Milward, Q.C. and *E. C. Clarkson* for respondents.—There is no risk incurred in rendering the service, it occasioned no deviation on the part of the *Spain*, and only caused a delay of a few hours in her voyage; The amount awarded is sufficient; an award of salvage is a matter in the discretion of the judge, and the Court of Appeal will not encourage appeals in such matters.

July 23.—After consultation with the two nautical assessors, by whom the court was assisted, the judgment of the court was delivered by

James, L.J., who, after setting out the circumstances of the ships and the nature of the services increased the award to 4000*l.*, with costs of the appeal.

Baggallay and Cotton, L.JJ. concurred.

Milward, Q.C. submitted that the appellants were not entitled to costs of the appeal. It was not the practice of the Privy Council to give costs where an award of salvage was varied by them: (*The Inca*, 12 Moo. P.C. 189; Swa. 370; *The Cheta*, 3 Mar. Law Cas. O. S. 177; L. Rep. 2 P.C. 205; 19 L. T. Rep. N. S. 621; *The Amerique*, 2 Asp. Mar. Law Cas. 460; L. Rep. 6 P.C. 468; 31 L. T. Rep. N.S. 854); and this court will follow the practice of the Privy Council in Admiralty appeals.

James, L.J.—It is the custom in this court to give a successful appellant his costs, and I see no reason on principle why salvage appeals should differ from appeals in other cases.

Baggallay and Cotton, L.JJ. concurred.

Appeal allowed with costs.

Solicitors for appellants, *Toller* and *Sons*, agents for *Stone* and *Fletcher*, Liverpool.

Solicitors for respondents, *Gregory, Rowcliffe*, and *Co.*, agents for *Duncan, Hill*, and *Dickenson*, Liverpool.

SITTINGS AT WESTMINSTER.

Reported by W. Appleton, Esq., Barrister-at-Law.

May 30 *and* 31.

(Before Cockburn, C.J., James, Bramwell, and Brett, L.JJ.)

Fisher *v.* Smith.

Marine insurance—Sub-agent of broker—Lien on policies for premiums paid by him—Notice.

Plaintiff, a shipowner, employed S. and Co., insurance brokers, to effect marine insurances for him. S. and Co. had acted as plaintiff's brokers for about three years previously, and the ordinary course of business was for plaintiff to pay S. and Co. on monthly accounts between them. S. and Co. effected the insurances through defendant, as a sub-agent, who paid the premiums. Defendant had notice throughout the transaction that S. and Co. were acting as brokers for plaintiff, and also knew the ordinary course of business between plaintiff and S. and Co., as to monthly payments, but the plaintiff did not know, until after the policies had been effected, that S. and Co. had employed defendant or anyone else to effect them. Plaintiff, in one of his usual monthly settlements with S. and Co., was debited with the amount of the premiums on the policies, but the policies remained in defendant's hands. S. and Co. never paid defendant the amount of the premiums. A loss occurred on the property insured, and plaintiff brought an action against defendant to recover the policies.

Held (reversing the decision of the Exchequer Division), that the defendant had a lien on the policies for the amount of the premiums paid by him.

This was an appeal by the defendant from a decision of the Exchequer Division.

The action was to recover several policies of insurance, or damages for their detention.

At the trial, before Archibald, J. and a special jury, at the Gloucester Spring Assizes 1876, a verdict for the plaintiff for the damages claimed was taken by consent, subject to the opinion of the court upon the following special case.

Case.

1. The plaintiff is a shipowner and merchant at Barrow-in-Furness, in Lancashire, and sole shipper at that place for the steel rails of the Barrow Hematite Steel Company, which company carries on its business also in Barrow-in-Furness, and are the only manufacturers of steel rails there. The defendant is an insurance broker, carrying on business at Liverpool, in connection with W. H. Brand.

2. On or about the 19th July 1874 the plaintiff authorised Messrs. Skinner and Co., who are insurance brokers at Barrow-in-Furness, to effect marine insurances to the amount of 4000*l.* on part of a cargo of steel rails from Barrow to St. John's, New Brunswick, per ship *Eliza J. Milligan*, provided they could effect such insurances at 40*s.* per centum.

3. On the 1st Aug. 1874 the plaintiff received from Messrs. Skinner and Co. a covering note, of which the following is a copy:

58, Hindfoot-road, Barrow-in-Furness,
1st Aug. 1874.

Insured for account of Messrs. James Fisher and Sons, 4000*l.* per *Eliza S. Milligan*, captain——
From Barrow to St. John's,
On steel rails valued at 4000*l.*,
"f.p.a.," "f.g.a."

	£.	s.	d.
4000*l.* at 40*s.* per cent.	80	0	0
Policy...	0	10	0
	80	10	0
10 per cent. of 76*l.*...	7	12	0
	£72	18	0

W. J. Skinner and Co.
Frederick Evans.

The letters "f.p.a," "f.g.a.," and "f.c. and s." meaning "from particular average," "foreign general average," and "free from capture and seizure," refer to known clauses and conditions which were to be among the terms of the policies. The deduction of 10 per cent. in the amount of the premium represents the usual underwriters' discount, and the signature, "Frederick Evans," to the said note, is the signature of the clerk in the employ of Skinner and Co., who made out the note.

4. The plaintiff had employed Skinner and Co., as insurance brokers, to effect policies of marine

insurance on cargos of steel rails for about three years. There are no underwriters in Barrow, and Skinner and Co. effected such insurances in Liverpool or London, either directly with the underwriters or through other insurance brokers in those towns.

5. The plaintiff generally knew the name of any insurance office with which Skinner and Co. effected policies without the intervention of any broker, and in the present case had been informed, before receiving the covering note, that the policies which Skinner and Co. were authorised to effect, as above stated, had been effected through Brand and the defendant.

6. The course of business between the plaintiff and Skinner and Co., which was the usual course of business in the trade, was for that firm to make out and deliver to the plaintiff, on the 8th day of each month, an account debiting him with the sums of money due and payable by him to Skinner and Co., in respect of premium, brokerage, and other charges in relation to policies of insurance effected by Skinner and Co. for the plaintiff in the course of the month then preceding, and for the plaintiff thereupon to pay the amount of such account by his bills of exchange for the amount at one month's date; and such course of business had been regularly followed, and all such monthly accounts had been duly paid and settled up to and including that for July 1874, which was delivered up and paid early in August.

7. Of this account the first two items of the date 4th Aug. were in respect of premiums for policies of insurance to the amount of 3750*l.*, in respect of the before-mentioned cargo, per ship *Eliza S. Milligan*. On the 5th Sept. 1874 the plaintiff paid and settled such account with Skinner and Co. by his bill at one month, which said bill was duly honoured and paid. And the plaintiff is in no way indebted to Skinner and Co. on such or any other accounts, and all accounts between them have been long since settled.

8. The plaintiff did not demand of Skinner and Co. the policies of insurance until after the 13th Aug. 1874, when an average loss accrued in respect of the said cargo of the *Eliza S. Milligan*, and thereupon the plaintiff required possession of the said policies for the purpose of recovering the amount due in respect thereof. Three of these policies were at that time in the possession of the defendant. Under the circumstances hereinafter mentioned the fourth policy had never been in defendant's hands, and as to that policy no question arises.

9. No communication had, up to that time, passed between the plaintiff and the defendant, or Brand, nor did the plaintiff know that Skinner and Co. had not paid the premium on the policies, but when the plaintiff required the policies he found that the three above-mentioned were in the possession of the defendant, He thereupon demanded them from him, but the defendant refused to give them up on the ground of a lien for unpaid premiums, he having effected the policies under the circumstances hereinafter mentioned.

10. Skinner and Co., immediately upon receiving instructions from the plaintiff to procure insurances upon the cargo of the *Eliza S. Milligan*, as before set forth, communicated by letter, addressed to W. H. Brand, at Liverpool, requesting him to procure the said insurances. The defendant answered the letter in his own name, and Skinner and Co. continued the correspondence, sometimes addressing Brand, and sometimes addressing defendant by name. Ultimately the insurances in question were effected by the defendant at the request of Skinner and Co.

11. The defendant sent debit notes of the premiums paid in respect of such policies to Skinner and Co., and also forwarded to Skinner and Co. copies of the said policies, and such copies were received from the defendant on the 5th Aug, 1874. A duplicate of one of such copies accompanies and forms part of this case. The 2½ per cent. mentioned in the note at the foot of the copies of policies represents one moiety of the brokerage of 5*l.* per cent. allowed by the underwriters, and the 10 per cent. represents the usual discount allowed by all underwriters to brokers, and the brokers to merchants.

12. Skinner & Co. have effected various policies of marine insurance through the said W. H. Brand and the defendant during the course of six months or thereabouts, upon the terms of sharing equally the brokerage fee of 5*l.* per cent. in respect of the premiums payable on such policies; and the course of business was for the said W. H. Brand, or the defendant, to effect the policy with the underwriters, and procure and deliver to Skinner and Co. copies of the policies, and also to send to Skinner and Co. a debit note of the premiums paid, and at the commencement of each month to make out and deliver to Skinner and Co. an account debiting them with the money due in respect of the premiums paid on the several insurances effected for them during the month then preceding, and on the 10th of each month the account of premiums paid on the preceding month was paid.

13. It was not the usual practice for the defendant or Brand to part with the original stamped policies to Skinner and Co. until the premiums were received from Skinner and Co.

14. The defendant sent to Skinner and Co., during the first week in August, the usual monthly account of such premiums due for the month of July 1874, and inserted in such account as the last two items in point of date, 26*l.* 7*s.* and 26*l.* 11*s.* 9*d.*, premiums due and payable in respect of the policies effected upon the said cargo of the *Eliza S. Milligan*. Upon examination of such account, Skinner and Co. objected to such account as incorrect, on the ground that such last items ought not to have been introduced until the account for the next month (August). The defendant admitted such objection to be valid; the account for the month of July was corrected accordingly, and paid.

15. Early in September 1874 the defendant delivered the usual monthly account of the sums due and payable in respect of premiums paid during the month of August, including the two items mentioned in the last paragraph, and transferred from the prior account as before mentioned; but Skinner and Co. had not paid such account. The defendant detains the three policies in dispute, first, on the ground of a lien for the unpaid premiums on the policies; secondly, on the ground of a general lien for unpaid premiums on other policies effected under similar circumstances for the benefit of the plaintiff upon instructions received from Skinner and Co.

16. The defendant had notice throughout the transaction that Skinner and Co. were acting as

brokers, and that the plaintiff was their principal.

17. The premiums paid by the defendant on the three policies detained by him and still owing to him amount to 52*l.* 18*s.* 9*d.* The premiums paid by the defendant on other policies effected by him for the benefit of the plaintiff on the instructions of Skinner and Co. under similar circumstances to those stated above, and still owing to him, amount to a much larger sum.

It is agreed between the parties that the pleadings in this action on both sides shall form part of the special case, also that the court be at liberty to draw any inferences or find any fact which in the opinion of the court a jury ought to have drawn or found. The questions for the opinion of the court are, first, whether the defendant was entitled to retain the said policies of insurance as against the plaintiff in respect of lien for the premiums on those policies; secondly, whether he was entitled to retain the said policies in respect of a general lien for the unpaid premiums upon the other policies mentioned in the 15th paragraph of this case.

If the court shall be of opinion in the affirmative on both questions, the verdict entered for the plaintiff is to be set aside, and a verdict entered for the defendant generally with costs. If the court shall be of opinion in the affirmative on the first question only, a verdict is to be entered for the defendant with costs, except on the 1st, 2nd, and 10th pleas, on which a verdict is to be entered for the plaintiff. If the court shall be of opinion in the negative on both questions, the verdict entered for the plaintiff is to stand for 3000*l.* with costs, to be reduced to 40*s.* upon the three policies in defendant's possession being given up to the plaintiff.

The Exchequer Division gave judgment for the plaintiff, and the defendant appealed.

[The case in the court below is reported, *ante*, p. 211.]

H. Matthews, Q.C. and *David Maclachlan*, for the defendant, argued that, both by the general law of agency, and also by the peculiar rights and liabilities of an insurance broker in marine insurance law, defendant had a lien on these policies against the assured in the first place, and had done nothing since to prevent him setting it up here. In the first place, by the general law of agency, defendant had a lien on these policies against the plaintiff; for the plaintiff, by bringing an action for them, owns they were made for him. The right of lien is a right attaching to the thing, and is not qualified by any consideration of persons against whom it is claimed:

Arnould on Marine Insurance, p. 196;
Maans v. *Henderson*, 1 East, 336;
2 Duer Marine Insurance, 355;
Xenos v. *Wickham*, 14 C. B., N. S., 452;
Beckwith v. *Bullen*, 8 E. & B. 685;
Lanyon v. *Blanchard*, 2 Camp. 597;
Mann v. *Forrester*, 4 Camp. 60.

[Brett, L.J. cited Phillips on Insurance, s. 1909.]

But more especially is there such a lien in the case of an insurance broker who has effected a policy, and that by reason of the peculiar incidents of his position in insurance law. Such a broker is the only broker in the transaction. There cannot be two brokers. Skinner and Co., whatever their profession may be, are not brokers in this transaction; they are merely plaintiff's agents. The rights and liabilities of a broker are peculiar, and only one man—and that the man who has acted as broker in effecting the insurances—can have them: (*Cahill* v. *Dawson*, 3 C. B., N. S., 106.) The only liability of the agent is to his employer, in tort, for negligence. But the broker is the person primarily and solely liable to the underwriter for premiums: *i.e.*, he is a principal to be sued for premiums; and therefore he is a principal to sue the assured for repayment to him of the premiums. An underwriter cannot go against the assured for the premiums, nor set them off against him; he can only look to the broker:

De Gaminde v. *Pigou*, 4 Taunt. 246;
Dalzell v. *Mair*, 1 Camp. 532;
Jenkins v. *Power*, 6 M. & Sel. 282.

Being therefore absolute debtor for premiums to the underwriters, it follows that he must be the creditor of the plaintiff for them. To such an extent even is that the case, that he can sue for them before he himself has paid them over to the underwriter.

Power v. *Butcher*, 10 B. & C. 329;
Airy v. *Bland*, 2 Park. Ins. 811.

And so well is this position understood in the trade of insurance, that the books are absolutely void of cases of competing claims between brokers. Skinner and Co., therefore, never have been principals, and debiting an agent cannot affect the rights against a principal. The argument even goes the length that payment to Skinner and Co. was a wrongful payment, they being eliminated from the transaction, except collaterally. It is true that, if they had paid defendant the premiums, they might have had a lien against the plaintiff; but, in that case, they would merely have succeeded to defendant's lien. Defendant, then, both by the general law of agency, and by virtue of his peculiar position as insurance broker, having a lien, what has he done to deprive himself of it? He has in no way agreed to give credit, nor is such an agreement to be deduced from any binding usage in the trade. He must have done something to deceive the principal into paying the middleman, which there is no colour for saying he has done:

Heald v. *Kenworthy*, 10 Ex. 739, 745; 24 L. J. 76, Ex.;
Wyatt v. *Lord Hertford*, 3 East, 147;
Calder v. *Dobell*, L. Rep. 6 C. P. 486.

Powell, Q.C. and *Pritchard* for the respondent.—The case finds that defendant knew that plaintiff would, in the ordinary course of business, pay Skinner and Co., for it finds that such a course "was usual in the trade." Knowing that, and not having moved to prevent the plaintiff prejudicing his position by paying to Skinner and Co. when the policies were in defendant's possession, he must be taken to have estopped himself from setting up a lien against the plaintiff, under the principle of *Pickard* v. *Sears* (6 Ad. & E. 475), *Smethurst* v. *Mitchell* (28 L. J., N. S., 241, Q. B.), and many other cases. Again, defendant's knowledge of the course of dealing between Skinner and Co. and the plaintiff, and his conduct thereon, must be taken to have constituted Skinner and Co. his agents to receive payment of premiums, so that the payment to Skinner and Co. was payment to himself, and discharged any lien he might have. If it is true that there can be but one broker in any transaction of marine insurance, Skinner and Co., and not defendant, are in that position

here. He is merely their sub-agent. Against the plaintiff, consequently, the only lien is that of Skinner and Co.; defendant, if he has any lien, has only a lien against Skinner and Co., who employed him. It is not correct to say lien is a right attaching to the property irrespective of persons. They also cited

Waller v. *Holmes*, 1 Johnson & Hem. 241; 30 L. J. 34, Ch.;
Story on Agency, 386 *et seq.*

Cockburn, C.J.—I am of opinion that the judgment of the court below must be reversed.

The action is in detinue, and the pleas—the substantial pleas—assert a lien, one a specific and another a general lien. The facts of the case are simple. The plaintiff, a merchant carrying on business in Barrow-in-Furness, was in the habit of employing the firm of Skinner and Co., as insurance brokers, to effect insurances for him. There being no underwriters in Barrow-in-Furness, Skinner and Co. were obliged to effect the necessary insurances elsewhere; doing so, sometimes themselves by letter, sometimes employing other insurance brokers, in Liverpool or elsewhere, to do so for them. In this particular case they employed the defendant, an insurance broker at Liverpool. The defendant effected four policies—the right to the possession of three only of which is now in question—and, either paid the premiums, or had credit for them in his account with Skinner and Co. Now as to plaintiff and Skinner and Co,, there was a settled mode of payment existing between them. A monthly account was drawn up by Skinner and Co., and sent in to the plaintiff, who thereupon gave his bill at one month in payment. That mode was adhered to in the present case. The monthly account, including these premiums, which were debited to the plaintiff, was sent in, and a bill given for it, which was paid in due course. Skinner and Co., as I have said, employed the defendant to make these policies, and they remained in defendant's possession after the above settlement between plaintiff and Skinner and Co., and after the loss of the 13th Aug. had occurred. They were then demanded by the plaintiff, but defendant, not having been paid the premiums on the policies, either by Skinner and Co. or plaintiff, refused to give them up. The question therefore is, whether under that state of circumstances, there is a lien on these policies in defendant's hands.

Now the general law as regards such case is, that a broker is entitled to a lien for premiums on policies made for a principal. Is there anything here—and, if so, what is it—to deprive the defendant of that general right? It is said that because the defendant in this case knew—as the special case finds he knew—that Skinner and Co. were employed by the plaintiff, and that in the ordinary course of business the premiums on these policies would be settled in account between Skinner and Co. and the plaintiff, that therefore he trusted solely to Skinner and Co., and has no right now against anyone else. But we must look to the whole ordinary course of business before we can determine whether defendant should be made to relinquish his lien. Now it appears that defendant kept the policies in his possession till the premiums should be paid. The plaintiff, therefore, is in this dilemma: either Skinner and Co. were authorised to make these insurances through an agent, or they were not. If Skinner and Co. had such authority, then his principal becomes the employer of the agent, and must be subject to the liabilities of that position. If not, then the agent is not his agent to effect the policies, and the policies are not his, and he can have no claim to the possession of them. But then another answer is made. It is said that defendant, knowing as he did, the course of business between plaintiff and Skinner and Co., has "lain by" and allowed the plaintiff to be prejudiced, by permitting him to pay over the premiums to Skinner and Co. without giving him (the plaintiff) notice that the policies were in defendant's hands, who would claim a lien upon them till he was paid the premiums. I do not say that if there had been at that time any doubt as to the solvency of Skinner and Co. there might not perhaps have been some substance in such an answer; but in this case all parties were at the time considered to be solvent. Therefore I am clearly of opinion that there was no duty on the defendant—and, further, I think it would have been a most extraordinary course for him to have taken—to have gone to the plaintiff and said, "I effected the policies, and have them now, and mean to keep them; so if you pay Skinner and Co. you must run the risk of having to pay again to me, should Skinner and Co. fail to do so."

Therefore I am of opinion that plaintiff did give authority to Skinner and Co. to go and get these policies effected in the way they were effected; and that therefore defendant was his agent, and it was his business to see defendant paid, and defendant has a lien on the policies till he is paid.

James, L. J.—I am of the same opinion, and I have little to add to what my Lord has said.

When the policies had been made by the defendant either on credit or for cash they were from the first moment of their existence, subject to a lien for the amount of the premiums; and that lien was not against this man or that, but was a lien attaching to that property against whomsoever had a right on payment to claim it. That being so, what has defendant done or omitted to do to alter his rights? He has always kept the policies, he has never been paid, and he has done nothing showing an intention to give them up till he is actually paid. There has been nothing of the nature of "standing by." "Standing by" means lending yourself, by doing something, unconscientious if not dishonest, to another man putting himself into a false position. There has been nothing at all of that sort. All has been in the ordinary course of business. It is simply that defendant, finding Skinner and Co. insolvent, turns round to the plaintiff, and plaintiff finds he has paid to an insolvent man what was meant for defendant, and must pay again.

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

If this had been a solitary transaction between these parties, no argument would have been possible, because plaintiff knew defendant had been employed, and acknowledged it by bringing this action. Therefore there was an inevitable lien, and a lien on the article against all the world. It becomes unnecessary to go into the question raised by Mr. Maclachlan in his learned and able argument, which, however, shows conclusively that, at any rate in such a case as this, there is a lien in one holding the position of the defendant in this case. If it would have been so had this been the only transaction between the parties, it will be so here, unless there is something in their relations to alter their legal posi-

tion as regards each other. What of that sort has happened? As to the judgments in the court below, I do not quite see on what ground they proceed, with the exception of that part of Baron Cleasby's judgment which proceeds on the ground of partnership. But I can see nothing like partnership in the case. If not partnership, then it is said payment to Skinner and Co. was payment to defendant's agent. There is no ground, however, on the evidence, for saying so; for payment was not payment of a particular sum, but in account. And, even if that had been otherwise it was payment to plaintiff's, not to defendant's, agent. "Standing by" always implies that one colour has been given to a transaction which had, at first, another. Here the plaintiff was in the habit of paying Skinner and Co. without asking whether they had paid the premiums, or had the policies. What has defendant done, or suppressed, to give a different colour to the transaction? Take it he knew of that course of business between plaintiff and Skinner and Co., as we must. He would say to the plaintiff, "If you are content to pay Skinner and Co. I have no objection, but if the time comes for Skinner and Co. to pay me, and they don't, you must look out." He is not bound to take care of the plaintiff, when the plaintiff does not take care of himself. I can see no ground for saying defendant had not a lien, or cannot set it up here, if he has one. I think he has a lien, that is, a specific lien; as to a general lien, the judgment below will stand.

BRETT, L.J.—I am of the same opinion, but desire to put my judgment expressly on the ground of concurrence in the argument of Mr. Maclachlan.

Defendant says he has a lien until the premiums are paid him. He does not allege that he has paid them to the underwriters himself, therefore we must assume they are not paid. Therefore defendant can claim no lien here unless he does so on the ground of the peculiar nature of his right as a broker in the trade of insurance. Defendant knew that he was effecting these policies for the plaintiff, therefore immediately they were effected they became plaintiff's property; and therefore there can be no lien, if not the peculiar one contended for. By the custom of insurance, the broker who actually effects the policy is the man who is liable to the underwriters, and he is the only man who is so liable; therefore he is the only man who has this lien. Therefore, in this case, the defendant alone had this lien; Skinner and Co. did not effect the policies, and were not therefore possessed of a lien or liable to the underwriters. Therefore Skinner and Co., though brokers by trade, are here merely agents; whether they were entitled to delegate their employment, as they did, is not material; if it were a question, I should be of opinion that they were not, and that the plaintiff could, if he had chosen, have abjured the whole transaction when he came to hear of it. But he did not do so. What does he do? He ratifies it, for he knows of it before he pays Skinner. So it stands thus; defendant has effected some policies for the plaintiff, and plaintiff has accepted what he has done; the defendant, then, has a lien. Lien is only wanted against the owner of the thing retained, for he is the only person who can claim it; therefore "lien against all the world" is an erroneous expression. The defendant, then, had a lien against the plaintiff. Is it gone? The plaintiff says yes, because payment to Skinner and Co. is payment to defendant's agent to receive. I see nothing which makes Skinner and Co. such. Accounts are sent in according to the usual course of insurance business, and it has never yet been suggested that on that account lien is gone. Skinner and Co. were paid when the bill was given and accepted, and defendant, no doubt, looked to Skinner and Co. as the people who were to pay them; but that is not making Skinner and Co. defendant's agents to receive payment. Therefore payment to Skinner and Co. was not payment to the defendant. Then have they lost their lien by "standing by?" I agree in the definition given by my brother, of what is "standing by." The defendant did nothing wrong.

And, moreover, the conclusion we come to is not without the support of authority: (Arnould on Marine Insurance, pp. 196, 197; Phillips on Insurance, sect. 1909.) Phillips is very express. He says: "The agent who effects a policy for his principal, and advances the premium, or becomes responsible for it, and retains the policy in his hands, has a lien upon it for his commission and the premium, until the same are paid to him, or he is supplied with funds for the payment, whether his immediate employer is the assured himself, or an intermediate agent; and, in the latter case, whether the intermediate agency was known, or not known, to the sub-agent claiming the lien." That seems an authority entirely in point. I am of opinion, therefore, that the defendant had a particular lien; as to a general lien, I do not disagree with the court below.

Judgment reversed.

Solicitors for the plaintiff, *Chester, Urquhart, Mayhew*, and *Holden*, agents for *Bradshaw* and *Pearson*, Barrow-in-Furness.

Solicitors for the defendant, *Sharpe, Parkers, Pritchard*, and *Sharpe*, agents for *Gill* and *Archer*, Liverpool.

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

Reported by J. A. FOOTE and CAMERON CHURCHILL, Esqrs., Barristers-at-Law.

Tuesday, June 19.

ADAMS *v.* HALL.

Principal and agent—Undisclosed principal—Trade usage—Interpretation of charter-party—Admission of letters in evidence to explain charter-party—Agent his own principal.

The plaintiffs and defendants entered into a charter of the ship R. to load a cargo of deals. In the body of the charter the defendants were described as follows, "It is this day mutually agreed between Messrs. J. H. & Co., of Newcastle, for owners of the good ship R." The defendants signed the charter-party at the foot, as follows: "For owners, J. H. & Co." A cargo was loaded on board the ship R. at H., and the captain signed a bill of lading for the same, stating that he had received it in good condition, &c. The cargo was ultimately delivered to the plaintiffs at G., and was found on delivery to have been injured to the extent of 50l. In an action brought by the plaintiffs against the defendants for the damage, in the County Court at Gloucester, three

letters, which had passed between the plaintiffs and the defendants and their solicitors were admitted in evidence, and as soon as the plaintiffs' evidence was closed, the defendants' solicitor objected that there was no evidence against the defendants as principals, and applied for a nonsuit, on the ground that it appeared upon the charter-party that the defendants were not principals but only agents of the owner. The judge overruled the objection, and decided that the defendants were liable as principals. On an appeal it was

Held, that there was evidence to support the decision of the County Court judge that the defendants were liable as principals.

Held, further, that the charter-party was to be construed as explained by the letters, and that the letters were properly admitted in evidence.

Southwell *v.* Bowditch *commented on.*

THIS was an appeal from the County Court at Gloucester.

The plaintiffs, who are timber merchants at Gloucester, brought an action against the defendants, who are a firm of shipbrokers at Newcastle-on-Tyne, for damages done to a cargo of deals in a ship.

The plaintiffs and defendants entered into a charter of the ship *Regalia* to load a cargo of deals, &c., at Hudigsval in Sweden. The terms of the charter-party were as follows:

It is this day mutually agreed between Messrs. John Hall and Co. of Newcastle-upon-Tyne, for owners of the good ship, a vessel called the *Regalia*, steamship of the burden of 607 tons, net register, or thereabouts, now in Bristol, Harrison, master, and Messrs. Thomas Adams and Co. of Birmingham, merchants, that the said ship being light, staunch, and strong, and every way fitted for the voyage, shall, after discharging at . . . . , with all convenient speed sail and proceed to Hudigsval, having leave to take a cargo from Cardiff to Kiel, or so near thereunto as she may safely get, and there load from the factors of the said merchant a full and complete cargo, including a deck load, if allowed by law, and required by captain to consist of deals, battens, and boards, the latter not to exceed fifty (say fifty) St. Petersburgh standard hundred, with sufficient deal ends for broken stowage only, not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to Sharpness Point New Dock or so near thereunto as she may safely get, and deliver the same on being paid freight at the rate of—For timber, per load of 50 cubic feet, Queen's caliper measure: deals, battens, and boards, 2*l.* 17*s.* 6*d.* St. Petersburgh standard hundred; deal ends, 1*l.* 18*s.* 4*d.*, ditto, ditto; staves, 1*l.* 18*s.* 4*d.* mille; lathwood, 1*l.* 18*s.* 4*d.*, fathom of 4ft. old measure, being in full of all pilotage and port charges (the act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and steam navigation, of what nature and kind soever, during the said voyage, always excepted), freight to be paid on unloading and right delivery of the cargo, as follows, say one half in cash and the remainder by good and approved bill payable in London at four months date following, or all in cash, equal thereto, at captain's option. The cargo to be supplied to the steamer as fast as the master can receive and stow it, and to be discharged with all reasonable dispatch.

If required, sufficient cash to be advanced at port of loading, for ships ordinary disbursements, on usual terms.

The charter to have the option of keeping the ship ten days on demurrage over and above the said laying days at 30*l.* per day.

Penalty for non-performance of this agreement, estimated amount of freight.

The owner to have an absolute lien on the cargo for all freight, dead freight, and demurrage.

The steamer to have liberty to coal whenever and wherever, &c.

Witness to the signature of—for owners, John Hall and Co.

Witness to the signature of—Thomas Adams and Co.

THEOPHILIUS GOODSON. 26.8.76.

A cargo was loaded on board the ship at Hudigsval, and the captain signed a bill of lading for the same stating that he had received it in good order and condition, and the cargo was ultimately delivered to the plaintiffs at Gloucester, and when delivered it was found to have been injured to the amount of 50*l.* by coal dust which had been negligently left in the said ship.

Three letters which had passed between the plaintiff and defendants, and their respective solicitors, were proved and put in.

At the trial, as soon as the plaintiffs evidence was closed, the defendants' solicitor objected that there was no evidence against the defendants as principals, and applied for a nonsuit, on the ground that it appeared from the charter-party that the defendants were not principals, but only agents for the owners, but the judge overruled the objection, and decided that the defendants were liable in the action as principals.

No witnesses were called on behalf of the defendants; judgment was given for the plaintiffs for 50*l.*

The defendants' solicitor gave notice on the ground above mentioned.

The question for the opinion of the court was, whether the learned County Court judge rightly decided that the defendants were personally liable under the charter-party.

If the court were of this opinion, the judgment to stand; if otherwise, then judgment to be for the defendants.

Paget (*Anderson* with him) now appeared for the appellants.—The defendants are not liable, see *Thomson* v. *Davenport* (2 Smith L. C. 364, 7th edit.). In that case, at the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods. Held, that the seller might afterwards sue the principals for the price. [Lord COLERIDGE, C.J.—The old rule was, that the agent might make himself liable as well as the principal, unless the form of signature was limited. GROVE, J.—He was liable if he signed "as agent," and not if he merely signed "agent." See Story 345.] Lord COLERIDGE, C.J.—By the case of *Paice* v. *Walker and another* (L. Rep. 5 Exch. 173), a person signing a contract in his own name, without qualification, is not exempted from liability on the contract by merely describing himself in the body of the contract as agent for a named principal, without words, expressly or by necessary implication, showing that he only signs as agent; and in that case the defendants were held personally liable upon a contract which they had signed, for the sale of wheat, in the following form, "Sold A. J. Paice, Esq., London, about 200 quarters wheat (as agents for John Schmidt and Co., of Dantzig), &c. (Signed) Walker and Strange.] In the case of *Gadd* v. *Houghton and another* (L. Rep. 1 Exch. Div. 357), where some fruit brokers in Liverpool gave a fruit merchant the following sold note—"We have this day sold to you on account of James Morand and Co., Valencia, 200

cases Valencia oranges, of the brand James Morand and Co., at 12*s.* 9*d.* per case free on board . . ." and signed it without any addition; the purchaser having brought an action against the brokers for non-delivery of the oranges—it was held, reversing the decision of the Exchequer Division, that the words "on account of James Morand and Co." showed an intention to make the foreign principals, and not the brokers liable, and that the brokers were not liable upon the contract. *Paice* v. *Walker* commented on. [Lord COLERIDGE, C.J.—Is there any case where an agent contracting for a principal whom he does not name has been held not liable?] In the case of *Fairlie* v. *Fenton* (L. Rep. 5 Exch. 169) it was held that a broker could not sue in his own name upon contracts made by him as broker, because he was not a contracting party. The case of *Southwell* v. *Bowditch* (L. Rep. 1 C. P. Div. 100, 374) is in point. There, the defendant, a broker, signed and sent to the plaintiff a note of a contract in the following terms: "I have this day sold by your order and for your account to my principal five tons of . . . anthracene . . . W. A. Bowditch." In an action for goods sold and delivered, it was held, reversing the judgment of the Common Pleas Division, that, in the absence of usage making the defendants personally liable, the defendant was not personally liable upon the contract. [Lord COLERIDGE, C.J.—But the defendants are not brokers. It is an ordinary case of agency.]

Anstie for the rsspondents. — The case of *Hutchinson and others* v. *Tatham and others* (L. Rep. 8 C. P. 482) is in point. There the defendants, acting as agents for one L., chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charter-party was expressed to be made and signed by the defendants as "agents to merchants," the name of the principal not being disclosed: Held, on the authority of *Humfrey* v. *Dale* (E. B. & E. 1004; 27 L. J. 390, Q. B.), and *Fleet* v. *Murton* (L. Rep. 7 Q. B. 126), that evidence was admissible in an action by the shipowners against the defendants upon the charter-party, of a trade usage, by which, if the name of the principal is not disclosed within a reasonable time, the agents themselves are personally liable. There they signed "as agents;" in this case they do not, they merely sign "for owners." The case of *Southwell* v. *Bowditch*, which has been referred to by the Lord Chief Justice, is distinguishable; there the defendants gave the plaintiff to understand all through the transaction that the plaintiff was dealing with defendant's principal. [Lord COLERIDGE, C.J.—That case was founded on the opinion of eminent judges that "sold" and "bought of" were to be construed as identical terms. We must be guided by the principles of *Southwell* v. *Bowditch* rather than by the case itself. GROVE, J.—*Southwell* v. *Bowditch* went entirely on the construction to be put on the words "sold to" and "bought of." The words there were "for my principal," here they are not so definite.] In the case of *Gadd* v. *Houghton*, the words were "on account of" somebody else. There the defendant uses a strong expression to indicate that he is not binding himself; here there are no such words. No case as yet has been decided to show that "for" means "on account of." The word "pro" signifies agency, from constant usage. Here there is not any word which is in constant use to express agency. The case of *Paice* v. *Walker* referred to by my Lord is clearly in point. The case of *Lennard* v. *Robinson and Fleming* (5 E. & B. 125) is also in point. In that cash a charter-party stated that it was agreed between L., owner of the ship N., then at Genoa, and R. and F., of London, merchants," that the ship should proceed to Torrevieja, and there load from the factors of the said merchants a cargo "to be brought to and taken from alongside at merchants' risk and expense, which the said merchants hereby bind themselves to ship, and should proceed to Memel, and deliver, on paying freight; "thirty running days to be allowed the said merchants" for loading and discharging, and ten days demurrage at 4*l.* per day, The charter-party was signed "by authority of and as agents for, Mr. A. H. Schwedersky, of Memel," R. and F. In an action by L. against R. and F., the declaration set out the charter-party, and averred that Schwedersky was a foreigner, not a subject of this realm residing beyond the seas, to wit at Memel, and claimed from defendants demurrage and damages for detention *ultra*. Plea, that the agreement was entered into by defendants by the authority of and for and on behalf of, and as agents for, Schwedersky, and not otherwise; and he was named to and known by plaintiff as being defendants' principal at the time the agreement was made. On demurrer, judgment for plaintiff, the terms of the charter-party showing that defendants contracted personally. Moreover, the ownership is admitted by the defendants in the correspondence. In the letter of 2nd Nov. 1876, the defendants write:

Messrs. Thomas Adams and Co.,
Birmingham.
Regalia, S. S.

Dear Sirs,—We duly received your favour of the 30th ult., and in reply, we cannot entertain any claim such as you make, and must ask you to forward us the balance of freight, otherwise we will be compelled to put the matter in the hands of our Freight and Demurrage Association. We remain, yours truly,
(Signed) JOHN HALL and Co.

The second letter is dated 14th Nov. 1876, and in this the ownership is clearly admitted. The letter is from the defendants' solicitors to the plaintiffs' solicitors, and is as follows:

Dear Sirs,—Messrs. John Hall and Co., of Newcastle-upon-Tyne, have handed us your letter of yesterday's date; they instruct us that the damage (if any) would amount to only a small sum, and under the circumstances we must request you to let us have particulars how you make out so large a sum as £53 2*s.* 6*d.*

Please inform us for what price the deals respecting which you complain were sold, and also what was the price obtained for the remainder of the cargo. Yours truly, (Signed) OLIVER and BOTTERELL.

Messrs. Taynton and Son, Solicitors, Gloucester.

The third letter, which is also from defendants' solicitors to the plaintiffs, is dated 22nd Nov. 1876, and is as follows:

Regalia.

Dear Sirs,—We have seen our clients with reference to your letter of the 16th inst., and they instruct us to say that although they do no admit any liability in respect of the matter named in your letter, still they are willing to take all portions of the cargo which you state are damaged and to pay your clients for the same the cost price together with all freight and other proper charges paid by them on the same, and thus your clients cannot make any loss whatever in the matter. If you should decline this offer we will, of course, defend any proceedings your clients may think fit to take. Yours truly,
OLIVER and BOTTERELL.

Messrs. Taynton and Son, Solicitors, Gloucester.

The correspondence must be read. In the case of *Schmattz* v. *Avery* (16 Q. B. 655) which was an action of assumpsit on a charter-party by a freighter against a shipowner for not receiving the cargo, plea, non-assumpsit, proof was given of a charter-party expressed to be by the defendant, of one party, "and G. S. and Co. (agents of the freighter) of the other," and containing a memorandum as follows: "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. S. and Co. shall cease as soon as the cargo is shipped." No notice of this memorandum was taken in the declaration. G. S. and Co. were proved to be the plaintiffs. There it was held, first, that notwithstanding the terms of the charter-party, plaintiff might prove that he was the freighter, and his own principal, and, on proof of his being so, was entitled to recover in his own name; secondly, that it was not necessary to notice the memorandum in the declaration." The usage of trade must be judicially noticed when the principal is not disclosed. That has been decided in the case of *Fleet* v. *Murton* (L. Rep. 7 Q. B. 126) There the defendants, M. and W., fruit brokers in London, being employed by the plaintiffs, merchants in London, to sell for them, gave them the following contract note addressed to the plaintiffs: "We have this day sold for your account to our principal" so many tons of raisins. (Signed) M. and W., brokers. The defendants' principal having accepted part of the raisins and not having accepted the rest, the plaintiffs brought an action on the contract against the defendants, and they sought to make the defendants personally liable by giving evidence that, in the London fruit trade, if the brokers did not give the names of their principals in the contract, they were held personally liable, although they contracted as brokers for a principal; and evidence was also given of a similar custom in the London colonial market. There it was held that the evidence of the custom in the same trade was admissible, as not inconsistent with the written contract, on the authority of *Humfrey* v. *Dale* (7 E. & B. 266; E. B. & E. 1004), and that the evidence of a similar custom in the colonial market was admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence of such a custom in the fruit trade. In *Parker* v. *Winlow* (7 Q. B. 942), where a memorandum for a charter-party was expressed to be made "between P., of the good ship C., and W., agent for E. W. and Son," to whom the ship was to be addressed, it was signed by W. without any restriction: it was held, that W. was personally liable as charterer.

Anderson in reply.—*Paice* v. *Walker* is distinguishable. *Gadd* v. *Houghton* is precisely similar to this case, only there the defendant signed "on account of" instead of "for." In *Fleet* v. *Murton* the evidence of custom was admitted as not being inconsistent with the written contract; here the evidence that it is proposed to admit is inconsistent with the charter-party. The correspondence cannot be received to vary the contract. [Lord COLERIDGE, C.J.—We cannot exclude the correspondence, for why does the learned judge send it up? Do you contend that the charter-party is not affected by subsequent correspondence? The question is, as is generally the case, was there evidence that the defendants intended to render themselves liable as principals? You applied for a nonsuit on the ground that there was no evidence on this point. The judge was right in overruling the objection, if there was any evidence. You must argue that you are entitled to a nonsuit on the charter-party, and all submitted to us.] *Southwell* v. *Bowditch* is very clearly in favour of my contention. [Lord COLERIDGE, C.J.—In every case cited the parties in one sense contracted as agents, that is, including the principals. The question is, whether they excluded themselves, or whether the agent and principal are both liable, or, in other words, what is the effect of the words which may be read as personal to themselves?] In the case of *Potter* v. *Duffield* (L. Rep. 18 Eq. 4) where real estate was put up for sale under particulars and conditions of sale which did not disclose the vendor's name, but stated that B. was the auctioneer, the purchaser of one of the lots signed a memorandum acknowledging his purchase, and B. signed at the foot of this memorandum another, in these terms, "Confirmed on behalf of vendor, B." There it was held that the memorandum did not sufficiently show who the vendor was, and a bill for specific performance of the contract for sale was dismissed.

Lord COLERIDGE, C.J.—It is not necessary for me to express my opinion as to what our judgment would have been if we had had to decide this case upon the charter-party alone, for the charter-party is not alone. We have also the correspondence. The evidence and the correspondence are both set forth and sent to us by the learned County Court judge. He expressly mentions the letters, no doubt for some purpose, and they are intended to form materials for framing our judgment. We are asked for a nonsuit, upon the ground that there is no evidence against the defendants as principals, but that it appears upon the charter-party that they were only agents, and are not therefore liable. We cannot doubt, looking at the way the case is framed, that we are intended to look at the correspondence, and therefore it is not the dry construction of the charter-party alone that we have to consider, but the charter-party as explained and thrown light upon by all the evidence that is placed before us. There is no case which is in itself conclusive that decides such explanation. It must always in such cases be plain that the parties in one sense act as agents. The question, therefore, is not whether they are agents or principals, but whether, though agents, they are also principals. In an application for a nonsuit we must look at all the evidence. The evidence was tendered to the County Court judge without objection, and the question that we have to decide is, whether there was not abundant evidence that the defendants were owners, and contracted personally, and were personally liable. It is consistent with the signatures that they might be owners. When charged with their liability, their solicitors do not repudiate their liability, but request to be furnished with particulars in order that they may ascertain how the plaintiffs make out so large a sum as 53*l.* 2*s.* 6*d.* In their next letter the defendant's solicitors say, that, though they do not admit the liability in respect of the matters named by the plaintiffs, yet they are willing to take all portions of the cargo which the plaintiffs allege to be damaged, and to pay the plaintiffs the cost price for the same, together

with all freight and other proper charges paid by them on the same. What is this but admitting their liability? The only point they really question is the extent of their liability. Oh that ground, therefore, without going into the number of cases that were cited, we think there was abundant evidence to show that the County Court judge was right in deciding that the defendants were, in fact, part owners of the ship, and personally liable. The judge arrived at that conclusion, and I should have done the same.

Grove, J.—I am of the same opinion. The letters were not touched, as to their contents, in the argument of the plaintiff. The letters are very strong. Mr. Anderson says they are not admissible, but he cannot well contend that assuming they were admitted, they were not strong evidence. They were admitted, and there is nothing to show that they were ever objected to. But, moreover, the letters are evidence, for, as it was not clear on the charter-party in what capacity the defendants, Messrs. Hall and Co., were acting, it became material to show whether they were acting for themselves or others; and even if they were acting for others, there is nothing to prevent their taking their principal's liability, as in the case of a *del credere* agent. Moreover, we could not be sure that there was not some evidence of trade customs, and therefore we think that the letters were properly read, and were clearly evidence to support the decision. They have been sent up to us stamped with the County Court stamp, and are clearly intended as evidence to assist in framing our judgment. We think, therefore, that there is no evidence at all to support a nonsuit. *Appeal dismissed with costs.*

Solicitors for the appellants, *Oliver, Botterell,* and *Roche,* Newcastle-upon-Tyne and London.

Solicitors for the respondents, *E. Doyle* and *Edwards,* for *Taynton* and *Son,* Gloucester.

Thursday, Nov. 22, 1877.

(Before Grove and Lindley, JJ.)

De Garteig *v.* The Mersey Docks and Harbour Board.

Dock rates — Vessel trading inwards — Vessel arriving in ballast—Colourable cargo—Mersey Docks Acts Consolidation Act (21 *&* 22 *Vict. c.* 92), *s.* 230.

An Act of Parliament provided that a vessel trading inwards to the Port of Liverpool should pay dock rates, according to a fixed scale, proportioned to the distance of the port from which she was trading, and that a vessel arriving in ballast, but trading outwards, should pay in proportion to the distance of the port to which she was trading. A vessel that had discharged her cargo at a port in England and taken on board ballast being about to sail to Liverpool for the purpose of loading a cargo for the West Indies, took on board a bale of cotton and a few other articles admittedly in order that she might pay dock rates as a vessel trading inwards from the port where she took on board such articles, and not as a vessel arriving in ballast.

Held, that she was a vessel arriving in ballast within the meaning of the Act.

Special case.

1. The plaintiff is a native of the kingdom of Spain, and is the master of the barque *Esmeralda.*

2. The *Esmeralda* is a barque of 326 tons register, and capable of carrying, when fully loaded, 340 tons of cargo. She arrived at Liverpool from Fleetwood, and entered the docks on the 29th Jan. 1877, having the following goods on board, for which bills of lading had been signed by the plaintiff as master of the ship; three pieces of canvas, one barrel of beer, two barrels of potatoes, and one bale of cotton. The said goods were placed on board, and the said bills of lading were signed as aforesaid, in order that the said barque might be treated as a vessel trading inwards, and not a vessel arriving in ballast within the meaning of the 230th section of the Mersey Dock Acts Consolidation Act 1858.

3. When the said vessel entered the docks in the port of Liverpool, she had on board 42 tons of ballast, which she had taken in at Galveston, where she loaded a cargo consisting of cotton, which was discharged and delivered at Fleetwood. No further ballast was taken in at Fleetwood.

4. While at Fleetwood, the vessel was chartered for a voyage from Liverpool with cargo to be there taken on board for Puerto Rico in the West Indies.

5. Fleetwood was the most distant of all the ports from which the said vessel had sailed to Liverpool since her arrival in the British Isles.

6. The *Esmeralda* loaded at Liverpool a full and complete cargo, consisting of 508 tons weight and measurement with which she sailed from Liverpool for Puerto Rico.

7. By the Act of Parliament (21 & 22 Vict. c. 92), s. 230, it is enacted with respect to the dock tonnage rates on vessels entering into or leaving the docks as follows:

All vessels entering into or leaving the docks shall be liable according to the tonnage burden thereof, to pay to the board the rates hereinafter called the Dock Tonnage Rates, mentioned in Schedule B. to this Act annexed, according to the several and respective classes of voyages described in such schedule, that is to say, to or from the port of Liverpool, from or to any parts or places in such schedule mentioned, and such rates shall be paid to the board by the masters or owners of such vessels, and shall be charged as follows:

Vessels trading inwards shall be liable to the rates payable in respect of the most distant of all the ports from which such vessel shall have traded to Liverpool. Vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool or trading outwards shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards, and vessels built within the said port on first trading outwards, shall be liable to one moiety only of such rates, but shall thereafter pay full rates.

Vessels arriving in ballast and departing in ballast from the said port shall be liable to one moiety of the rates payable to the most distant of all ports for which such vessels shall clear out or depart.

One arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards, or arrived or departed in ballast, and without regard to any intermediate ports between which she may have traded whilst absent from Liverpool, but such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessels shall have traded. Vessels arriving in ballast and trading outwards, and vessels built in the port of Liverpool and trading outwards, and having paid the rates payable on such trading outwards, shall afterwards, on trading inwards, be liable to the rates payable on vessels trading inwards.

8. The following is a copy of schedule B. referred to in the said section.

[Schedule B. here set out.]

9. After the passing of the said Act the rates in the toll, schedule B. classes, have been legally altered, and at the time the *Esmeralda* sailed from Fleetwood the dock tonnage rates payable under classes 1 and 7 (which alone affect the present case) were at the rate of $2\frac{7}{8}$ of a penny per ton, and 1*s.* 6*d.* per ton respectively.

10. The defendants insisting that the *Esmeralda* was not a vessel trading inwards within the meaning of the 230th section of the above-mentioned Act, but was a vessel arriving in ballast, demanded 1*s.* 6*d.* per ton on her registered tonnage burden as dock tonnage rates under class 6 of schedule B.

11. The plaintiff insisted that the *Esmeralda* was a vessel trading inwards, and that she was only liable to pay dock tonnage rates on her registered tonnage board at the rate of $2\frac{7}{8}$ of a penny per ton under class 1 of schedule B.

12. The plaintiff was compelled to pay, and did pay, under protest, the said rate of 1*s.* 6*d.* demanded, in order to obtain her clearance.

13. If the dock tonnage rates were payable by the *Esmeralda* as a vessel arriving in ballast, but trading outwards, the claim of the defendants was right; if as a vessel trading inwards, the contention of the plaintiff was right.

14. The difference between the amount claimed by the defendants and the amount admitted by the plaintiff is 20*l.* 10*s.* 10*d.*

15. The court is to have the power to draw inferences of fact from the matters stated in the case.

16. The question for the opinion of the court is, whether the said barque, on entering the docks, was a vessel trading inwards or a vessel arriving in ballast within the meaning of the 230th section of the Mersey Dock Acts Consolidation Act 1858.

17. If the court shall be of opinion that the dock tonnage rates ought to have been paid by the plaintiff in respect of the vessel as trading inwards, judgment to be entered for the plaintiff for the said sum of 20*l.* 10*s.* 10*d.*, with costs.

18. If the court shall be of opinion that the dock tonnage rates ought to have been paid by the plaintiff in respect of the vessel as arriving in ballast, but trading outwards, judgment to be entered for the defendant, with costs.

Crompton (with him *Herschell*, Q.C.) for the plaintiff.—It is sufficient to come within the words of the statute. It is for the defendants to make out that this was a vessel arriving in ballast. The court can draw no line between one bale of cotton and a hundred. He cited *Geldard* v. *Gladstone* (11 East, 675); and remarks of Lord Cairns in *Partington* v. *The Attorney-General* (L. Rep. 4 E. & I. App. 100, 122).

Shand (with him *Benjamin*, Q.C.). for the defendants, was not called upon to argue.

Grove, J.—I am of opinion that our judgment must be for the defendants, even accepting the argument for the plaintiff to the fullest extent. The words of the Act are: "Vessels trading inwards shall be liable to the rates payable in respect of the most distant of all the ports from which such vessels shall have traded to Liverpool. Vessels arriving in ballast but trading outwards . . . shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards." The whole question here is the contradistinction between "vessels trading inwards" and "vessels arriving in ballast but trading outwards;" and what we have to decide is to which of these two classes, on the facts set out in the case, the vessel in question belonged. It appears to me that she belonged to the latter class. She had discharged her cargo at Fleetwood, and was in ballast; but, in order that she might pay toll at a lower rate on entering the docks at Liverpool, she took on board three pieces of canvas, one barrel of beer in bottles, two barrels of potatoes, and one bale of cotton. The case expressly finds that these goods were placed on board in order that she might be treated as a vessel trading inwards, and not a vessel arriving in ballast. It therefore negatives their having been taken on board in the *bonâ fide* course of trade for the purpose of earning the freight. How then can she be said to be a vessel trading inwards? I must read the second paragraph of the case as stating the only reason for taking the goods on board; and, so doing, in my judgment the case really finds the plaintiff out of court. Cases might arise where there was at once a *bonâ fide* desire to earn freight, and also to be liable for the lower duty only; cases of mixed motive, where neither reason by itself would be sufficient to induce a man to take goods on board, but where the two together are sufficient. But that would be a different case to the present. Looking at paragraph 2 of the case, and using the power to draw inferences of fact, it appears to me that this vessel had all the attributes of a vessel arriving in ballast, and none of those of a vessel trading inwards.

Lindley, J.—I am of the same opinion. It appears to me the only question we have to consider is into which of the two classes this particular vessel comes. Is she more correctly described, under the circumstances set out in the case, as a vessel trading inwards or as a vessel arriving in ballast? When we look at the facts, I think it would be impossible for us, or for any one, to doubt that the latter is the correct description. I do not wish to say anything about evading Acts of Parliament; but Acts of Parliament, whether fiscal or not, must be reasonably construed, so as to give some effect to their provisions. The question here is, what was the true character of this vessel, and the question of intention is only important as throwing light upon that. The true character of this vessel was that of a vessel arriving in ballast and trading outwards, as distinguished from a vessel trading inwards.

Judgment for the defendant with costs.

Solicitors for the plaintiff, *Stone* and *Fletcher*, Liverpool.

Solicitor for the defendants, *A. T. Squarey.*

Monday, April 30.

The Omoa and Cleland Coal and Iron Company v. Huntley.

Charter-party — Construction — Liability to charterers for negligence of crew.

The plaintiffs were charterers of a steamer belonging to the defendant under a charter-party by which the defendant was to appoint and main-

tain the ship with a full crew, whilst the plaintiffs were to find coals and to have the use of the ship for the purposes of trading between certain ports:

Held, that the defendant was responsible for the negligence of the crew.

The following special case was stated for the opinion of the court pursuant to an order of Huddleston, B., in chambers.

The plaintiffs were the charterers, and the defendant the owner of the *Vesper* steamship. The charter-party was (so far as material to this case) as hereinafter set out.

The vessel sailed from Glasgow for Dunkirk with coals. In the course of the voyage she was totally lost. For the purposes of this case, but not otherwise, it was assumed that the loss was occasioned by the negligence of the master and crew, and not by any excepted peril. It was admitted that the master and crew were appointed and paid by the ship-owners.

The plaintiffs contended that the master and crew of the vessel were the servants of the defendant, who was liable for the loss caused by their negligence.

The defendant contended that they were not so, and that he was not liable for their negligence.

The question for the opinion of the court was, which of the two contentions was correct.

The charter-party was as follows:

It is this day mutually agreed between Mr. W. H. Durie, agent for owners of the good steam ship or vessel called the *Vesper*, . . . and the Omoa and Cleland Iron Coal Company, of Glasgow, charterers of the said steamer:

Witnesseth that the said vessel or steamer, being tight, staunch and strong, and in every way fitted for the voyage or service, and so maintained by owners with a full complement of officers, seamen, engineers, and firemen, adapted to a steamer of her class, shall be placed under the direction of the said charterer or merchant, or his assigns, to be by him or them employed for the conveyance of lawful merchandise and/or passengers, as follows—between ports in the United Kingdom and the Continent, Baltic and the Black Sea being excluded between 1st Sept. and 1st March, as may be ordered by the charterers, the cargoes to be laden or discharged in any dock or other safe place the charterers may order.

The said steamer is let for the sole use of the said charterers and for their benefit for the space of six months; with option of twelve calendar months at charterers' option, commencing from the vessel's being ready at Grangemouth, N.B., to be at the disposal of the charterers.

The charterers to have the whole reach of the vessel's holds and usual places of loading, including passengers' accommodation, if any, sufficient room being reserved to the owners for the crew, necessary tackle, apparel, and furniture of the said vessel, and she is not to be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel.

The captain shall use all and every despatch possible in prosecuting the voyages, and the crew are to render all customary assistance in loading and discharging.

The captain to sign bills of lading as presented without prejudice to this charter-party, to follow the instructions of the charterers, or their assigns or consignees as regards loading, discharging, and departure.

The coals for the steam-engines shall be supplied by and at the cost of the charterers, as also all port and dock charges, pilotage, and extra labourage that may be required in addition to the crew for loading and discharging, the owners finding all ship's stores, paying crew's wages, and necessary stores for the engine-room, that is oil, tallow, and waste, also dunnage, and insurance on ship.

The freight for the hire of the said steamer shall be as follows, *videlicet*: Four hundred and ten pounds per month payable in advance monthly, until the vessel is again returned by the charterers, he or they having previously given not less than fourteen days' notice.

That in the event of loss of time by deficiency of men, collision, want of stores, breakdown of engines or machinery, or the vessel becomes incapable of steaming for more than twenty-four running hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage. . . . Should the vessel from breakdown of engines put into any other ports than those to which she is bound, the port charges pilotages, &c., at those ports to be borne by the owners.

The owners to have a lien upon all freight and cargo for arrears of hire. The charterers to have a lien upon the ship for the monthly freight paid in advance. And in the event of the said hire not being paid as above, the owners to have the liberty of terminating this charter-party, but still holding the charterers liable for the said hire.

The vessel to be delivered up to the owners on the termination of this charter-party at Clyde or Forth. All derelicts and salvages for owner's and charterers' equal benefit.

The captain to furnish the charterers, their agent, or supercargo when required, a true daily copy of log, and to take every advantage of wind by using sails with a view to economize the expenditure of coals, &c.

Butt, Q.C. and *J. C. Mathew* for the plaintiffs.—In *Laugher* v. *Pointer* (5 B. & C. 547), at page 554, Littledale, J., says, "If a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship," and he is liable for their default. Again, at page 578, Abbott, C.J. suggests the very case of a ship hired and chartered for a voyage, and remarks that "Many accidents have occurred from the negligent management of such vessels, and many actions have been brought against their owners, but I am not aware that any has ever been brought against the charterer, though he is to some purposes the *dominus pro tempore*, &c. *Fletcher* v. *Braddick* (N. R. 2 Bos. & P. 182) was a stronger case; the owner of a ship, chartered and commanded by an officer put on board by the Government, was held liable. In *Quarman* v. *Burnett* (6 M. & W. 499) the person who supplied the horses and the driver was held liable for the negligent driving. In *Schuster* v. *M'Kellar* (7 E. & B. 704) the marginal note suggests that the shipowner is liable for the miscarriage of goods, although he has chartered his ship. They also cited,

Fenton v. *Dublin Steam Packet Company*, 8 A. & E. 835;

Russell v. *Niemann*, 17 C. B., N. S., 163.

Herschell, Q.C. and *J. Edge* for the defendant.—*Rourke* v. *White Moss Colliery Company* (L. Rep. 2 C. P. Div. 208), decides that, although the owners of a mine employed the engineer whose negligence caused the accident, yet they were not liable because the engineer was under the orders of their contractor. *Colvin* v. *Newberry* (1 Cl. & F. 283) is directly in point. Lord Tenterden there says, at page 297: "Two propositions of law are clear . . . the first is, that in the common case of goods shipped on board a vessel . . . the shipper has a right to maintain an action against the owner of the ship; the other . . . that if the owner charters that ship to another . . . although he provides the master, crew, &c. . . . the action can only be brought against the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore*, &c.": (*Sandemann* v. *Scurr*, L. Rep. 2 Q. B. 86.) The owner of a chartered

ship has no lien for the stipulated hire *Hutton* v. *Bragg*, 7 Taunt. 14.) [Denman, J. referred to *Sack* v. *Ford* (32 L. J. 12, C. P.)]

Butt, Q.C., in reply.—In case of a collision the owners are liable. [Lindley, J.—Are the owners liable if they supply a competent ship and crew?] They must do more. They must not only navigate the ship from place to place, and carry the goods shipped by the charterers, but they are also liable for the negligence of the crew.

Denman, J.—I am of opinion that our judgment must be for the plaintiffs. The question before us turns upon the construction of the charter-party entered into by the plaintiff and defendant. In support of construction put forward by the defendant, Mr. Herschell advanced two propositions: first, that the master and crew were not, upon a true construction of the charter-party, the servants of the defendant; and, secondly, that if they were so in a certain sense, they were not so in such a manner as to make him liable for their negligence, because the contract only required the owner to provide a competent master and crew, and there was no evidence that they were not competent persons. On the first point, the cases cited by Mr. Butt established that, under a charter-party like the present one, the master and crew could, and probably would, be the servants of the defendant as against third parties; and from them he argued that in this case they were his servants, as between plaintiff and him. On that, as on the second point, we must see what is the true construction of the charter-party, and whether it contains any words treating or regulating the liability of the defendant. The document contemplates that, so far as the navigation of the ship is concerned, she should be under the control of the owner for the purpose of enabling him to carry out his contract. It is provided that the *Vesper* "shall be placed under the direction" of the plaintiffs. At first sight this clause appears to favour the contention of the defendant, for it seems to imply that the plaintiffs were to have the sole control of the vessel; but, on further consideration, it is evident that the clause merely empowers the plaintiffs to determine when she is to sail and between what ports she is to trade. Subsequent clauses provide that part of the vessel is to be reserved to the owners for the crew, that the captain is to use all despatch, that the crew are to render customary assistance, that the captain is to sign bills of lading, that coals are to be provided at charterer's expense, and that the captain is to furnish the charterers with a copy of the log, and to take every advantage of wind by using sails. These provisions are not consistent with the contentions of the defendant, that the navigation of the ship was under the control of the plaintiffs; if the crew had been the plaintiffs servants, such stipulations would have been useless. The clause as to the delivery up of the ship merely means that the charterers are to relinquish such control as they had at the end of the charter-party. Taken altogether, the true bargain was, that the owners were to supply a vessel and her crew for hire; that the crew were to navigate her from place to place as the charterers should direct; whilst the charterers were to name the direction in which she was to sail, but not to interfere in the management. The cases cited by the plaintiffs' counsel establish that the master and crew are in relation to third parties, the servants of the defendant, and hence I must hold them to be such servants as between the plaintiffs and the defendant.

As to the second point, a person who contracts to provide workmen or seamen for a specific undertaking, is bound to make good any injury which the other contracting party sustains by their negligence. Here, if the plaintiffs have sustained injury by the negligence of the defendant's crew, the defendant is liable.

Lindley, J.—I am of the same opinion.

The authorities do not enlighten us much; they only refer us to the charter-party itself. What, then, as between the parties, was the obligation of the owners as to the navigation of the vessel? Mr. Herschell says that all the defendant was bound to do was to provide a competent ship and crew. If that is the measure of his obligation, then he must succeed; but when the charter-party is looked at—and the closer it is looked at the better it will appear—the liability of the owners is more extensive. In order to understand its extent, consider, first, what power had the charterers? They hired a ship for a time for a certain purpose, and the master and crew were to obey certain orders given by them. These orders might be of two kinds: first, as to the appointment, conduct, and payment of the master and crew; and secondly, as to loading and sailing of the ship. The defendant had nothing to do with the former; but could only direct where the vessel was to go and with what she was to be laden. It appears to me plain upon the charter-party that, except for these specified objects, the captain and crew were to remain under the control of the defendant, and the defendant remained in all respect accountable for the manner in which the vessel might be navigated. I think that the owners coming under the obligation to navigate the steamer by their own crew, were responsible for the negligence of that crew. The ordinary responsibility of a master for the negligence of his servants is not in any way limited or cut down by the charter-party. *Judgment for the plaintiffs.*

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

Solicitors for the defendant, *Shum, Crossman*, and *Crossman*,

ADMIRALTY DIVISION.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

(Before Sir R. Phillimore.)

Saturday, Nov. 3, 1877.

The Hanna.

Salvage—Value—Affidavit of value—Evidence—Practice.

Where, in a salvage action, defendants have filed affidavits of value of their ship, freight, and cargo, which values have been accepted and agreed to by the plaintiffs, the defendants will not be allowed at the hearing to give evidence to decrease the values.

This was an action of salvage brought *in rem* on behalf of the owners, masters, and crews of the fishing smacks *Esmeralda*, *Gertrude*, and *Leader*, to recover reward for services rendered to the Swedish barque *Hanna*.

The *Hanna*, whilst on a voyage from Sweden to Hull, and a cargo of deals and iron, came into collision with another vessel, was very much damaged, and was left waterlogged and helpless

in the North Sea, about sixteen miles from Flamboro' Head; she was there found by the three fishing smacks, which succeeded in towing her to within fourteen miles of the Tyne. There a tug was engaged by the smacks, which towed the *Hanna* into Shields. The action having been commenced, the defendants, in accordance with the practice of the court, about the 16th Jan. 1877, filed affidavits of value, by which it appeared that the value of the ship as salved was 725*l.*; the value of the wood cargo as salved 1280*l.*; and the value of the iron cargo as salved 450*l.*; making the total value of ship, cargo, and freight 2455*l.*

The plaintiffs adopted these values in their statement of claim, and the defendants in their statement of defence did not deny the value as stated, and tendered 330*l.*, which at the hearing was increased to 360*l.*, to cover life salvage.

On the cause coming on to be heard,

Butt, Q.C. (*W. G. F. Phillimore* with him), for the defendants, tendered evidence to show that the value of the wood cargo had turned out very much less than that at which the affidavit of value filed by the defendants had put it, and desired to show that this fact had been communicated to the plaintiffs as soon as possible after the sale of cargo by auction, the sale taking place at the end of March, and the defendants' solicitor having written to the plaintiffs' solicitors on April 17th, stating the difference in value. He mentioned

The James Armstrong, 3 Asp. Mar. Law Cas. 46; L. Rep. 4 A. & E. 380; 33 L. T. Rep. N. S. 390.

Milward, Q.C. (*J. P. Aspinall* with him), objected to the evidence being given on the ground that by the practice of the court, an affidavit of value being once filed by defendants in salvage suits and accepted by the plaintiff, the defendants could not afterwards alter the values. The cargo might have deteriorated in value between the service and the sale. Moreover, the plaintiffs having stated the values in their statement of claim, as given in the affidavits of value filed by the defendants, the defendants had not, in their statement of defence delivered on 17th April 1877, denied the value so stated.

Sir R. PHILLIMORE.—The defendants, having filed an affidavit of value which has been accepted and agreed to by the plaintiffs, have, by the practice of the court, precluded themselves from giving evidence to reduce that value, and I must reject the evidence tendered.

The cause having been heard on the facts:

The COURT overruled the tender, and awarded the sum of 560*l.*

Solicitors for the plaintiffs, *Clarkson, Son*, and *Greenwell*.

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

Tuesday, Nov. 6, 1877.

THE ANNANDALE.

Forfeiture—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 103, *sub-sect.* 2—*Collusion—Sale to a foreigner—Costs.*

A nominal transfer of a British vessel to an Englishman resident abroad, to enable her to sail under a foreign flag, her former British owners preserving their control over her, and by such means endeavouring to evade the provisions of the Legislature with regard to the inspection, &c., of British ships, is an infringement of the Merchant Shipping Act 1854, *s.* 103, *sub-sect.* 2, *and the ship so transferred is forfeited to Her Majesty.*

The original English owners, who were added as defendants by order of the court, and who had not appeared, condemned in costs.

The Sceptre (3 *Asp. Mar. Law Cas.* 269; 35 *L. T. Rep. N. S.* 429) *followed.*

IN this case the plaintiff, a collector of Customs at the port of Liverpool, acting on behalf of the Board of Trade, prayed a forfeiture of the barque *Annandale* to Her Majesty for a breach of the Merchant Shipping Act 1854, sect. 103, sub-sect. 2. A Norwegian subject, named Lows, had entered an appearance and raised a defence, setting up a *bonâ fide* sale to him before seizure; to this defence the plaintiff demurred, and the demurrer was sustained by the Judge of the Admiralty Division (*ante*, p. 383; 2 P. D. 179; 36 L. T. Rep. N. S. 259), and on appeal by the Court of Appeal (*ante*, p. 472). The case now came on for hearing on the merits, as an undefended action, the defence which had been on the record (*ante*, p. 383) being withdrawn.

Dr. *Deane*, Q.C. for the plaintiffs, put in, first, affidavits of the Custom House officers at Newcastle-on-Tyne to show at what date the *Annandale* was struck off the register of British ships on the representation of her managing owner that she had been sold to foreigners, and that they had subsequently known her as sailing under the Belgian flag; secondly, affidavits of Custom House officers at Liverpool, with a declaration, made by the master of the ship, that she was a Belgian vessel, and a copy of the *Lettre de Mer*, under which the vessel sailed as a Belgian ship, attached as exhibits; thirdly, a copy of a bill of sale, executed on the arrival of the vessel at Liverpool and two days before her arrest, by her former English owners, acting in the alleged character of attorneys for one Henry Thomas Watson, the alleged Belgian owner, to the defendant Lows: fourthly, an affidavit of the said Henry Thomas Watson, setting out the circumstances under which he became the nominal owner of the ship under the Belgian flag, and from which it appeared that the former owners executed a bill of sale, in the presence of the Belgian Consul, to the deponent, who, being an Englishman and a British subject, was alleged to be a Belgian citizen; that the bill of sale was sent to the deponent, then resident in Belgium; that the deponent produced the bill of sale to the Belgian authorities, and, on his representation that the ship belonged to him—a Belgian citizen—had obtained a *Lettre de Mer* or provisional certificate for the vessel, which he forwarded to the former English owners. The consideration expressed on the bill of sale was never paid, or intended to be paid by the deponent; but he received a sum of 8*l.* for the loan of his name to the transfer. To his affidavit were attached as exhibits (*a*), a power of attorney to the former English owners to grant mortgages, and give bills of sale as security for such mortgages, whereby the mortgagors should "be put in as full possession of the property as before;" (*b*), a copy of the bill of sale to him; and (*c*), a copy of a letter from the former English owners to him forwarding the bill of sale, and asking for the Belgian papers to be sent as soon as possible, and referring to a circular of theirs having got into the *Times* and *Shipping Gazette*.

Dr. *Deane* then read a document which he stated to be the one referred to in the exhibit (c) attached to Watson's affidavit, and which was in the following terms:

Newcastle-on-Tyne, June 25, 1874.

SIR,—I beg to inform you that I have made arrangements for registering British or other ships under another flag (allowing the employment of officers of any nationality) on cancelling their present register. The vessels will remain at the disposal of the parties interested.

The cost of this arrangement and of procuring the foreign register will be £25 for each vessel, and for that amount you can be entirely freed from the interference of the Board of Trade, whether instigated by tradesmen seeking work, by discharged servants, by Mr. Plimsoll and his friends, or by any officials who, seeing a ship is going to be repaired, think they ought to have the credit of reporting her. Should you wish to avail yourself of the opportunity of protecting your interests you can do so at once by communicating with me. Yours truly,

H. J. LIVINGSTONE.

And concluded by praying a decree of forfeiture against the ship.

Sir R. PHILLIMORE.—I grant the prayer of the statement of claim, and condemn the vessel to be forfeited to Her Majesty under sect. 103, sub-sect. 2 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) with costs.

Dr. *Deane* asked against whom the decree for costs should be made, as some persons—*i.e.*, the original English owners of the ship—had been added as defendants by order of the court on 28th Nov. 1876 (L. Rep. 2 P.D. 179, note). But of the parties so added only one had entered an appearance, and he had taken no further part in the proceedings.

Sir R. PHILLIMORE.—The decree will be against the defendants generally.

Solicitor for plaintiff, *C. G. Toller*, for *Solicitor to the Board of Trade.*

Solicitors for defendant Lows, *Oliver* and *Botterell.*

Tuesday, Nov. 6, 1877.

THE RAFFAELLUCCIA.

Practice—Wages—Viaticum.

Foreign seamen discharged in Great Britain, and who recover wages in a suit against a foreign ship in which they served, are not entitled as of course to their passage money home, but will obtain it when their consul certifies they have gone or about to go home.

Semble, their shipping in another vessel as seamen, even for the voyage home, would disentitle them.

THIS was an action for wages, instituted by the mate Albergo Trapani and several seamen, against the Italian brig *Raffaelluccia.* It appeared that the plaintiffs, with one exception, a seaman named Volpa Gaetano, had been engaged on the 10th Feb. 1877, at the port of Castellamare, in the kingdom of Italy, to serve on board the *Raffaelluccia*, on a voyage from that port to Hull, and for one year, at certain specified rates of wages per month. Volpa Gaetano had been engaged on the 14th July 1877, at Hull, whilst the vessel was lying at that port, on monthly wages simply; subsequently all the plaintiffs were discharged in the port of Hull, and on 28th Aug. 1877 commenced proceedings for their wages, claiming also damages for wrongful dismissal, and a sum of money by way of *viaticum* to enable them to return to their homes. The action was undefended.

J. P. Aspinall for the plaintiffs.—We are entitled to a sum of money in compensation for the breach of contract, as our engagements were, with the exception of Volpa Gaetano, for a year certain, and not the ordinary monthly or voyage engagements used in British ships; and if we waive any special claim to compensation in that respect we are certainly entitled to be conveyed home at the expense of those who have broken the contract, so as to be enabled to enter into others on the same terms as this one. [Sir R PHILLIMORE.—Have you any certificate or notice from the Italian consul that these plaintiffs have returned or are about to return to Italy?] We are not provided with a certificate, as it is usual to grant a *viaticum* to foreign seamen discharged in this country.

Sir R. PHILLIMORE.—There is no doubt the plaintiffs are entitled to the wages claimed, but the *viaticum* does not follow as a matter of course; it may be that the plaintiffs are shipped, or are about to ship, in other vessels in this country at the same or higher rates of wages. I shall not make a decree for anything beyond the amount of wages earned, unless I am satisfied that the men are really *bonâ fide* going or that they have already gone home. I shall make a decree for the wages claimed, and, on the production in the registry of a certificate from the Italian consul that the men have gone or are going home, for the passage money of the plaintiffs to their homes.

Solicitor for the plaintiffs, *H. C. Coote.*

Tuesday, Nov. 6, 1877.

THE MARIE CONSTANCE.

Practice—Action in rem—Service of writ of summons—Rules of Supreme Court 1875, *Order IX., r.* 10.

The rules of the Supreme Court of Judicature as to service of writ of summons in Admiralty actions in rem are to be strictly followed.

Service of the writ on the captain of the ship on board, and nailing of the warrant of arrest on the mast, are not sufficient notice of a suit in rem against the ship to all whom it may concern.

THIS was a cause of damage instituted by the owners of the brigantine *George*, against the *Marie Constance*, for damages arising out of a collision between those vessels in the Bristol Channel, at 2.30 a.m., on the 22nd July 1827. The cause was undefended, and now came on for hearing, on the affidavits of those on board the *George* at the time of the collision.

J. P. Aspinall moved, in accordance with the prayer of the statement of claim, for a decree for the amount of damages sustained and costs, and for the sale of the *Marie Constance*, and payment of the amount of such judgment out of the proceeds. [Sir R PHILLIMORE.—There appears to have been an irregularity in the service of the writ of summons in this case; it appears that it was not nailed to the mast of the vessel, in accordance with Supreme Court of Judicature Act 1875, Sc. 1, Order IX, r. 10; R. S. C., Dec. 1875, rule 6.] The writ was served on the master on board the ship, and the warrant of arrest was duly nailed on the mast by the proper officer of the court; previous to the passing of the Judicature Acts, it was not necessary to do anything more than nail the warrant to the mast, and that has been done, and

that is notice to all whom it may concern of the suit, just as much as nailing the writ of summons could be; besides, the captain is the agent for all parties concerned in the ship, and service on him as custodian of the property is good service.

Sir R. Phillimore.—It is necessary that the rules should be strictly obeyed, and that has not been done in this case. Under the former practice of this court the warrant of arrest was in its form citatory, and therefore the nailing of it to the mast was a sufficient notice to all the world of the suit. That is no longer the case; the warrant of arrest contains no citation itself, that part of it is supplied by the writ of summons, which therefore is directed to be nailed to the mast in addition to the warrant of arrest. Service on the captain, even on board the ship, is not an alternative allowed by the rules of practice, nor sufficient notice to all parties who may have an interest in the ship; as, for example, mortgagors and others, between whom and the captain there is no privity, either real or implied. I shall not allow judgment to be entered until I am satisfied that the writ of summons has been served in the proper manner, and the proper times have elapsed for appearance and other proceedings subsequent to such service, but I will make the order as prayed, subject to the due service of the writ.

Solicitors for plaintiffs, *Clarkson, Son,* and *Greenwell.*

Tuesday, Nov. 6, 1877.

The Rowena.

Practice—Bottomry—Default cause—Evidence.

In all bottomry actions it is necessary that the original of the bond should be produced at the hearing.

This was an undefended bottomry suit, instituted against the *Rowena,* her cargo and freight. No appearance had been entered by the owners or others concerned in the ship.

W. G. F. Phillimore moved the court, on behalf of the bondholders, for a decree pronouncing for the validity of the bond so far as concerned the ship, and to order a sale of the vessel. In support of his application he referred to the copy of the original bond.

Sir Robert Phillimore inquired whether the original bond was in court, and on being informed that it was not, granted a decree for the validity of the bond, subject to the original being produced in the Registry; but said that he desired it to be known to all persons that the practice of the court, requiring the production of the original bond, and not merely a copy of it, at the hearing, is to be strictly adhered to as well in causes by default as in other cases, and that, if it were not, no decree of validity would in future be made.

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

Tuesday, Nov. 6, 1877.

The Bridgwater.

Practice—Ship under arrest—Discharge of seamen—Wages.

When a foreign ship is under arrest, and no appearance is entered for her, the court will allow the payment of wages and viaticum out of freight in the hands of a plaintiff in a bottomry suit, and order the discharge of the crew, although there is no suit instituted for their wages.

This was a motion on behalf of Messrs. Schroder and Co., the plaintiffs in a suit of bottomry, against the United States ship *Bridgwater,* her cargo and freight, for the discharge of the crew of that vessel, with the exception of the captain, and for leave to pay them the wages due to them out of the freight in their hands. The plaintiffs were holders of the bills of lading of the cargo, and entitled to delivery of it on payment of freight. They had not arrested the cargo, and the chartered freight due for the transportation of it, and which remained in their hands, would be insufficient to satisfy their claim on the bottomry bond.

The seamen had not instituted any suit for their wages, but there were other suits *in rem* for necessaries, &c., pending against the ship, in none of which had any appearance been entered.

Clarkson, for the plaintiffs, moved the court to order the discharge of the crew on payment to them of their wages due at the date of discharge, and a sum of money by way of *viaticum* to enable them to return home, the ship being a foreign vessel. He pointed out that, whilst the suits were pending and no appearance entered, it was a perfectly useless expense keeping the crew, but that the plaintiffs, though holders of a bottomry bond, and having freight in their hands, could not pay off the crew without the order of the court.

Sir R. Phillimore.—I shall make an order that the seamen be discharged, and shall give leave to the plaintiffs to pay them their wages to the date of their discharge, and such sum as the American Consul shall certify for to enable them to return home, out of the freight in their hands, and I shall allow the plaintiffs the costs of this motion.

Solicitors for plaintiff, *Stibbard, Gibson,* and *Cronshey.*

Nov. 12 *and* 13, 1877.

The Englishman.

*Collision — Lights — Look-out — Fishing vessel—Contributory negligence—*36 *&* 37 *Vict. c.* 85, *s.* 17—*Regulations for preventing collisions at sea, articles* 5, 9.

Decked fishing vessels are bound to carry the coloured light prescribed by art. 5 *of the regulations for preventing collisions at sea so long as they are actually under way, and are only justified in substituting the white mast-head light, prescribed by the* 2*nd cl. of art.* 9, *when their nets are over, and they are kept stationary by them.*

The Esk and The Gitana (*L. Rep.* 2 *A. & E.* 350; 20 *L. T. Rep. N. S.* 587; 3 *Mar. Law Cas. O. S.* 242) *followed.*

A vessel, though infringing the "regulations for preventing collisions at sea," will not be "deemed to be in fault" within the meaning of sect. 17 *of the Merchant Shipping Act* 1873 *for a collision caused exclusively by the negligence of the other colliding vessel, if the infringement of the regulations could not, under the circumstances of the case, have contributed to the collision.*

A close-hauled vessel exhibiting lights other than those required by the regulations for preventing collisions at sea was run into by a vessel running free, and whose duty it was to keep out of the way, but which, in consequence of not having a proper look-out, did not see the close-hauled vessel or her lights till the moment of the collision:

Held, that as the proper lights, had they been ex-

hibited, would not have been seen, neither their absence, nor the exhibition of any improper light, which could have been seen, but which, by reason of the improper look-out, was not seen, could by any possibility have contributed to the collision, and therefore that the vessel infringing the regulation as to lights could not be "deemed to be in fault" for the collision within the meaning of sect. 17 of the Merchant Shipping Act 1873.

The Magnet, The Fanny M. Carvill, The Duke of Sutherland (2 *Asp. Mar. Law Cas.* 478; *L. Rep.* 4 *A. & E.* 417; 32 *L. T. Rep. N. S.* 129). The Fanny M. Carvill (2 *Asp. Mar. Law Cas.* 565; 32 *L. T. Rep. N. S.* 646) *explained*.

THIS was an action for damages sustained by the French lugger *L'Etoile* in a collision between that vessel and the British three-masted schooner *Englishman* on the morning of the 27th Nov. 1876, about nine miles south of the Kentish Knock sand.

It appeared that the wind was about S.S.W. a moderate breeze, the weather fine, and the tide flood. There was some dispute as to the time of the collision, those on board *L'Etoile* alleging it had taken place about 7 a.m., when it was already daylight, and those on board the *Englishman* stating it to have taken place about 5.30 a.m.

L'Etoile, which was a decked (not "open") fishing vessel, and was prosecuting a fishing voyage, had been trawling in the early part of the night, but at the time of the collision was not fishing, and had her nets on board, and was under easy sail, close-hauled on the port tack, going about two or two and a half knots an hour, and preparing to get her trawl over again. She had no side lights burning at the time, having taken them in shortly before, and hoisted a white mast-head light.

The *Englishman* was running nearly before the wind, also under easy canvas, and had her side lights in their places. She never saw *L'Etoile* at all until her jibboom was between the lugger's masts.

The sections of the Merchant Shipping Act, and of the regulations for preventing collisions at sea, on which the argument principally turned, were the following:—Sect. 17 Merchant Shipping Act 1873 (36 & 37 Vict. c. 885):

If in any case of collision it is proved to the court before which the case is tried, that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it be shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

Regulations for preventing collisions at sea made by Order in Council, 9th. Jan. 1863:—

Article 5:

Sailing ships under weigh, or being towed, shall carry the same lights as steamships under weigh, with the exception of the white mast-head lights, which they shall never carry.

Article 9:

Open fishing boats and other open boats shall not be required to carry the side lights required for other vessels; but shall, if they do not carry such lights, carry a lantern having a green slide on one side and a red slide on the other side, and on the approach of or to other vessels such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

Fishing vessels and open boats, when at anchor or attached to their nets and stationery, shall exhibit a bright white light.

Fishing vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient.

Nov. 12, 1877.—The cause came on for hearing before the Judge of the Admiralty Division, assisted by two of the elder brethren of the Trinity House as assessors.

Milward, Q.C. and *Clarkson*, for plaintiffs, the owners of *L'Etoile*. The *Englishman* is alone to blame for this collision; it is obvious that they had no proper look-out. If there had been a look-out, he would have seen us sooner than he did, even if we had no lights exhibited. We were justified in carrying the light we did carry; we were practically trawling at the time. We were on the trawling ground, and going very slow, for the purpose of getting our trawl net overboard, and had already got the beam of it over the side. We were, therefore, within the meaning of the 2nd clause of art. 9 of the regulations for preventing collisions at sea, and had the light required by that regulation exhibited; but, even if the court should hold that we were not entitled at the time to exhibit that light, and should have had the ordinary side lights, or the light with slides, in substitution for them allowed by the 9th article for fishing vessels, it cannot be said that the absence of such lights caused or in any way contributed to this collision, or could have done so, so as to bring us within the scope of 36 & 37 Vict. c. 85, sect. 17. To do that, it must be shown that the condition of our lights contributed to the collision (*The Magnet, ubi sup.*), and that has not been done. The white light shown by us was visible at a greater distance than the ordinary side lights, and could have been seen if anyone on board the *Englishman* had been looking out. If the light had been seen, and from its nature misled the *Englishman*, and made her do or leave undone something, we might be liable. But a light which can be seen, but is not seen, cannot be said to contribute to a collision. Neither did the absence of our side lights contribute to the collision; if the white light was not seen, *a fortiori* the coloured lights would not have been seen. The mere absence of a light which might have been seen is not sufficient; the regulations require the lights to be exhibited from sunset to sunrise, but the absence of the lights just before the rising of the sun, when it is already broad daylight, could not in any sense contribute to a collision. So also, if there was on the deck of one of two colliding vessels no person but the helmsman, and he so situated as to be unable to see anything on either bow or ahead, the fact of the other vessel having no lights would not contribute to the collision. [Sir R. PHILLIMORE.—Your contention is that sect. 17 assumes that the other party is doing his duty, and that if you show that, by his failure to do so, your neglect to observe the regulations as to lights could have no effect on his conduct, you do not come within the section.] That is so. Had they seen our white light, which was visible three miles off, they might have contended that, it signifying a vessel either attached to her nets and stationery, or a vessel at anchor, they went closer than they otherwise would have done; but, as they did not see it at all, its nature could have no effect on this.

Butt, Q.C. (with him Dr. *Phillimore*) for the defendants.—It is only necessary to establish two

propositions to show that *L'Etoile* must be held to blame for this collision. First, she ought to have side lights; secondly, not having these, she is liable for this collision. The regulations do not contemplate that the mast-head lights of a fishing vessel should be visible so far as the side lights. The distance given for the latter in Art. 3 is two miles; the only distance given for a bright light in a sailing vessel is that given in Art. 7, and is only one mile. *L'Etoile* was bound to show her side lights; she was not within the second clause of Art. 9. Her net was not over the side, and she was not attached to it within the meaning of that article, neither was she stationary. On the contrary, she was sailing two or three knots. The case is analogous to that of a vessel getting under way, or coming to an anchor, and then it is settled that she is bound to exhibit her side lights when she is not actually held by her anchor: (*The Esk and The Gitana*, 20 L. T. Rep. N. S. 587; L. Rep. 2 A. & E. 350; 3 Mar. Law Cas. O. S. 242.) But to avoid the statute it is necessary for her to show that her neglect to comply with the regulations could not by any possibility have affected the collision, and she has not done so: (*The Fanny M. Carvill*, *The Duke of Sutherland*, *The Magnet*, 2 Asp. Mar. Law Cas. 478; 32 L. T. Rep. N. S. 129; L. Rep. 4 A. & E. 417.) The statute applies to foreign as well as British ships, the other vessel in the case of *The Magnet* (*ubi sup.*) having been a foreign vessel, and she was held to blame under this section. *The Fanny M. Carvill*, in which case also the other vessel was a foreigner, was appealed to the Privy Council (2 Asp. Mar. Law Cas. 565; 32 L. T. Rep. N. S. 646), and in the judgment of that court the true interpretation of the section is laid down: "Nor does it appear to their Lordships that the 17th sect. of the Act of 1873 can be taken merely to shift the burden of proof by raising a presumption of culpability, to be rebutted by proof that the non-observance of the rule did not in fact contribute to the collision because the preceding (16th) section clearly shows that where the Legislature intended only to raise a presumption capable of being rebutted by such proof, it used apt words to express that intention. Their Lordships therefore conceive that, whatever be the true construction of the enactment in question, that which would take the case out of its operation, by mere proof that the infringement of the regulation did not in point of fact contribute to the collision is inadmissible." *L'Etoile* infringed the regulations in two respects, either of which might have contributed to the collision. She should, under the circumstances, have carried her coloured bow lights, and no others. She did not carry the bow lights, and she did carry another, and therefore is liable for the collision.

E. C. Clarkson in reply.

Nov. 13, 1877.—Sir R. PHILLIMORE.—This is a cause of collision between a small French fishing lugger, called *L'Etoile*, of 42 tons register, and a three-masted schooner called the *Englishman*, of 183 tons register. The exact time of the collision is a matter of dispute in this case. On the one hand, on behalf of *L'Etoile*, it is stated to have been at about 7 A.M., and on the part of the *Englishman* to have been at about 5.30 A.M. The evidence is conflicting in this as in other cases, and the right time would be somewhere between these two periods. The collision took place, at all events, on the morning of the 27th Nov. 1876, nine or ten miles distant from the Kentish Knock. The direction of the wind is undisputed, it being S.S.W. The weather is variously stated to have been clear on the part of *L'Etoile*, and to have been overcast but clear on the part of the *Englishman*. *L'Etoile* was close-hauled on the port tack, heading W., and was getting her trawl out, and was proceeding, as it appears on the evidence, from two to three knots an hour. The trawl net was on the deck, and was being attended to by a portion of the crew who were getting it ready. The master of *L'Etoile* ordered her side lights to be taken in, and a globular white light to be exhibited at the masthead. There were also, as it appears from the evidence, two small white lights used by the crew on deck. While they were getting the nets ready, those on board *L'Etoile* saw the lights of the *Englishman* a mile off on their weather bow, bearing about W. by S, and then they showed white lights and a flare-up on board, but no heed was taken of them by the English vessel, which ran into the French vessel, and struck her port side amidships.

There is no question as to whether the latter was seen or heard of before the time of the collision. The preliminary act, filed on behalf of the *Englishman*, says she was first seen under the bows of the *Englishman*. According to the evidence, she was neither seen nor heard of until the jibboom of the *Englishman* had run between her masts; the English vessel appears to have had the wind on her starboard quarter. There has been a great discussion on a very important subject, namely, whether the English vessel had or had not a proper look-out; if she had a proper-look-out, and had seen the French vessel, of course it was her duty, having the wind free, to get out of her way. I have considered this matter, and the various other parts of the case, with the Elder Brethren, and we have arrived at the clear conclusion that the fair result of the evidence—taking into consideration all the circumstances, namely, what has been said, and the demeanour of the witnesses—is that there was a want of look-out on board the English vessel; nor, indeed, was it stoutly contended, nor could it be, that that was not the case.

But a question remains to be decided with respect to the liability of the French vessel for disobedience to the sailing regulations, and that leads to the consideration of the 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 82), taken in connection with art. 9 of the Regulations for Preventing Collisions at Sea. [His Lordship read the section and article given above, and observing that *L'Etoile* was not an open fishing boat, proceeded:] It is therefore clear that, unless she was attached to her nets and stationary; she had no right to exhibit a white light at her mast-head. We have no doubt upon this part of the case; the vessel was not attached to her net, and was not stationary. It was said she was just preparing to put down her net, and that it would be too harsh a construction of the rule to consider her not to be stationary. I think the principle laid down by me in the case of the *Esk* (*ubi sup.*) in the analogous instance of a vessel having an anchor out, but not holding, applies in this case. In that case I ruled as follows: "The object of the regulations, so far as their bearing on the present case is concerned, with respect to carrying lights, is to

furnish the means of apprising other vessels whether the vessel carrying them be stationary or in motion, in order that the coming or meeting vessel may direct her course in consequence, and give the vessel carrying coloured lights and in motion a wider berth than she would give if that vessel carried an anchor light and was stationary. This is the principle which underlies these rules. It is possible, no doubt, to draw fine distinctions between vessels which have just actually raised their anchor off the ground, and those which are in the very act of doing so; but practically the true criterion as to the application of the regulation must be whether the vessel be actually held by and under the control of her anchor, or not. The moment she ceases to be so she is in the category of a vessel under way, and must carry the appointed coloured lights." I am of opinion that the principle of that decision applies to the present case, and that the rule of navigation to which I have referred has been infringed by the French vessel.

On this occasion it remains to be considered what is the legal result of this infringement on the part of the French vessel, it being, in our judgment, clearly proved that the collision in this case was caused, as I have said, by a want of look-out on the part of the *Englishman*. The clause of the statute I have read has been the subject of very careful consideration both in this court and on appeal in the Judicial Committee of the privy Council, which affirmed the judgment which I delivered in the case of *The Fanny M. Carvill* (*ubi sup.*) There is no doubt a difficulty in applying the principles laid down in that judgment to all cases coming before the court; but, as I infer from the judgment of the Privy Council, the true principle to be applied is this, that the party guilty of infringement of the regulation has the burden cast upon him of showing that it could not possibly have contributed to the collision. Therefore, I have to consider, looking to all the circumstances of the case, whether the absence of a side light could have possibly contributed to the collision. There was a want of look-out on board the English vessel, and the French vessel had a white light visible a mile distant at least; she had also a flare-up shown, and neither of them was seen, and those on board the English vessel knew nothing of the approach of the French vessel until the shock of the collision and the blow. It is not immaterial to observe that the blow was upon the weather bow. Did then, the absence of the red side light contribute to the collision? After much consideration, we think that it did not, and that the collision was the consequence of no look-out on board the *Englishman*, and that the side lights would have been unseen as much as the mast-head light actually was. The absence of lights, in our judgment, could not have contributed to the collision; therefore, the clause of the statute does not apply, and the English vessel is alone liable for the damage, which, in our opinion, was unquestionably caused by the want of a look-out on board the vessel.

I pronounce, therefore for the plaintiff.

On the application of the defendant, execution was stayed.

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

Solicitors for the defendants, *Shephard* and Skipwith.

Nov 13, 20, *and* 27, 1877.

SPECIE *ex* SARPEDON.

Life salvage—Liability of owners of lost ship to contribute—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 459—*Costs of notices.*

Where lives and cargo have been salved from a ship, but the ship has been totally lost, the owners of the cargo are liable to pay salvage in respect of the lives, and the owners of the lost ship are not liable to contribute to such payment. (*a*)

Life salvage awards can only be paid out of the res salved, and not against owners of a ship personally.

Where parties have been summoned to appear under Order XVI., r. 18, *of the Rules of the Supreme Court, against whom no claim to contribution is made out, the parties so summoned are entitled to their costs.*

THIS was a motion in a cause of salvage. The cause was instituted on behalf of the owners and crew of the Spanish screw steamer *Calderon* for services rendered by that vessel in salving the passengers and crew, consisting of eighty-one persons, and eight boxes of specie of the value of 28,000*l.* or 30,000*l.*, from the British screw steamer *Sarpedon*.

The *Sarpedon* had been in collision with the British steamer *Julia David* on the night of the 4th Sept. 1875, about eighty-five miles S.W. of Ushant, and had sustained such damage that the crew and passengers had taken to the boats at once. The *Calderon* had come up at daylight, and at the request of the master of the *Sarpedon* the passengers, and the specie on board the *Sarpedon* were taken on board the *Calderon*. The *Calderon* attempted to tow the *Sarpedon*, but after some hours the attempt was given up and the *Sarpedon* abandoned in a sinking condition. The value of the *Sarpedon* and her cargo before the collision was estimated to be about 250,000*l.*

The suit was commenced by an action *in rem* against the specie salved, the statement of claim setting out the salvage services to the specie and to the crew and passengers as well. The cause came on for hearing on the 16th Jan, 1877, and was partly heard, and adjourned, and on the 10th Jan. 1877, on the application of the defendants, leave was given to serve notice of a claim to contribution and for an indemnity, under Order XVI., r. 18, of the Rules of the Supreme Court, on the Ocean Steamship Company, owners of the *Sarpedon*. On the 5th Feb, the Ocean Steamship Company entered an appearance, and on the 12th Feb. the Court gave directions that the notice served on them should be treated as a pleading.

The owners of the *Sarpedon*, on the 27th Feb. 1877, delivered a statement in answer, denying their liability. To this statement the defendants replied on the 9th March 1877 by a joinder of issue, and the plaintiffs on the 14th March 1877, by denying the claim for contribution and demurring to that for an indemnity.

(*a*) It must not be assumed from this case that an action will not lie *in personam* in Admiralty to recover salvage. As long ago as 1801 Lord Stowell held, in *The Hope* and *The Trelawney* (3 C. Rob. 215), that a suit *in rem* was not necessary, but that he would issue a monition against the owners of salved property to show cause why they should not pay reward to the salvors. At the same time there is no instance known of a motion having gone against the owners where none of their property could be proceeded against through its loss.—ED.

On the 10th April the judge decided to try the issue of fact before hearing the demurrer; and on the 5th May 1877 the hearing of the cause of salvage was continued, and an award of 4000*l.* made for the salvage services, to be paid in the first instance by the owners of the specie, but without prejudice to any claim they might have against the owners of the *Sarpedon* or the *Julia David*.

There was a cause of damage pending between the owners of the *Sarpedon* and the *Julia David*, which was heard in the Admiralty Division on 27th and 28th Nov. 1876, in which the judge of the Admiralty Division, on 29th Nov. 1876, found the *Sarpedon* to blame, but in which the Court of Appeal, on 7th Aug. 1877, after admitting fresh evidence at the hearing of the appeal on the 4th and 7th June 1877, reversed his decision, and found the *Julia David* alone to blame.

On the 13th Nov. the owners of the specie, in pursuance of notice, moved the court,

To determine how much of the sum of 4000*l.* awarded as salvage in this action on the 5th day of May 1877, and subsequently paid to the plaintiff by the defendants with costs, was for life salvage, and how much for salvage of specie, and to declare that the sum awarded for life salvage ought to have been paid to the plaintiffs by the owners of the *Sarpedon* parties in this action, and to order the owners of the *Sarpedon* to recoup to the defendants the sum paid by them in respect to life salvage and costs to the plaintiffs.

Dr. *Phillimore*, for the defendants, owners of the specie.—There is no obligation on the owners of this specie to pay life salvage; there is no privity between the owners of cargo and the passengers. The owners of a ship, though she is not herself salved must pay for the salvage of the lives of those on board her: (*The Medina*, *ante*, p. 219, 305; L. Rep. 1 P. D. 272: 2 P D. 5; 34 L. T. Rep. N.S. 918; 35 L. T. Rep. N. S. 779.) The fact that in that case the court was called on to consider whether an agreement between the captain of the vessel from which the life salvage was made and the salvor was equitable or not, make no difference, for in every case of salvage there is an implied agreement to salve for a reasonable sum. Here the master of the *Sarpedon*, acting on behalf of his owners invites assistance by hoisting signals of distress and the *Calderon* in reply accepts the responsibility of salving, if possible, the ship as well as the passengers and specie. There is a perfect agreement, only the amount is not settled at the time, but, as often happens, is to be settled on shore when the service is complete; that was an agreement at least as binding on the owners as that which in *The Medina* (*ubi sup.*) the Court of Appeal, affirming the decision of this court, considered inequitable indeed as to amount, but which they recognised as lawful by modifying it, and awarding what they considered to be a reasonable amount to be paid by the owners of the ship, though there was no property of theirs salved, and therefore no *res* capable of arrest.

Clarkson for noticees, owners of the *Sarpedon*.—An owner whose property is not salved, has never been liable to pay salvage. The Legislature intended to encourage life salvage, and did so by enacting in the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104, sect. 429) that claims for life salvage should have priority over claims for salvage of property, and the property salved, whether ship or cargo, or both, is liable to remunerate such claim for life salvage (*The Fusilier*, Br. & Lush. 341; 12 L. T. Rep. N. S. 186; 2 Mar. Law Cas. O. S. 39, 177); and that even when the cargo is recovered by its owners, and not by those who salved the lives of passengers (*Cargo ex Schiller. ante*, pp. 226, 439; L. Rep. 1 P. D. 473; 2 P. D. 145; 35 L. T. Rep. N. S. 97; 36 L. T. Rep. N. S. 714); therefore it certainly is liable in this case when salved by the same persons, and in the same operation. If the shipowners are to contribute, on what value is the contribution to be assessed when none of their property is salved? If a ship and crew were salved, but the cargo lost, it could not be held that the owners of the cargo should contribute in paying life salvage. In the case of *The Medina* (*ubi sup.*) the captain chose to bind, or attempt to bind, his owners by a bond given by him, expressly acting as their agent; but that is not the case here. The foundation of a suit of salvage is the maritime lien the salvors have on the salved property, and is not a personal action against the owners.

Phillimore in reply.

Cur. adv. vult.

Nov. 20, 1877.—Sir R. PHILLIMORE.—The court has already awarded the amount of salvage remuneration due in this case, namely 4000*l.* upon 28,000*l*, of specie recovered from going to the bottom of the sea, being part of the cargo belonging to the *Sarpedon*. The *Sarpedon* was abandoned at sea in a sinking condition, and has not been recovered, bnt eighty-eight persons were taken from on board her and saved by the *Calderon*, a Spanish vessel. It may be observed in passing that these persons were "persons belonging to the ship," within the meaning of sect. 458 of 17 & 18 Vict. c. 104—according to the judgment of the Privy Council in *The Fusilier ubi sup.*). The owners of the specie have cited the owners of the *Sarpedon*, the lost vessel, and now call upon them to contribute to the payment of the 4000*l.* awarded by the court.

It was contended on behalf of the owners of the specie, first, that the master of the *Sarpedon* as agent for the owners contracted with the *Calderon* to save the lives in question. I am of opinion that this averment is not in accordance with the facts of the case.

Secondly, it was contended that the master of the *Sarpedon* was bound to contract, and did contract by implication, with the *Calderon* for the saving of these lives. In support of this proposition the case of *The Medina* (*ubi sup.*) was cited. The circumstances of that case were very peculiar. The captain of the ship, which had gone to pieces, contracted on behalf of 500 pilgrims who were left on a rock just six feet above the water to have them taken off for the sum of 4000*l.*; the case was transferred to this court from the Exchequer Division of the High Court of Justice. I considered it to be a salvage contract, and reduced the amount to 1800*l.* on the ground of the unreasonableness of the amount extorted, as I thought, by intimidation. That case cannot, in my opinion, be considered as supporting the demand of the owners of specie in the case before me. I consider it to be now a fixed principle of salvage law that in the absence of any special contract some property, either ship or cargo, must be saved in order to found the liability of the owner of the ship or cargo to payment of salvage remuneration.

It has been particularly asked in this case, if the

specie as well as the ship had been entirely lost, would the owners of the lost specie have been liable to contribute to the salvage as it is argued the owners of the lost ship are? The principle was much discussed in the case of *The Fusilier* (*ubi sup.*) already adverted to; but the case of *Cargo ex Schiller* (*ubi sup.*) appears to me to have a still more direct bearing upon the question now before me. In that case the *Schiller* had been lost, but specie to a large amount, part of her cargo, had been recovered by divers. I considered the cargo was liable to pay salvage to persons who saved life from the wreck, and made an award of 500*l.* This sentence was appealed from and affirmed by two out of three judges of the Court of Appeal. Lord Justice Baggallay's judgment contained several passages which directly bear upon the present case. After affirming the liability of the cargo to pay salvage he says: "In the terms of the section, it is a liability to pay a reasonable amount of salvage; but is this to be construed as a general personal liability to be enforced against the owners under any circumstances whether the ship and cargo are lost or not, or as a liability capable of being enforced against and therefore limited to the value of the property, whether ship or cargo, saved from destruction?" After an argument, in which this question is answered in the affirmative, he says: "Upon the consideration of these several sections of the Act, I am of opinion that the liability to pay a reasonable amount of salvage to life salvors is imposed upon owners of cargo as well as upon owners of the ship, and that such liability is not a general personal liability to be enforced in any circumstances whether the ship and cargo are lost or not, but a liability limited to the value of the property saved from destruction."

I am of opinion that the owners of the lost ship are not personally liable to pay salvage, and I therefore reject the prayer of the defendants to determine how much of the sum awarded was for salvage of life and how much for salvage of specie, and to declare that the owners of the *Sarpedon* ought to pay to the owners of the specie the sum they have paid in respect of life salvage.

The motion was accordingly rejected.

E. C. Clarkson, on behalf of the owners of the *Sarpedon*, applied for their costs.

Sir R. PHILLIMORE directed the question of costs to stand over.

Nov. 27.—*E. C. Clarkson.*—The owners of the *Sarpedon* are entitled to their costs. The application on the part of the owners of the specie to bring them in was wholly unnecessary and unreasonable. The question of law as to liability was not even new, but had been decided in *Cargo ex Schiller* (*ubi sup.*) Besides, so far as we are concerned in the litigation, we have won, and we are therefore, according to the ordinary practice, entitled to our costs.

Phillimore for the owners of the specie.—The question of law was new, and we were justified in applying to have the question of liability tried between all the parties concerned.

Sir R. PHILLIMORE.—I have considered the question of costs in this case. The owners of the *Sarpedon* were brought in at the request of the owners of the specie. On the 5th May I decided what amount of salvage reward should be paid, and that it should be paid in the first instance by the owners of the specie, and condemned them also in the costs, reserving the question as to the liability of the owners of the *Sarpedon* to contribute to the payment of that award if the owners considered that they had a claim on them; there the matter rested till notice of the motion decided by the court last Tuesday was given. The court, on hearing that motion, decided that the owners of the *Sarpedon* were not liable in law to pay any salvage at all; and thus ended the attempt on the part of the owners of the specie to throw a portion of the burden of the salvage which they were primarily liable to pay on the owners of the *Sarpedon*. Under these circumstances, I am of opinion that the owners of the *Sarpedon* are entitled to their costs.

Solicitors for the plaintiffs, owners of the *Calderon, Clarkson, Son,* and *Greenwell.*

Solicitor for the defendants, owners of the specie, *Toller,* agent for *Hull, Stone,* and *Fletcher.*

Solicitors for the noticees, owners of the *Sarpedon, Pritchard* and *Sons.*

July 30 *and* 31, 1877.

THE PECKFORTON CASTLE.

Collision—Sailing rules, Arts. 12 *&* 17*—Conflict of rules—Proper manœuvres.*

When a close-hauled ship is on the leequarter of and sailing faster than one on the same tack having the wind free, and is consequently gaining on her, and their courses are such as to occasion risk of collision, Art. 12 *of the Regulations for Preventing Collisions at Sea applies and not Art.* 17*; and it is the duty of the ship having the wind free to keep out of the way of the close-hauled ship.*

Semble, the proper manœuvre for the ship having the wind free to adopt is—if the vessels have the wind on the port side, to port; and if on the starboard side, to starboard the helm.

THIS was an action *in rem* instituted by the owners of the German barque *August* against the British ship *Peckforton Castle,* for damages sustained by the *August* in a collision between the two vessels seven miles W. by S. from the Lizard about noon of the 7th July 1877. There was a counter-claim by the owners of the *Peckforton Castle* for the damages sustained by that vessel in the collision.

The wind was variously stated by the *August* to be about north, and by the *Peckforton Castle* to be about N.W.

The *August* was bound up channel on a voyage from Beaufort, South Carolina, to Bremerhaven, and was steering east with the wind free, going about four and a-half knots an hour.

The *Peckforton Castle* was bound down Channel on a voyage from Rotterdam to Cardiff in ballast, and was close-hauled on to port tack, making about five and a-half knots per hour.

When first observed the *Peckforton Castle* was on the starboard (lee) quarter of the *August,* and the *August* on the port (weather) bow of the *Peckforton Castle,* and the *Peckforton Castle* was overhauling and approaching the *August* on her lee (starboard) quarter. Neither vessel performed any evolution till the collision was imminent, each considering that it was the duty of the other to get out of the way. At the last moment the helm of the *August* was put hard a-starboard, and that of the *Peckforton*

Castle hard a-port, but notwithstanding these manœuvres the port bow of the *Peckforton Castle* came into collision with the starboard side of the *August* about the main rigging, doing so much damage that the *August* had to put into Plymouth to repair them.

July 30.—The cause came on for hearing before Sir Robert Phillimore, assisted by two of the Elder Brethren of the Trinity House as assessors.

The argument turned on articles 12, 17, and 18 of the Regulations for Preventing Collisions at Sea, which are as follows:

Art. 12. When two sailing ships are crossing so as to involve risk of collision; then if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled, and the other ship free, in which case the latter ship shall keep out of the way; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

Art. 17. Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel.

Art. 18. Where by the above rules one of two ships is to keep out of the way the other shall keep her course, subject to the qualifications contained in the following articles.

E. C. Clarkson and *C. Hall* for the plaintiffs, owners of the *August*.—The case is governed by Articles 17 & 18 of the regulations for preventing collisions at sea. The *Peckforton Castle* was an overtaking ship within the rule laid down in *The Franconia* (*ante*, p. 295; L. Rep. 2 P. D. 8; 35 L. T. Rep. N. S. 721). Had it been night she could not have seen our side-lights in consequence of our relative positions; it was therefore her duty to keep out of the way, which she did not attempt to do till too late, ours to keep our course, which we did.

Butt, Q.C. and *Myburgh*, for the defendants, owners of the *Peckforton Castle*.—The case is governed by Articles 12 and 18. The vessels were crossing vessels; it cannot be said that a vessel beating down channel is following one running up with a fair wind; and it is the case of crossing vessels, where both vessels "have the wind on the same side;" and therefore "the ship which is to windward" (the *August*) "shall keep out of the way of the ship which is to leeward"; and by Article 18, we were bound to keep our course, which we did.

Clarkson in reply.

July 31.—Sir R. PHILLIMORE, after consultation with the Trinity Masters.—It has been very properly admitted by the counsel on both sides that the real question at issue is whether Article 12 or Article 17 of the Regulations for Preventing Collisions at Sea applies to the facts and circumstances of this case. [His Lordship then read Article 12, given above, and proceeded:] Now, the wind, according to the *Peckforton Castle*, the defendant and counter-claimant, was N.W. by N., and according to the *August* was N. The *Peckforton Castle* was heading N.E. by N. a little before the collision, and N.E. at the time of the collision. The *August* was heading about E. It appears, therefore, that there was a difference of four points in the direction of their heads, and that both had to wind on the same (the port) side. The collision was a sliding blow—the *Peckforton Castle*, from leeward, striking the starboard beam of the *August* about her main rigging. Now, it is admitted that the *August* had the wind three points free. She says she saw the ship three points abaft her lee (starboard) beam, and the question, therefore, is which of the two rules is to be considered as governing this case. Does the rule which says that a ship with the wind free shall get out of the way of one close-hauled override? or is it consistent with the other rule, that "every vessel overtaking any other vessel shall keep out of the way of such last-mentioned vessel?" That is a question on which I decide with a certain amount of diffidence, notwithstanding the assistance which I have had from the Elder Brethren of the Trinity House. I am of opinion, however, that, although the vessel which had the wind free was being overtaken by the faster ship, yet, as the faster ship was close-hauled, and as both had the wind on the same side, the rule which governs this case is that which is contained in the 12th Article. I think the vessel which had the wind free ought to have ported in time to avoid a collision; at all events, she ought to have taken any steps which were necessary to avoid a collision. I say again, I pronounce my opinion with great diffidence; but, on the best judgment I can form in this matter, it is that the rule which applies in this case is that a vessel with the wind free shall keep out of the way of one close-hauled. I must, therefore, pronounce the *August* alone to blame.

Solicitor for plaintiff, *Thomas Cooper*.

Solicitors for defendants, *Gregory, Rowcliffe*, and *Co.*

Dec. 7 *and* 8, 1877.

THE PHILOTAXE.

Collision—Rules for preventing collisions, Arts. 15, 17, 19, *and* 20—*Thames Conservancy Rules, Rule* 29, *Arts. A., F., H., & J.—Practice—Assessors—Disagreement.*

A steamer manœuvring to come to an anchor in a place and manner such, that her regulation lights cannot be seen by an approaching vessel, is bound to give timely notice of her presence by showing a light or some other sufficient means.

Semble, the case of a faster-sailing vessel overtaking a slower steamer, in the ordinary course of navigation, is governed by Art. 17 *and not by Art.* 15 *of the Regulations for Preventing Collisions at Sea.*

Semble, where the two assessors disagree, the court can call in a third, and, after submitting the evidence already given to him, have the case reargued before the three assessors.

THIS was an action *in rem*, instituted by the owners of the British screw steamer *Carlotta*, for damages sustained by that vessel in a collision with a Norwegian barque *Philotaxe*, which took place in Sea Reach of the river Thames, about 11 p.m., on 5th Oct. 1877. There was also a counter-claim *in rem* by the owners of the *Philotaxe* for the damages sustained by that vessel in the same collision. The action was originally brought in a county court, but was transferred to the high court.

At the time of the collision the weather was fine but dark, the wind about E.S.E, blowing up the reach a moderate breeze, and the tide nearly high-water. The *Carlotta* was a screw steamer of 383 tons register, and was bound from Seaham to London with a cargo of coals, and at the time

of the collision was about to anchor on the north shore, a little below Thames Haven. For this purpose her engines had been stopped, and she was lying almost motionless with head angling to the north shore in a N.N.W. direction. She had her regulation lights burning. Under these circumstances the *Philotaxe*, a barque of 389 tons register, on a voyage from Christiana to London with a cargo of ice, came up the reach under topsails and foresail, running about three knots an hour before the wind, on a W.N.W. course.

From the relative position of the two vessels it was impossible for the *Philotaxe* to see the regulation lights of the *Carlotta*, and the *Carlotta's* hull was not distinguished till the *Philotaxe* was about a ship's length off, when it was seen right ahead, and the helm of the *Philotaxe* was put hard a-starboard. Those on board the *Carlotta* observed the red light of the *Philotaxe* on their starboard quarter about a quarter of a mile off, and shortly afterwards her green light. The steam whistle of the *Carlotta* was—it was alleged on the part of the *Carlotta*, but denied by the *Philotaxe*—sounded and her engines were put on full speed ahead, and her helm hard aport, but the stem of the *Philotaxe* struck the starboard quarter of the *Carlotta*.

On the 7th Dec. 1877 the case came on for hearing before Sir R. Phillimore, assisted by two of the Elder Brethren of the Trinity House.

The argument turned upon the construction of Arts. 15, 17, 19, and 20 of the Regulations for Preventing Collisions at Sea, which are as follows:

Art. 15. If two ships, one of which is a sailing ship and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the sailing ship.

Art. 17. Every vessel overtaking any other vessel shall keep out of the way of the said last mentioned vessel.

Art. 19. In obeying and construing these rules due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger.

Art. 20. Nothing in these rules shall exonerate any ship, 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 collision taking place in the River Thames above Yantlet Creek, the vessels were also subject to the Rules and Bye-laws for the Regulation of the Navigation of the River Thames, made by the conservators of the river. Those having reference to the present case were approved by an Order in Council of 5th Feb. 1872, and of these Rule 29, Arts. F., H., J., and A. are identical with Arts. 15, 17, 19, and 20 respectively, except some merely verbal differences between the last-mentioned one in each case. (a)

Milward, Q.C. and with him *Phillimore* for the plaintiffs, owners of the *Carlotta*.—This case is governed by Art. 17 (Rule 29, Art. H.), which is special, and therefore overrides Art. 15 (Rule 29, Art. F.), which is general. That the overtaking ship was a sailing vessel, and the one overtaken a steamer, is unimportant. The *Carlotta* was not "proceeding" at all; she was lying stationary, so far as any motive steam power was concerned. Yet, not being anchored, she was on her voyage to London and was drifting with the wind and tide up the river, and so was, if "proceeding" at all, "proceeding" away from the *Philotaxe*, which was behind her, and not therefore so "as to involve risk of collision;" it was the "proceeding" of the *Philotaxe* coming up astern which involved the risk, and therefore the *Philotaxe* was an overtaking vessel. We must, under the circumstances, be considered as a vessel under way, because we were bound to carry the regulation lights (*The Esk and The Gitana*, L. Rep. 2 A. & E. 350; 20 L. T. Rep. N. S. 587; 3 Mar. Law Cas. O. S. 242) and "no others;" and so far as the relative courses of the vessels were concerned, we came within the rule laid down by the Court of Appeal in *The Franconia* (*ante*, p. 295; L. Rep. 2 P. D. 8; 35 L. T. Rep. N. S. 721), to determine what are overtaking vessels. Besides, we were in the position of a vessel *quasi* disabled, we were out of the fair way of the river, and just coming to an anchor, we could not go far ahead because of the shore, and we could not go astern on account of vessels anchored further out than we were. If the *Philotaxe* came inside vessels at anchor she did it at her own risk, and Rule 19 (Rule 29, Art. J.) applies to the case. We saw her at a time when she might, by proper manœuvres, have avoided the collision, and we gave her notice of our position by whistling, which was all we could do under the circumstances. When we began to manœuvre to come to anchor the river was clear; there was, therefore, no negligence on our part, but a proper observance of the rules. There could not have been a proper look-out on board the *Philotaxe*, or they would have seen us sooner than they did; had they done so they would have starboarded sooner, and kept clear.

Clarkson (with him *C. Hall*) for defendants, owners of the *Philotaxe*.—We admit that the simple case of a slow steamer overtaken by a fast sailing vessel would be governed by Art. 17 and not Art. 15. [Sir R. PHILLIMORE.—You say that neither of those articles applies to the present case.] Neither of them, for we should not have been an overtaking ship except for the act of the *Carlotta* in slowing and stopping her engines. A steamer stopping and throwing herself across the river, for whatever purpose, does so at her own risk, and must not embarrass other vessels by her manœuvre. The *Carlotta* had no proper look-out; had she had one she would have seen our lights their full distance (two miles), probably before she began to come across the river; but she admits that she only saw them at a distance of a quarter of a mile. Had she seen them sooner, she could have straightened again, or even if, when she did see them, she had shown a light (*The John Fenwick*, 1 Asp. Mar. Law Cas. 201; L. Rep. 3 A. & E. 500; 26 L. T. Rep. N. S. 322), we might have been able to get out of the way. The case is really under Art. 20 (Rule 29, Art. J.) There was no negligence on the part of the *Philotaxe*. We were lawfully navigating the river; we were running up nearly mid-channel, and we had a perfect right to go whichever side of the vessels at anchor we thought fit, and to expect that any vessel obstructing the navigation would give timely notice of it to us. We had a

(a) It may be noticed that in the authorised printed copy of the Thames Conservancy Rules the marginal note to Rule 29, Art. F., confines its operation, as far as sailing ships are concerned, to "sailing vessels in tow;" but the article itself is identical with Art. 15 of the Regulations for Preventing Collisions at Sea, given above.

good look-out, but we could not see this low black object on the water till close upon it. Had its presence been notified to us, as it might have been, we should not have come inside the vessels at anchor, and the collision would not have happened.

Milward, Q.C., in reply.

Dec. 8.—Sir R. PHILLIMORE, after consultation with the Trinity Masters.—There is in this case so decided a difference of opinion between the two gentlemen by whom I am assisted, and on whose opinion in nautical questions I repose great confidence, that I think it would be better before giving my judgment—which agrees with the opinion of one of the Elder Brethren of the Trinity House, but is contrary to that of the other—to ask for the attendance of a third Trinity Master, to give him an opportunity of considering the evidence already given, and then on a future day—without detaining the witnesses, and so incurring expense—to have the question re-argued before myself and the three Elder Brethren; but if the parties desire it I will deliver the judgment at once, in which, as I have already observed, one of the Elder Brethren concurs.

Counsel on both sides being agreed that it would be more convenient to have the judgment at once, without incurring the expense of a fresh argument, and of printing the evidence for the third Trinity master,

Sir R. PHILLIMORE.—I feel the cogency of the objection of putting the parties to further expense, and I will give my judgment, in which one of the Trinity Masters agrees.

This is a collision which happened upon the 5th October in this year, between eleven and twelve o'clock at night, and the place was a little below Thames Haven, in the river Thames. The direction of the wind was E.S.E. The vessels that come into contract were the *Carlotta*, a British steamship of 383 tons register, with a crew of sixteen hands, and the Norwegian barque *Philotaxe*, of 389 tons register, manned by a crew of eleven hands. The *Carlotta* had a cargo of coals, and the *Philotaxe* had a cargo of ice. The state of the weather, which is material in this case, is alleged and is proved to have been fine and clear—that is, it was a night on which lights were visible, though objects on the water were difficult to make out. A point in which the Elder Brethren are perfectly agreed is that the lights were all distinctly visible at a proper distance. The portions of the vessels which came into contact were the stem of the *Philotaxe* and the starboard quarter of the *Carlotta* about twelve feet from the stern. The *Carlotta's* story is that she was about to drop an anchor on the north shore, and to the north of two vessels—a brig and a barque. It is important to notice that, according to her statement, she was to the northward of both these vessels. The evidence shows that she had passed the *Philotaxe* some twenty-five minutes or half an hour before that vessel passed, as the evidence also shows she did pass, between the brig and the barque. It will be understood that, the *Carlotta* having gone to the northward, the *Philotaxe* came between the brig and the barque; and the contention is that she had no right to do that, and that she ought to have kept to the southward, in which case there would have been no collision. Two facts are undisputed in respect to the two vessels: it is admitted that the *Philotaxe* carried her proper lights, and it is uncontroverted that the *Carlotta* was not visible, so far as her lights were concerned, to the *Philotaxe* when she came between the two vessels and was an approaching vessel. It is admitted that the *Carlotta* had no look-out on the starboard side aft, and that she took no other precaution than that of whistling. She said she was under a port helm, with her head N.N.W. or North, making a little way up the river with the wind and tide; that her engines were stopped and her anchor ready to let go. In this state of things she sees the red light of the *Philotaxe* with her sails set, about a quarter of a mile off; and the speed at which the *Philotaxe* was coming is shown to have been between four and five knots an hour. The *Carlotta* stated that she caused her whistle to be blown, and as the *Philotaxe* came on and exhibited her green light, the engines of the *Carlotta* were put full speed ahead, and her helm hard aport, and that the *Philotaxe* came on and struck her on the starboard quarter. The counter-statement of the *Philotaxe* is that she was proceeding W.N.W. with her proper regulation lights duly exhibited; that the *Carlotta* had passed her half an hour before at a distance of a ship's length, and that when, shortly before the collision, she became aware of the presence of the *Carlotta*, she adopted the right course, namely, putting her helm to starboard; but that nevertheless her stem came into collision with the starboard quarter of the *Carlotta*. She says the *Carlotta* was to blame for putting herself across the river at an improper time, without having regard to the circumstances: and the *Carlotta* contends that the *Philotaxe* was to blame for not taking proper measures for getting out of the way, one being a vessel about to be overtaken and the other an overtaking vessel.

I do not think it necessary to decide whether Art. 17 does or does not apply to the position of a vessel like that in which the *Carlotta* was. Art. 20 appears to me to be of great importance in the present case. The words of that article are these: "Nothing in these rules shall exonerate any ship, 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." Then follow words which ought to be borne in mind: "Or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."

Now, the court, with the advice of one of the Elder Brethren of the Trinity House, is of opinion that the *Philotaxe* appears to have been carefully managed. She shortened sail whilst coming up the river, reducing her speed before reaching the Chapman Light; she had a good look-out, and she exhibited her proper lights. The court is unable to see why she was bound to go to the south side of the river, or why she was not at liberty to have taken a similar course to that which the *Carlotta* had done. The court, therefore, is of opinion that the *Philotaxe* is not to blame for going between the barque and the brig, taking the precautionary measures which she had done.

The *Carlotta*, it appears to the court, having passed the *Philotaxe*, proceeded on her course up Sea Reach, and passed to the northward of the two vessels described as at anchor, the southernmost of which is proved to have been

in a place where the Mucking Light showed white. The *Carlotta* appears to have gone to the northward for the purpose of anchoring, altering her course from W.N.W. to North, the result of which was that she threw herself in the course of any ship following. The night was dark but clear, and had a proper look-out been kept, the lights of the *Philotaxe* must have been seen in sufficient time to have allowed the *Carlotta* to have taken some precaution which would have prevented the collision which ensued. I do not prescribe any particular act, but she might have shown a light, or by some other means have indicated her position. It is alleged that she whistled and hailed; but on the other hand, the evidence is that neither was heard. Looking to the peculiar circumstances of this case, the whistling, if any, took place at too late a period to give any useful indication of the position of the vessel.

On the whole, the court is of opinion, with the advice of one of the Elder Brethren of the Trinity House, that the *Carlotta* is alone to blame, and that she did "neglect" some "precaution," which was "required by the special circumstances of the case." I therefore pronounce the *Carlotta* alone to blame.

On the application of the plaintiffs, a stay of execution was granted.

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

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

Tuesday, Dec. 4, 1877.

THE NATIVE PEARL.

Co-ownership—Action in rem—Default of appearance—Accounts—Reference—Joinder of defendant—Practice—Rules of Supreme Court, Order XVI., r. 13.

Where an action is brought in rem against a ship by the owners of certain shares therein claiming possession and an account against the managing owner, and the latter makes default in appearing, the court will order such managing owner to be joined as a defendant, so that his accounts may be investigated, and will give possession to the plaintiffs if they hold a majority of shares; but will not order, before the reference, a sale of the defendant's shares to satisfy the plaintiffs' costs and any sum found due at the reference.

THIS was an action brought by the owners of forty-four 64th shares in the British ship *Native Pearl*, in lien against that vessel, to obtain possession of the ship as against Nicholas Richardson the owner of the remaining twenty 64th shares, and to obtain from the said Nicholas Richardson, as late managing owner an account of his management.

The writ was served on the ship in the usual way on the 1st Oct. 1877, and the ship was subsequently arrested by the marshal, but no appearance was entered by Nicholas Richardson or any other person.

The plaintiff's statement of claim alleged that Richardson, as managing owner, had possession of the ship and of her certificate of registry, that he had managed her improperly, that his authority as managing owner had been revoked by the plaintiffs, that the plaintiffs were desirous of obtaining possession of the ship and the certificate, which Richardson refused to deliver up, and that Richardson had refused and neglected to render proper accounts relating to the management and earnings of the said ship, and such accounts were still outstanding; and the plaintiffs claimed possession of the ship and of her certificate of registry, a reference of the accounts to the registrar and merchants, a sale of Richardson's shares in the ship, and payment out of the proceeds such sale of the balance found due to the plaintiffs upon the accounts and of the costs.

The action now came before the court on motion for judgment. In support of the statement of claim, an affidavit of the plaintiffs verified the facts stated in the statement, and further said that Richardson had failed to account for two voyages, and that his accounts for a previous voyage were deficient, that he had been dismissed from his post as managing owner, but that he declined to deliver up possession of the said ship or of her certificate of registry.

James P. Aspinall, for the plaintiffs, in support of the motion.—The plaintiffs being owners of a majority of the shares, are entitled to possession of the ship, and also to her certificate of registry, the delivery up of which I ask the court to order under the general power possessed by the court:

The St. Olaf. ante, p. 268; 35 L. T. Rep. N.S. 428.

The Frances, 2 Dods. 420.

But, as to the accounts, there is a difficulty. Richardson has not appeared, and, consequently, although the plaintiffs are entitled to a reference, they will have no accounts to refer; and, as Richardson is not a party, there is no means of making an order upon him to file his accounts. I ask the court to make Richardson a party to the action as defendant, and that the proceedings may be served upon him. By the rules of the Supreme Court, Order XVI., r. 13, it is provided that "no action shall be defeated by reason of the misjoinder of parties. . . The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order. . . . that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be neccessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added." Here the presence of Richardson is clearly necessary in order to enable the court to settle the question of accounts. This course has already been taken in an action *in rem* in *The Annandale* (*ante*, p. 489; L. Rep. 2 P. Div. 179; 37 L. T. Rep. N. S. 364). I also ask for sale of Richardson's shares to satisfy the plaintiffs' costs, and any sum that may be found due to the plaintiffs on the reference.

Sir R. PHILLIMORE.—The plaintiffs are entitled to possession of the ship and of the certificate of registry; and for this I pronounce judgment, and order that the ship and certificate be delivered up to them within three days after service of my order on Richardson, the late managing owner. I also order a reference of Richardson's accounts to the registrar, and that the name of such managing owner be added as a defendant, and that he be served with the proceedings, as provided by the rules. But with respect to the sale of the late managing owner's shares, I shall hold my hand until after the reference. It may be that he will pay the costs and what is found due without the necessity of selling the shares; or it may be that nothing will be found due to the plaintiffs, but something to the

defendant; and that, whatever costs they are entitled to in respect of recovering possession of the ship, are counter-balanced by the amount due to the defendant.

Solicitor for the plaintiff, *H. C. Coote.*

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

July 19 *and* 20, 1877.

(Before the LORD CHANCELLOR (Cairns), Lords O'HAGAN, SELBORNE, BLACKBURN, and GORDON.)

STEEL AND ANOTHER *v.* THE STATE LINE STEAMSHIP COMPANY.

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

Ship—Bill of lading—Warranty of seaworthiness—Exceptions—"Peril of the seas, however caused"—Open port.

In the absence of express words to the contrary, a bill of lading implies a warranty of seaworthiness, and all the exceptions in it must be taken to refer to a period subsequently to the sailing of the ship with the goods on board.

A ship sailed from America for Scotland with a cargo of wheat, and in the bill of lading "peril of the seas, however caused," was excepted. During the voyage the wheat was damaged by sea water. In an action by the indorsees of the bill of lading against the owners the jury found that the water obtained access to the cargo in consequence of one of the ports being insufficiently fastened, and on this finding the Court of Session entered a verdict for the shipowners, on the ground that the loss was covered by the exception in the bill of lading.

Held (reversing the judgment of the court below), that, as in order to bring the loss within the exception it must be found that the ship sailed with the port in a seaworthy state, and the jury had not done so, a new trial must be had.

THE respondents in this case were the owners of a line of steamers trading between New York and Glasgow. One of their steamers, the *State of Virginia*, sailed from New York with a cargo of wheat. On the voyage, after the ship had been five days at sea, she was found to be leaking very fast, and it was discovered that one of the orlop-deck ports was unfastened. The wheat was much injured by the sea-water, and the appellants, who were the indorsees of the bill of lading, brought this action to recover the damage they had sustained.

The bill of lading contained these exceptions, "bursting of bags, risks of craft or hulk, transshipment, explosion, heat, or fire at sea in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury however such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation, or land transit, of whatever nature or kind soever, and howsoever caused, excepted." The case was tried before Lord Young, when the jury found a special verdict in the following terms: "That the wheat was shipped to be conveyed according to the terms of the bill of lading; that the wheat was carried to Glasgow and delivered to the pursuers; that when delivered it was not in the like good order and condition in which it was shipped; that through the negligence of some of the crew one of the orlop-deck ports of the said steamship was insufficiently fastened, and that in consequence the said sea-water was thereby admitted to the hold after the ship had been five days at sea; that as the said ship was loaded, the said port was situated about a foot above the water line, and that if properly fastened by means of the screws thereto attached the said port would have been watertight throughout the voyage; that the said sea-water was not admitted to the hold till the morning of Sept. 6, and that for the first seven days of the voyage the weather encountered was substantially as set forth in the mate's log, which forms part of the process."

Upon these findings the First Division of the Court of Session, consisting of the Lord President (Inglis), and Lords Deas, Mure, and Shand, entered a verdict for the shipowners (the defenders). The pursuers then appealed to the House of Lords.

Benjamin, Q.C. and *Watkin Williams*, Q.C. appeared for the appellants, and contended that the whole bill of lading proceeded on the assumption that the ship sailed in a seaworthy condition, which it could not be if the port was improperly secured. All the exceptions depend on the implied warranty of seaworthiness, the breach of which was the cause of the loss. On the bill of lading the owner is *primâ facie* liable, unless he can bring himself within the exceptions.

Cohen, Q.C. and *J. C. Mathew*, for the respondents, argued that it was impossible to go beyond the verdict of the jury, which does not raise a case of anything more than negligence against the owners, which would be covered by the exception in the bill of lading of "perils of the seas, however caused;" some of the exceptions clearly applying to risks which might occur during the loading, before the ship had sailed on the voyage. The following cases were referred to, in addition to those cited in the judgments:

Merchants Trading Company v. *Universal Marine Company*, 2 Asp. Mar. Law Cas. 431 (reported also in *Dudgeon* v. *Pembroke*, at L. Rep. 9 Q.B. 596 and 31 L. T. Rep. N. S. 39);

Stanton v. *Richardson*, 1 Asp. Mar. Law Cas. 449; 2 *Id.* 288; 3 *Id.* 23; L. Rep. 7 C. P. 421 and 9 C. P. 390; 27 L. T. Rep. N.S. 513; 30 L. T. Rep. 643, and in the House of Lords, 33 L. T. Rep. N.S. N. S. 193;

Dudgeon v. *Pembroke*, 2 Asp. Mar. Law Cas. 323; 3 *Id.* 101, 393; L. Rep. 9 Q. B. 581; Q. B. Div. 96; 2 App. Cas. 284; 31 L. T. Rep. N. S. 31; 34 L. T. Rep. N. S. 36; 36 L. T. Rep. N. S. 382;

Macmanus v. *Lancashire and Yorkshire Railway Company*, 4 H. & N. 327;

Carr v. *Lancashire and Yorkshire Railway Company*, 7 Ex. 707;

Daniells v. *Harris*, 2 Asp. Mar. Law Cas. 413; L. Rep. 10 C. P. 1; 31 L. T. Rep. N.S. 408;

Smith v. *Kirby*, L. Rep. 1 Q. B. Div. 136; (*a*)

(*a*) Q. B. Div. *Dec.* 15, 1875.—SMITH *v.* KIRBY AND ANOTHER.—This was an action brought to recover damages for the loss of a cargo of maize, which was lost in a collision whilst being carried on board the defendants' steamship the *George Cairns*. The case came on for trial at the London Sittings after Trinity Term 1875, when the verdict was found for the plaintiff, subject to a reference to an arbitrator as to the amount of damages. The arbitrator subsequently found £9352 11s. as due to the plaintiff, and gave his certificate accordingly. The defendants thereupon obtained a rule calling on the plaintiff to show cause why the certificate should not be varied by reducing the amount of the damages to £9168, being the aggregate amount at £8 per ton of the tonnage of the *George Cairns*, on the ground that the defendants were not liable for more under sect. 54 of the Merchant Shipping Amendment Act 1854 (25 & 26 Vict. c. 63),

Allday v. *Great Western Railway Company*, 5 B. & S. 903.

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

The LORD CHANCELLOR (Cairns).—My Lords, there is some difficulty in this case by reason of the course which it has taken in the court below; but, I think, when your Lordships consider the whole of the facts as far as they appear, and the arguments which your Lordships have heard, there cannot be much doubt as to the result at which your Lordships should now arrive.

The question arises upon the shipment of a considerable quantity of wheat at New York in one of the State Line steamers named the *State of Virginia*. The present appellants are the indorsees of the bill of lading of that wheat, but, having regard to the provisions of the Bills of Lading Act, they are onerous indorsees, and they stand in the position of the original shippers; they have whatever right of action the original shippers had, and I may speak of them as if they had been in point of fact the shippers of the wheat.

Now, on the shipment of the wheat, a bill of lading was given, and I will in the first place direct your Lordships' attention to that bill of lading. It contains an affirmative portion, and also a portion which we may call a negative portion, or rather a portion which, by way of exception and curtailment of some antecedent liability created by the earlier portion, endeavours to protect the shipowners from certain consequences. The affirmative part of the bill of lading is this: it states that the wheat in question, marked and numbered as in the margin, has been shipped, and is "to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition, at the aforesaid port of Glasgow." It is an engagement, therefore, to carry and to deliver at a certain port in this kingdom the wheat so shipped on board. What is the meaning of the contract created by those words supposing they stood alone? I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement; a contract by the shipowner that the ship in which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which he engages to undertake and perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy. By "seaworthy" I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and loaded in that way, may be fairly expected to encounter in crossing the Atlantic. If there were no authority upon the question, it appears to me that it would be scarcely possible to arrive at any other conclusion than that this is the meaning of the contract. I took the liberty of asking the learned counsel for the respondents whether they were prepared to say that, if the owner of goods engaged room in a ship of this kind, and on bringing his goods alongside at the time the ship was ready for departure found that it was not seaworthy, he could not refuse the fulfilment of his promise to put his goods on board, and whether on the other hand he could not maintain proceedings against the owner of the ship for not having accommodation for his goods in a ship that was fit to carry them. I did not understand the learned counsel for the respondents to deny that the relative position of the owner of the goods, and the shipowners, was that which I supposed; that on the one hand the owner of the goods was entitled to refuse to put his goods on board, and on the other hand the owner of the ship did incur liability by not having a ship fit to fulfil the engagement he had entered into. But if that is so it must be from this, and only from this, that in a contract of this kind there is implied as part of the contract an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle I think there could be no doubt that this would be the meaning of the contract, but having regard to authority it appears to me that the question is really concluded by authority. It is sufficient to refer to the case of *Lyon* v. *Mells* (5 East, 428), in the Court of Queen's Bench, in the time of Lord Ellenborough, C.J., and to the very strong and extremely well-considered expression of the law which fell from the late Lord Wensleydale, when he was a judge of the Court of Exchequer, and was advising your Lordship's House in the case of *Gibson* v. *Small* (4 H. L. Cas. 353).

That being, as I submit to your Lordships, the effect of the earlier part of the bill of lading it then becomes material to consider still upon the construction of the bill of lading, what is the effect of the latter part, the qualified or exceptional part of the bill of lading. It is not very happily expressed as regards its grammar and the collocation of the words, but I will assume in favour of the respondents that everything that is mentioned between the words "not responsible" and the word "excepted" is meant to be matter in respect of which there is to be no liability on the part of the shipowner. But, looking at all that is mentioned between those two termini in the bill of lading, it appears to me that everything which is mentioned is matter subsequent to the sailing of the ship with the goods on board. There is mentioned there "the bursting of bags," and "the following perils, risks of craft or hulk"—which was

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the loss having occured without the fault or privity of the defendants. The gross tonnage of the *George Cairns* was 1021 tons, and the difference between the amount due at the rate of £8 per ton and the amount awarded, did not exceed interest from the date of the collision to judgment at the rate of 4 per cent per annum.

Cohen, Q.C. for the plaintiff, showed cause, and contended that on the authority of *The Northumbria* (3 Mar. Law Cas. O. S. 314; L. Rep. 3 A. & E. 6), the plaintiff was entitled to interest on the aggregate amount at £8 per ton of the ship's tonnage from the date of collision and that the above case was in accordance with the practice of the Courts of Chancery and Admiralty, which always allowed interest.

W. William, Q.C. for the defendants, in support of the rule, tried to distinguish the cases on the ground that in the present case there was only a single claim, whereas in the other cases there were several claims, none amounting to the full liability value.

The COURT (Blackburn, Quain, and Archibald, JJ.) held that there was no distinction in the case, and that the court would adhere to the established practice, and allow interest as claimed by the plaintiff, and discharged the rule. *Rule discharged.*

Solicitors for the plaintiff, *Hollams, Son, and Coward.*

Solicitors for the defendants, *Ingledew, Ince* and *Greening.*

found by the verdict, which I shall afterwards have to refer to, not to mean the risk of the ship herself—"transhipment, explosion, heat, or fire at sea in craft or hulk, or on shore, boilers, steam, or machinery, or from the consequences of any damage or injury thereto, however such damage or injury may be caused, collision, straining, or other perils of the seas, rivers, navigation, or land transit, of whatever nature or kind soever and howsoever caused, excepted." The only attempt to give any of these words a meaning which would refer them to what happened antecedent to or at the time of the departure of the ship was to construe the words "peril of the sea, however caused," so as to make them point to unseaworthiness ending in a loss at sea. But it appears obvious to me that what is here referred to as "peril of the seas" is, as described, something which happens on the transit, whether land or sea transit, and that, of course, does not commence till the ship leaves the port. Therefore, if it be the case, as I submit to your Lordships, it is, that in the earlier part of the bill of lading there is an engagement that the ship shall be reasonably fit to perform the service which she undertakes, there is, in my opinion, nothing in the latter part of the bill of lading which qualifies that engagement.

Now, that being the view of the construction of the bill of lading which I shall submit to your Lordships, let me proceed to apply it to what is found to have occurred in the present case. With regard to the pleadings, there is a statement in the 5th article of the condescendence of the pursuers (the appellants) that "when the said vessel left New York she was not in a seaworthy condition in respect of one of her side ports being open, or, at least, not sufficiently secured or fastened to prevent the influx of water into the hold; and the said port was allowed to remain open, or insecurely fastened, through the gross carelessness of those in charge of the vessel, and the result was that water flowed into the hold through the said port; and so little care was taken of the cargo that there were about fifteen feet of water in the hold before the fact of the leakage was discovered, and it is the damage done to the wheat in consequence of this influx of water which forms the subject of complaint in the action." There is a denial to that, but it is explained that on Sept. 6th, when the *State of Virginia* was about 1100 miles from New York, one of the side ports was burst open to some extent by the heavy seas which she encountered, and water overflowed into the hold through the said port." That will show your Lordships sufficiently the character of the allegations on the one side and on the other on that point, and to that I may add, in the statement on the part of the pursuers No. 3, it is said, 'when the said vessel sailed from New York on the said voyage she was unseaworthy," and to that there is a denial that the vessel was unseaworthy when she sailed from New York. There is one statement to which I shall refer in the condescendence; but, upon the general averment and denial, the first plea in law for the pursuers, before the additional pleas, was this: "The pursuers having sustained loss and damage to the extent aforesaid through the unseaworthiness of the defender's vessel, and the failure of the defenders to fulfil the said contract of carriage and safe custody, are entitled to decree for the sum sued for with interest and expenses." The case came on for a jury trial in Scotland, and the jury found on the issue a special verdict, and that special verdict finds.—[His Lordship then read the findings of the jury as set out above, and continued:]

Now, looking to this special verdict, and looking to that alone for the facts with which we have to deal, it appears to me that if our attention was confined merely to that special verdict there would be very great incertitude and ambiguity as to what the facts really were. Whether the ship at the time she left New York was or was not in a condition fit to perform the service which she had undertaken with reference to these goods, whether she was or was not "seaworthy" in the sense in which I have used that term, was a question of fact, and in the view which I have taken of the construction of the bill of lading, it was a question of fact which lies at the very root of this case. But your Lordships do not find in the special verdict, as I read it, any answer whatever to that question of fact. And although the Court in Scotland thought themselves able to apply the verdict, and to enter upon it a judgment for the defenders, and although the appellants in the first instance asked your Lordships to reverse that judgment and to enter a judgment for them, I think it has come to be admitted in argument on both sides that if the construction of the bill of lading be such as I have submitted to your Lordships it is, there is not here any finding upon the question of fact whether the ship was or was not seaworthy upon which judgment can be entered either way. Therefore I fear, although I regret the result that nothing can be done by your Lordships now but remit the case to the Court of Session in Scotland, and to direct that a new trial shall be had.

The judgment of the Court of Session was unanimous, but I do not see that in point of fact there was any opinion expressed by the learned judges in that judgment which is at variance with the law as I understand it, and as I have endeavoured to submit it to your Lordships. What I mean is this: I do not understand that any of those learned judges would have said that, if the question was, what is the construction of the affirmative part of this bill of lading, they would have placed that construction on any other footing than that on which I have endeavoured to place it. But what it appears to me was the error of those very learned persons was this, that although at one part of the judgment they appear to recognise the construction which I have mentioned of the earlier part of the bill of lading, they seem afterwards to have been entirely occupied with the other part of the bill of lading, with the exceptions in it, and to have assumed that these exceptions would be sufficient to wipe out or destroy what was the stipulation in the earlier part of the bill of lading. I say that for this reason: I find that the Lord President in the earlier part of his judgment expressed himself thus: "I think it is conceded on the part of the shipowners, the defenders here, that the object of this clause was to save them from all liability implied in the obligation to deliver in like good order and condition, except a liability which might arise from the unseaworthiness of the vessel. If they provided a seaworthy ship, tight, staunch, and strong, well manned and equipped for the carriage of goods, they say that in consequence of the manner in which the clause of

excepted risks is conceived they are free from all "other liability." I understand the Lord President to recognise and to approve of that which he calls a concession in argument on the part of the shipowners, and I understand it to be a statement by the Lord President that the shipowners were bound to provide a "seaworthy ship, tight, staunch, and strong, and well manned, and equipped for the carriage of goods." And that is simply the proposition which I have submitted to your Lordships to be correct in point of law. I do not understand that any of the learned judges differed from that proposition, and I again say that it appears to me that the only miscarriage which took place was that, having so laid down their views of the law, they did not apply it correctly with reference to the verdict which they had before them and with reference to the exceptions in the bill of lading.

I submit, therefore, to your Lordships that this appeal must be allowed to the extent of reversing the interlocutor of the Court of Session, and remitting the case with a declaration that there ought to be a new trial of the case.

Lord O'HAGAN concurred.

Lord SELBORNE.—My Lords, I also entirely agree with my noble and learned friends as to the law to be applied to this case, and also as to the construction of the bill of lading.

It was suggested that the bill of lading covered risks by way of exception, some of which might occur during the loading of the cargo on board, and the stowing of it in the ship. I cannot agree to that construction. It appears to me to be clear on the face of the bill of lading that it represents the goods as already shipped. It is given in duplicate in the ordinary course, and I also find that it is expressly stated by the pursuers in their condescendence that the wheat had been loaded on board the ship before and on the day which is the date of the bill of lading. I therefore quite agree that all the perils which were excepted were perils subsequent to the loading of the wheat on board the ship, and that they 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. I also concur as to the course which it is necessary for your Lordships to take, looking to the issues raised, and to the nature of the special verdict, which are necessary for the satisfactory determination of the case.

My noble and learned friend on the woolsack has submitted his view of the opinions given in the Court of Session. I must own that mine is upon that point not precisely the same. What I should collect myself is, that the learned judges, applying themselves to the special verdict alone, and dealing with the case as if they had nothing to do but necessarily to enter a judgment for the one party or for the other, found the special verdict to be insufficient to raise a case of anything more than negligence, default, or error in judgment on the part of the persons in the service of the ship; and as, consistently with the special verdict, that might have been during the course of the voyage, and was not found otherwise. I should conjecture that the learned Lords thought that the *onus probandi* upon that point lay with the pursuers, and not with the defenders, and on that ground entered the judgment in the defenders' favour. Of course I agree with what has been said, that that is not a satisfactory or a proper way of dealing with the case where the special verdict does not really find the material fact upon which the whole question turns.

Lord BLACKBURN.—My Lords, I entirely agree in the course which is proposed to be taken in sending the case down for a new trial on the ground that the special verdict does not really find the cardinal fact upon which it depends whether the judgment ought to be for the respondents or for the appellants.

I take it to be quite clear 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 that 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. I think it is impossible to read the opinion of Lord Tenterden, as early as the first edition of Abbott on Shipping, at the very beginning of this century, of Lord Ellenborough following him, of Parke, B., also, in the case of *Gibson* v. *Small* (4 H. L. Cas. 353) without seeing that these three great masters of marine law all concurred in that; and their opinions are spread over a period of forty or fifty years. I think, therefore, that it may fairly be said that it is clear that there is such a warranty, or such an obligation in the case of a contract to carry on board ship. In the case of *Redhead* v. *The Midland Railway Company* (L. Rep. 4 Q. B. 379; 20 L. T. Rep. N. S. 628), which has been referred to, which was the case of a contract to carry passengers upon land, there had been a good deal of reasoning in the Exchequer Chamber, to the effect that the obligation there was to furnish a carriage which was fit as far as they could reasonably make it, which is a different kind of contract from that which is now supposed. In the case of *Kopitoff* v. *Wilson* (3 Asp. Mar. Law Cas. 163; L. Rep. 1 Q. B. Div. 377; 34 L. T. Rep. N. S. 677), where I had directed the jury that there was an obligation, I did certainly conceive the law to be that the shipowner in such a case warranted the fitness of his ship when she sailed, and not merely that he had loyally, honestly, and *bonâ fide* endeavoured to make her fit. The court, when it came to be considered, had to see whether that did not clash with the reasoning in *Redhead* v. *The Midland Railway Company*, and we all agreed that it was immaterial to decide whether it did or not, because there was nothing in that case to raise the question whether it was an absolute warranty, or merely a duty to furnish it as far as could be properly done. Nor do I think that that question would really arise here; for here, if there was such a defect as would make the ship not reasonably fit to carry the wheat across the Atlantic, there can be no doubt that it must have been owing to negligence on the part of the shipowners or of some of their servants, and it cannot be said to have arisen from that kind of latent defect which no prudence could perceive.

Now, taking that to be so, it is settled that in a contract where there are excepted causes, a contract to carry the goods, except the perils of the seas, and except breakage, and except leakage, it has been decided that there still remains a duty upon the shipowner not merely to carry the goods, if not prevented by the excepted perils, but also that he and his servants shall use due care and skill about carrying the goods, and shall not be negligent. That has been determined in several cases, of which *Phillips* v. *Clarke* (2 C. B., N. S., 168) is the leading one, and that decision has been followed in several cases In the case of *Moes* v. *The Leith and Amsterdam Shipping Company* (5 Macph. 988; 39 Jur. 546), decided in Scotland, the same thing seems to have been determined, namely, that where there is such an exception, if the shipowner or his servants are guilty of negligence producing the misfortune, they are liable on that account. I think myself that the right and proper way of enunciating it in such a case would be to say, if, owing to the negligence of the crew, the ship sinks while at sea, although the things perish by a "peril of the sea," still, inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception. They may protect themselves against that, and they do so in many cases by saying, these perils are to be excepted whether caused by negligence of the ship's crew or not. When they do so, of course, that no longer applies. I think that exactly the same consideration would arise here as to the implied duty, which, though not expressly mentioned, arises by implication of law on the part of the shipowner, to furnish a ship really fit for the purpose. If that duty is neglected, and if in consequence of that neglect of duty the ship sinks, as it did in the case of *Kopitoff* v. *Wilson*, the shipowner is liable. If, as is alleged here, a port gives way, and the seas come in and wet the wheat, and if it is a consequence of the ship having started unfit that the mischief is produced, it seems to me to be exactly like the case of *Phillips* v. *Clarke*, where negligence not provided for by the contract occasioned the damage which it was said was an exception, but which the court determined was not an exception of which the shipowners could avail themselves, seeing that it was brought about by their negligence.

I perfectly agree with what has been said on the construction of the contract, that it does not at all provide for this case of an unseaworthy ship producing the mischief. The shipowners might have stipulated if they had pleased: "We will take the goods on board, but we will not be responsible at all, though our ship be ever so unseaworthy—look out for yourselves; if we put them on board a rotten ship that is our look out, you shall not have any remedy against us if we do." They might have so contracted, and perhaps in some cases they may actually do so. Or the shipowner might have said: "I will furnish a seaworthy ship, but I stipulate that, although the ship is seaworthy, and although I have furnished, I shall only be answerable for the vitiation of your policy of insurance, if you have one, in case the ship turns out not to be seaworthy, and I will protect myself against any perils of the seas, though the loss should be caused by that unseaworthiness." They might have contracted in that way. I think that, when this contract is fairly looked at, it appears that they do not so contract as to apply it to this case. I think that they have here sufficiently expressed in the contract that they will not be responsible or answerable for the consequences of a loss by perils of the seas, or any of the excepted perils, even though it may be produced by the negligence of the mariners. I think that they have done that, and that is what the Court of Session appear to have thought was all that it was necessary to say. But then the court below lost sight of the fact that if there was a want of seaworthiness in the ship—using the common phrase, which is used as meaning if the duty to make the ship reasonably fit for the voyage had not been fulfilled—if there was a want of seaworthiness in that sense, and that want of seaworthiness caused the loss, the contract did not protect the shipowners, and therefore it was incumbent upon them to see whether there was a want of seaworthiness, and whether it did produce the loss. The point was raised on the first plea in law distinctly; and then there were several additional pleas in law in which it was not raised, and it seems to have been lost sight of; and though the issue directed was so worded as to leave this open, it is so worded as to lead me to think that those who drew it were not thinking of this point, and when there came to be a special verdict it was found that "one of the orlop-deck ports of the said steamship was insufficiently fastened, and that in consequence the sea-water was admitted to the hold after the ship had been five days at sea;" and then it was found that this port was about a foot above the water line, and that the weather had been "as described in the mate's log." Now I cannot see that this special verdict finds either one way or the other, whether or no there was a want of seaworthiness or reasonable fitness to encounter the ordinary perils of the voyage or not. I think that is left quite ambiguous and uncertain. I quite agree with what has been said that it was a question of fact for the jury whether or not the vessel was made fit to encounter those ordinary perils.

That being so, I think it is impossible to decide either way, and consequently the case must be remitted to the Court of Session to ascertain whether or no the ship was seaworthy at the time she sailed, and whether the loss was occasioned by the want of seaworthiness, if such there was.

Lord GORDON concurred.

Interlocutor appealed from reversed, and case remitted to the Court of Session, with a declaration that there ought to be a new trial of the issue.

Solicitors for the appellants, *Simson, Wakeford*, and *Simson*, for *J. Henry*, Edinburgh.

Solicitors for the respondents, *Hollams, Son*, and *Coward*, for *Webster, Will*, and *Ritchie*, Edinburgh.

April 30, *May* 8, *and July* 27, 1877.

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY, O'HAGAN, BLACKBURN, and GORDON.)

THE RIVER WEAR COMMISSIONERS *v.* ADAMSON AND OTHERS.

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL IN ENGLAND.

Harbours, Docks, and Piers Clauses Act 1847 (10 *Vict c.* 27), *s.* 74—*Liability of owner of vessel for damage — Act of God — Construction of statutes.*

The Harbours, Docks, and Piers Clauses Act 1847 *enacts* (*s.* 74): "*The owner of every vessel shall be answerable for any damage done by such vessel to the harbour, dock, or pier, or the quays or works connected therewith,*" *&c., with an exception in the case of compulsory pilotage.*

A ship of the respondents, after being abandoned by her crew through stress of weather, became a complete wreck, and was driven by a storm against a pier of the appellants, and did damage to it.

Held, by the majority of the House of Lords (*Lord Gordon dissenting*), *that the owners were not liable, under the above section, for the damage so caused.*

By the Lord Chancellor (*Cairns*) *and Lord Hatherley* (*the latter doubting*), *that the section only applied to damage for which some person would have been responsible at common law, and did not create a right of action for damages where no such right existed before.*

By Lord O'Hagan, that the section did not apply to a derelict ship which had passed out of the owner's control.

By Lord Blackburn, that the section did not apply to the case of a common misfortune overwhelming both ship and pier without fault on either side.

By Lord Gordon, that the words of the section were express and unambiguous, and should be read according to their ordinary construction.

Observations by Lords Blackburn and Gordon on the construction of statutes.

Judgment of the court below affirmed, for different reasons.

Dennis *v.* Tovell (2 *Asp. Mar. Law Cas.* 402 *n.*; *L. Rep.* 8 *Q.B.* 10; 27 *L. T. Rep. N.S.* 482) *distinguished by Lord O'Hagan, and disapproved by Lord Blackburn.*

THE appellants in this case were the commissioners appointed by a local Act of Parliament for constructing a pier in Sunderland harbour at the mouth of the river Wear. The respondents were the owners of the steamship *Natalian*.

On Dec. 17, 1872 the *Natalian* was on a voyage from London to Newcastle, and was compelled by stress of weather to attempt to put in to Sunderland harbour. While still outside the entrance, in the open sea, she struck the ground near the appellants' pier, and the lives of all on board were in great danger from the violence of the storm. The crew were saved by the rocket apparatus, and when the tide rose the storm drove the ship against the appellants' pier, doing great damage to it. The ship had become a complete wreck, and it was impossible for the crew to go on board again, or to obtain control of her in any way.

The action was brought to recover the damage so caused under sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27), which enacts

> The owner of every vessel or float of timber shall be answerable to the undertakers for the damage done by such vessel or float of timber, or by any person employed about the same to the harbour, dock, or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same, provided always that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of.

The case was tried before Quain, J. at the Durham Summer Assizes in 1873, when a verdict was entered for the plaintiffs (appellants) for the agreed amount of 2825*l.*, with leave to move to enter a nonsuit or a verdict for the defendants. The Court of Queen's Bench refused the rule on the authority of *Dennis* v. *Tovell* (2 Asp. Mar. Law Cas. 402, n; L. Rep. 8 Q.B. 10; 27 L. T. Rep. N.S. 482), as reported in 2 Asp. Mar. Law Cas. 145; 29 L T. Rep. N. S. 530; but their decision was reversed by the Court of appeal (Jessel, M.R., Kelly, C.B., Mellish, L.J., Denman, J., and Pollock, B.), who held that the damage having been occasioned by the "act of God," the owners could not be made liable under the section, as reported *ante*, p. 242; L. Rep. 1 Q. B. 546; 35 L. T. Rep. N. S. 118.

C. Russell, Q.C. and *Shield* (*Herschell*, Q.C. with them) appeared for the appellants, and contended that there were two questions: first, whether the section did not impose an absolute liability on the shipowner, even if the damage was occasioned by the "act of God?" and secondly, whether this could be called the "act of God" in fact. The section contains three sets of provisions—first, an absolute liability for all damage of which the ship is the instrument, however caused; secondly, a liability for damage by a person employed on the ship, if wilful or caused by negligence; thirdly, a proviso excepting cases of compulsory pilotage. The scope of the Act is to extend considerable protection to the owners of piers, &c., as a pier itself, being immovable, cannot do damage. The way in which a "vessel" is coupled with a "float of timber," which would not have a crew on board it, points to the liability of a vessel when abandoned by its crew. The statute unquestionably extends the common law liability, and the question is, how far? If the judgment of the court below is right, the only effect of it is to shift upon the owner the onus of proving the "act of God," or of disproving negligence. Sect. 56 of the Act has been discussed in the recent case of *Lord Eglinton* v. *Norman* (*ante*, p. 471; 36 L. T. Rep. N. S. 888), in which the owner was held liable. See also *Dennis* v. *Tovell* (2 Asp. Mar. Law Cas. 402, n.), which was followed in *The Merle* (2 Asp. Mar Law Cas. 402; 31 L. T. Rep. N.S. 447). The liability exists except in the excepted cases. There is no such general rule as that all statutes must be held to except "the act of God." The cases are collected in a note to Broom's "Legal Maxims," under the heading "*Actus Dei nemini facit injuriam*," but they are all cases of contract or common law liability, such as *Reg.* v. *Leigh* (10 A. & E. 398), not statutory. Further, this damage can-

not strictly be said to have been occasioned by the "act of God" at all. The interpretation put on the section by the court below puts a premium on the early abandonment of a ship in distress, and is unsupported by any authority. [Lord Blackburn referred to *Coe* v. *Wise*, 5 B. & S. 440.]

The *Attorney-General* (Sir J. Holker, Q.C.) and *Greenhow*, for the respondents, argued that the intention of the section was to protect piers, &c., by stringent legislation, which would make people careful; but the exception in the case of compulsory pilotage shows that the owner cannot be held liable when he has lost control of the ship, and it is a mere log on the water. The common law maxim is founded on the case of *Paradine* v. *Jane* (Alleyn, 27): See also

Rex v. *Commissioners of Sewers*, 8 T. Rep. 312;
Nichols v. *Marsland*, 2 Ex. D. 1; 35 L. T. Rep. N. S. 725.

There is a great distinction between obligations imposed by law, and those resulting from contracts:

Brewster v. *Kitchell*, 1 Salk. 198;
Bailey v. *Crespigny*, L. Rep. 4 Q.B. 180; 19 L. T. Rep. N. S. 618.

The Legislature did not contemplate making the shipowner responsible for the act of God. [Lord Blackburn referred to *Latless* v. *Holmes*, 4 T. R. 660.] See

Nugent v. *Smith*, 1 C. P. D. 423; 34 L. T. Rep. N. S. 827;
Nichols v. *Marsland* (*ubi sup.*)

The Act was intended to enlarge the remedies of pier-owners, not to extend the liability of shipowners except in cases of negligence, though it gives power to arrest the ship. It was passed in 1847, and there was no Admiralty jurisdiction *in rem* in such cases till 1861: (see *The Clara Killam*, L. Rep. 3 A & E. 161; 3 Mar. Law Cas. O.S. 363.) The Merchant Shipping Act limits the owner's liability in cases of damage to life or shipping, and it would be a great hardship if he could be made liable to any amount for damage to a pier. A man may protect himself against a common enemy, such as the sea, even if he damages the property of another in so doing:

Nield v. *London and North-Western Railway Company*, L. Rep. 10 Ex. 4.

Shield was heard in reply.

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

July 27.—Their Lordships gave judgment as follows

The Lord Chancellor (Cairns).—My Lords, on the 17th Dec. 1872 the steamship *Natalian* was attempting, under stress of weather, to enter the Sunderland Docks, belonging to the appellants. While she was still in the open sea, about forty or fifty yards from the pier, she struck the ground, canted with her head to the south, and drifted bodily ashore. The crew were rescued from the ship by means of the rocket apparatus. The tide was low at the time, and as the tide rose the flood and the storm drifted the ship against the pier and caused damage to the amount of 2825*l.* 13*s.* The respondents are the owners of the ship, and the question is whether they are liable to pay this damage to the appellants.

The Court of Queen's Bench have held that the owners are liable. The Court of Appeal have been unanimously of opinion that they are not. The question depends upon the true meaning of the Harbours, Docks, and Piers Clauses Act, which enacts that the owner of every vessel or float of timber shall be answerable to the undertakers (that is in this case to the appellants) for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, with certain further provisions which I need not at present mention.

The Court of Appeal has been of opinion, and I think rightly, that the injury was not in this case occasioned by the voluntary act or the negligence of the respondents, or, indeed, of any person on board of or connected with the ship; that it could not have been prevented by any human instrumentality; but that it was occasioned by a *vis major*—namely, by the act of God in the violence of the tempest. Founding himself on this, the Master of the Rolls states that it is a familiar maxim of law that, where there is a duty imposed or liability incurred, as a general rule there is no such duty required to be performed, and no such liability required to be made good, where the event happens through the act of God or the Queen's enemies, and that the court may well come to the conclusion that the act of God and the Queen's enemies were not meant to be comprised within the first words of the section. The Lord Chief Baron states that no man can be answerable, unless by express contract, for any mischief or injury occasioned to another by the act of God. Lord Justice Mellish states that the act of God does not impose any liability on anybody. Mr. Justice Denman states that in every Act of Parliament words are not to be construed to impose a liability for an act done if the act is substantially caused by a superior power, such as the law calls the act of God.

In my opinion these expressions are broader than is warranted by any authorities of which I am aware. If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is the duty of a carrier to deliver safely the goods entrusted to his care; but, if in carrying them with proper care they are destroyed by lightning or swept away by a flood he is excused because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God. There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do, namely, to be liable for the damages. If, therefore, by the section to which I have referred, it is meant that the owner of every vessel shall, irrespective of whether anything has happened which would at common law give a right of action against anyone, pay to the undertakers the damage done by a ship to the pier, I should be unable to see any reason why the payment should not be made in the manner required by the statute.

I cannot, however, look upon this section of the

statute as intended to create a right to recover damages in cases where before the Act there was not a right to recover damages from someone. The section and those which follow it are in an Act which collects together the common and ordinary clauses which it was the habit of Parliament to insert in private Bills authorising the construction of piers and docks. There was no special legislation intended on this head for any particular place or any particular state of circumstances; and it would be difficult to suppose that, by means of ordinary and routine clauses inserted in private or local Acts, the Legislature, although it might well provide a ready and simple procedure for recovering damages where a right to damages existed by common law, would create a new right of liability to damages unknown to the common law.

By the common law, if a pier were injured by a ship sailing against it, the owner might be liable, if he was on board and directing the navigation of the ship, or if the ship was navigated by persons for whose negligence he was liable. But the owner would not be liable merely because he was the owner, or without showing that those navigating the vessel were his servants.

In my opinion it was to meet this state of the law that this section was introduced. It proceeds, as it seems to me, on the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person—that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God. The section relieves the undertakers from the investigation, always a difficult one for them to pursue, whether the fault has been the fault of the owner, or of the charterer, or of the persons in charge. It takes the owner as the person who is always discoverable by means of the register, and it declares that he shall be the person answerable—that is to say, the person who is to answer, or is to be sued, for the damage done. It does not absolve the master or crew if there has been wilful fault or negligence on their part. They, in that case, may be sued as well as the owner, but if the owner is thus in the first instance made to pay the damage, where there has been wilful or negligent conduct on the part of the master or crew, the owner may recover over against the master or crew; and if the damage has occurred by reason of the act or omission of any other person—if, for example, someone who had hired the ship sent her to sea insufficiently manned, and the accident occurred in consequence—the owner might apparently recover from the hirer by reason of this act or omission.

The clause appears to me to be a clause of procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against anyone existed before.

This makes the part of the section relating to the employment of a pilot intelligible and consistent with the rest of the enactment. If a licensed pilot is in charge, the owner is not discharged from a possible liability, but everything is left as it would be at common law. If a pilot was in charge of a ship and the owner was at the same time the master navigating the ship and did an act which caused damage, he would be liable at common law, and the Act leaves him so; but, in the same case, if, while the pilot was in charge and the owner was navigating the ship, the ship became unmanageable by tempest, the owner would not be liable.

I therefore think, although I do not concur in the reasoning of the learned judges of the Court of Appeal, that their conclusion was right, and that the appeal ought to be dismissed, with costs.

Lord HATHERLEY.—My Lords, I must candidly say that this case has given me much anxiety, and I have felt very great doubt and difficulty as to the proper interpretation to be given to this clause, which is, as it appears to me, somewhat inartistically framed. I cannot concur in the views expressed in the court below by some of the learned judges—on the one hand, that the damage which was done in this case having been caused by what is commonly said to be an accident, but is called in the language technically used in the law courts "the act of God," namely, a storm, the owner of the vessel would be excused by the section of the Act of Parliament, however construed, from the consequences of that mischief. Neither can I think, on the other hand, that, as has been held by others of the learned judges in the court below, the clause in question refers only to cases where a vessel is in charge of somebody. I do not think, in the first place, that the grammatical construction of the clause will admit of that solution of our difficulties.

When we look at the whole construction of the clause, it appears to me that it speaks in the first place of damage done by a vessel, without regard to anyone being on board or not; then it speaks in the second place of damage done by any person employed about the vessel; and then it says that the master or person in charge of a vessel is to be liable if damage is done through his wilful act or negligence. And then the excepted case occurs of the pilot, because he had been compulsorily, and against any power of resistance of the owner, placed on board and in charge.

Now we have to see whether or not damage arising from the "act of God"—that is to say, in this particular case, a tempest—should be held to be excepted. There might be other cases which would be similar to this of a tempest; the vessel might have been driven on the pier in some other way, or have been injured and become unmanageable by lightning, or the like. However it occurred, if the pier was damaged by the vessel in the way which was called by the learned judges in the court below "the act of God," is there anything in the Act of Parliament to say that the owner of the vessel shall not be responsible for the damage, but that there shall be an exception in respect of damage so caused?

One can easily conceive that the Legislature might think it desirable that those who provide this great accommodation for the navigation of the country—those who provide harbours of refuge and the like, which are greatly wanted in many parts of the coasts of the United Kingdom—should be indemnified against the possible damage which may accrue to their docks or other works, which they construct in discharge of the duties in question, and in the exercise of those powers which they have for making docks and other works. Those promoters might say: "We offer protection to the public at all times, only protect us from having our works damaged, in consideration

of the benevolent hospitality which we so afford." There is nothing, as it appears to me, utterly unreasonable in such a proposition reasonably carried out. It is quite true that many cases put by the learned judges in the court below are cases in which it would seem to be a very rigid enactment indeed, that damage to a very large and extensive amount, exceeding the value of the vessel itself, should be compensated by the persons whose vessel has done this damage being made answerable to make it good to the full amount of the damage done, which might even go to the destruction of the principal works, and might therefore result in the ruin of those persons whose vessel had been so forced against them. But, on the other hand, if there was any intention at all of giving a relief of this kind, which must be sought, of course, in the words of the Act, then, I apprehend, that the exception of a storm or tempest would be a very singular one, because it is a probable case to happen. There are, no doubt, many other ways in which damage might be done; but it is amongst the very probable causes that a storm or tempest should be the thing which would occasion the damage through the medium of the ship, which directly produced that damage. I do not think, therefore, that I can say, at all satisfactorily to my own mind, that, provided that the Act itself is clear and specific in its clauses, the party who caused the damage could be exempted because the damage was the result of a tempest, and not of what is ordinarily called his fault. Neither, as I have already said, by the grammatical construction of the clause, do I think that the clause is only to be applied in cases where some master, or other person, is in charge of the vessel.

Possibly the expression of Mellish, L.J. may come nearer to the mind of the Legislature. His notion of the general intent of the clause is this—that it points to something in which man is concerned. I think that is his expression. That is to say, in which human agency intervenes; and it was on that ground that he coincided with the views taken by the other learned judges. His idea of the whole intent and purpose of the clause was, not that the "act of God" was wholly to excuse the person liable under the enactment, if that liability once existed; but that the clause pointed to some act of man which was to take place, and not to a mere casualty occasioned by the tossing and driving about of the vessel from the effect of a storm upon the sea.

Finding that I cannot concur in the reasons given in the court below, of course one has to consider the construction of the clause. I think that, taking the view which was taken by the appellants in this case, the clause has been framed with probably extraordinary pressure and severity against the persons by whose vessels this damage would be created. No one can possibly deny that; and that severity seems to have induced some of the judges before whom the case has come, to think that it is impossible to attribute such an intention to the Legislature. Now I am afraid that it does sometimes occur that an Act of the Legislature cannot be carried without very great inconvenience and hardship; but that is not because the Legislature intended it, but because the possibility of its occurrence had been forgotten. I think that such a circumstance may have occurred here, and produced the enactment that we have before us.

However, it is the opinion, I believe, of the majority of your Lordships, that, on the whole case being considered, this is not a case that we can regard as struck at by this clause. Whether the ground to be assigned for that is the view which has been expressed by the Lord Chancellor, or whether any view may be adopted by any of your Lordships, similar to that taken in the court below, leading to the conclusion that the damage which here occurred is not brought within the meaning or purview of this Act, I shall not pause to inquire. There being this difference of opinion, I shall not do what I might probably under other circumstances have thought it my duty to do in this case. I am unwilling to do anything further than say that I cannot concur in the opinion expressed by my noble and learned friend on the woolsack, otherwise than with extreme doubt and hesitation.

Lord O'HAGAN.—My Lords, I need scarcely say that this is a difficult and embarrassing case. The various views which have been adopted by able judges make this very plain, and I do not think that any conclusion at which we can arrive will be completely satisfactory.

The difficulty arises from the former of the short clauses we are required to interpret. Your Lordships, exercising your appellate jurisdiction, act as a court of construction. You do not legislate, but you ascertain the purpose of the Legislature; and if you can discover what that purpose was, you are bound to enforce it, although you may not approve the motives from which it springs, or the object which it aims to accomplish.

Our daily experience demonstrates that the task of construction so understood, is not an easy one. It sometimes involves the necessity of harmonising apparently inconsistent clauses, and making homogenous provisions cast together haphazard by various minds, differently constituted, and looking to different and special objects, without regard to the harmony of the whole.

Undoubtedly, if the first division of the 74th section of The Harbours, Docks, and Piers Clauses Act 1847 stood alone, it would seem to cast upon the owner under all possible circumstances liability to the undertakers for any damage done by his vessel. That was the view reluctantly adopted by the Court of Queen's Bench, which we are asked to affirm in opposition to the judgment of the Court of Appeal; and if your Lordships, on a full consideration of the whole clause are satisfied that that was the view intended to be carried out, you have no alternative but to act upon it. No speculation as to the inconvenience or even the injustice which it may accomplish, no consideration of the admitted innocence of the owner of the vessel, or of the inevitable nature of the accident which wrought the injury, would justify a refusal to interpret the statute according to the design of the makers of it; and if you clearly see that they meant the liability to be unqualified and universal, you are not at liberty, on such grounds, to defeat that design and say that the appellants shall not have the benefit of it. If the law as it stands is oppressive or inequitable, the Legislature which devised it can alone reform it; and certainly, in my judgment, should your Lordships feel yourselves obliged to reverse the ruling of the Court of Appeal, such a reform will be needful, and should be promptly made, for

the results of such a reversal seem very serious. It would involve the obligation of the owner to make good damage done by his ship, although, as in this case he be free from blame for any imaginable injury by himself, or his servants, or in any other way. If necessarily abandoned on the high seas a thousand miles away, she drifts ashore, after long wandering, and does an injury; or, if taken out of his hands absolutely by a pirate or an enemy, she is brought in his absence, and against his will, to attack the coast of England; or if, as was put by the judges of the Appeal Court, the undertakers themselves shall have got hold of the vessel, and employed it so as to injure their own pier; in all these cases, and in others easily to be conceived, he would be responsible for results to which he had not contributed.

Now, no doubt it is possible that the Legislature may have contemplated for the protection of harbours, docks, and piers an enactment fraught with consequences of this description; but before we attribute to it so strange a purpose, we are bound, I think, to see whether the phraseology it has used, taken altogether, does not enable us to reconcile its action with common sense and common justice; and to say that although it has spoken obscurely, it has not made unavoidable such a very startling construction of its words.

The case before us is not perhaps quite so shocking as those which have been supposed to test the effects of this piece of legislation. But certainly it does seem hard that the respondent, having had his ship so injured by the winds and waves on the high seas that the crew abandoned her to save their lives, and she was derelict, and was forced by the storm against the pier, should not only have lost her value (10,000*l.*) save in so far as she was insured, but, in addition, nearly 3000*l.* for mischief done admittedly without fault of his, and by the "act of God." We must take care that a hard case shall not make bad law; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant without coercive necessity.

Now, I have come to the conclusion, though not without serious hesitation and misgiving, that there is no such necessity, and that the statute, well considered, is not applicable in the peculiar circumstances before us.

I do not propose that your Lordships should act on any very large application of the old maxim, "*Qui hæret in literâ hæret in cortice*," or refuse, from any assumption of error in policy on the part of the Legislature, to give effect to the literal meaning of the Act. But when we pass from the first clause of the section, and find it dealing with "the master or person having the charge of such vessel," I think it is indicated that "such vessel" may be taken to limit the description of "every vessel" in the preceding phrase, and to confine the liability of the owner to vessels "in charge" of a master or of somebody else. I do not see how we are to give effect to the word "such" otherwise than by qualifying the generality of the preceding language, and holding with Mellish, L.J. "that the section points to something done by the act of man, or to the act of the person in charge."

The terms of the statute appear to me fairly to bear this interpretation; and if they do, it is manifestly more in accordance with reason and probability than that which is opposed to it. In any view the provision is hard upon the owner, and puts him in a worse position than he would have held at common law. But there is something comparatively tolerable in the notion that he shall be responsible if an accident occurs when his captain, or someone else employed by him, acting for him and under his control, has at least the chance of avoiding it. When this chance is gone, because the *employés* cease to be in charge, and his ship becomes an ungoverned log, irresistibly borne against a pier without the possibility of check or guidance, the hard measure of liability for an act which is not his nor his agents' should not be imputed to him if there is fair ground for thinking that the section did not contemplate such a state of circumstances. In the one case it may be just that the owner should answer, if the injury arises from the actual or presumed default of his servants; and it may be politic to make him careful in the selection of them from an apprehension of the consequences of such an actual or presumed default. In the other, his utter and necessary powerlessness to avert the mischief should make us slow to say that he was meant to answer for it.

Then, as to the proviso, it appears to be reasonably explicable on the one construction and not on the other. If it was meant that the owner should be universally liable, whether or no any control remained with him or with his crew, how can we account for the exception as to the presence of the pilot? The injury is the same, the instrument of the injury is the same, and why, if the liability is to arise without any regard to circumstances in all other cases, although every possibility of control or default is absent, why should the pilot's compulsory employment exonerate the owner? On the other hand, if the true construction makes him only liable, when a master or some other freely chosen by himself and on his own responsibility is in charge, we can see good reason for the exoneration as soon as the pilot, whose retainer is not optional as in the case of his own people, assumes the care of the ship, and so disables him from meddling with her directly or indirectly. In the one case there is some control remaining with him, in the other there is none. The law displaces the person he had chosen to guide his vessel, and he is made irresponsible. Why should he not be so when the stress of the storm has the same effect, and forces his captain and his crew to abandon the trust he had committed to them? The proviso appears to me persuasively to sustain the argument of the respondents.

It has been said that, unless the appellants prevail, the statute must have failed of its object, which was manifestly the greater protection of the pier owners, because it gives them nothing which they had not at common law. I think that this is a fallacy. At common law there were serious questions continually arising which, on either construction of the statute, can arise no more. Often it was doubtful on whom liability should be charged, or by what evidence the charge of it could be made successfully. We can well conceive that the undertakers might have found difficulty in properly selecting a defendant amid the varying circumstances which affect the direction and management of merchant vessels, and the proof establishing responsibility must often have been hard to find, and inadequate to satisfy a jury.

I do not know the exact history of the legislation; but in this state of things the undertakers may perhaps have reasonably complained, that having performed great public service in forming a harbour, a dock, or a pier, they found themselves unable to recover for injuries confessedly done to works accomplished with much expense and labour, and of the utmost importance to the commerce of the country. And the Legislature may have fairly said that greater protection was due to them than they derived from the law which had grown up before that commerce and those works had been created, involving the necessity of safeguards theretofore uncalled for and unknown. Accordingly they made the owner, a person easily and always to be found, "answerable" as *owner*, and they dispensed with the proof of negligence, or any other proof, save of the fact of injury by the vessel, in all the cases contemplated by the Act. This was a great change, and a great addition to any security which the undertakers enjoyed at common law; and it was so, whether we give the clauses the universal force for which the appellants contend, or the more restricted application which, with the court of Appeal, I think your Lordships should attribute to them. And in addition a further material advantage, unknown to the antecedent law, is afforded to the undertakers, who are empowered to "detain the vessel or float of timber until sufficient security has been given for the amount of damage done by the same."

These most important provisions supply the *raison d'être* for the legislation, whatever be the issue of the controversy as to the extent of its action; and I think it is vain to allege that we cannot suggest for it a sufficient motive without straining its effect to work confessed injustice.

I do not stay to consider the argument that this construction, approved by the Court of Appeal, should be rejected because a float of timber is not usually "in charge" of anyone as a vessel is, and that Parliament cannot, therefore, be supposed to have restricted its view to cases in which the instrument of injury is derelict. The first answer is that floats may be, and are often, "in charge," not perhaps of such a "master" as governs a vessel, but of other persons such as the statute takes care to mention. And next the statute deals with the vessel and the float of timber, *quoad* the "charge" of them, precisely in the same way, and the observations I have made as to the first will, if they have force, be equally applicable to the second.

My reasoning has not been precisely that of the Court of Appeal, and I have not based it altogether upon the legal doctrine as to the "act of God." That doctrine is founded on the view, which commends itself alike to equity and reason, that liability should not be imposed, unless in special circumstances, or where public interests imperatively require it, for consequences which are not wrought by human will or act, and for which no human being is morally responsible. There are exceptions to its application, as when a man voluntarily contracts, with full opportunity of anticipating possible results, to do that from doing which he is disabled by inevitable accident; or when, as is said, the repairing of sea-walls is imperative by prescription, and is made impossible by such accident; and in various other cases.

And I am not at all prepared to say that the Legislature has not full power, if it be so minded, to declare that a proceeding it forbids, or a proceeding it commands, shall not be justified, in the commission of the one, or the omission of the other, because the result was caused by the "act of God." A law so providing we should be bound to enforce, and if in the case before us the statute was universally applicable, as the appellants contend, the unhappy shipowner must have submitted to its hard infliction. As I have said, I think that it is not so applicable, and that in these circumstances it does not apply, and it seems proper to suggest that we should not, upon any phraseology of a doubtful character, or without the clearest and most unequivocal expression of legislative intention, or if we may anywise reasonably interpret that intention in another sense, assume that a maxim so ancient, so well-established, and so accordant with the common sense of mankind, has been set at nought by the statute before us.

In the view I have presented to your Lordships, the only case cited as touching the present (*Dennis* v. *Tovell*, 2 Asp. Mar. Law Cas. 402 n.; L. Rep. 8 Q.B. 10; 27 L. T. Rep. N. S. 482) has no application to it. There the vessel was not derelict, and the owner may properly have been held liable. Here, on the other hand, in the words of Pollock, B., "out on the high seas she met with certain risks and injuries, which compelled the crew to leave her, and she became derelict." And in my judgment she should be dealt with as if she had been abandoned at the Antipodes, and had been ploughing the ocean without a crew for years before she was driven against the pier at Sunderland.

On the whole I think that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed.

Lord BLACKBURN.—My Lords, I have had very great doubt and hesitation in this case, and have, while considering it, changed the opinion I at first held.

The question raised depends upon the true construction of three sections of the Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27), namely, sects. 74, 75, and 76. These are part of a set of clauses gathered together under one head. viz., "Protection of the Harbour, Dock, and Pier, and the vessels lying therein, from fire and other injury." I do not think any other clause in the Act throws light on the construction of those sections, nor do I think that the construction put upon them will have any legitimate bearing on the construction of sections in other parts of the Act; though no doubt the principles of construction of statutes laid down by this House in the present case must have an important effect on those who have to construe that, or any other, enactment.

It is of great importance that those principles should be ascertained, and I shall therefore state as precisely as I can what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which

the words were used, and what was the object appearing from those circumstances which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used. I do not know that I can make my meaning plainer than by referring to the old rules of pleading as to innuendoes in cases of defamation. Those rules, though highly technical, were very logical. No innuendo could enlarge the sense of the words beyond that which they *primâ facie* bore, unless it was supported by an inducement, or preliminary averment of facts, and an averment that the libel was published, or the words spoken, of and concerning those facts, and of and concerning the plaintiff as connected with those facts. If these preliminary averments were proved, words which *primâ facie* bore a very innocent meaning might convey a very injurious one, and it was for the court to say whether, when used of and concerning the inducement, they bore the meaning imputed by the innuendo: (see the note to *Craft* v. *Boite*, 1 Will. Saund. 246.) The Legislature has rendered it no longer necessary to set out in the record the facts and the *colloquium* necessary to support an innuendo, they are now only matters of proof on the trial, but the principle remains.

In construing written instruments, I think the same principle applies. In the case of wills the testator is speaking of and concerning all his affairs; and therefore evidence is admissible to show all that he knew, and the court has to say what is the intention indicated by the words, when used with reference to those extrinsic facts; for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of the other testator's affairs and family.

In the case of a contract the two parties are speaking of certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words: (See *Grave* v. *Legg*, 9 Ex. 709.) In neither case does the court make a will or a contract such as it thinks the testator or the parties wished to make, but declares what the intention indicated by the words used under such circumstances really is.

And this as applied to the construction of statutes is no new doctrine. As long ago as *Heydon's case* (3 Rep. 7) Lord Coke says that it was resolved: "That for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: First, What was the common law before the Act? Secondly, What was the mischief and defect for which the common law did not provide? Thirdly, What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? and fourthly, The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy." But it is to be borne in mind that the office of the judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the court injudicious; and I believe that it is not disputed that what Lord Wensleydale used to call "the golden rule" is right, viz., that we are to take the whole statute together, and construe it altogether, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification, and to justify the court in putting on them some other signification which, though less proper, is one which the court thinks the words will bear. In *Allgood* v. *Blake* (L. Rep. 8 Ex. 160; 29 L. T. Rep. N. S. 331), in the judgment of the Exchequer Chamber as to the construction of a will, it is said: "The great difficulty in all cases is in applying these rules to the particular case; for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will, or produces so absurd a result, or inconvenience so great, as to justify the court in putting on them another signification, which to that mind seems a not improper signification of the words; while to another mind the effect produced may appear not so inconsistent, absurd, or inconvenient, as to justify putting any other signification on the words than their proper one, and the proposed signification may appear a violent construction. We apprehend that no precise line can be drawn, but that the court must in each case apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will." I think this is applicable *mutatis mutandis*, to the construction of statutes as much as of wills, and I think it is correct.

In local and personal Acts there was found to be great inconvenience from the clauses being framed according to the views of the promoter's counsel, and, consequently, being very differently worded: and to remedy this a practice arose of obliging the promoters to submit their Bills to the revision of the chairman of committees, who require them to make their clauses in the form he had approved of, unless some good reason was shown for deviating from it. These forms of clauses were well known, and from the name of the noble lord who had originated them, were called Lord Shaftesbury's clauses. The research which my noble and learned friend opposite (Lord Gordon) has made, shows that in the Harbour Acts passed in 1846, the common form of the clause used was in the words of what is now sect. 74 of the Harbours, Docks, and Piers Clauses Act 1846, but, except in one instance, without a proviso similar to that at the end of it. That shows what the frame of the section would have led one to guess—that the proviso was an afterthought, added to the enactment after it had been adopted. The preamble of the Harbours, Docks, and Piers Clauses Act declares that it is passed for the purpose of comprising in one Act the clauses usually contained in harbour and pier Acts for the purpose of avoiding prolixity, and producing uniformity. And the clause in question is one of a series for the "protection of the harbour, docks, and pier, and the vessels lying therein from fire or other injury."

The first inquiry for your Lordships is, are we justified in putting a different construction on the words of an Act passed at the instance of particular promoters, from that which would be

put on similar words in a general Act? To some extent I think we are. If in a local and personal Act we found words that seemed to express an intention to enact something quite unconnected with the purpose of the promoters, and which the committee would not, if they did their duty, have allowed to be introduced into such an Act, I think the judges would be justified in putting almost any construction on the words that would prevent them from having that effect. But I do not think it impossible that the Legislature can have intended in such an act to create a new liability to damages unknown to common law. The creation of such a liability would be in direct furtherance of the declared object of the enactment—the protection of the piers from injury. And in every construction of the enactment in question which I have heard suggested, the Legislature does impose on the owners a liability for damages occasioned by persons for whom they would not be liable at common law. At present I cannot see my way to limiting the words in this Act more than in a general Act; but I think that neither in a general Act nor in a special Act could the Legislature have meant to shift the burden of a misfortune befalling the owner of a pier from the owner of the pier, who at common law would bear it, to the owner of a ship wholly free from blame, and involved without fault of his in a common misfortune. It may have been said, but it can hardly have been intended to be said.

The common law is, I think, as follows: Property adjoining a spot in which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect, there is no difference between a shop the railings or windows of which may be broken by a carriage on the road, and a pier adjoining a harbour, or a navigable river, or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is liable to make it good; and he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for that owner incurs no liability merely as owner; but he does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land, and a ship, or a float of timber, on water, to take reasonable care, and use reasonable skill to prevent it from doing injury, and that this neglect caused the damage; and if he can prove that the person who has been guilty of this negligence stood in the relation of servant to another, and that the negligence was in the course of his employment, he establishes a liability against the master also.

In the great majority of cases the servant actually guilty of the negligence is poor, and unable to make good the damage if it is considerable, and the master is at least comparatively rich, and consequently it is generally better to fix the master with liability; but there is also concurrent liability in the servant, who is not discharged from liability because his master also is liable. And in a very large number of cases the owner of the carriage, or ship, or float of timber is, or at least is supposed to be, the master of those who were negligent, and consequently the action is most frequently brought against the owner, and is very often successful. But the plaintiff succeeds, not because the defendant is owner of the carriage, or ship, or float of timber, but because those who were guilty of the negligence were his servants.

I have stated the law with particularity, because I think it important to have it clearly before us. What I have said is really a statement of the law as laid down by Parke, B. in delivering the judgment of the Exchequer in *Quarman* v. *Burnett* (6 M. & W. 499), where the plaintiff was nonsuited because the defendants, though owners of the carriage, and actually seated in it at the time of the accident, were not the mistresses of the coachman whose negligence caused the accident.

I have already said that in the ordinary course of things those employed about a ship are the servants of the owners, and in *Hibbs* v. *Ross* (15 L. T. Rep. N. S. 67; L. Rep. 1 Q. B. 534; 2 Mar. Law Cas. O. S. 297) the majority of the Court of Queen's Bench thought this was so much the case that proof of ownership in the defendant was *primâ facie* evidence that they were his servants, calling on him to prove an exceptional state of things in which they were not his servants. A case very likely to occur in a harbour in which this would be disproved would be where the ship was put in the hands of a shipwright to be repaired, and the shipwright's servants in moving her into a graving dock negligently did mischief. The owner would not there be liable at common law. Where the owner of a ship is compelled to take a pilot on board, that pilot is not the servant of the owner, and he is not liable for the negligence of that pilot; but the captain and crew remain his servants, and he is liable for their negligence though a pilot is on board. Where no one is to blame—as where the damage is occasioned by inevitable accident—the loss, at common law, was borne by the owner of the property injured. And lastly, the person injured has at common law no lien on the ship, but only a right of action against the person to blame, and also, if he was a servant, against his employer.

Reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the Legislature was to give the owners of harbours, docks, and piers, more protection than they had. It seems to have occurred to those who framed the statute, that in most cases where an accident occurs it is from the fault of those who were managing the ship, and in most cases those are the servants of the owners, but that these were matters which in every case must be proved, and that consequently there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed; and with a view to meet this the remedy proposed was that the owner, who was generally really liable, though it was difficult and expensive to prove it, should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened; and this is expressed by saying that the owners "shall be answerable for any damage done by the vessel, or by any person employed about the same," to the harbour. It seems to have been suggested that where a compulsory pilot was on board the mischief might very well

be by his fault, and the presumption on which they acted—that mischief generally was due to the fault of the owner's servants—did not arise. This case, therefore, was by the proviso taken out of the enactment, and restored to common law. As to the possible case of the mischief being occasioned by the servants of a shipwright, or some other substantial person, it seems to have been thought enough to give the owner the remedy over provided by sect. 76. As to the cases in which the fault was that of some person not able to make compensation, for whom the shipowner was not at common law responsible, it may have been thought that the cases would occur so seldom, or when they occurred would probably be of such small amount, that the shifting of the loss from the owner of the property to the owner of the ship was not too high a price to pay for the saving of litigation and expense. The cases of a common misfortune befalling both ship and pier without fault of either seems not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words.

On reading the words of the enactment, I am brought to the conclusion that such was the scheme of legislation adopted by Parliament; the mischief being the expense of litigation, the remedy that the owners should be liable without proof of how the accident occurred. And if it had been confined to cases in which the damages were under 50*l.*, and might be recovered before two justices under sect. 75, I think it would be a scheme of legislation against which no very serious objection could be raised. *Dennis* v. *Tovell* (L. Rep. 8 Q. B. 10; 27 L. T. Rep. N.S. 482) was a case under 50*l.* raised in the County Court, and brought by appeal before the Court of Queen's Bench. Without bestowing so much consideration on the case as I have now done, I joined in the judgment of the court, which I have for a long time thought right, and now dissent from with great doubt and hesitation. It is impossible, however, to put any limit on the amount. The shipowner, if liable at all under this statute, is personally liable to his last farthing for the whole damage, however great and however small may be the value of his ship. In the present case the amount is 2825*l.*, and if the statute transfers the liability for so large a sum from the plaintiffs to the defendants, who have done nothing wrong, there is no doubt it is a hard case on the defendants. There is a legal proverb that hard cases make bad law; but I think there is truth in the retort that it is a bad law which makes hard cases. And I think that before deciding that the construction of the statute is such as to make this hardship, we ought to be sure that such is the construction; more especially when the hardship affects not only one individual, but a whole class.

I have therefore examined the reasons given by the various judges in the Court of Appeal, with a wish to find that some of them would in my mind justify the conclusion to which they have come in favour of the defendants. And I have tried to find some ground which had escaped their notice in which I could advise your Lordships to uphold that decision, but for a long time without success.

It is quite true that where a duty is imposed by law, if the performance of the duty is rendered impossible by the "act of God, or the King's enemies," the non-performance of the duty is excused. *Paradine* v. *Jane* (Alleyn 27), which is the case generally cited for that position, is one in which the point did not arise. That case was one in which it was attempted to argue that the duty imposed by the contract to pay rent was subject to a condition that the tenant was not evicted by the "act of God," or other *vis major*, and the really important part of the decision is, that where a contract is made which does not either expressly or implicitly except the "act of God," the courts could not introduce that exception by intendment of law; and that makes strongly against the supposition that in construing a statute where the Legislature might have expressed, but did not express, such an exception, the court should introduce it. And there is no case cited, and, as far as I can find, no case exists in which such a doctrine is laid down. In *Latless* v. *Holmes* (4 T. Rep. 660), where an Act, which received the Royal assent in May, by fiction of law related back to the first day of the session in October, it was held to apply to a transaction occurring between October and May. This was contrary to two legal maxims—that a fiction of law should never be used to work injustice, and that the law compels no one to do an impossibility; but the words of the enactment were too plain, and the court was obliged to work not only great hardship, but, in the particular case, great injustice. And in the present case, if the object of the statute be, as Pollock, B. says, and as I think it is, with a view to avoid expense and delay, that the owners of the docks are not to be put to the proof of negligence, or to the proof of how the inquiry was occasioned; that object would be, to some extent, less effectually carried out by importing such an exception, which is certainly not expressed in terms.

Still there remains the question whether the hardship produced, and the injustice worked, is so great as to justify the court in putting any meaning on the words, which they will bear in order to avoid it. Both Mellish, L.J., and, as I understand him, the Lord Chancellor, have thought that the words may be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man, damages for which someone is answerable at common law.

I have already said that the question whether words can bear a secondary sense different from the usual one, is one on which different minds differ. In the present cases I feel no doubt that the hardship is great enough to justify putting a considerable strain on the words to avoid it; for I feel certain that if the enactment has the effect of shifting the burthen of a misfortune to the piers from the owners of the property, who at common law would have borne it, to the owners of the ship, who are free from all blame, it is an unforeseen consequence of the words used, which words, if the consequence had been foreseen, would not have been used in the enactment.

I cannot see anything in the language of the Act to justify what was the opinion of some of the Judges of Appeal, and is, I think, adopted by Lord O'Hagan, that it is confined to cases in which someone is in charge of the ship, even if

that exception could save the defendants, which I do not think it would. The defendants were by their servants in possession of the ship when it drove on the bank. It did not strike the pier till the rising tide floated it in, but it was all one transaction; and when it struck the pier it was still a ship, and the defendants were still its owners. It is not necessary to inquire when and under what circumstances that which was once a ship becomes a mere congeries of planks to which the statute would not apply, further than to say this ship cannot be treated as having become such, nor was it in my opinion in any sense a derelict.

After much hesitation and doubt I am not prepared to say that this judgment should be reversed. I am not prepared to say that the words "damage done by the ship," as used in this enactment, necessarily include all expenses occasioned by misfortune in which the ship was involved in common with the piers. Mellish, L.J. (for whose judgment I have always had a degree of veneration, which his lamented death permits me to express more fully than I should think seemly if he still lived) seems to have thought that these words might bear the more restricted sense of *injuria cum damno*. The declared object of the enactment is the protection of the piers, &c., from "injury," which renders this construction a little less violent than if the object had been expressed to be to protect the harbour authorities from "loss." If they can bear that sense we ought to construe them so; and though I have had, and have, great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it; and consequently I agree that the appeal should be dismissed with costs.

Lord GORDON.—My Lords, the opinion which I have formed in this case differs from that at which the majority of your Lordships, and the Lord Justices of Appeal have arrived. I incline to the opinion of the Court of Queen's Bench. Having regard to the great weight due to the opinions which have been expressed by your Lordship, and also to the great weight due to the opinions of the Lords Justices of Appeal, both in their collective and in their individual capacity, I feel great distrust in my own opinion. But I have considered the case with great anxiety, not only in consequence of the views entertained by your Lordships, but also in consequence of the case involving the construction to be put upon a section of an Act of Parliament—a matter which it is of importance should not be subject to conflicting views, founded upon supposed expediency; and I feel that it is my duty to explain more fully than I should otherwise do the grounds upon which I venture to dissent from the opinions which have been expressed by your Lordships, although I am aware that my doing so will have no practical effect upon the decision of this case.

The question relates to the application of the provisions of an Act passed for consolidating certain provisions usually contained in special Acts authorising the making and improving of harbours, docks, and piers. It is a British statute, applicable to Scotland as well as England, and its provisions are of much importance. The question in this appeal arises out of the leading enactment of the 7th section, which provides [His Lordship here read the section, as set out above, and continued:] The enactment is general and express that the owner of every vessel causing damage to harbours, &c., shall be answerable for such damage, except in the single case where the vessel is in charge of a pilot; and the question which your Lordships have to consider is whether the words of the section are to be read and applied in their ordinary common sense meaning, or whether there is to be imported into the statute another exception than the express exception it contains, relieving the owner of a ship which at the time the damage occurred was in charge of a duly licensed pilot, an exception, viz., from liability in cases where the damage was caused by the vessel through the "act of God," or, as it is sometimes expressed, *vis major*.

It may be mentioned that this section was the subject of consideration in the case of *Dennis* v. *Tovell* (*ubi sup.*). That case, having involved a sum under 50*l.*, was decided in the County Court, but was taken on appeal before the Court of Queen's Bench who dismissed the appeal. That previous decision of the Queen's Bench prevented that court from reconsidering the section in the present case, but leave was granted by the court to appeal to the Lords Justices, which led to their Lordships' judgment—the subject of the present appeal to your Lordships' House.

The exemption from liability on the part of the owner when his vessel is under charge of a licensed pilot may, it appears to me, be regarded as strengthening the express words of the leading enactment of the 74th section, in accordance with the maxim *exceptio probat regulum*. The first consideration to be attended to in reading the clause judicially is whether the words are express, intelligible, grammatical, and unambiguous. I submit for your Lordships' judgment that they have all these characteristics. In my humble opinion the word "answerable" is merely an equivalent for "liable," and I observe that their Lordships' in the Court of Appeal deal with the expression as having that meaning, and no argument was addressed to your Lordships from the bar, on the part of the respondents, to show that the word was capable of any other construction. I think the section in question itself shows that the words are synonymous. For while it enacts that the owner shall be "answerable," it likewise enacts that the owner, or person in charge shall, "also in cases of negligence, be liable," and then it provides that "nothing herein contained shall extend to impose any liability for any such damage upon the owner" where the vessel shall be in charge of a pilot.

The next matter for consideration is what are the duty and province of a court of law, when ascertaining what effect is to be given to the section, which in my opinion is of the express and unambiguous character already stated; and in expressing an opinion upon this question your Lordships are at present officiating, not in your legislative character, but as the Supreme Court of Appeal, in a judicial capacity.

Blackstone, the highest constitutional and legal authority with reference to the law of England, when treating of statute law, states (vol. I., p. 89) "where the common law and statute differ, the common law gives place to the statute," and again (p 91) "If the Parliament will

positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do no one of them prove that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the Legislature, which would be subversive of all Government." In the case of *Birks* v. *Allison* (13 C. B. N. S. 24; 7 L. T. Rep. N. S. 786) Byles, J. stated that the general rule for the construction of Acts of Parliament is, that the words are to be read in their popular, natural, and ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe they were not intended to bear that construction, because of some inconvenience, which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such a large sense. Jervis, C.J., in the case of *Abley* v. *Dale* (11 C. B. 889), stated: "If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure; but we assume the function of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity, or manifest injustice from an adherence to their literal meaning." Cresswell, J., in the case of *Biffin* v. *Yorke* (6 Scott N. R. 222) states: "It is a good rule in the construction of Acts of Parliament that the judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words." In a recent case before your Lordships' House (*Hutton* v. *Harper*, 1 App. Cas. 464), where the construction of a statute incidentally arose, Lord O'Hagan said: "The argument from inconvenience is not to be lightly entertained, and never for the purpose of construing a statute which is clear in its terms, and indicates, unmistakably, the purpose of the Legislature. When the words are obscure, and the purpose therefore more or less doubtful, it may help to a right understanding of them.

The Lords Justices of Appeal, without stating that the leading enactment of sect. 74 is not express, or is even ambiguous, gave effect to the present respondents' contention, that the statute must be read as if it contained an express provision that the liability for damage should not attach to the owner where the damage had been caused by what is called the "act of God," which in the present case means stress of weather. Their Lordships proceeded upon the ground that such an exception applies to all cases where a duty is imposed, unless expressly included, and they held that the same rule was applicable to acts of Parliament, and, further, that it could not have been the intention of the Legislature, with reference to the statute in question, to impose what their Lordships regard as an unjust liability upon owners guilty of no fault or negligence. But no authority has been referred to, either by their Lordships or in argument from the Bar, warranting the introduction of such a qualification; and, after a careful search, I have been unable to find any, either in the law of England or of Scotland. It has been argued by the respondents that the introduction of such an extension of the owner's liability must be qualified by the implied condition freeing them from such liability where the damage was occasioned by the "act of God," in order to give what is called a "reasonable construction" to the statute itself.

With regard to the supposed intention of the Legislature to express the terms of the act subject to the implied condition, I may observe that Mellish, L.J. said: "I think, taking the language of the section, it clearly was the intention of the Legislature to extend the liability of the owners of vessels in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law, because, if that is not the intention, it is not easy to see the object of the section at all." This is very high authority for presuming, in so far as it may be relevant or competent to do so, what was the intention of the Legislature in passing the Act, although I submit that, where the terms of an Act are clear and unambiguous in the language of the enacting clause, these terms cannot be controlled by any supposed intention which may be presumed to have influenced the Legislature, or by consideration of the injustice of the result of the express terms used in the enacting clause.

In the *Sussex Peerage case* (11 Cl. & F. 85), the Committee for Privileges of this House desired the opinion of the judges, which was given, and was unanimous. The opinion was delivered by Tindal, C.J.; in the course of it he said: "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver." The opinion delivered by the Lord Chief Justice was approved of by the Lord Chancellor (Lyndhurst), and by Lords Brougham, Cottenham, Denham, and Campbell. And in the case of *Fordyce* v. *Bridges* in this house (1 H. of L. Cas. 1), with reference to the construction of the Apportionment Act, the provisions of which it was argued were quite inapplicable to the law of Scotland, Lord Brougham stated: "We must construe this statute by what appears to have been the intention of the Legislature. But we must ascertain that intention from the words of the statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute."

I think, in accordance with these authorities, that in such a case as the present, where the words are clear and distinct, we must judge of the intention of the Legislature from the words of the Act itself. But, if it were relevant or competent to speculate as to what truly may have been the intention of the Legislature in passing the 74th section, apart from the words of the statute, it appears to me, with great deference, that it may have been, amongst others, to give that amount of protection to the owners of piers, &c., which the words of the section clearly imply, and so relieve them from the often difficult questions of evidence

as to whether the damage was caused by the fault or negligence of owners of vessels, or their servants, in which cases there would be no doubt of their liability apart from the words of the statute.

It seems to me to be not important, in considering the intention, to consider the course of legislation with reference to Acts for the construction of piers and harbours, prior to the passing of the consolidating Act, with which your Lordships are now dealing. That Act was passed as the preamble states, because it was "expedient to comprise in one act sundry provisions usually contained in Acts of Parliament authorising the construction or improvement of harbours, docks, and piers, and that as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for insuring greater uniformity in the provisions themselves."

In accordance with a suggestion made in the course of the argument, I have looked into the private Acts which were passed for the construction of piers and harbours during the session immediately preceding that in which the consolidating Act was passed, and I find that there were twelve Acts passed in that session, each of which contained a clause imposing liability for injury done to harbour works in the same general terms as those of sect. 74 of the consolidating Act; and I presume, from the apparently stereotyped form of the clauses in these Acts, that the Acts passed in previous sessions had contained clauses to the like effect. I observe that the Wear Commissioners obtained a special Act in that session, and it contains the clause to which I have referred making an exception when a pilot is on board. The provision imposing liability for damage to pier and harbour works, must therefore, I think, have been familiar to the Legislature, and that appears to me to strengthen the presumption that the Legislature did intend by the clause your Lordships are considering to impose the liability in the general terms it has done. And as the Act affected so great interests as the piers and harbours of the United Kingdom, it is to be presumed that its terms would be thoroughly canvassed, and carefully considered in its passage through Parliament, especially with the view of preventing any limitation in the case of future piers and harbours of rights which had been conferred on owners of piers by previous legislation.

The risk of causing damage to piers or harbours is, I apprehend, a risk which it would be competent to owners of vessels to insure against, although it might require an alteration of the aristing form of policy, by making an express provision against the risk of such damage. The supposed injustice of the section thus resolves itself into a mere question of payment of money to cover the premium to secure against the risk of such damage.

Applying the authorities to which I have referred to the present case, I am humbly of the opinion, which I entertain with very great hesitation, that the opinions which have been expressed by your Lordships, that the statute ought not to be construed as if it contained an exemption from liability for damage where it occurs by the "act of God." The words appear to me to be express and unambiguous, and being so, I think they should be read according to their ordinary construction.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, *J. W. Hickin*, agent for *Ralph Simey*, Sunderland.

Solicitors for the respondents, *Johnson* and *Weatherall*, agents for *E. Haswell*, Sunderland.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Tuesday, Jan 22, 1878.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

THE CYBELE.

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

Salvage—Right of a Government civil service department to salvage—"Her Majesty's ships"—The Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 484, 485—*The Harbour and Passing Tolls, &c. Act* 1861 (24 *&* 25 *Vict. c.* 47.

The Board of Trade can claim salvage in respect of services rendered by vessels employed by them for commercial purposes in and about a public harbour, the property in which is vested in the Board of Trade. The expressions "ships belonging to Her Majesty," and "Her Majesty's ships," in sects. 484, 485 *of the Merchant Shipping Act* 1854, *are used in their ordinary sense, and apply only to vessels in the Royal Navy, and Semble, those belonging to the public service of a dependency of the British Crown.*

THIS was an appeal from a decision of the judge of the Admiralty Division (L. Rep. 2 P. Div. 224, 3 Asp. Mar. Law Cas. 478), by which he had decided that a salvage suit might be brought in respect of the services of vessels owned by the Board of Trade, and used about the harbour of Ramsgate, of which the Board of Trade is trustee. The facts of the case will be found fully set out in the report in the court below.

W. G. F. Phillimore (with him *Myburgh*) for appellants, owners of the *Cybele*.—We have no objection to remunerate the master and crew of the tug and crew of the lifeboat, and therefore waive any question which might arise in consequence of their not having obtained the leave of the Admiralty to sue in accordance with sect. 485 of the Merchant Shipping Act 1854. But we do object to paying a Government department for the use of vessels which, as belonging to them, belong to Her Majesty, in contravention of sect. 484. We appeal therefore from the decision of the court below which overruled our demurrer, and if we succeed in that appeal a question will arise with reference to the amount of the award. [BAGGALLAY, L. J.—Is not the question merely whether these vessels are Her Majesty's ships or not?] Practically the question is whether vessels belonging to a department of Her Majesty's Government are vessels belonging to Her Majesty. [JAMES, L.J.—Is not the question also whether the Board of

Trade, in regard to Ramsgate Harbour, is acting as the servant of the Crown or as trustee for the public?] The position of the Board of Trade is sufficiently well defined; it is a committee of Her Majesty's Privy Council, and therefore at least as directly Her Majesty's servant as the Board of Admiralty is (17 & 18 Vict. c. 104, s. 2). Besides, the question has already been decided in this court in the case of *The Cargo ex Woosung* (3 Asp. Mar. Law Cas. 239; Law Rep. 1 P. Div. 260; 35 L. T. Rep. N. S. 8). The commander of the salving vessel in that case was no more a naval officer in the ordinary acceptation of the term than the master of this tug is, and the vessel herself belonged to the Bombay Marine, a department certainly not in any sense more Her Majesty's servant than the Board of Trade is, yet there the court upheld the decision of the court below, setting aside the agreement made by the commander of the salving vessel, on the ground that he had no right to claim for the services rendered by the ship, she being one of Her Majesty's ships. James, L.J.—The reason of that decision was that the vessel was despatched on this particular service by superior orders, and the master had no authority, express or implied, to make any agreement for services which he was sent to perform.]

Cohen, Q.C. and *E. C. Clarkson*, for the respondents, were not called on. (*a*)

James, L.J.—I am clearly of opinion that this is not a Queen's ship within the meaning of the Act. The Board of Trade merely took over the harbour and the tug, as an ordinary corporation would have done and used them for the same purposes, and I cannot see that the learned judge of the court below could have come to any other conclusion than the one at which he arrived. The appeal must therefore be dismissed.

Baggallay, L.J.—I am of the same opinion. The sections only apply to fighting ships and others, such as troopships and store ships, which, are usually known as "Her Majesty's ships." These are vessels employed simply for commercial purposes—as a steam tug and lifeboat attached to the harbour—for performing the ordinary harbour services. They are neither under the special control, nor do they perform the special services, of the Queen's ships.

Thesiger, L.J.—I am of the same opinion. It is unnecessary to give an exact definition of the term "Her Majesty's ships," though I, and I believe the other members of the court, consider that the term is used in the ordinary and natural sense. It is not intended to include every case in which every department of Her Majesty's service thinks proper to use a vessel for that service.

Appeal dismissed with costs.

Solicitors for the appellants, owners of the *Cybele*, *Pritchard* and *Sons*.

Solicitors for the respondents, owners of the *Vulcan*, *Clarkson*, *Son*, and *Greenwell*.

(*a*) A somewhat similar decision, to which no reference was made in the court below, is that of *The Helen* (3 C. Rob. 224), where it was held that a vessel employed in the revenue service and the property of or hired by the Commissioners of Customs, but armed at the public expense, was entitled to prize salvage on the recapture of British property on the scale allowed to private ships, and was not limited by the scale allowed to Her Majesty's ships of war. See also the *Bellona* (Edw. 63).

Jan. 21, 22, *and* 25, 1878.

(Before James, Baggallay, and Thesiger, L.JJ.)

The Peckforton Castle.

Sailing regulations — Crossing — Overtaking — Articles 12 *and* 17.

Sailing ships on converging courses are crossing ships within article 12, *and the faster sailing vessel is not an overtaking ship within article* 17, *if at no time was she abaft the beam of the slower vessel.*

Semble, it is a well-recognised and useful rule of navigation that in all cases a sailing vessel going free should give way to one close-hauled.

Quære, what is the proper definition of an overtaking ship or steam-vessel.

The Franconia (*L. Rep.* 2 *P. Div.* 8; 35 *L. T. Rep. N. S.* 721; 3 *Asp. Mar. Law Cas.* 295) *doubted.*

This was an appeal from a judgment of the judge of the Admiralty Division by which, on 31st July 1877, he had found the German barque *August* alone to blame for a collision which took place between that vessel and the British ship *Peckforton Castle*, off the Lizard Point, in the English Channel, on 7th July 1877. The circumstances of the collision and the judgment of the court below will be found fully reported *ante*, p. 511; 2 P. D. 222. It will be observed that the Court of Appeal took a different view of the facts of the case from that taken by the court below, finding that the *Peckforton Castle* never was on the quarter of the *August*, whilst the court below took it to be admitted that she was so, but nevertheless arrived at the same conclusion and found the *August* alone to blame.

Jan. 21.—*Milward*, Q.C. (with him *E. C. Clarkson* and *C. Hall*) for appellants, owners of the *August*. The facts of the case have been found in our favour, and this court will not disturb the finding of the court below on the facts. We are found to be an overtaken ship, and therefore we come within the rule laid down by this court in *The Franconia* (L. Rep. 2 P. D. 8; 35 L. T. T. Rep. N. S. 360; 3 Asp. Mar. L. C. 295); but the judge instead of following that case and deciding that rule 17 applied, considered that the latter clause of rule 12 governed the case because both ships had the wind on the same, the port, side, and that therefore, because we were to windward, it was our duty to give way. This cannot however be the proper construction of that clause. The article has been speaking of "crossing" ships, and therefore "they" in the last clause can only refer to the case of crossing ships before mentioned, and cannot include our case, which has been found not to be one of crossing ships, and is one which is not mentioned at all in the rules before art. 17, which gives the rule to govern the case of overtaking ships under which we come. [Baggallay, L.J.—The case of *The Franconia* (*ubi sup.*) was one of two steamers; may not the case of two sailing ships be different, as art. 12 only applies to sailing ships, and therefore could not have been applied to *The Franconia* (*ubi sup.*)?] That cannot make any difference in the *ratio decidendi* of *The Franconia*, as the test given there the invisibility of the lights of the overtaken ship, would preclude the overtaking vessel from knowing whether she was a steamship or a sailing vessel. James, L.J.—But if the overtaking ship is herself a steamer, is it not unimportant whether the

overtaken one is a sailing ship or a steamer, and in any case, either by art. 16 or art. 17, the overtaking ship is to get out of the way? Art, 16 appears to be perfectly general so far as a steam and sailing vessel are concerned, and so long as the steamship, approaching at whatever angle, cannot see the lights of the approached vessel she must conclude that she is a sailing vessel and act accordingly; but that rule would not apply in the case of an approaching sailing vessel which may come within the provisions of art. 12. Thesiger, L.J.—Is it not possible that a vessel may be in one sense overtaking, but yet practically a crossing ship?] I submit not. The great benefit of the rules is their simplicity, and for that purpose ships are divided into three classes: (1) vessels meeting end on, (2) vessels crossing, and (3) vessel overtaking. The first class is defined by the Order in Council, issued subsequent to and explanatory of the rules on the 30th July 1868, only to include those cases where each vessel sees both side lights of the other; the third was defined by this court to include only those cases where one vessel saw neither side light of the other, leaving for a definition of crossing vessels those cases where one side light only is seen. If it is now said that a vessel may be both overtaking and crossing, it will lead to great confusion, and put persons in charge of ships in grave doubt as to the course they should pursue under circumstances where prompt and decisive action is required. Moreover, whatever the court may consider to have been our duty under the circumstances, it will consider that there was at least an equal neglect of duty on the part of the *Peckforton Castle* on deliberately keeping her course till she ran us down, in a case where there was any doubt as to the application of two rules, and will vary the decree so far as to find both the vessels to blame for the collision.

Butt, Q.C. (with him *Myburgh*) for respondents, owners of the *Peckforton Castle*.—The fair result of the evidence is that the *Peckforton Castle* was not an overtaking ship at all, but a crossing vessel. It is impossible, if she had been in the position and at the distance at which it was stated by the *August* that she was first seen, that she should in the time have come up to the *August*. She must, both from the evidence and also from the physical necessities of the case, have been not on the quarter but before the beam of the *August* when first seen, and therefore the rule laid down in *The Franconia* (*ubi sup.*) does not apply. Had the course of the *Peckforton Castle* been, as the appellants contend, about E.N.E., it is obvious that we should not have been on that tack at all, as we should have had a fair wind to pursue our voyage on the other tack. It cannot be said that a vessel bound down channel is overtaking one bound up. If our story as to the direction of the wind is correct, and the relative position of the vessels is as stated by the appellants, the collision could not have happened at all. If their story as to both the direction of the wind and also the relative positions of the vessels is correct, it would have been impossible for us to have caught her up in the time; therefore the only possible solution of the collision is that both the direction of the wind and the relative position of the vessels are correctly stated by us, and therefore that we were crossing ships.

Milward, Q.C. in reply.

Cur. adv. vult.

Jan. 25.—Baggallay, L.J.—Shortly after noon on the 6th July last, the German barque *August* and the British ship *Peckforton Castle* came into collision in the English Channel near the Lizard: the barque was passing up channel, on a voyage from South Carolina for Bremerhaven, and the ship was proceeding in ballast from Rotterdam to Cardiff. An action of collision was at once instituted by the owners of the *August* against the owners of the *Peckforton Castle*, which was met by a counter-claim of the latter. The action came on for trial, and on the 31st of the same month the judge of the Admiralty Court held that the *August* was alone to blame. From that decision the present appeal is brought.

It is the common case of the appellants and of the respondents, that at the respective times when each vessel was first seen from the other, the *August* was on the port tack heading E., or nearly so, and had the wind at least three points free; it is further agreed that for at least half an hour before the collision the *Peckforton Castle* was close-hauled and on the port tack, but there is much conflict of evidence as to the direction of the wind and the consequent course of the *Peckforton Castle*, and also as to various other circumstances of the case. It was however admitted in the Admiralty Court, and has been admitted in the argument before us, that the real question at issue is whether the 12th or 17th article of the regulations for preventing collisions at sea is applicable to the circumstances of the present case. The appellants assert that the *Peckforton Castle* was first seen from the *August* about 11.30 a.m.; that the wind was then, and continued until after the collision to be, from N. to N. by W.; that the *Peckforton Castle* when so first seen was three points on the starboard quarter of the *August*, distant about three miles, heading between E.N.E. and N.E. by E., that is at an angle of from two to three points from the course of the *August*, which was E.; that each vessel continued on her course until just before the collision, the speed of the *Peckforton Castle* being considerably in excess of that of the *August*; that under such circumstances the *Peckforton Castle* was an overtaking vessel within the meaning of the 17th article of the regulations, and, as such, bound to keep out of the way of the *August*, but neglected to do so. The respondents on the other hand insist that the wind was from N.W. to N.W. by N.; that the *Peckforton Castle*, which during the forenoon had been on the starboard tack heading W. by S., went on the port tack at twelve o'clock, and that thenceforth her course was between N.N.E. and N.E. by N., or inclined at an angle of from five to six points to that of the *August*, and that the *August* was first seen from the *Peckforton Castle* about 12.15, being then four points on the port bow and distant about a mile and a half; that under such circumstances the *August* and the *Peckforton Castle* were crossing vessels within the meaning of the 12th article of the regulations, and the *August* being to windward was bound to keep out of the way, and not having done so, was alone to blame. The respondents further assert that at no time was the *Peckforton Castle* three points on the starboard quarter of the *August*, as seen from that ship, and that, if she had been so situate, with the wind from N.W. to N.W. by N., a collision between the two vessels could not possibly have occurred if each had continued on her course.

Having regard to the two views so put forward by the parties, we are of opinion that the question of fact, upon the solution of which the decision of this appeal must depend, is that of the direction of the wind. If this be ascertained, the course of the close-hauled ship lying within six points of the wind can readily be determined. Now with reference to this question five witnesses who were on board the *August*—her master, mate, boatswain, helmsman, and look-out—all swear most positively that the wind was from N. to N. by W.; whilst five other witnesses who were on board the *Peckforton Castle*—her master, first and second mates, and helmsman, and a licensed pilot—positively swear that the wind was from N.W. to N.W. by N. In addition to these ten witnesses a Trinity pilot gave evidence on behalf of the appellants to the effect that he left Falmouth harbour about eleven o'clock; that at the time of the collision, which, however, he did not witness, he was some six miles from the Manacles, and that the wind was then N. On the other hand, two other Trinity pilots who saw the collision speak positively to the wind being N.W. by N. Now, apart from the circumstance that as regards the first-mentioned of these three pilots there was nothing to cause him to notice the precise direction of the wind at the time of the collision, whilst the attention of the two latter would probably be directed to it by reason of their witnessing the collision, it is to be further noted that the latter were close upon the spot where the collision occurred, whilst the former was some miles to the eastward, and at a spot where the direction of the wind would be influenced by land currents. But there is one piece of evidence adduced on the part of the respondents which, taken in connection with the testimony of the witnesses who have been mentioned, is, in our opinion, conclusive, and that is the official weather report of the Lizard lighthouse for July 6th, from which it appears that from three a.m. until nine p.m. of that day, the wind was continuously N.W., though it blew with varying force. We are satisfied upon this evidence that the wind, at and near the place where the collision occurred, was for some time previously to and for some time after the collision from N.W. to N.W. by N., as alleged by the respondents, and this view of the case is strongly supported by the circumstances to which we are about to advert. The course of the *Peckforton Castle* during the forenoon and up to twelve o'clock, whilst on her starboard tack, was admittedly W. by S. Had the wind being N. or N. by W., as asserted by the appellants, she would have made her course W.N.W., or W. by N., instead of W. by S, and would have had no occasion to go on the port tack until after she was considerably past the Lizard. Now, one effect of our having arrived at this conclusion as to the direction of the wind, in the face of the positive statements of so many witnesses who were on board the *August*, is to materially lessen the value which we might otherwise have been disposed to attach to their evidence upon other matters, as to which there is a conflict of testimony; but, in our opinion, it is unnecessary to enter into any particular consideration of these other controverted matters.

It being established that the direction of the wind was from N.W. to N.W. by N., the course of the *Peckforton Castle* on her port tack must have been, as alleged by the respondents, N.N.E. and N.E. by N., inclined, therefore at an angle of at least five points to that of the *August*, and it was utterly impossible for the *Peckforton Castle* to have been ever seen from the *August* three points on the starboard quarter of the latter, or, indeed, in any direction abaft her beam. The statement of the master of the *Peckforton Castle* appears to be substantially correct, that, after he went about, his ship was pretty broad on the starboard bow of the *August*. The ship and the barque were consequently crossing vessels with the wind on the same side, and the barque, being to windward, was bound to keep out of the way; this she neglected to do, and we agree with the learned judge of the Admiralty Court in thinking that she was alone to blame. The gentlemen who have given us their assistance as nautical assessors concur in the views which we have expressed; but they are further of opinion that the *August* was guilty of a breach of the well-recognised rule of navigation that a ship having the wind free should give way to one close-hauled. This view was probably taken by the judge of the Admiralty Court, and by the Elder Brethren who assisted him; but we prefer to base our decision, against the appellants, upon the ground that they disobeyed the directions given in art. 12.

The appeal must be dismissed with costs.

The judgment which I have just pronounced is the judgment of the court. I desire, however, to add a few observations with reference to that portion of Mr. Milward's argument which was based upon the judgment in the case of *The Franconia* (*ubi sup.*). Mr. Milward, in support of his contention that the *Peckforton Castle* was overtaking the *August*, and relying upon the evidence of his own witnesses, that she was three points on the starboard quarter of the latter, claimed the benefit of the definition of an overtaking vessel, suggested by Brett, L.J. in delivering the judgment in the case of *The Franconia*. What Brett, L.J. said was as follows: "It seems to me that this may seem a very good definition. I will not say that it is exhaustive, or that it may not on some occasion be found to be short of comprising every case: but I think it is a very good rule, that if the ships are in such a position, and are on such courses and at such distances, that if it were night the hinder ship could not see any part of the side lights of the forward ship, then they cannot be said to be crossing ships, although their courses may not be exactly parallel. It would not do, I think, to limit the angle of the crossing too much, but a limit to that extent it seems to me is a very useful and practical rule, and then if the hinder of two such ships is going faster than the other she is an overtaking ship." Mr. Milward's argument was this: If the *Peckforton Castle* was three points on the starboard quarter of the *August* she could not, had it been night have seen any of the side lights of the *August*, and she was accordingly an overtaking vessel, and the 17th and not the 12th article of the regulations was applicable. This would have been a very effective, if not a conclusive, argument if it had been established that the *Peckforton Castle* was three points on the starboard quarter of the *August*; but we have held that the *Peckforton Castle* was not three points on the starboard quarter of the *August*, or in any direction

abaft her beam; and therefore the question whether the definition is accurate or not is not of importance in the present case. I desire however to state that, without expressing any dissent from the definition—which I am bound to say I at the time thought unsatisfactory, though it was not in my opinion necessary for the decision of *The Franconia* case—I am unwilling to be considered as giving it an unqualified assent; the arguments in the present case have caused me to entertain some doubt upon the subject, and I deserve to reserve to myself the right of reconsidering it when the circumstances of any case before me may require it. It is occasionally a matter of considerable difficulty to decide whether a particular vessel is crossing, overtaking, or approaching the other, within the intent and meaning of the several articles of the regulations; and the court, whose duty it is to decide such questions, must act upon the view taken by it of the special circumstances of the case under consideration, and with a due regard to the several matters provided for by the 19th article, as well as those recognised rules of navigation which, though not expressed, or fully expressed, in the regulations are nevertheless of general application.

JAMES, L.J.—I also desire to add that the result of the argument induces me to come to the conclusion that I doubt whether the definition laid down in *The Franconia* case can be laid down as a rule to be so generally applicable as appears to be intimated in that case.

THESIGER, L.J.—With regard to the rule referred to, after what has fallen from the other members of the court, I have only to add that I am not prepared, in a case like the present, to express the view that it ought not to be adopted as a convenient rule of navigation. I only desire to reserve my assent to it until the occasion arises when it will have to be considered more fully whether the test given by it can be in all cases equally applied.

Appeal dismissed with costs.

Solicitors for the appellants, owners of the *August, Gregory, Rowcliffe*, and *Co.*

Solicitors for the respondents owners of the *Peckforton Castle, Cooper* and *Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by J. M. LELY, Esq., Barrister-at-Law.

Friday, Dec. 21, 1877.

(Before COCKBURN, C.J.)

WILSON AND ANOTHER v. GENERAL SCREW COLLIERY COMPANY.

Steamship — Contract for fittings of — Breach— Measure of damages—Recovery for loss of use of ship.

The defendants, having contracted to supply the plaintiffs' steamship with a propeller shaft and other fittings, supplied useless fittings, whereby the plaintiffs, besides being obliged to replace the fittings, lost the use of the ship for nine days.

Held, that the lost earnings of the ship for the nine days ought to be included in the damages recoverable.

THIS was an action for breach of a contract by the defendants to supply the plaintiffs' steamship with certain fittings.

The facts appear from the written judgment of Cockburn, C.J.

Day, Q.C. and *Edwyn Jones* for the plaintiffs.

Murphy, Q.C. and *J. C. Matthew* for the defendants.

Cur. adv. vult.

Dec. 21.—COCKBURN, C.J.—This was an action tried before me at the last assizes for the county of Surrey. It was an action brought against the defendants, who are a company engaged in the repair of steam vessels, for breach of a contract to furnish a new brass liner to the propeller shaft of a steam vessel of the plaintiffs, and a new brass stem brush; the allegation being that those articles were not constructed, or fitted on, in a workmanlike and proper manner, in consequence of which they became useless, and the plaintiffs were obliged to replace them, whereby they were not only put to expense, but lost the use of the vessel for nine days, and they claimed damages, not only for the cost of the new brass liner and brush, but also for the loss sustained by the detention of the vessel. The jury found for the plaintiffs as to the machinery having been defective; and it is not disputed that judgment shall be given for the cost of the new machinery, amounting to 157*l.* 15*s.* 6*d.*; but it was contended by the defendants that the plaintiffs were not entitled to recover damages for the loss sustained by the vessel remaining unemployed during the time that the new machinery was being made and fitted.

Evidence was given by the plaintiffs that the earnings of such a vessel as the one in question would be from 26*l.* to 27*l.* a day. No evidence was adduced to show that the vessel would have been actually so employed; but no objection was made on this score, the contention of the defendants being based on the general proposition that the damages claimed were too remote. I reserved the question for future consideration, and it has since been argued before me by counsel.

On consideration I am of opinion that the damages claimed are not too remote, and fall within the rule laid down by the Court of Exchequer in *Hadley* v. *Baxendale*, 9 Ex. 350 It is there said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." It appears to me that when machinery is ordered for a sea-going steam vessel, it must be in the contemplation of the parties that the purpose of the thing ordered is to enable the vessel to resume her usual employment, and that, in the event of the machinery being defective, the defect will have to be made good before the vessel can be again employed, and that the detention of the vessel will be the probable result of the breach of contract.

I therefore hold that the plaintiffs are entitled to recover the loss sustained by the detention of the vessel, amounting to 234*l.*, as well as the cost

of replacing the machinery. The judgment will therefore be entered for 391*l.* 15*s.* 6*d.*

Judgment accordingly.

Solicitors for the plaintiff, *Lowless, Nelson,* and *Jones.*

Solicitors for the defendants, *Thomas* and *Hollams.*

COMMON PLEAS DIVISION.

Reported by A. H. Bittleston and J. A. Foote, Esqrs., Barristers-at-Law.

Friday, Dec. 7, 1877.

(Before Grove and Lindley, JJ.)

Steel *v.* Lester and Lilee.

APPEAL FROM INFERIOR COURT.

Master and servant—Partnership—Negligence—Ship—Owner and captain—Transfer of control over—Share in profits—Registration—"Managing owner"—38 & 34 Vict. c. 88, *s.* 4, *sub-sect.* 4.

The owner of a ship, who, by a verbal agreement, gives up all control over her to the captain, but retains a right to one-third of the net profits, and is subsequently to the agreement registered as "managing owner" under the Merchant Shipping Act 1875, *is liable for the negligent management of the vessel by the captain, although occurring during her employment under a charter-party of which the owner knew nothing.* (*a*)

Fraser *v.* Marsh (13 *East,* 238) *distinguished.*

Special case stated by a County Court judge.

This was an action brought by the plaintiffs, who are millers at Spalding, against the defendant Lester, as the owner, and the defendant Lilee as the master, of a sloop called the *Anne of Goole,* for damage amounting to the sum of 50*l.* occasioned to the plaintiffs' wharf by the sloop breaking loose from her moorings under circumstances which, in my opinion, showed negligence by the defendant Lilee in the management of the vessel, and evidence being given that damage to 50*l.* had been suffered by the plaintiffs in consequence, I gave judgment against both the defendants to that amount with costs. From this judgment there is no appeal on the part of the defendant Lilee, but the defendant Lester alleges that he is not liable for the negligence of Lilee.

The facts bearing upon this point proved before me were as foilows:—

The defendant Lester, who is a merchant living and carrying on business at Stoke-upon-Trent, in the county of Stafford, purchased, in the month of May 1873, the sloop *Anne,* which was duly transferred to him, and registered in his name as the owner. He was afterwards registered as the "managing owner," under the provisions of the Merchant Shipping Act 1875.

For about three months after the defendant Lester purchased the vessel, he traded with her on his own account, employing the defendant Lilee as skipper, paying him standing wages. At the end of three months from his purchase of the sloop, he agreed verbally with the defendant Lilee that he should take the ship wherever he chose, on condition that he (Lester) should have a third of the net profits. Lilee was to be at liberty to go to any port, and to take in any cargo he chose, and to refuse any cargo. He was also to engage the men, and Lester had no control over the vessel. Lilee was to render to Lester accounts of his profits from time to time, and this state of things centinued till after the collision, Lester selling the vessel in 1876. Lester, on cross-examination, could not say what his profit was on this particular voyage. He said the account given him by Lilee was somewhere, but he had not got it with him. In the month of March 1876 the defendant Lilee entered into a charter-party, a copy of which is set out in the Appendix hereto (No. 1).

The sloop arrived at Spalding in due course, and after partially discharging the cargo the vessel remained several days at the said port, and whilst so remaining the damage was occasioned to the plaintiffs' wharf, by reason of the negligence of the defendant Lilee.

The defendant Lester was not consulted by the defendant Lilee as to the contract for taking the said cargo, and never saw or heard of the charter-party till after the commencement of the action; he was not present at the port of Spalding when the vessel arrived there, or at any time thereafter during her stay at the said port, and he did not take any part in the management of the said vessel during her voyage to, or whilst she remained at the said port. The men employed in navigating the said vessel (as on all previous voyages during the existence of the agreement between the two defendants) were hired and paid by the defendant Lilee, who found all stores required for the said ship, and paid to the defendant Lester one-third of the profit realised by the voyage.

I gave judgment on the 5th July 1877, and a copy of such judgment will be found in the appendix (see Appendix No. 2).

The question for the consideration of the court is whether, under the circumstances above stated, the defendant Lester is legally liable for the negligence of the defendant Lilee in the management of the said ship whilst lying at the port of Spalding, which occasioned the damage to the plaintiffs' wharf for which this action was brought. If he is so liable my judgment is to stand; but if he is not, then the judgment is to be against Lilee only, and judgment is to be entered for the defendant Lester, with costs.

James Stephen, Judge.

8th Aug. 1877.

Appendix No. 1. Copy Charter Party.

London, 21st March 1876.

It is this day mutually agreed between Lilee, master, for and in behalf of the owner of the good ship or vessel called the *Anne of Goole,* burthen per register 44 tons, now at London, and Lawes Chemical Manure Company (Limited), 59, Mark-lane, London, that the said ship, now being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to wharf or dock as directed by shipper, free of dock dues to vessel and there load in regular turn with other sea-going vessels (barges not to be termed sea-going ships) from the factors of the said merchants a full and complete cargo of manure in bags and or bulk at merchants' option, about 80 tons, the cargo to be brought to and taken from alongside the vessel at merchants' risk and expense, notwithstanding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and

(*a*) This case turns upon the facts which are held to show that the owner had not given up all his right and control to the master, but intended to preserve his right and position as managing owner. In the United States it seems to be held that where a master has the control of a vessel sailing her on shares, and no other facts appear, this constitutes the master owner *pro hac vice,* and the owners are not liable for his negligence or the negligence of a crew engaged by him. (See *Somer* v. *White,* 65 Maine Rep. 542; 20 Amer. Rep. 718.)—Ed.

furniture, and being so loaded shall therewith proceed to Spalding or Gainsboro' as ordered on signing bill of lading and deliver the same on being paid freight at the rate of 6s. 6d. per ton of 20cwt. and 2ls. gratuity. Merchant paying Welland dues on cargo. If cargo be shipped in bulk the bags to be carried free of freight (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage always excepted); the freight to be paid on unloading and right delivery of the cargo in cash. Four working days are to be allowed the said merchants (if the ship is not sooner despatched) for discharging the said ship, and all days on demurrage over and above the said lying days at 30s. per day.

Penalty for nonperformance of this agreement, estimated amount of freight.

(Signed) JOHN LILEE.

(Signed) Pro. Lawes and Co., THOS. PHILO.

21-3-76.

APPENDIX No. 2. COPY JUDGMENT.

In the case of *Steele* v. *Lester and Lilee*, which was heard at the last court, the action was against Lester the owner and Lilee the master of the ship *Anne*, which, having broken from her moorings in the river at Spalding in April last, damaged a wharf belonging to the plaintiffs to the extent of fifty-seven pounds six shillings and threepence, and the action was brought to recover the sum of fifty pounds, the residue being abandoned in order to bring the case within the jurisdiction of this court.

In order that either of the defendants should be liable in this action, it must be shown that there was negligence on the part of the defendant Lilee, who had the control of the vessel. And I am of opinion, on the evidence, that he was guilty of negligence in the way in which he fastened the ship after he had removed her from her first moorings, and also because he left the ship under the charge of an incompetent man, who might have avoided the accident if he had attended to what was said to him by the witness Mitchell.

No serious opposition was made to the amount of the damage alleged to have been caused by the ship, and I have therefore no difficulty in giving judgment in the action for the amount claimed.

With regard to the other defendant, the owner of the vessel, it was urged in his behalf that, though he was at the time of the transaction the registered "managing owner" of the vessel, that the relationship of master and servant did not then exist between him and Lilee so as to make him liable for his misconduct, and I was pressed with the case of *Fraser* v. *Marshall* (13 East, 238) as supporting that view. That decision, however, when I had the opportunity of reading it over carefully, I found to have been given in reference to a state of facts widely differing from those before me. In that case the owner had actually by a charter-party demised the ship for a time certain to the master at a certain rent, but here there was nothing of the kind: a verbal arrangement at the most, and that very loosely proved. And it is clear to me that the owner must be held liable in this case either as standing in the position of Lilee's master or else as his partner under the peculiar arrangement he said he made with him. And, for the purposes of the present action, it is of no importance which position he filled, as in either case he would be responsible for Lilee's acts while in conduct of the vessel.

Judgment, therefore, for fifty pounds and costs must be entered against the defendants.

F. T. Streeten for the appellant.—The agreement between Lester and Lilee does not show a partnership, a mere sharing of profits is not enough: (*Ross* v. *Parkyn*, 44 L.J. 616, Ch.) There is nothing here to show a partnership. Then, further, there is here no relationship of master and servant, or employer and employed, or principal and agent. [LINDLEY, J. cited *Pooley* v. *Driver* (L. Rep. 5 Ch. D. 45; 46 L. J. 466, Ch.) GROVE, J. cited *Lock* v. *Fowler* (L. Rep. 7 C.P. 292; 41 L. J. 99, Ch.] If a person is injured by the negligence of another, a third person is not liable unless the relationship of servant and master can be shown to exist between the third person and the person doing the injury, or unless the act from which the mischief arises is done by the express authority of the third person: (*Venables* v. *Smith* 46 L. J. 470, Q. B.) Here nothing of the sort is shown. The case finds that Lester knew nothing of the charter-party. [LINDLEY, J.—He may have left everything in Lilee's hands, and yet Lilee only be the captain.] In *Milligan* v. *Wedge* (12 Ad. & Ell. 737) the buyer of a bullock employed a licensed drover to drive it from Smithfield; the drover employed a boy to drive it, and mischief was occasioned to the bullock through the careless driving of the boy. There the licensed drover was held to be liable, if anyone. That case shows that you can only go one step beyond the person who does the injury. [GROVE, J.—In *Milligan* v. *Wedge* (*ubi sup.*) Lord Denman says: "The party sued has not done the act complained of, but has employed another who is recognised by the law as exercising a distinct calling."] It is not disputed here that Lester was owner of the vessel; but it is found by the case that he had no control over it. Lilee had the possession and entire use of the vessel; but not the whole profit. Although there is no letting here, there is a parting with the use of the vessel, and therefore the case of *Fraser* v. *Marsh* (13 East, 238) is in point. The case of *Fowler* v. *Lock* (L. Rep. 7 C. P. 272; 9 C. P. 751, n. 10 C. P. 90) is also in point. GROVE, J.—My decision in that case went on the fact that the owner gave up the use of the cab for the day, and therefore the cabman was the bailee of the cab, and not the servant of the owner, at all events *inter se*. And I distinguished the case of *Powles* v. *Hider* (6 E. & B. 207; 25 L. J. 331, Q. B.), on the ground that the judgment in that case proceeded on the relation and responsibility of the cab proprietor to the outside public.] Byles, J., in his judgment in *Fowler* v. *Lock* (*ubi sup.*), says. "Suppose that in a country town, in the time of Charles I., the owner of a horse and cart contracted to allow another man to have the entire and exclusive personal use and control of them, at so much a week or so much a day, for the purpose of carrying, for the driver's profit, passengers or goods within the limits of the town, but without reserving to himself (the owner) any right to direct where the horse and cart should go, provided they were used within the prescribed limits and were returned within the agreed time; what in that case would have been the nature of the relation between the parties? I should have thought it would not have been that of master and servant, but would have been that of bailor and bailee." Here there is an absolute parting with the control of the vessel to Lilee. Lilee hired the sailors, paid them, dismissed them, and could go wherever he pleased. [LINDLEY, J.—

That is so in all cases of partnership, where there is a dormant partner.] He cited also

Reedie v. *The London and North-Western Railway Company* (4 Exch. 244.)

Finlay for the respondent.—This is really a question of fact, upon which the decision of the County Court judge is equivalent to the verdict of a jury. He decides upon the evidence that there was not here an absolute demise of the ship, as there was in (*Fraser* v. *Marsh* (*ubi sup.*). [LINDLEY, J.—Have not we to decide whether his conclusion was right, on the facts found? GROVE, J.—Here the evidence is unquestioned, and we have to decide what is the proper legal inference to be drawn from these unquestioned facts.] Then, Lester is registered as the managing owner, under 38 & 39 Vict. c. 88, s. 4, sub-sect. 4. If the contention of the appellant was right, Lilee, and not Lester, would be so registered. [GROVE, J.—This is an action brought, not by Lilee against Lester, but by a third person, and is therefore distinguishable from *Fowler* v. *Lock* (*ubi sup.*)] That is so. The registration of Lester as managing owner is an admission of the strongest kind that the vessel was under his control. GROVE, J.—The case finds that he had no control over the vessel, But that may be in the same way as a master exercises no direct control over his coachman.] He was stopped by the Court.

Streeten in reply.

GROVE, J,—I am of opinion that the County Court judge was right, and that his decision must be affirmed. The action was commenced against Lilee and Lester for injury occasioned by the negligence of Lilee in the conduct of a ship of which Lilee was the master and Lester the registered owner. The question we have to decide is, whether the relationship of master and servant existed between Lester and Lilee, or, to put it more widely, whether Lester had or had not divested himself of his responsibility for the acts of Lilee.

The case that seemed most in favour of the appellants' contention was *Fraser* v. *Marsh* (13 East, 238). There it was held that the registered owner of a ship having chartered her to the then captain at a rent for a certain number of voyages, is not liable for stores furnished to the ship by order of the charterer during the charter-party. But there was there an absolute demise and parting with the vessel; nor was the registration there of the same kind as the registration of the managing owner under the Merchant Shipping Act 1875, which has for its object that there shall be someone responsible for the seaworthiness and proper management of the vessel. There are, therefore, two distinctions between *Fraser* v. *Marsh* and the present case; and I draw the same inference as the County Court judge did, that there was here no absolute parting with the vessel, but that Lester still in a certain sense retained the management of the vessel through the captain.

Another case cited was that of *Fowler* v. *Lock* (*ubi sup.*) There the plaintiff, a cab-driver, obtained from the defendant, a cab proprietor, a horse and cab upon the usual terms—viz., that the driver on bringing them back at the end of the day, should hand over to the proprietor a fixed sum, retaining for himself all the day's earnings over that sum, the day's food for the horse being supplied by the owner, and the latter having no control over the driver after leaving the yard. The majority of the Court of Common Pleas held that the relationship between the defendant and the plaintiff was not that of a master and servant, but that of bailor and bailee, and consequently that the defendant was under a legal obligation to furnish the plaintiff with a horse that was reasonably fit to be driven in a cab. The Exchequer Chamber, being divided in opinion, and considering the statement of facts upon which they had to decide imperfect, ordered a new trial. Upon the action again being tried, in answer to questions put to them by the judge, the jury found that the horse was not reasonably fit to be driven in a cab; that the plaintiff did not take upon himself the risk of its being reasonably fit to be so driven; that the defendant did not take reasonable precautions to supply the plaintiff with a reasonably fit horse; and that the horse and cab were intrusted to the plaintiff as bailee, and not as servant. A verdict having been thereupon entered for the plaintiff, the Court refused to disturb it. If the present action had been one by Lilee against Lester, by the master of the vessel against the owner, *Fowler* v. *Lock* might have had a very strong application, but that is not so. The action here is brought by one of the public, and is consequently within the express distinction taken in *Fowler* v. *Lock* between that case, which involved the nature of the contract between the cabowner and the cabman only, and a case involving the relation and responsibility of the cab proprietor to the public, a distinction supported by the previous decision in *Powles* v. *Hider* (6 E. & B. 207; 25 L.J. 331, Q. B.) Assuming, therefore, *Fowler* v. *Lock* to be rightly decided, it does not govern this case.

Then *Venables* v. *Smith* (L. Rep. 2 Q.B. Div. 279) is, as far as it goes, in favour of the decision of the County Court judge. It may be distinguishable from the present case, but at all events, it supports the contention of the respondents rather than of the appellants.

There was one part of the case which at first seemed to me to be very strongly in favour of the appellants' contention—namely, the finding that Lester had parted with all control over the vessel. Because it seemed that, if that was so, the case was brought within *Fraser* v, *Marsh* (*ubi sup.*) But though it is true in a certain sense to say that Lester had no control over the vessel, he still remained the responsible owner and manager of her as regards the outside public. There are two important matters that lead me to this conclusion. The first is that by sect. 4, sub-sect. 4, of the Merchant Shipping Act 1875, it is provided that "the owner of every British ship shall from time to time register at the custom-house of the port in the United Kingdom at which such ship is registered the name of the managing owner of such ship, and, if there be no managing owner, then of the person to whom the management of the ship is intrusted by and on behalf of the owner; and in case the owner fail or neglect to register the name of such managing owner or manager as aforesaid he shall be liable, or, if there be more owners than one, each one shall be liable in proportion to his interest in the ship, to a penalty not exceeding in the whole 500*l.* each time that the said ship leaves any port in the United Kingdom, after Nov. 1, 1875, without the name being duly registered as aforesaid." Now it is found by this

case that Lester was registered as owner of the vessel. If he had demised the ship so as to part with the management of her, he might have had Lilee inserted in the register as the managing owner. He did not do so, however, and, in consequence, remains the responsible owner of the vessel. The second matter is, that he never gives up his interest in the adventure; so that he not only avows to the public through the register that he is the responsible owner, but he retains an interest in common with Lester to the extent of one-third of the profits. Whether that constitutes him a partner for all purposes it is unnecessary now to decide; it is sufficient for the present purpose that he would suffer by the failure of an adventure, and benefit by its success.

On these grounds, I am of opinion that Lester is liable for the negligent conduct of the vessel by Lilee.

LINDLEY, J.—I am of the same opinion. The question we have to decide is, whether on the facts stated the defendant Lester is liable. The facts are shortly these: Up to July 1873 Lester employed Lilee as skipper. Then that arrangement was altered, and the altered arrangement was this: instead of Lilee being master of the vessel, Lester allowed Lilee to have the management of it, on condition of paying a certain proportion of the profits to him. What is the true effect of that agreement? We are asked to say that it amounts to a demise of the ship from the owner to the master, so as to shift the responsibility for negligent management from the one to the other. I do not think that that is so. It seems to me that this agreement may be looked upon as having for its object one of two things. It may be either a mode of paying the master of the ship, Lester still retaining the management of her; or a taking of the master into partnership. Which of these views is the correct one it is unnecessary to decide. I think the former is the most probable. But the vessel was being managed for the joint profit of Lester and Lilee. Lilee was therefore either Lester's partner or Lester's agent. I do not think the facts show anything like a demise of the ship.

This is how I treat the matter independent of the Merchant Shipping Act 1875, but I think it important that Lester does not register Lilee as managing owner of the vessel, under the provisions of the Merchant Shipping Act, but himself. I do not say that that is conclusive. Looking at the purposes of that provision, it may sometimes, in cases of this kind, be necessary to go behind the register in order to discover the true relation of the parties. But the fact of a man going and registering himself as managing owner is certainly very strong evidence that he is so. Then Lilee himself takes that view, as he enters into a charter-party on behalf of the owner. That is a very good ground for our taking the same view.

Appeal dismissed with costs.

Solicitors for the appellant, *Wedlake* and *Son*, for *Keary* and *Marshall*, Stoke-upon-Trent.

Solicitors for the respondent, *Routh* and *Stacey*, for *Maples* and *Son*, Spalding.

Nov. 7 and Dec. 21, 1877.

(Before Lord COLERIDGE, C.J., and DENMAN, J.)

PALMER *v.* ZARIFI BROTHERS.

Bill of lading—Charter party—Demurrage—Contract by indorsee of bill of lading.

A charter-party stipulated that the agreed freight should be paid on right and true delivery of cargo, and that the discharge at the port of delivery should be done in accordance with the usage of the discharging port. The defendants were indorsees of the bills of lading, which were expressed to be subject to the conditions of the charter-party, and contained the following clause: "The goods to be taken from the ship by the consignee immediately they come to hand in discharging the ship, otherwise they will be landed or put into craft by the master or ship's agent (at the merchant's risk and expense), and either or both to have a lien on such goods until the payment of all costs and charges so incurred."

In an action by the plaintiff for damages for the detention of the ship by default of the defendants, the jury found that the ship was detained for two days beyond a reasonable time for unloading, and that 30l. a day was a fair charge for the detention, and that the defendants held themselves out to the plaintiff as receivers of the cargo under the bill of lading, so as to lead the plaintiff to look to them as such. There was evidence that the defendants told the plaintiff's agent, before the ship arrived, that they had the cargo, and would pay the freight; and that during the unloading the plaintiff's agent complained daily to the defendants of their delay, telling them that there would be a claim for demurrage, without a repudiation by them of liability.

Held, that there was evidence that the defendants undertook to pay for any unreasonable delay, and that they took delivery under the provisions of the bill of lading.

ACTION by shipowners for damages for the detention of a ship beyond a reasonable time for taking delivery of a cargo of wheat.

The ship was chartered by merchants in Smyrna to take a full cargo of wheat to a safe port in England, to be named on signing bills of lading; freight of 5*s.* a quarter to be paid on right and true delivery of cargo, "the discharge at the port of delivery to be done in accordance with the usage of the discharging port." The master signed bills of lading, expressed to be subject to the conditions of the charter-party; and the bills of lading were indorsed to the defendants, who had notice of the ship's arrival at the English port named.

The bill of lading referred to the charter-party for the amount of freight payable, and contained the following clause: "The goods to be taken from the ship by the consignee immediately they come to hand in discharging the ship, otherwise they will be landed or put into craft by the master or ship's agent (at the merchants risk and expense), and either or both to have a lien on such goods until the payment of all costs and charges so incurred."

There was evidence that the cargo might have been discharged in twenty-four hours, according to the usage of the discharging port, and that during the unloading remonstrances were made to the defendants by the ship's agent, and acknowledged by them, as to the delay. The defendants alleged that they were only the nominal

holders of the bill of lading, and were acting for a firm in Liverpool.

The plaintiff sued for damages for three days' detention of the ship, at 30*l.* a day. The jury found that the ship was detained two days beyond a reasonable time for unloading, and that 30*l.* a day was a reasonable claim; and further, that the defendants held themselves out to the plaintiff as receivers of the whole cargo under the bill of lading, so as to lead the plaintiff to believe that they were the persons to whom the plaintiff was to look as such.

The defendants had obtained a rule *nisi* for a new trial, on the ground that there was no evidence which should have been left to the jury, or to show any contract by the defendant to pay demurrage.

Nov. 7.—*Herschell*, Q.C., for the plaintiff, showed cause. The defendants contended, first, that the holders of the bill of lading are not liable for this detention; and, secondly, that even if that were so, they are not, in that sense, the holders. As to the second point, even if the defendants were acting for other principals, and holding the bill of lading for them, the jury have found that they held themselves out as receivers of the cargo under the bill of lading, so as to induce the plaintiff to look to them as such. An actual holder of a bill of lading, giving no notice of any one behind for whom he is acting, is personally liable under the conditions expressed in it. Here the shipowner waived his lien for freight by giving up the cargo, confiding in the ostensible holder of the bill of lading. And, if the defendants are to be regarded as holders of the bill of lading, they are clearly liable, for the bill of lading incorporates the conditions of the charter-party, and provides that the goods shall be taken from the ship immediately they come to hand in unloading. *Miller* v. *Young* (4 E. & B.); *Chappel* v. *Comfort* (31 L. J. 58 C. P.) decided that a promise might be implied by the holder of the bill of lading to pay freight.

R. E. Webster, on the same side.—The question is, whether there was a condition in the bill of lading that the cargo should be cleared within a certain time. If so the owner is liable:

Steel v. *Roberts*, 17 L.J. 166, Q.B.;
Jesson v. *Solly*, 4 Taunt. 52;
Wegener v. *Smith*, 15 C. B. 729.

Cohen, Q.C. (*J. C. Mathew* with him) for the defendants.—First, we say that under this bill of lading the shipper himself would not be liable for damages for detention. There is an express clause that, if the consignee does not, the master shall land the goods. He cannot refrain from doing so, and then sue for damages. Secondly, there was no lien for demurrage given by the charter-party, nor by the bill of lading. The law implies no such contract by the defendants as that alleged, and there was none in fact. There was no evidence of any refusal to deliver the cargo on the ground of a claim to demurrage; and therefore there was no contract to pay if the cargo was given up. The defendants were mere holders of the bill of lading, with no special property in the cargo.

Dec. 21.—The judgment of the court (Lord Coleridge, C.J., and Denman, J. was delivered by

DENMAN, J.— In this case the plaintiff, who was the owner of the steamship *Greenwood*, sued the defendants for damages for three days' detention of that ship beyond a reasonable time for taking delivery of a cargo of wheat. The statement of claim set forth the terms of a charter-party, by which certain merchants of Smyrna agreed to give the ship a full cargo of wheat for a safe port in England, to be named on signing bills of lading, freight of 5*s.* per quarter to be paid on right and true delivery of the cargo, "the discharge at the port of delivery to be done in accordance with the usage of the discharging port." It was then stated that upon loading the cargo, the master signed bills of lading, which were expressed to be subject to the conditions of the charter-party, that the bills of lading were indorsed to the defendants, who had notice of the arrival of the ship; that according to the usage of the port, the cargo might have been discharged in twenty-fours, which it was not; and the plaintiff claimed three days' demurrage according to the contract, 30*l.* per day. There was also a claim on the ground that the defendants were bound to take delivery within a reasonable time, which it was alleged they had not done. The bill of lading referred to the charter-party for the amount of freight, and contains the following clause, "The goods to be taken from the ship by the consignee immediately they come to hand in discharging the ship, otherwise they will be landed or put into craft by the master or ships' agent (at the merchant's risk and expense), and either or both to have lien on such goods until the payment of all costs and charges so incurred." According to the evidence for the plaintiff, the crew could have discharged more rapidly than they did, but for want of lighters. The jury found that the ship was detained for two days beyond a reasonable time for unloading, and that 30*l.* a day was a fair charge for the detention. They also found "that the defendants held themselves out to the plaintiff as receivers of the whole cargo under the bill of lading, so as to lead the plaintiff to believe that they were the persons to whom the plaintiff was to look as such." A rule *nisi* was granted to show cause why there should not be a new trial on the ground of misdirection in not holding that there was no evidence to justify the jury in finding for the plaintiff, and in holding that there was evidence of a contract for the payment of demurrage.

We do not think that the finding of the jury is to be construed so critically as to authorise us to draw a distinction between demurrage in the strict sense and damages for unreasonable delay; but we consider the real question to be whether upon the evidence in the case, the learned judge was bound to have told the jury that there was no evidence upon which they could find that the defendants were liable for the two days' delay found by the jury. We are of opinion that there was evidence upon which the jury could properly find as they did, and that their finding, fairly construed, amounts to a finding that the defendants took delivery of the cargo under the bills of lading, including that part of them which stipulated that the goods were to be taken from the ship immediately they came to hand in discharging the ship. It was proved that some time before the arrival of the ship the defendants announced to the plaintiff's agent that they had the cargo, and would pay the freight. This we understood to mean the freight stipulated for in the charter-party. This, of itself, would not be evidence of any agreement to pay demurrage as such, there

being no stipulations as to demurrage in that charter-party. But the evidence showed that daily during the delivery the plaintiff's brokers complained of the delay, and told the defendants that there would be a claim for demurrage. Looking at the terms of the bill of lading, we think that the fair construction of these complaints and warnings is, that they amounted to a notice to the defendants that they were being held to the terms of the bills of lading as regards an immediate discharge of the cargo. It was sworn by one of the plaintiff's witnesses that the defendants in answer to these complaints and warnings, replied that they hoped that the brokers would not press them, and that the plaintiffs had been very lenient in a former case, which was a case of demurrage. After the discharge was completed the defendants, on being told that the claim for demurrage was three days, asked the broker if he would not settle for less, and on more than one occasion offered to settle for 50*l*. It appears to us that this was evidence upon which the jury might not improperly find that the defendants undertook to pay for any unreasonable delay, and that this, in substance is what the jury have found. The consideration for this undertaking would obviously be, that the plaintiff abstained from exercising his power under the bill of lading to employ other lighters and to keep his lien upon the goods against the consignees for the cost, We think that is the true effect of the finding and the evidence, and that the rule must consequently be discharged.

Rule discharged.

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

Solicitors for the defendants, *Hollams, Son,* and *Coward.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. ASPINALL, and F. W. RAIKES, Esqs., Barristers-at-Law.

Friday, Jan. 11, 1878.

(Before Sir R. PHILLIMORE.)

THE SARAH.

Salvage—Custom to apportion award—Information leading to salvage service—Costs.

Where there was a custom to share in salvage awards in a particular manner according to the ratings of the salvors on board their ship, but some of the salving crew had exposed themselves to much greater risks than the rest, the court gave them a larger share on equitable principles.

Carrying information to a vessel which enables her to render a salvage service is itself a service in the nature of salvage, and will be rewarded accordingly.

Where separate salvage suits have been unnecessarily prosecuted, the court will only allow one set of costs, and direct the amount allowed to be distributed rateably amongst the plaintiffs in the separate suits.

THESE were causes of salvage instituted respectively by the mate and two of the crew of the steam tug *Great Western,* the owners, master, and remainder of the crew of the *Great Western* and the owners, master, and crew of the steam tug *Kingfisher,* against the ship *Sarah,* for salvage services rendered to that vessel on the 14th Oct. 1877, and following days. The two latter actions had been consolidated, leave being granted to the owners of the *Kingfisher* to be represented at the hearing by one counsel. The *Sarah* was a sailing ship of 1176 tons register, belonging to the Port of Yarmouth, Novia Scotia, and on the 14th Oct. 1877, whilst on a voyage from Quebec to Liverpool, laden with a cargo of timber, she got ashore on the Middle Mouse Rocks off the coast of Anglesey, in which position she was observed by those on board the *Kingfisher,* a paddle tug belonging to the Liverpool Steam Tug Company. The *Kingfisher* was at the time engaged to perform a contract of towage, and was subsequently unable to proceed to the *Sarah.* She, however, left her tow for awhile, and proceeded to the *Great Western,* a paddle steam tug of 300 tons gross register, propelled by engines of 130 nominal horse power, and capable of working up to 800 horse power, and which at the time, about 10 a.m., was abreast of the Ormes Head on the look-out for vessels. Those on board the *Kingfisher* informed those on board the *Great Western* of the position of the *Sarah,* and the *Kingfisher* then returned and completed her contract of towage. The *Great Western* at once proceeded to the Middle Mouse, and arrived there about noon, the tide being flood, the wind blowing a moderate and increasing gale from W.S.W. and a heavy sea running. When the *Great Western* arrived the *Sarah* was aground forward, with a list to starboard, and the sea breaking over her stern; and her captain and crew were removing their effects from her. After communicating with the captain of the *Sarah,* the *Great Western* proceeded to put some pilots she had on board into a pilot boat in the neighbourhood, and on her return, about four p.m., found the crew of the *Sarah* getting into a lifeboat which had come off to her. The *Great Western* then towed the lifeboat to her station. The captain and pilot of the *Sarah* shortly afterwards came on board the *Great Western.* and, after leaving the ship's papers and chronometer, went on shore, to consult Lloyd's agent. About five p.m., whilst he was on shore and no one on board the *Sarah,* those on board the *Great Western* observed that the *Sarah* had changed her position and was thumping heavily on the rocks with her port bilge. The *Great Western* then went as close to the *Sarah* as was prudent, and her mate and two of her crew, the plaintiffs in the first salvage suit, boarded her in the tug's boat, and after a while got a hawser from her quarter to the *Great Western,* which then succeeded in towing her off the rocks; they then got another hawser from her bow to the *Great Western,* which then proceeded to tow her to Liverpool The *Sarah* was water-logged, and the mate and the hands from the *Great Western* remained on board and navigated her till her arrival in the Mersey, at about 8.30 a.m. on 15th Oct., when she was brought to an anchor. During the time the services were performed the wind was blowing a heavy gale, with rain and hailstorms. The *Great Western* continued in attendance on the *Sarah* till the 22nd, when the weather having moderated, she, with the assistance of other tugs, beached the *Sarah* near New Ferry in the Mersey, after which the *Great Western* still continued in attendance till 25th Oct. The value of the *Sarah* as salved was 6,566*l*., and that of the *Great Western* was 13,000*l*,

The discussion turned principally on the exist-

ence and validity of a custom among tug owners and crews at Liverpool to share salvage awarded at a fixed rate of percentage, according to the ratings of the crew, by which the mate of the *Great Western* would be entitled to 1½ per cent., and each of the crew to 1 per cent. of the total amount. This custom the plaintiffs in the first suit denied, and said that, even if it existed as to ordinary salvage services, it did not apply where some of the crew had rendered special services at the risk of their lives. The salvage service being admitted, no witnesses were called to prove them.

Jan. 11.—The cause came on for hearing before Sir R. Phillimore, assisted by two of the elder brethren of the Trinity House.

Butt, Q.C. and *Potter*, for owners, master, and part of the crew of *Great Western*, contended that the custom was a good one:

The Ganges, 22 L. T. Rep. N. S. 72; 2 L. Rep. A. & E. 370; 3 Mar. Law Cas. O. S. 342;

and that they were entitled to their costs as the question of apportionment might have been raised on motion without instituting a separate action.

W. G. F. Phillimore for mate and two of the crew of the *Great Western*.—Such an agreement, even if proved to exist, does not tie the hands of the court. It does not apply to a case like the present, where the services of those remaining on board the *Great Western* were unattended with personal danger; and ours were rendered at the risk of our lives. The court will decree an apportionment on equitable principles.

Barnes for owners, master, and crew of *Kingfisher*.—We are entitled to salvage. Had it not been for the information brought by us to the *Great Western*, the salvage services would not have been rendered. We did all we could in the way of salvage. We set the salvage operations in motion.

E. C. Clarkson for defendants, owners of the *Sarah*.—Admitting the salvage services, they only lasted fourteen hours, and were rendered without any danger being incurred, at all events, by those remaining on board the *Great Western*. The alleged services of remaining by the *Sarah*, after she got into the Mersey, are not salvage services at all; there were plenty of tugs there, and any of them would have remained by the ship for a small rate of pay daily during that time. The *Great Western* was not a salvor, but a servant of the *Sarah*, and is amply remunerated by a payment of 25*l.* per day, which we say we agreed to pay. The service of the *Kingfisher*, if salvage at all, is of the most trivial nature. We ought not to pay costs of more than one set of salvors at all events. It was unnecessary to bring more than one suit.

Sir R. PHILLIMORE, after consultation with the Trinity Masters.—It has been very properly admitted that a meritorious salvage service has been rendered to this ship, which was in my opinion—an opinion confirmed by that of the Elder Brethren of the Trinity House—in a state of great danger. She was on a rock on the Middle Mouse Island, and had been left by her crew. There is no doubt that but for the immediate succour she received she would have gone entirely to pieces. There is another consideration of importance, as to the amount of personal peril that was incurred by those who rescued her, which we think in this case has a considerable bearing, on account not only of the service rendered in getting her off the rock, but of the admitted state of the weather. Looking to all the circumstances, and without thinking it necessary to recapitulate the principles on which salvage awards are made in this court, I am of opinion, and the Elder Brethren agree with me, that I ought to award 3000*l.* as the total amount. The value of the property saved from total destruction, at considerable peril to the salvors themselves, was 6566*l.*

As to the distribution of the award, the *Kingfisher* did render a meritorious service in the nature of salvage service in conveying the information with great rapidity, thus setting in motion the machinery by which the salvage was rendered; and I shall award her 60*l.* with costs. To the three men who went on board the *Sarah*, I award, to the mate 25*l.* and to the two seamen 20*l.* each, in addition to what are their shares on the usual scale in these boats; the remainder to the owners, master, and crew of the *Great Western*. I only allow one set of costs; that set of costs to be divided rateably between the plaintiffs other than the *Kingfisher*, and I allow the *Kingfisher* her costs.

Solicitors for plaintiffs, owners, master, and crew of the *Great Western*, except three; and also for plaintiffs, owners, master, and crew of the *Kingfisher*; *Wright*, *Stockley*, and *Becket*.

Solicitors for plaintiffs, mate, and two of the crew of *Great Western*; *Tyndall* and *Paxton*.

Solicitors for defendants, owners of *Sarah*; *Stone* and *Fletcher*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

Nov. 19, 20, *and Dec.* 7, 1877.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

BAYLEY AND OTHERS *v.* CHADWICK.

Commission—Proximate cause—"In consequence of."

Defendant employed plaintiffs to sell a ship, and agreed that if a sale was effected to any person "led to make such offer in consequence of" plaintiffs' mention or publication of it, plaintiffs should be paid commission.

Plaintiffs advertised the ship, and put her up to auction, but she was not sold. Shortly afterwards, S. purchased her by private contract. S. had heard of the auction from a person who had been in communication with plaintiffs.

Held (reversing the judgment of the Common Pleas Division), that there was no evidence that S. had been led to purchase in consequence of plaintiffs' advertisement.

APPEAL from the judgment of the Common Pleas Division.

The action was brought to recover a commission of one per cent. on the purchase money of the steamship *Bessemer*. The defendant, who was the liquidator of the Bessemer Steamship Company, had instructed the plaintiffs to sell the *Bessemer* by auction.

By a written agreement the plaintiffs were to

have one per cent. commission on the purchase money, if the ship was not sold by auction but a sale was subsequently effected "to any person or firm introduced by" the plaintiffs, "or led to make such offer in consequence of" the plaintiffs' "mention or publication of the ship for auction purposes." The plaintiffs advertised the *Bessemer* for sale, and put her up to auction, but she was not sold. The defendant afterwards sold her to a person named Wilson, who purchased as agent for a person named Sugden of Leeds. At the trial before Lord Coleridge, C.J., it was proved that a person named Pearson, of Hull, who wrote to the plaintiffs to inquire about the *Bessemer* shortly after the auction, had met Sugden and had a conversation with him about the auction, and Sugden then stated that if he had been at the auction there would have been a bid. This conversation was previous to Sugden's purchase through Wilson. Lord Coleridge, C.J. ruled that there was evidence to go to the jury that Sugden was induced to make an offer in consequence of the plaintiffs' advertisements, and the jury found for the plaintiffs. A rule for a new trial was discharged by Lord Coleridge, C.J. and Denman, J. (*ante*, p. 453; 36 L. T. Rep. N. S. 740), and the defendant appealed.

Nov. 19 *and* 20.—*Herschell*, Q.C. and *Reid* for the defendant. There was no evidence to show that there was any immediate connection between the advertisements issued by the plaintiffs and the making of the offer by Sugden. The consequence must be proximate, and indirect consequences would not be included:

Ionides v. *Universal Marine Assurance Company*, 14 C. B. N. S. 259; 32 L. J. 170, C. P.

Gully, Q.C. and *Edwyn Jones* for the plaintiffs. —There was a *primâ facie* case, and it was rightly left to the jury. The obvious intention of the contract was to secure their commission to the plaintiffs in case the *Bessemer* should be disposed of by a private sale. There can be no doubt that the sale was effected to a certain extent in consequence of the plaintiffs' advertisement, and it was not necessary that the advertisement should be the entire or direct cause of the sale.

Herschell, Q.C. in reply.

Cur. adv. vult.

Dec. 7.—Bramwell, L.J.—This case was tried before Lord Coleridge, C.J., and he thought there was some evidence, and left the matter to the jury, who found a verdict for the plaintiffs. There was a motion for a new trial, and the rule was discharged. I am of opinion that there was no evidence. Certainly the parties in this case have done their best to create litigation, by expressing the contract between them in such a foolish document as that which is now before us. The question is, was there any evidence that the subsequent sale of the *Bessemer* was effected to a person who was led to make an offer in consequence of the plaintiffs' mention or publication of the ship for auction purposes? I am of opinion that there was no evidence. Sugden was the purchaser of the ship, and Sugden purchased through Wilson. There was evidence to show that Sugden may have been led to make an offer for the ship in consequence of his dealings with Pearson; but what led Pearson to have correspondence with the plaintiffs and to communicate what he knew to Sugden? This communication took place in consequence of Pearson's casually meeting Sugden in the market and saying that there had been no offer, and Sugden saying that if he had been at the auction there would have been a bid. But Pearson might just as well have made the same remarks to Sugden if there had been no advertisement. All the advertisement did was to cause Pearson to know that the plaintiffs were the persons who had the sale, but it did not cause Pearson and Sugden to walk together and hold a conversation, nor did it cause Sugden to make the offer. If we look at the words of the document it appears that the fact that Sugden was led to make an offer in consequence of the plaintiffs' mention or publication, &c., is what the plaintiffs have got to prove. It is obvious that Sugden was in no sense led to make his offer by this. The plaintiffs' advertisement was no part in the train of causation. I think, therefore, that there was no evidence for the jury, and the result is that the judgment of the court below must be reversed, and the verdict entered for the defendant.

Brett, L.J. concurred.

Cotton, L.J.—I am of the same opinion. It was not necessary that the plaintiffs' advertisement should be the only or immediate cause of the sale in order to entitle them to commission, but the advertisement must lead in some way to the offer by Sugden, and in my opinion there was no evidence that it did so.

Judgment reversed.

Solicitors for plaintiffs, *Lowless* and *Co.*

Solicitor for defendant, *Chambers.*

Friday, Nov. 23, 1877.

(Before Bramwell, Brett, and Cotton, L.JJ.)

Shepherd and others v. Kottgen and others.

Shipping—Sacrifice—General average contribution.

A shipowner is not entitled to general average from owners of cargo in respect of the abandonment (to save the whole adventure) of ship's tackling when the condition of the tackling was such that it must have been lost in any event.

Owing to the looseness of the rigging the mast of a vessel was swaying about during a heavy gale in such a manner as to endanger the vessel; and by the captain's order it was cut away and abandoned. On the trial of an action by the shipowners against the owners of cargo for a general average contribution in respect of the loss of the mast, the judge left it to the jury to say whether, at the time of sacrifice, the mast was virtually a wreck and valueless; but he did not ask them to find whether, if the storm had suddenly ceased, the mast might possibly have been saved.

Held (reversing the decision of the Common Pleas Division), that there was no misdirection. (a)

(a) The effect of this finding of the jury is that the mast was so hopelessly loose that it must have gone even if not cut away, and that it could not have been saved; in other words, that it had no value to the shipowner, and hence there was no loss by him for the common good. It is true that this precise question has never been decided before; but the question whether a mast broken by a gale, and lying alongside a ship fast by the rigging, which is cut away by the master to save the ship's cargo, is to be contributed for has often been discussed. A very clear judgment on this point, citing all the authorities, was given by the Supreme Court of Louisiana in *Teetsman* v. *Clamageran*, 2 Louisiana Rep. 195, which was as follows: "There is some slight contradiction in

Appeal from Common Pleas Division.

The action was by shipowners against the owners of cargo to recover for a general average loss incurred by reason of the sacrifice of a ship's mast during a storm.

The action came on for trial before Manisty, J., and a special jury, in London, during the Hilary sittings, 1877.

The following are the material facts admitted in evidence or proved at the trial:

The plaintiffs' barque *Rollo* sailed from London with a general cargo, the defendants having shipped goods on board of her.

The vessel was bound for Hong Kong, and somewhere between Scilly and Lisbon she encountered a storm; portions of the rigging gave way, and from this cause the mainmast was, in the captain's language, lurching violently. His evidence was: "We wore the ship to try and save the mast. The mainmast was lurching violently. The mainmast would not break. We wanted it to break, for the simple reason that it was lurching so heavily that I was afraid it would open the ship out. I ordered the chief mate to cut away the port rigging, so that it might fall to starboard clear of the ship. The mate obeyed my order." On cross-examination he says: "As soon as the starboard main rigging was gone I knew the mast was gone, unless we could secure the starboard main rigging. The whole difficulty was that the mast would not break. I was afraid the mast would break the ship out."

Re-examined: "the mast was lurching so much as to put the ship in danger of opening up."

Question: "If the mast had not been lurching so much, could you have secured the mast?"

Answer: "Yes."

The mate being asked, "Why did you want to cut the mast away?" says, "To save the ship and cargo and our lives, I should think. The mast was lurching about so violently I expected it would rip up the decks. If the decks were ripped up she (the ship) would fill with water." Cross-examined: "Some of the rigging had gone, and the ship was lurching violently. We thought, of course, then that the mast would go, or, if it did not go, that it would rip up the decks."

The second mate says: "The mast kept lurching; the rigging was ultimately cut away, and then the mast went over the side to starboard."

Question: "Why was the port rigging cut away?"

Answer: "To let the mast go."

Question: "Why did you want the mast to go?

Answer: "Because it would have torn the ship's deck; it would have opened her up." Cross-examined, he says: "If it had broken off it would have been a different thing altogether. We were afraid of its ripping up the deck. I can't say if the mast would have gone whether we cut the port rigging or not. She might have gone steadier afterwards. I decline to speculate on what might have occurred. I know that if the mast had not gone the ship would have opened out."

The expert called first for the defendants said that, under the circumstances described in the evidence for the plaintiffs, he would have described the mast as a wreck—a gone mast. On cross-examination he said that, "if the mast had been lurched out of the ship, that would have been an extremely dangerous thing for the vessel.

The other experts gave evidence much to the same effect, one saying that "it (the mast) was an impediment to the adventure, and one that it was desirable in the interests of all to get rid of." Another, on cross-examination, said, that if the weather had moderated, it might have been possible to have saved the mast, but difficult.

The substance of the evidence was, first, that if the storm had continued, of which there was great probability, the mast would not have broken, but would have gone wholly overboard, tearing up the ship, and that in all probability the whole would have been lost; secondly, that the mast might possibly have been saved if the weather had moderated quickly, but this was very improbable; thirdly, that the mast was cut away not as a mere incumbrance like a mast or a board attached by rigging, but for the purpose of preventing its tearing up the ship and sacrificing the adventure.

The learned judge concluded his summing up as follows: "You must judge for yourselves, having regard to all the circumstances, the state of the weather, the state of the sea, the rigging gone, and all the circumstances as proved by the witnesses, and there is no evidence to contradict it. Are you of opinion that that mast was virtually a wreck and valueless and gone at the time it went over.

The jury found that the mast was a wreck; and, in answer to a further question by the learned judge, "Do you find whether it was hopelessly lost?"—"Yes."

The jury found for the defendants, and a rule was obtained for a new trial on the grounds of

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the authorities whether under these circumstances masts and rigging form a subject of general average. The better and more general opinion seems to be that they do. Everything which is voluntarily sacrificed for the benefit of all concerned being considered the subject of general, not particular, average. The next inquiry in this case is, what was sacrificed? Not sound masts certainly; for before they were cut away for the general safety, or even before a determination was taken to cut them away, they had been broken by the tempest. In the situation they were, at the time the rigging was cut, they would have been the subject of particular average. Any injury they sustained previous to the time they were sacrificed for the general benefit cannot be the subject of contribution, for that injury was not voluntarily incurred. For the benefit of all compensation should be made to the amount of the loss sustained, and that amount was their value at the time they were separated from the vessel. One of the English writers (Stevens) assigns for reason why masts hanging over the sides of a vessel are not a subject of general average—that the situation in which they are placed renders them of no value. Phillips says they are, or may be, of some value, and that to the extent of that value they are matter for contribution. Boulay-Paty, in recognising the rule that they properly fall under the head of *avarie grosse*, states that they only do so for the value they had at the time they were cut away. This appears to us to be the good sense of the matter; for it is quite unjust to make the freighters contribute for the full value of masts, which were already rendered scarcely of any value by an accident or force for which they were not responsible: (Boulay-Paty, tit 12, sect. 2, vol. 4, p. 447; Stevens on average, part 1, ch. 1, sect. 31, art. 5; Emerigon, vol. 1, ch. 12, sect. 41, p. 622; Phillips on Insurance.) The average has been settled in this case on the ground that the defendant was bound to contribute his proportion of the price which the new masts cost in the port where the repairs were made. This we think an error for which the judgment must be reversed. The defendant is responsible for his proportion of the value of the masts had after they were broken by the storm, and at the time they were cut away."—[Ed.]

misdirection, that there was no evidence to justify the verdict, and that the verdict was against the weight of evidence.

The misdirection complained of was that the judge did not ask the jury, "Whether, if the weather had moderated, the mast could possibly have been saved."

The Common Pleas Division (Grove and Lopes, J.J.) thought there was a misdirection, and that the verdict was against evidence, and made the rule absolute for a new trial, the following judgment being delivered:

July 12, 1877,—Grove, J. (after stating the facts as above),—The rule before us was obtained on the ground of misdirection, and that the verdict was against the weight of evidence. The misdirection complained of was, that the judge did not ask the jury, as was done by Cleasby, B. in the case of *Corrie Coulthard*, (*a*) "Whether, if the weather had moderated, the mast could possibly have been saved." During the argument another question occurred to us as having

(*a*) COURT OF APPEAL, WESTMINSTER.

Thursday, Jan. 17, 1877.

(Before Cockburn, C.J., Sir W. B. Brett, and Sir R. Baggallay.)

Corrie *v.* Coulthard.

This was an appeal by the defendants from a decision of the Court of Exchequer refusing a rule for a new trial, appealed from on the ground of misdirection, and on the ground that the verdict was against the weight of evidence.

The action was brought by the owners of the steamship *Star of Erin* against the owner of cargo on board that vessel, to recover general average contribution in respect of a mast of the steamship alleged to have been sacrificed by the master of the steamship for the general benefit of ship and cargo.

The circumstances as stated by the master in a letter to his owners were as follows: "Since leaving the Lizard I have had nothing but gales of wind from W.S.W. to N.W. and very heavy sea, making little or no headway. On the 11th latitude 45° 35′ north, longitude 8° 40′ west, blowing a very heavy gale of wind and a very heavy sea. Ship hove to under the lower maintopsail on the port tack, and rolling and straining very heavily; at 4 p.m., the mainmast settled down in the ship about 4in., very suddenly slacking up the rigging and allowing the mast to roll about heavily; swiftered the rigging together to try if possible to save it, but had no effect; cut away the maintopmast to lighten it thinking to be able to save the lower mast, but the wreck not clearing properly, the mast still kept settling down in the ship. Being afraid of the heel of the mast working down to the plating and going through the bottom of the ship, cut away the mainmast also, which broke 3ft. above the main deck and went over to leeward clear of the ship." In the evidence of the master taken before an examiner, he said: "As the ship rolled the mast was swaying from side to side; we tried to swifter the rigging in to steady the mast if possible; this did not steady the mast, but made it settle more into the ship; if the heel of the mast had got on one of the plates in the vessel's bottom, it would have gone through her, and in my judgment the ship would then have foundered; when I saw this, I determined to cut away the topmast." The mast was an iron cylindrical mast resting in the iron kelson plate, the edges of the mast going to the end of the plate. The violence of the storm caused the bottom of the mast to split up; iron forming the bottom of the mast kept gradually turning up, and the mast gradually settling down, and this gave the master the impression that the mast was working its way through the bottom of the ship. The mast would not actually have worked through the bottom of the ship, and would not have been lost without the ship was lost at the same time from some other cause.

The action was tried before Cleasby, B., and he left to the jury certain questions on which they found, first, that the mast was not valueless as a mast before it was cut away: secondly, that if the weather had moderated the mast might have been saved; and thirdly, that the master in cutting the mast away acted reasonably under the circumstances, although mistaken as to the danger of the mast going through the ship's bottom.

C. Bowen for the appellants.—There is here no voluntary sacrifice, because there was nothing to be sacrificed. The mast, when it was cut away was wreck and worthless, and there can be no sacrifice where there is no value. It became necessary for the captain to cut away the mast, as a matter of duty to his owners, to save the ship from destruction, and this is not a matter for general salvage. If goods or part of a ship are in such a condition, as in the case of burning masts or sails, that they must be destroyed eventually by cutting them or throwing them away to save the ship, the master cannot establish a claim for general salvage:

Parsons on Insurance, 212;

Johnson v. *Chapman*, 35 L. J. 23, C. P.; 2 Mar. Law Cas. O.S. 404.

If the mast was a source of danger to this ship the master was bound, in his duty to the owner, to cut it away, and the loss falls on his owner. The master had no choice and made no selection of a thing to sacrifice.

Cohen, Q.C., and *H. Mathew*, for the respondents, were not called upon.

Cockburn, C. J.—Assuming the fact as the defendants wish to put them, can they get out of the difficulty that there is a common adventure? Whatever is done for the benefit of the ship, with a view to save the ship, operates *pro tanto* to save the cargo. It is one thing to say that the mast is rubbish, and another that it was a source of danger to the ship. Suppose the storm had abated before the mast was thrown overboard, and then the master had said, "It is useless; I will throw it overboard." Then it might be called rubbish; but it was not in that condition. It may have been a source of danger, but it was not worthless. It was just like the case of a mast struck by lightning, in which the mast would perish if it was left alone; it is the case of a mast which would still be a good mast were it not that it got loose and was swaying to and fro, and might damage the ship. Then to prevent that possible damage they cut it away, but it has not ceased to be valuable as a mast. When the thing itself is in such a condition that it is about to perish, there is no sacrifice; but here is a mast which is good as a mast, but it becomes a source of danger, and to abate that danger it is cut away. The defendants contend that there must be selection of the thing sacrificed; there cannot always be a selection. This is not a case where there is a quantity to sacrifice, and the master considered the throwing overboard of a certain thing will lighten the ship the most. When you have on board a thing that is a source of common danger, you cannot select, you must sacrifice that particular thing. If your mast is sprung and you know it is liable, as in this case, to get displaced and do damage—to destroy the ship and cargo possibly, the only thing you can cut away is the mast; you cannot select. The true principle is that you should voluntarily sacrifice a portion of the ship or cargo for the benefit of both. Suppose a ship carrying a quantity of iron, she strains in a very heavy sea, and it is absolutely necessary to lighten, and the master throws overboard the cargo; he does this to save the ship and cargo, if any remains. It is done for the common good. I do not see any difference between a part of the mast or the rigging in such a condition as to cause danger, and the cargo getting loose. One is the same as the other, according to principle. If the mast was in that rotten condition that it would have gone overboard in a short time, and not have imperilled the vessel, the defendant's argument has some foundation, but if the mast would have gone through the ship, and caused it and all on board to go the bottom, that would be quite different. It is not necessary that the judgment of the master should be borne out by the facts when they come to be examined into. It is enough if he exercises a reasonably sound judgment under all circumstances. I suppose that if, in the judgment of the master, the mast, in the condition in which it then was, would not have been likely to cause damage to the ship, he would not then have cut it away. It was not useless, for he could have tightened his

an important bearing upon the case, which was this: whether, at the time the mast was cut away, the purpose for which it was cut away was to save the adventure by preventing the mast tearing up the ship, to which the evidence very strongly pointed; or, whether it was cut away as wreck, as a mere incumbrance or lumber. The question was very much discussed by the Court of Appeal in *Corrie* v. *Coulthard* to which we shall presently refer. We are of opinion that both the questions just alluded to should have been asked of the jury; that, although the learned judge does say to them, that if the mast had not been cut away, it would have been very dangerous for the vessel, and that there was common danger to the ship and to the cargo, he does not put these as questions to the jury but leaves to them only the question of whether the mast was virtually a wreck and gone. He says: "As to putting to you whether, if the weather had moderated, it might have been saved in a storm amounting to a hurricane, or at all events a heavy gale, and the ship in the trough of the sea, and, the weather not showing any signs of improvement, to ask you whether, if the weather had moderated, the mast might have been saved, seems somewhat out of place in this case." And he then puts the question which he repeats at the close of the summing up. We are further of opinion that, assuming the question which we have stated to have been put to the jury, and the jury had found for the defendant, that finding would have been wrong and against the weight of evidence. In our judgment, the beneficial objects of the doctrine and law of general average would be frittered away if, where a sacrifice is made, as seems obviously the case here, to save the whole adventure, the sharing the burden of such sacrifice could be made to depend upon nice questions of probability, afterwards discussed, as to whether the thing might or might not have been saved. In ordinary questions of general average it is presupposed that great danger exists to the ship and cargo, and in those cases the probability is that the thing sacrificed would have gone with the whole venture, and therefore it would be the sacrifice of a probably valueless thing. Here, if the mast had gone, the ship would probably have gone with it. The ship was probably saved by the sacrifice of the mast. The evidence appears all one way on this point. The case differs in our judgment from those of cutting away wreck, as hypothetically put by Willes, J. in the case of *Johnson* v. *Chapman* (19 C.B. N.S. 563; 2 Mar. Law Cas. O. S. 404), where he supposes a case of part of a mast going overboard, with spars and sails attached to it, and hanging by a stay, battering and adding to the danger of a vessel. There the wreck is real not anticipatory, and, as Willes, J. observes, "you cannot keep it, there is no intentional sacrifice in cutting it away." Here the mast was sound and entire, and a mast it was in its usual place, though lurching from the rigging, being gone on one side. It would defeat the main utility of general average if, at a moment of emergency, the captain's mind were to hesitate as to saving the adventure through fear of casting a burden on his owners. What was the pressing necessity here at the time of the act? The prevention of the ship being torn up and lost. Wreck is hardly an accurate term for contingent wreck. The making the potential the same as the actual, we cannot help thinking, will much embarrass the law on this subject, and the judgment of experts as to probabilities after the event is a very dangerous criterion for a jury to be guided by. The case of *Corrie* v. *Coulthard* (see note, p. 546) is almost identical in fact with this case; indeed, in our judgment, it is identical in so far as the legal question is concerned. That case is not reported, but, by consent of counsel on both sides in this case, we have been furnished with the shorthand writer's notes of it. The Court of Appeal, consisting of the Lord Chief Justice of England, Sir B. Brett, and Sir R. Baggallay, gave no formal judgment, but their observations in the case on the motion by way of appeal from the Exchequer Division, are all one way, and wholly in points as to the present case. There the mast (an iron one) becoming loose, the captain feared (though it turned out afterwards without cause) that it would go through the bottom of the ship, and he cut it away. The same contention was put forward there as here, but the jury found for the plaintiff, *i.e.* in favour of general average, Baron Cleasby asking then whether, if the weather had moderated, the mast could possibly have been saved. But the observations of the court go much further than on the mere question, whether the direction of the judge was right. The Lord Chie

rigging up; it would still serve as a mast. He would not have thrown it away as useless or valueless if he had not thought its then position was calculated to injure the ship. The jury found he was right in supposing there was danger, and but for that supposition he would not have touched the mast. The question in all this case is, not whether the event shows the wisdom of what was done, but whether, under all the circumstances, it was the exercise of a reasonable, prudent, sound judgment. The master must exercise his judgment. Here the mast was shaking to and fro, and the rigging was loose; he cut away the mast, not because of its value or want of value as a mast, but because he thought its condition was likely to be destructive to the vessel. Therefore it shows he cut away the mast as a sacrifice for the benefit of ship and cargo. He sacrificed the mast because, if it had been allowed to remain where it was, it would, in his judgment, have led to the common destruction of mast, ship, and cargo. I agree that if a thing is in the act of burning, if it cannot be saved, if it must go, as in the case of a cargo or mast on fire, and it is thrown overboard, it would perish without any intention of sacrifice; but when there is no such certainty of its perishing, except in the event of the common destruction of the whole adventure, if the master thinks it will cause the destruction of the ship, and he sacrifices it, that is a voluntary sacrifice, giving a right to a claim for general average.

Sir W. B. Brett.—If a sacrifice is made both for the benefit of ship and cargo, it is general average; that is the fair definition of general average. If it is both for the benefit of ship and cargo that the thing should be done, it is always the duty of the master to make a general average loss, and although he may have been bound to do so here, there has still been a sacrifice. If this had been a sound mast, and the rigging had been lost, what could the defendants have said then? Their point is that the mast was wreck; that it was no loss at all. When masts are blown overboard, and are floating alongside, attached by the rigging, and are then cut away, it is settled that this is a general average loss if they are cut away for the benefit of ship and cargo. If, at the moment you sacrifice a thing it is of no value, whatever future circumstances might arise, then if there is a sacrifice there is no loss; but then, if under a change of circumstances the thing would be of value, there is not only a sacrifice but a loss.

Sir R. Baggalay concurred.

[N.B.—The above judgments were not delivered consecutively, as given, but are compiled from the answers given by the court to the arguments of counsel; and are taken from the shorthand writers' notes.—Ed.]

Justice says: "It is not necessary that the judgment of the master should be borne out by the facts when they come to be examined into; it is enough if he exercise his judgment under all the circumstances. . . . He must exercise his judgment. He cuts away the mast, not because of its value as a mast, but because he thinks its condition is likely to be destructive of the vessel. . . . If the danger is that the mast will perish at the same time that it causes the perishing of the ship, and it is cut away for the purpose of preventing peril to the ship and its own destruction, is not that general average? . . . Whatever be the condition of the mast, it was a source of danger to the ship." The Lord Chief Justice says much more to the same effect. Sir Baliol Brett says: "You do not mean to say it was so valueless that a man in a calm would have thrown it overboard; it was worth money. . . . Wreck means rubbish, I suppose. . . . If it is done for the benefit of the ship and cargo, then it is general average." In the present case, it appears to us, the evidence is greatly preponderating, that the mast was cut away for the benefit of the ship, cargo, and crew, that it was not actual wreck, and was not cut away as such. Mr. Phillips, a high authority on this subject, says (Phillips on Insurance, sect. 1271): "If the thing abandoned is so exposed to destruction that it cannot possibly be retrieved and saved and its abandonment cannot possibly contribute to the safety of the crew and ship, cargo or freight, there may be grounds of objection to contribution; but, in case of such objection, the construction will be very liberal in favour of contribution." Being of opinion that the question of the mast being saved was put to the jury as one of probability and not of possibility, that no question was left to them as to the purpose for which the mast was cut away, and that contingent wreck was treated by the judge as though it were actual wreck, we think there should be a new trial. We also think that, although the learned judge is not dissatisfied with the verdict, yet, that the verdict was against the weight of evidence, regarding the evidence from the point of view we have regarded it in this judgment.

The defendants appealed from this decision.

Nov. 23, 1877.—*Butt*, Q.C. and *J. C. Matthew* for the defendants.—If the jury had said it was impossible to save the mast, then the verdict must have been for the plaintiffs. In *Corrie* v. *Coulthard* (see note, *ante* p. 546) a claim was allowed for general average; but then there the mast was not hopelessly lost. If a thing is cut or cast away, on the ground that it is endangering the whole adventure, and is itself in such a condition that it must perish, even if the rest of the adventure be saved, then its destruction gives no rise to general average contribution; for, if a thing must be hopelessly lost, it can make no difference if it be thrown overboard a few minutes before it would go of its own accord. They cited and refered to

2 Parsons on Insurance 212 (note);
Crocket v. *Dodge*, 3 Fairf. 190;
Slater v. *Hayward Railway Company*, 26 Conn. 128;
Lee v. *Grinnell*, 5 Duer. 400;
Johnson v. *Chapman*, 19 C.B.N.S. 563; 35 L. J. 23 C. P.; 2 Mar, Law Cas. O. S. 404.

Cohen, Q.C. and *McLeod* (*H. Sutton* with them) for plaintiffs.—In *Johnson* v. *Chapman* (*ubi sup.*) the cargo was unstowed, and was breaking the bulwarks, and there was therefore no reasonable hope of saving it. But in this case the mast was sound, and there was no fear of the rigging breaking. It was lurching violently, and to save the rest of the adventure they cut it away. It is submitted that the finding of the Common Pleas Division was right, that no verdict of a jury can prevent what was an intentional jettison from being anything else than a cause for general average contribution. They cited

Phillips on Insurance, 1718.

J. C. Matthew replied.

BRAMWELL, L.J.—I am of opinion that this appeal must be allowed. I think that the right question was left to the jury, and that their verdict was given on sufficient evidence. The Division below in their judgment found no difficulty in the law of the case, but thought my brother Manisty did not leave to the jury what he did leave about possibility. Now, I think that he left the right question to them. From the evidence of the captain, the mast was a lost mast, and must have gone in a short time, and the jury found that it was "hopelessly gone" before it was cut away. The question was, how was its destruction to be finished? My brother Brett has written down a very useful definition of sacrifice, which I have asked him to read in his judgment; but, for my part, I think that when the thing said to be sacrificed has some peculiar condition attaching to it, so that if the rest of the whole adventure be saved or lost, the specific thing must yet be lost, then there is no sacrifice entitling to general average. This was the case here. The mast must have been lost whether the vessel reached port or not. There was no sacrifice and no right to average contribution. Why did the mast go? On account of the imperfect manner it was fitted, for the port rigging had given way. I cannot quite agree with the view the court below have taken of what my brother Manisty did say to the jury. I think he put the proper question well and precisely to them.

BRETT, L.J.—I am also of opinion that the learned judge left the right question to the jury, and that their verdict was correct, and, therefore, that here there is no claim for general average. The question is, strange to say, a novel one. General average, and what must subsist to found it, has often been discussed, but the word "sacrifice" has never before been thoroughly considered, nor have the conditions necessary to constitute a sacrifice ever been laid down. The matter was before the court in *Corrie* v. *Coulthard* (see note, *ante* p. 546), but in that case it was not necessary to define sacrifice so accurately as now. I agree with my Lord that the question left by my brother Manisty to the jury was substantially the question which the court below say ought to have been left to them. The word "possible" as used in an issue of law does not mean "mathematically or scientifically possible;" it is used in the same sense as used in the ordinary concerns of life.

The sacrifice here is said to have consisted in the cutting of the rigging in order to cause the fall of the mast, and the question here is whether or not this was an act of sacrifice. I will assume that the master, when he cut the rigging, did intend to sacrifice the mast in order to save the ship and the cargo, and that he did not think it was a gone

mast at the time (as, if he had not held that opinion, then there would have been no question). Then did he sacrifice anything? Consistently with the decision of this court in *Corrie* v. *Coulthard*, and in accordance, as it seems to me, with what was intimated by the court in that case, the following proposition may be stated: If anything on board a ship which is cut or cast away, because it is endangering the whole adventure, is in such a state within itself, or in such a condition from external circumstances that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average. Or the proposition may be stated in the following terms: Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or by reason of the condition in which it is placed, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice.

Another form of stating the result of these propositions is to say that there is nothing in respect of which a general average contribution could be claimed, because the thing, in respect of which the contribution is claimed, was, when the act relied upon was done, of no value whatever to its owner.

We may say, therefore, with regard to this case, that there was no sacrifice, or, alternatively, that there was nothing in respect of which the plaintiffs can claim contribution. They cannot claim it in respect of loss to themselves, for by the hypothesis they have lost nothing; there has been no sacrifice, for nothing has been sacrificed; there is nothing for which general average contribution can be claimed, for nothing was lost.

The question left to the jury was, as I read it, when the cutting of the rigging took place was the mast in such a condition, through the slackening of the starboard rigging and the violence of the storm, and the practical impossibility of the storm ceasing in time to save the mast, that it must have been lost whether the ship was saved or not? and the jury found that it would have gone overboard anyhow, whether the act relied on was done or not; and therefore the act relied on was not actually a sacrifice, and therefore has caused no loss to the shipowner, and he has no claim for general average. The case of *Corrie* v. *Coulthard* is not inconsistent with this, because there the jury did not find that the mast was hopelessly lost.

Cotton, L.J.—I am of the same opinion, I think that the mast was hopelessly gone at the time of the cutting of the rigging, and by hopelessly I mean so that in all common sense, according to the ordinary course of human events, it was impossible for it to have been saved, and the jury found this also, and I think were justified in their finding by the evidence. The experts were clear that the mast must have gone overboard anyhow, and that what was done only hastened it by two or three minutes. Does this justify a claim for general average? I think not. Where a part of a common adventure is abandoned to save the rest, then all those whose property is saved must contribute to compensate those whose goods have been sacrificed, and the various portions of the ship must be considered as the goods of the master if they are sacrificed to save the cargo; there is no reason why he should bear the loss, and the question to be considered in estimating the value of his loss is what the value of his property would have been had it not been abandoned. It is necessary that there should be a voluntary abandonment, and this case must be decided by an application of that principle. But, where the thing abandoned was in such a condition that it must have been lost anyhow, the hastening on of its destruction is not a voluntary abandonment, and cannot be sufficient ground for contribution. This loss was not caused by the act of the master, but by the peculiar peril of the thing itself.

Appeal allowed

Solicitors for plaintiffs, *Lewis* and *Watson*.

Solicitors for the defendants, *Hollams, Son, and Coward*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by J. M. Lely, Esq., Barristers-at-Law.

Monday, Feb. 4, 1878.

(Before Cockburn, C.J., Mellor and Manisty, JJ.)

Ex parte Storey.

Wreck Commissioner—Stranding of ship without serious damage—Power of commissioner to suspend master's certificate—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 242, 432, 433—*Merchant Shipping Act* 1862 (25 *&* 26 *Vict. c.* 63), *s.* 23—*Merchant Shipping Act* 1876 (39 *&* 40 *Vict. c.* 80), *ss.* 29, 32.

The Merchant Shipping Act of 1876 *transfers to the Wreck Commissioners appointed under that Act the jurisdiction to suspend certificates conferred upon justices of the peace by prior Merchant Shipping Acts, and does not enlarge such jurisdiction.*

By the Merchant Shipping Act 1854, *ss.* 242, 432, *the Board of Trade might suspend the certificate of a master of a ship if upon investigation before justices it was reported that serious damage to the ship was caused by the wrongful act or default of such master.*

By the Merchant Shipping Act 1862, *s.* 23, *the jurisdiction of the Board of Trade to suspend the certificate was transferred to the justices themselves.*

By the Merchant Shipping Act 1876, *s.* 29, *a "wreck commissioner" has the same jurisdiction and powers as are conferred by the Act of* 1854 *on two justices, "and all the provisions of the Merchant Shipping Acts of* 1854 *to* 1876 *with respect to investigations conducted under the Merchant Shipping Act of* 1854 *apply to investigations held by a wreck commissioner."*

And by sect. 32 *of the same Act, whenever any British ship has been "stranded or damaged," the Board of Trade may cause an inquiry to be made, "and all the provisions of the Merchant Shipping Act shall apply to any such inquiry as if it had been held under the Merchant Shipping Act* 1854."

Held, that the Wreck Commissioner has no jurisdiction to suspend a certificate in a case where a ship has been stranded but not damaged, and a rule for a certiorari to quash the suspension by him of a certificate in such case made absolute.

This was a rule for a *certiorari* to remove into this division the decision and judgment made by H. C. Rothery, Esq., Wreck Commissioner of the United Kingdom, on the 28th Nov. 1877, whereby he directed that the certificate of Mark Storey, the master of the steamship *Ayton*, should be suspended for six calendar months. The said ship had been stranded, but, according to the finding of the commissioner, neither seriously or materially damaged, off the west coast of the Morea. The question for this court was purely one of law, and turned upon the construction of the following sections of the Merchant Shipping Acts.

Merchant Shipping Act 1854, s. 242: (*a*)

The Board of Trade may suspend or cancel the certificate (whether of competency or service) of any master or mate in the following cases (that is to say):

(1) If upon any investigation made in pursuance of the last preceding section, he is reported to be incompetent, or to have been guilty of any gross act of misconduct, drunkenness, or tyranny.

(2) If upon any investigation conducted under the provisions contained in the eighth part of this act, or upon any investigation made by a naval court constituted as hereinafter mentioned, it is reported that the loss of abandonment of, or serious damage to any ship, or loss of life has been caused by his wrongful act or default.

(3) If he is superseded by the order of any admiralty court or naval of court constituted as hereinafter mentioned.

(4) If he is shown to have been convicted of any offence.

(5) If upon any investigation made by any court or tribunal authorised or hereafter to be authorised by the legislative authority in any British possession to make inquiry into charges of incompetency or misconduct on the part of master or mates of ships, or as to shipwrecks or other casualties affecting ships, a report is made by such court or tribunal to the effect that he has been guilty of any gross act of misconduct, drunkenness, or tyranny, or that the loss or abandonment of or damage to any ship, or loss of life, has been caused by his wrongful act or default, and such report is confirmed by the governor or person administering the government of such possession.

And every master or mate whose certificate is cancelled or suspended shall deliver it to the Board of Trade, or as it directs, and in default shall, for each offence, incur a penalty not exceeding 50*l.*; and the Board of Trade may at any subsequent time grant to any person whose certificate has been cancelled a new certificate of the same or of any lower grade.

Sect. 432:

In any of the cases following: (that is to say)

Whenever any ship is lost, abandoned, or materially damaged, on or near the coasts of the United Kingdom:

Whenever any ship causes loss of material damage to any other ship on or near such coasts:

Whenever, by reason of any casualty happening to or on board of any ship on or near such coasts, loss of life ensues:

Whenever any such loss, abandonment, damage, or casualty happens elsewhere, and any competent witnesses thereof arrive or are found at any place in the United Kingdom:

It shall be lawful for the inspecting officer of the coast-guard, or the principal officers of customs residing at or near the place where such loss, abandonment, damage, or casualty occurred, if the same occurred on or near the coasts of the United Kingdom, but, if elsewhere, at or near the place where such witnesses as aforesaid arrive, or are found, or can be consequently examined, or for any other person appointed for the purpose by the Board of Trade, to make inquiry respecting such loss, abandonment, damage, or casualty; and he shall for that purpose have all the powers given by the first part of this Act to inspectors appointed by the said board.

Sect. 433:

If it appear to such officer or person as aforesaid, either upon or without any such preliminary inquiry as aforesaid, that a formal investigation is requisite or expedient, or if the Board of Trade so directs, he shall apply to any two justices or to a stipendiary magistrate to hear the case: and such justices or magistrate shall thereupon proceed to hear and try the same, and shall for that purpose, so far as relates to the summoning of parties, compelling the attendance of witnesses, and the regulation of the proceedings, have the same powers as if the same were a proceeding relating to an offence or cause of complaint upon which they or he have power to make a summary conviction or order, or as near thereto as circumstances permit; and it shall be the duty of such officer or person as aforesaid to superintend the management of the case, and to render such assistance to the said justices or magistrate as is in his power, and upon the conclusion of the case the said justices or magistrate shall send a report to the Board of Trade containing a full statement of the case and of their or his opinion thereon, accompanied by such report of or extracts from the evidence, and such observations (if any) as they or he may think fit.

Merchant Shipping Act 1876, sect. 29:

For the purpose of rendering investigations into shipping casualties more speedy and effectual, it shall be lawful for the Lord High Chancellor of Great Britain to appoint, from time to time, some fit person or persons to be a wreck commissioner or wreck commissioners for the United Kingdom, so that there shall not be more than three such commissioners at any one time, and to remove any such wreck commissioner . . .

It shall be the duty of a wreck commissioner, at the request of the Board of Trade, to hold any formal investigation into a loss, abandonment, damage, or casualty (in this Act called a shipping casualty) under the eighth part of the Merchant Shipping Act 1854, and for that purpose he shall have the same jurisdiction and powers as are thereby conferred on two justices, and all the provisions of the Merchant Shipping Acts 1854 to 1876, with respect to investigations conducted under the eighth part of the Merchant Shipping Act 1854, shall apply to investigations held by a wreck commissioner.

Sect. 32:

In the following cases:

(1) Whenever any ship on or near the coasts of the United Kingdom, or any British ship elsewhere, has been stranded or damaged, and any witness is found at any place in the United Kingdom; or

(2) Whenever a British ship has been lost or is supposed to have been lost, and any evidence can be obtained in the United Kingdom as to the circumstances under which she proceeded to sea or was last heard of;

the Board of Trade (without prejudice to any other powers) may, if they think fit, cause an inquiry to be made, or formal investigation to be held, and all the provisions of the Merchant Shipping Acts 1854 to 1876 shall apply to any such inquiry or investigation as if it had been made or held under the eighth part or the Merchant Shipping Act 1854.

C. S. Bowen, for the Board of Trade, in showing cause, read and adopted as his argument the following extract from the judgment of the Wreck Commissioner:—"The 432nd section, the first section of part VIII. of the Merchant Shipping Act 1854, defines certain cases in which inquiries may be held, these cases being, 'whenever any ship is lost, abandoned, or materially damaged,' or when she has caused 'loss or material damage to any other ship,' or when there has been 'loss of life;' and it goes on to provide that the person appointed to hold the inquiry shall report thereon

(*a*) By s. 23 of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), the power of cancelling or suspending the certificate of master or mate by the 242nd section of the principal Act conferred on the Board of Trade shall (except in the case provided for by the fourth paragraph of the said section) vest in and be exercised by the local marine board magistrates, naval court, admiralty court, or other court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade.

to the Board of Trade. And sect. 242 of the same Act says that 'the Board of Trade may suspend or cancel the certificate of any master or mate if, upon any investigation conducted under the provisions of the eighth part of this Act . . . . it is reported that the loss, or abandonment of, or serious damage to any ship, or loss of life, is caused by his wrongful act or default.' Since then, the power to cancel or suspend the certificate has, by the 23rd section of the Merchant Shipping Act 1862, been transferred from the Board of Trade to the court or tribunal 'by which the case is investigated or tried.' And by sect. 33 of the Merchant Shipping Act 1876 it is provided that an inquiry may be held 'whenever any ship on or near the coasts of the United Kingdom or any British ship elsewhere has been stranded or damaged,' omitting the word 'materially;' and it goes on to say that 'all the provisions of the Merchant Shipping Acts 1854 to 1876 shall apply to any such inquiry or investigation as if it had been made or held under the eighth part of the Merchant Shipping Act 1854.' Now it was contended on behalf of the master, that on the true construction of these statutes, the court has only power to cancel or suspend an officer's certificate if serious or material damage has been done. It was admitted that we had full power under the Act to inquire into the stranding, and might, if we thought proper, censure the master for any misconduct of which we might deem him guilty, but it was said that the Legislature has given us no authority either to suspend or cancel his certificate in this case, no material or serious damage having been done to the vessel. To this it was first objected, on behalf of the Board of Trade, that in this case there had been material or serious damage to the vessel by the jettison of 60 tons of coal. He said that it was not essential that the damage should be to the hull of the vessel; that if, for instance, the masts, sails, or rigging had been injured, that might be a material or serious damage to the vessel; and as the coals supplied the motive power to this vessel they must be regarded as a portion of her equipment, and that the loss of them would be a material and serious loss. I can quite understand that there might be a case in which the loss of the coal on board a steamer might be a material and serious loss to the vessel, but in this case the vessel is stated to have left Port Said with 200 tons of coal on board; her daily consumption, we are told was about 11 tons, and consequently the jettison of some 60 tons could hardly be regarded as a serious or material damage within the meaning of the Act. I am bound, therefore, to consider whether the Acts of Parliament which have been referred to do give power to the court to cancel or suspend an officer's certificate in the case of the mere stranding of a vessel, and without any serious or material damage having been done to her. Under the 432nd section of the Merchant Shipping Act of 1854, the only cases in which inquiries could be held were those in which there had been 'loss or abandonment of, or serious damage to any ship, or loss of life;' and in all these cases the 242nd section of the same Act gave power to cancel or suspend the officer's certificate. Now one of the objects contemplated by the 32nd section of the Act of 1876 was to extend these inquiries to cases of simple stranding, even though no serious or material damage had been done to the vessel; and it declared that all the provisions of the Merchant Shipping Acts 1854 to 1876 should apply to any such inquiry, as if it was an inquiry under the Merchant Shipping Act of 1854. The Legislature clearly intended that an inquiry into a case of simple stranding without serious damage should stand in all respects upon precisely the same footing as inquiries under the Act of 1854; and that this is so is obvious from the words of the 29th section of the Act of 1876, which gives the wreck commissioner power to hold an investigation 'into a loss, abandonment, damage, or casualty (in this Act called a shipping casualty),' thus ranking them altogether under one name; and it says that the commissioner is to have the same jurisdiction and powers as belong to two justices, and that all the provisions of the Merchant Shipping Acts 1854 to 1876 shall apply to inquiries held by a wreck commissioner. If so, and if all the Merchant Shipping Acts from 1854 to 1876, both inclusive, are to be read together and to be taken as one Act, may it not be said that it was the intention of the Legislature that in every case in which an inquiry is held, whether material damage has or has not been done to the ship, the court should have the power if it thought fit to suspend or cancel the certificate of the master for misconduct? It being admitted that under the Merchant Shipping Act of 1854 the court would have the power to cancel or suspend the certificate of an officer in any case in which it could hold an inquiry, and the Legislature having decided that the court might hold inquiries in other cases than those contemplated in the Act of 1854, and that the inquiries in the new class of cases should be in all respects placed upon exactly the same footing as inquiries in the old class of cases, it seems to follow that the power of suspending or cancelling the certificates, which is one of the powers referred to, applies to the new equally as to the old cases. The question, I admit, is not free from doubt or difficulty; but upon the best consideration which I can give to it at the present moment, and with the desire to carry out what I believe to be the clear intention of the Legislature, that is the conclusion to which I have come."

Maclaachln, for Mr. Storey, supported the rule.—The whole question in this case turns upon the meaning of the 32nd section of the Merchant Shipping Act 1876. That section no doubt speaks of a ship being "stranded or damaged;" and omits any words like "serious or material;" but the section only designates the occasion of an inquiry, and confers no further jurisdiction upon the wreck commissioner to punish. Sects. 432 of the Act of 1854 and 29 of the Act of 1876 are *in pari materiâ*, and should be read together. In both of them the words "loss, abandonment, damage, or casualty" occur, and it is by them that the jurisdiction to punish is conferred. Sect. 32 is quite different, and only gives a jurisdiction to cause an inquiry to be made. [He was stopped by the Court.]

Cockburn, C.J.—I am of opinion that this rule ought to be made absolute.

What we have to determine is the effect of the two Merchant Shipping Acts of 1854 and 1876. In consideration of this question, Part viii. of the Merchant Shipping Act of 1854 must be examined before we turn to sect. 242 of that Act, although sect. 242 precedes that part in respect of arrangement of the various sections. The power to annul

or suspend a certificate depends upon the result of an inquiry ordered under sect. 432. Now, sect. 432 authorises the holding of an inquiry in certain specified cases. These cases are (1) loss or material damage to ship on or near coasts of the United Kingdom; (2) loss or damage caused to other ship on or near such coasts; (3) casualty causing loss of life on or near such coasts; and (4) loss or damage happening elsewhere, of which there are witnesses in the United Kingdom. The present case comes within none of these categories. *Ex concessis* no material damage has been done. Turning now to sect. 242, we find that the Board of Trade by that section "may suspend or cancel" the certificate of any master or mate, "if upon any investigation conducted under the provisions contained in the eighth part of this Act, it is reported that the loss or abandonment of or serious damage to any ship or loss of life has been caused by his wrongful act or default." So much for the Act of 1854. The provisions of the Act of 1876, which we have to consider, are sects. 29 and 32. Sect. 29, after providing for the appointment of a wreck commissioner, enacts "that it shall be the duty" of that officer "to hold any formal investigation into a loss, abandonment, damage, or casualty under the eighth part of the Merchant Shipping Act 1854, and for that purpose he shall have the same jurisdiction and powers as are thereby conferred on two justices, and all the provisions of the Merchant Shipping Acts 1854 to 1876, with respect to investigations conducted under the eighth part of the Merchant Shipping Act 1854, shall apply to investigations held by a wreck commissioner." Here we have a repetition of the words "loss and abandonment, damage, or casualty," and a direct reference to the Merchant Shipping Act 1854. We must therefore give the words the same meaning in both Acts.

At first I thought that an enlargement of jurisdiction was intended, but now I see that only a transfer of jurisdiction was intended. But it is said that an enlargement of jurisdiction is effected by sect. 32. To that I cannot agree. Sect. 32 of the Act of 1876 enables the Board of Trade to hold an inquiry only, but gives no power to suspend a master's certificate, If this had been intended by the Legislature specific words would have been used for that purpose. I do not say that it might not be right to extend the jurisdiction to meet those cases where the mere stranding of a ship, without more, may demonstrate the incompetency of a master. But I do say that we should take care not to strain the words of the statute so as to make it comprehend a case which is clearly not within it.

MELLOR, J.—I am entirely of the same opinion. After the statement of the clauses of the statutes by the Lord Chief Justice, and his comments upon them, in which I quite concur, I will merely say that I can see no express words conferring the jurisdiction claimed. All that the 32nd section of the Act of 1876 does is to allow an inquiry to be instituted in the cases coming within that section.

MANISTY, J.—I am of the same opinion. I think that the object of the various sections of the two statutes has been rendered pretty plain by the discussion they have undergone. The words "without prejudice to any other powers" in the 32nd section of the Act of 1876 have reference to the powers given to the Board of Trade in respect to material damage. The section itself merely authorises an *ex parte* inquiry.

Rule absolute.

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

Solicitors for Mr. Storey, *Oliver* and *Botterell*, for *Botterell* and *Roche*, Sunderland.

COMMON PLEAS DIVISION.

Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

Nov. 9 and Dec. 21, 1877.

(Before DENMAN, J.)

EVANS v. BULLOCK AND OTHERS.

Charter-party — Damages for breach—Costs of action against ship's captain—Port dues—Insurance.

A shipowner entered into a charter-party with the consignor of goods by which he was to deliver them at a good and safe port to be named by the consignor. The consignor named a port at which it was found that the ship could not safely unload, and the captain proceeded elsewhere and unloaded. The consignee brought an action against the captain for damages for delivering elsewhere; the consignor wrote to the captain, "We would recommend you to settle the matter in the best way you can." The shipowner defended the action and was ultimately successful; but he incurred considerable costs in excess of those which the unsuccessful party had to pay.

Held, in an action by the shipowner against the consignor, that, such costs not being damages flowing from the consignor's breach of contract, and the consignor not having given authority to incur them, the shipowner could not cover them; that the amount recoverable by the shipowner in respect of port dues was only the difference between what he would have paid had the ship unloaded at the port named, and what he actually did pay; and that insurance on the voyage from the port named to a safe port must be taken to have been included in the claim for demurrage, which had been allowed in full.

THIS was an action tried at Liverpool Summer Assizes 1877, before Denman, J., and reserved by him for further consideration.

Russell, Q.C., *Warr*, and *French* for the plaintiff.

Herschell, Q.C. and *Myburgh* for the defendants.

The facts of the case are fully stated in his Lordship's judgment.

DENMAN, J.—This was an action brought in 1874, and the pleadings were according to the system then in force.

The declaration was on a charter-party by which it was agreed that the plaintiff's ship *Nydia* should load at Akyab, from the factors of the defendants, a full cargo of rice, and therewith proceed to Queenstown or Falmouth for orders to discharge at a good and safe port in the United Kingdom or on the continent between Havre and Hamburgh, or so near thereto as she might safely get without breaking bulk, and deliver the same on being paid freight after a rate and in manner therein provided, to be discharged with all possible dispatch as customary. The declaration further stated that the plaintiff did not within the stipulated time, receive orders to

discharge at a good and safe port, but at a place which was not such; that the ship proceeded to such place, or as near as it could safely get without breaking bulk; that the defendants were not ready there to take delivery, but delayed the ship an unreasonable time, and compelled the ship to go to another port and there delayed her, whereby the plaintiff was deprived of the use of the ship and was put to expense in removing the ship to a good and safe port, and became liable to port dues to which he would not otherwise have been liable, and the ship was damaged by rocks to which she otherwise would not have been exposed, and was compelled to defend certain proceedings instituted against the captain in foreign courts in consequence of the breaches, and to appeal against certain proceedings, and to pay large sums incident to such proceedings.

It was proved at the trial that on the 13th March 1873 the defendants entered into a charter-party in the terms set out in the declaration. On the 28th March bills of lading were signed which provided that the goods were to be delivered at the port of discharge. On the 19th Aug. 1873 the ship arrived with her cargo of rice at Falmouth, where Ghent was named as the port of discharge, and the captain proceeded on his voyage. The vessel drew 20ft., and could not reach Ghent itself without lightening her load considerably, and proceeding up twenty-one miles of canal not more than 21ft. deep in parts. She arrived on the 25th Aug. at a place called Terneuyen, and there lay in the open river, which was four or five miles wide at that spot, in a place which was admitted was as near Ghent as she could get without breaking bulk. On the 29th Aug. Descamps who was the consignee of the bill of lading, contended that he was entitled to have the cargo delivered at Ghent proper, the bill of lading containing no express reference to the charter-party, but only the term as to delivering at the port of discharge as above mentioned. After considerable discussion the plaintiff proposed to take the risk to the ship of discharging where the ship lay, if Descamps would take the risk of lightering the goods to Ghent. This was declined by Descamps, whereupon the plaintiff communicated with the defendants, and being advised that he was not able to discharge the whole cargo safely at Terneuyen, sailed to Antwerp on the 18th Sept. and arrived on the 19th. In the meantime on the 15th he had written to Descamps two letters informing him that surveyors had reported the place in which the ship lay to be highly dangerous to attempt to discharge the whole cargo, and that he had, as was the fact, given notice to the defendants that, if before a day named they did not name some good and safe port to discharge at, he should send the ship to Antwerp, where he would be ready to deliver the cargo, holding them responsible for all loss or damage which had resulted or might result from non-compliance with the charter-party. The defendants on receipt of this notice on the 17th Sept. wrote as follows to the plaintiff's broker, who had forwarded the plaintiff's notice to them: "Dear sir,—We have forwarded the notice from the owners of the *Nydia* to the owners of the cargo. As you are aware, we long ago sold the cargo and transferred the charter, and we must therefore request the owner of the vessel to exercise his lien on the cargo for freight and all charges as he may be advised.—Bullock and Co." The ship having arrived at Antwerp on the 19th, the plaintiff on the 22nd wrote to the defendants announcing that fact, and stating that she was there moored in a safe place waiting to deliver her cargo, and that no application had been made for it. The letter then proceeded as follows: "If the cargo is not applied for within three days, the ship will be sent into dock and the cargo warehoused at the expense of whom it may concern, but without prejudice to my lien on the cargo, and also reserving my right to take legal steps to enforce the same by any means legally authorised for the recovery of the freight and all other charges which are or may become due." No answer was sent to this letter. On the 25th Sept. Descamps commenced proceedings in the court at Antwerp against the captain of the ship, claiming damages for non-delivery of the cargo at Ghent. The plaintiff, before being aware of these proceedings, made arrangements for unloading, which was commenced on the 29th. On the 30th the plaintiff wrote to the defendants as follows: "I beg to inform you that the freight on the *Nydia's* cargo has been arranged to be paid after the delivery of 100 tons, the demand for its delivery at Ghent to be settled by the Antwerp tribunal. As regards the claim for loss of time, double port charges, expenses of moving to a safe port, an accident while moving, and all other charges, I am advised that any claim for the losses should be made, not on the consignee, but on you as charterers, &c." To this letter the defendants replied as follows: "Oct. 1st, 1873, Dear sir,—We have your favour of yesterday, and can only reply by referring you to our letter of the 17th ult. to your broker, requesting you to exercise your lien on the cargo for freight and all charges. At the same time we would recommend you to settle the matter the best way you can.—Yours, Bullock and Co." Descamps took delivery of the cargo and paid the freight in the manner stipulated, under reserve of all his rights, the captain giving bail for 1400*l.* to get at his freight.

It was agreed at the trial that the opinion of the jury should be taken only on the question viz., as to the number of days for which, and the rate at which, the plaintiff should be allowed damages for the detention of the vessel, and no question arises as to the liability of the defendants to pay the 504*l.* assessed by the jury on that account. As to the other heads of damage claimed, it was arranged that the principle upon which they were to be assessed should be laid down by me after argument on further consideration, and that if after my judgment any question of amount remained in dispute, it should be settled by an arbitration to be agreed upon between the parties.

Upon the argument before me, the plaintiffs, in addition to the sum of 504*l.* assessed by the jury as damages for detention, claimed several other items of damage of which particulars had been delivered. The most important of these was a claim of 596*l.* for the costs to which the plaintiff had been put in defending the litigation which took place at the suit of the consignee of the cargo in Belgium, and in his appeal from the decision of the court of first instance, which was against the captain of the ship. The exact nature of this litigation was not very fully explained by the evidence, but it is enough to state that it was

a claim by Descamps for damages alleged to have been sustained by him by not sending the ship to Ghent proper; and that the plaintiff, though ultimately successful on appeal, was 596*l.* out of pocket for the costs of the proceedings beyond the sum allowed by the court.

I am of opinion that he is not entitled to recover such costs as damages from the defendants in the action. The only grounds upon which damages could be claimed would be, first, if they were the natural or necessary consequences of the defendants' breach of contract; or, secondly, if there were evidence in the case of any authority from the defendants to the plaintiff to incur these costs.

As to the first of these grounds it appears to me that the refusal of the defendants to take delivery of the cargo at Terneuyen cannot be said to have any relation at all to the claim of Descamps in respect of which he brought his action and claimed damages for non-delivery at Ghent proper. That was an erroneous contention founded upon a supposed want of sufficient reference in the bill of lading to the charter-party to bind the consignee of the bill of lading to the stipulation of the charter party as to not breaking bulk, and although it may be true that the proceedings of Descamps would never have been instituted if the defendants had not broken this contract, I can see nothing in that breach of contract either naturally leading to, or still less necessitating, Descamps' proceedings, or so connecting them with the defendants' breach of contract as to make them, or the resistance to them, a natural or necessary consequence of such breach. The costs incurred do not seem to me to be damages flowing from the defendants' breach of contract, but costs incurred by the plaintiff in defending himself against a totally independent and unfounded claim made by Descamps on a ground different from and unconnected with the plaintiff's cause of action against the defendants.

The second ground upon which it was sought to add the claim in question to the damages to be recovered was that it appeared upon the correspondence that the defendants had given actual authority to incur them. But I can find nothing in the correspondence or evidence to warrant me in so holding. The letters which I have set out above, so far as they are material to this question, instead of making out a request or authority to the plaintiff to defend the proceedings, seem to me to make out the very contrary. The defendants' letter of the 17th Sept., written after notice that the plaintiff would send the ship to Antwerp if the defendants did not name a good safe port within three days, and hold the defendants responsible for all loss and damage which had resulted or might result from non-compliance with the charter-party, goes on, "We long ago sold the cargo, and transferred the charter; we must therefore request the owner of the vessel to exercise his lien on the cargo for freight and all charges." This appears to me not in any way to contemplate such a litigation as afterwards ensued at the suit of Descamps, and even if it did, the answer of the defendants is anything but an authority to the plaintiffs to litigate. Descamps' proceeding, in fact, did not commence until the 25th Sept. In the plaintiff's letter of 30th Sept. there is no mention of the expenses of litigation; only an allusion to Descamps' demand for delivery at Ghent, in connection with the other arrangements made with him about the payment of freight after delivery of each 100 tons. The expression "other charges" in that letter cannot, I think, be construed to include Descamps' claim, or anything expended in resisting it; and the expression in the defendant's letter of the 1st Oct., "we would recommend you to settle the matter in the best way you can," seems to me to amount to no more than the words "take your own course," used in the case of *Baxendale* v. *The London, Chatham, and Dover Railway Company* (L. Rep. 10 Ex. 35), which appears to me to be in point upon this as well as upon the other ground upon which it was contended that these damages were allowable. On the whole I am of opinion that they must be disallowed.

In addition to the above claims the plaintiff contended that he was entitled to a sum for extra port charges incurred. It was not contested that some damages would be recoverable under this head, but it was urged that the plaintiff in his particulars had claimed too much by not making allowance for those port charges to which he would have been liable in any event, if the discharge had taken place at Terneuyen. The only rule that it is necessary to lay down with reference to this part of the case is that the arbitrator must ascertain the difference between the port charges actually incurred by the plaintiff at Antwerp and at Terneuyen (if any), and allow the plaintiff the difference between the sum of these and the total amount which he would have had to pay if the discharge had taken place at Terneuyen; such difference to be added to the damages found by the jury.

A claim was made for insurance on the voyage from Antwerp to Terneuyen, on the ground that it is a matter of course that a ship should be insured; and resisted on the same ground, inasmuch as insurance being assumed to be provided for must be taken to be a part of the fair expenses of the shipowner, provided for in the claim for demurrage. I think the latter argument ought to prevail, especially in a case where as in the present, the whole amount *per diem* claimed for demurrage was allowed, and that this claim cannot be supported.

There was also a minor claim for a loss by stranding on the voyage from Terneuyen to Antwerp, which was abandoned upon the argument before me, therefore I need not further notice it. There was also a charge for certain extra expenses said to have been incurred beyond those which would fairly be covered by the claim for demurrage, and it was not contended that if there were any such these should be assessed by the arbitrator and added to the damages.

As to the items not yet reduced to figures, from what passed on the argument I infer that there is not likely to be much dispute, possibly not even any necessity for going to the arbitrator at all. Probably it will be convenient that I should suspend final judgment until I receive a report from the arbitrator, or a consent of the parties as to the amount for which it is to stand.

Judgment for plaintiff for 50*l.*; *suspended as to residue.*

Solicitors for the plaintiff, *Field, Roscoe,* and *Co.*, agents for *Bateson* and *Co.*, Liverpool.

Solicitors for the defendants, *Hollams, Son,* and *Coward.*

Friday, Dec. 7, 1877.

(Before GROVE and LINDLEY, JJ.)

ELMORE AND ANOTHER *v.* HUNTER.

APPEAL FROM INFERIOR COURT.

Barges towed by steam-tug—Worked or navigated"—"In charge of"—Thames Conservancy Act, bye-law 16—22 & 23 *Vict. c.* 33, *s.* 66.

Sect. 66 *of the Thames Watermen and Lightermen Act* 1859 *provides that no barge shall be "worked or navigated" unless "in charge of" a licensed lighterman.*

Held, that barges being towed by a steam-tug were being "worked or navigated," and that, in order to comply with the Act, each of such barges must have a licensed lighterman on board.

THIS was a case stated by a Metropolitan police magistrate, sitting at Southwark police court, under 20 & 21 Vict. c. 43.

The appellants, barge-owners, trading under the name of Elmore and Scott, were summoned by the respondent on a charge for that, on the 25th Aug. 1877, they did unlawfully cause and permit two barges, used for the carrying of goods and merchandise, to be "worked or navigated" within the limits of the Act 22 & 23 Vict. c. 33, without having in charge of such craft a licensed lighterman or qualified apprentice, contrary to the provisions of the 66th section of that Act. Sect. 66 of 22 & 23 Vict. c. 33 (Thames Watermen and Lightermen Act 1859), is as follows: "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 (Teddington Lock and Lower Hope Point), 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 shall incur a penalty not exceeding 5*l.*" It was proved that on the day in question six barges, the property of the appellant, were being towed together within the said limit, on the Thames near London Bridge, by the steam-tug *Little Britain*, and that on two of the six barges there was no such licensed lighterman or apprentice in charge. It was argued, on behalf of the appellants, that the barges in tow of a steam-tug were not being "worked" or "navigated" within the meaning of the Act, so as to necessitate there being a licensed or qualified man in charge of each of them. The magistrate being of opinion that the offence defined by sect. 66 had been committed, convicted and fined the appellant. The question for the opinion of the court was, whether these barges were being "worked" or "navigated" within sect. 66, then the conviction to be quashed, otherwise to stand. It appeared that, in a previous case, another magistrate had decided the other way.

Sutton for the appellant.—It is admitted by the other side that there was a licensed lighterman on board the tug. The bye-laws are passed under sect. 80 of the Act, which says that "the Court of Masters, Wardens and Assistants are hereby empowered from time to time to make such bye-laws as they think proper . . . . for carrying into effect the purposes of this Act . . . . so that the same bye-laws be not inconsistent with any of the laws of this kingdom, or with this Act, or with any bye-laws, rules, orders or regulations made or to be made by the Conservators of the River Thames under the authority of the Thames Conservancy Act 1857, or of any Act for the time being in force relating to the conservancy of the river Thames." Looking at bye-law 16 of the Thames Conservancy Act, made by the Conservators of the River Thames under the authority of that Act, the words "work or navigate" in sect. 36 of the Watermen Act cannot refer to a barge being towed by a steam-tug. In bye-law 16 there is an express reservation in favour of a barge so being towed. The words are. "All barges, boats, lighters, and other like craft navigating the river, shall, when under way, have at least one competent man constantly on board for the navigation and management thereof . . . . with the following exceptions: When being towed by a steam vessel," &c. [LINDLEY, J. referred to the bye-laws made under the Thames Watermen Act; the 60th providing that every steam-tug shall have one licensed waterman on board, and that "every barge, lighter, or craft, towed on the river by steamboats, shall have one licensed lighterman or licensed apprentice at least in charge thereof, to steer and navigate the same; and if the same shall be navigated in contravention of this section, the owner thereof, or the person in charge of any such craft, shall incur a penalty not exceeding forty shillings." GROVE, J.—By the Thames Conservancy bye-law there is to be a competent man on board, by the Thames Watermen bye-law a licensed lighterman: but that may mean the same thing.] The 60th bye-law under the Thames Watermen Act is clearly inconsistent with sect. 66 of the Act, the one imposing a penalty not exceeding 40*s*, the other a penalty not exceeding 5*l.*; or, if not inconsistent, the bye-law contemplates an offence not provided for by the section otherwise the penalty would be the same. [LINDLEY, J.—One may merely be a provision carrying out the other.] The 60th bye-law being confined to vessels being towed, would be unnecessary if sect. 66 covered those. GROVE, J.—Why did they not proceed under the bye-law?] Because this bye-law is inconsistent with the bye-laws under the Thames Conservancy Act, and as it would, therefore, by sect. 80 of the Thames Watermen Act, have no force, they fell back upon this section in the Act. [GROVE, J.—Surely it is unsafe for a vessel being towed not to have someone to steer.] Their 16th bye-law—already quoted—shows that at all events the Conservators of the Thames did not think it necessary. Then nothing can be said to be "worked or navigated" unless it has a motive power of its own.

Bedford Pym, for the respondent, exhibited a model, and explained how the barges were fastened together and to the steamer. [He was stopped by the Court.]

GROVE, J.—The question we have to decide in this case turns upon the proper construction of sect. 66 of the Thames Waterman Act. I do not think that we can control that Act by any bye-laws. They may be inconsistent with the Act, in which case they are bad; or they may, without being absolutely inconsistent, be expressed less fully, as, for instance, where the bye-law says a competent man is necessary and the Act says a licensed lighterman. There is no inconsistency there, as all that the Act does is to add another

condition to the bye-law, viz., that the competent man must be a licensed man. Therefore, the real point is the proper construction of sect. 66, which is as follows: [Reads it.]

The case finds that on the occasion in question six barges were being towed together by the steam-tug *Little Britain*, and that on two out of the six there was no lighterman in charge; in other words, no person to attend to either of them. The question is whether four persons can be said to be in charge of six barges. I am of opinion that they cannot. We must construe this provision according to its object: and it appears to us that there was no person in charge of this craft, so as to fulfil the object of the Act.

First, there was no person actually in physical charge of these two barges, and there is nothing to show that in case of sudden necessity the four men who were in charge of the other barges could get across to render assistance; secondly, there was no person in charge of them, so as to have thorough control over them—control such as in an emergency might prevent their being swamped or sunk or, being an object of danger to other vessels.

Then as to the meaning of "worked or navigated," those words do not seem to me to be limited to the mere propelling of the vessel by the tug; because, if that were so, there might be an indefinite number of barges being towed in a long line, and they would be wholly beyond the control of the tug on turning a corner in the river. Suppose the case I put to Mr. Sutton in argument of a horse towing along the tow-path. What difference is there between that case and a towing by a steamer? The barge, while being towed, is "worked and navigated" partly by the steamer that is towing it and partly by the person on the barge. I am of opinion, therefore, that the Act applies to barges so being towed, and that each of such barges should have one man in charge of it. Each barge must have, to a certain extent, an independent course, and therefore not be wholly navigated by the mere propelling power of the steamer. There may be cases where two barges are so substantially united as to form one barge, and where it might be arguable that the whole really formed one craft. That clearly was not so in the present case. Had it been, even then I am inclined to think that the Act would be infringed, unless there was a man on each barge.

Lindley, J.—The case submitted to us involves two questions: first, whether these barges were being worked or navigated within sect. 66 of the Thames Watermen and Lightermen Act; and if they were, whether they were in charge of a licensed lighterman within the meaning of that section.

As to the first question, whether these barges were being worked or navigated within the meaning of the section, it seems to be clear that they were. I say this with all respect for Mr. Arnold, who, we hear, came to a different conclusion when a similar case was before him. Being worked and navigated means being moved about no matter how. Assuming that to be so, was sect. 66 complied with in this case?

Now, there were here six barges and four men. It might happen that the barges should be so coupled together as that two of them would practically form one boat, and I can well imagine that in such a case four men might be sufficient for six barges. The Act does not say that there must be a lighterman on board of, but "in charge of such craft." Was there then a lighterman in charge of these two barges? Supposing that things went wrong, and it became necessary to set the barges adrift, it is obvious that it would be essential that each barge should have a duly qualified man on board of her.

Then, as to bye-law 16 of those made under the Thames Conservancy Act, it cannot override the words of this Act. As I read it, it is inconsistent with the Act, as it exempts barges being towed by a steam-vessel from the necessity of having a competent man on board. But we are construing an Act of Parliament, and have nothing to do with any bye-laws that are inconsistent with it.

The conviction must, therefore, be upheld.

Grove, J.—I desire to add that I agree that the bye-law of the Thames Conservators is inconsistent with the 66th section of the Watermen Act. *Conviction upheld, with costs.*

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

Solicitor for the respondent, *William Edwin.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Friday, Nov. 16, 1877.

(Before Sir R. Phillimore.)

The Skiblander.

Salvage — Skill — Infectious disease — Amount — Apportionment.

The loan of a navigator to a vessel in distress, by reason of her own navigators being incapacitated by an infectious disease, is a salvage service on the part of the ship lending the navigator.

It is a salvage service of a very high order on the part of a navigator to go on board an infected vessel and navigate her.

This was an action of salvage brought by the owners, master, and crew of the Norwegian barque *Hirundo* against the Norwegian barque *Skiblander*, her cargo and freight, for services rendered to that vessel whilst on a voyage from Fernandina, in the State of Florida, to Liverpool.

It appeared that the *Hirundo*, a barque of 332 tons register, was on a voyage from Tonala, in Mexico, to Queenstown for orders, laden with a cargo of mahogany, and was manned by a crew of eight hands, including her master and mate, who were the only two persons on board having any knowledge of navigation; that her proper complement was nine hands, but that one man had deserted, and that her master was, to a great extent, an invalid, incapable of great exertion.

On 26th Aug., in lat. 36deg. N., long. 70deg. W., she fell in with the *Skiblander*, which was a barque of 360 tons register, and laden with a cargo of turpentine, and of the value, together with her cargo and freight, of 5135*l.* 13*s.* 2*d.*, and ascertained that her captain and his wife, and the first and second mates, were all ill with yellow fever, and that there was no one on board capable of writing up the log or taking an observation to determine the position of the ship. Those on board the

Hirundo took observations and communicated the position of the vessel to those on board the *Skiblander*, and kept company with her till night time, when she was lost sight of. On 1st Sept., in lat. 37deg. 53min. N., long. 68deg. 54min. W., the *Hirundo* fell in with the *Skiblander* again, with signals of distress flying, and ascertained that in the interval the captain's wife and the first mate had died of yellow fever, and that, in addition to the captain and second mate, one of the seamen had fallen ill with it. Under these circumstances, Osman Osmandsen, the mate of the *Hirundo*, went on board the *Skiblander* to navigate her to England; he also during the voyage had to attend to the sick and work as a seaman, the vessel being so short-handed. During the voyage the master, second mate, and two seamen of the *Skiblander* died of yellow fever, and the mate of the *Hirundo* himself suffered severely. On the 11th Oct. the vessel arrived at Liverpool.

The defendants did not deny the services, but paid 515*l.* into court, with a tender of costs. The plaintiffs, in their reply, submitted that the sum paid into court was not sufficient remuneration for their services.

Nov. 16.—The cause came on for hearing before Sir R. Phillimore, assisted by two of the Elder Brethren of the Trinity House as assessors.

W. G. F. Phillimore (with him *Barnes*) for the plaintiffs.—The sum of 515*l.* is quite insufficient for the perils incurred by the salvors; the mate who went on board did so at the imminent peril of his life continuing through the whole length of a long voyage, and those who remained on board the *Hirundo* ran great risk from the fact that they had only one navigator on board, and he an invalid, besides the danger of contagion from having held communication with those on board an infected ship. In a similar case, *The Active* (14 Jur. 606, Prit. Digest, 348), out of a value of 4300*l.*, an award of 1500*l.* was made. In the recent case of *The SeeNymphe* (*a*) an award of 1400*l.* was made on a value of 7500*l.*, and then the fever on board the salved ship was African and not yellow fever, and therefore not infectious.

E. C. Clarkson for defendants.—In the latitude in which the *Skiblander* was fallen in with, yellow fever is no longer infectious, and so the nature of the services is much exaggerated. The circumstances in *The Active* (*ubi sup.*) were very different; two-thirds of the crew were dead, and the vessel still in the tropics, and a seaman as well as an officer were lent. The tender is sufficient.

Sir R. PHILLIMORE.—This is a case, in the judgment of the court, of most meritorious salvage. It is almost impossible to praise too highly the gallantry of the man Osman Osmandsen under the circumstances, or to doubt that the preservation of the lives of those who were on board, and of the vessel itself, were due to his courage and skill. The navigation lasted, I think, for forty-two days, and for a distance of about 3000 miles. It is unnecessary that I should go over the facts, which have been clearly and properly stated in, and read to the court to-day from, the statement of claim. They constitute a case, as I have already said, of extraordinary merit. The peril of yellow fever, in the judgment of those who advise me, was by no means over at the time when the man Osman Osmandsen went on board, and it has been pointed out to me that it is no uncommon thing to require a vessel which comes into port with yellow fever on board to remain in quarantine for some days when she has been long out of the latitude and longitude where the fever was caught. Looking to all the circumstances of the case, I have to consider whether, out of 5,135*l.*, the sum of 515*l.* is a sufficient tender. I am of opinion that it is not. I shall award 900*l.* and costs.

Phillimore asked the court to apportion the award amongst the salvors.

Sir R. PHILLIMORE.—I have to remember in the apportionment that the *Hirundo* parted with one of her navigators, and retained only one on board, and that he was in very bad health himself, and liable to have caught the yellow fever, for he had been, I think, twice on board the *Skiblander*. It was, under the circumstances, a serious peril to her to part with one of the only two persons on board capable of navigating. But the greater salvor—if I may use the expression, the hero of these services—was Osman Osmandsen, and I shall allot to him 600*l.*, and 300*l.* to the *Hirundo*, and, this being not a steamer but a sailing vessel, I shall, of the 300*l.*, allot 100*l.* to the owner, 50*l.* to the master, and the remainder to the crew, according to their ratings.

Solicitors for plaintiffs, *Bateson* and *Co.*
Solicitors for defendants, *Stone* and *Fletcher.*

(*a*) *Dec.* 6, 1876.—The *See Nymphe* was a cause of salvage instituted by the owners, master, and crew of the East Indiaman *Empire of Peace* against the German brig *See Nymphe* to recover salvage. The *Empire of Peace* fell in with the *See Nymphe* off the West Coast of Africa in June 1876, and found that the captain of the *See Nymphe* and some of the crew had died of African fever, and that the mate and the rest of the crew were so ill as to be incapable of navigating her. The *See Nymphe* was bound from Opobo to Scilly for orders, and the second mate and two seamen of the *Empire of Peace* volunteered to board the *See Nymphe*, and did so, taking some medicine with them, and they navigated the vessel to Scilly after fifty-two days on board. The *See Nymphe* at the time they went on board had three feet of water in her hold, and, in consequence of the illness on board, the dirt and stench on board were very bad. On the voyage another of the crew of the *See Nymphe* died, and none of them were able to render any assistance except in steering. The value of the *See Nymphe* was agreed to be 7500*l.*

Dr. *Deane*, Q.C., and *W. G. F. Phillimore* appeared for the second mate of the *Empire of Peace.*

Myburgh for the owners and some of the crew of the *Empire of Peace*; *Clarkson* for the owners of the *See Nymphe.*

Sir R. PHILLIMORE.—This is a case which appears to the court to be one of extraordinary merit, in which gallantry, humanity, and skill in navigation are conspicuous; and, in my opinion, the evidence establishes that, but for the services of these three men, the ship and her cargo would certainly, and the lives of the crew on board of her probably, have been lost. I bear in mind that the disease was not of a contagious or infectious character, and that the ship seems to have sustained very little injury, and to have encountered favourable weather. Bearing these circumstances in mind, I must endeavour to apply the principles always governing salvage awards in this court. I consider that in giving a liberal reward in cases of this description the interest of navigation, as well as of humanity, will be greatly benefited. I shall award 1400*l.*; 480*l.* to the mate, 360*l.* to each of the men, and 200*l.* to the master owners of the *Empire of Peace.*

—ED.

Jan. 25, 26, 28, 29 *and* 30, 1878.

(Before Sir R. PHILLIMORE.)

THE OQUENDO.

Practice—Pleading — Counter-claim — Damage to Cargo — Improper stowage — Delay — General average—Adjustment.

Damage to cargo occasioned by salt water does not come within the excepted perils when by reason of the place in which it is stowed it is exceptionally liable to such damage in severe weather.

Where to a claim for damage to cargo, a counter-claim of general average is set up, it is not necessary that such general average should have been adjusted; but if the evidence supports the fact of a general average loss having been sustained, the amount thereof together with the amount of loss sustained through damage to the cargo will be referred to the registrar and merchants to report.

Semble, since the passing of the Judicature Acts the Admiralty Division has acquired a right to entertain a claim for a general average loss which the High Court of Admiralty did not possess. (*a*)

THIS was an action *in rem* for damage to cargo, brought by Messrs. F. and A. Delcomyn against the Spanish barque *Oquendo* under the provisions of the Admiralty Court Act 1861.

The plaintiffs were indorsees of bills of lading for and owners of a cargo of sugar laden on board the *Oquendo* at Havana, and carried by her in the first instance into Queenstown and subsequently to London, where it was discharged in a damaged condition, occasioned, as the plaintiffs alleged, by the negligence of the defendants in stowing it and in delaying it at Queenstown. The defendants pleaded that there had been no negligence, but that the damage was caused by bad weather, an excepted peril of the sea; the defendants also counter-claimed for an amount of money which they alleged to be due to them from the owners of the cargo for a general average contribution in respect of certain property of the defendants jettisoned and cut away during the continuance of the bad weather for the good of the adventure.

The statement of claim, delivered 22nd Jan. 1878, besides alleging the plaintiffs' claim to the cargo as indorsees of the bill of lading, and that it was one of the terms of the said bill of lading that the ship should put into Falmouth for orders, and thence to a market, proceeded:

4. The said ship did not duly prosecute her said voyage in accordance with the said bill of lading, but deviated therefrom without sufficient cause, and wrongfully delayed the prosecution thereof, and put into Queenstown, and, although the said master applied to the plaintiffs for orders, and was duly ordered by the plaintiffs to proceed to London, being a market within the meaning of the said bill of lading, he neglected to do so, and delayed his said voyage, and stayed at Queenstown with his vessel for an unreasonable time, whereby the said cargo sustained damage, and the plaintiffs were put to loss and inconvenience, and were deprived of profits which they would otherwise have made by the sale of the said goods.

5. The defendants, although not prevented by any danger or accident of the sea, did not deliver the said sugar in accordance with the said bill of lading in the like good order and condition as that in which it had been shipped, and, on the contrary, delivered the same to the plaintiffs in a greatly damaged condition.

And claimed damages for the breach of contract and breach of duty, and a reference to the registrar and merchants to assess the amount of such damage.

The statement of defence and counter-claim, delivered the 23rd Jan. 1878, besides denying generally the allegations of the statement of claim, alleged that the cargo was not carried on the "terms of the bill of lading only, but on the terms of the said bill of lading and of the charter-party referred to in the said bill of lading," and that "it was a term of the said charter-party that the *Oquendo* should sail for Queenstown, Falmouth, or Plymouth to receive orders," and then alleged that in consequence of bad weather, and the ship being thrown on her beam ends, it had been necessary, to enable her to right and for the saving of ship and cargo, and of the adventure, to cut away or let go "various ropes, in consequence of which several sails attached thereto were blown away and lost," and also to throw overboard a variety of articles, and that the *Oquendo* shipped a great deal of water. It then stated that the ship put into Queenstown on the 28th Nov., and that the master at once communicated with the consignee, and that he received orders to proceed to London on 5th Dec.; that she was detained at Queenstown till the 10th Dec., refitting, and by bad weather, and "that if any damage was done to the sugar such damage was occasioned by matters excepted in the bill of lading, to wit, the dangers and accidents of the sea;" and then, by way of counter-claim, the defendants repeated the allegations of the defence as to loss sustained by them, and alleged that "such loss was a general average loss, that the plaintiffs by their admissions were owners of the cargo, and that they had signed an average bond, to which the defendants referred, and continued:

3. The plaintiffs' proportion of such loss has not yet been ascertained, but is about 200*l.*, and claimed

1. Judgment against the plaintiffs for the sum of 200*l.* or such sum as shall be found to be the due proportion of the said general average loss.
2. A reference, if necessary, to ascertain the amount of the said general average loss, and of the plaintiffs' proportion thereof.
3. The costs of this action.

To this defence and counter-claim the plaintiffs delivered a reply on the 24th Jan. 1878, which, after a general denial of the allegations of the defence inconsistent with the claim, proceeded:

3. With regard to the defendants' counter-claim, the plaintiffs say, that before this action was commenced, to wit, on the delivery of the cargo, the defendants required them to sign, and they did sign and deliver to them, an average bond in the usual form, whereby it was agreed between the plaintiffs and defendants that all claims and questions, if any, relating to general average should, in the first instance, be assessed and determined by an average stater in the usual way, and that the plaintiffs should and would pay to the defendants any general average due to them by law, after the same had been ascertained and determined, and the plaintiffs further say that they have always been ready and willing to carry out their said agreement and to pay any general average due from them by law, but the defendants had not caused the said general average to be made up or ascertained and determined in accordance with the said agreement, and have never given them any particulars thereof, and have never

(*a*) The cases by which it has been held that the High Court of Admiralty had no jurisdiction to entertain a claim for general average contribution, are not referred to by name in the arguments of counsel or the judgment of the court, but for convenience of reference are given here. They are: *The Constantia* (4 Notes of Cases, 677); and *The North Star* (1 Lush. 50; 2 L. T. Rep. N. S. 264).

presented to them any general average statement, nor (save by their said counter-claim) made any application to the plaintiffs for general average.

To this reply the defendants, on the same day, the 24th Jan. 1878, delivered a rejoinder, which was a simple joinder of issue.

The bill of lading, dated Havana, 18th Oct. 1877, was, so far as is material to the question of deviation, in the following form: "Shipped, &c. . . . now lying in the port of Havana, and bound for Falmouth, and a market , . . to be delivered, &c., . . . on paying freight for the said goods as per charter-party. In witness &c." The charter-party referred to was of the same date, 18th Oct. 1877 and was in the Spanish language. After the usual stipulations as to space and the condition of the ship, a certified translation proceeds: "with which cargo she will sail for Queenstown, Falmouth, or Plymouth, to receive orders, to go to discharge in a safe port that will be named amongst those that are hereinafter mentioned, or direct to one of the said ports;" and then follow various stipulations as to the rate of freight payable in the event of proceeding direct, or after calling at a port for orders, to a port in the United Kingdom, or on the continent between Bordeaux and Antwerp.

The average agreement or bond, referred to in the counter-claim and reply, was dated the 17th Dec. 1877, and made between Yeaves and Co., agents for the owners of the *Oquendo*, of the first part, and the owners of the cargo of the second part, and after setting out that it was alleged that a general average loss had been sustained by the ship, continued:

And they, the said parties hereto of the second part do further promise and agree to bear and pay on demand to the said Yeaves and Co., or to such person or persons as they shall authorise to receive the same, the full amount or proportion which is due and payable by them, the parties hereto of the second part, in respect of the said average or averages, charges, and expenses. And, lastly, that, in case any dispute shall arise between the said parties hereto of the second part, or any of them, and the said Yeaves and Co., touching the amount to be paid by the said parties hereto of the second part in respect of the average or averages, charges, and expenses aforesaid, they the said parties hereto of the second part will, if required, enter into and execute an agreement or other engagement for referring the said disputes to the award and determination of a proper competent person or proper competent persons.

Jan. 25.—The cause came on for hearing before Sir R. Phillimore, assisted by two of the Elder Brethren of the Trinity House as assessors.

It appeared from the evidence that the damaged sugar was principally stowed either partially underneath the floor of the forepeak, which was separated from the hold by a bulkhead nearly down to the floor, and nearly underneath a scuttle on deck frequently opened during the voyage, or in the neighbourhood of the mainmast, chain lockers, and pump well; there was also some damage done to that stowed in other parts of the ship. On proof of the charter-party the claim on account of deviation was given up. There was contradictory evidence both as to the amount and the nature of the damage.

Jan. 29.—*Butt*, Q.C. (with him *J. C. Mathew*) for the plaintiffs.—The story of the weather contained in the log and protest, and given by the defendants' witnesses, is inconsistent with the reports of survey held on the ship. Had the weather been the cause of the damage we should not have found the damage at the bottom but at the sides of the ship where the straining would take place, in the wake of the chain plates. The delay at Queenstown was quite unnecessary. The trifling repairs could be executed in two or three days, and the weather was not such as to detain the ship. They were pumping up sugar, and therefore the captain must have known that there was damage to the cargo, and that it would rapidly deteriorate, and therefore it was his duty to press on his voyage. The damage was caused by improper stowage of the cargo both as to place in which it was stowed and from insufficiency of dunnage. With regard to the counter-claim, even supposing that the evidence supports the allegation that a general average loss has been sustained, which I do not admit, such a claim cannot be recovered in this action. The proper method, even independently of an agreement to refer, is to have the amount settled before an average adjuster. An adjustment stating the amount due is a condition precedent to recovering it. The reason of the bond is, that whilst owners of cargo are liable at common law for general average, the mere consignees are not, but to get delivery, and as an inducement to the master to waive his lien on the cargo, they promise to take the liability on themselves instead of leaving the shipowner to his remedy against the owners of cargo resident abroad. [Sir R. PHILLIMORE.—Do you content that the claim made by the defendants in their counter-claim is bad altogether?] It does not matter whether the defendants can or cannot raise a claim for general average contribution in this court when the amount of their claim has been ascertained in the usual way. Until that time there is no cause of action. There has been no demand for payment at all, and therefore no refusal to pay. [Sir R. PHILLIMORE.—If you contend that the counter-claim raises no cause of action, should not that question have been raised by the pleadings or on a motion to strike out the counter-claim?] The question is raised by the reply. [Sir R. PHILLIMORE.—May it not be that, though the time has not come at which an action could be brought on the claim for a general average contribution, yet that, under the provisions of the Judicature Act, it is competent to a defendant to plead it by way of counter-claim to an action brought against him, in reference to the same transaction, by a person from whom he will ultimately be able to recover.] No a counter-claim only lies for a matter which might be the subject of a cross action or of an original action. Here there is at present no cause of action. There is no breach of the provisions of the bond or agreement on which an action could be brought. As a matter of fact the question of general average does not arise, and as a matter of law there is no question to raise. Suppose, however, there should, in an adjustment of general average in the action, prove to be more money due to the defendant than there is to us for the damage done to our cargo, it would be most unjust that they should get their costs when we could not have paid the claim sooner if we would, and have never refused to pay it when due.

Milward, Q.C. (with him *W. G. F. Phillimore*) for the defendants.—It is perfectly competent for a defendant to raise a claim of this description by way of set-off or counter-claim. The average agreement is not a bond—it is not under seal. It is merely a

promise on the part of the plaintiffs to give a true account of the value of the cargo, and a promise to pay general average, and, if we choose so to arrange, to refer any dispute we prefer under the circumstances not to an average adjuster, but to come to this court. The agreement to refer under certain circumstances does not oust the jurisdiction of the court. [Sir R. PHILLIMORE.—Before the Judicature Acts I had no jurisdiction to entertain a claim of general average, but I understood that it is admitted that since the coming into operation of these statutes I have jurisdiction. *Butt*, Q.C.—I do not admit that this court has jurisdiction in such a matter; but I rely on the point that no court could have jurisdiction to entertain the claim in its present form.] On the facts is there any evidence to show that this is not a perfectly *bonâ fide* case? The evidence of those who must know most about the circumstances is not contradicted in any way. [Sir R. PHILLIMORE.—Evidence which is not from its nature capable of direct contradiction may yet be discredited in two ways: either by its own inherent improbability, or by a subsequently ascertained state of facts not being consistent with it.] Yes; but our uncontradicted evidence is clearly not in itself so improbable as to induce the court to discredit it, and the subsequently ascertained state of facts is, that we did throw overboard a great variety of things from the deck of our ship, but it is inconceivable that we should have done so for the purpose of receiving a proportion only of their value as general average. The delay at Queenstown was reasonable; it would have been perilous to sail again in the middle of winter without sails to replace those we had lost before arrival: and after we had got the sails the wind and weather were not favourable for a prudent master to set sail.

Butt, Q.C. in reply.

Cur. adv. vult.

Jan. 30.—Sir ROBERT PHILLIMORE.—The *Oquendo* is a Spanish barque of 390 tons, of which no owner or part owner was at the time of the commencement of this action domiciled in England or Wales. The plaintiffs are merchants carrying on business in London, and were the owners of the cargo. The *Oquendo* left Havanah on the 29th Oct. last, and reached Queenstown on Nov. 28. Her cargo consisted of 2343 boxes of sugar, containing 958,219lb. net, Spanish weight. It was, according to the bill of lading, to be carried to Falmouth for orders; but according to the charter-party these terms were enlarged, and the vessel was to carry the cargo to Queenstown Falmouth, or Plymouth, and there receive orders. The cargo was put on board in good condition and was taken out in bad condition. It appears from the evidence supplied by the log, and the protest and the testimony of the Spanish master and crew, who were examined at great length, that the vessel encountered bad weather on her voyage from the Havana to Queenstown, more especially on the 17th and 24th Nov. [His Lordship then read a certified translation of the entries in the log for those two days, and proceeded:] In the protest, for some reason not satisfactorily explained, there is no account of the events which took place on the 17th, but there is of those of the 24th, much in the same terms and language as in the log. A good deal of discussion took place as to what was the proper translation of the Spanish word *manguera*—whether a cyclone or a waterspout appears to be doubtful; but it was, at all events, a violent storm of wind and rain, and its effect, according to the log, was to throw the vessel on her beam ends. I should say also that the evidence is that the vessel was on her beam ends on the 24th Nov. for a considerable time, varying from one to two hours according to the different statements. The vessel, being in this condition on the 24th, arrived at Queenstown on the 28th, apparently in no distress whatever, making no water, and requiring, as the bills which have been put in prove, very small repairs, the refitting amounting strictly to not more than 2*l.* for work that was absolutely necessary.

Now the defence is that the weather, of which I have read a description from the log and protest, was the cause of the damage which, it is admitted, the cargo sustained, and that therefore the damage was caused by one of the excepted perils, and that the owner of the ship was not liable for it. It is stated also, with regard to the charge of delay, that it was caused by circumstances over which the defendants had no control—the badness of the weather, and the necessity of getting some of the sails, damaged, blown away, or thrown overboard in the storm, refitted.

Then there is a counter-claim, by which the defendants, being in that respect plaintiffs, claim under an average agreement signed by the plaintiffs the sum of 200*l.* to be paid to them, and that there shall be a reference to the registrar and merchants. This is the first time that in this court a counter-claim of general average loss has been set up. The vessel remained at Queenstown from Nov. 28 till Dec. 10, and then went on to the Millwall Docks in London, and, after arriving there, was seven or eight days discharging her cargo.

It is said, and apparently proved, that the owner and the master had no belief that any damage had been done by salt water until the discharge of the cargo took place.

The charge on the part of the plaintiffs is in substance as follows: That there was negligence on the part of the defendants in stowing the cargo, and a want of proper protection to it, and an undue delay in bringing the vessel to her port of destination after she arrived at Queenstown. I have, with the assistance of the Elder Brethren, examined the evidence very carefully, and I am prepared to state the conclusions at which the court has arrived.

First, the court is of opinion that the charge of undue delay is not proved, and the Elder Brethren entirely agree in this view of the case. We think that, looking at all the circumstances, the delay was not unreasonable.

There remains the other matter to be considered, namely, whether there was negligence in not providing sufficient protection for the cargo. In regard to this, the first point which forces itself upon the attention of the court is the bad weather the vessel encountered, especially on the 17th and 24th Nov. This state of the weather is no doubt supported by the evidence of the master and the crew, and is necessarily not contradicted by any positive evidence on the other side. At the same time I have thought it my duty to call the attention of the Elder Brethren to the terms of the protest and the condition the vessel must have been known to have been in if she had encountered the weather represented, and to contrast that with

her arrival on the 28th, only four days afterwards, without any signs of distress and the small expense, incurred in refitting her. The Elder Brethren are, in consideration of these matters, decidedly of opinion that the statements both in the log and the protest are grossly exaggerated. They think that, making all allowances for the alteration expressions may receive in course of translation, their own nautical experience warrants them in saying that, if they were translated literally, the vessel could not, after sustaining such weather, have arrived at Queenstown in the condition in which she did arrive. Nevertheless, I am of opinion that there is not sufficient counter-evidence before me to altogether discredit the statement made in the protest and confirmed by the evidence; but I accept the opinion that the terms are grossly exaggerated, and that has had the effect of shaking the credit which the court ought to be able to repose in the witnesses on these parts of the case.

The next point, in regard to the question of negligence in the protection of the cargo, is the matter of dunnage, which has been much discussed. First of all, we are of opinion that the damage in the mainhold had two causes: (1) The leakage from the butts at the partners, caused by straining; and (2) from the chain-locker pipes not being properly secured, which, though there is no direct evidence of it, yet the Trinity Masters assure me that their experience as seamen leads them to conclude was the case, and that the deficiency of dunnage in such places as the chain-locker and pump casing, if indeed there was any, is clearly proved. It is to be observed that, sugar being what is sometimes called a very sensitive cargo, the entrance of water will rapidly cause damage. As to the cargo forward, the Elder Brethren are clearly of opinion that it should not have been put there at all, and that it was improper to stow it under the fore-scuttle, which is constantly resorted to for stores, coals, and other articles, and which therefore could not afford adequate protection to cargo stowed underneath it. I think the matter must be referred to the registrar and merchants to ascertain the amount of damage done.

There is one word to say about the counter-claim. It has been contended on the one hand that the counter-claim on the ground of general average cannot be entertained by the court, as its jurisdiction was ousted by the agreement between the parties; and, on the other hand, it is argued that this is a misapprehension of the fact, and that in point of law and point of fact the court has jurisdiction. I am of opinion that the answer is a good one. The agreement is, in substance, that "in case any dispute shall arise between the parties touching the amount to be paid in respect of average, the parties shall, if required, enter into an agreement or other engagement for referring the same to arbitration." It was at the option of the defendant to require the reference, and he has not done so, but has preferred coming to this court. I am of opinion that this matter must also be referred to the registrar and merchants to state what proportion of the general average is to be defrayed by the cargo.

I shall order a reference to the registrar and merchants for the purposes I have mentioned. The costs will be reserved generally.

Solicitors for plaintiffs, owners of the cargo, *Waltons, Bubb*, and *Walton*.

Solicitors for defendants, owners of the *Oquendo*, *Lowless* and *Co.*

Jan. 30 *and Feb.* 5, 1878.

(Before Sir R. PHILLIMORE.)

THE BLESSING,

*County Court—Admiralty jurisdiction—Wages—Share of fishing adventure—Wrongful dismissal—Detention of chattels—Damages—*36 *&* 37 *Vict. c.* 85, *s.* 8—31 *&* 32 *Vict. c.* 71, *s.* 3, *sub-sect.* 2.

A contract that a master mariner shall take a share of a fishing adventure and bear a share of certain disturbances is a contract of wages by the general law maritime, independent of the Merchant Shipping Amendment Act 1873 (36 *&* 37 *Vict. c.* 85), *s.* 8; *and jurisdiction over such a contract is conferred on County Courts having Admiralty jurisdiction by the County Courts Admiralty Jurisdiction Act* 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3, *sub-sect.* 2.

A claim for damages for wrongful dismissal is within the cognizance of a court having original Admiralty jurisdiction, and, semble, of a County Court having Admiralty jurisdiction by statute.

Quœre, Whether a claim for damages for wrongful detention of personal chattels on board a ship is within the jurisdiction of a Court of Admiralty.

THIS was an appeal from a decision of the County Court of Durham, holden at Sunderland, on the 20th of April 1877, by which the learned judge of that court had refused to hear a suit on the ground of want of jurisdiction.

The cause was instituted on behalf of Thomas Gillson, mariner, on the 17th Jan. 1878, against the fishing smack *Blessing*, and George S. Gulston, her owner, "for wages and wrongful detention, and carrying of certain goods," and a warrant of arrest issued on the 31st Jan. 1877. The particulars of the plaintiff's case, so far as they were material, were as follows:

1. On or about Oct. 4, 1876, the fishing smack *Blessing* being in the port of Sunderland, her owner, the above-named defendant George S. Gulston, hired the plaintiff Thomas Gillson to serve as master on board the said fishing smack, the said plaintiff to be subject to and obey the reasonable and proper rules of the said defendant on the terms following, that is to say:

(*a*) The said agreement to be in force from the day of the date thereof up to Easter-day in the present year.

(*b*) The plaintiff's wages or remuneration to be 11-64ths of the invoice price at which all the large fish sold, and also his share of the smaller fish divisible amongst the crew (in the fishing trade known as stock o'bate), and in addition to the said wages to have and be provided with food and provisions during the said term.

(*c*) The plaintiff to pay for one-fifth of the provisions supplied for the use of the crew on board the said fishing smack.

4. The plaintiff did all things, and was always ready and willing to do all things, necessary on his part to entitle him to have the said agreement in all respects performed by the defendant. Yet, during the continuation of the said agreement, the defendant wrongfully removed and discharged the plaintiff therefrom, and from the said fishing smack, and refused to allow him board, lodgings, and provisions, according to the said agreement, in and on board the said fishing smack.

5. The defendant detained on board the said fishing smack, and refused to deliver up, the clothing of the plaintiff mentioned in the schedule to these particulars;

and the plaintiff claims as due to him the amounts set forth in the said schedule.

The Schedule referred to.

	£.	s.	d.
Damages for wages from 8th Jan., when plaintiff was wrongfully discharged, to 1st April 1877, twelve weeks at £2 per week	24	0	0
Net board and lodgings after deducting one-fifth of plaintiff's proportion of victualling during the same period, at 10s. per week.	6	0	0
Share of stock o'bate, at 15s. per week ...	9	0	0
Value of clothing detained on board	2	14	0
	41	14	0

When the cause came on for hearing, an objection was taken to the jurisdiction, and the learned judge decided that he had no jurisdiction and dismissed the suit. The judge's notes, on which the appeal was heard, were as follows:

Mr. R. objects that it is not a suit of wages, that it is more in the nature of a partnership. Mr. H. referred to 36 & 37 Vict. c. 85, s. 8. Agreement put in not executed as provided by that section.

I hold, on Mr. R.'s objection, that this is not a suit for wages, or within the jurisdiction of the Court of Admiralty at all, it is not within the jurisdiction of the County Court as a wages suit. I suggested that Mr. H. should ascertain whether the Court of Admiralty ever entertained a suit under such an agreement as a wages suit, and, if he found it had, he might apply to me again.

M'Clymont, for the plaintiff, on the 30th Jan. obtained a rule *nisi* to set aside this decision, and on 5th Feb. 1878 the rule came on for argument.

M'Clymont for the appellant.—There is jurisdiction for a judge of a County Court having Admiralty jurisdiction to entertain a suit of this description: sect. 3 County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71). The agreement is a contract of wages. This species of agreement is specially countenanced by sect. 8 of the Merchant Shipping Act Amendment Act 1873 (36 & 37 Vict. c. 85). [Sir R. PHILLIMORE.—Is the agreement in writing?] Yes, but we have failed to obtain it; the original is in the possession of the defendant, and he has not given it up, though he has had notice to do so. But even if it was not executed in accordance with the statute, it is nevertheless a binding agreement for the payment of a share of the profits of the fishing adventure as wages. [Sir R. PHILLIMORE.—The learned judge does not say he had no jurisdiction to entertain the suit if it was a wages suit, but that under the circumstances it was not a wages suit, and that therefore he had no jurisdiction.] This method of payment of wages in the fishing trade has been recognised as a portion of the general maritime law long anterior to the Merchant Shipping Acts: (*The Frederick*, 5 Ch. Rob. 8.) It is sufficient if I show that this is, speaking generally, a wages suit. I am not bound to show that each item of the claim comes under that definition. That is a matter for the consideration of the County Court.

Clarkson.—I admit that an agreement to take a share of the profits of a fishing adventure is an agreement in the nature of a contract of wages, and that the County Court judge has jurisdiction in such a case; but the case is not confined to that; there is a claim for damages for wrongful dismissal. It has been held that this court has jurisdiction to entertain such a claim, but that is a consequence of its original jurisdiction:

The Great Eastern, L. Rep. 1 A. & E. 384; 17 L. T. Rep. N. S. 228;
The Northumbria. (*a*)

But the Admiralty jurisdiction of the County Courts is the creature of the statute, and therefore limited by the statute; and there is nothing in sect. 3, sub-sect. 2 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) to give such jurisdiction as this, in a case of damages for wrongful dismissal. The other item of the claim is clearly beyond the jurisdiction of the County Court. This court has never exercised a jurisdiction to estimate damages in an action of detinue.

M'Clymont in reply.—Our claim for wrongful dismissal is a claim for wages under the contract, which we have not been allowed to complete, and therefore is a claim properly included in a claim for wages. As to the last item of the claim, the Court of Admiralty has exercised jurisdiction in cases of personal injury (*The Ruckers*, 4 Ch. Rob. 73); and in a recent case the petition alleges the wrongful detention of clothes and other chattels of the plaintiff's on board the ship (*The Roebuck*, 2 Asp. Mar. L. C. 387; 31 L. T. Rep. N. S. 274). That pleading was not objected to, and the court made a general decree which shows that such a claim may be made in a Court of Admiralty. [Sir R. PHILLIMORE.—Supposing that the High Court of Admiralty had such a jurisdiction, how do you show it to be conferred on the County Court?] Sect. 2 sub-sect. 1, of the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51) gives a County Court jurisdiction over "any claim in tort in respect of any goods carried in any ship," but I do not consider it necessary to press that part of the claim.

Sir R. PHILLIMORE.—I give no decision as to whether the court can entertain a claim for the wrongful detention of chattels, but I shall remit this case to the judge of the court below, with an intimation that the County Court has jurisdiction over the main portion of this claim. That it is a question of wages, on the authorities cited, there can be no doubt. It appears to me a matter of regret that the learned judge was not properly informed of the cases by those who argued the matter before him. I remit to him to re-try the case. The appellants are entitled to have their costs below and of the appeal.

Solicitors for plaintiff, *Belfrage* and *Middleton*, agents for *Holmes* and *Brewis*.

Solicitors for defendants, *Tuffnell* and *Southgate*, agents for *Dixon*.

Feb. 22, 23, *and* 25, 1878.

THE PRINCETON.

Collision—Dragging—Duty of pilot—River Mersey—Compulsory pilotage—The Mersey Dock Acts Consolidation Act 1858 (21 & 22 *Vict. c. xcii.), ss.*

(*a*) *The Northumbria* was an action brought in 1876 by a master mariner to recover the balance of his wages and disbursements, and damages for wrongful dismissal. The plaintiff was engaged for a voyage from England to South American ports and back, which would have lasted about six months. The action was *in rem*. The plaintiff was discharged about a fortnight after the engagement, and when the vessel put back into a port of distress. The defence was drunkenness. The Court found for the plaintiff that he had not been guilty of drunkenness, and gave him damages for the wrongful dismissal to the amount of the wages he would have earned if he had completed his voyage.—ED.

128, 138—*Merchant Shipping Act* 1854 (17 & 18 *Vict. c.* 104), *ss.* 353, 362—*Costs.*

Where a vessel under the charge of a pilot is at anchor and drags, it is the duty of the pilot to inform himself of the condition of affairs, before taking steps to avoid damage arising from it, and not to wait till someone reports it to him.

Where a vessel coming from sea into the river Mersey with a pilot on board is prevented from docking, in consequence of the violence of the wind, or want of water, and anchors, but is to be docked as soon as circumstances permit, the employment of a pilot is, under the Mersey Docks Acts Consolidation Act, compulsory.

The Admiralty Division will adhere to the practice of the High Court of Admiralty as to costs in cases of compulsory pilotage.

THIS was an action brought by the owners of the Dutch barque *Twee Zusters* against the American ship *Princeton*, to recover for the damages sustained by the former vessel in two collisions which happened between the vessels whilst at anchor in the river Mersey on the 25th Jan. 1878. The *Princeton* counter-claimed for the damage sustained by her in the same collision. The *Twee Zusters* was a barque of 375 tons register, and had put into Liverpool as a port of refuge. In consequence of the badness of the weather on her arrival she had been unable to get a pilot, and had come in, and to anchor, without one. The *Princeton* was a ship of 1349 tons register, laden with a cargo of cotton, and had come into harbour in charge of a pilot, who, at the time of the collision, was still on board.

When the vessels were anchored in the first instance each gave the other a clear berth.

At 4 a.m., shortly after which time the first collision happened, the tide was ebb, running about 2½ knots, and the wind blowing a gale from about N.N.W. against the tide. The *Twee Zusters* had two anchors down with 45 fathoms of chain on one, and 69 fathoms on the other. The *Princeton* had one anchor down with 70 fathoms of chain. Both vessels were riding to the tide with their heads up the river.

Under these circumstances each vessel alleged the other to have dragged, in consequence of which the collision happened. The jibboom and port cathead of the *Twee Zusters* coming into contact with the starboard mizen chains of the *Princeton*. Before the collision the *Twee Zusters* had paid out cable and ported her helm. After the collision the *Twee Zusters* dropped clear to the northward of the *Princeton*. On the following flood tide the vessels swung clear of one another, but on the succeeding ebb, about 6 p.m., they again came into collision, in much the same positions as before, and remained in collision for a considerable time, doing considerable damage; and ultimately the *Twee Zusters* parted from her anchors. The *Princeton* slipped her cable before going into dock, and when her anchor was weighed it was found to be foul, the cable being round the stock. The pilot of the *Princeton* proved that he was engaged to take the vessel from sea into dock, and that she would have gone into dock as soon as the weather permitted.

Each vessel alleged the want of a proper look-out on board the other, and an insufficiency of ground tackle, and negligence. The *Princeton* raised in addition the defence of compulsory pilotage.

It was proved that the pilot of the *Princeton* had been paid the proper pilotage rate from sea to the docks, and also the sum of 10*s.*, being at the rate of 5*s. per diem* for two days during which the *Princeton* lay in the river.

Butt, Q.C. (with him *Myburgh*) for plaintiffs, owners of the *Twee Zusters*.—It was negligence on the part of the *Princeton* to lie at single anchor in such weather. It is proved that the anchor was foul when weighed, and therefore it must have been foul before the cable was slipped; therefore it would not hold so well as if clear, consequently the *Princeton* dragged and occasioned the collision. She was also out of the control of her helm; had she been properly under control she could have avoided the collision. The question of compulsory pilotage does not arise. She had no proper look-out; had she had a proper look-out she would have been seen to have been approaching the *Twee Zusters*, and the fact would have been reported. It was not reported, and that has been held to be contributory negligence on the part of the crew.

Milward, Q.C. (with him *Clarkson*).—We never dragged at all, and therefore our anchor was sufficient to hold us. When weighed the chain was only under the stock, and that would make no difference in the holding power of the anchor, even if it was in that condition at the time of the collision.

Myburgh in reply.

Feb. 25.—Sir R. PHILLIMORE.—This is a case of collision between two vessels at anchor in the river Mersey, either to the northward of Egremont Ferry or abreast of the Bramley Moore Dock. The vessels which came into collision were the *Twee Zusters*, a Dutch vessel of 375 tons register, and heavily laden, and which had come to anchor in a proper berth to the westward of mid-river on the 23rd Jan. in this year, and had, before the collision, dropped both her anchors the starboard one with forty-five fathoms of chain and the port one with sixty fathoms. The other vessel was the *Princeton*, an American ship of no less than 1349 tons register, laden with a cargo of cotton. She had come to anchor in a proper berth abreast of the Bramley Moore Dock, with her starboard anchor and seventy fathoms of chain. The *Twee Zusters* had anchored twenty-four hours before the *Princeton*. It is admitted, and also proved by the evidence, that in coming to anchor the *Princeton* did not give the *Twee Zusters* a foul berth, there being a cable's length distance between them; but, nevertheless, two collisions took place. It is also admitted that, whichever is responsible for the first collision is responsible also for the second, because the fouling of the berth which caused the first collision was the cause of the second also. In the first the jibboom of the *Twee Zusters* came into contact with the starboard side of the *Princeton*, and on the evidence it is plain that the collision must have been occasioned by one of the two vessels dragging her anchor on the tide, the wind at the time blowing in an opposite direction to the tide. The question which the court has discussed with the Elder Brethren of the Trinity House is, which of the two vessels dragged? After a careful consideration of the evidence, which is contradictory, we think that, on the whole, it establishes that the *Twee Zusters* remained at her anchor, and

the *Princeton* drove upon her. We are clearly of opinion that the pilot in charge ought to have let go the second anchor, as that was a precaution which the state of the weather imperatively demanded. We think that the collision was caused by the dragging of the anchor of the *Princeton*, to prevent which proper measures, such as setting her staysail, were not taken. I pronounce the *Princeton* alone to blame.

Butt, Q.C. then contended that the pilot was not responsible for the collision. There ought to have been a proper look-out, and there was not, or if there was a look-out he neglected his duty; he ought to have given notice to the pilot or person in charge of the ship when the vessels were approaching one another; he must either have seen that they were approaching and neglected to report it, or he did not see it and ought to have done so. It was also negligence on the part of the ship's officers to leave her in an unmanageable condition.

Milward, Q.C. was not called on.

Sir R. PHILLIMORE.—The Trinity Masters are of opinion, and I entirely agree with them, that the pilot himself ought to have seen the state of affairs. I therefore decree that the pilot alone is to blame for this collision.

The question whether under the circumstances the employment of the pilot on board the *Princeton* was such as to exempt the owners from liability was then argued. The statutes and sections on which the arguments were based were the following:

The Liverpool Pilot Act (5 Geo. 4, c. lxxiii.).

Sect. 32. Every pilot so to be licensed as aforesaid, who shall pilot or conduct any ship or vessel into the said port of Liverpool, is hereby required to take care (if need be) to cause such ship or vessel to be properly moored at anchor in the river Mersey, and afterwards to conduct such ship or vessel into one of the wet docks within the said port, without being paid any other rate or price than is hereby directed to be taken for the piloting or conducting such ship or vessel into the said port of Liverpool; but in case such attendance shall be required during such ship or vessel being at anchor in the river Mersey and before she is docked, five shillings per day shall be paid, provided, &c.

Sect. 34. If the owner, master, or commander of any ship or vessel shall require the attendance of a pilot, licensed as aforesaid, on board any ship or vessel during her riding at anchor, or being at Hoylake, or in the river Mersey, such pilot shall attend such ship or vessel, and be paid for every day he shall so attend five shillings and no more: provided always, that in case such pilot shall not be employed the whole day, but be dismissed in less time than a day, such pilot shall be paid five shillings for his attendance: provided also that the pilot, so to be licensed as aforesaid, who shall have the charge of any ship or vessel, shall be paid for every day of his attendance whilst in the river, except the day of going to sea with such ships or vessels as shall be outward bound, and the day of returning from sea and the day of docking for such as shall be inward bound.

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

Sect. 353. Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation, and all exemptions from compulsory pilotage then existing within such districts shall also continue in force, &c.

Sect. 362. An unqualified pilot may, within the pilotage district, without subjecting himself or his employer to any penalty, take charge of a ship as pilot under the following circumstances (that is to say) . . . For the purpose of changing the moorings of any ship in port, or of taking her into or out of any dock, in cases where such act can be done by an unqualified pilot without infringing the regulations of the port, or any orders which the harbour master is legally empowered to give.

Sect. 388. No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law.

The Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.) s. 6, repeals *(inter alia)* the sections of the Liverpool Pilot Act set out above.

Sect. 123 enacts a penalty of 20*l.* for unlicensed persons piloting vessels in or out of the port of Liverpool.

Sect. 128. The pilot in charge of any inward-bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey and before going into dock, in which case he shall be entitled to receive five shillings per day for such attendance.

Sect. 129 enacts a penalty of 5*l.* on masters of inward-bound vessels omitting to fly a signal for a pilot on coming within the pilot stations, and not giving reasonable assistance to a pilot to come on board.

Section 130 enacts that masters of vessels other than coasting vessels in ballast or under 100 tons burthen refusing to accept the services of a pilot when offered shall pay full pilotage rates to such pilot.

Sect. 133 gives power to the board to fix pilotage rates for inward-bound vessels within certain limits.

Sect. 138. If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at Hoylake or in the river Mersey, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of five shillings, and no more, provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river; but no such charge shall be made for the day on which such vessel, being outward bound, shall leave the river Mersey to commence her voyage, or being inward bound, shall enter the river Mersey.

Sect. 139. In case the master of any vessel being outward bound . . . . shall proceed to sea and shall refuse to take on board or to employ a pilot, he shall pay to the pilot who shall first offer himself to pilot the same, the full pilotage rate that would have been payable for such vessel if the pilot had actually piloted the same into or out, as the case may be, of the said port of Liverpool, together with all expenses incurred in recovering the same.

Bye-laws for the licensing and government of the pilots under the jurisdiction of the Liverpool Pilotage Committee approved by Order in Council June 24th 1856.

5. Duties of individual pilots.—Every pilot on his arrival from sea, either in charge of a vessel or otherwise, shall give notice thereof to the master of the boat to which he belongs as soon as possible, and shall not leave his vessel until she is safely anchored in the river, nor then leave her without a written permission from the commander, or on being relieved by a pilot of equal class by order of one of the masters of the boat, &c.

Butt Q.C. and *Myburgh* for plaintiffs, owners of the *Twee Zusters*.—Pilotage is not in this case compulsory. Admitting it to be so in the Mersey generally, that is that, with certain exceptions not affecting this case, vessels inward bound into the port of Liverpool are bound to employ a licensed pilot, the compulsion only lasts till they are

moored, and revives when they are moving from their moorings into dock. The Mersey Docks Consolidation Act, (21 & 22 Vict. c. xcii.), s. 6, repeals the previous Pilotage Act, but as that Act (5 Geo. 4, c. lxxiii.) was in force when the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) was passed, the exemptions from compulsory pilotage whilst a vessel is lying in the river, contained in sects. 32 and 34 of the former Act are preserved by sect. 353 of the latter Act, and there is nothing since to limit them. Sect. 128 of the Mersey Docks Consolidation Act 1858 (21 & 22 Vict. c. xcii.) is almost identical with the section of the former Pilot Act referred to, and by it the duty of the pilot is defined to be, "to cause the vessel to be properly moored at anchor in the river Mersey." The pilot here had fulfilled that duty; then comes an employment voluntary on the part of the master of the ship, but which the pilot is bound to accept, and for which he receives 5*s.* a day, which the pilot has done; the fact of the payment being made shows that the employment was within the voluntary portion of the clause; if the service were one continuous compulsory service from sea to dock, the ordinary rate of payment for that service would alone have been made, no matter how long it took to perform. *The Annavolis* (Lush. 295, 4 L. T. Rep. N. S. 417; 1 Mar. Law Cas. O. S. 69) is not in point; the pilotage was compulsory there because the vessel was again *en route* from her anchorage to the dock, for which service the pilotage is compulsory; besides there the antecedent delay in the river had been necessary; no such necessity is shown here. Sect. 128 of the Mersey Docks Consolidation Act 1858 (21 & 22 Vict. c. 92) shows that pilotage is compulsory in the first and last stages of coming from sea to dock, but not in the second; if there could be any doubt about the meaning of the statute, it is put an end to by a former decision of the court (*The Woburn Castle* 3 Mar. Law Cas. O. S. 240; 20 L. T. Rep. N. S. 621). Sect. 138 of the Mersey Dock Consolidation Act 1858 (21 & 22 Vict. c. xcii.) shows the period within which the voluntary service lasts, and the collision happened whilst the *Princeton* was within that period. The judgment of the Judicial Committee of the Privy Council in the case of *The City of Cambridge* (L. Rep. 5 P. C. 451; 30 L. T. Rep. N. S. 439) supports this view, as it only shows that where a vessel *outward bound* is hindered by the weather from at once proceeding to sea, the employment of the pilot remains compulsory during her unavoidable detention, as it is the intention to proceed as soon as possible; and in that case he is entitled to extra remuneration under a different section of the Act (sect. 139 Mersey Docks Consolidation Act 1858). But it does not apply to ships inward bound which might remain for a month before proceeding into dock, or never go there at all. [Sir R. PHILLIMORE—It would extend the exemption of shipowners from liability to a very great extent indeed, if they are not to be liable at all whilst a pilot is in board their vessel lying at anchor in the river, no matter how long.] That could not be the intention of the Legislature, and the tendency of the courts has been to interpret the statutes relieving the shipowner of liability strictly. The pilot was not bound to stay on board unless required to do so by the master, and therefore he was not compulsorily employed.

Milward, Q.C. and *Clarkson*.—The case of keeping a pilot on board for a month at 5*s.* a day is totally distinct from this case. Here the pilot was engaged to take the ship from sea into dock, and he was bound to complete the service; he could not dock when he came in, as the water was too low, but he was to dock the next tide; then he was prevented by the violence of the weather, but there was a continuing intention to dock as soon as possible; under these circumstances he could not leave the ship, and it was not necessary for the captain to require him to remain on board. The fact of receiving 5*s.* a day for the two days he was detained in the river by the weather does not matter; if he received it and was not entitled to it that cannot alter the law, but in this case he was entitled to it, though employed compulsorily. *The City of Cambridge* (*ubi sup.*) is directly in point; it shows that where the intention to proceed continues the pilotage is compulsory. *The Woburn Abbey* (*ubi sup.*) was the case of a ship lying in the river without any intention of proceeding into dock immediately. This ship was really navigating, her anchoring was a step in her journey to dock, and she was doing so in a district in which pilotage was compulsory by law, and she had taken on board a pilot on compulsion of law, and therefore her owners are exempt from liability for the result of his negligence:

General Steam Navigation Company v. *British and Colonial Steam Navigation Company*, 19 L. T. Rep. N. S. 357; 20 L. T. Rep. N. S. 581; L. Rep. 3 Ex. 330; L. Rep. 4 Ex. 238; 3 Mar. Law Cas. O. S. 168, 237.

Myburgh in reply.—There are three stages recognised in the case of vessels coming from sea into dock, and rightly, for when they enter the river they cannot tell what dock they are to go to, or whether they are to dock at all: they may be ordered to another port of discharge. Whilst they are moving either on their way to anchor or on their way to dock, the pilotage is compulsory; whilst stationary in the river, it is voluntary. The case of an outward-bound ship is different; there, when she leaves the dock, she is to go to sea at once, there is no doubt as to her destination. The wording of sects. 128 and 139 of the Mersey Docks Consolidation Act 1858 distinctly recognises the difference between inward and outward bound vessels. *The City of Cambridge* (*ubi sup.*) was an outward bound vessel, and therefore cannot govern the case of an inward-bound ship.

Sir R. PHILLIMORE.—I must take as admitted facts to which the law is to be applied the following: That the pilot was taken on board with an engagement to pilot the *Princeton* to her mooring-place, and subsequently to her dock, and that, in the discharge of that engagement, he had moored her for the night meaning to take her into dock on the next day; that the next morning the weather was such as, in his judgment, rendered it unsafe to proceed into dock; that he so advised the captain, and that in consequence the vessel did not go into dock; on that day the collision happened. The question arises whether, having regard to sects. 128, 138 of the Mersey Dock Act 1858 (21 & 22 Vict. c. xcii.) and to the general provisions as to pilotage contained in that Act, and to sects. 353 and 362 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) the vessel remained under the charge of a compulsory pilot during the interval between the mooring and docking. It is not necessary that I should do more than

refer to *The Annapolis* (*ubi sup.*), *The Woburn Abbey* (*ubi sup.*), and *The City of Cambridge* (*ubi sup.*) in support of the view I take. Looking to the principle to be extracted from those cases, and giving a reasonable interpretation to the sections of the Acts of Parliament, I am of opinion that the *Princeton* was still under the management of a compulsory pilot, who was taken on board by compulsion of law. To hold otherwise would be a harsh construction of the statute. The ship was at the time of the collision, *in itinere*, making her progress towards the dock, and there was no discontinuance of the engagement of the pilot, or substitution of a voluntary for a compulsory service. The circumstances show that the vessel was compelled to remain where she was by a *vis major*. If she could have gone into dock sooner, I am not prepared to say that I should consider her entitled to the immunity to which she is under the existing circumstances entitled. I confine this construction of the law to the particular facts of this case, and I think that the pilot taken on board by compulsion of law was still in charge of the vessel at the time of the collision. With regard to the receipt of 5*s.* *per diem*, that has been disposed of by one of the cases to which I have referred, *The City of Cambridge* (*ubi sup.*), and the reception of it does not affect the construction I put upon the Act. I pronounce that the vessel was under the charge of a pilot, taken on board by compulsion of law, at the time the collision happened.

Milward, Q.C. then applied for costs.—Admitting that it was the practice of the High Court of Admiralty not to allow costs in a case where a defendant raised other defences in addition to that of compulsory pilotage and succeeded only on the ground of compulsory pilotage, that is not the practice of the High Court of Justice, in which in all cases, including the present (see *General Steam Navigation Company* v. *London and Edinburgh Shipping Company*, *ante* p. 454; 36 L. T. Rep. N. S. 743; 2 Ex. Div. 467), a successful defendant gets his costs, and this division will follow the practice of the other divisions.

Butt, Q.C. was not called on.

Sir R. PHILLIMORE.—I see no reason for altering the well-established practice of this court as to costs in cases of compulsory pilotage, and I shall, in accordance with that practice, make no order as to costs.

Suit dismissed, but without costs.

Solicitors for plaintiffs, owners of the *Twee Zusters*, *Bateson* and *Co.*

Solicitors for defendants, owners of the *Princeton*, *Duncan*, *Hill*, and *Dickenson*.

Tuesday, Feb. 26, 1878.

THE FALCON.

Appeal from County Court—Amount under 50*l.*—*Sect.* 31 *County Court Admiralty Jurisdiction Act* 1868 (31 *&* 32 *Vict. c.* 71).

A plaintiff claiming an amount not exceeding 50*l. in an Admiralty cause in a County Court, is precluded from appealing from the decision of the court by sect.* 31 *of the County Courts Admiralty Jurisdiction Act* 1868 (31 *&* 32 *Vict. c.* 71).

The Doctor Van Thunnen Tellow (20 *L. T. Rep. N. S.* 960; 3 *Mar. L. C.* (*O. S.*) 244; *and* The Elizabeth (*L. Rep.* 3 *A. & E.* 33; 21 *L. T. Rep. N. S.* 729), *commented on and explained.*

THIS was an appeal from the City of London Court in its Admiralty jurisdiction. The plaintiffs, owners of the dumb barge *Bromley*, instituted a suit in that court against the *Falcon*, a steam vessel belonging to the General Steam Navigation Company, for damages sustained by the *Bromley* in a collision between that vessel and the *Falcon* in the River Thames on the 9th Sept. 1877. The plaintiffs claimed in the suit the sum of 30*l.* The cause was heard in the City of London Court on the 5th Feb. 1878, when the learned judge of that court, Mr. Commissioner Kerr, dismissed it with costs.

On the 12th Feb. 1878, *Safford*, for the plaintiff, moved *ex parte* to set aside the judgment, and obtained a rule *nisi*.

On the 26th Feb. 1878 the rule came on for argument. The argument turned on the question whether sect. 31 of the County Courts Admiralty Jurisdiction Act 1868 gave any appeal to a plaintiff who had claimed less than 50*l.* The following is the section in question:

> No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.*

E. C. Clarkson and *C. Hall*, for the respondents, owners of the *Falcon*.—The court has no power to entertain the appeal. The action is only entered in 30*l.*; and therefore by sect. 31 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) there is no appeal. The Act is express that there is no appeal in such a case by defendants, and therefore by implication there is none for the plaintiffs. *The Doctor Van Thunnen Tellow* (20 L. T. Rep. N. S. 960; 3 Mar. Law Cas. O. S. 244) is not in point. That case only decided that the section in question did not apply to a case where the plaintiff recovered nothing; but it does not appear that the suit in that case was instituted for less than 50*l.* Had it been so there could have been no appeal, as the plaintiffs could never have recovered more than 50*l.* The true interpretation of the section is that no appeal should be allowed where the amount recovered or sought to be recovered, is less than 50*l.* That the section does apply to appeals by the plaintiffs is shown by *The Elizabeth* (L. Rep. 3 A. & E. 33; 21 L. T. Rep. N. S. 729; 3 Mar. Law Cas. O. S. 325). It is contrary to equity that an appeal should be denied to a defendant and allowed to a plaintiff. The whole spirit and purport of the County Court Admiralty Jurisdiction Act was to give a cheap remedy in these small cases, and the object of the Acts would be defeated if in such a case a plaintiff has a right of appeal. Where the words of a statute are ambiguous, as in this case, the courts will interpret them according to the intention of the Legislature.

E. Clark and *Safford* for appellant.—This case is decided by *The Doctor Van Thunnen Tellow* (*ubi sup.*) and *The Elizabeth* (*ubi sup.*) The first of those cases shows that the 31st section of the County Courts Admiralty Jurisdiction Act 1868 does not apply to plaintiffs, and does not in any way limit the right of appeal which a plaintiff has in all cases. In the latter case there were cross-causes, and that in which the defendant was plaintiff was dismissed; and though he would have no appeal *quâ* defendant, he had a right of appeal *quâ* plaintiff in his cross-cause. Some reasonable construction must be

put on the 31st section, and the proper construction is obtained only by reading it as if the words "if any" were inserted, that is, "that no appeal shall be allowed unless the amount, if any, decreed or ordered to be due shall exceed the sum of 50*l.*" If it applies to plaintiffs the effect of the Act would be nugatory, for the plaintiff could always institute his suit for a sum larger than 50*l.*, even if he did not expect to recover so much, and so retain his right of appeal. It is usual in statutes for the words "sum claimed" to be used, and not amount "decreed to be due." The Legislature in departing from the usual form of words must have had some meaning. If the statute is interpreted literally it can only apply to defendants; and it must have been the intention of the Legislature to leave the plaintiff's right of appeal untouched. If it applies at all to plaintiffs it must apply to them in every case where they do not succeed, as no amount is decreed to be due to them.

Clarkson in reply.—The fact that a plaintiff could give himself a fictitious right of appeal by making a nominal claim over 50*l.*, if my construction of the statute is correct, does not effect so great an injustice as would be created if the appellant's construction were correct. In that case the plaintiff, by reducing his claim just below 50*l.*, would preserve his own right of appeal and preclude the defendant from appealing. The statute is intended to allow appeals when the amount of the *bonâ fide* claim does exceed 50*l.*, *i.e.*, when the "amount decreed or ordered to be due *might* exceed the sum of 50*l.*"

Sir R. PHILLIMORE.—In this case the appellant was plaintiff in the City of London Court. He entered his action for 30*l.*, and he got a decision of the judge against him. The question before me is whether, taking into consideration the true construction of sect. 31 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) he has or has not a right of appeal? The words of the Act are, "No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.*" I have no hesitation in saying that it appears to me that the whole purport of the statute shows it to have been the intention of the Legislature to exclude appeals where the amount recovered is under 50*l.* The question then is whether that construction can be put upon these words? Upon this question I will refer to the two cases that have been cited. I have no note of my judgment in *The Doctor Van Thunnen Tellow* (*ubi sup.*), but I am represented as having said, "The enactment is badly drawn. In my opinion the 31st section must be held to apply to appeals where an amount has been decreed to be due, that is, to appeals by defendants only." It is clear that that is an extra-judicial dictum, and not necessary for the decision of that case. In the case of *The Elizabeth* (*ubi sup.*) the court certainly decided that it was competent to the plaintiffs or the defendants to appeal. Now I think that neither of these decisions can be considered as governing the case before me, because the circumstance of the plaintiff, who is the appellant, having instituted his action for an amount less, than 50*l.* is not one which seems to me to be decided by either of those judgments. At all events, upon the best construction I can give to the section I am bound to decide this question. Can a plaintiff who has brought an action for only 30*l.* appeal from the decision of the judge of the court below to this court? Looking at the whole purport of the Act, and endeavouring, as it is my duty to do, to give a proper construction to the section of the statute, and having a strong opinion that it was the intention of the Legislature to exclude all appeals where the sum recovered did not exceed 50*l.*, I think I must rule that there is no appeal in this case. I do so on the ground that the plaintiff having brought this action for 30*l.*, by no process whatever could he have got a decree or order which would have exceeded 50*l.* I do not disguise from myself the difficulty of the construction of the statute, but, upon the whole, I think that this is a reasonable construction to arrive at. As I consider it a case of considerable difficulty, I shall give no costs.

Appeal dismissed for want of jurisdiction, but without costs.

Solicitor for appellant, *Preston.*

Solicitor for respondents, *Batham.*

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Nov. 6 *and Dec.* 13, 1877.

(Before the LORD CHANCELLOR (Cairns), Lords PENZANCE, BLACKBURN, and GORDON.)

SIMPSON AND OTHERS *v.* THOMSON AND OTHERS.

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

Ship—Collision between ships of same owner—Merchant Shipping Act 1862, *sect.* 54—*Rights of parties.*

The Merchant Shipping Acts, in giving shipowners power to limit their liability, do not create any new rights, but restrain existing rights by limiting liability.

The right of the underwriters of a lost ship for damages against a wrong-doer is merely to make the same claim that the insured might have made.

In the case of a collision between two ships belonging to the same owner, by which one was totally lost through the exclusive fault of the other:

Held (*reversing the judgment of the court below*), *that the underwriters of the policy on the lost ship could make no claim against the sum paid into court, under the Merchant Shipping Act* 1862 (25 & 26 *Vict. c.* 63), *s.* 54, *the insured being himself the person who had caused the damage.*

Yates *v.* Whyte (4 *Bing. N. C.* 272) *approved and followed.*

THIS was an appeal from a decision of the First Division of the Court of Session in Scotland (the Lord President Inglis, Lord Deas and Mure).

A Mr. William Burrell, a shipowner and shipping agent of Glasgow, was the owner of two steamships—the *Dunluce Castle* and the *Fitzmaurice*—trading between Leith and London. In Feb. 1876, while the former vessel was on her voyage to the northward, and the latter to the southward, they came into collision off Lowestoft, through the exclusive fault of those in charge of the *Fitzmaurice*, and in consequence of the collision the *Dunluce Castle* was totally lost.

Burrell admitted his liability as owner of the ship in fault, and petitioned the Court of Session to stop all actions and suits instituted against him as such owner in respect of the col-

lision, and to limit his liability under sect. 54 of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63) to the sum of 3590*l.* which was paid into court.

Burrell had effected policies of insurance on the *Dunluce Castle* for the sum of 6000*l.*

The appellants, who were the owners of the cargo on board the ship, and the respondents, who were the underwriters of the policies, and had paid as for a total loss, both put in claims upon the sum paid into court. Burrell had claimed against the respondents as underwriters in respect of the total loss of the *Dunluce Castle*, and the underwriters had paid the amount due on the policies, 6000*l.* Upon receiving payment, Burrell assigned to the respondents all his right, title, and interest as owner of the *Dunluce Castle* to recover any sums due from the underwriters of the *Fitzmaurice*. The respondents claimed to be ranked and preferred to the fund for the sum of 6000*l.* with interest *pari passu* with such other claimants as should establish their claims, or to be ranked after payment of the claims of the cargo, owners, and seamen of the *Dunluce Castle*. By interlocutor of Nov. 24, 1876, the Court of Session limited the liability of Burrell in respect of the collision, holding him liable for the sum of 3590*l.* 8*s.* only, and ranked the claimants, including the appellants and respondents, *pari passu* on that fund.

From this judgment the owners of the cargo appealed to the House of Lords.

The case is reported in 4 Court of Session Cases (4th series) 177; 14 Scottish Law Rep. 120.

Watkin Williams, Q.C. and *J. C. Mathew* appeared for the appellants, and argued that as Burrell could not have maintained a claim upon the fund in court, as he was owner of the ship in fault, and could not have any redress against himself, so the underwriters, who had put themselves in the position of the assured by paying the amount of the policies, could be in no better situation.

Benjamin, Q.C., and *E. C. Clarkson*, for the respondents, contended that, as the underwriters would have been entitled to rank as claimants against the sum in question in the ordinary case of a collision between ships belonging to different owners, their rights could not be affected by the accidental circumstance that both the ships belonged to the same person.

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

Dec. 13.—Their Lordships gave judgment as follows.

The LORD CHANCELLOR (Cairns).—My Lords, the appellants in this claim dispute a claim which was made by the respondents (other than William Burrell) in the Court of Session, and allowed by them to rank as creditors upon a sum of 3590*l.*, which was paid into court under circumstances which I will shortly mention.

William Burrell was the owner of two ships, the *Dunluce Castle* and the *Fitzmaurice*, trading between Leith and London. The *Dunluce Castle* was insured by two time policies. The policies were in the usual form, and were against (among other perils) the perils of the seas. They were underwritten by the respondents, other than William Burrell, and those respondents I will afterwards call the underwriters. The *Dunluce Castle*, on her passage from London to Leith on 4th Feb. 1876, came into collision with the *Fitzmaurice* off Lowestoft, and in consequence of the collision the *Dunluce Castle* with her cargo was sunk and totally lost. The *Fitzmaurice* was entirely in the wrong, and it was through the negligent navigation of those in charge of her that the collision took place.

This being so, Burrell, as the owner of the vessel that was in fault, and admitting his liability, petitioned the Court of Session, under the Merchant Shipping Acts 1854 and 1862, to stop all actions instituted against him, paying into court the sum of 3590*l.* already mentioned, being the tonnage liability fixed by the Acts, and leaving those who had any claim or right of action against him to establish their claim or right against that sum.

In the proceedings consequent on this petition the appellants, as owners of the cargo on board the *Dunluce Castle*, made and established a claim against the fund, as did also the master and seamen of the ship in respect of their effects lost in the collision, and the respondents, the underwriters, also made a claim, on the ground that they had paid 6000*l.* to Burrell under the two insurances on the *Dunluce Castle* as upon a total loss, and ought to rank as creditors against the fund *in medio* for that amount. The appellants resisted the right of the underwriters to share in the distribution of the fund; but the Court of Session, by the interlocutors under appeal, have sustained the right of the underwriters, and your Lordships have now to say whether that decision is correct.

My Lords, I ought in the first place to state that, in my opinion, the question must be considered just as if the underwriters had brought an action against Burrell. It is true that under the Merchant Shipping Acts all actions against Burrell have been restrained, and a limited sum of money has been paid into court to answer rateably, as far as will suffice, the claims of all persons who have brought, or might bring, actions against him. But the Merchant Shipping Acts do not profess to create any new right; on the contrary, they act in restraint of existing rights, substituting merely a limited for an unlimited liability. The question must be looked at, therefore, in the same way as it would be if, all other things remaining the same, the underwriters were not in competition with any other claimants, but were suing Burrell for damages on the ground that his ship, the *Fitzmaurice*, had through careless navigation run down his other ship, the *Dunluce Castle*, upon which they, being the insurers, had paid as for a total loss.

My Lords, the learned counsel who argued this case at your Lordships' bar on behalf of the respondents could not suggest that such an action had ever been brought, nor could they point out in any text book or in any decided case any authority that such an action could be maintained. In order, however, to determine whether such an action could be maintained it is necessary to ascertain the principle upon which the underwriters, having paid as upon a total loss, are held to succeed to whatever can be recovered in respect of the thing insured.

The Lord president states this principle thus: "It is necessary to consider very particularly what

is the effect of a total loss, either actual or constructive, as in a question between the owners and the underwriters of the lost vessel. There can be no doubt that, whether the loss be actual or constructive, if it be a total loss, the property of the sunk vessel passes to the underwriters. And it is also quite settled that all the incidents of that property pass with it. But it is necessary to go a little deeper than that general statement of principle in order to see what is the precise relation of the underwriters and the owners after the property of the vessel has so passed from the one to the other. It is quite clear that in any transference, either of an heritable subject or of a corporeal movable by voluntary conveyance, nothing passes as an incident of the subject of the nature of a claim of damages. The disponee of an heritable subject or the purchaser of a corporeal movable takes it just as it stands at the time of the conveyance, with, of course, all the incidental rights belonging to it as a piece of property; but it is quite clear that in such a case a claim of damage for injury done to that property before transference takes place could never pass along with the conveyance of the subject. Now, it is quite settled that, in that kind of vendition which takes place by the operation of the law when the underwriter pays the contents of his policy upon a sunk ship, a claim of damages against a vessel which has caused the loss of the ship by collision does pass along with the property of what remains of the vessel; and therefore it is quite obvious from that consideration alone, without going any further, that the transference which is operated by force of law when the underwriter pays under his policy upon the lost ship is something quite different from an ordinary voluntary conveyance of a corporeal movable." And, further on the Lord President continues thus: "Then, is it to be said that when the property of the sunk vessel had passed to the underwriters with all its incidents, including the right to claim against the offending ship for the damage done by the collision—is it to be said that the owner of the offending vessel shall escape from this liability because he was also owner of the sunk ship? I confess I am quite unable to see any ground in law for holding that. It seems to me, on the contrary, to be quite clear that the operation of the legal assignment of the ship from the owner to the underwriters is to carry with it all the rights which would have belonged to any owner of that vessel, no matter who he might be; and as soon as by that legal assignment the owner of the offending ship ceased to be owner of the *Dunluce Castle*, there was no longer any identity of persons between the party who makes the claim and the party who is liable to satisfy the claim. That identity is put an end to by the operation of law, and therefore I think that the underwriters in these circumstances would have a perfectly good ground for action against the owner of the *Fitzmaurice* to make good the damage caused by the collision."

The view of the Lord President, therefore, appears to be that, after payment by the underwriters as on a total loss, there is effected, by some independent operation of law, a transfer of whatever, if anything, can be recovered in specie of the thing insured; and that there is also created by a similar operation of law, and by reason of the transfer of the thing insured, an independent right in the underwriters to maintain in their own name, and without reference to the person insured, an action for the damage to the thing insured, which was the cause of the loss.

My Lords, speaking with great respect for the Lord President and the other learned judges who followed his opinion, I feel bound to say I am not aware of any authority for the view of the case thus taken by him. The case cited by him of the *North of England Insurance Company* v. *Armstrong* (L. Rep. 5 Q.B. 224; 21 L. T. Rep. N.S. 822; 3 Mar. Law Cas. O.S. 330) does not appear to me to touch the question. The reasoning of the Lord President would be inapplicable to the case of a partial loss, and yet no one would dispute the right of underwriters, after paying to A on a partial loss occasioned to his ship by the collision of the ship of B, to sue B if his ship was in fault. I know of no foundation for the right of underwriters, except the well-known principle of law that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship that has been lost are entitled to the ship in specie if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrongdoer for damage for the act which has caused the loss. But this right of action for damages they must assert, not in their own name, but in the name of the person insured; and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all.

The case of *Yates* v. *Whyte* (4 Bing. N. C. 272) involved questions analogous to, and, as it seems to me, decisive of the present. The plaintiff was there suing the defendant for damaging his ship by collision, and the defendants sought to deduct from the amount of damages to be paid by them a sum of money paid to the plaintiff by his insurers in respect of such damage, and if the insurers had possessed an independent right of action against the defendants, the defendants might no doubt have been right in their contention.

I think it desirable to read to your Lordships what was said by some of the learned judges in that case. Tindal, C.J., says: "I think this case is decided in principle by that of *Mason* v. *Sainsbury* (Marshall on Insurance, 3rd edit. 796; 3 Douglas' Reps. 61). There a party whose property had been burned by a mob, was allowed, after receiving the amount of his loss from an insurance office, to sue the hundred on the statute 1 Geo. 1, for the benefit of the insurers. The only distinction between that case and the present is, that there the action for the wrong was brought at the instance of the insurance office, which is not the case here. But it establishes that the recovery upon a contract with the insurers is no bar to a claim for damages against the wrong-doers." Lord Mansfield says (Marshall on Insurance, 3rd edit. 796): "Though the office paid without suit, this must be considered as without prejudice, and it is to all intents as if it had never been paid. The question comes to this: Can the owner of the house having insured it, come against the hundred under this Act. Who is first liable? If the hundred be first liable, still it makes no difference. If the insurers

be first liable, then payment by them is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. We every day see the insured put in the place of the insurer. It is in abandonment so, and the insurer uses the name of the insured. It is an extremely clear case. The Act puts the hundred in the place of the trespassers, and on principles of policy I am satisfied it is to be considered as if the insurers had not paid a farthing. That the insurers may recover in the name of the assured after he has been satisfied appears from *Randal* v. *Cochrane* (17th June 1748, 1 Ves. sen. 97), where it was held that they had the plainest equity to institute such a suit. Such, therefore, is the situation of the underwriters here that this case has received its answer from it. If the plaintiff cannot recover, the wrong-doer pays nothing, and takes all the benefit of a policy of insurance without paying the premium. Our judgment must be for the plaintiff."

Park, J. says: "I am of the same opinion. This point has been decided since the time of Lord Hardwicke. So much so, that it has been laid down in text writers that where the assured, who has been indemnified for a wrong, recovers from the wrong-doers, the insurers may recover the amount from the assured. In *Randal* v. *Cochrane* it was said that they had the clearest equity to use the name of the assured, in order to reimburse themselves, and in *Mason* v. *Sainsbury* the judges were all unanimous; they held indeed that the insurers could not sue in their own name; but they confirm the general opinion that the wrong-doer should be ultimately liable, notwithstanding a payment by the insurers."

Vaughan, J. says: "No case has been cited which establishes the point contended for on the behalf of the defendants; while *Randal* v. *Cochrane* and *Mason* v. *Sainsbury* are in point for the plaintiff. In *Mason* v. *Sainsbury* it was argued, as here, that the plaintiff having received his indemnity from the insurers, could not recover a second time against the hundred; but Lord Mansfield said, 'Who is first liable?' If the hundred is first liable, still it makes no difference; if the insurers be first liable, then payment by them is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. We every day see the insured put in the place of the insurer. And in *Clarke* v. *The Hundred of Blything* (1823 2 B. and C. 254) the authority of *Mason* v. *Sainsbury* was expressly recognised by Lord Tenterden."

My Lords, these authorities seem to me to be conclusive that the right of the underwriters is merely to make such claim for damages as the insured himself could have made; and it is for this reason that (according to the English mode of procedure) they would have to make it in his name; and if this is so, it cannot of course be made against the insured himself.

It may be said that this view of the law inflicts considerable hardship upon the underwriters. I am not, however, satisfied that this is the case. Either the policy by which the underwriters are bound is an insurance against perils of the sea arising from the negligent navigation of any other vessel, even although that vessel belong to the person insured, or it is not. If it is not an insurance against such a peril of the sea, the underwriters should defend themselves accordingly and decline to pay for the loss. If, on the other hand, the insurance is a contract to indemnify against the consequences of the negligent navigation of any other ship of the insured, it would be little short of an absurdity that the underwriters should in the first place indemnify the insured for the consequences of that negligent navigation according to their contract, and immediately afterwards recover the amount back from the insured as damages occasioned by this negligent navigation.

I must therefore move your Lordships that the interlocutor of the 24th Nov. 1876 be varied by inserting, after the words "rank and prefer the whole of the other claimants," the words "other than the underwriters," and by inserting a finding that the underwriters, Thomas Thomson and others, are jointly and severally liable to the appellants, Simpson and Co., and others, with regard to the expenses occasioned by the discussion between the claimants Thomas Thomson and others, and Simpson and Co. and others, and that the interlocutor of the 10th March 1877 should be reversed, with a declaration that the objections for Simpson and Co. ought to have been received, and with this declaration remit the case to the Court of Session; and I further move your Lordships that the respondents, the underwriters, be ordered to pay to the appellants the costs of this appeal.

Lord PENZANCE.—My Lords, the facts which give rise to the question in this case are undisputed, and are these.

Mr. Burrell was the sole owner of two vessels, the *Dunluce Castle* and the *Fitzmaurice*, which came into collision at sea. The collision was due entirely to the negligence of those in charge of the *Fitzmaurice*, and the result of it was that the other vessel (the *Dunluce Castle*) and her cargo were wholly lost. Mr. Burrell, as owner of the ship in fault, instituted this suit under the provisions of the Merchant Shipping Acts for the purpose of limiting his liability to those who had suffered by the collision to a sum equalling the value of the ship in fault, calculated at 8*l.* per ton, and has paid into a bank under order of the court that sum, to be distributed by the court among those entitled to it.

The respondents are underwriters who had insured the vessel which was sunk (the *Dunluce Castle*), and who have paid Mr. Burrell, as the owner of that vessel, under a value policy effected with them by him, the sum of 6000*l.* as for a total loss. For this sum they have claimed to rank with the other claimants upon the fund in court; and the question is, whether they are entitled to do so? The court below have affirmed their right and allowed the claims, and it is from that decision that the present appeal is brought.

As the claim thus put forward is made under the provisions of the statutes above referred to, I will call attention to those provisions. The 25 & 26 Vict. c. 63 (Merchant Shipping Act Amendment Act 1862), s. 54, provides, "That the owner of any ship shall not (except in cases of their actual fault and priority) be answerable in damages in respect of loss or damage to ship or goods" in an amount exceeding 8*l.* per ton of the ship doing the injury. And the statute 17 &

18 Vict. c. 104 (the Merchant Shipping Act 1854), sect. 514 (which is incorporated with the last-mentioned Act), provides that "in cases where any liability is alleged to have been incurred by any owner" in respect of injuries to ships or goods, &c., "and several claims are made or apprehended," a suit may be instituted by such owner "for the purpose of determining the amount of such liability, and for distribution of such amount rateably among the claimants."

From these provisions it is, I think, clear that no claim upon the fund can properly be made except in respect of some "liability" of the owner to the claimant by reason of an injury or wrong for which the owner would be "answerable in damages to the person claiming." And accordingly the objection made to this claim by the appellants is that the underwriters of the lost ship have no right of action against the owner of the ship that did the mischief, except such, if any, as they may have derived from the owner of the lost ship, in whose place they may claim to stand, and that he himself had and could have no such right of action, inasmuch as being the owner of both vessels any right of action he had must be a right of action against himself, which is an absurdity and a thing unknown to the law.

In answer to this objection it seems to have been considered by the court below that by the payment of a total loss, and the cession or transfer to the underwriters of the vessel (or whatever might remain of her) which followed thereupon by operation of law, some new right of action sprung up or was created against the owner of the wrong-doing ship in favour of the underwriters. I say "new" right of action, because the right of action contemplated is something different from and other than the right of action which resided in the owner of the injured ship, the benefit of which could only be made available to the underwriters by transference from that owner, and consequently could only be pursued in his name.

My Lords, I entirely agree with the reasoning of the Lord Chancellor on this head, and am of opinion that there is no warrant to be found in the existing decisions for such a proposition.

But in the argument at your Lordships' bar the learned counsel for the respondents took their stand upon a much broader ground. They contended that the underwriters, by virtue of the policy which they entered into in respect of this ship, had an interest of their own in her welfare and protection, inasmuch as any injury or loss sustained by her would indirectly fall upon them as a consequence of their contract; and that this interest was such as would support an action by them in their own names and behalf against a wrong-doer. This proposition virtually affirms a principle which I think your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidents of a contract of insurance.

The principle involved seems to me to be this —that where damage is done by a wrong-doer to a chattel, not only the owner of that chattel, but all those who by contract with the owner have bound themselves to 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 wrong-doer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation.

This, I say, is the principle involved in the respondents' contention. If it be a sound one, it would seem to follow that, if by the negligence of a wrong-doer goods are destroyed which the owner of them had bound himself by contract to supply to a third person, this person as well as the owner has a right of action for any loss inflicted on him by their destruction.

But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently-driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicine for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person, to the serious loss of the manager. Can the manager recover damages for that loss from the wrong-doer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel.

My Lords, I have given these illustrations because I fail to see any distinction in principle between them and the right asserted by the underwriters in the present case; and if I am right in so regarding them they show at least how much would be involved in a decision by your Lordships whereby that right should be affirmed.

But the ground upon which I will ask your Lordships to reject this contention of the respondents' counsel is this—that upon the cases cited, no precedent or authority has been found or produced to the House for an action against the wrong-doer, except in the name, and therefore in point of law on the part, of one who had either some property in or possession of the chattel injured. On the other hand, the existence of authorities in which the suit has been brought in the name of the owner, though for the benefit of persons having a collateral interest, is somewhat strong to show that such persons had no right of action in themselves. For it is to be presumed that a person having such a right would pursue it directly, and not indirectly, through the name of another.

The observations of Lord Mansfield in the case of *Mason* v. *Sainsbury*, which was an action against the hundred for damage done to the petitioner's property, the value of which underwriters had already paid, throw some light on the subject: "If the insurers be first liable, then payment to them is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of a contract of insurance. It is an indemnity. We every day see the insurer put in the place of the insured. In abandonment it is so, and the insurer uses the name of the insured."

Tindal, C.J. quotes this language in the case of *Yates* v. *Whyte* (4 Bing. N. C. 283), and adds,

"That the insurers may recover in the name of the assured after he has been satisfied appears from *Randal* v. *Cochrane*, where it was held that they had the plainest equity to institute such a suit."

And in the same case Park, J. said: "This point has been decided ever since the time of Lord Hardwicke; so much so that it has been laid down in text-writers that where the assured, who had been indemnified for a wrong, recovers from the wrong-doer, the insurers may recover the amount from the assured. In *Randal* v. *Cochrane* it was said they had the clearest equity to use the name of the assured in order to reimburse themselves, and in *Mason* v. *Sainsbury* the judges were all unanimous; they held indeed that the insurers could not sue in their own names, but they confirmed the doctrine that the wrong-doer should be ultimately liable notwithstanding a payment by the insurers."

A question was raised in the course of the argument at your Lordships' bar, whether the underwriters could have defended themselves against an action brought on the policy by Mr. Burrell, on the ground that the loss was occasioned by a ship which belonged to himself, and was navigated by his agents and servants? The solution of this question, whichever way it be solved, does not seem to me to advance the claim now made by the underwriters. If they had a good defence against Mr. Burrell's claim, they were bound to avail themselves of it, and thus throw the loss upon Mr. Burrell, instead of paying him and claiming to throw the loss on the other creditors of the distributable fund. If, on the other hand, they had no such defence, I fail to see how that circumstance has any bearing upon or in any degree improves their position in the claim they now make.

In the result therefore I submit to your Lordships that the only liabilities in respect of which Mr. Burrell paid the fund into court under the statutes were those for which he was answerable in damages; and that, as he could not be answerable in damages to himself, no claim ought to be allowed against the fund in respect of any right derived from him, and enforceable only in his name; while, on the other hand, the underwriters have produced no authority or even judicial dictum for the proposition that, in their own right, and independently of Mr. Burrell in his character of assured, they could have sued him for damages in his character of owner of the *Fitzmaurice*. And for these reasons I concur in all respects in the motion placed before the House by the noble and learned Lord on the woolsack.

Lord BLACKBURN.—My Lords, I have had the advantage of reading the opinion of the noble and learned Lord who spoke last in this case, in which I completely agree. But as the judges in the court below have given a judgment the other way, I think the respect which I sincerely feel for their authority makes it proper to say why I dissent from their reasoning, or, in other words, to point out what seems to me the fallacy in the judgment in the court below.

My Lords, I do not doubt at all that where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid. The right to receive payment of freight accruing due, but not earned at the time of the disaster, is one of those rights so incident to the property in the ship, and it therefore passes to the underwriters because the ship has become their property, just as it would have passed to a mortgagee of the ship, who before the freight was completely earned had taken possession of the ship: (see *Keith* v. *Burrows*, July 1877, L. Reps. 2 App. Cases, 636.) This is at times very hard upon the insured owner of the ship; he can, however, avoid it by claiming only for a partial loss, keeping the property in himself, and so keeping the right to earn the accruing freight. In such a case he recovers an indemnity for the amount of the loss actually sustained, in calculating which all the benefits incident to the property retained by the shipowner must be considered.

But the right of the assured to recover damages from a third person is not one of those rights which are incident to the property in the ship; it does pass to the underwriters in case of payment for a total loss, but on a different principle—and on this same principle it does pass to the underwriters who have satisfied a claim for a partial loss, though no property in the ship passes. This will appear clear if we suppose that the owner of the *Dunluce Castle* had in this case been a different person from Mr. Burrell, and that the *Dunluce Castle*, instead of being totally sunk, had only been injured to the extent of 50 per cent. of her value. The owner of the *Dunluce Castle* would have had a right of action to recover that 50 per cent. from Mr. Burrell, not because he was the owner of the *Fitzmaurice*, but because he was the master of the captain and crew whose negligence, in the course of their employment, occasioned the damage. The underwriters could not resist payment of an indemnity to the owner of the *Dunluce Castle*, on the ground that he had a remedy over against Mr. Burrell, but they would have had a right, if he had already recovered something from Mr. Burrell, to have that considered in settling what that indemnity should be; or, if he had not yet recovered from Mr. Burrell, they would, on the principle laid down in *Randal* v. *Cochrane* (1 Ves. sen. 97), have a right to get what they could from Mr. Burrell in order to recoup themselves.

Mason v. *Sainsbury* (3 Dougl. 61) and *Yates* v. *Whyte* (4 Bing. N. C. 272) were both cases of partial loss only. The right of the underwriters could not arise in those cases by relation back to the passing of the property at the time of the loss, for there was no such passing of the property. It could only arise, and did only arise, from the fact that the underwriters had paid an indemnity, and so were subrogated for the person whom they had indemnified in his personal rights from the time of the payment of the indemnity.

In England the action must be in the name of the shipowner, not of the underwriters. I think this material, as showing that it is the personal right of action of the shipowner, the benefit of which is transferred to the underwriters. In other systems of jurisprudence, or it may be in our own as altered hereafter, the assignee of such a right may be able to sue in his own name. The important question will still remain. Is it a transfer of a right of action,

which cannot be transferred unless it already exists, or a fresh right created? The whole reasoning of the court below is applicable to the case of a total loss, and of a total loss only. It would not be applicable to the case of a partial loss of 99 per cent. or even more. I think, however, the reason of the law is not more applicable to those who have indemnified for a total loss than to those who have indemnified for a partial one.

I have only further to observe, that if the law had been that the owners of a ship were to be treated as a *quasi* corporation, and so the owners of the *Dunluce Castle* had had a right of action for damages against the owners of the *Fitzmaurice*, irrespectively of whether some or the whole of the shareholders in the two *quasi* corporatione were identical, the case would have been quite different. But such is not the law, and the Legislature in the Acts now in consideration did not intend to give any right of action for damages which did not exist before, but only to limit the amount recoverable under the existing law.

I think that the question whether the underwriters had or had not a defence against any action on the policy by Mr. Burrell does not arise, and I prefer to say nothing about it.

Lord GORDON—My Lords, this case is attended with some difficulty; but having given it that anxious consideration to which the opinions of the very learned judges of the Court of Session are so well entitled, I have come to the opinion that the appeal must be sustained.

I have had the advantage of seeing and considering the opinions which have been delivered by your Lordships, and I concur in that of your Lordship on the woolsack. It is unnecessary, therefore, that I should detain your Lordships by any lengthened remarks.

This discussion arises with reference to a fund which is of limited amount, and beyond which there is no liability against the person who has provided the fund, viz., the owner of the *Fitzmaurice*, which was the vessel doing the injury to the *Dunluce Castle*, in respect of which all the claims arise. There are several claimants on the fund, in particular the owners of the cargo which was on board of the *Dunluce Castle* at the time she was injured, and the underwriters on the vessel. The fund is insufficient for payment in full of all the claims, and the owners of the cargo object, and are entitled to object, to the right of these underwriters to rank on the fund. The peculiarity in the case is, that the same person is the owner of both ships—both the ship which was sunk and that which did the injury. If the ship had belonged to different owners I think there can be no doubt that in such a case as here occurs, viz., a case of a total loss, the underwriters would have been entitled as in right of the owner of the injured ship to vindicate a claim of damages against the owner of the vessel which had caused the damage, and to participate in the fund *in medio* which forms the measure of the offending shipowners's liability under the Merchant Shipping Acts. But that is not the case with which your Lordships have to deal; and you must consider the case on the facts as they arise, viz, that the same person was the owner of both ships.

I think there is nothing peculiar to Scotch law in the case, the systems of both countries in regard to marine insurance being the same, and the provisions of the Merchant Shipping Acts applying equally to both.

The view which I take of the case is a very short one, and it is this—I think the case must be looked at as if the owner of the *Dunluce Castle* had not been insured. His having effected insurance was a very proper and prudent act, but he did it for his own benefit, and the underwriters cannot complain that they have had to meet the risk against which they insured. Now, I think it is clear that if the owner of the *Dunluce Castle* had not been insured he could have had no claim against himself as the owner of the *Fitzmaurice*, which caused the injury to the *Dunluce Castle*. The injury to that ship was substantially caused by its own owner, and he could not be liable to himself for the damage so caused. And if he could not be liable to himself, he could not assign any right, either expressly or by implication of law, to any third person, as he had none to convey. No doubt the rights of underwriters are well established, and it is one of these that on payment of the risk as for a total loss they are entitled to all the rights in the injured ship which belonged to its owner, but they are not entitled to more. And if the owner of the *Dunluce Castle* had no right to sue the owner of the *Fitzmaurice*, neither can the underwriters on the *Dunluce Castle*, whose rights were derived from the owner of that vessel.

I therefore concur in the judgment which my noble and learned friend on the woolsack proposes.

Interlocutor of Court of Session, 24th Nov. 1876, varied by inserting after the words "rank and prefer the whole of the other claimants" the words "other than the underwriters," and by inserting a finding that the underwriters Thomas Thomson and others are jointly and severally liable to the applicants Simpson and Co. and others with regard to the expenses occasioned by the discussion between the claimants Thomas Thomson and others and Simpson and Co. and others; and interlocutor of the 10th March 1877 reversed, and a declaration that the objections for Simpson and Co. and Henderson, Hogg, and Co. ought to have been received; and cause remitted with this declaration to the Court of Session; and respondents, the underwriters, ordered to pay to the appellants the costs of this appeal.

Judgment appealed from reversed, and cause remitted to the Court of Session. The appellants to have the costs of this appeal.

Solicitors for the appellants, *Waltons, Bubb*, and *Walton*.

Solicitors for the respondents, *Grahames*, and *Wardlaw*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by W. Appleton, Esq., Barrister-at-Law.

Friday, Feb. 8, 1878.

(Before Bramwell, Brett, and Cotton, L.JJ.)

French and Sons *v.* Newgass and Co.

Shipping—Charter-party—Classification of ship—Warranty.

In a charter-party the ship was described as nearly classed "A 1½. Record of American and Foreign Shipping Book." The ship was chartered to New Orleans to load cotton. Soon after her arrival there the certificate of her classification was cancelled, and the charterers were in consequence unable to obtain insurances on the cotton, and they refused to load the ship. In an action by the shipowners against the charterers for breach of the charter-party it was

Held (affirming the decision of Denman, J.), that there was no breach of warranty by the plaintiffs, because the statement of the ship's classification in the charter-party was a warranty only that she was so classed at that time, and not that she was rightly, or would continue so classed, and that plaintiffs were entitled to maintain their action.

Action by shipowners to recover damages against charterers for breach of the charter-party.

The plaintiffs were the owners of the ship *William Jackson*, and on the 4th Sept. 1876 they chartered her to the defendants. The material part of the charter party was: "A 1½, Record of American and Foreign Shipping Book. It is this day mutually agreed between the owners of the ship called the *William Jackson*, newly classed as above that, &c." The ship was chartered to New Orleans to load a cargo of cotton. The ship arrived at New Orleans on the 13th Nov. On the 25th Nov. the certificate of a classification of the ship (A. 1½, Record of American and Foreign Shipping Book) was cancelled. The ship had been classed in the previous August in Liverpool. She was surveyed by a person employed by Lloyds' as having been newly remetalled which it turned out was not the case.

In consequence of the cancellation, the defendants were unable to obtain marine insurance on the cotton, and they refused to load the ship.

At the trial before Denman, J., at the last Liverpool assizes, the judge entered judgment for the plaintiffs on the above facts.

The defendants appealed.

Herschell, Q.C. for defendants.—There was here a breach of warranty that the ship was as described in the charter-party, and the charterer was therefore not bound to load. *Hurst* v. *Usborne* (25 L. J. 209, C. P.; 18 C. B. 144) is different from this case; there the vessel was properly classed at the time the charter-party was made, and ran out of her class by effluxion of time during her voyage. The court held there was no breach of warranty, but the judgment went upon the fact that it was in the knowledge of both parties that the ship would become unclassed in course of time. Here the description in the charter-party is a warranty that the ship at that time is classed as described and will continue so classed until the time expires, [Bramwell, L.J.—Then if you could show that in fact she ought not to have been on the register, although still kept on it, there would still be a breach of warranty.] I say that the ship *ab initio* must be such as she is offered to the charterer. She arrived as an unclassed ship, and the defendant is not bound to pay freight or carry out the charter-party on his part. It is no unreasonable construction, as between the shipowner and charterer, that the ship is to be such as she is described. The charterer is unable to obtain insurances on the ship and goods by reason of her not being classed.

W. H. Butler followed.—The warranty in the charter-party is that the ship was classed as described, and rightfully so classed. He referred to

Clover v. *Roydon*, 2 Asp. Mar. Law Cas. 167; 29 L. T. Rep. N. S. 639; L. Rep. 17 Eq. 190;

Jackson v. *The Union Marine Insurance Company*, 2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. N. S. 789; L. Rep. 10 C. P. 125.

C. Russell Q.C. and *French*, for plaintiffs, were not heard.

Bramwell, L.J.—I am of opinion that the judgment must be affirmed. I really cannot bring myself to entertain doubt about this case. It appears to me a very clear one.

The statement in the charter-party is a warranty of some sort or kind that the vessel is registered in the shipping books of American Lloyd's. Now what is the warranty precisely? Mr. Herschell says it is a warranty that the vessel is "so classed, and will continue so classed," until she goes out of her class by effluxion of time. Mr. Butler put it as a warranty that she was "so classed, and rightly so classed" at the time of the charter-party. I do not think it is possible to put either of these constructions upon the warranty; either of them, in my opinion is unreasonable. It is not only a warranty, it is also a statement of condition. The shipowner thinks well to get his vessel put on the American registry. The charterer takes the vessel, but the matter is of no more importance to the one than to the other. Now, that being the true state of things, what is the reasonable expansion of this undertaking? I think it is this: "I, the shipowner, warrant that the American association, having satisfied themselves about the matter, have put my vessel on their register as 'newly classed A 1½,' and she is now there classed as such, but I do not undertake that they may not change their minds on account of some new matter coming to their knowledge, and which might induce them, rightly or wrongly, to change their minds." How could he undertake it? It seems to me impossible to hold that there was any such undertaking on the part of the shipowner as to warrant that the ship was rightfully on the register, or would continue there.

If this is held to be a warranty that the ship was rightfully registered, then although she was on the register and continued there, yet, if the charterer could show that she ought not to be there, terms of the charter-party would not be complied with. I think the question a very important one, because, if Mr. Herschell's contention is right, policies of insurance on ships

and goods, which contain similar warranties, would be void in cases like the present. I think the mischiefs which would result from giving effect to Mr. Herschell's contention, are much greater than could arise from holding the other way, because shipping people may always guard themselves by inspecting the ship on their own account.

It was said also in argument that, if this case was decided against the charterer, he would be left without remedy for all the loss he has sustained; for it is admitted that he may have suffered some loss by not being able to insure his goods so favourably. It is said he has no remedy because no action would lie by him against the American Lloyd's Association if they have improperly taken the vessel off their registry. But I cannot see how an action would lie by the shipowner against them. They do not undertake to be always right, but they undertake to use due diligence; supposing they had failed in that duty towards the plaintiff, could he say: "You put me on your register improperly: the charterer in consequence rejected the ship, and I lost thereby a large amount of property." I think that would be too remote. The mischief appears to be as great to one party in this action as to the other. It was a misfortune to both that the ship should have been improperly put on the register, if it was improperly put on.

In my opinion the utmost warranty given in the charter-party was, that at that time the ship was classed A 1½.

Something was said about the proceedings of the American Lloyd's Association having rendered the charter-party void *ab initio*. I do not know how that could be done except by some agreement between the parties, or by the operation of some legal principle. As I said before, this is a case in which the limit of the engagement by the shipowner is that his ship is on the American register "at this time," and "at this time" the American association are satisfied that it should be so registered.

Brett, L.J.—I am of the same opinion.

I think the question is solely one of construction; and the document must be construed according to the ordinary rules used in the construction of instruments. Now, this instrument is elliptical to begin with. The words in question are, "Newly classed, A 1½;" the ordinary meaning of that must be that it refers to the ship, and states that she is now classed in the register of the American and Foreign Shipping Books, and that she is newly classed. I agree that not only a warranty is given, but a condition is stated. Now, one rule of construction is, that, unless the words used in the instrument are shown to have some technical sense, they must be construed according to their ordinary and natural sense; another rule is, that you cannot import words inconsistent with the contract into the contract by evidence of custom; you may add words not inconsistent with those actually used, but without proof of custom you have no right to add any words at all. There is no custom, nor evidence of custom, here, and the words must therefore be construed according to their ordinary and natural grammatical construction, and that is a statement of a fact existing at that time. I think the statement is of what existed at the time of the charter-party, viz., that the ship was classed as described. Mr. Herschell proposes to add words to the effect that she would continue so classed during the remainder of the time for which she was classed. It is obvious that the effect would be to add entirely new words. After they were added, it is manifest that the shipowners would fail in offering a proper ship under the charter-party, even although the registration were cancelled without cause. Mr. Butler, seeing this, wants to put in "and rightly so classed," which adds words to the charter-party, and also adds to the meaning of it, by implying as a fact against the shipowner that not only he but his surveyor had made a proper survey of the ship. I think we ought to stand by the ordinary meaning of the words used in the charter-party (there being no evidence of any different meaning) that the ship was, as a fact, classed as described at the time of the charter-party.

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

We cannot consider whether there is any remedy against the American Lloyd's Association. The question for us turns upon a very few words, "newly classed A 1½, &c." Now what warranty is that? In my opinion it does not come to more than this, that at the time when the charter-party was entered into the ship was on the register as "A 1½," and had been newly so classed. Mr. Herschell contends that the words amounted to something more. He put it that, having regard to this document, the warranty was not only that the vessel was classed at that time, but should continue so classed until in course of time it should run out of its class. That, in my opinion, is not the meaning, because it would include a warranty against the wrongful act of the American Lloyd's Association. If that were meant, it should I think, have been expressly provided for in the contract. We cannot import a further contract that the description in the charter-party shall not be altered by the wrongful act of third parties. Assuming that the ship did answer the description at that time, has the cancellation had the effect of making it a false description, or has the warrantry been broken? It was said that the cancellation had the effect of making it as though the registration had never existed. In my opinion it had no such effect. If the ship was rightly taken off the register it is impossible to say that makes the description false as between other parties. Their rights no doubt are affected by it, but no question as to the cancellation arises between them.

I am of opinion that we cannot import into this contract the terms which are required if we give effect to Mr. Herschell's construction of it.

Judgment affirmed.

Solicitors for the plaintiffs, *Smith, Williams*, and *Quiggin*, Liverpool.

Solicitors for defendants, *Haigh* and *Sons*, Liverpool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Reported by J. R. BROOKE, Esq., Barrister-at-Law.

Jan. 19 *and Feb.* 2, 1878.

(Before MALINS, V.C.)

Re QUEEN'S AVERAGE ASSOCIATION; *Ex parte* LYNES.

Company—Mutual assurance—Illegal policies—Costs of winding-up—Past member.

An unregistered mutual marine assurance association was ordered to be wound up in 1870.

The 8th rule of the association provided that any policy-holder should cease to be a member forty-eight hours after the loss of his ship. A. had ceased to be a member under this rule in 1867, *but a part of the sum insured by his policy was still due at the date of the winding-up. A. proved his debt in the winding-up, was put upon the list of contributories, and paid a call. In* 1875 *all the policies were held to be illegal, and all the debts of the company were consequently expunged, except* 42*l. due to outside creditors.*

On an application by A. to have his name removed from the list of contributories:

Held, that it could not be so removed, and that he was liable to contribute to the costs of the winding-up.

Re Arthur Average Association (*ante* p. 245; 34 *L. T. Rep. N. S.* 388; 3 *Ch. Div.* 522) followed.

ADJOURNED SUMMONS.

The Queen's Average Association was a mutual assurance association for the assurance of members' ships exactly similar in its constitution to the Arthur Average Association.

The 8th rule provided that every policy-holder should cease to be a member forty-eight hours after the loss of his ship. Charles Temple Lynes became a member of the association in May 1867 by insuring a ship called the *Wye* for 800*l.* The ship was lost on the 13th Dec. 1867.

On the 18th March 1870, the association was ordered to be wound up. At that date a sum of 164*l.* 9*s.* 9*d.* was still due to Mr. Lynes on his policy. He proved a claim for that sum, and was put upon the list of contributories in respect of his policy.

In April 1872 a first *pro ratâ* call was made for payment of costs and liabilities, the call on Mr. Lynes being 43*l.* 7*s.* 4*d.* which he was allowed to set off against his claim upon the association.

In 1875 it was decided by the Master of the Rolls, in the case of the *Arthur Average Association* (2 Asp. Mar. Law. Cas. 530, 570); 32 L. T. Rep. N. S. 525, 723; L. Rep. 10 Ch. 542), that associations of this nature were illegal, and all their policies void under 30 Vict. c. 23, s. 7 because not signed by the insurers.

The Court of Appeal, without going into the first point, affirmed his decision on the second. The policies issued by the Queen's Association being exactly similar to those of the Arthur, all debts to policy-holders were expunged. The debts to outside creditors amounted to 42*l.* only. This was an application by C. T. Lynes to have his name removed from the list of contributories.

Pearson, Q.C. and *Caldecott* for C. T. Lynes.—Mr. Lynes had ceased to be a member of the association for more than a year before the date of the winding up order, and was only put upon the list of contributories conditionally in respect of liabilities of the association due while he was a member. These now turn out to be nothing, and it is attempted to retain him on the list merely to contribute to the cost of the winding-up. The rule as to costs laid down by James, V.C., in *Re London Marine Assurance Association* (20 L. T. Rep. N. S. 943; L. Rep. 8 Eq. 176), viz., that each payer or receiver must bear them *pro ratâ* according to the amounts to be paid and received by him respectively is correct and not that laid down by Jessel, M.R., in

Re Arthur Average Association, *ante p.* 245; 34 L. T. Rep. N. S. 388; L. Rep. 3 Ch. Div. 522.

They also cited

Brett's case, 29 L. T. Rep. N. S. 255; L. Rep. 8 Ch. 800.

Glasse, Q.C. and *Everitt* for the official liquidator.—The judgment of the Master of the Rolls in the Arthur Average Association meets every argument that has been urged against us. It was a common mistake of the law; all parties had the benefit (such as it was) of the winding-up, and must contribute to the costs of it. A motion to discharge the winding-up order in the Arthur Average Association has been refused by the Master of the Rolls. In the case before James, V.C. no question was raised as to the validity of the policies. If this application succeeds, all the contributories will be able to have their names removed on the same grounds.

Pearson in reply cited

Re the National Permanent Benefit Building Society, L. Rep. 5 Ch. 309.

MALINS, V.C.—Upon the ordinary principles of justice I entirely agree with Mr. Pearson in this case. By the rules of this society every person insured became a member and liable to contribute to the insurance fund. But every member losing a ship ceased to be a member forty-eight hours after his loss. Mr. Lynes lost his ship on 13th Dec. 1867. He therefore ceased to be a member on the 15th. In 1870 the association was ordered to be wound-up, and Mr. Lynes being still a creditor, availed himself of the winding-up for the purpose of recovering his debt. He was put upon the list of contributories in Jan. 1871, and in April 1872 a call was made. That call Mr. Lynes paid by allowing the amount of it to be deducted from his claim, which is exactly the same thing as if he had paid it in cash. Then in 1875, to the surprise of every one connected with these societies, the Master of the Rolls and the Court of Appeal decided that these associations were illegal, and their policies void, because they were not signed as required by law. Under these circumstances I think the just view of the case would be that Mr. Lynes had only acted under the winding-up for the purpose of recovering his debt, and that when he failed to do so, he ought to have been held to have retired from the society in 1867. But by paying the call and allowing his name to remain for seven years on the list of contributories he submitted to the winding-up order. The application to discharge the winding-up order has failed in the case of the Arthur Average Association, and would no doubt fail if made in this case. As the order is still subsisting the costs must be paid, and the question is who is to pay them. If Mr. Lynes gets off it appears that all the contributories can do the same. The question as to the costs of winding-up a similar association has been before two judges, but in the

case before James, V.C. the debts due in respect of the policies were allowed in the winding-up. The case before the Master of the Rolls was exactly similar to the present one, and he, after going carefully into the whole case, has decided that as the costs have to be paid he cannot draw any distinction between the different classes of contributories. I cannot say that I dissent from his decision. It is a choice of evils. It is a hardship that a man who has become a contributory only to recover his debt, should, when he has lost it, be made liable for the costs of the winding-up. But it would also be a great hardship to make the official liquidator pay them. I cannot, therefore, come to any other conclusion than that Mr. Lynes is liable, and that this application must fail. The official liquidator must have his costs out of the estate. I cannot give Mr. Lynes any costs.

Solicitor for the appellant, *A. R. Steele.*

Solicitors for the official liquidator, *Lowless* and *Co.*

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Friday, May 24, 1878.

SCHUSTER AND OTHERS *v.* FLETCHER.

General average—Expenses of earning freight—Shipowner's exertions to save cargo—Commission.

The plaintiffs shipped chests of indigo on board the defendant's ship at Calcutta for London, the cargo consisting also of tea, jute, linseed, and other indigo. The ship stranded on the French coast near Boulogne, and the defendant being informed thereof immediately obtained the services of a salvage association, sent out his manager, opened an account in his favour to provide for expenses, and procure pumps, tackle, and appliances for salvage operations; and the whole cargo was thereby saved and brought forward to London, and the freight was earned. An agreement was entered into by the consignees, amongst whom were the plaintiffs, by which they estimated the value of their goods, and agreed to contribute in that proportion to the sacrifices and damages incurred by the defendant, and to the losses of those whose goods could not be identified, according to an average adjustment to be prepared by certain average staters. All the goods identified were given up to the owners, and the rest was sold through a broker who received his brokerage. The average staters allowed the defendant in their statement 2500l. as agency, arranging for salvage operations, receiving cargo, meeting and arranging with consignees, receiving and paying proceeds, and generally conducting the business.

Held, upon a case stated, that these were expenses incurred by the shipowner in earning his freight, and could not be charged as general average.

THE following was the report of a referee in an action under an order made the 20th Dec. 1877:

1. The attention of the parties being called to the terms of the said order, it was agreed that there was no matter in dispute in the action except with reference to the sum of 2500*l.* hereinafter mentioned, and that the said order was to be taken as an order to report as special referee under sect. 56 of the Supreme Court of Judicature Act 1873.

2, 3, and 4. The plaintiffs are merchants in London; the defendant is sole owner of the ship *Victoria Nyanza.* In December 1873, the plaintiffs shipped on board that vessel at Calcutta, for delivery at London, under bills of lading, 125 chests of indigo, and the ship sailed for London, having on board a valuable cargo of indigo, tea, jute, and linseed, the indigo being the most valuable portion. On the 4th April 1874, the ship, while prosecuting her voyage, stranded at Etaples, near Boulogne.

5. The defendant was at once informed by telegraph of the disaster, and he forthwith communicated by telegraph with Messrs. G. H. Fletcher and Co., of Liverpool, a firm of which he had formerly been, but was not then, a member.

6. G. H. Fletcher and Co. at once communicated with the Liverpool Salvage Association, and obtained from that association the services of Captain Chisholm and Captain St. Croix, two gentlemen of experience in salvage operations, who on the 5th April started for Etaples.

7. G. H. Fletcher and Co. also on the 6th April sent out their own manager, Mr Bromehead, to the same place, and the defendant sent him a power of attorney to act for him, and opened a credit of 5000*l.* in his favour at Boulogne to provide for expenses there. The defendant also procured the necessary pumps, tackle, and other appliances to be sent out from England for the purpose of salvage operations.

8. Under the directions of Mr. Bromehead, with the assistance of Captains Chisholm and St. Croix, a part of the cargo was taken out of the ship as she lay stranded (an operation of considerable difficulty) and sent to Boulogne. On the 25th April the ship was got off and towed into Boulogne harbour, whence she ultimately sailed to Liverpool.

9. The whole of the cargo was saved and transhipped at Boulogne, and brought forward by the defendant to London and the freight earned.

10. The first of the cargo reached London about ten days after the stranding, and the whole by the middle of May.

11. On the 25th of April 1874, an average agreement, a copy of which is annexed hereto, was entered into between the defendant and the several consignees of cargo. The several consignees in accordance with that agreement paid sums of money to the defendant, the plaintiffs paying 1212*l.*

12. The cargo as it arrived was landed and warehoused at the London Docks.

13. Some portions of the cargo proved difficult of identification, by reason of the shipping marks having become obliterated. Other parts of the cargo it was impossible to identify. All the goods which were identified were given up to the consignees, under the terms of the average agreement. The goods which were not identified were sold by the defendant by arrangement with the consignees thereof through a broker, who received his brokerage.

14. The defendant incurred considerable trouble in chartering ships to carry on the cargo from Boulogne to London, and in sending out lighters and necessary appliances to Boulogne, and in the identification of so much of the cargo as was identified, and in the endeavour to identify the residue, and in ascertaining and answering the inquiries of and arranging with the consignees, and in preparing for the sale of and selling the unidentified cargo and distributing the proceeds.

15. Mr. Elmslie, of the firm of Elmslie and Son, the average staters, mentioned in the average agreement hereinbefore mentioned, prepared an average agreement dated the 16th Nov. 1875.

16. In that statement all disbursements by the defendants are included and duly distributed among the several interests, including charges for the services of Captains Chisholm and St. Croix and of the Liverpool Salvage Association, and of Mr. Bromehead, and the accounts paid to the dock company.

17. The statement also includes a charge as follows: "G. H. Fletcher and Co. Agency.—Arranging for salvage operations, receiving cargo, meeting and arranging with consignees, receiving and paying proceeds, and generally conducting the business, 2500*l.*" This charge the plaintiffs object to, and seek to recover back their proportion thereof.

18. The sum of 2500*l.* does not represent any sum which the defendant has paid or rendered himself liable to pay to G. H. Fletcher and Co. It was arrived at and distributed in the following manner: Mr. Elmslie formed the opinion upon all the circumstances of the case that 2500*l.* was a reasonable remuneration to the defendant

as shipowner in respect of his services hereinbefore mentioned, and in respect of his advances for disbursements; and he proceeded to distribute the sum as follows: He took thereout a sum amounting to 2½ per cent. on the proceeds of the unidentified goods sold, and debited this to cargo in the cargo column. He took thereout further a sum amounting to 2½ per cent. upon the total disbursements, and this he debited to the several interests rateably in their respective columns. The balances of the 2500*l.* he debited to general average in the general average column.

19. The effect is that the sum of 2500*l.* thus distributed was made up of three heads of charge—(1) a commission on the sale of unidentified cargo; (2) a commission on disbursements; (3) a charge by way of remuneration for trouble in respect of the matters mentioned in paragraph 14.

20. There was no contract on the part of the consignees or any of them to pay the defendant the remuneration claimed, or any part thereof under any of the heads above-mentioned, unless such a contract is to be found in the average agreement above-mentioned.

21. No custom was proved entitling a shipowner under such circumstances to any remuneration under any of these heads. But a charge for remuneration by the shipowner in respect of his trouble and labour in such cases has for the last few years been often inserted in average statements, and with increasing frequency. The charge has often been allowed, and sometimes resisted by underwriters.

22. Where unidentified goods have to be sold, and the sale is managed, not by the shipowner himself, but by the shipbroker, or some third person, a commission to such person (in addition to the selling broker's brokerage) is charged and allowed.

23. Where money for disbursements upon salvage of cargo is provided, not by cargo owner or shipowner, but by some third person, commission upon such disbursements is charged and allowed.

24. Where, in case of wreck the shipowner abandons the voyage, and the Salvage Association of London, Liverpool, or elsewhere intervenes and salves the cargo, a sum by way of remuneration under the name of office charges, in addition to disbursements, analogous to the third head of charge in the present case, is always charged by and allowed to the association.

25. With reference to the first head of claim. If the defendant is entitled in point of law to charge a commission on the sale of unidentified goods, the commission of 2½ per cent. charged being an ordinary merchant's commission, is not an unreasonable commission to charge.

26. With reference to the second head of charge, the defendant was never out of pocket throughout the transaction hereinbefore mentioned to any large amount, or for any considerable length of time, and unless he was entitled by reason of any general rule to charge a commission on disbursements, there are no special circumstances in the present case making it reasonable to do so in this instance.

27. With reference to the third head of charge, if the defendant is entitled in point of law to any remuneration for his trouble in and about the matters hereinbefore mentioned the sum of 200*l.* is a reasonable remuneration in respect thereof.

The following was the agreement referred to in paragraph 11.

An agreement made and entered into this 25th April 1874, between George Hamilton Fletcher, of Liverpool, in the county of Lancaster, the owner of the ship *Victoria Nyanza* of 1022 tons register or thereabouts, on the one part, and the respective other persons whose names and signatures, or the names and signatures of whose partnership firms are respectively hereto set and subscribed, such persons being respectively owners or consignees or persons duly authorised and entitled to take delivery of cargo by the said vessel, and who are hereinafter called "the said consignees" of the other part.

Whereas it is alleged by the said George Hamilton Fletcher that the said ship, whilst in the prosecution of a voyage from Calcutta to London with a general cargo of indigo, jute, and other produce, was, by perils and accidents of the seas, stranded on the French coast about twenty-five miles south of Boulogne, and that steps were at once taken by the master and the said owner of the said ship for the safety and preservation of the ship and cargo, and a large portion of the said cargo was discharged from the said ship and landed, and the same has since been forwarded to London by the said George Hamilton Fletcher, and other large portions of the said cargo have been saved and have arrived in London or elsewhere in England, either in the said ship or otherwise. And whereas the said George Hamilton Fletcher alleges that he has paid and expended, or has become liable to pay and expend, large sums of money, and has incurred great expenses and made certain sacrifices in and about the saving and preservation of the said ship and cargo, and the forwarding of the same cargo to London, and otherwise in consequence of the said stranding, and that part of such sums of money, expenses, and sacrifices will be a charge upon the cargo of the said ship, and that other portion thereof will be a charge on the said ship or on the freight of the said goods, and that other portion thereof will be a charge in the nature of general average on the said ship, her cargo, and freight. And whereas in the course of the aforesaid salvage operations, damage may have been done to the said ship or to the said cargo, which may give rise to a claim for general average contribution in respect thereof. And whereas the said sums of money, expenses, sacrifices, and damages cannot yet be ascertained and adjusted, and the respective amounts and contributions due from the respective owners or consignees of goods by the said ship in respect thereof, cannot yet be ascertained. And whereas the said consignees have respectively applied to the said George Hamilton Fletcher for delivery of the goods consigned to them respectively by the said vessel, or of which they are respectively authorised to claim and take delivery as aforesaid, and the said George Hamilton Fletcher has agreed to deliver the said goods to them respectively on the freight due thereon being duly paid or secured to him, and upon receiving such payment on account of and security for the amounts and contributions which may be due from or in respect of the said goods for general average or charges or otherwise on account of the said sums of money and expenses expended or incurred by the said George H. Fletcher as aforesaid, or on account of the said sacrifices and damages as is hereinbefore mentioned. And whereas the said consignees in consideration of the delivery of their said goods in manner aforesaid have respectively agreed to pay and have paid to the said George Hamilton Fletcher, or to Messrs. Ismay, Imrie, and Co., of London, on his behalf, on account of the said amounts and contributions due from or in respect of their said goods, the sums of money respectively set against their signatures hereto, and the receipt whereof is acknowledged by the initials of the said George Hamilton Fletcher, or by the said Messrs. Ismay, Imrie, and Co. placed against the same, and they have also respectively agreed to sign the undertaking hereinafter contained. Now, this agreement witnesseth that for the considerations aforesaid, the said consignees do respectively promise and agree to and with the said George Hamilton Fletcher, that they will, as soon as conveniently may be, and within a reasonable time after this date, respectively give to the said George Hamilton Fletcher or his agents, true and correct particulars of the goods which shall be so delivered to them respectively as aforesaid, and of the value of such goods for the purpose of the adjustment of the general average and charges thereon. And further, that when and so soon as the said sums of money, expenses, sacrifices, and damages shall have been duly adjusted, and the respective amounts or proportion due to the said George Hamilton Fletcher from or in respect of the goods so delivered to them respectively, whether for general average, or charges, or otherwise, on account of the said sums of money and expenses expended or incurred by the said George Hamilton Fletcher as aforesaid, or on account of such sacrifices or damage to the said ship or goods as aforesaid has been duly ascertained, they will respectively pay to the said George Hamilton Fletcher the amount or proportion so due in respect of their said goods, after deducting therefrom the amount so paid by them on account as aforesaid; and for the considerations aforesaid, the said George Hamilton Fletcher does promise and agree to and with the said consignees respectively, that the said George Hamilton Fletcher shall and will use all reasonable diligence to cause the said sum of money, expenses, and damages to be ascertained and adjusted, and the amounts and contributions due from the said consignees respectively in respect thereof to be ascertained according to law; and

that in case the amount so paid to him on account of the said consignees or any or either of them shall, on the final adjustment, appear to exceed the amount due from such consignees or consignee respectively, the said George Hamilton Fletcher shall and will forthwith return the balance or excess to such consignees or consignee respectively. And it is further agreed between the said parties hereto that Messrs. Elmslie and Son shall be the average staters engaged to prepare the said adjustment.

Signed by the plaintiffs and others.

Mathew (with him *Davidson*) argued for the plaintiff, but was stopped by the Court.

M'Leod for defendant.

Cockburn, C. J.—Our judgment must be for the plaintiffs. This is a charge which cannot properly be made; it may be considered under two heads: First the expense of getting the ship and cargo from the place of stranding, and bringing the cargo to England; and next, the expense as to the unidentified goods. As to the first head of expense, it cannot be brought under the head of general average, which pre-supposes some sacrifice made on the part of the shipowner or the owner of cargo for the preservation of the general interest in the adventure. (a) In such case the loss does not fall on the individual whose property has been sacrificed; but, as the sacrifice has been made for the general good, it is borne equally by all. But that is not the case in the present instance. This is a case in which the shipowner has an interest in getting his own ship off, and in bringing her safe into port, and also in bringing home the cargo, in order to earn his freight, and he cannot throw the extra expense upon the shippers of goods. He was doing what was essential to his own interest, and in the performance of the obligations of his own contract. He is not justified in giving up the adventure, unless it becomes hopeless, and it is not hopeless when he can bring both ship and cargo into port with some expense and trouble on his part. In point of fact he did not abandon the voyage, and brought home both ship and cargo. Therefore as to this head of expense, it is clear the charge cannot be made by the shipowner. Then as to the expense incurred as to the goods not identified; that, also, is for the shipowner's own benefit, as well as for the benefit of the consignees. They are entitled upon production of bills of lading to delivery of their goods. If the shipowner says, "There are the goods, but I cannot distinguish yours, select which are yours," the obvious answer is, "You are bound to deliver our goods, and unless you do so we shall not pay the freight." The parties in this case came to a very wise arrangement—that the goods not capable of being identified should be sold for the benefit of the consignees, and the proceeds divided *pro ratâ*. That was for the common convenience, and the shipowner was interested in carrying it out, as well as the consignees. And to say that the shipowner should be entitled to make an extra charge in respect of that which was for his own benefit would be contrary to all principle. Our judgment, therefore, is that these charges cannot be made.

(a) The word "sacrifice" alone was used by the Chief Justice, but it must be taken to mean "sacrifice" or "expenditure." The shipowner is entitled to recover as general average such expenditure only as amounts to extraordinary expenditure, and in no sense can remuneration to him for performing his duty as shipowner be called extraordinary expenditure.—[Ed.]

Mellor, J.—I am entirely of the same opinion on both points. It was argued by Mr. M'Leod that the plaintiff and the other parties with him to the agreement were standing by whilst the shipowner was doing more than he strictly was obliged to do; and that as they suffered him to do this, they were bound to pay a charge for it. I cannot see that any such duty is made out by the facts. *Judgment for plaintiffs.*

Solicitors for plaintiffs, *Hollams, Son* and *Coward.*

Solicitors for defendant, *Waltons, Bubb* and *Walton.*

COMMON PLEAS DIVISION.

Reported by A. H. Bittleston and J. A. Foote, Esqrs., Barristers-at-Law.

Nov. 15 *and Dec.* 21, 1877.

(Before Denman J.)

McMillan and Son *v.* Liverpool and Texas Steamship Company (Limited) and C. Grimshaw and Co.

Company—Liability for acts of directors—Purchase of ship—Part payment in shares—Conditional promise to dispose of—Refusal to accept—Not allotting.

Shipbuilders contracted with a trading company to build for them a steamer, to be paid for by instalments at different stages of the vessel's progress, one-tenth of the whole to be paid in fully paid-up shares in the company at par, on delivery of the ship. At a meeting between the directors of the company and the shipbuilders on the day that the above contract was signed, the latter having raised an objection to receiving any part of the purchase money in shares, the chairman and the managing director of the company, who together formed a firm carrying on a separate business as cotton brokers under the title of C. G. and Co., gave them the following letter, dated the same day: "We hereby beg to say that we shall do our best to dispose of the stock we propose that you shall take in payment of the last instalment of the steamer, this day contracted for with you. It is not our expectation that we shall have to call upon you to take up these shares." This was signed "C. G. and Co." Before the delivery of the ship, an individual member of the firm of shipbuilders applied for some shares in the company on his own account, and the company declined to allot any to new applicants except at 5 per cent. premium. No shares were allotted to the shipbuilders until three years after the delivery of the ship, when the company was about to wind-up.

Held, first, that, in the absence of express authority or some evidence of ratification, the letter of C. G. and Co. did not bind the company; secondly, that the shipbuilders having from the time of the delivery of the ship insisted upon payment of the last instalment in cash, the company were not bound at that time to allot them shares; and thirdly, that the duty of C. G. and Co. as regards disposing of the shares did not arise until they were due, viz., on the delivery of the ship, and therefore that a resolution of the company to issue no shares except at a premium, before the delivery of the ship, was no evidence as against C. G. and Co. that they did not do their best to dispose of the shares; and that C. G. and Co. having in no

way prevented shares being allotted to the shipbuilders on or after delivery of the ship, no duty arose on their part until such allotment.

This was an action tried at Liverpool during the last Summer Assizes before Denman, J., and reserved by him for further consideration.

It was argued by *Russell*, Q.C. and *Bigham* for the plaintiffs; *Herschell*, Q.C. and *Mybergh* for the defendants, the Liverpool and Texas Company; *Gully*, Q.C. and *Carver* for the defendants, Grimshaw and Co.

The facts of the case and the arguments of counsel sufficiently appear from his Lordship's judgment.

Dec. 21.—Denman, J.—In this case, which was tried before me at the last Liverpool Assizes, the plaintiffs were shipbuilders at Dumbarton. The defendant company was a trading company registered under the Acts of 1862 and 1867, and the defendants C. Grimshaw and Co. were a firm of cotton brokers at Liverpool consisting of two persons, Thompson and Lingham, Thompson also being the chairman and Lingham, the managing director of the company. On the 23rd Aug. 1873 the plaintiffs contracted with the company to build for them a steamer for 52,200*l.*, payable by instalments at different stages of the vessel's progress, the two last to be one-fifth by cash, when delivered, and one-tenth (*i.e.* 5250*l.*) "by company's fully paid-up shares at par, when delivered." It was agreed that "when delivered" meant "when the ship was delivered." The statement of claim alleged that, in consideration of the plaintiffs entering into the contract, and thereby undertaking to accept the final instalment in shares of the company, it was further agreed that the defendants (the company) should sell or do their best to dispose of the stock before the said final instalment became due or within a reasonable time afterwards, so that the plaintiffs might be paid wholly in cash. It then set out the following letter, addressed to the plaintiffs, and signed "C. Grimshaw and Co.," dated on the same day as the contract, upon the construction of which the argument before me, on further consideration, mainly turned: "We hereby beg to say that we shall do our best to dispose of the stock we propose that you shall take in payment of the last instalment of the steamer, this day contracted for with you. It is not our expectation that we shall have to call upon you to take up these shares." The statement then alleged that this letter, though signed by Grimshaw and Co. only, was written by them as agents for and on behalf of the company. An attempt was made at the trial to prove this part of the statement of claim; but I do not think it necessary to say more than that, in my opinion, there was no such evidence as to fix the company with any liability founded on this letter; and the question most seriously argued before me was, whether the defendants C. Grimshaw and Co. were liable for a breach of the promise contained in it, which depended, first, on the true construction to be placed on it, and, secondly, on the conduct proved as against the defendants, which was relied upon as a breach. The vessel was finished and delivered to the company on the 24th Oct. 1874. The breach relied upon as against the company was, that between the 23rd Aug. 1873 and the 24th Oct. 1874 (*i.e.*, between the contract and the delivery of the ship), and for some time afterwards, stock for the amount of the final instalment might easily have been sold or placed in the market, or otherwise disposed of at or above par, and that the defendants did not within a reasonable time after the 24th Oct. allot shares and tender scrip to the plaintiffs, and so prevented the plaintiffs from themselves selling them at par, that the business of the company fell off, and on the 5th April 1877 it went into voluntary liquidation by a resolution, confirmed on the 20th, and that on the 19th April the company for the first time tendered scrip for shares at par value, which shares were then much depreciated in value, and were refused by the plaintiffs, who had lost the par value of the shares, and had not been paid the 5250*l.* in cash. It was proved at the trial by one of the plaintiffs that on the 22nd Aug. 1873 he had a meeting with the directors of the company (Messrs. Thompson and Lingham being present), when the terms of the proposed contract were discussed, but nothing said about payment being to be made in cash or shares. On the 23rd the same plaintiff went to the office of Messrs. Grimshaw and Co., and the contract was again discussed, and the plaintiff at first objected to take the last one-tenth of the price in shares; but after some further discussion Mr. Lingham said that the prospects of the company were so good that if the plaintiffs were not willing to take the shares at the time of the delivery of the ship, they (the firm of Grimshaw and Co.) would get them taken up. The plaintiff then said he must have a guarantee or back letter; whereupon the letter of 23rd Aug. 1873, set out in the claim, was given. On the 24th Oct. 1874 the vessel was delivered, and on the 20th Nov. 1874, the plaintiffs sent in their account claiming a final balance of 7477*l.* 10*s.* At that time 40,000*l.* or thereabouts was due in respect of the earlier instalments, and bills had been given which were from time to time renewed, and in fact a very much larger sum than the final balance claimed in the letter of 20th Nov. 1874 remained due at the time of the action, brought in June 1877. The plaintiff, in his cross-examination, admitted that he was aware, on the 21st Aug. 1873, that it would be necessary that substantially all the money required in order to pay for the ship would have to be found by shares. On the 1st Dec. 1874 a letter was sent to the plaintiffs, in answer to their letter of the 20th Nov., signed "C. Grimshaw and Co., managing directors, per C. A. Webster" (the secretary of the company), in which, after discussing certain deductions claimed by the company, was the passage, "You also appear to forget that one-tenth of the cost of the ship you promised to take shares for at par." In answer to which, on the 3rd, the plaintiffs wrote: "With reference to payment of the one-tenth in shares of the company, your letter of 23rd Aug. 1873, given at the time of contract, implies that we will not be called on to take these shares, and as we are circumstanced at present, and for two or three months to come, we are not in a position to take shares, although our intention is to take a number of shares on as early a date as possible." The answer to this letter came on the 11th in a letter signed, "C. Grimshaw and Co., per C. A. Webster, managing director," and contained the following: "The letter (of 23rd Aug.) simply states that C. G. and Co. will do their best to dispose of the stock which you engaged to

take in the company, which unfortunately they have been unable to do, and the directors have no alternative but to allot the shares to you as per contract." No shares were in fact allotted to the plaintiffs until the 19th April 1877, under the circumstances to be presently mentioned. After a good deal of intermediate correspondence, relating to the renewal of bills given for the earlier instalments, the company on the 5th April 1877 resolved to wind-up, and on the 10th April 1877 the secretary wrote, referring to the terms of the contract of 23rd Aug. 1874, and suggesting that plaintiffs should make immediate application for shares for 5250*l.* as balance of payment for the ship. To this the plaintiffs replied that they were in no way bound to accept shares, and that they intended to insist upon payment in cash, and on the 19th shares were allotted. The plaintiffs proved that before the delivery of the ship, viz., in March 1874, an individual member of their firm had applied for some shares on his own account, and that the company had declined to allot any to new applicants except at 5 per cent. premium, from which it was argued that it would have been easy to dispose of shares to the amount of the last instalment, and that the plaintiff was entitled as against C. Grimshaw and Co., consisting of two influential members of the company, as not having done their best, which it was alleged followed from the evidence in question. I cannot, however, see that a resolution of the company to issue no shares except at a premium, in March, is evidence as against Grimshaw and Co. that they did not do their best to dispose of the shares intended to be allotted to the plaintiffs, unless it can be held that the letter of the 23rd Aug. compelled them then and there, and before the final instalment was due, to appropriate certain shares to the plaintiff in respect of the 5250*l.* to be taken in shares by them, and if possible to dispose of those shares specifically for their benefit, even though not a single other share in the company might be disposed of to any other person in the meantime. It was, indeed, contended that this was the meaning of the letter of the 23rd Aug. But I cannot put this construction upon it. Looking at the contract itself, which bound the plaintiff to take his final instalment in shares fully paid up, at par, I am of opinion that it entitled the plaintiff, as soon as his final instalment was due, to an allotment of the requisite number of shares, each share to be treated as so much cash to the extent of its nominal value, whatever its real value might be at the time.

I think, therefore, that Messrs. Grimshaw's duty as regards disposing of these shares did not arise until they were due to the plaintiff, viz., on the 24th Oct. 1874. Then is there any evidence in the case of any breach of their undertaking by not disposing of these shares, or not doing their best to do so? I apprehend not. If the plaintiffs had upon the completion of the ship requested an allotment of the requisite number of shares and been refused, or even had the company or Grimshaw in any way prevented the allotment of shares to the plaintiffs, it might have been otherwise; but the evidence appears to me to make out clearly that the plaintiff was throughout insisting upon payment of the last instalment in cash, to which he had no right as against the company, and that he did so under the doubly erroneous impression that the company were bound by C. Grimshaw and Co.'s letter, and that that letter contained an absolute guarantee that the plaintiffs should in no case be liable to take the payment in shares. I think, therefore, that there is no evidence of any breach of the contract between C. Grimshaw and Co. and the plaintiff, putting the true construction upon the letter of the 23rd Aug. 1873. As regards the company undoubtedly they did not allot shares until 1877, but I think it is abundantly clear that the plaintiff was at no time between 24th Oct. 1874 and the 19th April 1877 willing to take shares, and I do not think that the company were bound to allot them against his express notice that he claimed to be paid in cash, and in the absence of any application on his part for an allotment. It was forcibly argued by Mr. Bigham in his reply that this construction reduces the letter of the 23rd Aug. to a nullity, whereas it was the moving consideration to the plaintiffs for entering into the contract with the company, and therefore, as he urged, must have been intended to have some important effect. But the answer to this argument is, that the words of the written agreement must not be strained in order to meet the plaintiffs' conception of the bargain, but construed according to their actual meaning as nearly as it can be ascertained. Looking at the terms of the contract, I think the meaning is what I have explained, and, so construing the contract, I cannot see any evidence which would warrant me in deciding that there was any breach of it.

I must therefore give judgment for the defendants Grimshaw and Co. on this ground, and I also think that the company are entitled to judgment on the ground that, the letter of the 23rd Aug. not having been brought before the company, nor intended to bind them, they were not parties to it. I do not think it was a transaction in the ordinary management of the company such as Messrs. Thompson and Lingham, under their firm's name of C. Grimshaw and Co., could bind the company to, without express authority or some evidence of ratification, which is not to be found.

For these reasons I give judgment for both sets of defendants, with costs.

Solicitor for the plaintiffs, *C. C. Deane*, Liverpool.

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

Monday, May 14, 1878.

(Before Grove and Lopes, JJ.)

Ellis and Co. *v.* General Steam Navigation Company (Limited).

Practice—Writ of summons—Admiralty jurisdiction of County Court—Leave to issue writ in Superior Court where claim for damage to cargo under 300*l.—County Court Act* 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3.

When there are circumstances rendering it advisable that an action which a County Court has jurisdiction to try under the County Courts Admiralty Jurisdiction Act (31 *&* 32 *Vict. c.* 71), *s.* 3, *should be commenced in the High Court, such as the necessity for a commission abroad, the court will grant leave for a writ to issue under* 31 *&* 32 *Vict. c.* 71

sects. 3, 9, *though the cause of action may be of less amount than the limit of the County Court jurisdiction.* (*a*)

In such a case notice of the order made by the court should be given when the writ is served.

Motion for leave to issue writ in the Superior Court, under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), s. 9.

The plaintiff's claim was for damage to cargo by negligence, and the amount claimed was under 300*l.*, namely 47*l.* 7*s.* 1*d.*

Sect. 3 of the County Courts Admiralty Jurisdiction Act 1868, provides that any County Court having Admiralty jurisdiction under the 2nd section, shall have jurisdiction to try and determine *inter alia*, as to any claim for damage to cargo, or damage by collision, any cause in which the amount claimed does not exceed 300*l.*

By sect. 9 of the same Act it is provided that if any person shall take in the High Court of Admiralty of England or in any Superior Court proceedings which he might, without agreement, have taken in a County Court, except by order of the judge of the High Court of Admiralty or of such Superior Court, or of a County Court having Admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court in that Admiralty cause is limited by the Act, he shall not be entitled to costs, and shall be condemned in costs, unless the judge of the High Court of Admiralty or of a Superior Court before whom the cause is tried or heard shall certify that it was a proper Admiralty cause to be tried in the High Court of Admiralty of England or in a Superior Court.

Hilbery moved for leave to issue a writ out of the Superior Court, on an affidavit that it would be necessary for the proper hearing of the cause that a commission to take evidence should issue abroad, and that this could not be done if the action were brought in the County Court. An application has already been made at chambers, but the master doubted whether under the above section he had jurisdiction to make the order, and whether it should not be made by the court. He submitted that, if such an order were not made, the plaintiff would be obliged to run the risk of having to pay costs, even though he succeeded, if the judge who tried the cause refused to certify:

Hewitt v. *Cory*, L. Rep. 5 Q. B. 418.

By the Court.—You may take a rule absolute in the first instance. Notice of the order should however be given to the defendant when the writ is served. *Rule absolute.*

Solicitors for the plaintiffs, *F. W.* and *H. Hilbery.*

(*a*) This decision proceeds upon the assumption that the County Court has jurisdiction in all claims for damage to cargo. This assumption is, to say the least of it, not indisputable. It must be taken now as well-established law, requiring a decision of the Court of Appeal to alter it, that the County Court has jurisdiction in Admiralty only in cases in which the High Court of Admiralty before the Judicature Act had jurisdiction: (See *Simpson* v. *Blues*, 1 Asp. Mar. Law Cas. 326; *Gunestead* v. *Price*, *Fullmore* v *Wait*, 2 Asp. Mar. Law Cas. 543). It is true that the Privy Council in *Cargo ex Argos* (1 Asp. Mar. Law Cas. 519) decided otherwise, but the other decisions are decisions of courts which now form part of the High Court of Justice, and would undoubtedly be followed in any case of prohibition to a County Court. Now, the General Steam Navigation Company, the defendants in this action, are a company carrying on business in London, and therefore domiciled in England within the meaning of the 6th section of the Admiralty Court Act 1861. Hence the High Court of Admiralty would have had no jurisdiction to try any action against them or any of their ships for damage to cargo happening on board such ships, and consequently the County Court would have no such jurisdiction. It would appear then that the application for leave to bring this action in the Superior Court was unnecessary, as the action could not have been brought in the County Court, and hence there would have been no proceedings which might have been taken in a County Court within the meaning of the County Courts Admiralty Jurisdiction Act 1868, sect. 9. —Ed.]

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Wednesday, May 29, 1878.

(Before Sir R. Phillimore.)

The Gleaner.

Practice—Costs—Unliquidated damages—Loss of fishing—Collision.

Where a plaintiff claimed unliquidated damages in respect of loss of the remainder of a season's fishing occasioned by a collision, and on a reference to the registrar and merchant, the defendants objected to the claim altogether, but the plaintiff recovered, being awarded less than two-thirds of the amount claimed by him as damages, the Court gave him costs in respect of the reference on the ground of the peculiarity of the plaintiff's claim, and without prejudice to the general rule as to costs of references.

This was an action brought against the trawl fishing smack *Gleaner* by the owners of the drift-net fishing smack *Maud and Florence* and of her fishing gear, to recover damages in respect of a collision between the vessels, whereby the fishing gear of the *Maud and Florence* was lost.

The *Maud and Florence*, of Scarborough, was, on the 10th Oct. 1877, drift-net fishing in the North Sea; she had about sixty nets out. Whilst she was so engaged the *Gleaner* of Hull, which was trawling, ran into and fouled her nets, and these nets, with the barrels, strops, and warps attached thereto, became so entangled, that after attempting to haul them in for some hours, the crew of the *Maud and Florence* were obliged to cut them adrift, saving only ten nets out of the sixty. The *Maud and Florence* then made for Filey, and was there laid up for the winter, as the fishing season only lasted four weeks longer, and the plaintiffs, as they alleged, were unable to procure in that time nets to enable them to resume their fishing. The plaintiffs during the negotiations before action claimed 155*l.* for the value of the nets and gear lost, and also compensation for loss of fishing, but the defendants not paying the amount claimed, the plaintiffs applied for leave to commence the action in the High Court upon an affidavit setting out the circumstances of the collision, and alleging that the value of the nets &c., lost was 155*l.*, and that in addition thereto the plaintiffs had a claim for consequential damages for loss of fishing, the amount whereof recoverable was uncertain, and that it was desirable to proceed in the High Court rather than in a County Court. Leave to commence the action

in the High Court was given, and the action was commenced accordingly.

The defendants admitted liability, and paid 155*l.* into court in satisfaction of the plaintiffs' claim. The plaintiffs rejected the tender, and at the reference before the registrar and merchant made their claim as follows:

1. Fishing nets	£105
2. Barrels and barrel strops	18
3. Warps	32
4. Loss of four weeks' fishing from the 10th Oct. 1877 to 7th Nov. 1877	200
	355

At the reference the defendants altogether disputed the plaintiffs' right to recover for loss of fishing upon two grounds, first, because the damages were too remote; secondly, because, as they contended, the plaintiffs might have procured more nets and have continued the fishing.

The reference first came on for hearing on the 7th Feb. 1878, and the registrar not being satisfied with the evidence as to the number of nets lost or as to the impossibility of procuring other nets, adjourned the reference to enable the parties to produce further evidence on these points. On the 29th April the reference proceeded, and on the further evidence the registrar made his report, finding the sum of 227*l.* due to the plaintiffs, that is to say:

1. Fishing nets	£105
2. Barrels and strops	18
3. Warps	32
4. Loss of four weeks' fishing from 10th Oct. to 7th Nov. 1877	72
	227

With interest at 4 per cent. per annum from 10th Nov. 1877 until paid.

The registrar gave his reasons for his report, which were as follows: "The principal point in dispute in this case was a rather novel claim for loss of fishing during the last four weeks of the season of 1877, and which was objected to by the defendants as being too remote a damage. It appears that the plaintiffs' smack *Maud and Florence*, belonging to Filey in Yorkshire, was engaged in drift-net fishing for herrings in the North Sea, when the defendants' vessel *Gleaner*, which was trawling, fouled her nets during the night of the 10th Oct. last. The result was that after prolonged attempts to haul them in the smack was only able to save ten nets out of a fleet of sixty, and was compelled to return to port. Being then unable to procure before the close of the season, which terminates early in November, other nets for the purpose of continuing their fishing, the plaintiffs were reduced to the necessity of laying up their smack at once, and taking to the much less lucrative occupation of line fishing, and for the loss arising from this interruption of their regular net fishing the plaintiffs have made a special claim. It is well known that herring fishing with nets is systematically pursued by thousands of smacks during a certain portion of the year, and constitutes the main source of livelihood to a large number of fishermen.

"The plaintiffs in this case were so employed at the time the damage complained of was sustained. They were actually engaged in operations from which profitable results might be anticipated with confidence, almost with certainty, and the loss they sustained by the interruption of their employment was directly consequent on the destruction of their nets by the wrongful act of the defendants.

"It is to be borne in mind that a smack of this class is solely used for net fishing, and if its nets are destroyed and cannot be renewed at once, the smack itself is necessarily laid up unemployed for a certain time at the very period of the year when it would otherwise be profitably employed. According, therefore, to the ordinary principle on which demurrage and compensation for non-employment is allowed, in respect of a vessel disabled by injury to her hull or gear, some compensation is clearly due to the plaintiffs in this case under that head; and this being so, I have considered that the ordinary rule of allowing so much per ton per day is not applicable to a vessel of this class which is not constructed and is never employed for the conveyance of cargo or passengers, or in earning freight in the common sense of the term, and that the plaintiffs are entitled to recover the probable net amount they were prevented from earning by the customary use of their smack and its fishing gear. With regard to the amount allowed under this head, viz., 72*l.*, we formed our estimate from the evidence before us of what the gross earnings of the smack would have been if she had continued fishing for four weeks on her usual ground. From that estimate we have made deductions for the expenses that would have been incurred by them, also for wear and tear of the smack and of her nets and warps, &c., and further for the amount the plaintiffs did actually earn in the substituted occupation they had recourse to. It is to be gathered from the evidence before us that herring fishery in what may be termed the Filey waters is less productive in the latter half of October and the beginning of November than in the Yarmouth waters. The season ends, in fact, for Filey smacks early in November, although it continues to a later period farther south, and for this reason the Yarmouth smacks which frequent the North Sea waters in the early part of the autumn return in the month of October to their own waters."

The defendants did not object to the report, which was taken up by the plaintiffs, and the registrar having made no recommendation as to costs, the plaintiffs gave notice that they should move the judge to certify that they were entitled to their costs of the action, and to condemn the defendants and their bail therein, and in the costs of the reference.

May 29.—*James P. Aspinall* for the plaintiffs in support of the motion.—The plaintiffs are entitled to their costs of the action, although they have recovered less than 300*l.*, because they obtained leave to commence the action in the High Court under the County Courts Admiralty Jurisdiction Act 1868, sect. 9. As to the costs of the reference, it is true that more than one-third has been struck off the amount claimed by the plaintiffs, but as the defendants paid into court the amount claimed by the plaintiffs for the loss of fishing gear, the only part of the plaintiffs' claim reduced is the plaintiffs' claim for unliquidated damages, and this was the only amount in dispute between the parties. The ordinary rule as to costs ought not to apply to a claim for unliquidated damages, where it is impossible for the plaintiffs to do more than estimate the amount of

their loss; they must put down in their claim a sum sufficient to cover what the court may think enough to satisfy the loss sustained. The rule as to costs is intended to prevent exorbitant claims in respect of moneys alleged to be due or paid for work and materials for demurrage which can be accurately ascertained; it ought not to apply to claims for damages, the amount of which are greatly in the discretion of the court, and are not capable of exact estimation.

Gainsford Bruce for the defendants.—The plaintiffs ought to have brought this action in a County Court, and ought not to have their costs here. As to the reference, the payment into court was general, and not specifically for the value of fishing gear. The ordinary rule as to costs should apply; the plaintiffs have made out no exceptional case. The adjournment of the reference was occasioned by the plaintiffs not being fully prepared with their proofs at the first hearing.

J. P. Aspinall in reply.

Sir R. PHILLIMORE.—In this case the plaintiffs ask for the costs of the action, and the costs of the reference. By the registrar's report, which has not been objected to, the plaintiffs recover less by more than one-third than they claimed, and the total amount recovered amounts to less than 300*l*. As to the costs of the action, I think the plaintiffs properly obtained leave to bring the action in this court, and that they are consequently entitled to those costs. As to the costs of the reference the plaintiffs ask for the costs upon the ground of the peculiarity of their claim. Their claims consisted of claims for loss of gear, and for loss of the season's fishing. The defendants tendered the amount claimed for loss of gear, but resisted altogether the claim for loss of fishing. This course of action on the part of the defendants has undoubtedly occasioned costs, and I am of opinion that, considering the peculiarity and nature of the claim of the plaintiffs, they are entitled to some costs; I think, however, that the plaintiffs are not entitled to full costs because, by reason of their not being prepared with their case on the first day of the hearing of the reference, they occasioned an adjournment; in respect of this adjournment they are not entitled to costs. Under the circumstances, I think justice will be done by awarding to the plaintiffs the sum of 40*l*., *nomine expensarum*, in respect of the costs of the reference, in addition to the costs of the action. My decision here turns upon the peculiarity of the case and claim, and must not be taken in any way to weaken the authority of the general rule as to the costs of reference in cause of damage.

Solicitor for the plaintiffs, *H. C. Coote.*

Solicitors for the defendants, *Collyer-Bristow, Withers* and *Russell.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by E. S. ROCHE, Esq., Barrister-at-Law.

Dec. 10, 11, 1877; *Jan.* 14, 15, 18; *and March* 12, 1878.

(Before JAMES, BAGGALLAY and THESIGER, L.JJ.)

DE BUSSCHE *v.* ALT.

Principal and agent—Sub-agent—Agent making a profit by sale to himself—Disclosure—Acquiescence—Delay.

In 1868 *the plaintiff consigned a steamer to G. and Co., his agents at Shanghai, for sale, fixing a minimum price of* 90,000 *dollars, and requiring cash payment. The defendant was a merchant residing in Japan, and he undertook, as G. and Co.'s agent, to sell the vessel in Japan, or in the event of her not being sold to find employment for her. This was done with the sanction of the plaintiff. The defendant, being unable to sell the ship for cash at the price named, took her himself for* 90,000 *dollars, and resold her to a Japanese prince for* 160,000 *dollars, payable partly in cash and partly on credit. No information reached the plaintiff of any intention on the part of the defendant to change his character of agent for sale for that of purchaser until June* 1869, *after the transaction with the prince was carried out. The defendant paid* 90,000 *dollars to G. and Co., who remitted it to the plaintiff.*

In the meantime the defendant, though not without some trouble, had obtained the whole amount of 160,000 *dollars from the prince.*

In 1873 *the plaintiff instituted proceedings to compel the defendant to pay over the increase realised by him in the resale of the vessel, on the ground that he was the plaintiff's agent in the transaction, and bound to account for all profit made.*

Held (affirming the decision of Hall, V.C.), that this was one of those special cases where a privity arose between the principal and the sub-agent, and the sub-agent became liable to the principal as if he had been directly employed by him. The relation of agent and principal was established and existed between the defendant and the plaintiff at the time of the purchase and re-sale of the vessel; and the defendant therefore must account to the plaintiff for all the profit he had made in the transaction.

Held, further, that there had been no such acquiescence or delay on the part of the plaintiff as would disentitle him to maintain the action.

Semble, that mere submission to a wrongful act which has been completed without the knowledge or assent of the person whose right is infringed cannot, without some conduct amounting to accord and satisfaction, or a release under seal being shown, bar his right of action; although, under the name of laches, it may afford a ground for refusing relief under some particular circumstances.

THIS was an appeal by the defendant from a decision of Hall, V.C. The bill was filed by

Edward Munster de Bussche, a merchant and shipowner of Ryde, in the Isle of Wight, against William John Alt, a member of the firm of Alt and Co., merchants in Japan, and sought to make the defendant liable to account, as the plaintiff's agent, for profits made by him in the purchase and sale of a steamship called the *Columbine*. It appeared that in 1868 the plaintiff was the registered owner of two composite screw steamers, called the *Nymph* and the *Columbine*, subject to a mortgage to Messrs. John Willis and Son, merchants in London, to secure an account current. Each of the steamers was intended by the plaintiff, according to his usual course of business, for sale in some port in India, China, or Japan, and in the summer of 1868, by arrangement between the plaintiff and his mortgagees, who were pressing for payment of the mortgage debt, the vessels were consigned for sale to Gilman and Co., a firm of merchants carrying on business at Hong Kong and Shanghai in China, and at Yokohama in Japan. It was admitted that, although John Willis and Son took the active part in the original consignment of the vessels to Gilman and Co., yet the relationship of principal and agent in the transaction was constituted between the latter firm and the plaintiff. The amount of the mortgage debt was very much below the selling value of the vessels, and Gilman and Co., throughout the transactions which followed upon the consignment, as a rule corresponded with the plaintiff rather than with Willis and Son. The consignment was announced by Willis and Son to Gilman and Co. in a letter of the 3rd July 1868, in which occurred the following passages:

> The *Columbine* is now at Bombay, and if she cannot be sold will take cotton round to China, where, if a sale does not take place, we must beg you to send her with a freight to Shanghai, Nagasaki, or Yokohama, or all three ports if necessary, so as to get her sold as soon as possible. We understand that you have no establishment at Nagasaki, but no doubt you can appoint some good agent to do the business; but we have to caution you that great care should be taken in appointing an agent where a sale is likely to be effected, as Mr. De Bussche will naturally look to us for the proceeds.

At that time the defendant was a partner in the firm of Alt and Co., an English mercantile house which traded in Japan, having three different branches in that country—one at Nagasaki, another at Osaca, and a third at Hiogo—and had been from time to time employed by the plaintiff as agent for the sale of merchandise. The defendant was the managing partner at Osaca and Hiogo, and a Mr. Hunt was the manager of the Nagasaki branch. The defendant hearing that the two steamers had been consigned for sale, and having better opportunities than Gilman and Co. for disposing of them in Japan, suggested to that firm that he should be allowed to do so; and the plaintiff also, having been informed that the defendant's house and another Japan house could sell composite steamers, forwarded the information to Gilman and Co., in a letter of 10th Sept. 1868. In the result Gilman and Co. authorised the defendant to sell the vessels, or, in the event of their not being sold, to find employment for them. The defendant undertook the duty, and the plaintiff corresponded with the defendant's manager at Nagasaki, on the footing of the defendant having so undertaken it. On the 23rd Oct. 1868 the plaintiff wrote to Gilman and Co. confirming a limit which he had previously mentioned for the price of each of the vessels, viz., 90,000 dollars net proceeds in England, and stating his willingness to allow some portion, suggesting one-third, to remain on credit, if good interest were allowed and covered by the guarantee of Gilman and Co.; and on the 5th Nov. in the same year the plaintiff wrote again to Gilman and Co., withdrawing the requirement of a guarantee from them, and expressing his willingness to allow a credit, if necessary, of 20,000 dollars or 25,000 dollars for six or nine months, secured on the vessel. The defendant, however, asserted that he was never made acquainted with the fact of the plaintiff's willingness to allow a credit, and that the instructions which were conveyed to him by Gilman and Co., as coming from Willis and Co., were to the effect that only cash was to be taken for the steamers. The evidence upon this point was not clear, but in the view of the court nothing really turned upon it, and they had treated the defendant's assertion as correct. For some time prior to the defendant's employment in connection with the two steamers he had business relations with a prince of a Japanese district called Geyshien; and the prince had become indebted to him in certain moneys, some of which were payable in the year 1868 and some in 1869. This Japanese prince was desirous of becoming the purchaser of a steamer, and the defendant appeared very early to have conceived the notion of selling either the *Nymph* or the *Columbine* to him. In the latter part of 1868 and the early part of 1869 several letters passed between the defendant and members of the firm of Gilman and Co., in which the difficulty of obtaining cash for the vessels was stated by the defendant, and in which he suggested that he should himself become the purchaser with a view of reselling on credit. Gilman and Co. in the answers to the defendant did not appear indisposed to accede to his suggestion, provided the plaintiff's limit of 90,000 dollars was obtained; but in the opinion of the court the correspondence failed to establish that any definite arrangement was come to until a date later than the 18th March 1869. It appeared, however, that before that date the defendant had brought his negotiations with the officers of the Prince of Geyshien for the sale of the *Columbine* by him to the prince to a close; and on the 24th Feb. 1869 an agreement in writing, purporting to be made between the defendant's firm and the prince's officers, was signed at Osaca, under which the defendant was to receive 160,000 dollars for the vessel, payable as to 75,000 dollars in cash, and as to the balance in two equal instalments in the fourth and eighth months (Japanese) of the then year; that is, in May and Sept. 1869. The contract was subject to confirmation by the Geyshien government, and complete possession of the vessel was not to be given over until full payment was received.

On the same day a further agreement between the same parties was signed, under which, in consideration of the purchase of the steamer, it was arranged that the prince should pay to the defendant in the second month of the year 22,400 rios due in the third month, 23,000 rios due in the fourth month, and in the eighth month 30,723 rios due in the tenth and eleventh months of the preceding year. These agreements were alleged by the defendant to have been mere inchoate arrange-

ments, which were subsequently cancelled; but on the 17th March 1869 two admittedly binding and final agreements were concluded, which were in substance to the same effect, with the exception that possession of the vessel was to be given on payment of the 75,000 dollars, while the bill of sale was to be retained until payment of the whole purchase money. Upon these agreements being executed the crew of the *Columbine* was discharged, possession of the vessel was given to the prince, and on the 25th March a formal transfer to a trustee for the prince and the defendant was executed by the defendant. During the period over which the transactions with the prince extended, Mr. Hunt, the manager of the defendant's firm at Nagasaki, was corresponding from time to time with the plaintiff, mainly on matters of business unconnected with the sale of the *Columbine*, but incidentally also upon the subject of that vessel; and in a series of letters, coming down to as late a date as the 8th April 1869, Mr. Hunt invariably spoke of the sale of the vessel as about to be effected, or as having been effected, by the defendant under his employment for that purpose, and gave no intimation of any intention on the part of the defendant, either conceived or carried out, to change his position of agent for that of purchaser. In a postcript to a letter of the 10th March 1869 Hunt wrote as follows:

Since writing the above we are in receipt of advices from our Hiogo friends, who state that they are finding constant and remunerative employment for the *Columbine*, and that she was about to proceed on a trip to the Inland Sea for the purpose of being inspected with a view to purchase.

And when, on the 8th April, he mentioned the fact of a sale having been effected, it was in the following terms:

Columbine.—This vessel has been sold; particulars regarding the sale, Messrs. Gilman and Co., of Shanghai, will doubtless give you by this mail. Our firm at Osaca have informed their friends about this subject. Capt. Lobintz, of the *Columbine*, is proceeding home by this mail.

It was admitted on the part of the defendant that Hunt was ignorant of the nature of the transactions resulting in the sale to the prince. While Hunt was writing to the plaintiff, as above stated, Gilman and Co. were also in correspondence with the plaintiff, and in none of their letters to him did they suggest that the defendant was to assume any other position than that of agent. On the 12th March 1869 the defendant, in the name of his firm, wrote to Gilman and Co. to the following effect:

We beg to advise having settled a sale of the steamer *Columbine*, which will enable us to remit you the net limit given our Mr. Alt for the vessel by your Mr. Lavers (one of the partners in the firm of Gilman and Co.), and we hold to your credit 3000 dollars as a deposit on account of the same, which will be forfeited should the arrangements we are making fall through, which please note. Our senior addresses Mr. Lavers on the subject, to which we refer you. Please hand us by return the necessary documents to make a legal transfer of the vessel, as we may have to give a bond to the consul here if we require to change the flag before such is received by us.

The defendant on the same day wrote privately to Mr. Lavers in the following terms:

We now write officially to say we will take the *Columbine* over at the limit named in your letter of the 10th Dec., which I hope will be satisfactory, and show you that I have been correct in my ideas as to the sale of the steamers, and induce you to be a little patient with reference to the *Nymph*, which I am sure we shall be able to settle very soon now. Please let me have transfer documents by return, made out in the name of W. J. Alt. We shall remit you 90,000 dollars, less our 5 per cent. commission, which we will divide with you in this instance, or will hand your Yokohama firm the equivalent of 85,000 dollars at 4*s*. 6*d*., *plus* your commission at 2½ per cent., which comes to nearly the same thing.

Mr. Lavers replied on the 18th March as follows:

Yours of the 12th March reached me yesterday, and I am much pleased to hear that there is at last some chance of selling the *Columbine*, although at the price you name, 85,000 dollars, it cannot be done. By my letters of the 20th Jan. to your firm, and the 21st Jan. to you, you will not fail to notice that the limit given on these dates was 90,000 dollars, free of commission. Our commission would be 5 per cent., but we should be quite content to divide this with you, say give you 2½ per cent. The steamers would be dirt cheap at this price. We cannot accept 85,000 dollars net, with an addition of 2½ per cent. as our commission. Our last instructions from Mr. De Bussche are as follows:—"London, 4th March.—The limit on the *Columbine* and *Nymph* at 85,000 dollars net in England, with the 200*l*. per month added since 1st Sept. for insurance and interest. No deduction from above price of any earnings."

Some additional correspondence passed between the defendant and Gilman and Co., and, although the latter appeared ultimately to have acquiesced in the purchase by the defendant of the *Columbine* at the limit given by the plaintiff, there was nothing to show that they were aware of the terms of the resale, or of the fact that the defendant had completed the arrangement for resale before he bound himself to become a purchaser. In the meantime Gilman and Co. were also in correspondence with the plaintiff, and in their letters they spoke of the defendant as acting as an agent in the sale of the vessel. On the 17th March 1879 they wrote:

We have just received later advices from Hiogo, under date of the 12th instant, by which we are glad to find the Japanese had entered into positive negotiations for purchase of the *Columbine*, and paid a small amount of money as a guarantee of their good faith in the matter, so that we trust a telegram will reach you in anticipation of this letter advising actual sale of the steamer on satisfactory terms.

On the 30th March 1869 Gilman and Co. wrote to the plaintiff:

Columbine.—On the 17th instant we wrote you that our friends in Japan had advised us that the steamer was in a fair way of being sold. We have heard since from them to the effect that, as they found so much difficulty in making a sale at any price for prompt payment, they will take the steamer over at 90,000 dollars. You will no doubt understand it is unusual to sell steamers to the Japanese for cash, payment in most instances extending over some time. Our friends make the above offer, not having actually sold the steamer, but are in hopes of making a re-sale on credit terms, as a profit sufficient to reimburse them for loss arising out of interest of money, &c.

On the 12th April 1879 Gilman and Co. communicated to the plaintiff the sale of the vessel, as follows:

Columbine.—We telegraphed our friends in London on the 8th instant to advise Willis and Son that this steamer had been sold for 90,000 dollars. Messrs. Alt and Co. had effected the sale before receiving our advices communicating your increased limit to cover 200*l*. per month for marine insurance. As, however, the price obtained is net, the difference is fortunately small, and the 90,000 dollars we shall have pleasure to remit you will nearly cover the amount required for insurance in addition to your former limit of 85,000 dollars. The steamer was transferred at Hiogo, where she was sold on the 21st ult., as advised in our telegram.

On the 3rd June 1869 Gilman and Co. wrote to the plaintiff to the following effect:

We have now to ask you for our commission on the sale of the *Columbine*. You are aware that the steamer was worked by Messrs. Alt and Co., in Japan, who afterwards took her over for your limit of 90,000 dollars.

Before the plaintiff was informed by Gilman and Co. that the defendant himself had become the purchaser of the vessel, he appeared to have received some intimations from Japan which aroused suspicions as to the conduct of the defendant in the matter of the sale; and he therefore placed himself in communication on the subject with a Mr. Pitman, who had been captain of one of his vessels, and with Messrs. Walsh and Co., a firm of merchants at Nagasaki, with whom at the time he had business relations. On the 17th April Pitman wrote from Yokohama to the plaintiff as follows:

I am given to understand from the best authority that the *Columbine* and *Nymph* have been sold for about 16,000 dollars each on credit; what price you have received I cannot find out.

On the 21st April Walsh and Co. wrote as follows:

We have also been informed that the *Columbine* was sold to the Prince of Geyshien for 175,000 dollars, mostly on credit, though the reported sale price at Hiogo was 90,000 dollars.

And on the 29th April Pitman wrote again:

I find the *Columbine* price was 175,000 dollars on long credit. I still trust that Alt's have known their interests better than to do what report accuses them of, viz., of only crediting you with 90,000 dollars.

Upon the information so received the plaintiff appears to have, although reluctantly, treated the sale to the defendant as an accomplished fact. Mr. Lavers subsequently inquired of the defendant whether he would mind telling him the terms of the sale by the defendant of the *Columbine*, but the latter took no notice of the inquiry. The 90,000 dollars were paid or accounted for by the defendant to Gilman and Co., and through them the amount was paid to the plaintiff or his mortgagees. The *Nymph* was subsequently sold, and the matter slept, so far as the plaintiff and Gilman and Co. were concerned, until shorty before the original bill in the present suit was filed on the 10th April 1873. In the meanwhile the defendant received the agreed price for the *Columbine* from the Prince of Geyshien in the following manner: He received 75,000 dollars in various payments extending from 9th Feb. to 13th April 1869; 4000 dollars on the 18th Sept.; and the balance of principal and interest, amounting to 93,750 dollars, in Dec. 1869, in rice which the prince had entered into an agreement to transfer to him, but which agreement, as stated by the defendant, was only obtained after the defendant, at considerable risk and expense to himself, had frightened the prince into compliance by a visit to his capital in a large American steamer. The defendant, in Dec. 1870, dissolved his connection with the firm of Alt and Co., and returned to England, where from time to time, he met the plaintiff without hearing from him any complaints upon the subject of the sale of the *Columbine*. It was proved, however, that the plaintiff did not receive from him or any other person any further information as to the terms of such sale, beyond what had been given by Pitman and Walsh and Co. The plaintiff instituted no proceedings until March 1873, when he required the defendant to account, as his agent, for the purchase money received by him for the *Columbine*, and on the 10th April 1873 he filed this bill praying that the alleged purchase by Alt and Co. of the *Columbine* on their behalf was fraudulent and void, and that the defendant might be ordered to account to him for all moneys paid to him or his firm in respect of the sale of the vessel.

The defendant, in his answer to the bill, alleged that, as regarded the dealings of agents abroad, it was the common practice, where ships or other articles of commerce were consigned by merchants residing in England to their foreign agents for the purpose of sale, for the principal or consignor to fix a limit or reserved price as the minimum amount for which such ship or other article was to be sold, or as to merchants in Japan, at the minimum at which such might be taken over, or taken to and purchased by the merchant. He believed it was the fact that such limit or reserved price was not intended by the principal, or regarded by the agent, as relieving the latter from the obligation of disposing of the article consigned to him for sale at the highest price which he could obtain for it, or from the obligation to account for the full proceeds of sale, except where he informed the principal or consignor, or other person for whom he was acting, that he took to or purchased it at the price named, and such principal or other person agreed thereto, in which case the agent was wholly relieved from any and every such obligation as aforesaid, and had simply to pay or otherwise satisfy the price or sum named like any other purchaser, and dealt with and disposed of the ship or other article as he best could and thought most desirable for himself. The defendant subsequently put in a further answer to the plaintiff's amended bill in the following words:

I crave leave to refer to the practice or custom stated in the 12th paragraph of my former answer, and say that not only is there such a practice or custom as therein stated, and that the same is, as I submit and believe, a good, valid, and commercial custom; but it is also a further common and usual custom and practice in China and Japan, and one which I believe and submit is also a good, valid, and commercial custom, for goods to be taken over by commission agents as well as merchants, at the limit placed upon them by the consignor or principal, provided that price is not then below the then cash market value of the goods, and that even without any mention being made of the fact or notice thereof given to the consignor or principal, and the goods or price thereof are accounted for and remitted, and commission charged in the same way as if they had been sold to third parties.

In the court below, *Dickinson*, Q.C., *J. C. Mathew*, *W. Barber*, and *Pollard*, for the plaintiff.

Butt, Q.C., *Bristowe*, Q.C., and *T. A. Roberts*, for the defendant.

Hall. V.C. gave judgment for the plaintiff, concluding his judgment thus:—It seems to me, therefore, according to the plain principles upon which this court acts, that the agent appointed by Gilman and Co. was, under the circumstances, not selling according to what the defendant says were the instructions of the principal to sell for cash, but was departing from those instructions without express authority from the principal, and selling in a different manner, because he says he could not sell in the way in which he was directed, and doing that with a view to his own advantage and gain. How can it be contended that, if a profit results from that transaction, the agent is not liable, upon the ordinary principles of equity in respect of all profit made by him? The agent

must be liable to somebody; and as Gilman and Co. repudiated it, the original principal must be able to enforce payment of that which is his own money. Every agent must account for all profit which he makes out of a transaction, and cannot put it into his own pocket, and profit was made by Alt, an agent, and therefore must be accounted for. Gilman and Co. did not release him from that accountability, and, as I hold, they could not, and never did, release him effectually from any liability; and, being accountable for that profit, upon the ordinary principles of equity, it is enforceable by the plaintiff. The plaintiff is not precluded by anything that has taken place in the way of delay from asserting his claim. Acquiesence is out of the question. In fact, the term is inapplicable to the question, and what was said by Lord Cottenham in the *Duke of Leeds* v. *Earl Amherst* (2 Phil. 123) shows there was no acquiescence in this case. Therefore the result is, that "the defendant must personally account to the plaintiff for all moneys received by him by or on behalf of the firm of Alt and Co., from the purchasers of the steamship *Columbine*, in respect of the sale thereof effected. There must be an account of all moneys which he has received in respect of the sale, and an account of all moneys which have been paid by the said firm, to the plaintiff, in part payment of the purchase moneys received by the same firm or any member thereof in respect of the said sale of the said steamship, and that after allowing to the defendant the proper commission and other usual agent's charges, the defendant may be ordered forthwith to pay over to the plaintiff the balance." And in taking these accounts, all proper allowances must be made to the defendant in respect of any disbursements or expenses properly made or incurred by him in reference to the sale. Although these would be payable without being specifically mentioned, he must be entitled to every reasonable and proper disbursement which he has incurred, so as to ascertain what is the fair and clear profit derived from the transaction. The plaintiff must have his costs up to the hearing.

On the appeal from this decision,

Butt, Q.C., *Bristowe*, Q.C., and *T. A. Roberts*, for the appellant, contended—First, that the relationship of principal and agent was not constituted between the plaintiff and the defendant; secondly, that even if it were at one time constituted, the relationship ceased before the sale of the *Columbine* took place; and thirdly, that assuming the defendant to have been at one time constituted, and to have continued throughout the transaction of sale, the agent of the plaintiff, the latter had by acquiescence lost any right to follow the profits made by the defendant out of it. The defendant was the agent only of Gilman and Co., and accountable to them, and if the plaintiff had any real case, he ought to have proceeded against Gilman and Co., who were his agents. The plaintiff had given them authority to sell the vessel to anyone for cash at a definite price, and consequently, to allow the defendant to purchase for cash at that price. The fact that the defendant had been asked to endeavour to find a purchaser would not effect the right of Gilman and Co. to sell to him; neither was it necessary, under the circumstances, that he should communicate with Gilman and Co. in respect to the negotiations for the resale of the vessel. There was no authority for the proposition urged in the court below that a sale between an agent and a sub-agent could not be recognised as legal. With regard to acquiescence, the plaintiff was aware of the resale to the Japanese prince shortly after it took place, and, therefore, ought at once to have brought forward a claim or repudiated the transaction, instead of remaining silent for a length of time, which silence must operate as a presumptive proof of acquiesence in the act, They referred to

Russell on Agency, 2nd edit. p. 14;
Story on Agency, par. 201, 217a, 254, 258;
Tickel v. *Short*, 2 Ves. sen. 238;
Lockwood v. *Abdy*, 5 L. T. Rep. 122; 9 Jur. 267.

Dickinson, Q.C. and *W. Barber*, for the plaintiff, submitted that when he agreed to the appointment by Gilman and Co. of the defendant as agent in the matter, the defendant became his agent, and as such was bound to make a disclosure of the whole transaction in connection with the sale and re-sale of the vessel. The plaintiff, if applied to, would have allowed the defendant to sell on terms of credit, but he knew nothing of the negotiation with the Japanese prince until after the transaction had been completed. There was no evidence to show that the defendant had discharged himself of his agency before the conclusion of the re-sale of the vessel, and therefore, being in a fiduciary character, he could not make a profit out of that re-sale without the knowledge, and to the prejudice, of his principal. The plaintiff could not be debarred from relief by acquiescence or lapse of time, as there had been nothing amounting to accord and satisfaction on his part; nor had there been any such delay as would disentitle him to maintain an action. With regard to the practice alleged by the defendant in his answer to exist in Japan, for an agent to purchase articles at the minimum price fixed by his principal without the consent of the latter, provided the price was not below the market value of the goods, there was nothing in the evidence to support so unreasonable a proposition. They cited

Duke of Leeds v. *Earl Amherst*, 2 Phil. 123;
Fawcett v *Whitehouse*, 1 Russ. & My. 132;
Re Canadian Oil Works Corporation, 33 L. T. Rep. N. S. 466; L. Rep. 10 Ch. App. 593;
Dunne v. *English*, 31 L. T. Rep. N. S. 75; L. Rep. 18 Eq. 524.

Butt, Q.C. in reply.

The written judgment of the court was delivered by

Thesiger, L. J.—The question raised by this appeal is as to the liability of the defendant to account as agent for profits made by him in the purchase and sale of a steamship, which he was, as alleged by the plaintiff, employed to sell for him.

After stating the facts his Lordship proceeded Upon this state of facts the learned Vice-Chancellor decided that the plaintiff's claim to receive any profits made by the defendant out of the transaction of the sale of the *Columbine* was well founded, and decreed the necessary account for the purpose of ascertaining those profits. Against that decree this appeal is brought.

In support of the appeal it has been contended on the part of the defendant, first, that the relationship of principal and agent was not constituted between the plaintiff and the defendant: secondly, that even if it were at one time constituted, the relationship ceased

before the sale of the *Columbine* took place; and thirdly, that assuming the defendant to have been at one time constituted, and to have continued throughout the transaction of sale, the agent of the plaintiff, the latter has lost by acquiescence any right to follow the profits made by the defendant out of it. The first contention raises a question which, as it appears to us, does not present any difficulty. As a general rule, no doubt, the maxim "delegatus non potest delegare" applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim, when analysed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal, which he has himself undertaken to personally fulfil, and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident of the contract. But the exigencies of business do from time to time render necessary the carrying out of the intentions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case the reason of the thing requires that the rule should be relaxed, so as on the one hand to enable the agent to appoint what has been termed a "sub-agent" or "substitute" (the latter of which descriptions, although it does not exactly denote the legal relationship of the parties, we adopt for lack of a better, and for the sake of brevity) and on the other hand to constitute in the interests and for the protection of the principal a direct privity of contract between him and such substitute; and we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist: or where in the course of employment unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him as if he had been appointed agent by the principal himself. The law upon this point is accurately stated in Story on agency, sec. 201. A case like the present, where a shipowner employs an agent for the purpose of effectuating a sale of a ship at any port where the ship may from time to time, in the course of its employment under charter, happen to be, is pre-eminently one where the appointment of substitutes at ports other than those where the agent himself carries on business is a necessity, and must reasonably be presumed to be in the contemplation of the parties; and in the present case we have, over and above that presumption, what cannot but be looked upon as express authority to appoint a substitute and a complete ratification of the actual appointment of the defendant in the letters which passed respectively between Willis and Sons and the plaintiff on the one side, and Gilman and Co. on the other. We are therefore of opinion that the relationship of principal and agent was, in respect of the sale of the *Columbine*, for a time at least constituted between the plaintiff and the defendant.

Next arises the question whether that relationship ceased before the actual sale of the vessel, and upon this question also we are of opinion that the contention of the appellant must fail. In the first place, it is clear that down to the time of the sale the plaintiff was no party to any termination of the defendant's agency, and we think that Gilman and Co. could not, after having once appointed and allowed the defendant to act as agent for the plaintiff in connection with the proposed sale of his vessel and without any authority from the plaintiff, change the defendant's position in the transaction from that of an agent to that of a purchaser from the plaintiff. All the reasons which would apply to prevent the original agent from changing his position without the assent of his principal would equally apply to the case of the substitute, and if such a transaction were held to be valid, so as to entitle the substitute to make a profit out of it, it would open the door in a variety of cases to agents who could not themselves directly become purchasers, indirectly doing the same thing through the intervention of substitutes, and to the commission of serious frauds upon principals. But in the present case we are also satisfied, by the evidence to which attention has already been directed, that Gilman and Co. themselves never assented to the termination of the defendant's employment as agent for the sale of the *Columbine*, and never assented to the defendant's taking the vessel himself until after the agreement for her sale to the Prince of Geyshien was complete. When that agreement was concluded, the defendant was still, in fact and in law, the plaintiff's agent, and on and from the conclusion of the agreement the plaintiff was entitled to have the benefit of it, and, as a consequence, has a right to maintain the present suit unless in some way by his conduct he has deprived himself of that right. This brings us to the consideration of the contention of the defendant founded upon what has been termed "acquiescence" on the part of the plaintiff. It has been urged that the plaintiff ought not to be allowed to impeach the validity of the transaction in question or to follow the profits made out of it, after having, with knowledge that the defendant had become the purchaser of his vessel, assented to the transaction being completed on that footing, received by himself or his mortgagees through the hands of Gilman and Co. the purchase-money, allowed the defendant to incur risk and expense, which as agent he could not have been called upon to incur, in obtaining payment from the Prince of Geyshien, and finally to dissolve his connection with the firm of Alt and Co. upon—as it is suggested but not proved—the footing of his freedom from all outstanding claims, and to return to England and there reside for a considerable period without any intimation of proceedings being taken against him by the plaintiff. It is necessary, however, to bring these circumstances to the test of legal principles. It is competent no doubt to a principal to ratify or adopt the act of his agent in purchasing that which such agent has been employed to sell, and to give up the right which he would otherwise be entitled to exercise of either setting aside the transaction or recovering from the agent the

profits derived by him from it; and the non-repudiation for a considerable length of time of what has been done would at least be evidence of ratification or adoption, or might possibly by analogy to the Statute of Limitations constitute a defence; but before the principal can properly be said to have ratified or adopted the act of his agent, or waived his right of complaint in respect of such act, it should be shown that he has had full knowledge of its nature and circumstances, in other words, that he has had presented to his mind proper materials upon which to exercise his power of election, and it by no means follows that because in a case like the present he does not repudiate the whole transaction after it has been completed, he has lost a right actually vested in him to the profits derived by his agent from it. It appears to us also that, looking to the dangers which would arise from any relaxation of the rules by which in agency matters the interests of principals are protected, the evidence by which in a particular case it is sought to prove that the principal has waived the protection afforded by those rules should be clear and cogent. In the present case, so far from the plaintiff having had full knowledge of the nature and circumstances of the transaction relating to the sale of the *Columbine*, or the evidence of ratification or adoption being clear and cogent, it is apparent that he was kept in entire ignorance of the amount of purchase money payable by and the terms of the credit given to the Prince of Geyshien, and of the important fact that the defendant had abstained from binding himself as a purchaser of the vessel until he had obtained the contract for her resale. It is to be observed also that while the plaintiff did not in terms repudiate the transaction by which the vessel was sold, and appears to have grumblingly submitted to it as something which he could not help, he at the same time made no statement and did no act from which is to be inferred any condition, or stipulation, or promise, that upon becoming better acquainted with the circumstances of the transaction he would not enforce his legal rights against the defendant by claiming from him any profits made out of the transaction. We are of opinion, therefore, that there is no such evidence of ratification or adoption on the part of the plaintiff of the acts of the defendant as is sufficient to show that he waived the protection given him by the law, and dealt with the agent *quoad* these acts as a person discharged of his agency.

It still remains to be considered whether, short of such ratification or adoption the plaintiff can be held to have by his conduct in any way precluded himself from taking the present proceedings. The term "acquiescence," which has been applied to his conduct, is one which, as was said by Lord Cottenham in *The Duke of Leeds* v. *Lord Amherst*, ought not to be used; in other words, it does not accurately express any known legal defence; but if used at all, it must have attached to it a very different signification according to whether the acquiescence alleged occurs while the act acquiesced in is in progress, or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term "acquiescence," and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be devested without accord and satisfaction or a release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding.

Applying, then, the principles above enunciated to the present case: First, it is clear that there was no acquiescence on the part of the plaintiff in the defendant becoming the purchaser of the *Columbine*, and obtaining the profit of the sale to the Prince of Geyshien at any time before the sale to the prince was a complete transaction. He said nothing, did nothing, and there was nothing which he abstained from saying or doing, by which he induced the defendant to do or abstain from doing anything, or to alter his position before the transaction with the Japanese prince was completed. *Primâ facie*, therefore, the plaintiff was entitled to bring his action to recover the profit derived by the defendant from the transaction. Secondly, there has been no release by the plaintiff of his right of action, or anything which could be held to amount to accord and satisfaction. Thirdly, assuming that under certain circumstances a person might by his conduct, whether constituting laches or amounting to an estoppel, entirely preclude himself from enforcing a vested right of action, yet in the present case no conduct having that effect can properly be imputed to the plaintiff. He made no representation to the defendant that he would not take proceedings. Even if his conduct could under any circumstances be held to have been equivalent to such representation or to constitute laches, it was pursued, as already pointed out in ignorance, due to the defendant's own concealment of the terms of the sale to the Prince of Geyshien, and especially of the fact that such sale preceded the purchase by the defendant. And, lastly, the principal element of an estoppel by conduct, viz., that it should have been pursued with the intent or so as to induce the person relying upon the estoppel to act in a particular manner, is here wholly wanting, for the plaintiff was quite unaware, until after the defendant's answer to the suit was put in, that the defendant had run any risk or incurred any expenses in obtaining payment of the price stipulated to be paid by the Japanese prince. We are of opinion, therefore, that the plaintiff has not by his conduct

in any way precluded himself from taking these proceedings.

In dealing with the case we have put aside one topic which was discussed in the argument for the appellant, but which is besides the real questions between the parties, viz., the righteousness or unrighteousness of the transaction impugned. The law under which an agent is prevented from making a profit out of his employment by acting as a principal instead of as an agent is wholly independent of considerations of this kind, and it is most important in the interest of commercial honesty in general that the honesty of the agent concerned in the particular transaction should not be inquired into as a question upon which its validity depends, for by this strictness the temptation to embark in what must always be a doubtful transaction is removed. If the defendant could have made out by the most conclusive evidence that 90,000 dollars in cash was a full and more than full equivalent for the bargain which he got from the Japanese prince, it would be wholly irrelevant. At the same time we must add that the present case is one which comes very clearly within the mischief which the law is intended to obviate. Looking to the large price which the defendant stipulated to receive upon his sale of the *Columbine*, and the amount which was to be paid in cash, one cannot but feel some doubt whether his purchaser might not possibly, if the defendant's own interest had been out of the way, been induced to give, instead of 160,000 dollars, partly in cash and partly on credit, a sum down in cash exceeding, at least to a small amount, the limit of 90,000 dollars fixed by the plaintiff. But even if that were not so, it is at all events highly probable that, if the offer of the Japanese prince had been submitted to the plaintiff, he would have been willing to sell direct to him upon the terms of the contract made by the defendant with him. It is urged no doubt by the defendant that the terms were mixed up with the terms of the contemporaneous contract by which the defendant gave the prince further time for payment of debts then due while hastening the period of payment for those coming due; but when those terms are looked at more closely it becomes apparent that, under any circumstances, the prince was prepared to give a large sum of money with a considerable cash payment for the plaintiff's vessel; and when it is asked, as it has been in argument, "what was the defendant to do in the face of the alleged positive prohibition to sell for anything but cash?" the answer is plain. He might have said, and ought to have said, "I cannot get all cash, but I can get so much cash and so much credit from a customer of mine, and if you do not like that, let me accept his offer for myself, and I will give you your limit in cash." Full opportunity for taking this course, either through the post or by means of the telegraph, was open to the defendant, but instead of taking it he thought proper to conceal altogether from the plaintiff, from Gilman and Co., and even from his own manager at Nagasaki, the real nature of the transaction in which he was engaged; and although he may have acted without any fraudulent or improper motive, he cannot reasonably be said to be free from blame or to have a right to complain of consequences which a more due regard to his duty towards his principal could easily have obviated. There was one matter alleged by the defendant, and actually supported by evidence, although admitted to be untenable in argument, which ought not to pass without notice and reprobation, viz., an alleged custom or practice in the ports in which the defendant traded for an agent for sale with a minimum limit, himself to take at that limit and at his own option the thing he is employed to sell. We cannot but express a hope that the court will never again hear of such a contention or have before it such evidence. The fact that there has been a notion entertained by some commercial agents of the existence of such a custom or practice may go far to explain how such a transaction as that complained of in this suit came to be.

In conclusion, we are of opinion that, although some hardship may have been caused to the defendant by the delay of the plaintiff in taking these proceedings, he has nevertheless most properly been made liable in them, and that the decree of the Vice-Chancellor should in all respects be affirmed, and this appeal be dismissed with costs.

Solicitors for the plaintiff, *Tatham Oblein*, and *Nash*.

Solicitor for the defendant, *G. Badham*.

SITTINGS AT WESTMINSTER.

Reported by P. B. Hutchins, Esq., Barrister-at-Law.

Jan. 17 *and* 22, *and Feb.* 18, 1878.

(Before Bramwell, Brett, and Cotton, L.JJ.)

Mirabita *v.* The Imperial Ottoman Bank.

Sale of goods—Passing of property—Unascertained goods deliverable to order.

P. shipped a cargo of umber on board a ship chartered for plaintiff. The bills of lading stated that the cargo was shipped by P., to be delivered "to order or assigns." P. drew a bill of exchange on plaintiff, and handed it to the vendor of the umber, who discounted it with defendants, and handed them the bills of lading, to be given up to plaintiff on payment by him of the bill of exchange at maturity. Plaintiff refused to accept the bill of exchange without receiving the bills of lading. A new bill of exchange was substituted for the former bill, and forwarded to defendants' agents with directions to give up the bills of lading when it was paid. The ship and the bills of exchange arrived on the same day. Plaintiff did not then accept the bill, and the cargo was entered at the Custom-house in defendants' name. Plaintiff afterwards offered to pay the bill of exchange, and receive the bills of lading, and give a guarantee for the freight, but defendants refused, and sold the cargo.

Held (affirming the judgment of the Exchequer Division, on a special case), that the property in the cargo had passed to plaintiff, and he was entitled to recover.

Appeal from the Exchequer Division.

The following special case was stated by an arbitrator:—

The plaintiff is a merchant carrying on business at Malta and Constantinople. The defendants are a banking company, incorporated by a firman of the Sultan, and carrying on business at Constantinople, with agencies at London and Larnaca.

On the 26th June 1873 a contract was made between the plaintiff and Phatsea and Pappa, a

firm at Larnaca, for certain umber to be sold to and shipped for the plaintiff by Phatsea and Pappa at Larnaca.

On the 7th July 1873 the plaintiff wrote to Phatsea and Pappa, stating that he would send ships on receiving advice of the quantity of umber ready for shipment, and also that the bills of lading must state that Phatsea and Pappa shipped the umber "by order and on account" of the plaintiff.

On the 26th Aug. 1873 Phatsea and Pappa had 600 tons of umber ready for delivery and shipment under the contract, and they chartered, by order of the plaintiff, and for his account, a British ship, the *Princess of Wales*, then lying at Alexandria, to carry a cargo of such umber from Larnaca to London. The plaintiff approved of the charter-party. The *Princess of Wales* proceeded to Larnaca, where she took on board a cargo of 600 tons of umber. About the 9th Oct. the plaintiff sent 150*l.* to Phatsea and Pappa for ship's advances, of which sum 70*l.* was paid to the master.

On the 9th Oct. the master signed four bills of lading for the cargo, which stated the goods to be shipped by Phatsea and Pappa, and to be delivered "to order or assigns." The bills of lading were given to Phatsea and Pappa.

On the 10th Oct. the *Princess of Wales* sailed from Larnaca, and on the 14th Oct. Phatsea and Pappa informed the plaintiff by telegram that the vessel had left with 600 tons on the 10th inst.; that they would shortly receive bills of lading and draft at sixty days, and requesting them to insure the cargo. The plaintiff communicated with his son, F. Mirabita, trading in London as Mirabita Brothers, and through him effected an insurance on the cargo.

Phatsea and Pappa drew a bill of exchange for 280 Turkish liras on the plaintiffs, and indorsed and handed it with the bills of lading to Corkji, from whom they had bought the umber which formed the cargo. Phatsea and Pappa had paid Corkji for the umber, and they handed him the bill of exchange by way of accommodation, to enable him to obtain an advance from the defendants, and in anticipation of future supplies of umber.

Corkji discounted the bill of exchange at the Larnaca agency of the defendants' bank, and with the bill of exchange handed them the bills of lading, saying that they were to be sent to Constantinople, and given up to the plaintiff on payment by him of the bill of exchange at maturity.

The Larnaca agency forwarded the bill of exchange and bills of lading to their bank at Constantinople, Pappa having come to Constantinople and handed to the plaintiff the charter-party and invoice of the cargo, which stated that the same was "shipped by order and on account of" the plaintiff. The defendants' bank at Constantinople presented the bill of exchange to the plaintiff for acceptance, but he declined to accept without receiving the bills of lading. The bill of exchange and the bills of lading were then returned to the Larnaca agency. The plaintiff afterwards offered to the defendants' bank at Constantinople to pay the bill of exchange before maturity on receipt of the bills of lading, but in consequence of the documents having been returned to Larnaca this offer could not be accepted.

It was then arranged between the plaintiff and Pappa that a new bill of exchange for 254*l.* 11*s*, should be drawn by Phatsea and Pappa to the order of Corkji on Mirabita Brothers in London at two months' date, which should be substituted for the former bill for 280 Turkish liras, and notice of the agreement was given to the defendants' bank at Constantinople.

A new bill of exchange, dated the 9th Oct. 1873, was, in accordance with the terms so agreed, drawn by Phatsea and Pappa, and sent by them to Corkji, who handed it to the Larnaca agency, saying that it was to be sent with the bills of lading to London, where Mirabita Brothers would be ready to accept and pay the bill of exchange at maturity against delivery of bills of lading. The Larnaca agency accordingly gave up the first bill of exchange, and on the 20th Nov. 1873 forwarded the bill for 254*l.* 11*s.* to their agency in London, and directed them "to give up the bills of lading on payment of the inclosed bill of exchange."

At the time of making the agreement with the plaintiff for the drawing of the bill of exchange for 254*l.* 11*s.* as already mentioned, it was doubtful whether the bills of lading would reach England before the arrival of the ship. Pappa thereupon gave the plaintiff a letter, addressed to the master of the *Princess of Wales*, to be used in case the ship should arrive in England before the bills of lading, which letter purported to authorise the master, if the bills of lading had not come to hand to deliver the cargo to the plaintiff.

On the 3rd Dec. the *Princess of Wales* reached Gravesend, and was ordered to the Millwall docks by F. Mirabita.

On the same day the bill of exchange for 254*l.* 11*s.*, together with the bills of lading, was delivered by post, and in the course of the day was left at the office of Mirabita Brothers with the following note attached: "Bill of lading for terra umber, weighing 600 tons, per *Princess of Wales*, to be given up against the payment of attached draft, 254*l.* 11*s.*, on Mirabita Brothers."

F. Mirabita returned the bill of exchange to the defendants' London agency, stating that he was ready to pay the bill at maturity, but he did not then accept it.

On the 8th Dec. the defendants' London agency gave orders to the ship's brokers to enter cargo in the name of the bank, and on the 12th the cargo was entered at the Custom-house in the defendants' name; but the defendants took no other steps towards taking possession of the cargo till after 20th Dec.

On the 12th Dec. F. Mirabita called on the defendants and offered to pay the bill and receive the bills of lading. The defendants' manager refused to accept payment, alleging that they had taken possession of the cargo, and thereby had made themselves liable for freight.

On the 18th Dec. F. Mirabita again offered to pay the bill of exchange, and to give a guarantee for the freight. After some further negotiation the defendants landed the cargo, and, after heavy charges for demurrage, landing, and other expenses had been incurred, sold the cargo in bulk, without any authority from the plaintiff or F. Mirabita, for a sum which was not sufficient to pay the amount of the bill of exchange, freight, and expenses; the cargo was worth more than the amount of the bill of exchange, freight, and expenses, and if the plaintiff had obtained possession of it, he would have made a profit therefrom.

So far as it was a question for the jury, the arbitrator found as a fact that it was the intention of Phatsea and Pappa, and of the plaintiff, that the property in the cargo of umber should pass to the plaintiff upon its shipment on board the *Princess of Wales*, subject to a lien on the same for payment of the price; and their intention that the property in the cargo should be vested in the plaintiff continued from the time of shipment until the arrival of the ship in England.

The court to be at liberty to draw inferences of fact, and to disregard the above finding, if a jury would not have been justified in coming to such a conclusion from the facts above stated. The question was whether the plaintiff was entitled to recover damages from the defendants for their dealing with the cargo as above mentioned.

The Divisional Court (Cleasby and Huddleston, BB.) gave judgment for the plaintiff, and the defendants appealed.

Jan. 17 *and* 22.—*H. Matthews*, Q.C. and *Arthur Wilson* for the defendants.—The property in the cargo of umber did not pass to the plaintiff, and therefore he can have no claim against the defendants for dealing with it as they did. There was no sale of specific goods, and the fact that the shippers took bills of lading by which the umber was to be delivered to their order or assigns, and afterwards gave an interest to Corkji, which interest Corkji transferred to the defendants, would prevent any property from passing to the plaintiff:

Wait v. *Baker*, 2 Ex. 1;
Turner v. *The Trustees of the Liverpool Docks*, 6 Ex. 543; 20 L. J. 393. Ex.;
Van Casteel v. *Booker*, 2 Ex. 691; 18 L. J. 9, Ex.;
Ellershaw v. *Magniac*, 6 Ex. 570;
Shepherd v. *Harrison*, 1 Asp. Mar. Law Cas. 66; 24 L. T. Rep. N. S. 857; L. Rep. 5 H. of L. 116;
Ogg v. *Shuter*, 3 Asp. Mar. Law Cas. 77; 33 L. T. Rep. N. S. 492; L. Rep. 1 C. P. Div. 47; 45 L. J. 44, C. P.;
Gabarron v. *Kreeft*, and *Kreeft* v. *Thompson*, 3 Asp. Mar. Law Cas. 36; 33 L. T. Rep. N. S. 365; L. Rep. 10 Ex. 274; 44 L. J. 238 Ex.;
Jenkyns v. *Brown*, 14, Q. B. 496.

F. M. White, Q.C. and *Archibald* for the plaintiff.—The question as to the passing of the property is a question of fact, and the exact point of time at which it passes varies according to the circumstances of the particular case. Here it appears from the special case that it was the intention of the parties to pass the property to the plaintiff upon shipment of the cargo, subject to a lien for the price; this finding is borne out by the facts, and the authorities show that it is a question of intention. See, in addition to the authorities already referred to:

Benjamin on Sales, book 2, c. 5, pp. 265, 271, 2nd edit.;
The notes to *Coggs* v. *Bernard*, 1 Smith's L. C. 203, 6th edit. (citing *Kemp* v. *Westbrooke*, 1 Vesey 278, and *Franklin* v. *Neate*, 13 M. & W. 481);
Browne v. *Hare*, 3 H. & N. 484; 4 H. & N. 822, 27 L. J. 372, Ex.; 29 L. J. 6, Ex.;
Wood v. *Bell*, 5 E. & B. 772; 6 E. & B. 355; 25 L. J. 148 and 321, Q.B.;
Joyce v. *Swan*, 17 C. B. N. S. 84.

Arthur Wilson in reply.

Cur. adv. vult.

Feb. 18.—The following judgments were delivered:

Bramwell, L.J.—This case has been argued on the footing that the law of England or a like law is applicable, and we must so deal with it. We must treat as the governing bargain between the plaintiff and Phatsea and Co., the one made at the time it was arranged that the payment should be made by a bill at two months, and that the vendees should not be entitled to the 600 tons of umber, or bills of lading of them, until payment of the bill of exchange. No question arises as to the defendants' rights, for it was admitted, and properly admitted, that the defendants did wrong in refusing the amount of the bill and selling the umber. On the other hand there is no contract between the plaintiff and the defendants, so that in the result the case is reduced to this: When the defendants tortiously disposed of the umber, had the plaintiff such a property therein, a right thereto, as to entitle him to maintain this action? It is argued that he had not, and the reason given is, that, as the umber bought was not specific and ascertained, and as on shipment the shippers took a bill of lading to order, and gave an interest in it to Corkji, who transferred it to the defendants, no property passed, and for this a long series of authorities, beginning with *Wait* v. *Baker* (*ubi sup.*) and ending with *Ogg* v. *Shuter* (*ubi sup.*), is cited. It is almost superfluous to say that by these authorities I am bound, that I pay them unlimited respect, and I may add I do so the more readily as I think the rule they establish is a beneficial one. But what is that rule? It is somewhat variously expressed, as being either that the property remains in the shipper, or that he has a *jus disponendi*. Undoubtedly he has a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with the vendor. This appears from *Gabarron* v. *Kreeft* (*ubi sup.*), *Wait* v. *Baker* (*ubi sup.*), and to some extent from *Ellershaw* v. *Magniac* (*ubi sup.*). In the first case Parke, B. expressly says that the vendee Baker could, under the circumstances, maintain an action against Lethbridge for having sold the barley to Wait. This property or power exists then; and therefore, if the vendors of the umber had sold it to the defendants, this action would not be maintainable. But in that case the defendants would have acquired a right, while, as I have said, it is admitted that no right in them can be relied on. I think it is not necessary to inquire whether what the shipper possesses is a property, strictly so called, in the goods, or a *jus disponendi*, because, I think, whichever it is, the result must be the same, for the following reasons: That the vendee has an interest in the specific goods as soon as they are shipped is plain. By the contract they are at his risk. If lost or damaged they must bear the loss. If specially good, and above the average quality which the seller was bound to deliver, the benefit is the vendee's. If he pays the price, and the vendor receives it, not having transferred the property, nor created any right over it in another, the property vests. It is found in this case that as far as intention went the property was to be in the plaintiff on shipment. If the plaintiff had paid, and the defendants had accepted, the amount of the bill of exchange, it cannot be doubted that the property would have vested in the plaintiff. Why? Not by any delivery. None might have been made, the defendants might have wrongfully withheld the bill of lading. The property would have vested by virtue of the original contract of sale. It follows that it vested on tender of the price, and that whether

the vendor's right was a right of property or a *jus disponendi;* for whichever it was, it was their intention that it should cease on the plaintiff's paying the price, and therefore it would cease unless meanwhile some title had been conferred on a third person to something more than the price. This, though wrongful as regards the plaintiff, would have been valid. But no such title exists here. There is nothing in the authorities inconsistent with this. The only case that may be thought to seem so is *Wait* v. *Baker* (*ubi sup.*), where, though the vendee tendered the price, he was held to have acquired no property. But it is manifest that in that case the vendor originally took the bill of lading to order, and kept it in his possession to deal with as he thought fit, and never intended that the property should pass until he handed the bill of lading to the vendee on such terms as he chose to exact. Parke, B. says: "There is no pretence for saying that Lethbridge agreed that the property should pass. . . . There was nothing that amounted to an appropriation in the sense of that term which alone would pass the property. . . There was no agreement between the two parties that that specific cargo should become the property of the defendant," the vendee. Here all the evidence shows that there was such an agreement. The arbitrator says it existed, in fact, at the time of shipment, but the subsequent conduct of both parties shows it. What seems decisive is this, the plaintiff must have a right against someone. Has he any against Phatsea? Now Phatsea has done nothing that he had no right to do, he has done everything he was bound to do, treating the altered agreement as governing. No action therefore would lie against him. It must then be the defendants who are in the wrong. I think they are, that the property was to pass on payment, and consequently on tender of payment of the bill of exchange, that the bill of lading was handed to the Larnaca Bank to be delivered to the plaintiff on payment of the bill of exchange, and that, therefore, the plaintiff can maintain this action, and judgment should be affirmed. I would add that I agree with the reasoning of my brother Cleasby in the court below; and I would further remark that I believe this is a question which would not have been open to the slightest doubt if the action had been brought after the coming into operation of the Judicature Acts. Cotton, L.J. has favoured me with a perusal of his judgment, and I entirely agree with it.

Cotton, L.J.—In this case the vendors, on shipping the goods, the subject of the contract, took a bill of lading requiring the delivery of the goods to be to their order, and dealt with that bill of lading in this way in order to secure payment of the bill of exchange which they then drew on the plaintiff. The bill of exchange was discounted with the defendants, and the bill of lading was transferred to them as security for the bill of exchange; this bill of exchange having been refused acceptance, a second bill of exchange was drawn and given in lieu of the first bill, upon the terms of the delivery of the bill of lading to the plaintiff upon payment of the second bill of exchange, and in so dealing with the bill of exchange the vendors intended that, upon payment, the plaintiff, the purchaser, should obtain the goods, and they agreed, and as far as they could transferred to the purchaser their right to insist, that on payment of the bill of exchange the bill of lading should be handed over. I mention those facts for the purpose of adding this: that the action was instituted before the passing of the Judicature Acts, and therefore it is simply to be dealt with as a legal question; and we cannot inquire here how far the plaintiff has the right in equity to insist that he occupies the same position as the vendors, and to insist that, as against the pledgee of the bill of lading, the plaintiff, as transferee of the right, has a good equitable title, even if he has not a legal title. In fact, in the present case, it simply turns on this question, whether the property in the goods in question has, under the circumstances, passed to the plaintiff. Now, I quite agree with the judgment of Bramwell, L.J., but as several cases were cited in the argument, which it was contended were adverse to the ground of our decision, I think it better to state what I consider to be the principle of those decisions, and to point out how far that principle is applicable to such cases as this. Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract; that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Waite* v. *Baker*, *Ellershaw* v. *Magniac*, and *Gabarron* v. *Kreeft* (*ubi sup.*), in each of which cases the vendors had dealt with the bills of lading for their own benefit, the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for, or had paid, the price. So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft or payment or tender of the price is conditional only, and until such acceptance or payment or tender the property in the goods does not pass to the purchaser; and so it was decided in *Turner* v. *The Trustees of Liverpool Docks*, *Shepherd* v. *Harrison*, and *Ogg* v. *Shuter* (*ubi sup.*). But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or

tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which according to the intention of the parties is necessary to transfer the property is done, and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser. Apply these principles to the present case. Pappa did not attempt to make use of the power of disposition which he had under the bill of lading for the purpose of entirely withdrawing the cargo from the contract. He dealt with it only for the purpose of securing payment of the price. It is expressly stated in the special case that Mr. Corkji, who acted for Pappa, discounted the said bill of exchange at the agency of the defendants' bank, and with the bill of exchange handed them the bills of lading, saying that they were to be sent to Constantinople, and given up to the plaintiff on payment of the bill of exchange at maturity. Under these circumstances there was an appropriation by the vendor of the cargo subject only to payment of the price; this was tendered, and as it is conceded that the defendants were wrong in claiming anything more, the plaintiff, the purchaser, had done or offered to do all that was incumbent on him to make the appropriation absolute, and the property vested in him.

BRETT, L.J. concurred.

Judgment affirmed.

Solicitors for plaintiff, *Stocken* and *Jupp.*

Solicitor for defendants, *Clements.*

Thursday, Feb. 14, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

CUNNINGHAM *v.* DUNN AND ANOTHER.

Charter-party—Shipowner's liability—Action for not loading—Prevention by act of foreign government.

Plaintiff and defendants agreed by charter-party that defendants' ship, then on her way to Malta, should, "after loading dead weight at Malta for owners' benefit," sail to a first-class Spanish port as plaintiff should order, and load light cargo for plaintiff. A first-class port was described in the charter-party as "any port that a steamer with cargo from a foreign part can load at by Spanish law without risk of detention by customs authorities." Defendants had contracted to load government stores at Malta, and plaintiff knew this. The ship was ordered to Valencia, but on her arrival was unable to load there because the Spanish customs regulations prohibited ships carrying Government stores from loading. A ship carrying any other kind of dead weight could have loaded.

In an action for breach of the charter-party in not loading,

Held (affirming the judgment of Lord Coleridge, C.J.), that plaintiff was not entitled to recover.

APPEAL from the judgment of Lord Coleridge, C.J.

The action was brought by the plaintiff, a merchant, against the defendants, owners of the steamship *Rainton*, for not loading a cargo pursuant to a charter-party made between the plaintiff and the defendants, by which the ship was described as "now on her way to Genoa and Malta," and it was agreed that she should

With all convenient speed, after loading dead weight at Malta for owner's benefit, sail and proceed to Messina, and one first-class Spanish port in the Mediterranean, or two first-class Spanish ports in merchant's option, or one Spanish port only, orders to be given at Malta twenty-four hours' after steamer's arrival there, or so near thereto as she may safely get, and there load from the factors of the said affreighter the remaining measurement space of light cargo only, including all descriptions of fruit, cargo not to exceed 400 tons, nor to be less than 300 tons, which the said affreighter binds himself to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded, shall therewith proceed to a safe place in the river Thames, London, as ordered on arrival at Gravesend, or so near thereto as she may safely get, and deliver the same on being paid freight . . . . By first class is meant any part that a steamer with cargo from a foreign port can load at by Spanish law, without risk of detention by customs authorities.

The statement of claim further alleged that orders were duly given at Malta to sail to Valencia, and there load; that Valencia is a first-class Spanish port within the meaning of the charter-party, that the plaintiff had his cargo ready to be loaded at Valencia, and that the said steamship did not load the said cargo at Valencia, but, by and through the default and breach of agreement of the defendants, neglected to do so.

The statement of defence alleged that

At the time the said charter-party was entered into, the said steamship was on her way to Malta, and bound to load there certain military stores for the English Government as the plaintiffs then well knew, and the words in the said charter-party "after loading dead weight at Malta," referred to and were intended by the plaintiff and defendants to refer to the said military stores, and the defendants did not know of anything to prevent the fulfilment of the said charter-party, and did not know of anything to prevent the said steamship with the said military stores on board, loading merchandise at any first-class Spanish port and the said steamship in pursuance of the said charter-party loaded the said military stores at Malta. And the customs' regulations which were in force at Valencia during all the times mentioned in the statement of claim, prohibited merchandise at that port from being put on board vessels having military stores on board, and by the regulations in force at Valencia at the times aforesaid, any attempt to load at Valencia merchandise on board a vessel having military stores on board would expose such vessel to the risk of detention and to detention by the customs authorities there, and by reason of the premises, Valencia was not a first-class Spanish port within the true intent and meaning of the said charter-party and the agreement therein contained.

The said steamship proceeded to Valencia, and was ready to take on board there the agreed cargo, but the plaintiff was prohibited by the custom's authorities there from loading the same, and neglected to load the same.

Even if the said steamship was not ready to take on board the agreed cargo, the plaintiff suffered no damage thereby, because, if the steamship had been ready, the plaintiff would have been prohibited and prevented by the customs authorities of the said port from loading the said cargo on board the said steamship, and was, in fact, prohibited and prevented by the said customs authorities from loading the said cargo on board the said steamship, and from performing the said charter-party on his part.

At the trial, which took place at Guildhall on the 5th Dec. 1877, before Lord Coleridge, C.J., and a special jury, it was proved that the *Rainton* loaded military stores at Malta and sailed to Valencia, in order to load there pursuant to the charter-party. She arrived at Valencia on the 16th Nov. 1875. At that time vessels, having military stores on board, were prohibited by the Spanish Custom-house regulations from loading at Spanish ports. The plaintiff's agent at Valencia, the British Vice-Consul at Valencia, and the

British Ambassador at Madrid endeavoured to obtain permission from the Spanish Government for the *Rainton* to load at Valencia, but although she was permitted to anchor in the port, permission to load was refused, and she was obliged to go to sea again, and the cargo which had been intended for her had to be shipped by other vessels, and the plaintiff sought to recover damages for extra freight expenses, and loss of commission thereby sustained.

In answer to questions left to them by Lord Coleridge, the jury found that the plaintiff did know that the dead weight to be taken by the *Rainton* at Malta was military stores.

That he knew it, first, when the charter-party was entered into, and, secondly, when he ordered the *Rainton* to proceed to Valencia. That he knew this fact would prevent the loading of the other cargo and subject the ship to embargo, and that he knew it when he ordered the ship to Valencia.

That the defendant knew these facts subsequently to receiving a telegram from the Foreign Office. (This was after the *Rainton* had gone to Malta.)

There were other findings not material to this report.

Lord Coleridge, C.J., gave judgment for the defendants, and the plaintiff appealed.

Murphy, Q.C. and *Bray* for the plaintiff.—Judgment was entered for the defendants wrongly on the construction of the charter-party, and on the findings of the jury. The parties must be bound by the written contract into which they have entered, and no evidence to show that there was a contract to carry Government stores from Malta can be admissible. A difficulty which was in existence before the contract was entered into, cannot excuse performance; it is only something arising after the contract which can have that effect. Here the defendant should have provided against the difficulty beforehand:

Paradine v. *Jane*, Aleyn, 27;
Medeiros v. *Hill*, 8 *Bing.* 231.

These cases are in point here, and *Harris* v. *Dreesman* (23 L. J. 210, Ex.) is not.

Cohen, Q.C. (*Gainsford Bruce* with him) for the defendants.—*Macdonald* v. *Longbottom* (1 E. & E. 977, 987; 28 L. J. 293, Q. B.; 29 L. T. 256, Q. B.) is in favour of the defendants; and so is *Ford* v. *Cotesworth* (3 Mar. Law Cas. O. S. 190; 19 L. T. Rep. N. S. 634; L. Rep. 4 Q. B. 127; in the Exchequer Chamber, 3 Mar. Law Cas. O. S. 468; 23 L. T. Rep. N. S. 165; L. Rep. 5 Q.B. 544). In that case Blackburn, J., in delivering the judgment of the Court of Queen's Bench, says (L. Rep. 4 Q. B. at pp. 133, 134): "We agreed that whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances. And if some unforeseen cause, over which he has no control, prevents him from performing what he has undertaken within that time, he is responsible for the damage. But where the act to be done is one in which both parties to the contract are to concur and both bind themselves to the performance of it, there is no principle on which, in the absence of a stipulation to that effect, either expressed by the parties or to be collected from what they have expressed, the damage arising from an unforeseen impediment is to be cast by law on the one party more than on the other; and consequently we think that what is implied by law in such a case is, not that either party contracts that it shall be done within either a fixed or a reasonable time, but that each contracts that he shall use reasonable diligence in performing his part. It is on the application of this principle to a charter-party that the present question depends. We think that delivering cargo is as much the duty of the shipowner as of the merchant; and consequently that the contract implied by the law, in the absence of any stipulation in a charter-party, is that each party shall use reasonable diligence in performing his part of the delivery at the port of discharge, the merchant being ready to receive in the usual manner, and the owner, by his captain and crew, to deliver in the usual manner." This judgment, which was affirmed by the Exchequer Chamber, proceeds on the consideration that loading and discharging a ship is something to be done by both parties to the contract. If that is correct it follows that the defendants here cannot be liable.

Murphy, Q.C., in reply referred to *Stanton* v. *Richardson* (1 Asp. Mar. Law Cas. 449; 27 L. T. Rep. N. S. 513; L. Rep. 7 C. P. 421), affirmed in the Exchequer Chamber (2 Asp. Mar. Law Cas. 288; 30 L. T. Rep. N. S. 643; L. Rep. 9 C. P. 390.)

BRAMWELL, L J. —I think the judgment ought to be affirmed. I think there was no default in either party at Valencia. The case when the ship was at Valencia would be governed by *Ford* v. *Cotesworthy* (*ubi sup.*), for I think both parties were ready there. A point was made by Mr. Murphy that it was the fault of the ship. He says she warranted that she was fit to take in cargo, but she did not so present herself at Valencia. I know of no authority for that; I will deal with the charter-party. It describes the ship as "now on her way to Genoa and Malta," and goes on to provide that she "shall with all convenient speed, after loading dead weight at Malta for owner's benefit, sail and proceed" to certain ports named, and load cargo for the affreighter. This provision was introduced to protect the shipowner, by entitling him to load dead weight for himself before he became liable to fulfil his engagement with the charterer, and it does show that the ship is going on a voyage to Malta to load dead weight; there is no restriction as to the nature of the dead weight, and I think the fair construction is that the ship was going on her voyage there, and there is no general warranty. It may, however, be suggested that, supposing there were no general warranty of that sort, still the charterer would be entitled to say to the shipowner, "you have no right to disable yourself from performing your part of the contract." I think there is some weight in that contention, but there are two observations to be made in answer to it; first, the defendants did not know that there was an impediment, for there was evidence that they thought what they did could be safely done; it is said they had no right to risk it, but I am not so clear as to that, for I do not think we can put in the words "Government stores," which do not appear on the face of the charter-party. But, secondly,

the plaintiff gave a licence to the defendants before the charter-party was entered into, to do what they did, and though strictly speaking, evidence of the giving of that licence prior to the charter-party might not be admissible, still it was a continuing licence, and the plaintiff knew how matters stood, and sent the ship to the Spanish port without objection. I think there was a joint inability, that there was no refusal by the defendants at Valencia, that there was no warranty, and that if it can be said the defendants had no right to disable themselves from performing their part of the contract, the answer is that they did not know they were disabling themselves, and they had a licence from the plaintiff to do what they did, and therefore the judgment must be affirmed.

BRETT, L.J.—I am of opinion that, under a charter-party in the ordinary form to load at a particular port, the shipowner is bound to have his ship at that port ready to receive the cargo, and if he is prevented by any unforeseen cause (for instance, capture, where there is no exception as to capture), he would fail to perform what he had undertaken, and would be liable to an action at the suit of the charterer. The charterer is bound to have the cargo ready within a certain time, and if he is prevented by any misfortune which is attributable to the cargo itself, that is his misfortune, and he is liable to the owner, which being the liability under an ordinary charter-party, it is clear that there can be no action either way without proving that the plaintiff was ready and willing to perform his part of the undertaking. Now, what is the condition here? According to the charter-party, the ship was on her voyage to Genoa and Malta, and was to proceed to Messina or some Spanish port or ports to load a cargo for the plaintiff; but then there is an unusual term—"with all convenient speed after loading dead weight at Malta for owner's benefit." The first question is, what is the proper interpretation of this clause? I would go further than Bramwell, L.J.; for the purpose of applying the terms in the charter-party, I think we may receive evidence of the facts that were known to the parties, to show that they were negotiating with reference to particular facts. Here the facts were that the shipowners were under a contract to load military stores at Malta, and the parties were negotiating with reference to known facts, one of which was that dead weight included military stores; so there is no reason why any words should be put in, except for this purpose, to show that as between the plaintiff and the defendants the ship was to be allowed to take military stores on board. No evidence could be given to show that military stores were not dead weight, but measurement goods, for that would be to contradict the words of the charter-party; but the words include stores, and *Macdonald* v. *Longbottom* (*ubi sup.*) is an authority to show that the view I have stated is correct. I therefore think that on the charter-party it was agreed that the ship might take military stores on board, and carry them to England, that there should be a ship ready to take cargo at Valencia, but she was to be a ship with military stores on board. The defendants according to the evidence, did take the ship to Valencia for the purpose of taking cargo on board, and, except for her having the military stores on board, it is admitted that she was ready for cargo. The defendants up to that time had done nothing which they were not entitled to do, but by reason of the law of Spain, and the refusal of the Spanish Government to permit the ship to load, the defendants were not ready to take the cargo, and by reason of the same law and the same refusal, the plaintiff was not ready to put the cargo on board. It seems to me, therefore, that the parties were prevented by the Spanish Government from carrying out the contract into which they had entered, and I think that *Ford* v. *Cotesworth* (*ubi sup.*), though not exactly a parallel case, is nearly in point; there it was decided that where both parties were bound by charter-party to use due diligence in unloading, and owing to a threatened bombardment of the port where the ship was discharging, the authorities refused to allow the unloading to proceed for several days, the charterer was not liable for the delay; that is only another way of saying that where both parties are bound to use reasonable diligence, if both are not ready because they are prevented, neither party can maintain an action against the other. I think, therefore, the judgment should be affirmed.

COTTON, L.J.—We must take it, for the purpose of this argument, that the plaintiff had a cargo which he was ready to put on board if he could when the defendants' ship was brought to Valencia, but he was subject to a prohibition. The plaintiff was ready to perform his part of the contract, and the ship was there ready for cargo, but the Spanish Government prevented the owners of the ship (the defendants) from taking the cargo, and prevented the owner of the cargo (the plaintiff) from putting it on board, because the military stores were on board the ship, so that the Spanish Government would not allow the cargo to be loaded. If there were nothing in the contract to the contrary, I should think that would be a breach, because the defendants prevent themselves from being ready and willing to carry out their undertaking. But we must look at the contract, and I think that parol evidence is admissible, not to explain the meaning of particular words, but because we must learn what the facts of the case are, and say what the true construction of the charter-party, dealing with those facts, is. The ship was on her way to Malta under a contract to take in cargo, and both parties knew the nature of the cargo to be such that unless the Spanish Government consented to the loading of the ship at Valencia, it would be impossible for her to load. The contract was for the whole capacity of the ship, subject to the cargo which was to be taken on board at Malta, and all that the shipowners have done which would tend to induce the Spanish Government to prevent the loading of the ship is done under the contract, and, therefore, the plaintiff cannot say to the defendants "you are in default so as to be answerable to me for not loading." The act of the Spanish Government would excuse both parties, unless either were in default, but the defendants are not in default, and, therefore, they are excused, and are not liable to the plaintiff, and the judgment ought to be affirmed. *Judgment affirmed.*

Solicitors for plaintiff, *Lowless* and *Co.*
Solicitors for defendant, *Miller* and *Smith.*

May 13 *and* 14, 1878.

(Before Brett, Cotton, and Thesiger, L.JJ.)

Wingate, Birrell, and Co. *v.* Foster.

Marine insurance—Insurance to a place, while there, "and until again returned"—Risk covered by policy—Deviation.

Steam pumps were insured "at and from Ardrossan to the Alexandra steamer, ashore in the neighbourhood of Drogheda, and while there engaged at the wreck, and until again returned to Ardrossan by the Seamew salvage steamer . . . including all risk . . . while at the wreck."

After the Alexandra was raised, she made for Belfast Lough, which is not the way to return to Ardrossan, the pumps remaining on board her; on this voyage she sank, and the pumps were lost.

Held (affirming the judgment of Field J.), that the loss was not covered by the policy.

Appeal from the judgment of Field, J.

The action was brought to recover for a total loss on a policy of insurance on some steam pumps, valued at 2000*l*. The risk was described in the policy as follows: "At and from Ardrossan to the *Alexandra* steamer, ashore in the neighbourhood of Drogheda, and while there engaged at the wreck, and until again returned to Ardrossan by the *Seamew* salvage steamer, beginning the risk from the loading on board the said ship or wreck, including all risk of craft, and for boats to and from the vessel and while at the wreck."

The pumps were taken on board the *Seamew* from Ardrossan to the place where the *Alexandra* was lying. The pumps were put on board the *Alexandra*, her bottom was platformed, and the water pumped out of her, and she was raised. It was then found necessary to make for the nearest safe port, and the *Alexandra* was taken in tow by two steam-tugs and made for Belfast Lough, with the *Seamew* in attendance, the pumps remaining on board the *Alexandra*. On the voyage to Belfast Lough the *Alexandra* sank with the pumps on board. At the trial these facts were stated in the opening speech of the plaintiffs' counsel, and were admitted.

Field, J. ruled that the loss was not covered by the policy, and gave judgment for the defendant.

The plaintiffs appealed.

Cohen, Q.C. and *J. C. Mathew* for the plaintiffs.—The voyage to Belfast Lough was undertaken in order to carry out the purpose for which the pumps were used, and it was a necessary voyage; it must have been within the contemplation of the parties, and the risk is covered by the policy:

Rodocanachi v. *Elliott*, 2 Asp. Mar. Law Cas. 21, 399; 28 L. T. Rep. N. S. 840; L. Rep. 8 C. P. 649; affirmed in the Exchequer Chamber, 31 L. T. Rep. N. S. 239; L. Rep. 9 C. P. 518.

Butt, Q.C. and *Macleod* for the defendants.—On the facts stated in the opening speech on behalf of the plaintiffs, and on the true construction of the policy, the pumps, while on board the *Alexandra* on the voyage to Belfast Lough, were not covered by the policy:

Pearson v. *The Commercial Union Assurance Company*, 2 Asp. Mar. Law Cas. 100; 3 Asp. Mar. Law Cas. 275; 9 L. T. Rep. N. S. 442; 15 C. B. N. S. 304; 33 L. J. 85 C. P.; affirmed in the Exchequer Chamber, 29 L. T. Rep. N. S. 279; L. Rep. 8 C. P. 548; and in the House of Lords, 35 L. T. Rep. N. S. 445; L. Rep. 1 App. Cas. 498.

J. C. Mathew in reply.

Brett, L.J.—I confess that, if I had had to try this case, I should hardly have ventured to do what my brother Field did, but should have been inclined to leave the case to the jury, and reserve any point of law that might arise; but, having heard the case discussed in the argument which has taken place before us, I am now of opinion that my brother Field was right, and that no question could have been left to the jury the result of the answer to which could have been to bring the case within the terms of the policy. In order to explain how I come to the conclusion that this case is not within the terms of the policy, I must state what, in my opinion, is within those terms. I think that the words by which the loss intended to be covered by the policy is shown mean loss at any part of the voyage described, either on the ship or on the wreck. But the pumps could not be on the wreck on the voyage described. The voyage to the wreck is thus described: "At and from Ardrossan to the *Alexandra* steamer, ashore in the neighbourhood of Drogheda." The policy then describes what is not part of the actual voyage, but is part of the voyage insured, as in *Rodocanachi* v. *Elliott* (*ubi sup.*); the second part of the risk is described in these words, "and whilst there engaged at the wreck." Taking the other part, the policy would have covered a loss which might occur on the voyage to the wreck; but it seems that that part is confined to the place where the wreck was, and does not extend to any other place; for instance, after the ship has left the place where she was wrecked. The risk is not to cease the moment the wreck is afloat; but it is to continue (so far as these words are concerned) only at that place where the wreck lay before she was raised. The only doubt which I have had was whether, on proof of certain facts, the next words in the policy might not have been held to cover the loss. I have a strong opinion that they would have covered it if the wreck had been taken back to Ardrossan direct. There was a good insurance on board the ship and on board the wreck; it was not confined to the time when the pumps were on board the steamer. The words are, "and until again returned to Ardrossan." If the words were, "and back to Ardrossan," it would be clear that they only meant on the voyage back; but these words are larger, and might be construed so as to express the view of time; but they may cover the voyage only, and they do not naturally describe any other voyage, and in order to hold that they cover the risk in the present case we must say that they would cover another voyage. But what would that voyage be? It is undescribed as to extent, and it is undescribed as to direction. Then are we entitled so to construe the policy as to add a voyage which the words do not of themselves include? It seems to me we cannot do so. In *Rodocanachi* v. *Elliott* (*ubi sup.*) no voyage was added. In that case there was only one way to get to London, whichever was used. What the court did was only applying the description to the journey. In *Pearson* v. *The Commercial Union Insurance Company* (*ubi sup.*) there was a term in the policy "with liberty to go into dry dock." There was there a description of the track which the vessel was to follow, and it was only said that the policy would cover every usual mode of following that track, if it would not cover every necessary mode; but anything that is usual, and I

should say anything that is necessary, must not be added if not covered by the words of the policy. Therefore, even if it were proved that it was usual for pumps to be carried as these were, or if it were proved that it was neeessary, it is not covered by the words of the policy. Therefore, assuming all that is contended for as to its being necessary and usual were proved, the voyage on which the loss took place would be a part of the operation performed in a locality which was not described in the policy, and therefore, if we held that the risk covered the loss, we should add to the policy something ,to be done in a place of which there was no description. Therefore, we are called upon to do what the court cannot do, and my brother Field was right. As to the question of our power to order a new trial, it is unnecessary to give any opinion.

Cotton, L.J.—The case on the part of the plaintiff is put in two ways. We are asked either to enter a judgment for the plaintiffs, or to direct a new trial in order to find the facts. The real question is, what have the defendants undertaken? On the question of construction, in the case of this policy, as in the case of every other instrument, we must have before us the facts which were before the parties, not in order to add anything to the written document, but in order to ascertain what was intended; and this is especially so in the case of mercantile documents. The first question is as to construction, and we must see whether without any new facts the risk is within the contract which has been entered into between the parties. I think there is nothing in the fact that the *Seamew* is described as a salvage steamer. Three are three classes of risks insured against. The first is the voyage to the *Alexandra* steamer, which was ashore near Drogheda, and the second is for the time while there on board the wreck. I am of opinion that we should do violence to the contract if we were to hold that the description included this risk, for it is governed by the words "and there," &c.; that is, at the place where the wreck was lying. The third class of risk is "and until again returned to Ardrossan." If the plaintiff can make out that the risk is covered, it must be on those words. It was argued that there was nothing against it, but Mr. Cohen must show that it was within the contract. The vessel was to return to Ardrossan, but on the statement made on behalf of the plaintiffs, the risk and the voyage on which the loss took place were not undertaken in order to return the pumps to Ardrossan, but for another purpose. It is like the case in the House of Lords (*Pearson* v. *The Commercial Union Assurance Company* (*ubi sup.*): the ship had abandoned the return to Ardrossan,and had undertaken a different voyage. Then ought we to send the case back for a new trial? I should be very unwilling to do so in a case like the present, where both parties have come to this court on the statements and admissions which were made at the trial, and have put the case on the construction of the policy without further evidence. I do not say that under some circumstances we might not direct a new trial; but here, in the exercise of our discretion, I think we ought not to do so. In my opinion the appellants have not shown anything to lead to a different construction of the policy from that at which we have arrived. It is said that if you insure the end you insure the means by which the end is to be attained, and that we must see what is usual for the transit. It is contended that this was so in *Rodocanachi* v. *Elliot* (*ubi sup.*), where the insurance *primâ facie* covered only sea risk, but was held to include a risk on land as well. There it was right to admit parol evidence. The transit was partly by land, and it was well known that the carriage from Marseilles was by that way only; but here it is not shown that the risk was in any way one which the policy could be held to cover. Therefore in my opinion the judgment appealed from was right.

Thesiger, L.J.—This case comes before us on appeal on facts stated at the trial and admitted, and two questions have been raised—first, what is the reasonable inference as to the intention of the parties to be drawn from the facts; and secondly, what is the construction of the policy. Taking the opening in a liberal manner, it is only this: The steamer *Alexandra* was ashore near Drogheda and some arrangement, which is not before us, was made to send pumps to raise her. It is a common practice to platform vessels, in order to raise them; but a vessel might be raised without doing this. I can well imagine certain circumstances where, after a vessel has been raised it would be right to keep the pumps on board and use them during the voyage to the port of refuge; but it is a common practice to raise vessels by pumps and stop the leak, and then there is no necessity for the pumps to remain on board. Therefore it is impossible to gather on the facts that it was contemplated by the parties that the pumps should be used on the wreck and kept there until arrival at the port of refuge. The other question is whether, on the construction of the policy the parties have contracted that the risk should not only include the voyage to the wreck, and the time while the pumps were being used on the wreck, and the voyage from the place where the wreck was raised back to Ardrossan, but should also take in a voyage to another port, which was foreign to the course back to Ardrossan. It seems to me that by holding that they have so contracted we should be doing violence to the plain meaning of the policy; the words are clear and distinct, "at and from Ardrossan to the *Alexandra* steamer ashore in the neighbourhood of Drogheda." According to these words,the terminus of the voyage out was where the wreck was situated. Then came the words, "and while there engaged at the wreck." If it stood there, there can be no doubt that this case would not come within the terms of the policy. The latter part adds the words, "and until again returned to Ardrossan." The policy does cover the use of the pumps on the wreck, but only on the spot where the wreck was stranded; this is made plain by the words, "risk of craft, &c." Then there is the provision as to the return voyage. What is the meaning of this? The word "return" imports a place from which the ship has returned. We must take the words preceding, and, if we do so, it is the terminus of the voyage out. Stopping there, it is impossible to think that the return voyage might take the vessel out of her course. Two cases have been cited, but neither of them assists the plaintiffs. *Pearson* v. *The Commercial Union Assurance Company* (*ubi sup.*) is strongly opposed to their contention. It is argued there that the risk was in the contemplation of the

parties because it was usual and proper. The policy there covered loss by fire in the Victoria Docks and in the dry dock; and it was urged that the court might infer that it covered a further locality—that is, while going to and from the dry dock; it was found as a fact that it was an ordinary incident that the paddle wheels should be removed. Blackburn, J. says in that case in the Exchequer Chamber: "I do not think this is like the case of a voyage policy at all. The ship was insured while in the Victoria Dock or the dry dock, and probably while on her way between the two, going or returning. She was when lost moored in the Thames for purposes no doubt very usual and proper; but if the parties wished to cover the risk while she was so moored, they should have provided for it by appropriate words in the policy." (L. Rep 8 C.P. at page 551). In the House of Lords Lord Chelmsford says (L. Rep. 1 App. Cas. at page 506) "I agree with what was said by Mr. Justice Blackburn in the Exchequer Chamber that if the parties wished to cover the risk while the ship was so moored they should have provided for it by appropriate words in the policy. Whether the underwriters would have undertaken this risk it is impossible to say: as they were not aware that it would arise, there was of course no provision applicable to it." If they were not aware there, where it was usual to do what was done, the same reasoning applies even more forcibly to the present case. Lord Chelmsford then goes on to say, "It would be a strong implication to raise against the underwriters that they necessarily contracted by the policy to extend the locality to which the insurance against fire was expressly confined, upon the ground of a usual practice of dealing with large steam vessels under repair, which they did not know would have to be resorted to on the part of the assured. More especially is this the case when it appears that the whole work upon the paddle wheels might have been done in the Victoria Docks." This is entirely applicable here, and if any case could govern another where the decision turns on the words of a particular policy that case would govern this. *Rodocanachi* v. *Elliott* (*ubi sup.*) is distinguishable; there silk was insured from Shanghai to London, and several parts of the transit were mentioned in the policy, such as conveyance by the Messageries Imperiales and Marseilles; and evidence was given to show that it meant to include the land journey from Marseilles across France. Therefore, the evidence did not show what the parties contemplated as different from their words, but showed what the words imported, and what they were intended to include. Therefore, I am of opinion that the learned judge was right, and I see no reason for a new trial, if we have the power now to order one.

Judgment affirmed.

Solicitors for plaintiffs, *Hollams, Son,* and *Coward.*

Solicitors for defendants, *Waltons, Bubb,* and *Walton.*

Wednesday, Feb. 6, 1878.

(Before Cockburn, C.J., Bramwell, Brett, and Cotton, L.JJ.)

The Union Bank of London *v.* Lenanton.

Debtor and creditor—Sheriff—Sale of goods—Ship and shipping—Transfer—Bills of sale—British ship—Merchant Shipping Acts 1854 *and* 1862 (17 *&* 18 *Vict. c.* 104, *ss.* 18, 19, 55, 56, *and* 25 *&* 26 *Vict. c.* 63, *s.* 3)—*Bills of Sale Act* (17 *&* 18 *Vict. c.* 36) *s.* 7.

The owner of goods which are in the custody of the sheriff under a fieri facias may make a valid sale and delivery of possession of them to a purchaser.

D., a shipbuilder, being indebted to plaintiffs in a large sum, as security made an equitable assignment to them, dated 21st May 1875, *of all his right and interest in a steamship built for but not delivered to the Turkish Government, and retained by D. as having a lien on the vessel for its price. D. also agreed to execute any further assurance of the ship to plaintiffs which they might require. This assignment was not registered under the Bills of Sale Act, nor was the ship registered as a British ship under sect.* 19 *of the Merchant Shipping Act* 1854. *By an agreement dated 24th June* 1876, *D. agreed to sell to plaintiffs certain machinery, fixtures, and loose tools upon his business premises at a valuation, but this agreement was never signed by the parties to it. On July* 18, 1876, *the sheriff, under an execution issued upon a judgment obtained against D. by a creditor, took possession of the machinery, fixtures, and tools, and also of the steamship. On Aug.* 22, *plaintiffs (the sheriff's officer being still in possession), under an authority from D., took formal possession of the articles comprised in the agreement of June* 24, 1876. *Defendant, having obtained a judgment against D., a writ of fieri facias was issued, and on Sept.* 13, *a levy on the machinery, fixtures, tools, &c., was made under the writ. On an interpleader issue to try plaintiffs' right to the steamship, and to the machinery, &c., as against defendant, it was*

Held (affirming the decision of Pollock, B.), that plaintiffs had a good title to the ship, and to the machinery, &c., as against defendant, because (1) *the transfer of the ship by D. to plaintiffs, being within the exceptions in sect.* 7 *of the Bills of Sale Act, was effectual without registration under that Act, and the ship was not a British ship so as to require registration under sect.* 19 *of the Merchant Shipping Act* 1854. (2) *The possession taken by plaintiffs on Aug.* 22, *of the machinery, &c., constituted a sufficient actual acceptance and receipt to take the agreement of May* 21 *out of sect.* 17 *of the Statute of Frauds, and the sale by D. to plaintiffs of the machinery, &c., was valid, notwithstanding they were in the custody of the sheriff when plaintiffs took possession.*

Per Bramwell and Brett, L.JJ.—A transfer of a ship, which has not been registered as a British ship under sect. 19 *of the Merchant Shipping Act* 1854, *is good, although not made by bill of sale under sect.* 55 *of that Act.*

Appeal from a decision of Pollock, B,, on the trial before him (without a jury) of an interpleader issue directed to be tried by order of Field, J.

The material parts of the issue were as follows:

"The Union Bank of London affirms, and John Lenanton denies, that the leasehold premises called or known as the Ship-building Yard, at Cubitt Town, in the county of Middlesex, formerly in the occupation of Messrs. J. and W. Dudgeon, and now in the occupation of the said Union Bank of London, and which hereditaments are comprised, &c., and all buildings, machinery, and other fixtures erected on, or affixed to the said premises, the particulars whereof are specified in the list or schedule to be delivered to the defendant, and the paddle steamer *Edhem* being part of the goods and chatttels, on the 13th Sept. 1876, seized in execution by the sheriff of Middlesex under a writ of *fieri facias*, tested, &c., and issued out of the High Court of Justice, Common Pleas Division, for the having of a judgment of the said court recovered by the said John Lenanton, in an action at his suit against John Dudgeon, a person of unsound mind so found by inquisition, and Alexander John Dudgeon, William Leigh Dudgeon, and Robert Fletcher, committees of his estate, were at the time of the said seizure the property of the said Union Bank, as against the said John Lenanton; and it has been ordered by the Hon. Mr. Justice Field that the said question shall be tried by a jury," &c.

Messrs. John and William Dudgeon were partners in a ship-building business at Cubitt Town and Millwall, and the steamship *Edhem* was built by them for, and under a contract with, the Turkish Government, but was retained by the Messrs. Dudgeon in their possession until the price of it should be paid. On the 1st of April 1875, William Dudgeon died, leaving by will his share in the leashold premises of the firm and also the steamship *Edhem* to his brother John, and the business was carried on by John Dudgeon until the 18th Oct. 1875, when the firm suspended payment. About this time John Dudgeon became a lunatic, and was so found by inquisition, and committees of his estate were duly appointed.

The firm of John and William Dudgeon kept a banking account with the Union Bank of London, and prior to and at the death of William Dudgeon they were indebted to the bank in a sum of more than 38,000*l.*, being money that had been advanced to them from time to time upon the security of (amongst other securities) deposits of the leases, and deeds relating to the ship-building yard at Cubitt Town, and also leasehold property called the Sun Engine Works at Millwall. By an agreement, dated the 21st May 1875, John Dudgeon charged all the deeds and writings comprised in the schedule thereto with the repayment to the bank of a sum of 38,150*l.*, and the agreement proceeded:

And the said Jno. Dudgeon doth hereby charge all the hereditaments and premises comprised in the said deeds, writings, and evidences respectively, and all buildings, machinery, and other fixtures whatsoever which already have been, or during the continuance of this security shall be erected upon or affixed to the said hereditaments and premises, or any of them, together with all the estate and interests of the said Jno. Dudgeon, or of the firm of J. and W. Dudgeon in the said premises and fixtures with the payment to the said bank of the said sum of 38,150*l.*, and of the interest thereon after the rate aforesaid. And doth also agree at any time or times during the continuance of this security, upon the request of the said bank or their assigns, but at the cost of the said Jno. Dudgeon, to execute to the said bank or their assigns a legal mortgage of the said premises and fixtures, in such form and with such power of sale and other provisions as the said bank or their assigns may require for further securing the payment as aforesaid of the money which shall then be owing upon the security of this agreement, with interest for the same after the rate aforesaid. Provided always that nothing contained in this agreement, or in any mortgages to be executed in pursuance thereof, shall give to the said bank or their assigns any right or power to sever and sell apart from the hereditaments hereby charged, machinery, and other fixtures which now or hereafter shall be affixed to the said hereditaments or any part thereof respectively.

Then followed a schedule of the several leases and deeds referred to in the agreement.

By another memorandum of agreement of the same date John Dudgeon made an equitable assignment to the bank of all his and the firm's right and interest in the steamship *Edhem* as security for the repayment to the bank of the sum of 7000*l.* with interest, and John Dudgeon further charged all his and his firm's right and interest in the ship with the repayment of that sum and interest, and agreed to execute any such further assurance of the ship and of the 7000*l.* as the bank might require. Neither of the two agreements of the 21st May 1875 were registered under the Bills of Sale Act (17 & 18 Vict. c. 36), and the steamship *Edhem* was not registered as a British ship under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104, s. 19).

Shortly after the death of William Dudgeon a bill was filed in Chancery by the Sultan of Turkey to obtain possession of the *Edhem*. An administration suit had also been commenced as to the estate of William Dudgeon, and also a partnership suit against the executors of William by John Dudgeon, and on the 9th Nov. 1875 Robert Fletcher was appointed receiver in the suit.

In Jan. 1876 Robert Flether and the two sons of John Dudgeon (who had then been declared of unsound mind) were appointed committees in lunacy of his estate.

On the 24th June 1876 an agreement was entered into between the executors, the receiver, and the committees of the estate of John Dudgeon of the one part, and the Union Bank of the other part, by which, after reciting that the parties thereto were desirous of making a final settlement of all claims and matters whatsoever relating to the principal sum and interest owing to the bank, it was agreed that the committee should forthwith execute to the bank a legal mortgage of the ship-building yard at Cubitt's Town, and the Sun Engine Works, Millwall, and an absolute assignment of the machinery and other fixtures thereon. By the 4th clause of the agreement it was provided that:

The said committees and the said executor will sell to the said bank all (if any) machinery and other fixtures now in or upon the said Sun Engine Works and the said ship yard respectively, and not charged with the repayment of any part of the said principal sum and interest at a valuation to be made by two valuers or their umpire, one of such valuers being appointed, &c. Such valuation shall, as regards the said machinery and fixtures in and upon the said Sun Engine Works, proceed on the basis of the sale of a going concern; and as regards the said machinery and fixtures in or upon the said ship yard on the basis of an unreserved sale by public auction.

By clause 5 it was provided that.

The said committees and the said executor will sell to the said bank all the loose tools and other implements now in and upon the said Sun Engine Works, and specified in a valuation list lately made by Mr. F. Lewis, surveyor, at the price of 2500*l.*

Clause 6:

The said committees and the said executor will, at their own expense, assign absolutely to the said bank, in such manner and form as the said bank shall require, all the interest of them or either of them, or of the said J. Dudgeon, or the estate of the said W. Dudgeon in the steamship *Edhem*, and in all payments and moneys which may be received in respect of the same from the Turkish Government, or from any other person or persons whatsoever.

The said committees and the said executor respectively will also take or concur in taking any proceedings in the suit of *The Sultan of Turkey* v. *The Union Bank of London*, which the said bank may require for the perfection of its title to or possession of the said premises or any part thereof.

The sum of 2500*l.* mentioned in clause 5 was before the next-mentioned facts paid by the bank.

This agreement was never signed by the parties to it, but it was confirmed by the Master in Lunacy on June 29th.

On the 16th July a creditor named Wilcox obtained a judgment against John Dudgeon; and on July 18th execution was issued, and the sheriff took possession of the shipbuilding yard, fixtures, and plant, and also of the ship *Edhem*, which was then in a dock forming part of the shipbuilding yard undergoing certain alterations after having taken her trial trip.

On the 22nd Aug. the Union Bank, under an authority from the receiver and committee, took formal possession under the agreement of the 24th June of everything comprised in clause 4 of that agreement, and took into their service the people in charge of the yard and works. At that time the sheriff's officer remained in possession. At that time all the instalments payable by the Turkish Government for the *Edhem* except the last had been paid, but the Union Bank retained the ship under the assignment for this last instalment and other moneys due in respect of other ships. The above-mentioned action of *The Sultan of Turkey* v. *The Union Bank* was brought to compel the delivery of the *Edhem*.

On the 2nd Sept. 1876 the defendant obtained a judgment against John Dudgeon for 870*l.* On the 12th Sept. a writ of *fieri facias* was issued, and on the 13th a levy was made.

On Sept. 29th the interpleader order before set out was obtained, and the 870*l.* was paid into court to abide the event.

On the hearing of the interpleader, Pollock, B. gave judgment for the plaintiffs, but granted a stay of execution to allow the defendant to appeal, which he now did.

By 17 & 18 Vict. c. 104, s. 18 (the Merchant Shipping Act 1854) it is enacted that:

No British ship shall be deemed to be a British ship unless she belongs wholly either to (1) natural born British subjects, or (2) persons made denizens by letters of denization, or naturalised by or pursuant to any Act of the Imperial Legislature, or by or pursuant to any Act or ordinance of the proper legislative authority in any British possession; or (3) bodies corporate established under, subject to the laws of and having their principal place of business in the United Kingdom, or some British possession.

By sect. 19:

Every British ship (with certain exceptions therein specified) must be registered in manner thereinafter mentioned, and no ship thereby required to be registered shall unless registered be recognised as a British ship; and no officer of customs shall grant a clearance or *transire* to any ship hereby required to be registered for the purpose of enabling her to proceed to sea as a British ship, unless the master of such ship, upon being required to do so, produces to him such certificate of registry as is hereinafter mentioned, and if such ship attempts to proceed to sea as a British ship without a clearance or *transire*, such officer may detain such ship until such certificate is produced to him.

By sect. 55:

A registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale, and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar.

By sect. 57:

Every bill of sale for the transfer of any registered ships, or of any share therein, when duly executed shall be produced to the registrar of the port at which the ship was registered, together with the declaration hereinbefore required to be made by a transferee, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale, and shall endorse on the bill of sale the fact of such entry having been made, with the date and hour thereof; and all bills of sale of any ship, or shares in a ship, shall be entered in the register book in the order of their production to the registrar.

By 25 & 26 Vict. c. 63 s. 3, it is declared that The expression "beneficial interest," whenever used in the second part of the principal Act, includes interest arising under contract or other eq itable interests, and the intention of the said Act is that without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property.

By the Bills of Sale Act (17 & 18 Vict. c. 36), s. 7, it is enacted that the term "bill of sale" under that Act shall not include (*inter alia*) "transfers or assignments of any ships or vessel or of any share thereof."

Butt, Q.C. and *Witt* for defendant.—There was not a sufficient receipt and acceptance of the goods comprised in clauses 4 and 5 of the agreement of the 24th June 1876 to take the contract out of the Statute of Frauds. *Benthall* v. *Burns* (4 B. & C. 423) is in point. There it was held that the acceptance of a delivery order by the vendee of wine was not a sufficient acceptance of the wine to satisfy the statute. The property in the goods never passed to the vendee until long after the 13th Sept., when the levy was made, because the sheriff's officer, being in possession, could not be the vendor's agent to hold the goods for the vendee. The goods are *in custodia legis*, and the owner, though no doubt he has a special property in them, cannot give possession to his vendee:

Benjamin on Sales, 2nd edit. 228, 229;
Gillett v *Hill*, 2 Cr. & M. 530;
Ex parte Mutton; *Re Cole*, L. Rep. 14 Eq. 178; s. c. 41 L. J. 57, Bank;
Giles v *Gover*, 9 Bing. 128.

As to the transfer of the *Edhem*, the vessel should have been registered under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 154), pt. 2, ss. 18 and 19. The *Edhem* was a "ship," although not completed, and belonged to a British owner. The assignment of her was therefore void. Sect 7 of the Bills of Sale Act 1854 defines "bills of sale," but does not include transfers or assignments of any ship or vessel. By that expression is meant "statutory transfer," otherwise the mischief aimed at by the Bills of Sale Act would still exist. Therefore, if the ship is not registered under the Merchant

Shipping Act, the Bills of Sale Act applies, and the transfer should have been registered under it. The two Acts are intended to be supplementary to one another. The assignment does not purport to be an actual transfer: it is only by way of equitable charge. It is more within the words in the Act—"declarations of trust without a transfer and other assurances."

Holl, Q.C. and *J. P. Aspinall*, for the plaintiffs, were directed to confine themselves to the question of whether the exception in the Bills of Sale Act did not apply only to transfers of ships already registered under the Merchant Shipping Act.—This is not a "ship" within the meaning of the Merchant Shipping Act. She was never intended to be owned by a British subject. Dudgeon only treated her as his own in the capacity of builder, and the only interest he parted with was the builder's lien upon her. The Sultan of Turkey was the real owner. She was clearly a "ship" within the exception in the Bills of Sale Act, the words of which are general.

Cockburn, C.J.—I am of opinion that in this case the judgment of the court below should be affirmed.

It is clear that the Messrs. Dudgeon, and after the death of one of them and the lunacy of the other, the executors and committee in lunacy were indebted to the plaintiff's bank in a very large sum. The bank desired to have security, and in consequence this agreement of the 21st May 1875, and the bill of sale of the ship, also dated the 21st May 1875, and the agreement of the 24th June 1876, between the Dudgeons and the Banking Company were entered into. The first question is as to the effect of the fourth and fifth articles of the agreement of the 24th June 1876. Now it is quite clear that it was intended by the fourth and fifth articles to transfer by way of sale the Dudgeons' property in, first the machinery and fixtures then on the Sun Iron Works and Ship Yard respectively, and next in the loose tools and implements in the Sun Engine Works. This agreement having been entered into, a creditor of the Dudgeons, named Wilcox, sends in an execution under a *fi. fa.* against the goods of the late firm, and a sheriff's officer took possession of the articles comprised under article 4. That being the state of things, the plaintiffs, under the authority of the agreement, entered upon the premises, and, with the assent of the vendors or some of them, did all that they could towards taking possession. They did what would certainly, independently of the question of the execution, amount to a taking possession sufficient to satisfy the Statute of Frauds.

The question then presents itself whether the possession of these goods by the sheriff was sufficient to prevent the possession being taken by the vendees. I think it was not. It is, I think, a fallacy to say that goods are in the possession of the sheriff. They are in the custody of the law, and of the sheriff's officer as representing the law. That is possession undoubtedly as against a wrong doer who might seek to divest the sheriff's officer of any portion of the goods seized; but I think it is custody only so far as the real owner of the goods is concerned. Until the goods are sold under the authority of the law they are in the possession virtually of the owner, at all events as respects everyone except the execution creditor or the officer of the law who holds the goods under the *fi. fa.* It must be remembered that sect. 17 of the Statute of Frauds provides especially for the protection, not of sellers, but of buyers. That section requires that there shall be an actual receipt of the whole or part of the goods before the seller is entitled to say to the buyer, "You have bought goods of me; complete your contract." If the buyer does anything which virtually amounts to a receipt of the goods, I am of opinion that he is within the protection of the Statute of Frauds, and if the buyer goes to the spot where the goods are, and with the assent of the seller takes possession either actually or constructively of the goods, it amounts to a receipt of the goods.

But we are also of opinion that the agreement to sell under the 4th article of the agreement, and the agreement to sell under the 5th article, though they relate to different fixtures and machinery, must be taken as one entire contract. Therefore the acceptance of the thing sold under the 5th article would satisfy the statute of Frauds with respect to the whole contract. But no difficulty arises under the 5th article. The difficulty is as to the sale of goods under the 4th.

The main difficulty however is as to the assignment of the *Edhem*. That professes to be an assignment by way of bill of sale; but the bill of sale has not been registered. Therefore if the bill of sale comes within the Bills of Sale Act, the assignment would be bad for want of registration. I am of opinion, however, that the exception in the Bills of Sale Act clearly shows that it was not intended to apply to ships. Next comes the question whether the requirements of the Merchant Shipping Acts are satisfied, or whether this was a vessel which required registration as a British ship, and, if so, whether, the vessel not being registered, a bill of sale which purports to pass the property in an unregistered vessel is valid. I confess that I had at first doubts of its validity, because the Shipping Act expressly requires that a British ship shall be registered, and then goes on to deal with the mode of passing property in a British ship by sale, providing in effect that before you can pass the property in a British ship you must necessarily register her in order to bring her within the operation of sect. 57, which requires that a transfer should be registered. But I do not think our decision should depend upon that. I do not think this was a British ship within the contemplation of the Act. She was built, it is true, by a British owner, and on looking at the contract between the British owner and the foreign purchaser for the manufacture and transfer of the vessel it appears to me that the property in the ship was not to pass from the builder to the purchaser until she was actually delivered at the spot where the delivery was to take place. Therefore in a sense, she was a British ship, being the property of a British owner until delivery; but in my opinion she was not a British ship within the contemplation of the statute. The statute was intended to apply to ships permanently the property of a British owner. That was not the case with this ship, for as soon as she crossed the sea she was intended to be transferred to a foreign owner, and from that hour was never intended to be a British ship. I therefore do not think she is within the Act which refers to British ships.

I therefore concur with the rest of the court in thinking that the judgment of Pollock, B. was right, and must be affirmed.

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

The first question argued before us was whether the property in the articles comprised in clause 4, passed by virtue of the contract, and by virtue of that which took place when the agents of the bank went down to take possession, because no doubt there was some sort of a taking possession, and the plaintiffs were entitled to add it to the agreement. I am of opinion that the property did pass, for the reason that I have stated before in the course of the argument, that this was one contract. It was a contract by which in effect the plaintiffs, the bank, became purchasers of a going concern expressly so found, and they were to take everything that constituted a part of that going concern, and unless they got one part, there was no reason for saying that they would have taken the other part, and, although it is a rule that where something remains to be done under the contract the property does not pass, that rule is admitted to exist only where there is nothing to show a contrary intention. Now I am of opinion here that both these parties intended that the property should pass, or, at all events, that all the articles comprised in clause 4 should pass, although it was necessary to take some steps to ascertain the precise amount which was to be paid. That being so, the Messrs. Dudgeon, the executors, and the committees, having agreed that the plaintiff should take and have possession, and as they did take and have possession, I cannot but agree that the property did pass; and I am clearly of opinion that the property mentioned in clause 4 did pass.

Then the question arises also whether there was a good contract under the Statute of Frauds. I will not deal with the point which was put by my Lord except to say that it was impossible to suppose that an execution debtor cannot make an effectual sale of his goods to a purchaser because they are in the possession of the sheriff. If he can make an effectual sale, and if there can be—not a delivery in one sense—but an actual acceptance of the goods within the Statute of Frauds, it certainly took place here. But I am also of opinion that the delivery and acceptance of the goods comprised in article 4 of the contract, and the payment of the sum mentioned in clause 5 was a sufficient acceptance of part and part payment to satisfy the Statute of Frauds. *Scott* v. *The Eastern Counties Railway Company* (12 M. & W. 33) is in point. The marginal note is "where an order is given for goods, some of which were ready at the time of the contract, and the goods are to be manufactured according to order, and the goods which are ready made are afterwards delivered and paid for the acceptance of them is a part acceptance of the whole to satisfy the provisions of the Statute of Frauds (29 Car. 2, c. 3), s. 17, and the 9 Geo. 4, c. 14, s. 7, as the whole forms one entire contract." To my mind that is in point in this case, because here is one contract comprised in one document called an agreement. We have no reason to suppose that the parties would have entered into a part of the contract unless they had entered into the whole of it. I am of opinion also on that ground that the Statute of Frauds does not prevent the plaintiff's right to recover.

As to the ship *Edhem*, I am of opinion that the property in an unregistered ship may, and indeed must, pass otherwise than by the bill of sale required by the statute. By the words of the Shipping Act it almost necessarily must be so. Now the 17 & 18 Vict. c. 104, s. 19, says, "Every British ship must be registered in manner hereinbefore mentioned," with an exception that does not affect this case. If it stopped there, registration would appear to be obligatory upon the owner of every British ship. There is no penalty imposed for not registering, but the statute says, "no ship hereby required to be registered shall, unless registered, be recognised as a British ship, and no officer of Customs shall grant a clearance," and so on. So that the consequence of non-registration is that you do not get the benefit of your British ownership. Now what follows? The statute does not say "no ship or share therein shall be transferred except by bill of sale," but, "a registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships shall be transferred by bill of sale." That is only applicable where the ship is a registered ship. This ship was not, and if there was some obligation to register, which I think there was clearly not, the statute does not say that, because that obligation has not been observed, the ship may not be assigned. Moreover it should be remembered that the whole of this is one piece of legislation. It proceeds to say, "every bill of sale for the transfer of any registered ship or of any share therein, when duly executed shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore required to be made by a transferee, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale and shall indorse the fact of such entry having been made;" and so on, and all bills of sale of any ship or shares in a ship shall be entered in the registrar's book in the order of their production to the registrar. I rather think that the consequence of not doing that is that a subsequent transferor or incumbrancer takes precedence; that is, whosoever gets first on the register takes precedence. Therefore I am of opinion here that the Dudgeons were not bound to register, and further, if they were bound to register, there is no prohibition of an assignment otherwise than by bill of sale, because that is only applicable to registered ships, and there is no prohibition or assignment of unregistered ships. Further, and in addition to that, Lord Justice Cotton pointed out that under the third section of the 25 & 26 Vict. c. 63, it is clear that the plaintiffs would be entitled to an equitable interest in this ship without registration. It might be transferred to them otherwise than by statutory bill of sale under the sections I have referred to without registration; so much for that point.

Then I think that the last point that was made was this, that this was void under the Bills of Sale Act, and we were asked to read the exception in the Bills of Sale Act, as though the words were "transfer or assignment of a ship pursuant to the Merchant Shipping Act." I am of opinion that we cannot so read it. Really it is difficult to give a reason why we

cannot, except to say no reason has been given why we should. No doubt the words used are something like the words used in the Merchant Shipping Act; but they are general words, which it seems must be intended to have some sweeping effect. It may be asked why sales of ships in general should not have been mentioned. The answer to it is this, that the Bills of Sale Act (a much lauded Act, and a very good one I dare say, but one which I generally find applied to the purpose of mischief rather than to the prevention of it) deals with documents. You may make a verbal transfer of anything without being within the Bills of Sale Act; therefore, the language in the statute is properly limited to the case of a document such as is described by the words in the Bills of Sale Act, and certainly it would be a most amusing construction if Mr. Witt was right, because the Merchant Shipping Act which was in force at the time of the Bills of Sale Act is now repealed, and therefore there would now be no transfer under the old Merchant Shipping Act; and consequently the exception never would apply, and every assignment of a ship must be registered under the Bills of Sale Act. That is an impossibility. Then Mr. Witt says: "But you have subsequent provisions in the Merchant Shipping Act which renew the old law." Unless we could hold clearly that the person who drew the Bills of Sale Act had a prophetic view of it, and was providing for what was coming, we could not construe them in that way. I am of opinion that that contention fails. I have dealt with the four questions raised by Mr. Butt and Mr. Witt; and I am of opinion that they ought to be answered unfavourably to the defendants, and that this judgment should be affirmed.

Brett, L.J.—In this case judgment has passed for the plaintiff on the interpleader issue. The question is, whether the property was in the bank as against the execution creditor, and the property, with the fixtures and the *Edhem*, is said to have passed to the bank by virtue of and under a contract.

The first question raised is, whether there is a contract which can be relied upon by the plaintiffs in this case between them and the Dudgeons; that depends upon whether there is a sufficient contract within the Statute of Frauds, that is, one which can be looked at notwithstanding the requirements of the Statute of Frauds. The contract is in writing, but it is not signed; therefore, so far, it has not complied with the Statute of Frauds. Then the question comes to be whether there is something which would allow us to look at the contract notwithstanding it is not signed. Now the first thing which we must decide in order to determine that point is whether the contract with regard to sects. 4 and 5 is one or several. I am inclined to think myself, for the reasons that have been given by Bramwell, L.J., that the contract is one; the contract is on one paper. It is described as one contract; but the real test where the contract is on one paper seems to me to be, whether the consideration, or the cause of making the contract is one or is divisible; I think, inasmuch as it was taken to as a going concern, it could not be that the real substance of the whole of the agreement was divisible, but that it was one, and if it was one, then it seems to follow that the Statute of Frauds is satisfied by reason both of the payment and of the delivery of the tools under clause 5. But supposing they are separate contracts, and we are to look to paragraph 4 as containing a separate contract, then I entirely agree with my Lord Chief Justice that, even taking that to be so, there was a sufficient actual taking of possession by the bank here to enable us to look at the contract in compliance with the Statute of Frauds. If that be taken to be the contract with regard to paragraph 4 only, the vendor gave authority to the vendee to go down and take possession of all that he could give him, and that is the same to my mind as if the vendor had gone down with the vendee. Then the vendee goes down and finds there certain servants of the vendor; he takes those servants into his own pay (he himself being actually present or his agent), and tells them to hold the goods for him, that being done with the consent of the vendor, and the servants do accept that employment, and remain at the place. Therefore it seems to me that it is the same thing as if the vendor and vendee had gone down together, and, both being there, the vendor had said to the vendee, "Now take these goods, they are yours," and the vendee had said, "Very well, I will take them, they are mine." The only objection to that is, that it is said the sheriff is in possession, and therefore this vendor could not give possession to this vendee, and the vendee could not take possession. Now for the purpose of satisfying the Statute of Frauds, it seems to me that the presence of the sheriff, and his holding the custody of the goods, does not prevent it from being, as between the vendor and the vendee, a sufficient actual taking possession by the vendee so as to bind the contract under the Statute of Frauds. That is all we need determine upon that point. In either case it seems to me that we are entitled to look at the contract notwithstanding the Statute of Frauds. Now if we look at the contract, then comes the question whether the contract does pass the property in those fixtures. I mean those fixtures which are in paragraph 4. I am inclined to think that that paragraph 4 did of itself pass the property. It certainly identifies the specific goods; the goods themselves are in existence, and it identifies them, and I am inclined to think there is nothing more necessary to pass the property. If something more was required to be done, then I think that transaction which took place with the consent of the vendor and the vendee (which was an appropriation of things and a declaration from one to the other, "You take those things as belonging to you," and the agreement of the other, "I do take those things as belonging to me") was sufficient to pass the property; therefore in either view the property in those fixtures passed to the bank.

Now with regard to the ship, I think there are two reasons why one may hold that the property in the ship passed also. I treat the agreement of the 2nd May 1875 as intending to pass the property in the ship. If so, what was the ship? The ship at the time was finished; she was a ship; that is now admitted. She belonged solely to British owners, but she never was intended to be registered as a British ship, and for that reason I should agree with my Lord Chief Justice that not being registered you might fairly say that it was not a ship which was ever intended to be brought within the Merchant Ship-

ping Act at all. But supposing that be not sufficient, as a fact she was not registered, and it seems to me that the only transfer which is forbidden without registration by the Merchant Shipping Act is a transfer of a registered ship. If it were not for that statute no registration of the transfer would be necessary, and the only transaction which would otherwise be good, but which is forbidden to be good by the Merchant Shipping Act, sect. 55, is the transfer of a registered ship. Therefore it seems to me that in either view this transaction was not made void or insufficient by reason of the Merchant Shipping Act. Then it is said that, if so, it is not available by reason of the Bills of Sale Act, and if the Bills of Sale Act had been conterminous with the Merchant Shipping Act, so that you could have said that every ship which is not to be dealt with under the one Act must be dealt with under the other, then the ship would go under the Bills of Sale Act. But the Bills of Sale Act is not conterminous with the Merchant Shipping Act. The Bills of Sale Act excepts all ships; that is whether British ships or foreign ships, or whether registered ships or not registered ships. Therefore, although the ship is not registered, and although the transfer is not within the Merchant Shipping Act, yet it is a ship, and is excepted from the Bills of Sale Act. Therefore a ship unregistered is a thing the transfer of which is not dealt with either by the Merchant Shipping Act or the Bills of Sale Act, and goes according to the common law, and the transfer is good, although there has been no registration at all.

I think on every point of view the appeal must fail, and the judgment of the court below must be affirmed.

Cotton, L.J.—I am of opinion that the appeal must fail. I will first deal with the ship, because there are considerations affecting the other points which do not affect the ship.

The first question is this, whether, putting aside the Bills of Sale Act, the bank had a good and valid title to the ship. The instrument under which they claim is the instrument of the 24th May 1875, and that, after reciting (in my opinion incorrectly) what are supposed to be the interests of the Dudgeons, says this, "The said John Dudgeon hereby charges, &c., &c." (reading down to words "as they may require.") Now in a Court of Equity that would be a good contract not transferring the property of the ship, but giving the plaintiffs a right in equity to say that whatever interest the firm of Dudgeons had in the ship should be transferred to them as a security for their debt. Now I do not go into the question which has been dealt with as to whether this is a ship which, under the Act of 1854, ought to have been transferred by a duly registered bill of sale; but in the Act of 1862 there is an express proviso to meet the question which had arisen under the Act of 1854, giving a shipowner in equity a right to transfer his interest in it. It is this, "Without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property." So that, independently of the other question we have been discussing, in which I fully agree with the rest of the court here, this case is expressly met by that section. There was an equitable interest in the ship, granted by contract to the Union Bank by Messrs. Dudgeon, and that, assuming this was a British ship, would have been effectual, independently of the Bills of Sale Act, to give them a title to the ship at the time when the execution of the 13th Sept. was issued. Then the question arises still, does the Bills of Sale Act make that interest of no effect as against the execution creditor? It would be a bill of sale within the Act, unless it is cured by a proviso or an exception contained in the interpretation clause, but only in this way: although the Bills of Sale Act deals with bills of sale, assignments, and transfers (and that is held to exclude that which is not an assignment in law) the contract is nevertheless an effectual contract in equity, giving the person a right to the thing in specie. Then we have this exception, "this Act is not to include the following documents, that is to say, transfers or assignments of any ship or vessel or any share thereof." Does this document come within that exception? I am of opinion that it does. What is contended is this, that we must read it in this way, "transfers or assignments of any ship or vessel duly registered under the Acts relating to registration of British ships." But there are no such words to be found. It is true that at the time this Bills of Sale Act was passed the words were "transfers by registered bills of sale," but now they are "transfers affecting British ships are effectual." The Act is not to include "transfers or assignments of any ship or vessel or any share thereof." They are not included in the Act. In that exception you must extend the word "assignment" to that which does not purport to be a transfer of the legal estate, but which is one in equity, so as to give the mortgagee a right to have a transfer, and it is in no way limited so as to exclude anything which you may call a transfer or assignment of any British vessel. My opinion, therefore, is that it is not within the Bills of Sale Act, and the transfer is effectual, so as to give the bank a title against Lenanton.

Now we come to the other things which have been claimed, and I confess I have a great difficulty in seeing what the question on the argument before us was, except with regard to the ship, because the interpleader order is to "ascertain what was the title to all the buildings, machinery, and other fixtures erected on the said premises, the particulars whereof are specified in a schedule to be delivered to the defendant." The premises are those included in certain leases which are also mentioned in the contract of the 21st May, relating to the ship-building and manufacturing premises, not including the ship. That document charges in the fullest terms "all buildings, machinery, and other fixtures whatsoever which have been, or which during the continuance of this security shall be erected on or affixed to the said hereditaments and premises or any of them." But then there was a subsequent agreement, the 4th clause of which referred to "all machinery and other fixtures now in or upon the said works or ship-yard not charged, &c. (reading down to the words) principal sum and interest." I understood the contention of Mr.

Butt to be this: "I do not claim any fixtures which are effectually compromised within the security granted by the equitable mortgagee of the leaseholds. I do not claim what was purchased and paid for under the 4th clause of that contract, but there is something else." Now the 4th clause of the mortgage included every bit of machinery which was on the leasehold premises, for the mortgage includes "all machinery erected or to be erected during the continuance of the security." Chattels would not be effectually passed, but anything on the premises must either be included within the mortgage or not included in it. The mortgage covers, and effectually covers, all fixtures; everything else must be within this 4th clause. I think the fallacy of the whole argument consists in this: It was assumed that the valuers under this 4th clause were to select what should be found to be purchased by the bank. But that, in my opinion, is wrong. A good deal of the argument as to the property passing is attributable to that idea. But all that the valuers had to do was to value what under this 4th clause was to be purchased and identified. They were to go upon the premises referred to, the ironworks, and the shipyard, to value everything, which was effectually covered by the mortgage. That is what they were to do, and if the valuers have not valued all they ought to have done, it is said that, in consequence of their mistake, the Act of Parliament does not apply. Under the order made by Lush, J. there is an express exclusion from the operation of the interpleader order of all loose tools, machinery, &c., and goods at the ship-building yard at Millwall, not included in the securities of the Union Bank of London. Now it is said that was only to exclude those loose chattles, which under clause 5 of the agreement were to be paid for by the 2500*l.* That cannot be, because those loose chattles were on the Sun Iron Works; and, as I understand it, under an agreement approved by a Court of Chancery and in lunacy, a payment was to be made by the Union Bank for that which was not effectually comprised in the security, putting out of the question those chattels for which 2500*l.* was to be paid which are in the Sun Iron Works, that the chattels in the ship-building yard were to be so bought. The learned judge (the parties being before him) excludes those from the interpleader order, and I rather think that the intention was to raise this contention, that, although these were fixtures which *primâ facie* passed by the mortgage, yet that, as between landlord and tenant, they would not pass effectually under the mortgage, so as to oust the execution creditor. It seems to me that the only question that can arise is as regards those things not expressly comprised in the mortgage which were not valued by the valuers. My opinion entirely agrees with that expressed by the other members of the court, that the property effectually passed by the contract. There was no written contract, but, assuming that the contract was one which, notwithstanding the Statute of Frauds, was valid, it was a contract that related to certain specific things, including all things on the premises which were not effectually covered by the mortgage It passed them all. All that was to be done by the valuers was to point them out. They were only to ascertain the value of those things which were not included in the contract; they were to value all the things that were not covered by the security held by the bank; and then, after that, so as to obviate the question under the Statute of Frauds, although the sheriff was in possession, there was an interest which the owner of the property could sell. The parties acting on behalf of the lunatic do give authority to the bank to go down and take possession. The bank, having taken possession under the authority, expressly directed to the gatekeeper, they tell him: "Now, you hold these things for us." In the other part of the case it was said that was a most effectual attornment. These parties did hold possession of the things, subject, it is true, only to the execution; they did hold possession of that which was the subject of the sale, and there was a receipt by the purchasers, so as to prevent a difficulty arising under the Statute of Frauds.

Judgment affirmed.

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

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

SITTINGS AT LINCOLN'S INN.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Friday, May, 31, 1878.

(Before James, Baggallay, and Bramwell, L.JJ.)

The Carnarvon Castle.

APPEAL FROM PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY BUSINESS).

Practice—Security for costs of counter-claim—Severance of action—Ship and cargo.

Where the owners of a ship which has sunk, and the owners of the cargo laden on board her, join as plaintiffs in an action against another ship for damages sustained by collision, the Court will order the claim by the owner of the ship to be dismissed, unless security for the counter-claim is given, but will allow the owner of cargo to proceed without security.

This was an appeal for an interlocutory order of the judge of the Admiralty Division.

On the 1st Dec. 1877 a collision occurred between the brigantine *Hazard* and the ship *Carnarvon Castle*, in consequence of which the *Hazard* sunk and the *Carnarvon Castle* sustained damage. A joint action was commenced against the *Carnarvon Castle* on behalf of the *Hazard*, and of the cargo laden on board the *Hazard*. Bail was given on behalf of the *Carnarvon Castle*, and she was released from arrest about the 6th Dec. 1877. A statement of claim on behalf of the owner of cargo on board the *Hazard* was delivered on the 9th Jan. 1878, and on behalf of the *Hazard* herself on the 17th Jan. On the 8th Feb. the defendants, owners of the *Carnarvon Castle*, applied to the assistant registrar of the Admiralty Division to compel the plaintiffs, owners of the *Hazard*, to give security to answer the defendants' counter-claim and for costs. The assistant registrar ordered security to be given in 1000*l.*: the security not being given on the 20th Feb., the assistant registrar, on the application of the defendants, ordered a stay of proceedings until bail for the amount should be given. On the 12th April 1878 the plaintiff's solicitor applied for leave to continue the action so far as it concerned the cargo laden on board the *Hazard*, notwith-

standing the stay of proceedings, On the 16th April the judge made the following order on the summons

The judge having heard counsel on both sides directed that defendants and their bail do stand dismissed from this action, and all further observance of justice therein so far as regards the claim of the owner of the vessel *Hazard* one of the plaintiffs, at the expiration of a fortnight, unless within that time he shall have given bail in the sum of 1000*l.* to answer defendants' counter-claim and costs. The judge further directed plaintiffs' solicitor to file within four days a statement setting forth the names, addresses, and descriptions of the owners of the cargo of the vessel *Hazard*, the remainder of the plaintiffs.

The judge also removed the stay of proceedings ordered by the assistant-registrar on the 20th Feb.

On May 1, 1878, the defendants, owners of the *Carnarvon Castle*, moved the judge in court to set aside the above order made in chambers, or in the alternative for leave to appeal from it. The judge gave leave to appeal.

On May 3, the defendants gave notice that they would move the Court of Appeal to reverse the said order, and to decree all further proceedings to be stayed, unless bail was given as directed by the order of the 20th day of Feb. 1878.

May 31.—The motion came on for hearing.

G. Bruce, for appellants, owners of the *Carnarvon Castle*.—In this case, the *Hazard* being sunk, I have had no opportunity of arresting her, and so obtaining bail to answer my claim. The order of the registrar of 20th Feb. was a perfectly good order; the interests of the cargo and of the ship in which it was laden were joined in one action, and we were entitled to security for our counter-claim or cross cause (sect. 34 Admiralty Court Act 1861, 24 Vict. c. 10), and a stay of proceedings till they were given. Admitting that if the cargo alone had sued in the first instance, I could not have had security against it, that would have been a hardship, but an unavoidable one; but, if the plaintiffs, by their own act in joining ship and cargo in one action, have enabled me to get rid of that hardship, and to have security, it is not competent for them afterwards to sever the action so as to defeat my claim for security. Neither was it competent for the judge of the court below to allow, which he practically has done, the action to be divided. The security for costs was ordered against the plaintiffs generally, and, although one of the plaintiffs has been dismissed, that is no reason why the security for costs should be taken away.

Butt, Q.C., for respondents, was not called on.

James, L.J.—It is admitted that if the owner of cargo, a British subject, had sued, alone, the defendants would have had no claim for security from them, as they could have no counter-claim against the innocent cargo. The fact that to save expense and inconvenience, and multiplicity of suits, the owners of the ship and owners of cargo joined in one action, does not alter the condition of affairs; it would be most inequitable if, by such means, the undoubted right of action of the cargo should be defeated.

Baggallay and Bramwell, L.JJ. concurred.

Appeal dismissed with costs.

Solicitors: for appellants, owners of *Carnarvon Castle*, *Parker* and *Clarke*; for respondents, owners of cargo taken on board *Hazard*, *Hollams, Son*, and *Coward*.

END OF VOL. III.

SUBJECTS OF CASES

ACCOUNTS.

See *Shipowner*, Nos. 3, 5.

ACT OF GOD.

See *Carriage of goods*, No. 1—*Damage*, No. 3.

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See *Booty of War—Collision*, Nos. 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 36, 39, 40, 41—*Necessaries*, No. 3—*Practice*.

ADVANCE OF FREIGHT.

See *Marine Insurance*. Nos. 10, 12.

ADVANCES.

See *Marine Insurance*, Nos. 10, 12.

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See *Charter-party*, No. 1—*Marine Insurance*, Nos. 1 2, 5—*Sale of Ship*, Nos. 1, 2.

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AVERAGE.

See *General Average—Marine Insurance*, No. 22.

BANKRUPTCY.

See *Practice*, No. 23—*Stoppage in Transitu*, Nos. 3, 4.

BARGE.

See *Collision*, No. 14—*Thames Navigation*.

BARRATRY.

See *Marine Insurance*, Nos. 3, 4.

BILL OF EXCHANGE.

See *Sale of Goods*, Nos. 5, 6.

BILL OF LADING.

See *Carriage of Goods*. Nos. 4, 5, 6, 7, 8, 11, 12, 14, —*Sale of Goods*, Nos. 5, 6, 7, 8, 9—*Stoppage in Transitu*, Nos. 1, 2, 3.

BILLS OF SALE ACT.

See *Sale of Ship*, No. 5.

BOARD OF TRADE.

See *Discipline*, Nos. 1, 2—*Salvage*, No. 7.

BOOTY OF WAR.

Distribution—Order in Council—Admiralty Jurisdiction.—When the Crown grants to captors booty of war and by Order in Council, under 3 & 4 Vict. c. 65, s. 2, refers the claims of all parties whomsoever to the property captured to the Judge of the Admiralty Court, who is to take into consideration any capture which may have been made of any property during the operations by any of the claimants, and is to make such order as to him shall seem right, both in regard to the persons who are, and the proportions in which such persons are entitled to share . . . . reserving, however, to H.M. the right to direct the rates or scale of distribution according to which the property or the proceeds thereof is to be repaid to the several ranks of the force or forces to which such property may be adjudged, and the court proceeds to adjudge certain claimants entitled to share, and in pursuance thereof, sums of money on account of the booty are distributed among the successful claimants: the High Court has no jurisdiction, on the application of the successful claimants, complaining that the Government have refused to pay over and distribute the remainder of the booty, to order that such remainder be brought into the registry of the court to abide the event of the suit; under such an order the court has no power of distribution. (Adm.) *Banda and Kirwee Booty* .....*page* 66

BOTTOMRY.

1. *Communication with owners of cargo—Extent of —Repairs.*—A statement by the master of the injuries sustained by his ship and of the repairs necessary, is not sufficient communication with the owners to justify him in giving a bottomry bond upon the ship and cargo, if unaccompanied

by a statement that such bond is necessary (P. C.) *Kleinwort and others* v. *The Cassa Marittima of Geona* 358

2. *Communication with owners of cargo—Duty to supply funds.*—The mere receipt by the owners of the cargo of general information that the ship is damaged and in need of repairs, does not impose upon them the duty of supplying money for such repairs without further information. *The Onward* (*ante*, vol. 1, p. 540; 38 L. T. Rep. N. S. 206; L. Rep. 4 A. & E. 38) affirmed and followed. (P. C.) *Kleinwort and others* v. *The Cassa Marittima of Geona* 358

3. *Practice—Original bond to be produced.*—In all bottomry actions it is necessary that the original of the bond should be produced at the hearing. (Adm.) *The Rowena* 506

See *Wages*, No. 7.

BRITISH SHIP.

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See *Carriage of Goods*, Nos. 4, 5, 7, 8, 9, 10, 11, 12, 15—*Charter-party*, Nos. 2, 3, 4, 5—*Consignor and Consignee*, Nos. 1, 2—*Marine Insurance*, Nos. 7, 8, 12, 13, 17, 18, 22, 23, 26—*Mortgage*, No. 6—*Sale of Goods—Salvage*, Nos. 13, 14, 15, 16, 19.

CARRIAGE OF GOODS.

1. *Act of God—Definition of.*—A loss occasioned by the act of God is a loss arising from and occasioned by the agency of nature, which cannot be guarded against by the ordinary exertions of human skill and prudence, so as to prevent its effect. (Ct. of App.) *Nugent* v. *Smith* 198

2. *Common carrier—Delivery beyond the realm—Liability*—The common law liability of a carrier attaches to a contract for carriage to a place without the realm—(C.P. Div.) *Nugent* v. *Smith* 87

3. *Common carriers—Steamship—Damage to mare—Negligence—Perils of Sea.*—Where a steamship company carrying goods as common carriers carry a mare, which during a storm is injured so that she dies, and the jury find that the injury was caused partly by bad weather and partly by the fright and struggling of the mare, and that there was no negligence on the part of the carriers, the latter are not liable for the loss of the mare. (Ct. of App.) *Nugent* v. *Smith* 198

4. *Bill of lading—Exceptions—Rats.*—A shipowner is liable for damage to cargo by rats, unless expressly exempted by the bill of lading, such damage not being a peril of the sea. (Am. Rep.) *The Barque Carlotta*: *Bliss* v. *Gomez et al.* 456

5. *Bill of lading—"Leakage"—Damage to other goods.* The common form in a bill of lading "not accountable for leakage" exempts the shipowner only from liability for loss occurring to the leaky package, and not for damage done to other packages by a liquid escaping. (C.P. Div.) *Thrift* v. *Youle* 357

6. *Bill of lading—Exceptions—Warranty of seaworthiness—Time of operation—Exceptions.*—In the absence of express words to the contrary, a bill of lading implies a warranty of seaworthiness at the time of the sailing of the ship, and all the exceptions in it must be taken to refer to a period subsequent to the sailing of the ship with the goods on board. (H. of L.) *Steel and another* v. *The State Line Steamship Company* 516

7. *Bill of lading—Exceptions—Warranty of seaworthiness—Finding of jury.*—When goods are shipped under a bill of lading containing an exception of "perils of the seas, however caused," during the voyage, the goods are damaged by salt water getting to the cargo through a port negligently fastened by one of the crew, and the jury find to that effect, and no more, such finding is not enough to justify a verdict for the shipowner, as there must be a finding that the ship was seaworthy on leaving the port of loading. (H. of L.) *Steel and another* v. *The State Line Steamship Company* .....*page* 516

8. *Damage to cargo—Bill of lading—"Good order and condition—"Weight, contents, and value unknown"—Onus of proof.*—A master signing a bill of lading in which it is stated that the goods were "shipped in good order and condition," but which contains a memorandum of "weight, contents, and value unknown," admits that, as far as can be seen externally, the goods are shipped in good condition, and if they arrived damaged the onus lies upon the shipowner to excuse himself from the damage. *The Peter der Grosse* 195

9. *Damage to cargo—Charter-party—Vessel to be cleaned—Mode of Cleaning—Evidence.*—Where by a charter-party it is provided that "it is understood that the vessel is now bound to Barcelona with a cargo of petroleum in barrels; vessel to be cleaned as customary previous to loading homeward cargo," and the homeward cargo is damaged by petroleum, the fact that other vessels can be and are cleansed so that their cargoes show no signs of petroleum damage, is evidence to show that the vessel is not properly cleansed. (Am. Rep.) *The Barque Carlotta*; *Bliss* v. *Gomez* ... 456

10. *Damage to cargo—Excepted perils—Place of stowage.* Damage to cargo occasioned by salt water does not come within the excepted perils when by reason of the place in which it is stowed it is exceptionally liable to such damage in severe weather. (Adm.) *The Oquendo* 558

11. *Damage to cargo—Cesser of liability clause—Governing law.*—Where by a bill of lading it is agreed that certain goods are "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of M. unto the G. Railway Company, and by them forwarded to T., and at the aforesaid station delivered to A. . . . No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed," and the goods are damaged, no claim can be made unless the damage is discovered before removal from the station at T., even if the damage is latent; and this ruling is applicable in Canada, although differing from French and Canadian law, if the ship and bill of lading are English. (P.C.) *Moore* v. *Harris* 173

12. *Damages—Measure—Late Delivery—Carriage by sea—Loss of market.*—Where, through the negligence of a carrier by sea, goods carried by him are not delivered in a reasonable time, the owner of the goods or assignee of the bill of lading for the goods is not entitled to recover, as damages from the shipowner, the difference between the market value of the goods when they ought to have been delivered and the market value when they actually were delivered. (Ct. of App., reversing Adm.) *The Parana* 399

13. *Damages—Measure — Interest. — Semble*, the measure of damages recoverable in such a case is interest at the ordinary commercial rate on the value of the goods for the period of the delay in delivery. (Ct. of App.) *Id* 399

14. *Demurrage—Delay in discharging—Indorsees of bill of lading—Evidence of liability.*—Where goods are carried under charter-party and bill of

lading, by which they are to be taken from alongside by the consignee as they come to hand in discharging, the facts—that indorsees of the bill of lading have told the shipowner that they had the cargo and would pay the freight, that they had been remonstrated with for delay in discharging, and had been told that there would be a claim for demurrage without their repudiating their liability—are evidence to show that such indorsees took under the provisions of the bill of lading, and are liable for unreasonable delay. (C. P. Div.) *Palmer* v. *Zarifi Brothers*. *page* 540

15. *Freight — Charter-party — Delivery short of destination — Non-acceptance by consignees.*—Where by a charter-party it is agreed that a steamship shall load a cargo at an English port and proceed to Taganrog, in the Sea of Azov, or so near thereto as she might safely get and deliver the same afloat at an agreed rate of freight; and the ship laden arrives at Kertsch and then finds the Sea of Azov frozen over, and not being able to reach Taganrog before April, discharges her cargo at the custom house at Kertsch, notwithstanding the protests of the consignees, and the consignees afterwards at their own expense carry the cargo on to its destination, the shipowner does not perform his contract to deliver under the charter-party, and the consignees not accepting short of the destination, he has no right to freight either under the charter-party or *pro ratâ itineris*. (Ct. of App., affirming Q.B.) *Metcalfe* v. *Britannia Ironworks Company* 313, 407

16. *Freight—Sale of goods at intermediate port—Enforced loan—Indemnity—Pro ratâ freight.*—Where a master carrying goods under charter sells part at an intermediate port for necessary repairs, the owners of the goods may either treat the money thereby obtained as a forced loan, or may claim an indemnity from the shipowner for the amount that would have been obtained at the port of destination; and if they elect to treat it as an enforced loan, the shipowner has no claim for *pro ratâ* freight; hence, if the goods sold fetch more than they would have done at the port of destination, and the amount realised is paid over to the owner of cargo on demand made by them, upon the figures stated in an average statement, which made no allowance for freight to the shipowners, the latter cannot recover this *pro ratâ* freight in respect of the cargo sold. (C.P. Div.) *Hopper* v. *Burness and others* 149

17. *Passengers' luggage—Railway and Canal Traffic Act—Reasonable condition—Special contract.*—The luggage of a passenger by railway comes within sect. 7 of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), fixing the liability of railway companies for the loss of or injury to "any articles, goods, or things in the receiving, forwarding, or delivering thereof," and no condition therefore limiting the company's liability in respect of such luggage is binding, unless it be a "just and reasonable one" and be embodied in a special contract, signed by the passengers or the person delivering such luggage to the company for carriage. (Ex. Div.) *Cohen* v. *The South-Eastern Railway Company*..... 248

18. *Passengers' luggage—Railway and Canal Traffic Act — Regulation of Railways Act — Railway company owning steamships.*—By sect. 16 of the Regulation of Railways Act 1868 (31 & 32 Vict. c. 119), sect. 7 of the Railway and Canal Traffic Act is incorporated, and its provisions extended and made applicable to luggage conveyed by railway companies on board steam vessels used by them for the purpose of carrying on a communication between any towns or ports. *Stewart* v. *The London and North-Western Railway Company* (19 L. T. Rep. N. S. 302) discussed and distinguished. (Ex. Div.) *Cohen* v. *The South-Eastern Railway Company* ..... *page* 248

19. *Practice—Damage to cargo—Particulars.*—In a cause of damage to cargo the court (Admiralty Division), contrary to the practice of the High Court of Admiralty, made an order for particulars of the plaintiff's claim, so as to enable the defendant to pay into court in respect of those items of the claim for which he was prepared to admit liability. (Adm. Div.) *The Wetterhorn*... 168

20. *Railway and Canal Traffic Act — Railway company—Steamships hired—Reasonable stipulations—Sea transit.*—Where a railway company, having no steamships of their own, make a contract with a person to carry goods of that person by a route which involves a sea transit, and procure a steamship company to carry the goods over the sea transit for them, such contract is, as far as regards the sea transit, governed by the Railway and Canal Traffic Act 1854, sect. 7, and any stipulation in it which is unreasonable is void, and hence the railway company cannot exempt themselves from the negligence of servants of the steamship company during the sea transit. (H. of L.) *Doolan* v. *The Midland Railway Company* 485

21. *Stevedore — Charter and sub-charter — Liability of shipowner.*—Where a ship is chartered to carry goods under a charter-party containing a clause by which "the stevedore is to be nominated by the charterer but to be under the control of the captain and paid by the owners," and the charterer sub-charters the ship by a charter-party containing a similar clause, and the sub-charterer appoints the stevedore, who acts under the personal directions of the master and owner, the stevedore can recover from the shipowner the price of his labour, and is not deprived of his right by sending in his account to the sub-charterer by whom he is named, such account being addressed to "captain and owners." (Ct. of App.) *Eastman* v. *Harry* 117

22. *Warranty of seaworthiness—Shipowner's contract.*—In whatever way a contract for the conveyance of merchandise be made, if there is no agreement to the contrary, the shipowner is by the nature of the contract impliedly and necessarily held to warrant that the ship is good and in a condition to perform the voyage then about to be undertaken, that is to say, that she is seaworthy or fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage. (Q. B. Div.) *Kopitoff* v. *Wilson* 163

23. *Warranty of seaworthiness — Carriage of armour plates—Duty of shipowner.*—Where a shipowner agrees to carry armour plates by his ship, and they are stowed by his servants, and in rough weather break loose and go through the ship and sink her and are lost, it is a proper direction, in an action to recover their loss, to tell the jury that a shipowner warrants the fitness of his ship when she sails, and it is proper to ask them whether she was (as regards the plates carried) reasonably fit to encounter the ordinary perils of the voyage agreed upon. (Q. B. Div.) *Kopitoff* v. *Wilson* 163

CARRIER.

See *Carriage of Goods.*

CERTIFICATE OF MASTER.

See *Discipline*, No. 2.

CERTIFICATE OF REGISTRY.

See *Master*, Nos. 1, 2.

CESSER OF LIABILITY.

See *Charter-party*, Nos. 16, 17, 18, 19.

CHARTERED FREIGHT.

See *Marine Insurance*, Nos. 10, 11, 12.

CHARTERERS.

See *Carriage of Goods*, No. 21—*Charter-party—Practice*, No. 20—*Salvage*, Nos. 18, 33—*Wages*, No. 1.

CHARTER-PARTY.

1. *Agent—Owner—Evidence of liability.*—Where a charter-party is made between charterers and persons who sign "for owners" of the ship, correspondence between the charterers and such persons is admissible in evidence to show that such persons are themselves the owners and not mere agents, and are liable under the charter-party. (C. P. Div.) *Adams* v. *Hall* .....*page* 496
2. *Cargo—Construction—Full and complete cargo.*—Where a charterer agrees to load "a full and complete cargo, say about 1100 tons," these are words of contract, not expectation; and he does not contract to load any vessel that may be sent to her full capacity, but only to load as fully as can be done by providing about 1100 tons; hence he must load up to 1100 tons, but he need not fill the ship. (C. P. Div.) *Morris* v. *Levison* 171
3. *Construction—Choice of different goods—Option of charterer—Reasonableness.*—A charter-party containing the words "the ship to load the following cargo of lawful merchandise. . . . . ; a full and complete cargo of sugar in bags, hemp, or compressed bales, and (or) measurement goods not exceeding what the vessel can reasonably stow and carry over and above her tackles," gives the charterer the option in what form he will tender the cargo, provided he tenders some or all of the goods named and no others, and does not present a cargo of any kind, or of all kinds together, which is unreasonable as regards the nature of the goods he presents. (H. of L.) *Stanton* v. *Richardson* 23
4. *Construction—Obligation of shipowner—Seaworthiness.*—A shipowner entering into a charter-party to carry such a cargo is bound to provide a ship which is reasonably suited to carry that particular cargo and is staunch and seaworthy for the purposes of that cargo, and must be kept so. Hence, if the charter-party allow wet sugar to be loaded and the ship is unfit to receive it, and her pumps become clogged by the moisture from the cargo, and she cannot be made fit to carry the cargo or seaworthy for that cargo in a reasonable time, the charterer may throw up the charter-party. (H. of L.) *Id.*... 23
5. *Contract—Parties—Mistake—Name not struck out—Reforming contract.*—Where a charterer sues on a charter-party and the shipowners answer that the charter-party was made between the defendant and a third party, not the plaintiff, it is a good reply to plead that the charter-party is made upon a printed form ordinarily used by and containing the name of the third party as a party thereto, and that the plaintiff and defendant had signed the document inadvertently omitting to alter or strike out the name of the third party. There is no necessity to reform the charter-party, as upon the facts being shown the court will treat it as reformed. (C. P. Div.) *Breslauer* v. *Barwick* 355
6. *Contract—Specified time—Right of cancellation.*—The charterer of a vessel chartered for a specified time commencing on a named day who cannot have the vessel on the day agreed on, is entitled to cancel the charter. (Ct. of App.) *Tully* v. *Howling*.....*page* 368
7. *Damages — Action by shipowner — Breach of charter-party against charterer—Safe port—Costs of action brought by consignee.*—In an action by a shipowner against a charterer for breach of contract in not naming a safe port to unload according to charter-party, the extra costs of an action brought by the consignee against the master for not unloading at the port named, and successfully contested by the master, are not (the taxed costs having been recovered from the consignee) recoverable as damages against the charterer, unless he has expressly authorised the shipowner to incur the costs on her behalf. (C. P. Div.) *Evans* v. *Bullock and others* 552
8. *Damages—Action by shipowner against charterer—Safe port—Port dues.*—But in such case the shipowner is entitled to recover as damages the difference between the port dues at the port named and the port dues he actually paid (if they are in excess of the former) at the port where he discharged the cargo, and no more, under this head. (C. P. Div.) *Evans* v. *Bullock and others.* 552
9. *Damages—Action by shipowner against charterer—Safe port—Demurrage—Insurance.*—Where the shipowner has in such a case recovered for demurrage in respect of the delay so occasioned, he cannot recover for the cost of insurance from the port named to port of actual discharge (even if he could in any event), as such insurance, being an ordinary expense of the shipowner, must be taken to be included in the demurrage recovered. (C.P. Div.) *Evans* v. *Bullock and others* 552
10. *Demurrage—Detention—Default of charterers—Bad weather.*—Where a ship by the default of the charterers, is prevented from loading according to the charter-party "in her regular turn," and is in consequence delayed several days, and during such days bad weather comes on so that she is still further delayed, the charterers are responsible in damages as demurrage for the detention of the ship during the bad weather as well as for the detention during the previous days consequent upon the default. (Ex. Div.) *Jones* v. *Adamson and another*..... 253
11. *Demurrage—Detention at port of loading—Time of loading not fixed—Charterer's liability.*—The word "demurrage" in a charter-party fixing the time for discharge and giving a lien for demurrage, does not include detention at the port of loading, unless the time of loading is fixed by or can be gathered from the charter-party; and if the charter-party contains a clause exempting the charterer from liability on the completion of the loading no action will afterwards lie in respect of such detention. (Ex.) *Lockhart* v. *Falk* 8
12. *Demurrage—Lay days—Sundays—Construction.*—In a charter-party by which it is agreed "the loading and discharging of the said ship to be as fast as the steamer can work, but a minimum of seven days to be allowed the charterers, and ten days on demurrage over and above the said lying days at 25*l.* per day," "lying days" mean working days, and do not include Sundays. (Q.B.) *Commercial Steamship Company* v. *Boulton and another*..... 111
13. *Demurrage—Part of day.*—A ship detained part of a day on demurrage is entitled to be paid for the whole of the day. (Q.B.) *Id.*..... 111
14. *Demurrage—Lay days—Bad weather—Risk of charterer.*—Where by a charter-party a given number of days is allowed to a charterer for un-

loading, a contract is implied on his part that from the time when the ship is at the usual place of discharge he will take the risk of any ordinary vicissitudes, including bad weather, which may occur to prevent his releasing the ship at the expiration of the lay days. (Q.B. Div.) *Thiis and others* v. *Byers*.....*page* 147

15. *Demurrage—Loading—"Stiffening"—Construction.*—Where a charter-party provides that a ship is "to be loaded at the average rate of 75 tons per clear working day. . . . . Stiffening coal, if required, to be supplied at ship's expense at the rate of 40 tons per clear working day after written notice is given to the charterer's agent of its being required, but all days on which stiffening coal is taken on board, or the ship is detained for the same, to be excluded in the computation of the said working days allowed for loading;" the putting stiffening coal on board is "loading" within the charter-party, and demurrage is payable under a demurrage clause in respect of the neglect to supply stiffening coal, thus causing a detention of the ship. (Ct. of App.) *Sanguinetti* v. *The Pacific Steam Navigation Company*..... 300

16. *Liability of charterer to cease unloading—Demurrage—Lien—Exemption of charterer.*—But where the charter-party further provides that the master is "to have a lien on the cargo for all freight and demurrage due under this agreement," and that "all liability of the charterers shall cease as soon as the cargo is on board," the liability of the charterer for such demurrage ceases on the completion of the loading, and the shipowner's only remedy is by means of the master's lien. (Ct. of App.) *Sanguinetti* v. *Pacific Steam Navigation Company*..... 300

17. *Liability of charterer to cease on loading—Detention—Lien for freight, demurrage, &c.—Exemption—Effect of.*—Where a charter-party contains the words, "This charter being concluded by the said A. and B. for and on behalf of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted, the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage, and all other claims, which lien it is hereby agreed they shall have;" the charterer is liable for all undue detention before the cargo is completely shipped, whether the shipowner has a lien on the cargo therefor or not. (Q.B. Div.) *Lister* v. *Van Haansbergen*..... 145

18. *Liability of charterers to cease on loading—Lien—Exemption—Effect of.*—A charter-party containing the clause, "The liability of the charterers to cease as soon as the cargo is on board, provided the same is worth the freight at the port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise," exempts the charterers from all liability after the ship is loaded even in respect of breach of contract for which the shipowner's lien would give no remedy. (Ct. of App.) *French and another* v. *Gerber and others*..... 403

19. *Liability of charterer to cease on loading—Charterers also consignees—Bill of lading—Exemption.*—Where a charter-party provides for the cesser of liability of the charterers on loading and payment of advance freight at the port of shipment, and the bills of lading make the cargo deliverable "unto order or assigns, he or they paying freight and other conditions as per charter-party," and the cargo is loaded, and advances paid, and the charterers become consignees also, they are nevertheless exempted from the payment of freight, the bill of lading making no new contract. (P. C. Div.) *Barwick* v. *Burnyeat, Brown and Co*.....*page* 376

20. *Lighterage—Contract—"Merchant's risk and expenses"—"Cargo at A. as customary"—Custom.*—Where a charter-party stipulates that a ship shall load a full cargo at one of several ports, including A., the cargo "to be brought to, and taken from alongside at merchants' risk and expense," and these words are in print, and the charter-party further contains the words "cargo at A. as customary" in writing, the latter words work an exception to the former, and if the custom at A. is for the shipowner to repay to the charterer any reasonable lighterage paid by him, the charterer can recover the same from the shipowner. (Q.B. Div.) *Scrutton* v. *Childs*..... 873

21. *Loading—Breach of charter—Foreign Government—Liability of shipowners.*—Where a charter-party provides that a ship shall, after loading dead weight at a port, proceed to a first-class Spanish port where "a steamer with cargo from a foreign port can load at by Spanish law without risk of detention by Customs authorities," and the ship having, as known to the charterer when making the charter-party, loaded Government stores at the first port, is ordered to Valencia, and is there unable to load, by Spanish regulations prohibiting ships carrying stores from loading; the shipowner commits no breach of charter in not loading, and the charterer cannot recover against him. (Ct. of App.) *Cunningham* v. *Dunn and another*..... 595

22. *Seaworthiness—Warranty—Time of sailing.*—The warranty of seaworthiness implied in a charter-party attaches at the time of the ship's sailing on her voyage and is not exhausted on her proceeding in a seaworthy condition to her loading berth. (Q. B. Div.) *Cohen* v. *Davison*... 374

23. *Shipowner—Charterer—Demise of ship—Liability of shipowner—Terms of contract.*—Where a shipowner lets his ship to a charterer under a charter-party, by which the shipowner is to provide a full crew and pay them their wages, and to find all ship's and engine stores, and the charterer is to find coals for the engines, and to have the direction of the ship for the purposes of trading between certain ports, the shipowner remains responsible for the negligence of the crew who are his servants. (C. P. Div.) *The Omoa and Cleland Coal and Iron Company* v. *Huntley*..... 501

24. *Warranty of class—Time—Duration—Insurance on cargo.*—Where a charter-party describes a ship as newly classed "A 1¾, record of American and Foreign Shipping Book," such description is only a warranty that she is so classed at the time of the making of the charter-party, but is not a warranty that she is rightly or will continue so classed. Hence, if shortly after the making of the charter-party the certificate of classification is cancelled and the charterers cannot insure on cargo, there is no action for breach of charter-party against the shipowner. (Ct. of App.) *French and Sons v. Newgass and Co*..... 574

See *Carriage of Goods*, Nos. 15, 21—*Collision*, No. 7—*Marine Insurance*, Nos. 10, 12—*Wages*, No. 1.

COLLISION.

1. *Assistance to injured vessels—Merchant Shipping Act* 1873.—The Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 16, having imposed upon the master of every ship, in case of collision with

another ship, a duty, "if and so far as he can do so without danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary to save them from any danger caused by such collision;" this duty is not discharged by a steamship, where, it being practicable and safe to lower a boat to render assistance, although possibly dangerous to stay by the injured ship, she continues her voyage without lowering her boat, and merely hails and signals for other vessels to go to the assistance of the injured ship. (Adm.) *The Adriatic* .....*page* 16

2. *Assistance to injured vessels—Merchant Shipping Act* 1873—*Onus of proof.*—A ship failing to render assistance to another with which she has been in collision, and showing no reasonable cause for such failure, will be held to blame for the collision, unless proof be given to the contrary on her behalf, (Adm.) *The Adriatic*..... 16

3. *Compulsory pilotage—Burden of proof—Contributory negligence.*—In cases of collision, if it be proved on the part of the defendants that the accident occurred through the fault of a pilot compulsorily employed, the burden of proving that the defendants have been guilty of contributory negligence lies on the plaintiffs, and they must show such negligence either by direct proof adduced by themselves or from facts proved in the defendants' evidence. *The Iona* (16 L, T. Rep. N. S. 158; L. Rep. 1 P. C. 426; 2 Mar. Law Cas. O. S. 479) explained. (H. of L.) *Clyde Navigation Company* v. *Barclay and others* 390

4. *Compulsory pilotage—Contributory negligence of defendants or their servants—Onus of proof.*—When the defence of compulsory pilotage is relied upon in a collision cause, the onus of proving negligence on the part of the defendants or their servants causing or contributing to the collision, is on the plaintiff. *Clyde Navigation Company* v. *Barclay* (1 App. Cas. 790; 36 L. T. Rep. N. S. 379) followed. *The Iona* (L. Rep. 1 C. P. 432; 16 L. T. Rep. N. S. 158) disapproved. (Ct. of App.) *The Daioz*..... 477

5. *Compulsory pilotage—Pilot—Duty of—Vessel dragging.*—Where a vessel under the charge of a pilot is at anchor and drags, it is the duty of the pilot to inform himself of the condition of affairs before taking steps to avoid damage arising from it, and not to wait till someone reports it to him. (Adm.) *The Princeton* 562

6. *Compulsory pilotage — River Mersey — Vessel coming from sea — Docking,* — Where a vessel coming from sea into the river Mersey with a pilot on board is prevented from docking, in consequence of the violence of the wind, or want of water, and anchors, but is to be docked as soon as circumstances permit, the employment of a pilot is, under the Mersey Docks Acts Consolidation Act, compulsory. (Adm.) *The Princeton*..... 562

7. *Compulsory pilotage — Falmouth Harbour — Trinity outport—Compulsion—Merchant Shipping Acts.*—Falmouth Harbour being within a Trinity outport district for which pilots were licensed by the Trinity House prior to 1854, pilotage is, by the Merchant Shipping Act 1854, compulsory there for a vessel bound from a Mediterranean port to the port of Falmouth. (Adm. Div.) *The Juno*..... 217

8. *Damages — Measure — Loss of charter-party— Deductions — Freight earned— Expenses—Wear and tear.*—In estimating the loss sustained by a ship in a collision, a charter-party, previously entered into contingent on the arrival of the ship on a fixed date at another place but cancelled by the charterers by reason of the delay occasioned by the collision, should be taken into consideration, the amount recoverable in respect thereof being the freight that would have been earned under the charter-party, less deductions for freight actually earned after repairs and for expenses and saving of wear and tear, &c., which would have been incurred in the performance of the charter-party. (Adm.) *The Star of India..page* 261

9. *Damages — Measure — Demurrage.*—In addition to such damages the shipowner is entitled to demurrage during the time he is detained for repairs at the usual rate allowed to ships. (Adm.) *The Star of India* 261

10. *Dock—Control of dockmaster—Duty of crew.*—When a vessel enters dock with the permission and under the general directions of the dockmaster, and within the space over which his authority by statute extends, those on board of her are bound to use diligence and care to carry out the directions of the dockmaster in such a manner as to avoid doing damage to other vessels. (Adm.) *The Cynthia*..... 378

11. *Latent defect — Absence of negligence — No liability.*—The owners of a vessel are not liable for damage caused to another vessel in a collision occasioned by the sudden breaking down of an apparatus in which there is an inherent latent defect, in the absence of any negligence in the user of the apparatus. *The William Lindsay* (*ante*, vol. 2, p. 118; L. Rep. 5 P. C. 338; 29 L. T. Rep. N. S. 355) followed. (Adm.) *The Virgo* 285

12. *Liability — Act causing collision — Must be negligent to create liability.* Before a plaintiff in a collision cause can be deprived of his right of recovery against a negligent defendant by reason of an act done by the plaintiff, without which the collision would not have occurred, it must be shown that such act of the plaintiff was negligent. (Ct. of App.) *The Sisters* 122

13. *Liability—Dockmaster—Tug—Pilot.—A vessel* leaving dock with a pilot on board, and within the space over which the dockmaster's authority extends by statute, is responsible for damage resulting from the use of a tug of insufficient power by her master, even when such tug is in the general employment of the dock company, there being no obligation on the dock company to supply a tug. (Ct. of App.) *The Belgic* 348

14. *Lights—Dumb barge—Steamer—Negligence— Presumption.*—When a collision occurs between a dumb barge without lights and a steamer on a dark night in the river Thames, there is no presumption of law that the steamer is to blame. It is in all cases necessary for those who allege negligence, causing a collision, on the part of another vessel, to prove it. (Ct. of App., reversing Adm.) *The Swallow* 371

15. *Lights — Overtaking vessel — Light astern— Signal.*—It is *primâ facie* the duty of an overtaking ship to keep out of the way of a ship ahead of her, but if the latter ship sees another approaching her from a direction where her lights are not visible, and which vessel she has reason to suppose does not, in fact, whether keeping a good look-out or not, see her and is likely to come into collision with her, it is her duty to give some warning to the overtaking ship, not necessarily by exhibiting a light, but by some signal, such as the firing of a gun, the showing a light, or otherwise, which will indicate her whereabouts

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to the overtaking ship, and call the attention of that ship to the danger of a collision. (P.C, from Adm.) *The Anglo-Indian* .....*page* 1

16. *Lights — Overtaking vessel — Light astern— Signal — Speed — Steamship — Sailing ship.*— Although a ship is, under some circumstances, bound to keep a look-out astern, and to show a light or give a signal to another ship overtaking her and evidently unable to see her, nevertheless where a steamer going at a high rate of speed in a fair way overtakes a sailing ship showing no light or signal, and does not see her until too near to avoid a collision, although keeping a good look-out, the steamer will be held alone to blame, if a lower rate of speed would have given the steamer time to have avoided the collision upon sighting the sailing ship. (P.C. from Adm.) *The Earl Spencer* 4

17. *Light—Signal — Steamer coming to anchor— Lights not visible.*—A steamer manœuvring to come to an anchor in a place and manner such that her regulation lights cannot be seen by an approaching vessel, is bound to give timely notice of her presence by showing a light or some other sufficient means. (Adm.) *The Philotaxe* 512

18. *Lights—Ship aground—Duty to warn vessels.*— When a vessel is aground in a place where her ordinary riding light cannot be distinguished by approaching vessels, and where vessels are not expected to lie, it is her duty to exhibit a light on a mast or some elevated position, and to have a look-out to give warning to approaching vessels of her position by the best means in her power. (Adm.) *The Thomas Lea* 260

19. *Light—Signals—Overtaking vessels.*—A vessel is not bound to show a light or signal astern to a following vessel, unless there is apparent danger from such vessel. (Ct. of App.) *The City of Brooklyn* 230

20. *Look-out—Steamship— Roadstead.*— A steamship running through a roadstead should, in addition to her master on the bridge, carry a look-out man in the daytime. (Ct. of App.) *The Transit*..... 233

21. *Practice— Admiralty — Interrogatories—Preliminary act.*—In an action of damage by collision in the Admiralty Division, interrogatories which seek to obtain information given in the preliminary act of the party interrogated are inadmissible, and will be struck out on the application of the party sought to be interrogated. (Adm. *The Boila*..... 125

22. *Practice —Appeal—Nautical assessors —Question of fact.*—On an appeal in a cause of collision from the Admiralty Division, the Court of Appeal when unassisted by nautical assessors, will not reverse a finding of the court below upon a question of fact depending upon the credibility of witnesses regarded from a nautical point of view, provided that there is evidence in support of that finding. (Ct. of App.) *The Sisters* 122

23. *Practice—Assessors disagreeing—Semble*, where in a collision cause the two assessors disagree, the court can call in a third, and, after submitting the evidence already given to him, have the case re-argued before the three assessors. (Adm.) *The Philotaxe* 512

24. *Practice—Costs—Admiralty— Inevitable accident.*—Where the defence of inevitable accident is sustained, the plaintiff will not be ordered to pay the costs, unless he might have known that there was, apart from the merits, a good legal defence. (Adm.) *The Virgo* 285

25. *Practice—Costs—Compulsory pilotage.*—Where defendants in an action of collision raise the defence of compulsory pilotage only and succeed therein, they are entitled to their costs. (Adm. Div.) *The Juno*..... ..*page* 217

26. *Practice —Costs — Compulsory pilotage.*—The Admiralty Division will adhere to the practice of the High Court of Admiralty, as to costs in cases of compulsory pilotage. *The Princeton*..... 562

27. *Practice— Costs — Complusory pilotage — Defence.*—A defendant in an action (not in Admiralty) of collision succeeding in his defence on the plea of compulsory pilotage is entitled to his costs, although the rule in the Admiralty Division is uniform not to allow costs in such case, except where it is the sole defence raised. (Ex. Div.) *General Steam Navigation Company* v. *London and Edinburgh Shipping Company*..... 454

28. *Practice — Costs — Compulsory pilotage — Defence.*—When a suit (instituted in the Admiralty Division) is dismissed, or an appeal succeeds on the ground that the defence of compulsory pilotage is established, no order will be made as to costs either below or on appeal. *The Schwann* (L. Rep. 4 Ad. & Ecc. 187; 30 L. T. Rep. N. S. 237) followed. (Ct. of App.) *The Daiox* 477

29. *Practice—Costs —Reference —Fishing vessel— Loss of fishing —Damages.* — Where a plaintiff claimed unliquidated damages in respect of loss of the remainder of a season's fishing occasioned by a collision, and on a reference to the registrar and merchant, the defendants objected to the claim altogether, but the plaintiff recovered being awarded less than two-thirds of the amount claimed by him as damages, the court gave him costs in respect of the reference on the ground of the peculiarity of the plaintiff's claim, and without prejudice to the general rule as to costs of references. (Adm.) *The Gleaner* 582

30. *Practice—Costs—Court of Appeal—Varying of decree—Both ships to blame.*—Where the Court of Appeal varies a decision of the judge of the Admiralty Division, by which he found one vessel that is wholly to blame for a collision, by finding that both vessels were to blame, each party will pay its own costs, both in the court below and in the Court of Appeal. *The Agra and The Elizabeth Jenkins* (2 Mar. Law Cas. O. S. 532; L. Rep. 1 P.C. 501: 16 L. T. Rep. N. S. 755) followed. (Ct. of App.) *The Corinna* 307

31. *Practice — Costs — Court of Appeal—Varying decree—Inevitable accident.*—Where the Court of Appeal varied the decision of the judge of the Admiralty Division, by which he found one vessel that is wholly to blame for a collision, by finding that the collision was an inevitable accident, the practice of the Privy Council that each party should, except under very exceptional circumstances, pay their own costs, will be followed. *The Marpesia* (*ante*, vol. 1, p. 261; L. Rep. 4 P. C, 212; 26 L. T. Rep. N. S. 333) followed. (Ct. of App.) *The City of Cambridge* 307

32. *Practice—Costs—Inevitable accident*—It is the practice of the Admiralty Court in case of inevitable accidents that each party should pay its own costs. But if, from the circumstances of the collision, it must have been obvious that the collision was an inevitable accident, the court will use its discretion as to dismissing the suit with costs. (Adm.) *The Innisfail*; *The Secret*... 337

33.—*Practice—Counter-claim—Security for costs of resident out of jurisdiction.*— A defendant in a collision cause making a counter-claim for the damage sustained by his own vessel must, if he be resident out of the jurisdiction, give security for the costs, not merely of his counter-claim, but of the whole action. (Adm.) *The Julia Fisher* 380

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34. *Practice—Counter-claim—Security for costs—Default.*—If he make default in giving security for costs pursuant to order, he will have his counter-claim dismissed. (Adm.) *Id.*.....*page* 380

35. *Practice—Damage to cargo — Ship carrying cargo — Preliminary act.* — In an action for damage to cargo sustained in a collision between two ships where the action is brought against the ship carrying the cargo, the parties are not bound to file preliminary acts under the Rules of the Supreme Court, Order XIX., rule 30. (Adm.) *The John Boyne* 341

36. *Practice—Jurisdiction—Admiralty Division—Lord Campbell's Act—Action in rem.*—The High Court of Justice (Admiralty Division) has jurisdiction to entertain an action *in rem* brought by the personal representatives of a deceased person killed by the negligence of those on board a foreign ship in a collision between that ship and a British ship on the high seas below high-water mark. (So decided in the Admiralty Division. On appeal the Court of Appeal was equally divided, and the appeal dismissed.) (Adm. and Ct. of App.) *The Franconia*..... 415, 433

37. *Practice—Inspection of documents—Compromise of action.*—In an action by owner of cargo against shipowner for damage in consequence of collision with another ship, caused by the defendant's alleged negligence, the plaintiff has a right to inspect terms of compromise of cross-suits in the Admiralty Court, entered into by the respective owners of the two ships. (Q.B. and Ct. of App.) *Hutchinson* v. *Glover* 85, 120

38. *Practice—Joint action of ship and cargo—Security for counter-claim—Dismissal of ship's action—Leave to cargo to proceed.*—Where the owners of a ship which has sunk, and the owners of the cargo laden on board her, join as plaintiffs in an action against another ship for damages sustained by collision, the court will order the claim by the owner of the ship to be dismissed, unless securities for a counter-claim made by the defendants is given, but will allow the owner of cargo to proceed without security. *The Carnarvon Castle.*—..... 607

39. *Practice—Particulars of claim.*—Where a ship was totally lost in a collision, the court (Admiralty Division), contrary to the practice of the High Court of Admiralty, made an order, in an action by the shipowners against the vessel doing the damage, for particulars of the plaintiff's claim to be delivered to the defendants. (Adm. Div.) *The N. P. Neilson* 169

40. *Practice—Vice-Admiralty Courts—Preliminary acts.*—The form of preliminary acts now in use in the High Court of Justice in collision cases should be used in similar cases in the Vice-Admiralty Courts. (P.C.) *The Norma*..... 272

41. *Practice—Vice-Admiralty Courts—Vivâ voce examination of witnesses.*—In collision causes in the Vice-Admiralty Courts witnesses should, as far as possible, be examined *vivâ voce* before the court, not upon written interrogatories before an officer of the court prior to the hearing. (P.C.) *The Norma* 272

42. *Regulations for preventing collision—Infringement not contributing to collision—Liability—Merchant Shipping Act* 1873.—A vessel, though infringing the "regulations for preventing collisions at sea," will not be "deemed to be in fault" within the meaning of sect. 17 of the Merchant Shipping Act 1873, for a collision caused exclusively by the negligence of the other colliding vessel, if the infringement of the regulations could not, under the circumstances of the case, have contributed to the collision. Hence where a vessel carrying wrong lights is run into by another which is bound to keep out of the way, but that other vessel, having no look-out, could not have seen any lights if they had been there, the vessel carrying the wrong lights will not be deemed in fault. *The Fanny Carvill* (2 Asp. Mar. Law. Cas. 478, 565) followed. (Adm.) *The Englishman*.....*page* 506

43. *Regulations for preventing collisions* (*Art.* 5)—*Lights—Fishing vessels—Stationary and moving.*—Decked fishing vessels are bound to carry the coloured lights prescribed by Art. 5 of the Regulations for Preventing Collisions at Sea so long as they are actually under weigh, and are only justified in substituting the white mast-head light, prescribed by the 2nd cl. of Art. 9, when their nets are over, and they are kept stationary by them. *The Esk and The Gitana* (L. Rep. 2 A. & E. 350; 20 L. T. Rep. N. S. 587; 3 Mar. Law. Cas. O. S. 242) followed. (Adm.) *The Englishman* 506

44. *Regulations for preventing collisions* (*Art.* 12, 19, 20)—*Sailing ships—Crossing.*—A vessel on the starboard tack close hauled approaching another, apparently on the port tack, is, nevertheless, bound to keep out of the way, so soon as she ascertains that the other vessel is unmanageable and unable to obey the ordinary rule of the road at sea. (P.C.) *The Lake St. Clair* v. *The Underwriter*..... 361

45. *Regulations for preventing collisions* (*Art.* 18)—*Sailing ship—Steamship.*—A sailing vessel, meeting a steamer, is bound to keep her course, and it is not the rule of the road that she should port her helm on nearing the steamer, such a deviation from the rules being allowed only under circumstances of immediate danger. (P.C.) *The Norma*..... 272

46. *Regulations for preventing collisions* (*Arts.* 12, 17)—*Sailing ships—Overtaking—Crossing.*—When a close-hauled ship is on the lee-quarter of and sailing faster than one on the same tack having the wind free, and is consequently gaining on her, and their courses are such as to occasion risk of collision, Art. 12 of the Regulations for Preventing Collisions at sea applies, and not Art. 17; and it is the duty of the ship having the wind free to keep out of the way of the close-hauled ship. (Adm.) *The Peckforton Castle*..... 115

47. *Regulations for preventing collisions* (*Arts.* 12, 17)—*Sailing ships—Overtaking—Crossing.*—*Semble*, the proper manœuvre for the ship having the wind free to adopt is—if the vessels have the wind on the port side, to port; and if on the starboard side, to starboard the helm. (Adm.) *Id.* 611

48. *Regulations for preventing collisions* (*Art.* 12, 17)—*Sailing ships—Crossing—Overtaking.*—Sailing ships on converging courses are crossing ships within Art. 12, and the faster-sailing vessel is not an overtaking ship within Art. 17, if at no time was she abaft the beam of the slower vessel. *Quære*, what is the proper definition of an overtaking ship or steam-vessel. *The Franconia* (L Rep. 2 P. Div. 8: 35 L. T. Rep. N. S. 360; 3 Asp. Mar. Law Cas. 295) doubted. (Ct. of App.) *Id.* 533

49. *Regulations for preventing collisions* (*Arts.* 12, 17)—*Sailing ships—Crossing—Overtaking—Close-hauled.*—*Semble*, it is a well-recognised and useful rule of navigation that in all cases a sailing vessel going free should give way to one close-hauled. (Ct. of App.) *Id.*..... 533

50. *Regulations for preventing collisions* (*Arts.* 15. 17)—*Sailing ship—Steamship—Overtaking.*—*Semble*, the case of a faster-sailing vessel overtaking a slower steamer, in the ordinary course of navigation, is governed by Art. 17 and not by

Art. 15 of the Regulations for Preventing Collisions at Sea. (Adm.) *The Philotaxe*.....*page* 512

51. *Regulations for preventing collisions* (*Arts.* 14, 17) — *Steamships — Overtaking ship — Crossing ship.*—As a general rule, wherever two steamships are on converging courses, the one abaft the beam of the other in such a position that the hinder ship cannot see the side lights of the leading ship, the former, if going at a greater speed than the latter, is to be considered as a vessel overtaking another vessel, within the meaning of Art. 17 of the Regulations for Preventing Collisions at Sea, and bound to keep out of the way; and they are not to be treated as crossing vessels under Art. 14. (Ct. of App.) *The Franconia* 295

52. *Regulations for preventing collisions* (*Arts.* 16, 17) — *Steamships — Overtaking ship — Stopping and reversing.*—Where one steamship is overtaking another within the meaning of Art. 17 of the Regulations, and there is risk of collision, the leading ship is not to be considered as approaching another ship so as to involve risk of collision within the meaning of Art. 16, and is not bound to slacken speed, or stop and reverse. (Ct. of App.) *The Franconia* 295

53. *Regulations for preventing collisions* (*Arts.* 19, 20 — *Tacking ship — Missing stays.* — When a vessel in tacking misses stays, she is bound to manœuvre in such a way as to come under command again as soon as possible, so as not to embarrass an approaching vessel by remaining in an unmanageable condition; and if possible she should warn the other of her condition. (P.C.) *The Lake St. Clair and the Underwriter*..... 361

54. *Speed — Steamship — Dark night.* — When a night is so dark that a steamer cannot make out other vessels until within her own length of them, she is not justified in running at such a speed that she cannot then avoid coming into collision with them. (Ct. of App.) *The City of Brooklyn* 230

55. *Steam ram—Latent danger.*—Where a ship carries a latent instrument dangerous to others, those who have control of it are bound to take all reasonable precautions that it shall not cause damage to others. (P. C. from Adm.) *H.M.S. Bellerophon*..... 58

56. *Steam ram—Latent danger—Duty to give warning.*—Where one of H.M.'s ships carries under her bows below water a ram, not ordinarily dangerous to vessels navigating the seas, but dangerous to vessels coming in contact with it, and the officer in charge of H.M.'s ship has under the circumstances reasonable ground for supposing that the ram will occasion damage to another (friendly) ship, and has reasonable means and opportunity of warning the other ship of the danger so as to enable her to avoid it, although the other ship has in the first instance been guilty of negligence, whereby she has occasioned the necessity for giving notice, it is the duty of the officer in charge of H.M.'s ship to give notice to the other ship; but if there is no reasonable ground for apprehending danger, and no reasonable opportunity for giving the notice, there is no obligation to give the notice. (P. C. from Adm.) *H.M.S. Bellerophon* 58

57. *Steamships—Navigation in open waters—Cause.* —Where two steamships are navigating open waters, such as the English Channel, some miles from land, one has no right to assume that the other will at a given time or place alter her course and take another course up or down Channel, but the former must, as the other ship approaches, take such measures as are required by the regulations in reference to the course upon which such other ship actually is. (Ct. of App.) *The Franconia* .....*page* 295

58. *Steamship—Trial trip—Negligence — Sufficient crew.*—The sending a new steamer, not yet out of the builders' hands, on a trial trip, manned by a sufficient number of men to work the ship, and in charge of a duly licensed pilot, but without regularly constituted officers and crew, does not amount to contributory negligence. (H. of L.) *Clyde Navigation Company* v. *Barclay and others* 390

59. *Steam tug—Steamship and sailing ship—Regulations for preventing collisions* (*Art.* 15).—A steam tug hove to during fine weather in a fairway and waiting for employment, is bound to keep out of the way of sailing ships using the fairway. (Adm.) *The Jennie S. Barker*; *The Spindrift* 42

See *Damage*, Nos. 1, 3—*Limitation of Liability*, Nos. 1, 2, 3, 4—*Master's Wages and Disbursements*, No. 1—*Practice*, Nos. 16, 17.

COLONIAL PORT.

See *Necessaries*, Nos. 1, 3.

COMMISSION.

See *Marine Insurance*, Nos. 1, 2, 30—*Sale of Ship*, No. 1.

COMMON CARRIER.

See *Carriage of Goods*, Nos, 1, 2, 3.

COMMUNICATION.

See *Bottomry*, Nos. 1, 2.

COMPANY.

See *Master's Wages and Disbursements*, No. 2.

COMPULSORY PILOTAGE.

See *Collision*, Nos. 3, 4, 5, 6, 25, 26, 27, 28.

CONCEALMENT.

See *Marine Insurance*, No. 6.

CONSIGNEES.

See *Carriage of Goods*, Nos. 14, 15—*Consignor and Consignee — Stoppage in Transitu*, Nos. 2, 3, 4.

CONSIGNOR AND CONSIGNEE.

1. *Bills drawn against cargo—Appropriation of cargo—Lien.*—Where a consignor draws bills of exchange in the ordinary form on his consignee, against or "on the strength of" goods shipped to the consignee, and sending the bills of lading to the consignee asking him to honour the drafts and such consignee does not honour the drafts, there is no appropriation of the cargo to the payment of such bills which will give a holder of the bills a lien on the cargo for their payment. (Ch. Div.) *Ranken* v. *Alfaro* 309

2. *Bills drawn against cargo—Appropriation of cargo—Assignment.*—And if the consignee on being applied to for payment by the holders of the bills of exchange, writes to them stating that he has received the warrant for the delivery of the cargo, and shall dispose of the same as instructed by the sender, this does not constitute an equitable assignment of the cargo for the payment of the bills. (Ch. Div.) *Id.* 309

CONSTRUCTIVE TOTAL LOSS.

See *Marine Insurance*, No. 7.

CONSUL.

See *Mortgage* No. 2—*Wages*, No. 4, 6.

CONTRIBUTION.

See *General Average—Marine Insurance Association*, Nos. 1, 2—*Practice*, No. 24—*Salvage*, Nos. 14, 15, 16.

CONTRIBUTORY NEGLIGENCE.

See *Collision*, Nos. 3, 4.

CO-OWNERS.

See *Master*, No.2—*Accessories*—No. 1—*Shipowner*, No. 6.

COSTS.

See *Collision*, Nos. 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34—*Limitation of Liability*, No. 4—*Marine Insurance Association*, No. 4—*Master's Wages and Disbursements*, No. 2 — *National Character*, No. 3—*Practice*, Nos. 4, 10, 14, 23, 24—*Salvage*, Nos. 21, 22, 25, 26.

COUNTER-CLAIM.

See *Collision*, Nos. 33, 34—*Limitation of Liability*, Nos. 1, 2.—*Practice*, No. 6.

COUNTY COURTS ADMIRALTY JURISDICTION.

See *Practice*, Nos. 7, 8, 9, 10, 11 — *Salvage*, Nos. 8, 9, 22—*Wages*, No. 2—*Wrongful Dismissal.*

COUNTY COURT APPEALS.

See *Practice*, Nos. 1, 8, 9, 10, 11—*Salvage*, Nos. 20, 22.

CROSSING SHIPS.

See *Collision*, Nos. 44, 46, 47, 48, 49, 51.

CUSTOM.

See *Charter-party*, No. 20—*Marine Insurance*, No. 1—*Salvage*, No. 6.

DAMAGE.

1. *Damage to realty abroad—Governing law—Lex loci—Liability of shipowner.*—The question of the liability of a shipowner, proceeded against in the English Admiralty Court for an injury done by his ship to a pier projecting into the sea, but attached to the soil of a foreign country, is governed by the *lex loci*, and not by English law. (Ct. of App., reversing Adm.) *The M. Moxham* .....page 95, 191

2. *Damage to realty abroad by ship—Admiralty jurisdiction.—Quære*, can an English Court of Admiralty entertain an action for damage to realty in a foreign country, apart from some agreement or contract of the parties. (Ct. of App., reversing Adm.) *Id.* 191

3. *Harbours, Docks, and Piers Clauses Act* 1847 *—Damage to pier—Abandoned wreck—Liability of owner.*—Under the Harbours, Docks, and Piers Clauses Act 1847, sect. 74, enacting that the owner of every vessel shall be answerable for any damage done by such vessel to the harbour, dock, or pier, or the quays or works connected therewith, the owner of a ship, which, abandoned by her crew through stress of weather, becomes a total wreck, and is driven against and damages the pier, is not liable for such damage. (H. of L., affirming Ct. of App., reversing Q.B.) *The River Wear Commissioners* v. *Adamson* 242

DAMAGES.

Contract to repair ship — Delay — Measure of damages—Loss of earnings.—Where a defendant has undertaken to supply the plaintiff's steamship with a propeller shaft and other fittings, and supplies things that are useless, and by that means the plaintiffs in obtaining other fittings lose the use of the ship for nine days, the loss of earnings of the ship for those nine days are to be taken into consideration in assessing the damages. (Q. B. Div.) *Wilson and another* v. *General Screw Colliery Company*.....page 536

See *Carriage of Goods*, Nos. 12, 13—*Charter-party*, Nos. 7, 8, 9—*Collision*, Nos. 8, 9.

DAMAGE TO CARGO.

See *Carriage of Goods*, Nos. 8, 9, 10, 11—*Practice*, No. 6.

DEFAULT.

See *Practice*, Nos. 12, 13—*Shipowner*, No. 5—*Wages*, Nos. 5, 7.

DELIVERY.

See *Carriage of Goods*, Nos. 12, 15—*Stoppage in Transitu.*

DEMURRAGE.

See *Carriage of Goods*, No. 14—*Charter-party*, Nos. 10, 11, 12, 13, 14, 15, 16—*Collision*, No. 9—*Damages—Practice*, No. 20—*Salvage*, No. 25.

DERELICT.

See *Salvage*, No. 10.

DETENTION.

See *Charter-party*—Nos. 10, 11, 17.

DEVIATION.

See *Marine Insurance*, No. 15.

DISBURSEMENTS.

See *Master's Wages and Disbursements.*

DISCHARGE.

See *Master*, Nos. 2, 3.

DISCIPLINE.

1. *Board of Trade inquiry—Master—No charge made.*—When an inquiry is instituted under the Merchant Shipping Acts into the conduct of a captain, the court may proceed with the inquiry, although the Board of Trade have no charge to make against the captain. (Q.B.) *Ex parte Minto* 323

2. *Wreck Commissioner—Jurisdiction—Certificate of master—Loss, damage, or serious damage—Merchant Shipping Acts*—Under the Merchant Shipping Acts 1854 to 1876, the Wreck Commissioner has no jurisdiction to suspend a master's certificate where a ship has been stranded but not damaged, as his jurisdiction in that respect is derived from the Merchant Shipping Act 1854, sect. 242, which gives such jurisdiction only in the event of loss, abandonment of, or "serious damage" to any ship. (Q. B. Div.) *Ex parte Storey* 549

DISCONTINUANCE.

See *Practice*, No. 14

DISCOVERY.

See *Collision*, No. 21.—*Practice*, No. 15.

DISTRIBUTION OF SALVAGE.

See *Salvage*, Nos. 5, 6, 24.

DIVISIONAL COURT.

See *Practice*, No. 1.

DOCK.

See *Collision*, No. 10.

DOCK DUES.

See *Charter-party*, No. 8—*Mersey Docks Acts Consolidation Acts.*

DOCKMASTER.

See *Collision*, No. 10.

DOUBLE INSURANCE.

See *Marine Insurance*, No. 8.

EQUIPPING.

See *Necessaries*, No. 2.

ESTOPPEL.

See *Practice*, Nos. 16, 17.

EVIDENCE.

See *Bottomry*, No. 3— *Carriage of Goods*, Nos. 8, 9, 14—*Marine Insurance*, No. 21—*Sale of Goods*, No. 4—*Salvage*, No. 19.

EXCEPTED PERILS.

See *Carriage of Goods*, Nos. 4, 5, 6, 7, 8.

EXCEPTIONS.

See *Carriage of Goods*, Nos. 4, 5, 6, 7, 8.

FALMOUTH HARBOUR.

See *Collision*, No. 7.

FIRE.

See *Marine Insurance*, Nos. 8, 9.

FISHING VESSEL.

See *Collision*, Nos. 29, 43—*Wages*, No. 2.

FOREIGN FLAG.

See *National Character.*

FOREIGN JUDGMENT.

See *Practice*, Nos. 16, 12.

FOREIGN SHIP.

See *Mortgage*, No. 2—*Necessaries*, No. 3.

FORFEITURE.

See *Marine Insurance*, Nos. 3, 4—*National Character.*

FRAUD.

See *Marine Insurance*, No. 6—*Shipowners*, Nos. 1, 2.

FREIGHT.

See *Carriage of Goods*, Nos. 15, 16—*Charter-party*, Nos. 17, 18—*Marine Insurance*, Nos. 10, 11, 12—*Mortgage*, Nos. 5, 6.

GENERAL AVERAGE.

1. *Donkey engine—Sailing ship—Leak—Spars consumed for fuel—Contribution.*—Where a sailing-ship carries a donkey engine for loading and discharging, which is also available for pumping, she need only carry a reasonable supply of coals for pumping purposes, and if during the voyage she springs a leak, and such supply of the coals is exhausted in pumping, and the master is compelled to consume spars and other materials for keeping up the fires, the shipowners are entitled to claim from the owners of cargo for general average in respect of such consumption. (Q.B. Div. and Ct. of App.) *Robinson* v. *Price..page* 321, 407

3. *Salvage expenses—Agency charges—Commission—Shipowner.*—Where a vessel gets aground and the shipowner engages salvors and incurs expense in rescuing her and her cargo and conveying the cargo to the port of destination, his exertions do not give him any right to commission or agency charges for superintending the salvage services and receiving the cargo, as he does these things for his own benefit for the purpose of earning freight; and such commission cannot be made a general average charge on the cargo unless specially provided for by an average agreement. (Q. B. Div.) *Schuster and others* v. *Fletcher* ..... *page* 577

3. *Ship's tackle cut away—Certainty of loss—Right to contribution.*—A shipowner is not entitled to general average from owners of cargo in respect of the abandonment (to save the whole adventure) of ship's tackling when the condition of the tackling was such that it must have been lost in any event. (Ct. of App., reversing C. P. Div.) *Shepherd and others* v. *Kottgen and others* 514

4. *Ship's mast—Endangering vessel—Wreck—Right to contribution.*—Where a ship's mast is swaying about in a heavy gale in such a manner as to endanger the vessel, and it is by the master's order cut away and abandoned, there is no contribution for such loss if the mast is a wreck and valueless when cut away, and must have been lost in any event; and if at the trial of an action by the shipowners against the owners of cargo to recover general average, the judge asks the jury whether the mast was or was not, at the time of the sacrifice, a wreck and valueless, there is no misdirection, and he is not bound to ask them whether, if the storm had suddenly ceased, the mast might possibly have been saved. Ct. of App., reversing C. P. Div.) *Id.* 544

See *Carriage of Goods*, No. 16—*Practice*, No. 6.

GOVERNING LAW.

See *Carriage of Goods*, No. 11—*Damage*, No. 1.

GOVERNMENT SHIP.

See *Salvage*, Nos. 2, 3, 4, 7, 12.

HARBOURS, DOCKS, AND PIERS CLAUSE ACT, 1847.

See *Damage*, No. 3.—*Wreck.*

HER MAJESTY'S SHIPS.

See *Salvage*, Nos. 2, 3, 7, 12.

HYPOTHECATION.

See *Sale of Goods*, No. 7.

ILLEGALITY.

See *Marine Insurance*, No. 30.

INCEPTION OF RISK.

See *Marine Insurance*, No. 30.

INDEMNITY.

See *Master's Wages and Disbursements*, No. 1.

INEVITABLE ACCIDENT.

See *Collision*, Nos. 24, 31, 32.

INJUNCTION.

See *Shipowner*, No. 4.

INSOLVENCY.

See *Practice*, No. 23.

INSPECTION OF DOCUMENTS.

See *Collision*, No. 37.

INSURABLE INTEREST.

See *Marine Insurance*, Nos. 13, 17, 18, 28.

SUBJECTS OF CASES.

INSURANCE.

See *Charter-party*, Nos. 9, 24—*Marine Insurance*—*Sale of Goods*, No. 3.

INTEREST.

See *Marine Insurance*, Nos. 13, 17, 18, 28—*Salvage*, No. 26.

JUDGMENT.

See *Practice*, Nos. 9, 13, 16, 17—*Salvage*, No. 26.

JUDICATURE ACTS.

See *Limitation of Liability*, No 1—*Practice*, Nos. 3, 12, 13, 14, 19, 22, 24, 26, 27.

JURISDICTION.

See *Booty of War*—*Collision*, No. 36—*Damage*, No. 2—*Discipline*, Nos. 1, 2—*Master*, No. 1—*Mortgage*, Nos. 1, 2—*Necessaries*, No. 3—*Practice*, Nos. 3, 21, 22, 25, 26—*Wages*, No. 2—*Wrongful Dismissal*.

KIDNAPPING ACT 1872.

See *Marine Insurance*, Nos. 3, 4.

LATENT DEFECT.

See *Collision*, No. 11.

LAY DAYS.

See *Charter-party*, Nos. 12, 13, 14.

LEAKAGE.

See *Carriage of Goods*, No. 5—*General Average*, No. 1

LIEN.

See *Charter-party*, Nos. 11, 16, 17, 18—*Consignor and Consignee*, No. 1—*Marine Insurance*, No. 27—*Master* No. 2—*Necessaries*, Nos. 2.—*Salvage*, Nos. 13, 14, 15, 16—*Stoppage in Transitu*, No. 3.

LIFE SALVAGE.

See *Salvage*, No. 14, 15, 16, 17.

LIGHTERAGE.

See *Charter-party*, No. 20.

LIGHTS.

See *Collision*, Nos. 14, 15, 16, 17, 18, 19, 43.

LIMITATION OF LIABILITY.

1. *Practice—Collision action—Admission of liability—Counter-claim for limitation.*—Under the system of pleading established by the Judicature Act and rules, the defendant, where he admits his liability for the damage done by a collision, but claims to have his liability limited to £8 or £15 per ton of his vessel under the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), s. 54, can so claim by counter-claim instead of by instituting a separate suit for limitation of liability. (Adm. Div.) *The Clutha* ..... *page* 225

2. *Practice—Collision—Counter-claim for limitation—Alternative.—Semble*, when liability is not admitted, a similar course may be adopted in the alternative. (Adm. Div.) *Id.* 225

3. *Practice—Payment into court—Collision action—Transfer to limitation action not necessary.*—Where a vessel under arrest in a cause of damage is liberated on payment into court of the amount to which her liability was limited under 25 & 26 Vict. c. 63, s. 54, together with a sum to cover costs and interest, and subsequently is found solely to blame for the collision, and the owners having instituted a suit for limitation of liability, move for a decree in that suit and that the money in court should be transferred to the credit of that suit, the court will grant the decree, but not the transfer of the money, as it is unnecessary by the practice of the court. (Adm. Div.) *The Sisters* ..... *page* 224

4. *Practice—Stay of proceedings—Reference—Costs.*—In a collision cause, although the defendant is entitled, upon admission of liability and payment into court of the amount of his liability under the Merchant Shipping Act, 1862, s. 54, to a stay of proceedings as against himself, plaintiffs having separate interests may, at the defendant's cost, proceed to a reference to settle the respective amounts due to them, and may tax their costs. (Adm.) *The Expert* 381

See *Maritime Insurance*, No. 25.

LIS ALIBI PENDENS.

See *Practice*, No. 18.

LOADING.

See *Charter-party*, Nos. 11, 12, 13, 14, 15. 16, 17, 18, 19, 20, 21—*Marine Insurance*, No. 13.

LOOK-OUT.

See *Collision*, No. 20.

LORD CAMPBELL'S ACT.

See *Collision*, No. 36.

LOSS OF MARKET.

See *Carriage of Goods*, No. 12.

MACHINERY.

See *Damages*.

MANAGING OWNER.

See *Shipowner*, No. 6.

MARINE INSURANCE.

1. *Agents—London merchants—Custom—Discount on insurances.*—By the custom of London merchants persons acting as agents for shipowners in insuring ships are entitled to retain the 10 per cent. discount allowed to them by underwriters, and if the shipowner has assented to this in his previous dealings with his agents he cannot object to them retaining any particular item. (V.C. B. and Ct. of App.) *Baring* v. *Stanton* 246, 294

2. *Agent—Revocation of authority—Commission.*—But insurance brokers whose agency in respect of a particular ship is revoked has no right to withhold the policies on that ship, to collect the moneys due thereon, or to charge commission for collecting such moneys. (V.C. B.) *Baring* v. *Stanton* 246

3. *Barratry—Kidnapping Act* 1872—*Carrying Polynesian labourers without licence—Forfeiture.*—The Kidnapping Act 1872 (35 & 36 Vict. c. 19) having prohibited the carrying of Polynesian native labourers in ships without a licence, under penalty of forfeiture of the ship, a master who, without the authority of his owners, but with a knowledge of the prohibition, ships and carries native labourers, and so brings about the seizure and condemnation of his ship, commits an act of barratry in respect of which his owners may recover against their underwriters. (P.C.) *The Australian Insurance Company* v. *William Townley Jackson* (resp.)..... 26

4. *Barratry—Kidnapping Act* 1872—*Evidence—Knowledge of prohibition.*—Where a master ships and carries Polynesian native labourers without a licence, against the provisions of the Kidnapping Act 1872, proof that the master, although he may never have seen the Act itself or the pro-

clamation thereof in the Australasian Colonies, was informed before shipping the labourers that such an Act existed, and that it was illegal to carry them, is sufficient evidence to justify a jury in finding that he shipped and carried the labourers wilfully and with knowledge of the prohibition, so as to make his act barratrous. (P. C,) *The Australian Insurance Company* v. *William Townley Jackson* (resp.).....*page* 26

5. *Broker — Employment — Lien — Premiums.* — Where a shipowner employs a broker to effect insurances, and the broker, there being no underwriters at the place of employment, necessarily engages another broker elsewhere to effect the insurances, and such latter broker pays the premiums, he has a lien upon the policies for such premiums as against the shipowner, who must be taken to have authorised his employment. (Ct. of App., reversing Ex.) *Fisher* v. *Smith* 211, 492

6. *Concealment of material fact—Master—Fraud or negligence—Communication to owners.*—Before a policy can be avoided for the concealment of a material fact, within the knowledge of the master of a ship, and not communicated by him to his owners, such concealment must have been culpably negligent, fraudulent, or wilful, for the purpose of enabling the owners to insure; hence where a master writing to his owners omits, without fraud or negligence, to mention the loss of an anchor and chain, and his owners, after receiving the letter, insure the ship, which is afterwards, in the course of her voyage and by perils not consequent upon the loss of the anchor and chain totally lost, her owners can recover for such loss, although not for the anchor and chain. (Q. B. Div.) *Stribley* v. *Imperial Insurance Company* 134

7. *Constructive total loss—Cargo—Perils—Part damaged—Sale by Master—"Free from particular average."*—There is no constructive total loss of cargo except where the whole loss is occasioned by the perils insured against, and consequently, where a portion of the cargo is damaged, and the whole is properly landed by the master and the damaged part sold, and the master makes default in forwarding the remainder, although it would have covered the expenses of forwarding, the owners cannot recover under a policy "free from particular average." (C. P. Div.) *Meyer and others* v. *Ralli and others* 324

8. *Double insurance—Fire Policy in hand—Marine policy—Notice.*—Where goods are insured against fire "in any shed, or store, or station, or in transit to A. by land only, or in any shed or store, or on any wharf in A. until placed on board ship," and are afterwards insured with other persons, "lost or not lost at and from the river B. to A. per ship or steamers, and thence per ship or steamers to C., including the risk of craft from the time the goods are first waterborne, and of transshipment and relanding and reshipment at A.," and it is a condition in the former policy that if the goods are "insured elsewhere, notice of such insurance shall be given to the insurers, otherwise the policy to be void," but no notice is given of the second policy, and the goods having come to A. in several steamers and not by land, are burnt at A. whilst in a warehouse stored and waiting for reshipment; the assured are entitled to recover on the fire policy, because the second policy applying only to marine risks, and not to storage on land, there was no double insurance, and the goods were not "insured elsewhere," words which would apply to a specific insurance of the same risk, and are not satisfied in the case of different policies upon different risks by the mere possibility of one overlapping the other under some possible circumstances. (Exch. Ch., from C.P.) *The Australian Agricultural Co.* v. *Sannders* .....*page* 63

9. *Fire— Ship— Description of place.*— A policy against fire on the hull of a ship whilst "lying in the Victoria Docks, London, with liberty to go into dry dock, and light boiler fires once or twice during the currency of this policy," although covering the ship whilst in the Victoria Dock and the dry dock, and during her passage up and down the river between the two, does not cover the ship whilst lying in the river for repairs, after coming out of dry dock, and before returning to Victoria Dock. (H. of L., affirming Ex. Ch.) *Pearson* v. *The Commercial Union Insurance Company* 275

10. *Freight advances—Charterers' interest—Commission — Premiums.*— Where a charter-party stipulates for "sufficient cash not exceeding £600 to be advanced against freight, if required, at ports of loading subject to insurance and 2½ per cent. commission," and the charterers make certain advances and insure the freight, they are entitled to insure on their own account, not only the actual cash advances, but also the commission and the premiums paid for insurance on freight as being "freight advances" within the charter-party. (Ct. of App.) *Williams and others* v. *The North China Insurance Company*..... 342

11. *Freight—Insurance by charterers—Ratification by shipowners.*—Where charterers insure freight on behalf of themselves and those interested, the shipowners may, if the policy be made on their behalf, ratify it even after a loss has occurred, (Ct. of App.) *Id.* 342

12. *Freight—Paid in advance—Charter-party— Loss of part of cargo — Deduction from amount earned—Amount recoverable from underwriters.*—Where by the terms of a charter-party a part of the freight is made payable and is paid in advance, the charterer has a right to deduct the whole amount so paid by him from any freight which may be actually earned in case of a loss of part of the cargo, and not merely a part proportionate to the amount of cargo lost. Hence, where a shipowner charters his ship from A. to B. by a charter-party, providing that freight shall be payable on delivery at so much per ton on the quantity delivered, "such freight is to be paid one half in cash on signing bills of lading and the remainder on right delivery of the cargo;" and half the freight is paid on shipment and the rest is insured and half the cargo is lost on the voyage and the other half delivered without further payment of freight, the shipowner is entitled to recover as for a total loss of half the freight. (H. of L., reversing Ex. Ch.) *Allison* v. *The Bristol Marine Insurance Company*..... 178

13. *Insurable interest—Purchase of "cargo"—Part only shipped—Total loss of part—No appropriation.*—Where a merchant buys a "cargo" of rice per a named ship, "payment to be by seller's draft on purchaser, at six months' sight, with documents attached," and part of that cargo having been shipped on board the named ship chartered by the purchaser, and the remainder being alongside in lighters, the ship sinks at her moorings, and the part of the cargo already loaded is totally lost, there is no appropriation of the part of the cargo shipped to the purchaser, as his contract was for a complete cargo, and he could not be called upon to pay for the cargo by the sender, and the purchaser has no insurable interest, and cannot recover against under-

writers on a policy "on rice;" nor can the purchasers make the underwriters liable by accepting bills of exchange against shipping documents signed after the loss and electing to be liable for the loss. (Ex. Ch. reversing C. P.; affirmed in H. of L., the Lords being equally divided.) *Anderson* v. *Morice*..... page 31, 290

14. *Perils of the sea—Causa proxima—Loss.*—In ascertaining whether a ship was lost by perils of the sea, *causa proxima non remota spectatur*; therefore any loss caused by the perils of the sea is within the policy, although it would not have occurred but for the concurrent action of some other cause which is not within it. (H. of L.) *Dudgeon* v. *Pembroke*..... 393

15. *Policy—Risk—Description—Loss—Deviation.*—Where steam pumps are insured "at and from Ardrossan to the A. steamer ashore in the nighbourhood of D., and while there engaged at the wreck and until again returned to Ardrossan by the s. steamer including all risk, while at the wreck," and after the A. steamer is raised she makes for Belfast Loch (which is not the way to Ardrossan) with the pumps on board, and on this voyage sinks, and the pumps are lost, the loss is not covered by the policy. (Ct. of App.) *Wingate, Birrell, and Co.* v. *Foster*..... 598

16. *Practice—United States Admiralty—Premiums—Libel—Pleading.*—A libel in an Admiralty Court, in the United States, claiming payment of premiums against ship, should set out the dates and amount of the policies, and also the name of the parties insured, and the character and extent of their interest. (U. S. Dist. Ct.) *The Dolphin* 287

17. *Profits—Policy on goods—Insurable interest.*—A policy on goods without any mention of profits does not cover any interest in profits which might arise collaterally from a contract relating to the goods, although such contract exist at the time of the loss of the goods. (Exch. Ch., reversing C. P.) *Anderson* v. *Morice*..... 31

18. *Re-insurance—Policy on goods—Declaration of interest.*—A policy of insurance "on goods" will cover a re-insurance. Hence an underwriter may re-insure the risk he has undertaken, and need only declare his interest to be in the original subject-matter, without declaring that he is re-insuring. (Ct. of App.) *Mackenzie* v. *Whitworth* 81

19. *Repairs—Extent of underwriter's liability—Election to repair—Total loss.*—An underwriter's liability under a policy on ship when the ship has sustained damage which the assured, although entitled to abandon elects to repair, must be measured by the cost of the repairs necessitated by the perils insured against, less one-third new for old, notwithstanding the underwriter is thereby made liable for more than the assured could have claimed for a total loss with benefit of salvage, and the assured obtains more than an indemnity for his loss. (Q. B. Div.) *Lohre* v. *Aitchison and another*..... 445

20. *Return of Premium—Termination of risk—Arrival at place of discharge.*—Underwriters are not bound to return premiums paid on a policy of insurance, unless the risk insured has terminated when the insurance is made, and on a voyage policy the voyage does not terminate (unless under an express stipulation) until the ship arrives, not merely at the port of discharge but at the usual place of discharge in the port, and is moored there. Where a ship on a voyage to Antwerp arrives there on Jan. 1, and enters the outer dock, and is insured on Jan. 2, before entering the inner dock, the usual place of discharge, the voyage is not terminated, and there is still a risk covered by the policy. (Ex. Div.) *Stone and others* v. *The Ocean Marine Insurance Company (Limited) of Gothenburg* .....*page* 125

21. *Seaworthiness—Loss by perils—Sinking at moorings—Evidence.*—Where a ship, previously to all appearances staunch and sound, and recently thoroughly repaired, and a few days before thoroughly examined without any defects being discoverable, sinks suddenly at her moorings, when she has taken in five-sixths of her cargo, and no direct evidence can be given why she founders, and no certain cause assigned for her doing so, the question of seaworthiness and loss by perils of the sea are proper questions for the jury in an action on a policy on cargo, and if evidence is given of her good condition and conduct &c., prior to the loss, this will justify the jury in finding a loss by perils insured against. (Exch. Ch., from C.P.) *Anderson* v. *Morice* 31

22. *"Suing and labouring"—Expenses—"Free from particular average"—Total loss.*—Expenses recoverable under the suing and labouring clause in a policy "free from particular average" are such expenses as are necessary to avert a total loss, such as, in the case of a grain cargo, unshipping and warehousing, separating the damaged from that which can be carried on, and conditioning the latter, but nothing beyond what is necessary for that object. (C. P. Div.) *Meyer and others* v. *Ralli and others* 324

23. *Time or voyage policy—"Fifteen days after arrival."*—Where a ship is insured from A. to B., and "for fifteen days after arrival," and she duly arrives at B., discharges her cargo, moves to another part of the port to take in another cargo, and is there lost by perils insured against before the expiration of the fifteen days, the underwriters are liable, because the policy must be considered, as to the fifteen days, not a voyage policy, but a time policy. (Ct. of App., reversing Ex. Div.) *Gambles and others* v. *The Ocean Marine Insurance Company of Bombay* 92, 120

24. *Time policy—Seaworthiness—Warranty.*—In an ordinary time policy there is no implied warranty that the vessel should be seaworthy at any period of the risk. H. of L., reversing Ex. Ch. and aff. Q. B.) *Dudgeon* v. *Pembroke* 101, 393

25. *Total loss—Collision—Ships belonging to same owner—Underwriters' right—Limitation of liability.*—The Merchant Shipping Acts, in giving shipowners power to limit their liability, do not create any new rights, but restrain existing rights by limiting liability. The right of the underwriters of a lost ship for damages against a wrongdoer is merely to make the same claim that the insured might have made. Hence, in the case of collision between two ships belonging to the same owner by which one is lost by the exclusive fault of the other, the underwriters of the policy on the lost ship can make no claim against the sum paid into court under the limitation of liability clauses of the Merchant Shipping Act (25 & 26 Vict. c. 63, sect. 54), the insured being himself the person causing the damage. (H. of L.) *Simpson and others* v. *Thomson and others* 567

26. *Total loss—Sale of goods by Master—Notice of abandonment—Right of underwriters to salvage.*—Where in the course of a voyage insured goods are so damaged that they are of necessity sold by the master, there is without abandonment a total loss for which the underwriters are liable, subject to their right to receive the proceeds of the sale from those to whom it is paid. If the assured have possession of the proceeds, they are deducted from the total loss, but if they are in the

hands of third parties the assured may recover for a total loss if they have nothing which would lessen the chance of the recovery of the proceeds by the underwriters. A refusal by assured to accept and give a receipt in full of all demands for the proceeds of sale from the hands of the shipowner, less *pro ratâ* freight claimed by him, leaving the net amount less than the insured value, is not an act which will deprive the assured of his right to recover for a total loss. (Q. B. Div.) *Saunders and another* v. *Baring and another*.....*page* 132

27. *Underwriter—Premiums—Lien—United States law.*—By United States law an underwriter upon ship has a maritime lien for the premiums due to him under marine policies upon the ship underwritten by him, and can enforce payment by proceeding *in rem* in Admiralty against the ship insured. (U.S. Dist. Ct.) *The Dolphin* 287

28. *Valued policy — Evidence of thing valued—Interest—Fraud.*—Under a valued policy it may be shown what it was intended to be valued, with a view to disputing interest in the whole subject of valuation, though the amount of the valuation can be disputed only on the ground of fraud. (Ct. of App.) *Williams and others* v. *The North China Insurance Company*..... 342

29. *Voyage policy — Deviation — Description of voyage.*—A ship which is insured for a voyage from Liverpool to Philadelphia and the United Kingdom, and which by a subsequent memorandum indorsed on the policy, in consideration of additional premium, obtains leave to go to Antwerp, must go either to a port in the United Kingdom or to Antwerp, but cannot within the policy go to Antwerp first and thence proceed to a port in the United Kingdom, and if she is lost between Antwerp and such port she is not covered by the policy. (Ex. Div.) *Stone and others* v. *The Ocean Marine Insurance Company (Limited) of Gothenburg* 152

30. *Wagering policy—Open policy on profits and commissions—Without benefit of salvge—British ship*—19 *Geo.* 2, *c.* 36.—Open policies on profits and commission on goods to be shipped containing the clauses "warranted free from all average" and "without benefit of salvage," but to pay loss upon such part as shall not arrive, are null and void under 19 *Geo.* 2, c. 37, if the insured may declare in British ships, and the assured are not entitled to a return of premiums paid. (C. P. Div.) *Allkins and another* v. *Jupe, Pembroke, Oppenheim and Choisy*..... 449

31. *Warranty of seaworthiness — Vessel built for inland navigation—Ocean voyage.* — Where a vessel built for inland navigation is insured for an ocean voyage there is an implied warranty that she shall be made as seaworthy for the voyage as such a vessel can be made by ordinary available means. (Ct. of App.) *Turnbull and others* v. *Janson* 433

See *Charter-party*, Nos. 9, 24.

MARINE INSURANCE ASSOCIATION.

1. *Membership—Rules—Payment of contribution—Estoppel.* — Where by the rules of a mutual marine insurance association no person can become a member except by signing the articles, but a shipowner, having an equitable interest, and having had transferred to him the legal interest in a ship insured in the association by its former owner (a member), pays the contribution claimed from him by the association, the latter are estopped from disputing the shipowner's interest in the policy and his right to sue on it, although he may not have complied with the rules as to membership. (Ex. Ch.) *Edwards* v. *The Aberayron Mutual Ship Insurance Society (Limited)* .....*page* 154

2. *Rules — Effect of—Contributory not member.*— The rules of such association, by which disputes are to be settled by the directors with an appeal to the whole society, and no action is to be brought for any claims on the society by its members, are not binding upon a person paying premiums under such circumstances, and do not preclude him from bringing an action after a refusal of his claims by the directors, but before an appeal to the whole society. (Ex. Ch.) *Edwards* v. *Aberayron Mutual Ship Insurance Society (Limited)* 154

3. *Unregistered association—Non-members taking policies—Manager's liability—Return of premium —Consideration.*—When non-members take out special rate policies in an unregistered mutual assurance association, having power to issue special rate policies to members only, and such policies so issued are signed by the managers who become personally responsible for the amount insured, such non-members have no claim upon the members for their premiums on the association being wound-up, and the personal liability of the managers prevents failure of consideration. (M. R.) *Re Arthur Average Association (De Winton and Co.'s case)* 245

4. *Winding-up — Contributory — Non-member — Costs.*—If a person claiming under the winding-up of a mutual assurance association allow his name to be put on the list of contributories and pay calls, he cannot afterwards obtain the removal of his name from the list of contributories upon the ground that he had prior to the winding-up ceased to be a member by the rules of the association, but will be held liable to contribute for costs. (V. C. M.) *Re Queen's Average Association; Ex parte Lynes*..... 576

MARITIME LIEN.

See *Marine Insurance*, No. 27—*Necessaries*, *No.* 2.

MASTER.

1. *Certificate of registry—Admiralty jurisdiction—Delivery up.*—The High Court of Justice (Admiralty Dvision) has power, upon the application of the owners of a ship, to order a master who had been dismissed from their employment to deliver up the certificate of registry and other papers and property belonging to the ship, where he refuses to surrender them. (Adm.) *The St. Olaf* 268

2. *Certificate of registry — Lien — Wrongful dismissal.*—*Semble*, a master, whether co-owner or not, can have no lien upon a certificate of registry or ship's papers in case of wrongful dismissal by the managing owners. (Adm.) *The St. Olaf* ... 268

3. *Dismissal—Reasonable notice.*—The master of a ship, in the absence of express stipulation in the contract of hiring, is entitled to reasonable notice of dismissal from the shipowner. (C. P. Div.) *Creen* v. *Wright*..... 254

See *Discipline—Master's Wages and Disbursements—Necessaries*, No. 1.

MASTER AND SERVANT.

See *Damage*, No. 3.

MASTER'S LIEN.

See *Master*, No. 2

MASTER'S WAGES AND DISBURSEMENTS.

1. *Collision—Bond given by master—No claim against owners.*—Where a ship, through the

default of her master, has run into and damaged another ship, and the master of the former has, in respect of such collision, given a bond for the amount of the damage binding himself and his owners and the ship, he, being himself a wrong-doer, cannot, in an action for wages and disbursements, claim the amount of such bond or to be indemnified against any claim to be made against him thereunder in respect of the collision. (Adm. Div.) *The Limerick*.....*page* 206

2. *Lien—Company—Wound-up—Leave to proceed—Costs.*—Where a master has a lien for disbursements on a ship which belongs to a limited company and the company is wound-up and all actions and proceedings stayed, the master must obtain leave in the winding-up to enforce his lien in Admiralty, and he will be entitled to recover the amount due to him, and also his costs in the winding-up proceedings. (Ct. of App.) *Re The Rio Grande do Sul Steamship Company (Limited)*..... 424

3. *Repairs to ship—Liability of master—Claims for disbursements.*—Where shipwrights execute repairs to a ship at the order of the master, given under circumstances by which the shipwrights acquire a right to claim against either the owners or the master, and they elect to claim against the master, the latter may, in an action for wages and disbursements, proceed against the ship and recover for the amount of such shipwrights' claim as a disbursement made on ship's account. (Adm. Div.) *The Limerick*..... 206

MATERIAL FACT.

See *Marine Insurance*, No. 6.

MATERIAL MEN.

See *Master's Wages and Disbursements*, No. 3—*Necessaries*, Nos. 2, 4.

MEASURE OF DAMAGES.

See *Carriage of Goods*, Nos. 12, 13—*Charter-party*, Nos. 7, 8, 9—*Collision*, Nos. 8, 9—*Damages*.

MERCHANT SHIPPING ACTS.

See *Collision*, Nos. 1, 2, 7, 42—*Discipline*, Nos. 1, 2—*Limitation of Liability*, Nos. 1, 2, 3, 4—*National Character—Portection of Seamen—Salvage*, Nos. 3, 7, 10, 12, 14, 15—*Unseaworthy Ships—Wages*, No. 1.

MERSEY DOCKS ACTS CONSOLIDATION ACTS.

Dock dues—Ship in ballast—Cargo.—A vessel discharging her cargo at another port in England and there taking on board ballast to go to Liverpool to load a cargo for the West Indies, is not, by reason of her also taking on board a bale of cotton and a few articles for the express purpose, entitled to be treated as a vessel trading inwards, but is a vessel arriving in ballast within the meaning of the Mersey Docks Acts Consolidation Act (21 & 22 Vict. c. 92), sect. 30, and must pay dock dues accordingly. (C. P.) *De Garteig* v. *The Mersey Docks and Harbour Board*..... 500

MERSEY PILOTAGE.

See *Collision*, No. 6.

MORTGAGE.

1. *Admiralty jurisdiction—Arrest—3 & 4 Vict. c. 65—Foreign ship.*—The arrest necessary to found the jurisdiction of the High Court of Justice (Admiralty Division) over claims by mortgagees of foreign ships under 3 & 4 Vict. c. 65, must be in a cause over which the court has jurisdiction; a mere *de facto* arrest is not sufficient. (Adm.) *The Evangelistria*..... 264

2. *Admiralty jurisdiction—Cause of mortgage or possession—Foreign ship—Consent of parties—Intervention of foreign representative.*—The High Court of Justice (Admiralty Division) has jurisdiction, independently of the Judicature Acts, to and will entertain on the intervention of the representative of a foreign state, or by the consent of parties, a cause of possession or mortgage of a foreign ship belonging to such state, so far as to ascertain the true position of the claimants and the nature of their title, and will, where it is for the advantage of all parties, order a sale of the ship. *The See Reuter* (1 Dods. 22) followed. (Adm.) *The Evangelistria*.....*page* 264

3. *Effect of mortgage—Transfer of interest.*—A mortgage of a ship transfers the ownership, so far as to entitle the mortgagee to the whole of the mortgagor's interest as security for his money. (C. P. Div.) *Keith and another* v. *Burrows and another*..... 280

4. *Effect of mortgage—Omission to register.*—The only effect of the omission to register a mortgage of a ship is to postpone it to a subsequently registered mortgage. (C. P. Div.) *Keith and another* v. *Burrows and another*..... 280

5. *Freight—Mortgagee's right—Assignee of freight.*—A mortgagee of the ship is entitled to freight as against an assignee of freight by an assignment made after the mortgage, but before its registration. (C. P. Div.) *Id.*..... 280

6. *Freight—Right of mortgagee—Bill of lading—Shipowner's cargo.*—The mortgagee of a ship is only entitled to such freight as is accruing by a contract existing when he takes possession, and where the cargo belongs to the shipowner, and is shipped under bills of lading at a nominal freight but upon sale of the cargo the shipowner invoices the cargo at an increased rate of freight, such increased rate is not freight, but the price of the cargo, and the mortgagee is not entitled to more than the bill of lading freight. (Ct. of App. and H. of L.) *Keith and another* v. *Burrows and another*.....427, 431

NATIONAL CHARACTER OF SHIP.

1. *Concealing British character—Merchant Shipping Act* 1854*—Forfeiture—Closing registry—Foreign flag.*—Where a British subject, the owner of a British ship, by a representation to the collector of customs at the port of registry that his ship has been sold to foreigners, procures the closing of the registry, and sails her under a foreign certificate of registry and under a foreign flag, whilst he continues to own her and to receive the profits of working her, doing such acts with the intent to conceal her British character from the officers of customs, and prevent her seizure as unseaworthy, he commits an offence against the provisions of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 103, by reason of which his ship is liable to, and will be condemned to forfeiture to Her Majesty. (Adm.) *The Sceptre*... 269

2. *Concealing British character — Forfeiture — Attachment of forfeiture—Bonâ fide purchaser—Merchant Shipping Act* 1854.—Where an offence is committed by a shipowner or master against sect. 103 of the Merchant Shipping Act 1854, by concealing her national character, the ship becomes forfeited to Her Majesty, and the forfeiture attaches, and the property in the ship is devested out of the owners, and vested in the Crown from the date of the committing of the offence, and a person purchasing such ship *bonâ fide* and without knowledge of the offence committed, after the commission thereof, but before seizure and condemnation, cannot acquire a title which will

override the right of the Crown. (Adm. and Ct. of App.) *The Annandale* .....*page* 383, 489

3. *Concealing British character—Forfeiture—Inspection of ships—Merchant Shipping Acts—Costs*—A nominal transfer of a British vessel to an Englishman resident abroad, to enable her to sail under a foreign flag, her former British owners preserving their control over her, and by such means endeavouring to evade the provisions of the Legislature with regard to the inspection, &c., of British ships, is an infringement of the Merchant Shipping Act 1844, s. 103. sub-sect. 2, and the ship so transferred is forfeit to Her Majesty. The original English owners, who were added as defendants by orders of the court, and who had not appeared, condemned in costs. *The Sceptre* (3 Asp. Mar. Law Cas. 269; 35 L. T. Rep. N.S. 429) followed. (Ct. of App.) *Id.* 504

NAUTICAL ASSESSORS.

See *Collision*, Nos. 22, 23.

NAVIGABLE RIVER.

Wharf—Rights of owner—Adjoining owner—Approach of vessels.—The owner of a wharf on a navigable river has the right of reasonable user of his wharf, and may bring vessels up alongside it for the purposes of loading and unloading, even though such vessels are longer than his own wharf, and project over an adjoining wharf, provided he does not unreasonably obstruct the business of the adjoining wharf, and the adjoining wharf owner is not entitled to put timber or anything else into the river, to prevent such vessels coming opposite his wharf. (M. R.) *Original Hartlepool Collieries Company (Limited)* v. *Gibbs* 411

NECESSARIES.

1. *Bill drawn for necessaries—Colonial Ports—Liability.*—Where a master in a colonial port, unable to procure or pay for necessaries otherwise, draws a bill of exchange upon a firm of shipbrokers in this country, who accept and pay the bill, such shipbrokers can proceed against the ship as for necessaries supplied in default of payment of the amount due by the shipowners. *The Onni* (Lush. 154) followed. (Adm. Div. and Ct. of App.) *The Anna* 237

2. *Equipping British ship—Material man—Lien—Purchaser.*—A material man, who supplies stores and materials for the equipment of a British ship, having no maritime lien, cannot enforce his claim against the ship in the hands of a subsequent purchaser thereof, even though such purchaser has notice at the time of purchase that the claim is still unpaid. (Adm.) *The Aneroid* 418

3. *Jurisdiction—British colonial port—Foreign ship.*—The Admiralty Division of the High Court of Justice has jurisdiction to entertain an action brought for necessaries supplied to a foreign ship in a British colonial port. *The Wataga* (Swab.) 165) followed. (Adm. Div. and Ct. of App.) *The Anna* 237

4. *Repairs—Ship's husband—Payment by bill—Dishonour—Right of recovery against co-owners.*—Where a ship is repaired by the order of the ship's husband, and the cost of the repair is, by arrangement with the ship's husband, apportioned among the several co-owners, who pay, some in cash and others in bills, and the bill of one of them is dishonoured, the material men can recover the amount so left unpaid from the other co-owners, who being bound by the arrangements as to payment, cannot set up that the taking of the bill gave the defaulting co-owner time to their detriment. (Ex. Div.) *Mould and another* v. *Andrews and others* .....*page* 329

NOTICE.

See *Master*, No. 3—*Practice*—Nos. 19, 20.

NOTICE OF ABANDONMENT.

See *Marine Insurance*, No. 26.

NOTICE TO THIRD PARTIES.

See *Practice*, Nos. 19, 20.

OBSTRUCTION.

See *Navigable River.*

ONUS OF PROOF.

See *Carriage of Goods*, Nos. 8, 9.—*Collision*, os. 3, 4.

OPEN POLICY.

See *Marine Insurance*, No. 30.

OVERTAKING SHIP.

See *Collision*, Nos. 15, 16, 19, 46, 47, 48, 49, 50, 51, 52.

OWNERS.

See *Shipowner.*

PARTIAL LOSS.

See *Marine Insurance*, Nos. 7, 12, 13, 22.

PARTICULAR AVERAGE.

See *Salvage*, No. 13.

PARTICULARS.

See *Carriage of Goods*, No. 19—*Collision*, No. 39.

PARTNERSHIP.

See *Shipowner*, No. 6.

PASSING OF PROPERTY.

See *Marine Insurance*, No. 13—*Sale of goods.* Nos. 5, 6, 7, 8, 9—*Stoppage in Transitu.*

PAYMENT OUT OF COURT.

See *Wages*, Nos. 5, 6.

PERILS OF THE SEA.

See *Carriage of Goods*, Nos. 4, 10—*Marine Insurance*, No. 14.

PERSONAL INJURY.

See *Collision*, No. 36.

PILOTAGE.

See *Collision*, Nos. 3, 4, 5, 6, 7, 13, 25, 26, 27, 28.

PLEADING.

See *Collision*, Nos. 33, 34, 40—*Practice*, No. 13—*Salvage* No. 27.

POLICY.

See *Marine Insurance*, Nos. 8, 15, 17, 18, 23, 24. 28, 29, 30.

PORT DUES.

See *Charter-party*, No. 8.

POSSESSION.

See *Mortgage*, No. 2.

PRACTICE.

1. *Appeals—County Court—Admiralty Division—Supreme Court of Judicature Act* 1873.—Although the Supreme Court of Judicature Act

1873, s. 45, provides that County Court appeals may be heard before a divisional court consisting of two or three judges (sect. 40), the Admiralty Division, having all the exclusive jurisdiction of the High Court of Admiralty before the passing of the Act, still retains the jurisdiction to hear and determine County Court Admiralty appeals. (Adm.) *The Two Brothers* .....*page* 99

2. *Appeal—Inferences of fact—Evidence — Reversing decree.*—The Court of Appeal has great reluctance in reversing a decision of a judge of first instance, where he has come to a conclusion of fact upon conflicting testimony and after hearing the witnesses; but where the court of first instance draws inferences from the facts proved before it, a decision founded upon such inferences will be reviewed, and if erroneous reversed, without great pressure, by the Court of Appeal. (Ct. of App.) *The Transit* 233

3. *Appeal—Jurisdiction — Discretion of judge—Supreme Court of Judicature Act.*—Sect. 19 of the Supreme Court of Judicature Act 1873 does not give the Court of Appeal jurisdiction to entertain an appeal from a judge of the High Court with reference to a matter which, before the passing of the Judicature Acts, was in the absolute discretion of the judge. (Adm. and Ct. of App.) *The Amstel.* 488

4. *Appeal—Security for costs — Special circumstances.*—The Court of Appeal will not order security for costs of an appeal except under special circumstances. A plaintiff arresting a ship which is released on bail, and against which he obtains a decree, is not entitled to security for the costs of appeal, merely because the bail bond only covers the costs of the court below and not of the Court of Appeal. (Ct. of App.) *The Victoria* 230

5. *Appearance—District registry—London registry —Title of cause.*—Where an action *in rem* is instituted against a ship in a district registry and the shipowners, residing out of the jurisdiction of that registry, enter an appearance in the London registry, the appearance must show where the action was commenced, the title of the cause in the district registry, and that the defendants are resident out of the jurisdiction of that registry. (Adm.) *The General Birch* 99

6. *Counter-claim—General average — Damage to cargo—Adjustment — Reference.* — Where to a claim for damage to cargo a counter-claim of general average is set up, it is not necessary that such general average should have been adjusted; but if the evidence supports the fact of a general average loss having been sustained, the amount thereof, together with the amount of loss sustained through damage to the cargo, will be referred to the registrar and merchants to report. (Adm.) *The Oquendo* 558

7. *County Court action - Leave to proceed in High Court—Commission—County Court Admiralty Jurisdiction Act* 1868.—When there are circumstances rendering it advisable that an action which a County Court has jurisdiction to try under the County Courts Admiralty Jurisdiction Act (31 & 32 Vict. c. 71), s. 3, should be commenced in the High Court, such as the necessity for a commission abroad, the court will grant leave for a writ to issue under 31 & 32 Vict. c. 71, sects. 3, 9, though the cause of action may be of less amount than the limit of the County Court jurisdiction. In such a case notice of the order made by the court should be given when the writ is served. (C. P. Div.) *Ellis and Co.* v. *General Steam Navigation Company (Limited)* 581

8. *County Court appeal — Admiralty — Amount under £50.*—A plaintiff claiming an amount not exceeding £50 in an Admiralty cause in a County Court, is precluded from appealing from the decision of the court by sect. 31 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71). Adm.) *The Falcon*...*page* 566

9. *County Court appeal—Court of appeal—Reasons for judgment.*—The reasons for judgment of the County Court judge, as well as for that of the High Court, should be before the Court of Appeal when a further appeal is made to that court. (Ct. of App.) *The Swallow* 361

10. *County Court appeal—Leave to appeal—Costs of appeal.*—Costs not allowed when the Court of Appeal reversed the decision of the court below, in an appeal for which permission was necessary. (Ct. of App.) *Id.* 361

11. *County Court—Appeal in Admiralty—Leave to appeal—Discretion of judge.*—Leave to extend the time for appealing from a County Court in the exercise of its Admiralty jurisdiction, is, by sect. 27 of the County Courts Act 1868, a matter within the absolute discretion of the judge of the Admiralty Division, and from his decision no appeal lies to the Court of Appeal. (Adm. and Ct. of App.) *The Anstel* 488

12. *Default of appearance—Proceeding in rem—Supreme Court rules—Admiralty Court Additional Rules* 1871.—Order XIII., rule 10, of the rules of the Supreme Court as to proceedings *in rem* by default being annulled by the rules of the Supreme Court, Dec. 1875, the effect of such annulment is to bring into force, under and by virtue of the Supreme Court of Judicature Act 1875, sect. 18, the Admiralty Court Additional Rules 1871, as to proceedings *in rem* by default. (Adm.) *The Polymede*..... 124

13. *Default of pleading—Signing judgment—Action in rem—Supreme Court Rules, Order XXIX., r.* 2.—Order XXIX., r. 2, of the Supreme Court Rules, as to signing judgment in default of pleading, does not apply to proceedings *in rem*; consequently in an action *in rem* for a liquidated sum for necessaries supplied, if the defendant make default in delivering his statement of defence, the plaintiff cannot at once sign final judgment, but must bring the case on for hearing before the judge upon affidavit. (Adm.) *The Sfactoria* 271

14. *Discontinuance—Costs.*—Where a plaintiff in an action, after succeeding in an interlocutory application, the costs of which are made costs in the cause, gives notice of discontinuance of the action, under Order XXIII. of the Rules of the Supreme Court, the defendant is entitled to his costs, including the costs of such application. (Adm.) *The St. Olaf* 341

15. *Discovery of documents—Action in rem—Foreign ship—Time.*—In an action *in rem* against a foreign ship whose owners are resident abroad, the court will make an order for discovery of documents against such owners, but will always allow a reasonable time for making the affidavit of documents. (Adm. Div.) *The Emma*..... 218

16. *Foreign judgment—Estoppel—Res Judicata—Lis alibi pendens.*—In an action of collision a judgment of a foreign court given in a cause between the same parties cannot be pleaded as an estoppel unless such judgment was obtained prior to the institution of the action in this country; there being no *res judicata*, but only *lis alibi pendens*, when the plaintiff instituted his action here, he can claim to proceed to judgment in this country if he chooses. (Adm.) *The Delta* 256

17. *Foreign judgment — Estoppel — Judgment by default.*—*Semble*, a judgment in a foreign court against a person not subject to the jurisdiction of that court to be an estoppel, must be a judgment on the merits, and not merely by default. (Adm.) *Id.*.....*page* 256

18. *Lis alibi pendens—Action in rem—Abandonment of proceedings.* — When a plaintiff in an action *in rem* has commenced two actions, one, first in order of date, in the High Court of Admiralty of Ireland, and a second in the High Court of Justice of England, he will not be allowed to proceed with the latter until he has abandoned proceedings in the former. It is not sufficient that he is desirous of abandoning proceedings in the former, and that he is not allowed to do so by the Irish court; such refusal should be corrected by appeal. (Adm. Div.) *The Cattarina Chiazzaro*..... 170

19. *Notice to third parties—Rules of Supreme Court—Order XVI., rr.* 17, 18—*Question common to plaintiff and defendant and third party.*—The court, on the application of defendant in an action, will order service of a notice citing a third party to appear in the action under rr. 17 and 18 of Order XVI., of the Rules of the Supreme Court, where it is satisfied that there is a material question to be tried in the action, common both to the plaintiff and the defendant, and to the defendant and the third party, although the whole question to be tried is not precisely identical in both cases, and that the plaintiff will not be prejudiced by so calling in the third party. (Ct. of App., reversing Q. B. Div.) *The Swansea Shipping Company (Limited)* v. *Duncan Fox and Co*.....166, 345

20. *Notice to third parties—Demurrage—Cargo sold to arrive—Charterers—Purchasers.*—Where shipowners sue charterers for demurrage at a rate fixed by charter-party, and the charterers have sold the cargo to arrive, and allege that the delay is occasioned by the default of the purchasers against whom they can claim over, the court will allow such purchasers to be brought in as third parties even though the questions are not identical. (Ct. of App., reversing Q.B. Div.) *Id.*.....166, 345

21. *Proceedings under protest— Pleading — Admiralty.*—Where a defendant objects to the jurisdiction in a cause *in rem*, and appears under protest, the former practice of the High Court of Admiralty, as to proceedings under protest, must be observed throughout. (Adm.) *The Evangelistria* 264

22. *Proceedings under protest — Admiralty — Supreme Court of Judicature Act* 1875.—The practice of the High Court of Admiralty previous to the passing of the Judicature Acts in proceedings in protest (Reg. Gen. Adm. 1859, r. 37), is preserved by sect. 18 of the Supreme Court of Judicature Act 1875. (Ct. of App.) *The Vivar* 308

23. *Security for costs—Assignment for benefit of creditors.*—Where a plaintiff has recently executed a deed of assignment of all his property to an assignee, he will be required to give security for the costs of suit, unless he satisfies the court he is solvent. The fact that he is carrying on business is not sufficient proof of his solvency. (Adm.) *The Lake Megantic* 382

24. *Third parties—Rules of Supreme Court, Order XVI., r.* 18—*Costs.*—Where parties have been summoned to appear under Order XVI., r. 18, of the Rules of the Supreme Court, against whom no claim to contribution is made out, the parties so summoned are entitled to their costs. (Adm.) *Specie ex Sarpedon*.....*page* 509

25. *Writ for service out of jurisdiction—Supreme Court Rules—Collision on high seas—Foreign ship.*—Where an English ship is damaged in collision upon the high seas, outside any territorial jurisdiction, by a ship owned by a foreign company established abroad, there is no power to issue a writ for service out of the jurisdiction upon, or of which notice is to be given out of the jurisdiction to, the foreign company, and claiming damage in respect of the collision. (Adm.) *Re Smith and others* 259

26. *Writ for service out of jurisdiction—"Within jurisdiction"—Supreme Court Rules.—Semble*, that "within the jurisdiction" in Orders II. and XI. of the Supreme Court Rules, means within the territorial jurisdiction. (Adm.) *Id.*..... 259

27. *Writ in rem—Service—Rules of Supreme Court.*—The rules of the Supreme Court of Judicature as to service of writ of summons in Admiralty actions *in rem* are to be strictly followed. Service of the writ on the captain of the ship on board, and nailing of the warrant of arrest on the mast, are not sufficient notice of a suit *in rem* against the ship to all whom it may concern. (Adm.) *The Marie Constance* 505

See *Bottomry*, No. 3—*Carriage of Goods*, No. 19—*Collision*, Nos. 21 to 41—*Limitation of Liability*—*Mortgage*, Nos. 1, 2—*Salvage*, Nos. 19 to 29—*Shipowner*, No. 5—*Wages*, Nos. 5, 6, 7.

PRELIMINARY ACT.

See *Collision*, Nos. 21, 35. 40.

PREMIUMS.

See *Marine Insurance*, Nos. 5, 27.

PRINCIPAL AND AGENT.

See *Charter-party*, No. 1—*Marine Insurance*, Nos. 1, 2, 5—*Sale of ship*, Nos. 1, 2.

PRIZE.

(As to the constitution and jurisdiction of British Prize Courts, see note p. 66.)

See *Booty of War*.

PROFITS.

See *Marine Insurance*, Nos. 17, 30.

PRO RATA FREIGHT.

See *Carriage of Goods*, Nos. 15, 16—*Marine Insurance*, No. 26.

PROTEST.

See *Practice*, Nos. 21, 22.

PROTECTION OF SEAMEN.

Boarding ship without permission—Merchant shipping Act 1854, *sect.* 237—*Place of destination—Dock—Place of discharge.*—Sect. 237 of the Merchant Shipping Act 1854, which provides that every person (with certain exceptions) who goes on board any ship about to arrive at her place of destination before her actual arrival in dock or at the place of her discharge, "without permission of the master," incurs a penalty, must be construed strictly; and a person boarding a ship which has arrived in a dock in her port of destination, although not the place of her discharge, is not liable to a penalty. (Q. B. Div.) *Atwood* (app.) v. *Case* (resp.) 84

PURCHASER.

See *Necessaries*, No. 2—*Shipowner*, Nos. 1, 2.

RAILWAY AND CANAL TRAFFIC ACT.
See *Carriage of Goods*, Nos. 18, 20.

RAM.
See *Collision*, Nos. 55, 56.

RATIFICATION.
See *Marine Insurance*, No. 11.

RATS.
See *Carriage of Goods*, No. 4.

RECEIVER OF WRECK.
See *Salvage*, No. 10.

REFERENCE.
See *Limitation of Liability*, No. 4.

REGISTER.
See *Shipowner*, Nos. 1, 2, 4, 6.

REGISTERED OWNER.
See *Mortgage*, Nos. 4, 5—*Shipowner*, Nos. 1, 2, 4, 6. —*Wages*, No. 1.

REGISTRATION.
See *Mortgage*, Nos. 4, 5—*Shipowner*, Nos. 1, 2, 4, 6.

REGULATIONS FOR PREVENTING COLLISIONS.
See *Collision*, Nos. 42 to 53, 59.

RE-INSURANCE.
See *Marine Insurance*, No. 18.

REPAIRS.
See *Necessaries*, No. 4.

RES JUDICATA.
See *Practice*, No. 16.

RETURN OF PREMIUMS.
See *Marine Insurance*, No. 20.

RISK.
See *Marine Insurance*, Nos. 9, 15, 20, 23, 29.

RIVER MERSEY.
See *Collision*, No. 6.

RULES OF SUPREME COURT.
See *Practice*.

SACRIFICE.
See *General Average*, Nos. 1, 3, 4.

SAILING SHIPS.
See *Collision*, Nos. 44, 45, 46, 47, 48, 49, 50, 53.

SALE OF CARGO.
See *Carriage of Goods*, No. 16—*Marine Insurance*, Nos. 7, 26.

SALE OF GOODS.

1. *Cargo—Vendor and purchaser—Right to whole cargo.*—Where vendors abroad contract to supply purchasers in England with a cargo of from 2500 to 3000 barrels (sellers' option) of petroleum, the shipment to be made abroad, and the vessel to proceed to a port of discharge to be determined by the purchasers; the purchasers are entitled to a whole cargo not exceeding 3000 barrels, and are not bound to accept 3000 barrels out of a ship chartered by the sellers, and loaded with 3000 barrels consigned to the purchasers, and 300 barrels differently marked and consigned to other parties. (Ct. of App.) *Borrowman and others* v. *Drayton* ..... page 303

2. *Contract—Shipment in month named—Vendor and purchaser.*—Where a merchant agrees to sell, and a purchaser to buy goods, to be shipped on board a ship in the months of March $\frac{\text{and}}{\text{or}}$ April, and nine-tenths are shipped in February and the rest in March, the shipment is not a March shipment, and the purchaser may refuse to accept. (H. of L., reversing Ct. of App., but affirming Q. B. Div.) *Bowes and others* v. *Shand and others*..... 208, 367, 461

3. *Contract — Specific quantity of goods—Double quantity shipped—Mistake—Insurance.*—Where plaintiffs abroad agree to sell and deliver in this country a specific quantity of goods upon the terms "cost, freight, and insurance," and through a mistake they ship double the quantity and send their agent a bill of lading for the double quantity and policy of insurance by which the double quantity is insured "free of particular average," the purchasers are not bound to accept half the amount so shipped as the goods sold, because the terms of the contract of sale as to insurance were not complied with. (Ct. of App.) *Hickox and another* v. *Adams and another* 142

4. *Contract — Time —"Ship at A." — Condition precedent—Warranty—Right of repudiation—Evidence.*—Where goods are sold to arrive under a contract, in which it is said "the ship now at A.," evidence is admissible to show the circumstances under which the contract was made, and that it was of vital importance that the ship should be at the place named at the time of the making of the contract, and those circumstances then bearing on the contract are questions for the jury, and if they find that it was a vital term of the contract that the ship should be at "A." at the time, the purchaser is entitled to repudiate the contract on the ground of failure of the performance of a condition precedent by the vendor. (Q. B. Div.) *Oppenheim* v. *Fraser*..... 146

5. *Passing of Property—Bills of Lading—Vendor and purchaser.*—The delivery, by the seller of goods contracted to be sold, on board a vessel chartered by the buyer, is not a delivery to the buyer but to the master of the vessel as bailee to the person indicated in the bills of lading, and consequently the property in the goods does not pass before the signing of the bills of lading; hence, where the seller chooses to make out the bills of lading to another person, and they are indorsed for value to some other than the buyer, there is no appropriation which will entitle the buyer to claim the goods as against the indorsee, even though the contract between buyer and seller is that the property in the goods shall be the buyer's on payment, and such goods are covered by funds in seller's hands; and if the payment is to be by bills of exchange drawn by the seller upon the buyer, the buyer might in ordinary course, and to protect himself, have the bills of lading made out to his agents, and the master is not bound to inquire why he does so, and would be bound to sign them although the charter-party stipulated for delivery to the purchaser or assigns, because he, the master, would know nothing of the relations between the parties save that the shipper was acting as agent of the purchaser; and hence no action will lie against the shipper for no delivery of the cargo. (Ex.) *Gabarron and another* v. *Kreeft; Kreeft* v. *Thomson* 36

6. *Passing of property—Bill of lading—Payment—Refusal of delivery.*—Where goods are shipped

on board a vessel in execution of a contract of sale, and the shipper takes a bill of lading "to order," for the purpose merely of securing the payment of the price, and not to prevent the goods from being considered as within the contract, the property in the goods passes to the purchaser so as to entitle him to maintain an action of trevor against the holders of the bills of lading and exchange, who refuse delivery after offer of payment of the price. (Ct. of App.) *Marabita* v. *The Imperial Ottoman Bank* ...*page* 591

7. *Passing of property—Shipment against bills—Hypothecation.*—Plaintiff had arranged with a merchant in Africa that the latter should purchase articles of produce and ship them for sale in this country by the plaintiff upon commission, plaintiff allowing the African merchant to draw upon him in order to purchase the articles, and the documents of title of the shipments being hypothecated to the plaintiff so as to enable him to provide funds to meet the bills drawn upon him. The day after the shipment of a cargo under this arrangement, the African merchant stopped payment, and his liquidator gave the bill of lading to the defendants with instructions not to part with it unless paid the value of the cargo. On action brought to recover back the value paid by the plaintiff under protest, and damages for the detention of the bill of lading: Held, upon demurrer, that the plaintiff had an equitable title to the bill of lading under the arrangement, and that the action was maintainable (Q. B. Div.) *Lutscher* v. *Comptoir d'Escompte de Paris*..... 209

8. *Passing of property—Stoppage in transitu—Vendor and purchaser.*—Where by the terms of a contract of sale the bill of lading is deliverable upon the vendee's fulfilling certain conditions, the shipper is entitled not only to retain possession of the goods under such bill of lading until those conditions are fulfilled, but also in case of the vendee's default to dispose of the goods. (Ct. of App.) *Ogg and another* v. *Shuter* 77

9. *Passing of property — "Cash against bill of lading"—Possession of vendor—Right of vendor.*—Where a merchant in France contracts to sell to other merchants in England certain goods, to be delivered "free on board" and "cash against bill of lading," the vendor is entitled to retain possession until the purchaser complies with the conditions of payment, and if on the arrival of the goods in England, the plaintiffs erroneously thinking that there had been a short shipment, refuse to accept the full draft presented to them for acceptance by the vendor's agent, the latter is entitled to dispose of the goods elsewhere, and no action will lie against the person receiving them from the agent. (Ct. of App.) *Ogg and another* v. *Shuter* 77

See *Stoppage in Transitu.*

SALE OF SHIP.

1. *Agent—Commission—Evidence of purchase being effected through agent*—When an agent is engaged to sell a ship, and it is agreed that if a sale is made to any person "led to make such offer in consequence of" the agent's mention or publication of it, the agent shall have a commission, the mere fact that a purchaser has been told in conversation by a person who had been in communication with the agent that the ship had been by them put up to auction, and not sold, is not in itself evidence that the purchaser has been led to purchase by the publication of it. (Ct. of App., reversing C. P. Div.) *Bayley and others* v. *Chadwick* 453, 543

2. *Agent—Sub-agent—Accounting for price.*—Where shipowner sends a ship to his agents abroad (Japan) for sale, and they, by reason of the impossibility of personally pressing on the sale at the different ports, necessarily employ a sub-agent to sell, that sub-agent becomes the agent of the shipowner, and is accountable to the shipowner for the proceeds of sale, and cannot take the ship himself at the limited price, and resell for his own benefit at a higher rate; if he does so, he is liable for the excess realised to the shipowner. (Ct. of App.) *De Bussche* v. *Alt*... *page* 584

3. *Statute of Frauds, sect.* 17—*Custody of sheriff—Acceptance and receipt.*—The owner of a ship or other goods which are in the custody of the sheriff under a *fi. fa.* may make a valid sale thereof and may deliver possession thereof to the purchaser, so as to constitute an acceptance and receipt within the meaning of the 17th section of the Statute of Frauds. (Ct. of App.) *Union Bank of London* v. *Lenanton*..... 600

4. *Transfer of ship—Registration—Merchant Shipping Act* 1854—*Bill of sale.*—A transfer of a ship, which has been built in England, but has not been registered as a British ship, and is not intended to be so registered under the Merchant Shipping Act 1854, sect. 19, is good, although not made by bill of sale under that Act. (Ct. of App.) *Union Bank of London* v. *Lenanton*..... 600

5. *Transfer of ship—Bills of Sale Act—Ship completed.*—A ship completed by her builders, and ready for delivery, is within the exception of the Bills of Sale Act, and an interest in her may be transferred without the instrument being registered under that Act. (Ct. of App.) *Union Bank of London* v. *Lenanton*..... 600

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

SALVAGE.

1. *Agreement—Compulsion—Setting aside as inequitable.*—Where the master of a vessel found passengers of another vessel (550 pilgrims) wrecked on a rock in the Red Sea in fine weather, and refused to carry them to Jeddah for a less sum than £4000, and the master of the wrecked vessel was by such refusal compelled to sign an agreement for that amount, and the service was performed without difficulty or danger, the agreement was held inequitable and set aside. £1800 awarded in the place thereof. (Adm. Div. and Ct. of App.) *The Medina* 219, 305

2. *Agreement—Setting aside—Government ship—Officers and crew—Right to reward.*—Although the captains, officers, and crews of Government ships are entitled to be remunerated for salvage services to the same extent as officers and crews of merchant vessels would be rewarded under similar circumstances, they are not entitled to impose terms upon the persons whose property they salve, or to refuse to render assistance unless those terms are accepted. (Ct. of App., reversing Adm.) *Cargo ex Woosung* 50, 239

3. *Agreement—Setting aside—Government ship—Officers and crew—Ship's services—Merchant Shipping Act* 1854.—An agreement so imposed by the captain of a Government ship upon the master of a ship in distress, by which the latter becomes bound to pay a fixed sum for services to be rendered, not merely by the officers and crew, but by the Government ship also, is invalid, as the services of the ship are not to be rewarded under the Merchant Shipping Act 1854, sect. 434. (Ct. of App.) *Id.* 50, 239

4. *Agreement—Government ship—Officers and crew.—Semble*, that the officers and crew of a Govern-

ment ship, ordered by Government to render salvage assistance, with no right to make any agreement with the master of the distressed vessel as to the amount of their reward. (Ct. of App.) *Id.*.....*page* 50, 239

5. *Apportionment—Agreement—Further services—Persons entitled to share.*—When persons agree to render a salvage service and to apportion the salvage in a particular way, and whilst such services are being performed, further salvage services are rendered, not contemplated by the agreement, the whole body of salvors are entitled to share in the reward, and not only those actually engaged in the further salvage operations. (Adam.) *The Cadiz and The Boyne* 332

6. *Apportionment—Custom—Greater risk—Greater reward.*—Where there was a custom to share in salvage awards in a particular manner according to the ratings of the salvors on board their ship, but some of the salving crew had exposed themselves to much greater risks than the rest, the court gave them a larger share on equitable principles. (Adm.) *The Sarah* 542

7. *Board of Trade vessels—Right to salvage—Public harbour—"Her Majesty's ships"—Merchant Shipping Act* 1854.—The Board of Trade can claim salvage in respect of services rendered by vessels employed by them for commercial purposes in and about a public harbour, the property in which is vested in the Board of Trade. The expressions "ships belonging to Her Majesty," and "Her Majesty's ships," in sects. 484, 485 of the Merchant Shipping Act 1854, are used in their ordinary sense, and apply only to vessels in the Royal Navy, and, *semble*, those belonging to the public service of a dependency of the British Crown. (Adm. and Ct. of App.) *The Cybele*.....478, 532

8. *County Court Admiralty jurisdiction—Property salved under £1000—Amount claimed under £300.*—A County Court having Admiralty jurisdiction under the County Courts Admiralty Jurisdiction Act 1868, has jurisdiction under sect. 3, in claims for salvage wherein the property salved does not exceed £1000, or in the alternative where the amount claimed does not exceed £300. (Adm.) *The Glannibanta*..... 339

9. *County Court Admiralty jurisdiction—Distribution of salvage — Amount recovered without action.*—Where a sum of money under £300 has been paid for salvage services rendered, a County Court having Admiralty jurisdiction has jurisdiction, in an action for distribution in case of dispute between the salvors, to apportion such sum among the salvors, although such sum has been recovered by agreement with the owners of the salved property and without action brought in the County Court. (Adm.) *Id.* 339

10. *Derelict — Wreck—Drifting barge — Merchant Shipping Act* 1854.—A laden barge accidentally breaking loose from her moorings in the river Thames, and drifting about with no one on board, is not derelict, and consequently not "wreck" within the meaning of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), and persons finding her and mooring her in safety are not precluded from recovering salvage for so doing by reason of their neglecting to comply with the provisions of the 450th section of the above Act, and deliver the barge to the receiver of wreck. (Adm.) *The Zeta* 73

11. *Engagement to render assistance—Lying by ship—Right to reward—Service completed by another ship.*—Where a ship is engaged to render assistance to another ship in distress, without any fixed sum being agreed upon, and does remain by ready to give assistance, she cannot be deprived of her right to reward by reason of another vessel offering and being engaged to tow for a less sum than the former ship is willing to accept, but will be entitled to recover a fair sum which will remunerate her for the services rendered, and compensate her for the loss she has sustained. (Adm.) *The Maude* .....*page* 338

12. *Government ship—Bombay Government—Services of ship—Merchant Shipping Act* 1854—*Leave to proceed.*—A vessel owned by the Bombay Government, and manned by uncovenanted servants of that Government, whose officers carry no Queen's commission, is a "ship belonging to Her Majesty within the meaning of the Merchant Shipping Act 1854, and no salvage reward is recoverable in respect of services rendered by such a vessel, and it is necessary for her officers and crew to obtain the consent of the Lords of the Admiralty in writing before bringing an action for salvage. (Adm. and Ct. of App.) *Cargo ex Woosung* 50, 239

13. *Lien on cargo—Employment by master—Liability of holder of bill of lading.*—A person who is by the master of a stranded ship placed in possession of ship and cargo for the purpose of saving the cargo, and who saves the cargo by his exertions, has a lien upon the cargo for his charges, which are in the nature of particular average on the cargo, and the holder of the bill of lading, whose agent induces such person to deliver up the cargo on a promise to pay such charges, is liable for them. (Q. B. Div.) *Hingston* v. *Wendt* 126

14. *Life salvage—Cargo—Liability to contribute—Merchant Shipping Act* 1854.—When life salvage is performed, cargo, subsequently salved from the same vessel as the lives, but by persons wholly distinct from the life salvors, is liable to contribute towards the payment of the reward due to the life salvors under the provisions of the Merchant Shipping Act 1854, sect. 458. (Adm. Div.) *Cargo ex Schiller* 226

15. *Life salvage—Cargo subsequently salved—Contribution—Merchant Shipping Act* 1854.—Where life salvage is performed, cargo subsequently salved from the same vessel as the lives, but by persons employed by the owners for the purpose and wholly distinct from the life salvors, is liable to contribute towards the reward due to the life salvors under the provisions of the Merchant Shipping Act 1854, sects. 458, 459. (Ct. of App.) *Cargo ex Schiller* 438

16. *Life salvge—Cargo saved—Ship lost—Liability to contribute.*—Where lives and cargo have been salved from a ship, but the ship has been totally lost, the owners of the cargo are liable to pay salvage in respect of the lives, and the owners of the lost ship are not liable to contribute to such payment. Life salvage awards can only be made out of the *res* salved, and not against owners of a ship personally. (Adm.) *Specie ex Sarpedon* 509

17. *Life saluage—Persons wrecked and ashore.*—There is no salvage of life entitling a ship to recover reward in the Admiralty Court where the ship takes off from an island on a barbarous but inhabited coast a ship's crew and passengers who have been wrecked there, but have been previously got ashore in safety, and who although suffering from want of water and exposure, are in no immediate danger. (Adm.) *Cargo ex Woosung* 50

18. *Naval officer commanding on station—Transport officer—Right to share.*—The senior naval officer on a station sending out of harbour a transport with her own crew and a number of men from one of Her Majesty's ships, for the purpose of rendering assistance to and towing into harbour a ship in distress, is entitled to share in the sum awarded for the service, and the naval officer (being also the transport officer of the station) who commands the men from H. M.'s ship is to be considered so far in charge of the whole expedition that he is entitled to reward in that capacity. (Adm.) *The Nile* .....*page* 11

19. *Practice — Affidavits of value — Evidence.* — Where, in a salvage action, defendants have filed affidavits of value of their ship, freight, and cargo, which values have been accepted and agreed to by the plaintiffs, the defendants will not be allowed at the hearing to give evidence to decrease the values. (Adm.) *The Hanna* 503

20. *Practice—Appeal—Costs.*—A successful appellant in a cause of salvage will get his costs of appeal, following the ordinary custom of the Court of Appeal, notwithstanding the former practice in the Privy Council, in such appeals, to the contrary. (Ct. of App. from Adm.) *The City of Berlin*..... 491

21. *Practice — Costs — Separate actions.* — Where separate salvage suits have been unnecessarily prosecuted, the court will only allow one set of costs, and direct the amount allowed to be distributed rateably amongst the plaintiffs in the separate suits. (Adm.) *The Sarah* 542

22. *Practice—Appeal—Tender under £50—Amount decreed or ordered—County Courts Admiralty Jurisdiction Act* 1863 (31 & 32 *Vict.* c. 71).—No appeal lies from the decision of a County Court in a salvage cause where there is a tender of less than £50, and that tender is upheld, the amount tendered being the amount "decreed or ordered" within the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), s. 31. (Adm. Div.) *The Fyenoord*..... 218

23. *Practice — Appeal — Increase of award.*—The Court of Appeal will increase the amount of a salvage award, if in their opinion, considering the value of the property salved and of the salving vessel the award of the court below is insufficient. (Ct. of App. from Adm.) *The City of Berlin* 491

24. *Practice—Apportionment—Agreement.*—Where salvors have entered into an agreement as to the apportionment of salvage, which in the opinion of the court is equitable, and not obtained by coercion, the court will uphold the agreement and apportion the salvage awarded in accordance therewith. (Adm.) *The James Armstrong* 46

25. *Practice—Arrest—Demurrage — Damages and costs—Bona fide action.*—Defendants in a salvage suit have no right to recover damages for demurrage against plaintiffs, who, having *bonâ fide* and through mere error of judgment arrested the defendant's vessel, and carried on the suit to recover reward for their alleged salvage services, are held to have performed no salvage, but mere towage services. (P.C.) *The Strathnaven* 113

26. *Practice—Judgment debts—Interest—Costs.*—Since the incorporation of the High Court of Admiralty in the High Court of Justice, an award of salvage is a judgment debt, and as such bears interest from the date of entry of judgment, the taxed costs bearing interest from the date of signing of the allocatur. (Adm.) *The Jones Brothers* 478

27. *Practice — Pleading—Information leading to employment.*—A paragraph in a statement of claim for salvage stating that by rendering the salvage service the salving vessel had been prevented from obtaining information which would have resulted in profitable employment, ordered to be struck out. (Adm.) *The Cybele* .....*page* 478

28. *Practice—Salvage suit—Towage service—Decree.*—In a salvage suit, in which there has been no tender made by the defendants, a court of Admiralty cannot, on finding that no salvage service has been performed by the plaintiffs, and their services were mere towage, make a decree for the amount of towage due to the plaintiffs. (P.C.) *The Strathnaver*..... 113

29. *Practice — Variation of decree — Mistake in values—Reduction of amount awarded.*—Where the Admiralty Court has made a decree awarding salvage upon values furnished by the respective owners of the ship, freight, and cargo, and accepted by the salvors, and afterwards it is discovered by the owner of cargo that he has been ordered to pay upon the value of the cargo without deducting the freight due upon delivery, the court has power to, and will if it sees fit, reduce the amount of salvage, and vary the proportions payable by the respective owners. (Adm.) *The James Armstrong*..... 46

30. *Services— Carrying information of loss.*—Carrying information to a vessel which enables her to render a salvage service is itself a service in the nature of salvage, and will be rewarded accordingly. (Adm.) *The Sarah* 542

31. *Services—Providing navigation—Infected ship.*—The loan of a navigator to a vessel in distress by reason of her own navigators being incapacitated by an infectious disease, is a salvage service on the part of the ship lending the navigator. It is a salvage service of a very high order on the part of a salvor to go on board an infected vessel and navigate her. (Adm.) *The Skiblander* 556

32. *Towage—Definition of salvage.*—Towage services (as distinguished from salvage services) are work done by one vessel in towing another to expedite her voyage, where nothing more is required than the accelerating her progress; and where a vessel is in neither actual nor imminent probable danger, another vessel engaged to tow her renders towage and not salvage services. (P.C.) *The Strathnaven* 113

33. *Transport — Government charter — Right to salvage.*—A ship chartered to Government as a transport under a charter-party in the ordinary form used by Government for chartering ships in time of war, is not demised to the Government in a way which deprives her owners of the right to salvage reward for services rendered by her under the directions of the Queen's naval officers commanding at the place where she is stationed. (Adm.) *The Nile* 11

SEAMEN.

See *Protection of Seamen—Wages—Wrongful Dismissal.*

SEA TRANSIT.

See *Carriage of Goods*, No. 20.

SEAWORTHINESS.

See *Carriage of Goods*, Nos. 6, 7, 22, 23—*Charter-party*, No. 22—*Marine Insurance*, Nos. 21, 24, 31.

SECURITY FOR COSTS.

See *Collision*, Nos. 33, 34, 38—*Practice*, No. 23.

SECURITY FOR COUNTER-CLAIM.

See *Collision*, No. 38.

SERVICE.

See *Practice*, Nos. 25, 26, 27.

SEVERANCE OF ACTION.

See *Collision*, No. 38.

SHARE OF PROFIT.

See *Shipowner*, No. 6.

SHERIFF.

See *Sale of Ship*, No. 3.

SHIPBUILDING CONTRACT.

See *Shipowner*, No. 7.

SHIPMENT OF GOODS.

See *Carriage of Goods*, No. 21—*Sale of Goods*, No. 2.

SHIPMENT, TIME OF.

See *Sale of Goods*, No. 2.

SHIPOWNER.

1. *Boná fide purchaser of shares—Fraud of vendor—Original owner—Registered owner.*—An original owner of shares in a ship cannot enforce his title to those shares against a registered owner who has purchased them *boná fide* for value from a person whose name was on the register as owner, even though such person had been registered through fraud on the original owner. (Adm.) *The Horlock*.....*page* 421

2. *Boná fide purchaser of shares—Original owner—Registered owner—Action—Defence of fraud—Pleading—Demurrer.*—A statement of defence alleging fraudulent registration of the plaintiff's predecessor in title was demurred to, and the demurrer sustained, on the ground that a fraudulent registration on the part of an intermediate transferee is no defence to an action for possession by a *boná fide* purchaser for value, without notice of the fraud. (Adm.) *Id.* 421

3. *Claim for account and sale—Mortgagee's right*—Where a part owner of ship institutes a suit against the ship claiming as against his co-owner an account and a sale of the ship, a mortgagee holding a mortgage, which would not be satisfied by a sale of the ship, is entitled, on intervening in the suit, to a release of the ship and to his costs from the time of his claiming the release. (Adm.) *The Eastern Belle* 19

4. *Ownership action—Injunction—Dealing with shares pendente lite.*—An injunction granted *ex parte*, on application of the plaintiff to prevent defendant dealing, and to restrain the registrar of shipping from registering any dealings, in shares of ship the subject of a co-ownership action *pendente lite*. (Adm.) *The Horlock*..... 421

5. *Practice—Co-ownership action in rem—Default in appearance—Joinder of defendant—Accounts—Reference—Costs.*—Where an action is brought *in rem* against a ship by the owners of certain shares therein claiming possession and an account against the managing owner, and the latter makes default in appearing, the court will order such managing owner to be joined as a defendant, so that his accounts may be investigated, and will give possession to the plaintiffs if they hold a majority of shares; but will not order before the reference, a sale of the defendant's shares to satisfy the plaintiffs' costs and any sum found due at the reference. (Adm.) *The Native Pearl* .....*page* 515

6. *Registered managing owner—Master having control—Agreement as to profits—Liability for negligence—Merchant Shipping Act* 1875.—The owner of a ship, who, by a verbal agreement, gives up all control over her to the captain, but retains a right to one-third of the net profits, and is subsequently to the agreement registered as "managing owner" under the Merchant Shipping Act 1875, is liable for the negligent management of the vessel by the captain, although occurring during her employment under a charter-party of which the owner knew nothing. *Fraser* v. *March* (13 East, 238) distinguished. (C. P. Div.) *Steel* v. *Lester and Lilee* 537

7. *Shipbuilding contract—Company—Payment by instalments—Shares—Mode of payments—Contract—Authority of directors.*—Shipbuilders contracted with a trading company to build for them a steamer, to be paid for by instalments at different stages of the vessel's progress, one-tenth of the whole to be paid in fully paid-up shares in the company at par, on delivery of the ship. At a meeting between the directors of the company and the shipbuilders on the day that the above contract was signed, the latter having raised an objection to receiving any part of the purchase-money in shares, the chairman and the managing director of the company, who together formed a firm carrying on a separate business as cotton brokers under the title of C. G. and Co., gave them the following letter, dated the same day: "We hereby beg to say that we shall do our best to dispose of the stock we propose that you shall take in payment of the last instalment of the steamer, this day contracted for with you. It is not our expectation that we shall have to call upon you to take up these shares." This was signed "C. G. and Co." Before the delivery of the ship an individual member of the firm of shipbuilders applied for some shares in the company on his own account, and the company declined to allot any to new applicants except at 5 per cent. premium. No shares were allotted to the shipbuilders until three years after the delivery of the ship, when the company was about to wind-up. Held, first, that, in the absence of express authority or some evidence of ratification, the letter of C. G. and Co. did not bind the company; secondly, that the shipbuilders having from the time of the delivery of the ship insisted upon payment of the last instalment in cash, the company were not bound at that time to allot them shares; and thirdly, that the duty of C. G. and Co. as regards disposing of the shares did not arise until they were due, viz., on the delivery of the ship, and therefore that a resolution of the company to issue no shares except at a premium, before the delivery of a ship, was no evidence as against C. G. and Co. that they did not do their best to dispose of the shares; and that C. G. and Co. having in no way prevented shares being allotted to the shipbuilders on or after delivery of the ship, no duty arose on their part until such allotment. (C. P. Div.) *McMillan and Son* v. *Liverpool and*

Texas Steamship Company (Limited) and C. Grimshaw and Co. .....*page* 579

See *Damage*, No. 3—*National character—Unseaworthy Ships—Wreck.*

SHIPPING DOCUMENTS.

See *Sale of Goods*, Nos. 6, 7.

SHIP'S HUSBAND.

See *Necessaries*, No. 4—*Shipowner*, No. 6.

SHIPWRIGHT.

See *Master's Wages and Disbursements*, No 3.

SIGNALS.

See *Collision*, Nos. 15, 16, 17, 19.

SPEED.

See *Collision*, No. 54.

STEAMSHIP.

See *Carriage of Goods*, Nos., 18, 20—*Collision*, Nos. 45, 50, 51, 52, 54, 55, 56, 57, 58, 59—*Damages.*

STEAM TUG.

See *Collision*, No. 59—*Thames Navigation.*

STEVEDORE.

See *Carriage of Goods*, No. 21.

STOPPAGE IN TRANSITU.

1. *Bill of lading—Assignment of—Past consideration good—Defeat of right to stop.*—The transfer of a bill of lading for a valuable consideration defeats the right of stoppage *in transitu*, and it makes no difference that no part of the consideration for the transfer arose out of such a bill of lading. Hence, where an advance is made on the promise of security to be given, and a bill of lading is afterwards deposited to cover such advance, there is a good transfer of the bill of lading which will defeat the right of stoppage. (Ct. of App., reversing Q.B.) *Leask* v. *Scott*.....352, 469

2. *Cesser of right—Place of destination—Bills of lading—Documents.*—Where goods are shipped "to L. consigned to order for account and risk of W. and Co., of B.," and the consignors send to their agents in L. bills of exchange and shipping documents, and the bills are accepted by W. and Co., who thereupon receive the shipping documents, L. is the place of destination of the goods, and the transaction is complete on signing the bills of exchange and handing over the documents; the right to stop *in transitu* ceases at L. (Bank.) *Re Whitworth and Co.*; *ex parte Blackburn*; *Ex parte Gibbs and Co.* 74

3. *Sale here for shipment abroad—Lien on bills of lading and each shipment—Bankruptcy—Right to stop.*—Where goods are sold by a merchant in B. to a merchant in London under a written agreement, by which the goods are to be sent to the purchaser, who is to ship them direct to named consignees abroad, for sale on his own account, and the vendor is to have a lien on the bills of lading and each shipment; and goods are consigned to the purchaser, who ships them and then becomes bankrupt without having had the bills of lading, the agreement does not deprive the vendor of his right to stop *in transitu*, and the *transitus* does not end in London, but continues until the goods reach their destination abroad. (Ct. of App.) *Ex parte Watson, Re Love*..... 396

4. *Wharfinger acting as agent for consignor and consignee—Bankruptcy of purchaser—Right to stop.*—Where a consignor sends goods by ship to a consignee, and they are delivered by the ship to a wharfinger, who acts on the part of both carrier and consignee, and whose business it is to collect the freights, and not part with the goods until they are paid for, and also to act as wharfinger and carrier for the consignee, and the consignee commits an act of bankruptcy upon which he is adjudicated bankrupt, and the consignors, as unpaid vendors, claim the goods in the hands of the wharfinger before they are claimed by the trustee in bankruptcy, the right of stoppage *in transitu* is not lost. (Bank.) *Ex parte Barrow*; *Re Worsdell* .....*page* 387

STRANDING.

See *Discipline*, No. 2.

SUING AND LABOURING.

See *Marine Insurance*, No. 2.

SUPREME COURT OF JUDICATURE ACTS.

See *Practice.*

SUPREME COURT RULES.

See *Practice.*

TENDER.

See *Salvage*, No. 22.

TERMINATION OF RISK.

See *Marine Insurance*, Nos. 9, 23, 29.

THAMES NAVIGATION.

Barge in tow—Licensed lighterman—Thames Watermen and Lightermen Act.—Barges in tow of a steam tug in the river Thames are being "worked or navigated" within the meaning of the Thames Watermen and Lightermen Act 1859 (22 & 23 Vict. c. 33), sect. 66, and must under that section have a licensed lighterman on board and in charge. (C. P. Div.) *Elmore and another* v. *Hunter* 555

TIME POLICY.

See *Marine Insurance*, No. 23, 24.

TOTAL LOSS.

See *Collision*, No. 39—*Marine Insurance*, Nos. 13, 14, 25, 26.

TOWAGE.

See *Salvage*, No. 32.

TRANSFER OF SHIP.

See *Sale of Ship*, Nos. 4, 5.

TRANSPORT.

See *Salvage*, Nos. 18, 33.

TRESPASS TO REALTY.

See *Damage*, Nos. 1, 2.

TRINITY OUTPORT.

See *Collision*, No. 7.

UNSEAWORTHINESS.

See *Carriage of Goods*, No. 6, 22, 23—*Charter-party*, No. 22—*Marine Insurance*, Nos. 21, 31.

UNSEAWORTHY SHIPS.

1. *Merchant Shipping Act* 1873, *sect.* 12—*Complaint—Wording of.*—It is not necessary that the complaint, made to the Board of Trade as to the condition of a ship under sect. 12 of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), should state that the ship "cannot proceed to sea without serious danger to human life," but it is sufficient if by reasonable inference it can be ascertained from the wording of the complaint that this in fact is the case. Neither is it necessary that the report made upon a survey ordered by the Board should so state, but it is sufficient if it can be ascertained by reasonable inference therefrom that this is in fact the case (*a*) (C. P.) Div.) *Lewis* v. *Gray* .....*page* 136

2. *Merchant Shipping Act* 1873—*Detention of ship—Survey—Reasonable time.—Semble*, that if the first survey held by the Board is unsatisfactory or insufficient, a second survey may be held, but that the Board, cannot upon an order for the detention of a ship for the purpose of holding a survey, justify a detention beyond what is reasonably necessary for that purpose. (C. P. Div.) *Id.* 136

VALUES.

See *Salvage*, No. 19.

VENDOR AND PURCHASER.

See *Marine Insurance*, No. 13—*Sale of goods—Stoppage in Transitu.*

VIATICUM.

See *Wages*, No. 4, 7.

VICE-ADMIRALTY COURTS.

See *Collision*, Nos. 40, 41.

VOYAGE POLICY.

See *Marine Insurance*, Nos. 23, 29.

WAGERING POLICY.

See *Marine Insurance*, No. 30.

WAGES.

1. *Allotment note—Owner—Chartered ship—Merchant Shipping Act* 1854, *sect.* 169—*Liability of registered owner.*—The registered owner of a ship, who charters his ship to a charterer, so that the latter, having the sole use of the ship, finds the stores, pays the crew's wages, does repairs, and appoints the master, the owner only paying insurance on the ship, and having a lien on the cargo and freight for the hire, is not "the owner or any agent, who has authorised the drawing of the note" within the meaning of sect. 169 of the Merchant Shipping Act 1854, so as to be liable at the instance of the wife of a sailor upon an allotment note signed in her favour by the master and her husband. (Q. B. Div.) *Meiklereid* (app.) v. *West* (resp.)..... 129

2. *County Court Admiralty jurisdiction—Share of fishing adventure—Contract of wages.*—A contract that a master mariner shall take a share of a fishing adventure and bear a share of certain disbursements is a contract of wages by the general law maritime, independent of the Merchant Shipping Amendment Act 1873 (36 & 37 Vict. c. 85), s. 8; and jurisdiction over such a contract is conferred on County Courts having Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), s. 3, sub-sect. 2. (Adm.) *The Blessing*.....*page* 561

3. *Decree—Wages after action.*—A seaman who commences an action *in rem* for his wages cannot have a decree in that suit for wages or subsistence money after the date ot the commencement of the suit, although retained in the service of the ship by the master; but he will be entitled to an allowance in the way of costs for detention and subsistence money from the commencement of the suit to the date of the decree. (Adm.) *The Carolina* 141

4. *Foreign seamen—Discharge—Passage home—Consul's certificate.*—Foreign seamen discharged in Great Britain and recovering wages in a suit against the foreign ship in which they have served are not entitled as of course to their passage money home, but will obtain it when their consul certifies they have gone or are about to go home. *Semble*, their shipping in another vessel as seamen, even for the voyage home, would disentitle them. (Adm.) *The Raffaelluccia* 505

5. *Practice—Default of appearance—Ship sold—Waive of proceedings.*—Where a ship has been sold in a cause in which no appearance has been entered, and the proceeds remain in the registry, all preliminary proceedings in a cause of wages may be waived, and the money due paid out of court. (Adm.) *The Julina* 264

6. *Practice—Claim of foreign consul—Payment*—The court will not pay the money to a foreign consul at his request, but will require the solicitor of the parties to satisfy any claims the consul may have before receiving the money. (Adm.) *The Julina* 264

7. *Practice—Foreign ship—Arrest—Bottomry action—Default of appearance—Payment by bondholder*—When a foreign ship is under arrest, and no appearance is entered for her, the court will allow the payment of wages and *viaticum* out of freight in the hands of a plaintiff in a bottomry suit, and order the discharge of the crew, although there is no suit instituted for their wages (Adm.) *The Bridgwater* 506

See *Master's Wages and Disbursements.*

WARRANT.

See *Carriage of Goods*, Nos. 6, 23—*Charter-party*, Nos. 22, 24—*Marine Insurance*, Nos. 21, 31—*Sale of Goods*, No. 4.

WHARF.

See *Navigable River.*

WHARFINGER.

See *Stoppage in Transitu*, No. 4.

WINDING-UP.

See *Master's Wages and Disbursements*, No. 2.

WORKING DAYS.

See *Charter-party*, No. 12.

WRECK.

Removal of wreck—Harbours, Docks, and Piers Clauses Act—Owner—Insurer.—Where a harbour master

(a) The Merchant Shipping Act 1873, sect. 12 is now repealed by the Merchant Shipping Act 1876, but the latter Act contains in sects. 6 and 12 provisions similar to those contained in sect. 12 of the former Act.—Ed.

removes a wreck of a ship obstructing the harbour, the person who was owner at the time of the wreck is liable as "owner" under the Harbours, Docks, and Piers Clauses Act 1847, sect. 57, and not insurers of the ship who have paid for a total loss between the loss and the removal (Ct. of App.) *The Earl of Eglington* v. *Norman and another* ..... *page* 471

See *Salvage*, No. 10.

WRECK COMMISSIONER.

See *Discipline*, No. 2.

WRIT.

See *Practice*, Nos. 25, 26, 27.

WRONGFUL DISMISSAL.

Admiralty jurisdiction—County Court jurisdiction.—A claim for damages for wrongful dismissal of a seaman is within the cognisance of a court having original Admiralty jurisdiction, and, *semble* of a County Court having Admiralty jurisdiction by statute. *The Blessing* ..... *page* 561